

Department of Land Use

RECOMMENDATION

Deed Restriction Change

Application No. 2011-0202-D

20 Montchanin Road

November 15, 2011

Location: South side Barley Mill Road (SR 141), east side Montchanin Road, north of Brecks Lane

Date of Hearing: September 6, 2011

Applicant: 20 Montchanin Associates, LLC

Councilperson: Robert S. Weiner

DESCRIPTION

To amend an original declaration of restrictions dated September 9, 1968 and amended January 17, 1969 by Columbia Gas Corporation and Dorcas and Donald Farguhar. The restrictions are associated with the rezoning of the property to O-2 in January 1969 which limited the use of the property to an office building and accessory uses. As originally presented, the proposed amendment will terminate and void the existing restrictions and remove the County as a third party interest (with the authority to approve or disapprove of any changes); in favor of a set of private restrictions that would control further development of the property with enforcement by The Kennett Pike Association, Inc. and Delaware Greenways, Inc. The private declaration of restrictions will control building height, building density, building setback, rezoning, exterior appearance, landscaping, access, and stormwater. While the private declaration is designed to stand on its own, it is derived from and implements a more comprehensive agreement dated December 31, 2010 between the Citizens for Responsible Growth in New Castle County, Inc. (CRG) and Barley Mill LLC. The private restrictions permit the construction of an additional building with approximately 6,000 square feet of GFA and are associated with the CN zoning request for 20 Montchanin Road (2011-0201-S/Z).

BACKGROUND & ANALYSIS

The 19.8 acre property located at 20 Montchanin Road contains a 134,889 square foot two-story office building. Rezoned to O-2 in 1969 and built as the Columbia Gas System headquarters, the property was later purchased and occupied by MBNA. More recently, the Stoltz Development organization purchased the property and submitted a minor land development plan for 20 Montchanin Road (2008-0273) to construct a second 36,501 square foot office building. However, that 2008 plan expired without recordation and the current proposal (2011-0201-S/Z) is to process this deed restriction change and request to rezone two acres for a 6,000 square foot commercial/retail/office building.

It is important to note that this DR change and the associated rezoning was submitted along with three other Stoltz Development Group projects in New Castle County; the revised Barley Mill Plaza rezoning, the revised Greenville Center, and the former Kirkwood fitness property at 3704 Kennett Pike. These four plans were part of a comprehensive private agreement dated December 31, 2010 between the CRG and the Stoltz Group (Barley Mill LLC, Greenville Center LLC and 3704 Kennett LLC) that controlled gross floor area, building heights, signage, traffic, plan approvals, retail development, office development, stormwater management, and landscaping. The various development proposals are ongoing and at different levels of review.

As introduced, the proposed private restrictions do not include New Castle County as a third party and will not require any public hearings if changes are later proposed. The terms of the declarations are to be solely enforced by the Kennett Pike Association, Inc. and/or Delaware Greenways, Inc.

At the September 6, 2011 Planning Board Public Hearing, John Tracey on behalf of the applicant presented both the rezoning and deed restriction change applications together. He highlighted the events that led to the private agreements and summarized the rezoning and deed restriction issues for the 20 Montchanin Road applications.

Twenty-five individuals (10 in support and 15 in opposition) spoke to the rezoning, land development plan, and deed restriction change. Most of those in support of the deed restriction change and the rezoning identified themselves as members of the CRG which they said represents a broad and strong coalition of residents, business owners, civic associations, local neighborhoods, and many other individual residents. Those against the deed restriction change and the rezoning represented a broad range of individuals and civic groups not having participated in the CRG negotiations or not being in agreement with the CRG conclusions. Suffice it to say here that the rezoning, the deed restriction change and the compromise private agreements between Stoltz and the CRG is controversial and divisive amongst the various citizen groups and property owners.

DEPARTMENT OF LAND USE RECOMMENDATION

The Department is well aware of the controversy surrounding the negotiated private restrictions and the overall compromise agreements. The Department has, and will continue, to support and encourage a healthy exchange of ideas between a developer and the general public as part of the planning process.

The 2007 Comprehensive Plan Update Future Land Use designation for this site is Community Redevelopment Area. This site is situated near the interchange and intersection of SR's 52, 100 and 141. These roads have historically carried large volumes of traffic and will continue to do so; and the roads will continue to provide transit service for many residents going in different directions. Kennett Pike is one of several primary arteries carrying traffic in and out of downtown Wilmington, while SR 141 functions as part of the road network carrying traffic to a variety of other large industrial and employment centers located all along its corridor from Concord Pike (US 202) to SR 9 in New Castle. The SR 141 corridor alternates between a limited access highway to grade-crossing intersections and includes residential driveway access in places; however, it has remained a highly desirable location for nonresidential development. While SR 141 varies in distance from the center of Wilmington, its intersection with Kennett Pike and Montchanin Road is less than four miles to the downtown employment core of the City. As such, this property is suitable for additional development.

In general, the Department is not opposed to the termination of the deed restrictions. The site is zoned OR and is well-suited to accommodate additional development. DART service is available along the Kennett Pike and SR 141 to provide additional means of travel to any new development. Chapter 40 of the *New Castle County Code* provides the necessary protections to buffer and screen the property from adjacent parcels.

While the Department can support the termination of the existing restrictions, it has reservations with the private agreement replacement. With respect to the termination of the existing restrictions, the Department would prefer to have the *New Castle County Code* as well as being listed in amended deed restrictions to control any future development and to ensure protection of the surrounding community. There is a degree of certainty when New Castle County is named in any restriction with respect to what is permitted with the developer and the community. When development is governed by private restrictions that are arrived through negotiations with certain groups and individuals without the benefit of public hearings, the controls and limitations placed on the property are likely to become problematic as time goes by.

In this situation, the CRG and the Stoltz Group have agreed to a series of terms and conditions that will control various projects. While the agreements can be amended, New Castle County and the County Council are not party to the restrictions and as a result have no authority or role to plan in any proposed changes. Although, the private controls do not permit any use or development in violation of any New Castle County land use laws, the compromise is clearly not in the best interest of the County or the general public.

As a result of the concerns raised by New Castle County, the developer has agreed to offer an amended deed restriction or to place notes on the record plan to restrict the following items: building height, building density, building set-back, rezoning and permitted uses, access and stormwater. The complete list of restrictions is attached as Exhibit 1 to this report.

The Department of Land Use considered the standards in Section 40.31.130.D of the *New Castle County Code* and other public comments. Based on this analysis the Department recommended **CONDITIONAL APPROVAL** for the termination of the existing deed restrictions as proposed and for the restrictions as listed in Exhibit 1 to be recorded as new deed restrictions or added to the record plan as may be directed by County Council. In addition, the Department recognized that the private agreement was negotiated in good faith and as such is an acceptable compromise between the developer and the public; and the Department is not opposed to the private agreement also being recorded.

PLANNING BOARD RECOMMENDATION

Mr. Wilson made a motion, which was seconded by Ms. MacArtor, to recommend **CONDITONAL APPROVAL** of the deed restriction application to terminate the existing restrictions and to create a new declaration of restrictions with New Castle County as a third and interested party based on the analysis and for the reasons stated in the Department's recommendation. The condition requires that the new declaration of restrictions be recorded or be added to the record plan as may be directed by County Council. The motion was adopted by a vote of **5-1-3** (*YES: Killingsworth, MacArtor, McDowell, Visvardis, Wilson; NO: Snowden; NOT VOTING: Anderson, McGlinchey, Udo*).

Mr. Snowden noted that his "no" vote is the result of his opinion that the reasons for the original restrictions from 1968 still exist today given that the character and sensitivity of the area remain as they were over 40 years ago.

In a discussion preceding the vote the following comments were offered by the Board:

Ms. Anderson noted that she had previously recused herself from all Stoltz applications and will do so here. She did note however, that she was concerned that the Board was expected to vote on the deed restriction change application with additional information just recently given to Board members at this business meeting.

Ms. Visvardis asked the meaning of "conditional" in the Department's recommendation. The condition of approval requires that the new restrictions, which provide for County Council approval if changed, must either be recorded or be added as notes to the record plan prior to recordation. The Department is not in favor of the deed restriction changes going forward as private restrictions without the County being listed as a third party.

Mr. McGlinchey is also concerned with giving proper attention and an appropriate evaluation to the new restrictions prior to making a recommendation this morning. Mr. Culver noted that the restrictions are essentially a mirror image of the private restrictions proposed in the application and presented at the public hearing. The biggest difference is that the newer version adds New

Castle County as a third party and if changes are proposed in the future the changes would require County Council approval. Mr. Culver also noted that these new restrictions are consistent with what recently transpired at County Council during the discussion and subsequent approval of the Barley Mill Plaza rezoning, which is one of several projects being pursued by the Stoltz Group, and in private negotiations with the Citizens for Responsible Growth (CRG).

To further clarify, Mr. Culver explained that the deed restriction change application as originally submitted was simply to terminate and void the existing restrictions in favor of a set of private restrictions that would control further development of the property with enforcement by The Kennett Pike Association, Inc. and Delaware Greenways, Inc. Again noting the recent County Council decision to gain more future control over other possible changes to the new restrictions for Barley Mill Plaza, the applicant and the Department are trying to bring consistency to this deed restriction application by recommending that the same process be followed. As now proposed by the applicant and shown in the new set of restrictions to be considered by the Planning Board, the County will be a party to the restrictions and will have control over any future changes.

Mr. Culver also noted in response to a question from Mr. McGlinchey, that the private restrictions in favor of the Kennett Pike Association and Delaware Greenways are still part of the negotiated agreement between the CRG and Stoltz but which are not within the purview of this Board or County Council.

Mr. McDowell suggested that while the deed restrictions now proposed are more appropriate than the private restrictions, he would prefer to see County Council require the restrictions as notes on the record plan rather than record a separate set of restrictions. Mr. Culver explained that the new restrictions under review were a more convenient way to get the message across rather than listing each one in the recommendation report. The separate set of restrictions will be attached as an addendum to the recommendation report.

Ms. Visvardis asked for clarification regarding the process to ensure that the existing deed restrictions will not be terminated without some sort of replacement restrictions in place. Mr. Culver noted that as recommended by the Department, the County Council resolution to terminate the existing restrictions has a condition that replacement restrictions be put in place at the same time.

Mr. Snowden asked what the consequences are to the property if the Board votes to deny this application. Mr. Culver noted that there is still some additional GFA that can be added to the site and within the upper limit prescribed by the existing restrictions. While no additional buildings could be constructed on site, the additional GFA could be added to the existing building. Mr. McGlinchey noted that the essence of this application then is to allow a second building on the site not to exceed 6,000 square feet of GFA and further limited by the new restrictions now under consideration.

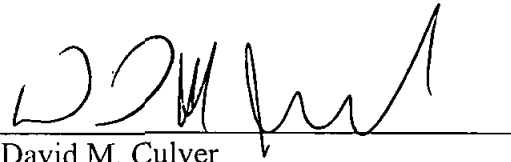
Ms. MacArtor asked for a five minute recess to review the new restrictions. Mr. Killingsworth granted her request for a short recess.

Mr. Udo asked for clarification as to what was meant by paragraph 9 of the new restrictions. Mr. Culver noted that the paragraph is intended to declare that there are still private restrictions to be put in place and that will also control the property.

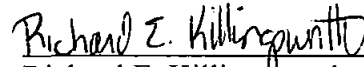
Ms. MacArtor suggested that the term "potential nuisance" as written in paragraph 4 of the new restrictions should be removed and reference should be made only to the uses given as examples.

COMPREHENSIVE DEVELOPMENT PLAN

The 2007 New Castle County Comprehensive Development Plan Update classifies this parcel as Community Redevelopment Area. As such it anticipates a mix of nonresidential uses and increased density with these areas. This deed restriction change would permit more intensive development on the former Columbia Gas property which is consistent with the goals and objectives of the Plan. And while there are cultural and historical resources nearby, the property can be developed with significant care to both compliment and protect those resources.



David M. Culver
General Manager
Department of Land Use



Richard E. Killingsworth
Chair
Planning Board

NOTE: The applicant is responsible to coordinate with the resident County Council person and the County Council Clerk to schedule this deed restriction change. This recommendation is forwarded to the applicant, the resident council person, and the clerk of County Council when it is finalized. A resolution must be prepared by the applicant for County Council use and submitted to County Counsel for review.

EXHIBIT 1

Tax Parcel No.: 07-030.10-015
Prepared by and Return to:
John E. Tracey, Esquire
Young Conaway Stargatt & Taylor, LLP
1000 West Street, 17th Floor
P.O. Box 391
Wilmington DE 19899-0391

DECLARATION OF RESTRICTIONS

This Declaration of Restrictions (this "Declaration") is hereby made this ____ day of _____, 20__, by 20 Montchanin Associates, LLC, a Delaware limited liability company (referred to herein as "Declarant"), and states as follows:

WHEREAS, Declarant is the owner and Developer of certain parcels of land situate in Christiana Hundred, New Castle County, State of Delaware, consisting of approximately 19.857 acres of land commonly known as the former Columbia Gas Campus located at the intersection of Montchanin Road (Route 100) and Barley Mill Road (Route 141), and being New Castle County Tax Parcel No. 07-030.10-015 (the "Property"); and

WHEREAS, Declarant desires to impose upon the Property certain restrictions and to bind itself, its successors and assigns who may hereafter be the owners of all or part of the Property.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Declarant does hereby covenant and declare for itself, its successors and assigns, that Declarant shall and does hereby stand seized of the Property, which Property shall henceforth be subject to the following covenants and agreements, which shall be covenants running with the land and which shall be binding upon Declarant, its respective successors, assigns, grantees and all other

subsequent owners or holders of any right, title to or interest in all or any portion of the Property, for the general benefit of New Castle County, a political subdivision of the State of Delaware, its successors and assigns:

1. **Building Height.** The height of the 6,000 square foot building proposed along Montchanin Road, as shown on Exhibit A attached hereto and made a part hereof (the "New Building") shall not be greater than twenty five (25) feet, plus rooftop mechanical equipment not exceeding an additional ten (10) feet in height, which shall be fully screened to the extent visible from Montchanin Road. The height of any future expansion, in whole or in part, of the present 138,193 square foot building located at 20 Montchanin Road (which for this purpose shall be deemed to include the existing cooling tower) (the "Existing Building") shall not materially exceed the present height of that portion of the Existing Building being expanded. The height of any future additional building constructed on the Property (other than the New Building), if separate from the Existing Building, or any replacement in whole or in part of the Existing Building, shall exceed neither two stories nor forty (40) feet (exclusive of basement) plus rooftop mechanical equipment not exceeding an additional ten (10) feet in height which shall be screened to the extent visible from Montchanin Road. As used herein, and throughout this Declaration, the term "height" shall have the meaning as set forth in Section 40.33.300 of the New Castle County Unified Development Code ("UDC") in effect as of the time of execution of this Declaration.

2. **Building Density.** The New Building shall not exceed 6,000 square feet of GFA, exclusive of the physical area constituting any drive through space. The total building footprint of all buildings at 20 Montchanin Road, including the New Building (exclusive of the physical area constituting any drive through space), the Existing Building and any future expansion of the Existing Building, or future additional building, shall not exceed 1.792 acres. Based on a

footprint for the Existing Building of 1.418 acres, any future expansion of the Existing Building and/or future additional building, together with the New Building, shall not have a total building footprint in the aggregate in excess of 0.374 acres. By way of illustration only, for the elimination of doubt, if the New Building has a footprint of 6,000 square feet (0.13774 acres), then the combined footprint of any future additional building would not exceed 10,283.92 square feet (0.23626 acres) (with due allowance for minor good faith construction variations occurring in the field). As used herein and throughout this Declaration, the term "gross floor area or GFA" shall have the meaning as set forth in Section 40.33.300 of the UDC in effect at the time of the execution of this Declaration, which pursuant to the provisions of Section 40.05.050K of the UDC excludes the square footage of parking structures; however, nothing herein shall be construed as permitting the construction of garages the footprint of which is not included in the overall 1.792 acre limitation set forth above for all buildings.

3. **Building Set-Back.** The New Building shall not be closer than 90 feet to the right of way line for the Montchanin Road right-of-way as such right of way line exists as of the date of this Declaration and shall be accessed by the existing entrance off of Montchanin Road.

4. **Rezoning and Permitted Uses.** The two acre parcel proposed to be created abutting Montchanin Road and Route 141, which serves as the site of the New Building, as shown on Exhibit A attached hereto, may be rezoned from Office Regional, "OR", to Commercial Neighborhood, "CN" upon application by the Property Owner and approval by New Castle County Council to accommodate the New Building. The New Building, proposed as a drive through facility, shall not be used for a drive through restaurant, gas station or convenience store, tavern, bar not incidental to a restaurant, or other potentially nuisance uses such as tattoo parlors and arcades. Except for this rezoning of said site for the New Building, the Property,

other than the newly rezoned parcel, may not be used for any purpose other than for offices and uses accessory thereto. There shall be no further rezoning of any portion of the Property, nor shall any other portions of the Property be used for non-office purposes, except for those uses accessory to office uses (however, this prohibition shall not preclude the New Building from being used for the non-office purposes specified above).

5. **Access.** The New Building, the Existing Building and any future expansion thereof or additional building shall be served solely by the existing entrance off of Montchanin Road.

6. **Stormwater.** All new construction or expansion of the Existing Building shall meet the stormwater/drainage requirements of the UDC, so as not to increase run-off onto the homes along Brecks Lane or onto the adjoining property owned by the Raskob Foundation.

7. **Amendment.** The foregoing real covenants are hereby incorporated for the benefit of New Castle County, its successors and assigns, and may not be altered, amended or modified, in whole or in part, without the approval of the County Council of New Castle County, its successors and assigns.

8. **Effective date.** These restrictions shall be recorded and become effective upon the expiration of any applicable appeal period applied to the recordation of the final Record Minor Land Development Plan for 20 Montchanin.

9. **Interpretation.** This Declaration is intended to apply in concert with that certain Declaration of Restrictions for 20 Montchanin by and between Declarant and Citizens for Responsible Growth in New Castle County dated February 24, 2011 and intended to be recorded in the Office of the Recorder of Deeds in and for New Castle County (the "CRG Declaration"). Questions of interpretation should first be resolved by reference to that document.

10. **Severability.** In the event that any provision of this Declaration is deemed to be illegal or unenforceable, the balance of this Declaration shall remain in full force and effect.

IN WITNESS WHEREOF, the Declarant has caused this Declaration of Restrictions to be executed and sealed the day and year first above written.

SEALED AND DELIVERED
IN THE PRESENCE OF:

20 MONTCHANIN ASSOCIATES, LLC

By: _____ (SEAL)
Keith D. Stoltz, Authorized Member

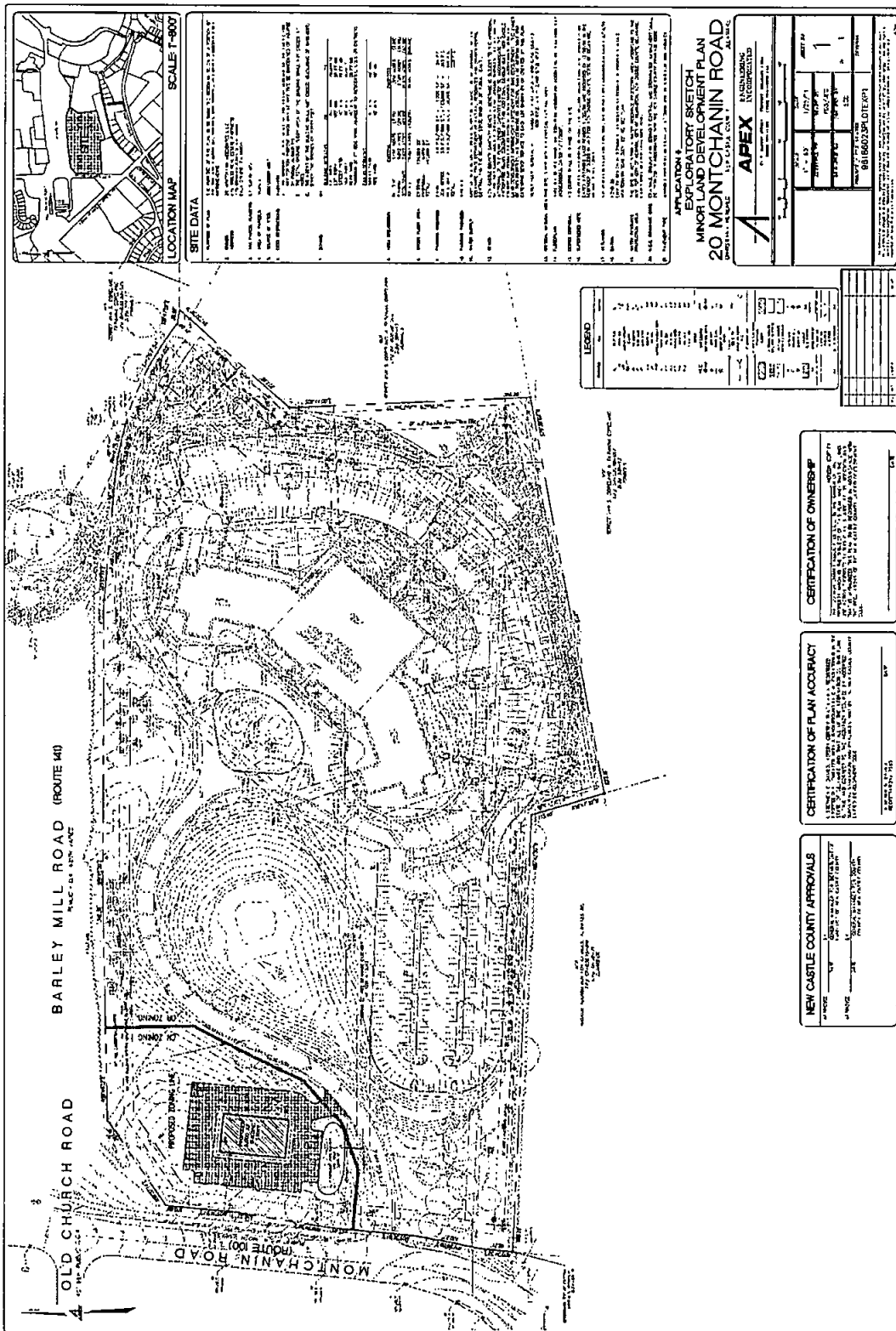
STATE OF DELAWARE)
) SS.
COUNTY OF NEW CASTLE)

BE IT REMEMBERED, that on this ___ day of _____, 20___, personally came before me, the Subscriber, a Notary Public of the State and County aforesaid, Keith D. Stoltz, authorized member of 20 Montchanin Associates, LLC, a Delaware limited liability company, party to this Indenture, known to me personally to be such and acknowledged this Indenture to be his act and deed and the act and deed of said entity, that the signature of the Authorized Member thereto is in his own proper handwriting and the seal affixed is the common and official seal of said company, and that his act of sealing, executing, acknowledging and delivering said Indenture was duly authorized by a resolution of the voting members of said company.

GIVEN under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Print Name: _____
My Commission Expires: _____

EXHIBIT A



APEX ENGINEERING, INC. 11/27/71