

MEMORANDUM

To: Governor Jack A. Markell

From: The Cabinet Committee on State Planning Issues

VIA: Meredith Stewart Tweedie, Cabinet Committee Chair

DATE: December 31, 2015

RE: Findings and Recommendations Regarding Certification of the Proposed Comprehensive Plan of the Town of Henlopen Acres

The Cabinet Committee on State Planning Issues (the “Cabinet Committee”), pursuant to the process outlined in the Delaware State Planning Act, 29 *Del. C.* Ch. 91, respectfully submits its findings and recommendations (the “Findings and Recommendations”) regarding the proposed Comprehensive Plan (the “Plan”) of the Town of Henlopen Acres (the “Town”). The Cabinet Committee submits these Findings and Recommendations following the dispute resolution proceeding, conducted pursuant to 29 *Del. C.* § 9103(d), that took place at the Cabinet Committee meeting on November 19, 2015. A more complete summary of the dispute resolution proceeding is contained in the draft Minutes of the November 19, 2015 meeting, a copy of which is annexed to this Memorandum and published on the State’s open meeting calendar.¹

Summary of Issue Presented: Whether the Governor should, pursuant to 29 *Del. C.* § 9103(e), certify the proposed Plan or return the proposed Plan to the Town with recommendations for revision.

Summary of Findings: While the Cabinet Committee is not aware of any legal deficiency in the proposed Comprehensive Plan, as a matter of policy, the proposed Plan is deficient in its failure to address the long-term operational concerns of the Rehoboth Art League, a cultural and historical institution that the State has consistently supported. While the Town has no legal obligation to change the zoning classification of the RAL, the Town’s unwillingness to consider a new zoning category and apparent inability to negotiate a mutually acceptable MOU that would protect the Town and the RAL’s respective interests within the existing residential classification is not consistent with the Administration’s policy priority of supporting artistic and cultural institutions like the Rehoboth Art League. The Cabinet Committee recognizes, however, that it takes two parties to negotiate, and makes no findings with respect to the reasonableness of either the Town or the RAL in any prior negotiations.

Summary of Recommendation: The Cabinet Committee recommends returning the proposed Plan to the Town in lieu of certification, with the following proposed revisions:

¹ See Attachment A (Minutes of November 19, 2015 Cabinet Committee meeting), also *available at:* [file:///govdovnas01/GovUsers\\$/meredith.tweedie/Downloads/draft%20meeting%20minutes%2011192015.pdf](file:///govdovnas01/GovUsers$/meredith.tweedie/Downloads/draft%20meeting%20minutes%2011192015.pdf)

- (1) The Cabinet Committee recommends that the Town re-submit the Plan to the OSPC for certification following the execution of a reasonable, mutually acceptable Memorandum of Understanding between the Town and the RAL that addresses the RAL's operational needs and the Town's concerns within the framework of the existing zoning designation of the RAL property.
- (2) In addition or in the alternative to Recommendation # 1, the Cabinet Committee recommends revising the Plan to reflect the creation of a new zoning category for the RAL. Recognizing the reality that this recommendation is contingent upon an unlikely future decision by the Town to allow the new zoning category, the Cabinet Committee acknowledges that this Recommendation will not be adopted without a major change in the Town's current position.

Upon receipt of these Findings and Recommendations, the Governor is statutorily obligated to act within twenty (20) days to certify the plan or return the plan to the Town with recommended revisions. Following the Governor's decision, "the municipality or county shall have the right to accept or reject any or all of the recommendations. The final decision on the adoption of the comprehensive plan is that of the municipality or county." 29 Del. C. § 9103(f). Accordingly, the above-stated Findings and Recommendations of the Cabinet Committee are made in full acknowledgment of the fact that the Town retains its existing statutory authority to make the final decision regarding the adoption of its Plan.²

cc (via email):

Cabinet Committee members

Connie Holland, Director, Office of State Planning and Coordination

Dan McCallister, Esq. and Glen Mandalas, Esq., Counsel to the Town of Henlopen Acres

² See *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10, *182-183 (Del. Ch. Jan. 18, 2006) ("The purpose underlying § 9204(d) is to encourage compliance with OSPC recommendations and to aid the state and the municipalities in discovering whether such compliance has occurred and, if not, why not."). The Court of Chancery reiterated this in a subsequent opinion, in which it also discussed the advisory role of the Cabinet Council on State Planning, the predecessor to the Cabinet Committee. See *Hansen v. Kent County*, 2007 Del. Ch. LEXIS 72, *23-24 (Del. Ch. May 25, 2007) ("The process is an advisory one--one without the capacity to resolve or determine, in a formal sense, any land use question. The statutory purpose ultimately was to give the State input into the local land use process and to assure that its concerns were adequately addressed.").

Memo Attachment A

Minutes of Cabinet Committee on State Planning Issues Meeting

Henlopen

Acres

11/19/2015

Cabinet Committee on State Planning Issues
Haslett Armory, Room 219
November 19, 2015
Meeting Summary

Committee Members Present:

Meredith Tweedie, Chair, Office of the Governor,
Connie Holland, Director, Office of State Planning
Anas Ben Addi, Director Delaware State Housing Authority
Tom Cook, Director of Finance
Jennifer Cohan, Secretary, Delaware Department of Transportation
Kara Coats for Secretary David Small, Department of Natural Resources and
Environmental Control
Bernice Whaley, Director, Delaware Economic Development
Terry Pepper for Secretary Jim Mosley, Department of Safety and Homeland Security
Brian Maxwell for Director Ann Visalli, Office of Management and Budget
Deb Gottschalk for Secretary Rita Landgraf, Department of Health & Social Services
Karen Field Rogers, Associate Secretary, for Secretary Steven Godowsky, Department of
Education

Also Present:

David Edgell, OSPC	Katherine Wilson, RAL
Dorothy Morris, OSPC	Daniel McAllister, Baird, Mendalas, Brockstedt
Miriam Pomilio, OSPC	John Staffier, Henlopen Acres
Drew Boyce, DelDOT	John Scheurer, Henlopen Acres
Lee Rowell, RAL	Joni Reich, Henlopen Acres
Tim Hidell, Henlopen Acres	David Lyons, Henlopen Acres
Henry Dewitt, Henlopen Acres	Thomas Roth, Henlopen Acres
Martin Clark, Henlopen Acres	Leonard Sophrin, City of Wilmington
Lee Mills, RAL	Andrew Donnelly, Governor's Office
John Schroeder, RAL	Glen Mendalas, Baird, Mendalas, Brockstedt
Patty Cannon, DEDO	
Gail McDermitt, RAL	

Meredith Tweedie, Chair, opened the meeting at approximately 1:05 pm with welcome and introductions.

Approval of Minutes

A motion was made by Director Ben Addi to approve the minutes from the previous meeting of September 30, 2015. The motion was seconded by Terry Pepper. Jennifer Cohan requested that the spelling of her name be corrected. With no further discussion the motion was unanimously approved.

Chairperson Tweedie announced that because the City of Wilmington was running late, the agenda would be changed so that item #4 could be heard first.

Henlopen Acres Dispute Resolution

Chairperson Tweedie stated that agenda item #4 relates to a request from the Town of Henlopen Acres for the Cabinet Committee to engage in a dispute resolution process regarding the ongoing disagreement between the Office of State Planning Coordination (OSPC) and the Town of Henlopen regarding the certification of their comprehensive plan. Chairperson Tweedie read, into the record, the language of the Comprehensive plan certification statute that allows for the dispute resolution.

Pursuant to 29 Del Code Section 9103 (d) Should the Office of State Planning Coordination make objection to any proposed comprehensive plan or amendments or revisions thereto, then the Office of State Planning Coordination shall immediately enter in to negotiation with the county or municipality in an attempt to solicit agreement and resolution. Any agreements reached during these negotiations shall be incorporated in to the public record and considered by the governing body prior to final action on the comprehensive plan. If the Office of State Planning Coordination and the county or municipality fail to reach agreement after a period of 45 days, the Office of State Planning Coordination shall report the extent of agreement and areas of continued disagreement to the Advisory Council on Planning Coordination for dispute resolution.

Chairperson Tweedie noted the parties in the dispute were the Office of State Planning Coordination and the Town of Henlopen Acres. She asked that Connie Holland move to the audience during the first agenda item as she acting as a party in the dispute resolution and not a Cabinet Committee on State Planning Issues member.

Chairperson Tweedie noted that while the statute discussed the Dispute Resolution it does not specify the procedures for such action. Meredith has spoken to Mr. Dan McAllister who represents the Town of Henlopen Acres regarding how the procedure should be conducted. These procedures were outlined and confirmed in a letter to Daniel McAllister dated November 16, 2015.

Each party will have an opportunity to present information in addition to the written statements they submitted. The procedures will be as follows:

- Each party will have a maximum of 20 minutes total to present his position to the Cabinet Committee in the presence of the other party and the members of the public. The presentation may be made by one or more representatives of each respective party, including counsel, or by any other means that the party deems appropriate under the circumstances.
- At the conclusion of each party's twenty (20) minute presentation, the Cabinet Committee may ask questions of the presenting party for a period not to exceed twenty (20) minutes. Because this is dispute resolution and not a legal proceeding there will not be limits on the members of each party that can answer questions.
- There shall be no cross-examination of either party by the opposing party.
- At the conclusion of the presentation and questioning period, each party may

make a closing statement not to exceed five (5) minutes in length.

- At the conclusion of the closing statements, any member of the public who wishes to provide public comment about the matters discussed may do so in a statement not to exceed five (5) minutes in length. The five minute period may be shortened or lengthened at the discretion of the Cabinet Committee Chair.
- At the conclusion of each party's closing statement and following the public comment period, the Cabinet Committee will deliberate on the record about whether to take further action.
- The Cabinet Committee's recommendations will be non-binding except as required by the Committee's enabling statute.
- Chairperson Tweedie noted that the Town of Henlopen Acres and the Office of State Planning have each submitted a report on their party's respective position which will be the basis of their presentation today.

Henlopen Acres Position

Glen Mendalas, counselor for the Town of Henlopen Acres introduced the members of the Town of Henlopen Acres staff at the meeting today.

Mr. Mendalas started his presentation with a clarification of the question before the committee today. He stated that there is a tendency to view this matter as a dispute between the Town of Henlopen Acres and the Rehoboth Art League. While there is a dispute in that arena, today that is not the issue. The appointed officials in the room today recognize that the Rehoboth Art League (RAL) is an important institution with great historical significance that should be preserved. No one within the town is advancing the position that the art league should relocate. The town has gone to great lengths to determine a solution to preserve the Rehoboth Art League. They pursued a special exception for the Rehoboth Art League which was recommended in the 2004 comprehensive plan. More recently the town worked, for many months, with the art league to create a Memorandum of Understanding. Unfortunately neither of those options ended in a resolution to the issue. So it is true that the Town of Henlopen Acres and the Rehoboth Art League do have a disagreement regarding the zoning of the Rehoboth Art League parcels but reducing the matter before you today to the issue of if the Art League should be preserved is a misplaced view of the issue before the committee.

The issue before the committee today is whether certification of the town's comprehensive plan should be held up due to the disagreement between the town and a single property owner over the proper zoning designation of a parcel, or in this case, two parcels. The Office of State Planning Coordination refuses to certify the draft comprehensive plan. The single outstanding dispute as to the town's draft plan is with the zoning designation of the Art League parcels. The RAL would like to see the parcels zoned with a new zoning designation, a cultural zoning designation, whereas the town

would like to see the parcels remain residential as practically every other parcel in the town is zoned. The State Planning Office has taken the position that it could not certify the plan until the town and the Rehoboth Art League come to an agreement. In a March 24, 2015 correspondence stated that the OSPC “could not move the plan forward for certification until a resolution could be reached between Henlopen Acres and the Rehoboth Art League regarding the zoning designation of the parcels.” Later in September 2015, Ms. Holland advised the town manger that she could not certify the plan until the Rehoboth Art League was resolved. So the issue is whether or not the plan can be held up based upon a disagreement of zoning on one parcel.

Mr. Mendalas asked the question “Is the State Planning Office correct that that is a proper reason to hold up the comprehensive plan?”. Mr. Mendalas stated that this question would need to be answered by the Cabinet Committee. Mr. Mendalas further stated that he feels the answer to the question can be found in the statutes.

Mr. Mendalas quoted 29 Del Code 9103 (a) which states

The comprehensive plan review and certification process is intended to compare planning goals and development policies among levels of government for the purpose of attaining compatibility and consistency among the interests of state, county and municipal governments. Plan review and certification are necessary to properly address potential burdens on the state government for future infrastructure and public services caused by local land use actions.

Mr. Mendalas stated that according to the statute the comprehensive plan certification process is intended to address burdens on the State government and other governments stemming from infrastructure needs. He questioned whether or not the zoning of these parcels places a burden on State government for future infrastructure. Mr. Mendalas further stated that it may be the case, in some towns that the zoning of a single parcel would place a burden on the State infrastructure but not in this case. Therefore, he stated that to deny certification of the comprehensive plan because of the designation of these properties is inconsistent with the Delaware Planning Act.

Regarding the nonconforming use, Mr. Mendalas stated that the Office of State Planning has taken the position that it cannot certify the plan as long as there is an inconsistency between the Existing Land Use map and the Future Land Use Map plan. The Future Land Use map shown previews the direction the municipality sees land use going. If the town has a parcel that is currently residential and they see it going to commercial in the future, they may put that on the map. Mr. Mendalas gave examples from comprehensive towns in neighboring municipalities. The situation in Henlopen Acres is that the Existing Land Use Map originally showed the Rehoboth Art League properties as institutional and the Future Land Use as residential. The Office of State Planning noted that the town did not have an institutional zoning category. The town revised the Existing Land Use map to show that it is a residential parcel but it is subject to a legal non-conforming use. The Future Land Use map designates the parcel as residential. The plan was still rejected because the non-conforming use issue was not rectified. Although the town made the decision that the parcel should remain residential and that was shown on the map, the position of the Office of State Planning was that the fact that the parcel was being used for something other than residential had to be rectified. Mr. Mendalas stated that the

existence of a non-conforming use should not be a reason to deny certification of this plan and he gave examples of other municipalities that have this same issue (specifically, Dewey Beach). Mr. Mendalas argued that the Office of State Planning has not held up other plans where there was an existing non-conforming use. Mr. Mendalas stated that, in addition, the Office of State Planning has stated that Henlopen Acres is obligated to reach an agreement regarding the zoning of the Rehoboth Art League properties. Mr. Mendalas stated that this position is not supported by statute or by law. The process of going through the plan and having it approved and adopted goes through a public process. The final decision to adopt the plan under the Delaware Planning Act rests with the municipality. He quoted 22 Delaware Code, Section 9206 (a) and stated that this section gets it right because the General Assembly gave the municipalities the power of zoning and once you give that power away, you cannot come in and try to take it back by forcing the town to adopt a zoning designation for these parcels that is inconsistent with the decision that has been made by the local officials. If a municipality was forced to come into agreement with a property owner before the plan was certified, it would put the planning process on its head.

In closing, Mr. Mendalas stated that it would be a much easier case if we were dealing with a concrete crushing plant in the middle of a residential community but that is not what we are dealing with - - the case before you deals with a deep rooted institution that has the respect of many people in the State of Delaware. It is not surprising that many are wondering why the town has determined that a rezoning is not the best course. The town is almost exclusively residential and there is a great interest to ensure the longevity of that residential character. The town has pursued alternatives to try to find a way to provide assurances to this institution that what has operated through the years will be maintained. The town will continue to work with the Rehoboth Art League to make that work but the town has made a decision completely within its authority to maintain the Rehoboth Art League parcels within a residential zoning designation. No matter how much they want to endorse the Rehoboth Art League, it is not appropriate or legal to attempt to force the town to change a long standing designation in order to certify the plan. Refusing to certify the plan on the basis constitutes a substantial overreach by the State Planning Office that is not supported by law.

Mr. Mendalas respectfully requested that the committee recommend the current draft Henlopen Acres plan, which has met every other item recommendation, for approval for certification.

Mr. Staffier, Henlopen Acres commissioner, reiterated several points made by Mr. Mendalas including the mapping inconsistency and the special exemption procedure that was recommended in 2004. He stated that the special exemption process was brought before the commission in 2005 and it was not passed. He did note, however that when it was going through the public process, the Rehoboth Art League opposed this process.

Mr. Staffier also wanted the CCSPI to understand that they have tried to work with the Rehoboth Art League during this process and the Memorandum of Understanding that was drafted, they thought, met all of their concerns. The town gave the MOU to the Art League and they have refused to comment on the MOU.

He further stated that he feels continued efforts should be done outside the end of the comprehensive plan and the plan should not be held up by the refusal of one property owner to agree.

Deputy Director Coats - For clarification, has the MOU had been executed? Mr. Mendalas stated that the MOU was an attempt to clarify what rights the Art League has under its grandfathered status but after 12 joint meetings to negotiate, council for Rehoboth Art League argued that it was contract zoning and the Art League did not sign. Mr. Staffier noted that the MOU was an attempt to allow the Rehoboth Art League to continue to do what they have been doing. He does not feel the Rehoboth Art League has come back to let them know how to change the MOU to give them what they want.

Secretary Cook – What was the time period of the 12 meetings and when the last meeting took place? Mr. Staffier noted that they began around June 2014 through September 2014. The MOU was given to the Art League in October 2014. Mr. Cook asked if it was fair to say that the two groups had not sat down in over a year. Mr. Staffier stated that was correct.

Director Ben Addi – You have stated that the town is mostly residential. Can you tell me what other zoning designation you have in the town and what is the percentage of each? Mr. Mendalas noted that there is a Marina district which is just the marina, the Recreation zone which is the beach, and the Governmental district which is the town hall. All other parcels are residential. Mr. Staffier noted that there are no commercial districts with in Henlopen Acres.

Deb Gottschalk – Is the special exemption a category in your zoning? Mr. Mendalas explained that there is no special exemption zoning district per say. The Rehoboth Art League existed before the town created a zoning district and in that case they are grandfathered in or what is called a legal non-conforming use because they don't conform to the zoning code but they are legal because the existed before the zoning.

Chairperson Tweedie – Various versions of this dispute have been through the Delaware courts. Can you give a brief explanation of where that left you? Dan McAllister stated that the Rehoboth Art League attempted to demolish one of the buildings on the parcel. The town denied this permit due to the fact that the property is residential. If the zoning designation that exists now were not in place, at least one of the areas would now be a parking lot. There was not enough of a set-back for the demolition permit to be granted. The case was dismissed on by the Superior court on technical grounds. It was appealed to the Supreme Court and the Supreme Court upheld the Superior court decision.

Chairperson Tweedie - The Superior Court also talked about the fact that it should be treated as one parcel instead of two. Has that issue been resolved? Mr. Roth stated that they are referred to as one parcel for zoning purposes even though it is two distinct parcels.

Chairperson Tweedie clarified the procedures in the statutory provisions. The town has asked the Cabinet Committee to conduct a dispute resolution because there was an inability to work out your differences with the State Planning Office within 45 days. Meredith noted that according to the dispute resolution process, the Cabinet Committee on State Planning Issues shall, within 45 days of receiving the report from State Planning

(received 11/17/2015), issue findings and recommendations and shall submit the proposed plan to the Governor for certification. It also says that within 20 days of the receipt of that report, the Governor shall certify the comprehensive plan or return the comprehensive plan to the municipality for revisions. The municipality shall have the right to accept or reject the Governor's recommendations. The final decision on the adoption of the comprehensive plan is that of the municipality. What would make the Town of Henlopen Acres satisfied? Are you wanting the Governor to certify the plan or do you want the plan to go back to the town so you can adopt it. Mr. Mendalas noted that initially they strived to achieve following the statute as written. They would like an adherence to the 45 days and they are asking for your recommendation to the Governor that he certify the plan as presented.

Chairperson Tweedie - If the Governor were to not certify and send it back with recommendations, what would the town do next? Mr. Mendalas stated that the town would certainly consider any recommendations by the Governor would give.

Chairperson Tweedie clarified that if they decided to reject them, the town could still adopt the plan. Mr. Mendalas agreed.

Terry Pepper asked what it would mean to the town if they do not have a certified plan. Mr. Mendalas stated that he could not find anything in the statute that give the state the right to do anything to the town. Mr. Staffier stated that at a public meeting the state said road money could be held up or that the state would not provide emergency aid if the plan is not certified.

Associate Secretary Field Rogers asked for a clarification on the meetings. There were 12 meetings but it was after the 12 meetings that the town provided the MOU to the Art League? The 12 meetings were not looking at the MOU? Mr. Staffier stated that the 12 meetings were held to collect information so the MOU could be drafted.

Deputy Director Brian Maxwell – What condition are the structures currently in? Mr. Staffier stated they have rehabbed one of the structures. Mr. Maxwell – What is the process they go through? Mr. Roth stated that they go through the same process as anyone else. Mr. Maxwell asked if there had been any substantial delays in permits. Mr. Roth stated no.

Chairperson Tweedie – If the buildings burnt to the ground, would they have to apply for a variance to rebuild in their existing footprint? Mr. Staffier stated that they would have to apply for a variance.

Office of State Planning position

Connie Holland, Director, OSPC began her presentation by clarifying that she was asked in a public meeting what would happen if the plan was not certified. Mrs. Holland stated that she told the town the only thing she knew, which is what happened within another

jurisdiction, Smyrna, and the state did withhold money for a water tower and some street aide.

Director Holland went over a power point presentation regarding the Office of State Planning Coordination's position on this issue. Ms. Holland stated that 22 Del Code, Section 702 (b) states:

Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, and the general uses of land within the community, and critical community development and infrastructure issues. The comprehensive planning process shall demonstrate coordination with other municipalities, the county and the State during plan preparation.

Director Holland also noted that the importance of the plan (see slide 2 or presentation) and noted that it is important that the plan identifies future land use of all parcels and that land use regulations must be consistent with the plan. She noted the highlighted areas of the presentation (presentation attached).

Director Holland also noted that the Office of State Planning coordinates with towns but does not write components of the plan. This is because, while the Office of State Planning does not certify the plans, we do put forth the plans to the Governor with a recommendation regarding certification. Mrs. Holland stated that it is her understanding that a plan has to go to the Governor with no issues.

The comprehensive plan checklist has been in place since 2003 and is used by all municipalities when developing a plan and the Office of State Planning created this checklist per the Delaware code and the checklist is used to make sure all municipalities are treated the same and there is transparency in the system. According to the checklist the Land Use Plan must include policies, statements, goals, planning components and a map which will serve to define the proposed land uses for all areas within a municipality's jurisdiction. Particular attention should be given to the recommended land uses for lands which are vacant or likely to be developed. Mrs. Holland highlighted that the checklist specifically states: The Land Use Plan must show the desired future land uses for each parcel in the municipality. This data will form the basis for the required update to the zoning ordinance within 18 months of plan adoption.

Director Holland recognized the Dewey Beach example give earlier but noted that the town had 18 months after the certification of their plan to correct the issue.

Director Holland discussed how plans are reviewed and how certification issues are addressed. She stated that Henlopen Acres is not unique; many towns have certification items and work with the Office of State Planning to address these issues. Mrs. Holland stated that there are many examples of issues that can arise when the plan text and maps

do not match. Examples include the City of Harrington. In their plan the maps had colors that were hard to distinguish which could cause zoning disputes and potential legal action for the town.

Director Holland stated that this is key. Anytime she has spoken to Henlopen Acres she has asked for predictability. She noted that OSPC has not been concerned with how the issue was resolved – through zoning, and MOU, a conditional use, etc. She also gave the Town of Ellendale as an example. The plan text and maps were in conflict with one another. The Office of State Planning worked with the town to correct these issues to avoid possible legal actions, or zoning disputes. She noted the lawsuit O’Neill v. Town of Middletown and stated that the lesson learned is that the comp plan has the force of law and must be consistent.

It is Director Holland’s opinion that the plan is not consistent with Title 22, Section 702 because of an inconsistency between the plan text and plan maps, specifically the Future Land Use Map. This issue was acknowledged in the Town’s 2004 plan but has remain unresolved for the past 11 years.

Director Holland discussed the chronology of the Henlopen Acres plan and how the Office of State Planning has worked with the town. Mrs. Holland stated that the Office of State Planning is not trying to take sides on this issue; she is really geared in not the top down but the bottom up in helping the jurisdiction obtain an environment they want to live in.

To summarize, Director Holland stated the OSPC does not believe that the current draft of the Henlopen Acres meets the minimum standards of Title 22, Section 702 of the Delaware Code. The problem is an apparent inconsistency between the text of the plan and the Future Land Use Map which creates unpredictability for property owners and citizens throughout the town.

The issue, per Director Holland, is as follows:

The plan text identified a cultural land use (Rehoboth Art League) and the historic structures it occupies as an important component of the community. The community’s vision appears to support the continuation of this land use, but not an expansion of the land use.

The plan text identifies a number of potential mechanisms to preserve and protect the historic structure and allow for the continuation of the cultural land uses. The path forward regarding which, if any, of these mechanisms will be employed is unclear.

This was identified in the 2004 plan, and is still unresolved to date – 11 years later.

The Future Land Use Map indicates the parcels as residential. This seems to indicate that it is the desire of the town for the cultural land use to cease to exist and revert to a residential land use. This appears to be inconsistent with the text, which offers multiple

other alternatives for this parcel and use. Some of those alternatives would be inconsistent with the Future Land Use Map (i.e., a new cultural zoning designation) should they be adopted.

In closing, Director Holland stated that the Rehoboth Art League is a significant historic structure and institution within the Town of Henlopen Acres that the state has a vested interest in protecting. The town proposed legal protection for the Rehoboth Art League as a part of their 2004 comprehensive plan which was certified by the Governor; however, to date, no legal protections have been implemented by the town.

Delaware code requires that land use regulations be changed to be in compliance with the comprehensive plan within 18 months of adoption. As such, the town is not in compliance with their currently certified plan. The review of their current draft plan update does not provide any additional confidence that the town will enact legal protections. Therefore, the Office of State Planning Coordination is recommending that the plan not be certified by the Governor until the issue of the non-conforming use is resolved by the text and the map being brought into compliance with one another and with the Delaware Code. This ensures predictability for all parties involved.

Chairperson Tweedie asked for questions from the Committee - - The committee members had no questions.

Public Comment:

John Schroeder, Chairman of the Board for the Rehoboth Art League gave the following comments:

The Rehoboth Art League was founded in 1938. His family became involved with the Rehoboth Art League about 3 years after it started when his father, who was stationed at Ft. Myers, began selling paintings there. The Corkrans started the Art League in a residential community now known as Henlopen Acres. The Town of Henlopen Acres was established 32 years later.

The MOU - - At the June 2014 meeting of the Henlopen Acres Planning Commission he spoke and asked that a committee consisting of 2 members from Henlopen Acres and 2 members from the Art League be formed to discuss the zoning issue. This request was denied. After that meeting, the Planning Commission chair reached out to meet with the Art League. The Chairman met with the Art League as an individual and they met several times. There was no agendas and the Art League members thought the meeting was to discuss the zoning issue. They met 12 times. They did not know an MOU was being created by the town because the group meeting was not town sanctioned. After receiving the MOU, the Art League met with their attorney who explained it was contract zoning and it was illegal. The Art League did get back to the town to explain that they could not move forward with the MOU.

The Cultural Zone – Probably 3 years ago, the Art League stated that they should be considered as a cultural zone because of their 75 year history within the town. The town stated that they did not know what a cultural zone was. Mr. Schroeder stated that he suggested they talk to the attorney for Lewes because a similar zone had been created there. That was declined. The Art League presented this idea to the town in writing in 2014.

Unlike all other properties in Henlopen Acres they are nonconforming and they have been trying since 1985 to get zoned based on their uses. What does nonconforming use mean to the Art League? In June 2012 they had a performance scheduled outside between 4:00 pm and 6:15 pm. They were fined by the town for having an increase in a nonconforming use. A year later they sponsored an open reception for SOAR (Survivors of Abuse in Recovery). The town notified them that this was a prohibitive extension of a nonconforming use. They were told by town officials that if the reception went forward the Art League, SOAR, and the participants were subject to citations. A year later they were planning another performance and were told the League and the Possum Point Players would be subject to legal action if the event occurred. The event did not occur.

Mr. Schroeder questioned how any entity can operate when micro managed to that extent because of your zoning.

Mr. Schroeder further stated that the Art League continued to work on issues they had heard were the problem - - both their programming and the growing of the buildings. Both have been addressed. They have opened a satellite location on Route 9 for the programming and they created a conservation easement with the State to make sure the building are maintained.

The Art League has been told by the Mayor that the Rehoboth Art League will not be rezoned. The Art League has asked for an ordinance from the Town to give them assurance that if a building were destroyed they could rebuild immediately.

Mr. Schroeder stated that they have asked that legal councils meet to resolve but it hasn't happened. The Rehoboth Art League is a non-profit organization with limited resources to raise fund. At this time, according to Mr. Schroeder, the zoning discrepancy is hampering their ability to raise funds.

John Schurer, Chairperson of the Henlopen Acres Planning Commission gave the following comments:

He noted the 30 years of discrepancy between Henlopen Acres and the Rehoboth Art League. The office of State Planning has visited several times and he has tried to comply with all recommendations. The Planning Commission has tried to make things as clear as possible. To him, zoning is a complicated thing with a number of components so they tried the MOU which addressed the issues that people wanted to see. The Town plan was certified in 2004. When it was up for review in 2009 they tried to review but gave up

because Connie would not sign off so they waited for the 10 year update and they still have the same issue.

Public comment closed at 2:35 pm

Closing Statements:

Glen Mendalas: The Office of State Planning has stated that all they want is clarity. He brought the committee back to the example of Dewey Beach. The OSPC did not ask them for clarity – they moved them forward.

Regarding the conservation easement - - The Town did not find out about the conservation easement from the Rehoboth Art League. They found out through a third party. If this was a good thing for the town, wouldn't they have contacted the town? The town had to go to the recorder of deeds and get a copy of the easement. He has read the easement and does not see it as a positive document for the town.

Mr. Mendalas closed by stated that he has worked with the Office of State Planning for a lot of years and Mrs. Holland is correct that they come to the town and work with them on issues so it is hard to say they should stand aside and let the plan move forward but in this instance he does feel the statutes give way to what is going on here and the plan needs to be forwarded to the Governor. Mr. Mendalas respectfully requested that the Committee move the plan forward with a recommendation for the Governor to certify.

Mr. Staffier stated that it is important to note that the letters of March 4, 2015 and September 22, 2015 the issue was between the Existing Use map and the zoning map. He stated that the Future Land Use map was not mentioned. The town addressed the inconsistency between the Existing Land Use map and the zoning map. The town intends for the RAL parcels to remain residential in the future so that could have been addressed if that issue had been brought to their attention. Regarding the conservation easement, he does not feel it prohibits the building or expansion of RAL structures if they are used for cultural uses.

Connie Holland: Director Holland stated that this issue is not personal. There have been some interesting meeting and some interesting comments. She is AICP certified which means she has to look at everything to ensure it is compliance with the law. Mrs. Holland congratulated the Town on a beautiful community but stated that she also cares about the State and feel that she has heard enough here today to prove it should not go to the Governor. There is confusion. We heard that confusion on the map. She has tried to document everything and she is sure they can go back and forth but the bottom line is the text does not meet the maps. Mrs. Holland stated that a full faith effort should be made to correct the issue. Regarding other jurisdictions, there is no secret there is a law that says if your text and maps say two different things, the town has 18 months to implement it. This document does not say the same thing and does not give a path forward and she has been dealing with this for 11 years. Mrs. Holland stated that it is only fair to the citizens of Delaware and the Rehoboth Art League to have this corrected.

Deliberations

Chairperson Tweedie stated that the question on the table is if this committee forwards the document to the Governor and if they do forward the document, what recommendation do they give to the Governor.

Ms. Tweedie stated that, she does not see discretion on whether or not the committee forwards this to the Governor. The committee has to send the plan to Governor within 45 days, according to subsection (e) of 9103. There will be a vote but does not see discretion on this issue.

She feels a couple of questions have been raised as follows:

1. Do the maps reflect the present reality?
2. Does the conservation easement have anything to do with this?
3. Can the Town certify their own plan and
4. What affect does the Governors decision have on the town?

There will be two votes. One will be whether or not to forward the plan to the Governor and the other will be on the recommendation.

Secretary Cook stated that this committee wouldn't be here but for the issue with the Rehoboth Art League. He really thinks that the entities need to get together and work this out. He heard the parties say they were open to it and he firmly believes that this issue needs to be resolved, both for the discussion today and for the future of the town.

Director Ben Addi asked about the 45 day requirement to forward to the Governor. If we know that it has to be forwarded to the Governor then does the committee vote to recommend whether to certify it or not certify it? Chairperson Tweedie noted this was correct.

The Delaware Supreme court stated that the two parcels are to be treated as one and they are currently a nonconforming use. There is no dispute about this issue. The question of the Future Use Map is that technically we can make recommendations but the town can come up with whatever use they want to on this matter. Her proposed finding are as follows (bold):

- 1. There is not an issue with how the plan reflects the present zoning status.**
- 2. The town has the ultimate discretion to adopt their plan per 9103 (f)**

With that said, is this a legal about the Office of State Planning or the town being legally correct or is this a policy question. In as far as it going to the Governor for recommendation, she feels it is a policy question in that the Court of Chancery decision (O'Neill v Town of Middletown) said that the State Planning Act doesn't confirm a right

of action on any plaintiff trying to challenge what the State Planning Office has done. The courts have looked at this statute and have determined that it is advisory and it is to allow the Government to provide coordination in the planning process. Whether or not the Governor chooses to agree with a town's comprehensive plan is a policy question because ultimately the town can do what the town wants to do.

- 3. Make recommendation on the policy question**
- 4. Recommend to the Governor to return the plan without certification for the parties to work out. This committee should support maintaining the existence of the Art League in a way that balances the interest of the Art League.**

Secretary Cook asked if the 45 day clock started on the 17th? Chairperson Tweedie stated it started on the 17th. Is there an ability to vote that it goes to the Governor but give the parties 30 days to try to reach agreement.

Mrs. Tweedie stated she does not have an issue with this idea if the parties think they can get together by the 19th of December.

Director Ben Addi asked what the outcome of these discussions would be that would cause us to recommend certification to the Governor? He is having a hard time understanding how he can meet the RAL needs. It was discussed that the dispute is between only the Office of State Planning and the Town. Secretary Cook stated that the Art League would have to be involved.

Deb Gottschalk discussed the idea of holding the recommendation for a 30 day period and if an agreement can be reached then it goes with a recommendation to certify, if not, a recommendation to not certify would go to the Governor.

Chairperson Tweedie stated that she thinks a motion should be made to forward to the Governor with a recommendation that he not take action for 31 days. People are welcome to send emails to Meredith and if she determines that an agreement has been reached. It was discussed that if at the 31 day mark there is a recommendation from State Planning to certify then it moves forward for certification; if there is not then the recommendation is to not certify.

Deputy Secretary Coats made a motion that the Chairperson hold the plan for 31 days. At day 32 the committee will send to the Governor. The Office of State Planning and the Town have 31 days to negotiate an agreement whereby the OSPC is willing to recommend certification. If the recommendation comes then the CCSPI would recommend certification to the Governor. If the recommendation does not come then it is forwarded to the Governor with a recommendation not to certify. The motion was seconded by Secretary Cook.

Questions: Director Ben Addi does not agree with plan. That puts the decision in the hands of one party which is not fair to the other party. The Committee can make a

decision to recommend as they are comfortable with based on what they have heard today and the Governor then has time to take our recommendation or not depending on what information he has within that timeframe.

As a matter of procedure, so this committee does not have to meet again, the committee should make a recommendation based on where it is today. While the town may be legally correct in the zoning status assertions and that is ultimately their decision, the question before the committee is a policy question. This committee cannot do anything to make that resolution happen.

Deputy Coats withdrew her motion

Secretary Cook made a motion to move the plan to the Governor as required by 29 Del Code 9103 with a recommendation not to certify. The motion was seconded by Terry Pepper. Favor: Deb Gottschalk, Terry Pepper, Brain Maxwell, Karen Field Rogers, Kara Coats, Tom Cook, and Meredith Tweedie. Opposed: Anas Ben Addi. **Motion carried.**

For clarification purposes the Governor has 20 days to certify or return to the town and the municipality shall have the right to accept or reject any and all recommendations. Chairperson Tweedie encouraged everyone to get together and settle the dispute.

City of Wilmington DDD Expansion

The City of Wilmington is requesting an expansion of their existing Downtown Development District to include an additional 1.50 acres.

Director Holland stated that when the Office of State Planning Coordination and the City of Wilmington have worked together to resolve the GIS issues.

Lenny discussed the how the issue was resolved and that the City will stay in close contact with the Office of State Planning Issues.

A motion was made by Anas Ben Addi that the expansion to the Wilmington DDD boundaries be approved as presented. The motion was seconded by Tom Cook. For the record, Chairperson Tweedie noted that the letter from the City is included in the packet. With no further discussion the motion was carried by a unanimous vote.

Public comments: Chairperson Tweedie asked if there were any members of the public that wished to speak.

With no public wishing to speak, a motion was made by Brian Maxwell; seconded by Tom Cook and unanimously carried that the meeting be adjourned. Meeting was adjourned at 3:15 PM.

Draft Minutes posted to calendar: December 18, 2015

Minutes approved:

Final minutes posted to public:

Memo Attachment B

Written position Statement with exhibits

Henlopen Acres

DELAWARE CABINET COMMITTEE ON STATE PLANNING ISSUES

In Re TOWN OF HENLOPEN ACRES)
COMPREHENSIVE PLAN,)
)

**THE TOWN OF HENLOPEN ACRES' POSITION STATEMENT REGARDING ITS
2015 COMPREHENSIVE PLAN**

The Town of Henlopen Acres (“Henlopen Acres” or “Town”), by and through its undersigned attorney, respectfully submits the following position statement to the Delaware Cabinet Committee on State Planning Issues (“Cabinet Committee”) in support of its request that its Comprehensive Plan be recommended to the Governor for certification:

I. Factual Background.

Henlopen Acres is a Delaware municipal corporation located in Sussex County which is subject to the Delaware Planning Act, 29 Del. C. § 9101, et seq. On December 1, 2014, the Henlopen Acres Planning Commission (“Planning Commission”) unanimously approved a ten year update to the Comprehensive Plan of the Town of Henlopen Acres (“the Plan”) at a public meeting, following the procedures set forth in state and municipal law. Present at the meeting was Constance Holland, (“Holland”), Delaware State Planning Director and head of the Office of State Planning Coordination. At that meeting, Holland advised that she would not certify the Plan if Henlopen Acres did not establish a new zone for the two parcels of land in the Town occupied by the Rehoboth Art League (“RAL”). The RAL parcels are currently zoned residential and will remain such in the Plan. As such, the RAL enjoys a grandfathered, non-conforming institutional use of its property. On December 12, 2014, the Henlopen Acres Board of Commissioners (“Commissioners”) unanimously approved the Plan.

On January 12, 2015, then Board of Commissioners President *pro tempore* (now Mayor) David F. Lyons forwarded the Plan to Holland and the State Planning Office for review, pursuant

to 29 *Del. C.* § 9103(8). See Exhibit A, attached. With respect to the RAL, the transmittal letter explained, among other things, that following numerous meetings with representatives of the RAL and with Town residents, the Town had forwarded a draft Memorandum of Understanding (“MOU”) to the RAL that clarified the scope of the RAL’s non-conforming use, provided the RAL with reasonable assurances that it would be able to rebuild its structures in the event of a catastrophic loss, and memorialized the RAL’s oft-publically-stated position that it had no plans or desire to expand its activities or structures in Henlopen Acres. The letter explained that the RAL had yet to provide any substantive comments in response to the draft, something that remains true to this day.

On March 24, 2015, following a meeting held at the State Planning Office on February 25, 2015 to review the Plan, Holland advised by letter to Henlopen Acres Town Manager Thomas Roth (“Roth”) that the State Planning Office could “not move the [P]lan forward for certification until an agreement [was] reached between [Henlopen Acres] and the Rehoboth Art League” regarding the zone designation of the RAL parcels. See Exhibit B at p. 2, attached. Holland also made several other recommendations in her March 24, 2015 letter to Roth.

On July 10, 2015, in response to Holland’s March 24, 2015 correspondence, the Town’s Planning Commission and the Town Board of Commissioners formally approved a revised Plan that adopted all of Holland’s certification comments, and substantially all of her Recommendations, but did not create a new zone for the RAL parcels. The existing use map appended to the Plan, however, was clarified (in response to Holland’s comments) to show the RAL parcels as “Residential-subject to a non-conforming use,” thus eliminating an inconsistency alleged to exist by Holland.

EXHIBIT A

Town of Henlopen Acres

104 Tidewaters
Henlopen Acres, Delaware 19971

302-227-6411
Fax: 302-227-3978

January 12, 2015

Mayor
Winnie Kee

Commissioners:
Andrew Brittingham
Frank Jamison
David Lyons
Joni Reich
Beatrix Richards
John Staffier

Town Manager:
Thomas Roth

**Maintenance
Manager:**
Alex McClure

**Security
Supervisor:**
Lee Stewart

Town Solicitor:
Glenn C. Mandalas,
Baird, Mandalas,
Brockstedt LLC

Member:
Association of
Coastal Towns

Delaware League of
Local Governments

Sussex County
Association of
Towns

Delaware Rural
Water Association

Ms. Constance Holland, State Planning Director
Office of State Planning Coordination
122 William Penn Street, Suite 301
Dover, DE 19901

Re: Comprehensive Plan

Dear Ms. Holland:

The enclosed ten year update of the Comprehensive Plan of the Town of Henlopen Acres is hereby submitted to your office for PLUS review. The update was unanimously approved by the Planning Commission of Henlopen Acres at a public meeting on December 1, 2014, which you attended, and was thereafter unanimously approved by the Henlopen Acres' Board of Commissioners at a public meeting on December 12, 2014.

At the December 1 Planning Commission meeting, you indicated that you intended to reject the update because it does not provide for or recommend establishing a new zone for the Rehoboth Art League ("RAL"). The Town hopes that on reflection you will reconsider that position.

As the attached timeline and draft Memorandum of Understanding ("MOU") show, the Town has devoted considerable time and effort to resolving the RAL issue. At the June 27, 2014 Planning Board meeting which you attended, the RAL's representatives stated that the RAL has no desire to expand either its facilities or its activities in Henlopen Acres. Instead, what it wants and needs is clarification from the Town of what it can and cannot do and legal assurance that it will be able to re-build its structures in the event of a catastrophic loss. The draft MOU does not establish any new zoning regulations applicable to the RAL or modify any existing regulations. Instead, it was intended and designed to (1) clarify the scope of the RAL's existing, legal, grandfathered non-conforming use status, (2) provide reasonable assurance that the RAL will be able to rebuild its facilities in the event of a catastrophic loss, and (3) memorialize the RAL's "no expansion" position. The MOU, therefore, would effectively give the RAL what it said it wanted at the June 27 meeting and thereafter. The Town does not believe that establishment of a new zone is necessary or advisable to achieve those goals. The RAL's current, grandfathered non-conforming use status already provides it with the legal right to continue its ongoing activities

and to maintain its existing facilities in perpetuity. Confirmation of the RAL's right to rebuild in the event of a catastrophic loss can be provided by means other than a new zone.

As the attached timeline reflects, the draft MOU was provided to the RAL on October 21, 2014, but the RAL has not yet provided the Town with comments. The door remains open, however, and we hope that an agreement can ultimately be reached. As you were able to personally observe at the June 27 Planning Commission public meeting, and as has been subsequently reaffirmed in numerous meetings with the RAL and individual residents, a strong majority of the residents of Henlopen Acres want the RAL to continue to prosper, but do not want it to expand its facilities or activities in Henlopen Acres. Since that is the position publically stated by the RAL at the June 27 Planning Commission meeting and thereafter, an agreement along the lines of the draft MOU should be achievable. For now, however, the ball is in the RAL's court.

In light of the above, the Town hopes you will agree that rejection of the enclosed update to the Town's Comprehensive Plan because it does not call for a new zone for the RAL would clearly not be warranted. In any event, however, we must advise you that the Town does not believe that the comprehensive planning process was intended to usurp local authority over zoning issues or to provide a means by which local authorities could be coerced into adopting zoning changes they consider to be inadvisable. Similarly, it is the Town's view that your office is not entitled to reject or to decline to process a submitted Comprehensive Plan update merely because you disagree with some aspect of it. You can, of course, state and explain your opposition, but you must, in our view, continue to process the update as provided in Section 9103 of Title 29 of the Delaware Code. And under Subsection (f) of that section, "The final decision on the adoption of the comprehensive plan [or update thereof] is that of the municipality"...

We trust that you will fulfill your obligations in this regard and that you will review the Henlopen Acres update under the same guidelines and standards as apply to other towns of similar size, character and circumstances. We look forward to the comments on the update from your office and from other State agencies and will comment and incorporate as many as we feel are helpful and reasonable within the context of the Town's planning process.

Respectfully,

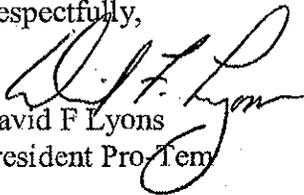

David F Lyons
President Pro Tem

EXHIBIT B



STATE OF DELAWARE
EXECUTIVE DEPARTMENT
OFFICE OF STATE PLANNING COORDINATION

March 24, 2015

Mr. Thomas Roth
Town of Henlopen Acres
104 Tidewaters
Henlopen Acres, DE 19971

RE: PLUS review 2015-02-07, Town of Henlopen Acres Comprehensive Plan

Dear Mr. Roth,

Thank you for meeting with State agency planners on February 25, 2015 to discuss the proposed Comprehensive Plan for the Town of Henlopen Acres.

Please note that changes to the plan, other than those suggested in this letter, could result in additional comments from the State. Additionally, these comments reflect only issues that are the responsibility of the agencies represented at the meeting.

Certification Comments: These comments must be addressed in order for our office to consider the plan amendment consistent with the terms of your certification and the requirements of Title 22, § 702 of the Del. Code.

- **Public Participation Section (p. 1)** – The town noted in the plan that 13 meetings were held between 2011 and 2014. Please expand the public participation section to include what was discussed at those meetings, what were the public comments at those meetings, and what the Town did to address the issues brought forth in the meetings. In addition, the plan should include specific information about the meetings regarding the Rehoboth Art League, where the town is in those discussions, and the path forward for resolving those issues.
- **Intergovernmental Coordination (p 26)** – The plan states that the neighboring jurisdictions were notified regarding the update and that the City of Rehoboth made numerous comments regarding the plan. Please expand the Intergovernmental Coordination section to include what comments were made and if any revisions were made to the draft plan as a result of those comments.

- Rehoboth Art League – The comprehensive plan Existing Land Use Map shows the Rehoboth Art League property as “Institutional”. However, the zoning map/code for the Town of Henlopen acres does not include an ”Institutional District”. The Town must work to rectify this nonconforming issue before the plan can be certified.

According to the 130-17, permitted uses of the residential district in your zoning code art galleries, art studios, and art classrooms, theater and theater classrooms, are permitted when authorized as a special exception, except where one of the principal activities is one which is customarily carried on for profit as a business.

Your 2004 comprehensive plan recommended (section 2.3b) “recommends that the Special Exception process for allowing land use activities in addition to those land uses by right be replaced by a conditional use process.....” In addition, section 2.3b states “that this would allow the Town Commissioners to (1) set conditions on how the property will be used, limits on changes to the property and structure and (2) require review if the property owner changes or the organization engaged in the use changes.”

To date, the town has not completed this recommendation, leaving the Rehoboth Art League as a special use exception in your residential section.

It is our understanding that The Rehoboth Art League has sought, through the town, a change of zone or a conditional use for their property, because, as it stands, they have been unable to work with the town for decision regarding needed repairs to the structure. The State is aware that the Rehoboth Art League and the Town of Henlopen Acres have been in communication regarding his issue but there has been no resolution reached. The Office of State Planning cannot move this plan forward for certification until an agreement is reached between the Town and the Rehoboth Art League.

During the PLUS meeting, I suggested that the attorney for the Town of Henlopen Acres and the attorney for the Rehoboth Art League set a meeting to discuss a Memorandum of Understanding that has been drafted and/or to resolve this issue.

- As noted by Sussex County, on page 11 of this letter, the plan should note that Sussex County operates the waste water system that serves the Town of Henlopen Acres. Page 18 of the plan states the Town’s waste water is connected to the Rehoboth Beach facility at Wolf’s Neck. This is incorrect. Waste water from the Henlopen Acres Sanitary Sewer District (HASSD) is conveyed to the Rehoboth Beach Sewage Treatment Plan (RBSTP). The RBSTP treats and disposes wastewater into the Lewes-Rehoboth Canal. The facility is located at 20543 Roosevelt Street, on the bank of the Lewes-Rehoboth Canal. Wolf Neck plant references should be deleted and RBSTP data included.

Recommendations

Our office strongly recommends that the Town consider these recommendations from the various State agencies as you review your plan for final approval.

Office of State Planning Coordination – Contact Dorothy Morris 302-739-3090

The Town of Henlopen Acres comprehensive plan calls for the building of new homes or the development of existing homes to be of a certain character such as no more than 2 story and not over 6,000 square feet and to maintain the current character and retain the current design of housing.

In 2012 lawsuit the U.S. Department of Justice (DOJ) filed a lawsuit against Sussex County for violations of the Fair Housing Act. According to Press release dated November 2012 (in part) "the settlement requires that the county take affirmative steps to provide for future affordable housing, communicate its commitment to fair housing, and establish mechanisms to ensure affordable and fair housing in Sussex County." Among other things, the county must formulate an affordable and fair housing marketing plan to encourage the development of housing opportunities that are available and accessible to all residents of Sussex County regardless of race, color or national origin, appoint a fair housing compliance officer, and ensure that county officials and staff undergo fair housing training.

The State would argue that allowing only single family detached homes in the Town of Henlopen Acres would not promote affordable housing. While we understand the town is small and nature and would want to keep the character of their town intact, being a municipality carries with it the responsibility to allow for all citizens the opportunity to live within the town. The comprehensive plan should discuss affordable housing and how that would be accommodated if a developer sought to build a mixed use structure in your town.

Department of Transportation – Contact Bill Brockenbrough 760-2109

On page 24, the Plan recommends that "The Town consider a traffic study to provide baseline information" but does not state how that information should be used. We support the recommendation and suggest that it could be used to identify needed or desirable transportation improvements. For example, the Transportation section on page 21 states that "The Town maintains a pedestrian friendly atmosphere that equally accommodates both bicycle and car." That may be but the Town streets have narrow lanes, no marked bike lanes and no sidewalks. Some of the busier blocks may warrant such features. The study could identify any such locations.

The Department of Natural Resources and Environmental Control – Contact Kevin Coyle
739-9071

DNREC offers several comments and suggestions to improve conservation and protection of the Town's resources. While the cumulative impact of various program suggestions and concerns may sound negative, the intent is to improve the plan elements related to environmental protection, open space, recreation and water quality and supply. DNREC would welcome the opportunity to meet with the Town in a collaborative manner to discuss these recommendations and possible future ordinances.

Recommendations for Comprehensive Plan Revisions

Key Wildlife Habitat (pp. 6-7). In addition to the Species of Greatest Conservation Need that were identified in the Comprehensive Plan, other species to consider are big brown bats and corn snakes:

- **Bats.** Some residents may have bats (most likely big brown bats) in their homes. Bats are an important part of our ecosystem and an animal group that provides a service to humans by eating insect pest species such as mosquitos, beetles and moths. The value of the pest-control services to agriculture provided by bats in the US alone range from a low of \$3.7 billion to a high of \$53 billion a year, estimated in a 2011 study by scientists from the University of Pretoria (South Africa), US Geological Survey, University of Tennessee and Boston University. Bats will return to the same structure each summer. Bats raise their pups (young bats) in structures and flightless pups can be present from mid-May through mid-August. Despite the benefits of having bats in the area, they are not welcome in most human-made structures. If a bat eviction (called an exclusion) is needed, there are ways to do them to minimize long-term impacts to the animals. Doing an exclusion to keep bats out of the structure or destroying the structure during this time period will likely result in killing young bats. We recommend waiting until September 1st to evict bats. This provides time for the young bats to learn survival skills before dispersing from their maternity colony. If bats become a problem for homeowners, they can contact the Holly Niederriter at 302-735-8651 for assistance or visit the Delaware bat program's website: <http://www.dnrec.delaware.gov/fw/bats/>
- **Corn Snakes.** Corn snake (*Elapha guttata guttata*) are a state-endangered species that may occur within Henlopen Acres. They feed on rodents and are generally harmless. They are most active at dusk, and tend to be secretive during the day. They are often confused with copperheads because of their markings, but unlike copperheads (which are not likely to occur in Henlopen Acres) corn snakes are not venomous. DFW recommends adding this species to the list of species for consideration in the town's comprehensive plan.
- **Shore Birds.** In order to protect shorebirds and terns, the town may consider placing signage along the beach to encourage beachgoers to avoid disturbing the birds that may

be roosting or feeding in the beach habitat. Promoting rules like keeping dogs leashed or off the beach entirely would also be beneficial.

Air Quality (pp. 7-8). The Town concedes that there are concerns with current conditions for pedestrian and bicycle traffic. Specifically, beach traffic is a seasonal safety issue. DNREC recommends that the Town consider improvements for safe multimodal transportation, beyond the proposed traffic study that is indicated in this Comprehensive Plan Update. **For every vehicle trip that is replaced by the use of a sidewalk or bike path, 7 pounds of VOC and 11.5 pounds of NOx are reduced each year, thereby improving air quality. Delaware currently violates federal health-based air quality standards for ozone, and both VOC and NOx are precursors to ground-level ozone formation.**

Tree Canopy (p. 8). DNREC supports the Town's desire to maintain and even grow, where possible, its current tree canopy which is more than 43%. As noted in the Comprehensive Plan Update, trees provide important air quality and other environmental benefits to the residents of Henlopen Acres, as well as to the surrounding communities. The plan recommends studying the best trees for tree canopy development and come up with a plan to plant trees on all right of way areas that have insufficient trees. Please note that our program botanist, Bill McAvoy, can provide technical assistance to Henlopen Acres if needed. Bill has extensive knowledge of native plants throughout the State and can provide recommendations of appropriate species to be planted in this area. He can be reached at William.McAvoy@state.de.us or 302-735-8668.

Similarly, DNREC supports the Town's recommendation to maintain, as codified, a minimum of 60% green cover per lot, as well as the Town's recommendation to encourage renewable energy use. In addition to planting trees, the Town may consider promoting the use of native plants in landscaping. In particular, native nectar plants for butterflies, such as seaside goldenrod, would be beneficial. In the late summer, millions of monarchs cross the Delaware Bay from Cape May and feed on the nectar of the seaside goldenrod that is in bloom at Cape Henlopen State Park. Additionally, planting beach plum (*Prunus maritime*) would provide good habitat for song birds.

Water Supply (p. 16). The Town has expressed the need to develop a source water protection ordinance to protect wellheads. 7 Del. C. §6082(c) states in part that "municipalities with populations of less than 2,000 persons, with the assistance of the Department, may adopt by ordinance the overlay maps delineating, as critical areas, source water assessment, wellhead protection, and excellent ground-water recharge potential areas. Furthermore, the ordinance shall include regulations governing the use of land within those critical areas designed to protect those critical areas from activities and substances that may harm water quality and subtract from overall water quantity". The Department is available to assist at the Town's request.

Total Maximum Daily Loads (p. 17). We strongly recommend that the Plan contain a narrative about Total Maximum Daily Loads (TMDLs) as a "stand alone" section (currently located in the Stormwater section). Please consider the following:

Under Section 303(d) of the 1972 Federal Clean Water Act (CWA), states are required to identify all impaired waters and establish total maximum daily loads to restore their beneficial uses (e.g., swimming, fishing, drinking water, and shellfish harvesting). A TMDL defines the amount a given pollutant (i.e., or the pollutant loading rate reduction for a given pollutant) that may be discharged to a waterbody from all point, nonpoint, and natural background sources, thus enabling that waterbody to meet or attain all applicable narrative and numerical water quality criteria (e.g., nutrient/bacteria concentrations, dissolved oxygen, and temperature) in the State of Delaware’s Water Quality Standards. A TMDL may also include a reasonable margin of safety (MOS) to account for uncertainties regarding the relationship between mass loading and resulting water quality.

In simple terms, a TMDL matches the strength, location and timing of pollution sources within a watershed with the inherent ability of the receiving water to assimilate that pollutant without adverse impact. The realization of these TMDL pollutant load reductions will be through a Pollution Control Strategy (PCS). A PCS identifies the specific strategies and actions (e.g., best management practices) necessary for reducing pollutants in a given water body (or basin/watershed), thus realizing the water quality criteria or standards set forth in the State of Delaware’s Water Quality Standards, ultimately leading to the restoration of a given waterbody’s designated beneficial use(s). Specifically, a PCS is a combination of best management practices (e.g., wetland buffers, green technology stormwater treatment, pervious paving materials, rain gardens, etc.) that will reduce nutrient and bacterial pollutant runoff loading by optimizing BMPs. The PCS for the Inland Bays consists of regulatory requirements for stormwater and wastewater with only voluntary recommendations for agriculture. The regulatory requirements for the Inland Bays PCS can be retrieved from the following web link:
http://www.dnrec.state.de.us/water2000/Sections/Watershed/ws/ib_pcs.htm

The Town of Henlopen Acres is located within the greater Inland Bays Basin. Within this Basin, the designated nutrient (nitrogen and phosphorus) and bacterial TMDL load reduction requirements are displayed in Table 1.

	N	P	Bacteria
Inland Bays Basin	40% Low Reduction zone	40% Low Reduction zone	40% Fresh

Table 1: TMDL reduction requirements for the Inland Bays

Stormwater (pp. 17-18). The *Delaware Sediment and Stormwater Regulations* have been revised and became effective January 1, 2014. A three-step plan review process is now prescribed in the regulations. Proposed development projects must submit a Stormwater Assessment Study for the project limits of disturbance and hold a project application meeting with the reviewing delegated agency as the first step, prior to submitting stormwater calculations or construction drawings, which are steps two and three. Resulting from the project application meeting a Stormwater Assessment Report will be completed by the reviewing agency and the

developer and forwarded to the Town. This Stormwater Assessment Report will rate the anticipated engineering effort necessary to overcome certain stormwater assessment items such as soils, drainage outlets, and impervious cover. The Sediment and Stormwater Program recommends that the Town consider the ratings from the Stormwater Assessment Report in making a decision to issue preliminary approval for any development request by incorporating the Stormwater Assessment Report as a required element when a plan is submitted into the municipal preliminary plan approval process.

The revised *Delaware Sediment and Stormwater Regulations*, effective January 1, 2014, have a goal of reducing stormwater runoff for the rainfall events up to the equivalent one-year storm, 2.7 inches of rainfall in 24 hours. Runoff reduction encourages runoff to infiltrate back into the soil as in the natural pre-development system and results in pollutant removal and stream protection. Best management practices (BMPs) that encourage infiltration or reuse of runoff, such as porous pavements, rain gardens, rain barrels and cisterns, green roofs, open vegetated swales, and infiltration systems should be allowed for new development sites within the Town. Furthermore, limiting land disturbance on new development projects and limiting impervious surfaces by allowing narrower street widths, reducing parking requirements, and allowing pervious sidewalk materials will be necessary to help achieve the runoff reduction goals in the revised regulations.

The Town of Henlopen Acres should mention the updated regulations in your plan.

Parks and Recreation. In August of 2011, the Delaware Division of Parks and Recreation conducted a telephone survey of Delaware residents to gather information and trends on outdoor recreation patterns and preferences as well as other information on their landscape perception. These findings are the foundation of the 2013-2018 Statewide Comprehensive Outdoor Recreation Plan (SCORP) providing guidance for investments in needed outdoor recreation facilities and needs within county and municipal comprehensive plans. For the purpose of refining data and research findings, Delaware was divided into five planning regions. The Town of Henlopen Acres is located within SCORP Planning Region 5.

When looking at the findings from the 2011 telephone survey, it is apparent that Delawareans place a high importance on outdoor recreation. Statewide, 93% of Delaware residents indicated that outdoor recreation had some importance in their lives, while 67% said it was very important to them personally. These findings are very close to the results of the same question asked in the 2008 public opinion telephone survey, indicating a continued demand for outdoor recreation opportunities throughout the State.

Placing high importance on outdoor recreation resonates throughout the five SCORP regions. In Region 5 (Eastern Sussex County), 65% said it was very important to them personally.

Outdoor Recreation Needs/Priorities

Based on the public opinion survey, the most needed outdoor recreation facilities in Region 5 include:

High facility needs:

- Walking and Jogging Paths
- Bicycle Paths
- Public Swimming Pools
- Community Gardens
- Fishing Areas
- Off-Leash Dog Areas
- Picnic Areas
- Basketball Courts
- Playgrounds

Moderate facility needs:

- Hiking Trails
- Boat Access
- Canoe/Kayak Launches
- Camping Areas
- Ball Fields
- Football Fields
- Public Golf Courses
- Soccer Fields
- Tennis Courts

Preparing for a Changing Climate. Sea level rise is one of several climate change impacts that can affect communities, the others being variable precipitation and increasing temperatures. Together, precipitation and accelerated sea level rise contribute to increased flooding. Under Governor Markell's Executive Order 41, directing Delaware State agencies to prepare for emerging climate impacts and seizing economic opportunities from reducing emissions, DNREC and the Office Of State Planning Coordination are tasked with identifying actions local governments can take to improve community resiliency, including an assessment of infrastructure vulnerabilities, land use policies, and other adaptation strategies that may be integrated into comprehensive land use plans. With that in mind, DNREC requests the opportunity to work with the Town to develop language for the comprehensive plan that addresses climate change impacts, as well as adaptation and mitigation strategies for the Town to pursue through implementing ordinances.

Sea Level Rise. Portions of Henlopen Acres and its surroundings will be subject to direct and permanent inundation from sea level rise (<http://de.gov/slrmmap>).

Sea levels in Delaware have risen by about a foot over the past century (NOAA, 2014). This rate of sea level rise is likely to accelerate in the coming decades as a result of global climate change and local subsidence. Accelerated sea level rise will result in permanent flooding of low-lying coastal areas, increased risk of flood damage during storms and increased frequency of nuisance flooding (DNREC, 2012).

Sea level rise may accelerate the rate of salt water intrusion into ground water and affect water supplies.

Recommendations:

1. The City should consider additional land use controls for the areas subject to 1.5 meter of sea level rise.
2. To reduce the costs of providing infrastructure the City should consider not permitting roads, sewer or water to be extended into areas subject to 1.5 meter of sea level rise.
3. The City should consider avoiding new structures within a mapped Sea Level Rise Area. Where such development cannot be avoided, new structures should be built with an additional 18 inches of freeboard to protect the health, safety and general welfare of people occupying and using the structures.

Recommendations for Ordinances and Plan Implementation

Wetlands Delineations:

Recommendation: Require all applicants to submit to the Town a copy of the development site plan showing the extent of State-regulated wetlands (as depicted by the State Wetland Regulatory Maps), and a United States Army Corps of Engineers (USACE) approved wetlands delineation as conditional approval for any new commercial and/or residential development. Additionally, the site plan should depict all streams and ditches which are jurisdictional pursuant to the Subaqueous Act (7 Del. C., Chapter 72) as determined by DNREC.

Freshwater Wetlands Protections:

Recommendation: Implement regulations to protect freshwater wetlands where regulatory gaps exist (i.e., isolated wetlands and headwater wetlands).

100 Foot Upland Buffer:

Based on a review of existing buffer research by Castelle et al. (Castelle, A. J., A. W. Johnson and C. Conolly. 1994. *Wetland and Stream Buffer Requirements – A Review*. J. Environ. Qual. 23: 878-882.), an adequately-sized buffer that effectively protects water quality in wetlands and

streams, in most circumstances, is about 100 feet in width. In recognition of this research and the need to protect water quality, the Watershed Assessment Section recommends that the applicant maintain/establish a minimum 100-foot upland buffer (planted in native vegetation) from all water bodies (including ditches) and wetlands.

Recommendation: Require a 100-foot upland buffer width from all delineated wetlands (approved by the USACE and DNREC) or water bodies (including ditches).

Impervious Surface Mitigation Plan:

Recommendation: Require the calculation for surface imperviousness (for both commercial and residential development) take in to account all constructed forms of surface imperviousness - including all paved surfaces (roads, parking lots, and sidewalks), rooftops, and open-water storm water management structures.

Recommendation: To encourage compact development and redevelopment in the Town's central business area, require an impervious surface mitigation plan for all residential and commercial developments exceeding 20% imperviousness outside that area, or at least in excellent recharge areas outside that area. The impervious surface mitigation plan should demonstrate that the impervious cover in excess of 20% will not impact ground water recharge, surface water hydrology, and/or water quality of the site and/or adjacent properties. If impacts to groundwater recharge, surface water hydrology will occur, the plan should then demonstrate how these impacts will be mitigated. If the impacts cannot be mitigated, the site plan should then be modified to reduce the impacts from impervious cover.

Poorly Drained (Hydric) Soils:

Recommendation: Prohibit development in poorly or very poorly-drained (hydric) soil mapping units. Building in such areas predictably leads to flooding and drainage concerns from homeowners, as well as significant expense for them and, often, taxpayers. Proof or evidence of hydric soil mapping units should be provided through the submission of the most recent NRCS soil survey mapping of the parcel, or through the submission of a field soil survey of the parcel by a licensed soil scientist.

Green Technology Stormwater Management:

Recommendation: Require the applicant to use "green-technology" storm water management in lieu of "open-water" storm water management ponds whenever practicable.

Stormwater Utility:

Recommendation: Explore the feasibility of a stormwater utility to fund upgrades to existing stormwater infrastructure. Upgrades to the stormwater system may reduce pollutant loads and help reach the established total maximum daily load for nitrogen, phosphorus, and bacteria.

Reach out to the Sussex Conservation District, Sussex County, and the Delaware Clean Water Advisory Council as partners in funding stormwater retrofits.

Drainage Easements:

Recommendation: The Town should pursue drainage easements along waterways and storm drains where currently there is none.

Sussex County – Contact Janelle Cornwell 855-7878

The plan should note that Sussex County operates the waste water system that serves the Town of Henlopen Acres. Page 18 of the plan states the Town's waste water is connected to the Rehoboth Beach facility at Wolf's Neck. This is incorrect. Waste water from the Henlopen Acres Sanitary Sewer District (HASSD) is conveyed to the Rehoboth Beach Sewage Treatment Plant (RBSTP). The RBSTP treats and disposes wastewater into the Lewes-Rehoboth Canal. The facility is located at 20543 Roosevelt Street, on the bank of the Lewes-Rehoboth Canal. Wolf Neck plant references should be deleted and RBSTP data included.

The proposed comprehensive plan update is consistent wastewater plans developed by Sussex County to serve the HASSD. Based on a review of the comprehensive plan update, Sussex County feels it will be able to meet the needs of the town of Henlopen Acres.

State Historic Preservation Office – Contact Terrence Burns 736-7404

Please see the attached letter from the State Historic Preservation Office.

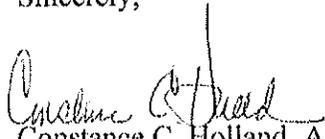
Approval Procedures:

- Once all edits, changes and corrections have been made to the Plan, please submit the completed document (text and maps) to our office for review. **Your PLUS response letter should accompany this submission.** Also include documentation about the public review process. In addition, please include documentation that the plan has been sent to other jurisdictions for review and comment, and include any comments received and your response to them.
- Our office will require a maximum of 20 working days to complete this review.
 - If our review determines that the revisions have adequately addressed all certification items (if applicable), we will forward you a letter to this effect.
 - If there are outstanding items we will document them in a letter, and ask the town to resubmit the plan once the items are addressed. Once all items are addressed, we will send you the letter as described above.

- Once you receive our letter stating that all certification items (if applicable) have been addressed, the Planning Commission and Council should adopt the plan pending State certification. We strongly recommend that your Council adopt the plan by ordinance. The ordinance should be written so that the plan will go into effect upon receipt of the certification letter from the Governor.
- Send our office a copy of the adopted plan along with the ordinance (or other documentation) that formally adopts your plan. We will forward these materials to the Governor for his consideration.
- At his discretion, the Governor will issue a certification letter to your City.
- Once you receive your certification letter, please forward two (2) bound paper copies and one electronic copy of your plan to our office for our records.

Thank you for the opportunity to review this Comprehensive Plan. If you have any questions, please contact me at 302-739-3090.

Sincerely,



Constance C. Holland, AICP
Director, Office of State Planning Coordination

Attachment

EXHIBIT C

Town of Henlopen Acres

104 Tidewaters
Henlopen Acres, Delaware 19971

302-227-6411
Fax: 302-227-3978

Mayor
David Lyons

Commissioners:
Andrew Brittingham
Timothy Hidell
Frank Jamison
Joni Reich
Beatrice Richards
John Staffier

Town Manager:
Thomas Roth

*Maintenance
Manager:*
Alexander McClure

*Security
Supervisor:*
Lee Stewart

Town Solicitor:
Glenn C. Mandalas,
Baird Mandalas
Brookstedt, LLC

Member:
Association of
Coastal Towns

*Sussex County
Association of
Towns*

*Delaware Rural
Water Association*

*Delaware League of
Local Governments*

July 17, 2015

Ms. Constance Holland, State Planning Director
Office of State Planning Coordination
122 William Penn Street, Suite 301
Dover, DE 19901

RE: Comprehensive Plan

Dear Ms. Holland:

Thank you for your March 24, 2015 written compilation of the comments received at our February 25, 2015 meeting with State agency planners regarding the ten year update of the Comprehensive Plan of the Town of Henlopen Acres, which was submitted to your office by the Town on January 12, 2015. The attached final version of the update was formally adopted by the Town's Planning Commission and Board of Commissioners at public meetings held on July 10, 2015. A copy of the ordinance adopting the plan, which was enacted unanimously by the Town's Board of Commissioners, is attached hereto for your use. This plan fully addresses and incorporates the Certification Comments in your letter regarding Public Participation, Intergovernmental Coordination and Wastewater Treatment. It also addresses most, if not all, of the Recommendations set forth in your letter.

In response to your Comments on the Rehoboth Art League¹, (RAL), we have clarified the legend of the Existing Land Use map (Map 6) to show that the RAL property is "Residential - Subject to Legal Non-Conforming Use." Map 6, therefore, is now fully consistent with the Henlopen Acres Zoning Code and Zoning map, and accurately reflects the current status of the RAL property.

¹ We must note at the outset that the Town was disappointed that the State Historic Preservation Office ("SHPO") chose to resubmit its March 2, 2012 comments on this subject without modification and that your office chose to accept those comments without raising any concerns. Former Henlopen Acres Mayor Davis provided comments and documentation to your office on March 22, 2012 showing that the SHPO's 2012 submission, and the self-serving history of the RAL prepared by former RAL board member Richard E. Poole that was attached thereto, were inaccurate and unsubstantiated in several important respects. Nevertheless, the SHPO has now simply re-adopted its entire 2012 submission, with no apparent effort to verify its accuracy. The Town submits that in these circumstances, both the SHPO comments and the attached Poole history should be stricken and disregarded.

In our January 12, 2015 cover letter transmitting the then current version of the ten year update to your office for PLUS review, we recounted in detail (both in the letter itself and in the timeline attached thereto) the considerable time and effort that the Town had devoted to resolving the RAL issue. We reported that in October, 2014 we had provided the RAL with a draft Memorandum of Understanding ("MOU") intended (1) to clarify the scope of the RAL's current legal non-conforming use status, (2) to provide the RAL with reasonable assurance that it would be able to re-build its structures in the event of a catastrophic loss, and (3) to implement and memorialize the RAL's repeated public statements that it has no desire or intent to expand its activities or its structures in Henlopen Acres. We reported further that as of January 12, 2015, the RAL had not yet provided any comments on the draft MOU.

The situation has not significantly changed since then. Encouraged perhaps by the unfortunate and, we believe, incorrect statement in your March 24 letter that your office "cannot move this plan forward for certification until an agreement is reached between the Town and the Rehoboth Art League" (see discussion below), the RAL has continued its refusal to provide comments on the MOU. Instead, it has simply stated that it has been advised by its attorney that the MOU would constitute illegal contract zoning and has reiterated its long standing demand for a new zone, without providing any specifics regarding permitted activities or structures. The "contract zoning" claim is at odds both with the Town's legal advice and with your March 24 letter, which specifically recognized the MOU as a legitimate basis for discussions between the Town and the RAL.

If the RAL was to provide the Town with good faith, written comments on the MOU, explaining what changes it believes would be necessary to accurately clarify its current status and implement and memorialize its "no expansion" position, the Town would certainly be willing to engage in further substantive discussions with the RAL. That process could include an attorneys' meeting such as you suggested in your March 24 letter. Until the RAL provides a meaningful response, however, such a meeting would be pointless.

Going forward, the door remains open for further discussions with the RAL and if an agreement is ultimately reached that requires changes to the Town's Comprehensive Plan, the Plan can and will be amended at that time. The Town, however, has no reason to believe that such an agreement will be reached anytime soon. As indicated above, the Town strongly disagrees with your view that in the absence of such an agreement, your office "cannot move this plan forward for certification". Holding the plan hostage in that way is inconsistent with Subsection 9103(f) of Title 29 of the Delaware Code which confirms that "The final decision on the adoption of the comprehensive plan [or update thereof] is that of the municipality..." and with Subsection 9206(a) of the Code which confirms that nothing in the State's planning process "shall be construed to deny local jurisdictions their final decision-making authority over proposed local land use planning action." It is also inconsistent with the procedures set forth in Subsection 9103(d) of the Code which provide that when your office objects to a plan and does not reach agreement within the filing county or municipality within 45 days thereafter, it must forward the matter to the Cabinet Committee on State Planning Issues for resolution.

The Town hopes that you will reconsider your prior position on the RAL issue and will certify the updated plan to the Governor for approval. If you do not, however, then, the Town requests that you follow the procedures set forth in Section 9103(d) of the Code and forward the Town's updated plan and your report thereon to the Cabinet Committee on State Planning Issues for dispute resolution and further processing.

Respectfully submitted,



David F. Lyons, Sr.
Mayor

enclosures

EXHIBIT D

Town of Henlopen Acres

104 Tidewaters
Henlopen Acres, Delaware 19971

302-227-6411
Fax: 302-227-3978

Mayor:
David Lyons

August 28, 2015

Commissioners:
Andrew Brittingham
Frank Jamison
Joni Reich
Beatrice Richards
John Staffier
Tim Hidell

Ms. Constance Holland, State Planning Director
Office of State Planning Coordination
122 William Penn Street, Suite 301
Dover, DE 19901

Town Manager:
Thomas Roth

Re: Comprehensive Plan

**Maintenance
Manager:**
Alex McClure

Dear Ms. Holland:

**Security
Supervisor:**
Lee Stewart

On August 26, 2015, a meeting was held at your offices to review the final version of the ten year update to the Comprehensive Plan of the Town of Henlopen Acres. The Plan was formally adopted by the Town's Board of Commissioners and its Planning Commission in public meetings held on July 10, 2015 and was forwarded to your office by the Town on July 17, 2015.

Town Solicitor:
Glenn C. Mandalas,
Baird, Mandalas,
Brockstedt LLC

In its July 17, 2015 transmittal letter, the Town specifically requested that if you do not certify the updated Plan to the Governor for approval because of your position on the Rehoboth Art League issue, you follow the procedures set forth in Subsection 9103(d) of Title 29 of the Delaware Code and forward the Plan and your report thereon to the Cabinet Committee on State Planning Issues for dispute resolution and further processing. The Town reiterated that request at the August 26 meeting. Your staff, however, requested that we further confirm that request in writing following the meeting, and by this letter, we hereby do so.

Member:
Association of
Coastal Towns

Delaware League of
Local Governments

Sussex County
Association of
Towns

Delaware Rural
Water Association

We wish to emphasize that we do not intend by this request to foreclose the possibility of further discussions between the Town and the RAL. On the contrary, as we stated both in our July 17 letter and at the August 26 meeting, as well as in our January 12, 2015 letter transmitting the initial version of the updated Plan to your office, the door remains open for such discussions, the first step towards which should be the provision by the RAL to the Town of good faith, written, substantive comments on the draft Memorandum of Understanding that the Town provided to the RAL in the Fall of 2014. There is no prospect, however, that an agreement with the RAL will materialize anytime soon, and, as we have made clear, both in our July 17 letter and at the August 26 meeting, the absence of such an agreement does not justify any further delay in processing the updated Plan. Since your office has indicated that it is unwilling to certify the update to the Governor for approval without such an agreement, the procedure set forth in Subsection 9103(d), *supra*, should be followed, and the Plan should be forwarded to the Cabinet Committee. If further discussions with the RAL occur, they can go forward independent of the Comprehensive Plan.

Town of Henlopen Acres

104 Tidewaters
Henlopen Acres, Delaware 19971

302-227-6411
Fax: 302-227-3978

Mayor:
David Lyons

Commissioners:
Andrew Brittingham
Frank Jamison
Joni Reich
Beatrix Richards
John Staffier
Tim Hidell

Town Manager:
Thomas Roth

**Maintenance
Manager:**
Alex McClure

**Security
Supervisor:**
Lee Stewart

Town Solicitor:
Glenn C. Mandalas,
Baird, Mandalas,
Brockstedt LLC

Member:
Association of
Coastal Towns

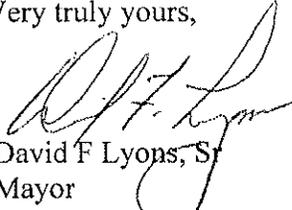
Delaware League of
Local Governments

Sussex County
Association of
Towns

Delaware Rural
Water Association

A final point that needs to be addressed on this subject concerns the role of Mr. Tim Slavin in any future discussions that may be held between the Town and the RAL. The Town questions whether the Conservation Easement recently executed between the Secretary of State's office and the RAL serves actually to provide the Secretary with an independent "seat at the table" in any such discussions. And insofar as Mr. Slavin himself is concerned, his longstanding, consistent public support of the RAL's position *vis a vis* the Town obviously disqualifies him as any sort of a neutral participant. That said, if the RAL wishes Mr. Slavin to participate, the Town will not object. From the Town's perspective, however, his role will be that of an advisor to the RAL, and his views will not have any special status and will not be entitled to any special weight, by virtue of the Easement or his office in the State government.

Very truly yours,


David F Lyons, Sr
Mayor

cc: Henlopen Acres Board of Commissioners
Timothy Slavin, Division of Historical and Cultural Affairs
Glen Mandalas, esq
Jeffrey Bullock, Delaware Secretary of State
Senator Ernesto Lopez
Representative Peter Schwartzkopf

EXHIBIT E



STATE OF DELAWARE
EXECUTIVE DEPARTMENT
OFFICE OF STATE PLANNING COORDINATION

September 22, 2015

Mr. Thomas Roth
Town of Henlopen Acres
104 Tidewaters
Henlopen Acres, DE 19971

RE: PLUS review 2015-08-02, Town of Henlopen Acres Comprehensive Plan

Dear Mr. Roth,

Thank you for meeting with State agency planners on August 26, 2015 to discuss the proposed Comprehensive Plan for the Town of Henlopen Acres. This meeting was to discuss changes to the comprehensive plan resulting from the February 25, 2015 meeting.

The Preliminary Land Use Service (PLUS) letter from the above referenced meeting noted three certification items. At the August 26, 2015 meeting, we discussed the certification items as follows:

- Public Participation Section (p. 1) – The town noted in the plan that 13 meetings were held between 2011 and 2014. Please expand the public participation section to include what was discussed at those meetings, what were the public comments at those meetings, and what the Town did to address the issues brought forth in the meetings. In addition, the plan should include specific information about the meetings regarding the Rehoboth Art League, where the town is in those discussions, and the path forward for resolving those issues.

The town has updated the comprehensive plan to discuss the meetings and the public participation in more depth. The changes to the draft plan reviewed at the August 26, 2015 PLUS meeting are sufficient to meet this requirement.

- Intergovernmental Coordination (p 26) – The plan states that the neighboring jurisdictions were notified regarding the update and that the City of Rehoboth made numerous comments regarding the plan. Please expand the Intergovernmental Coordination section to include what comments were made and if any revisions were made to the draft plan as a result of those comments.

The town has updated the comprehensive plan to discuss the meetings and the public participation in more depth. The changes to the draft plan reviewed at the August 26, 2015 PLUS meeting are sufficient to meet this requirement.

- As noted by Sussex County, on page 11 of this letter, the plan should note that Sussex County operates the waste water system that serves the Town of Henlopen Acres. Page 18 of the plan states the Town's waste water is connected to the Rehoboth Beach facility at Wolf's Neck. This is incorrect. Waste water from the Henlopen Acres Sanitary Sewer District (HASSD) is conveyed to the Rehoboth Beach Sewage Treatment Plan (RBSTP). The RBSTP treats and disposes wastewater into the Lewes-Rehoboth Canal. The facility is located at 20543 Roosevelt Street, on the bank of the Lewes-Rehoboth Canal. Wolf Neck plant references should be deleted and RBSTP data included.

Per Janelle Cornwell of Sussex County, the comprehensive plan has been updated to correct the information regarding the wastewater.

- Rehoboth Art League – The comprehensive plan Existing Land Use Map shows the Rehoboth Art League property as “Institutional”. However, the zoning map/code for the Town of Henlopen acres does not include an ”Institutional District”. The Town must work to rectify this nonconforming issue before the plan can be certified.

At the February 2015 PLUS meeting the possibility of a memorandum of understanding was discussed between the town and the Rehoboth Art League. At the meeting staff requested that the attorneys for both parties meet to discuss the memorandum and hopefully come to an agreement. It is my understanding that the town has not reached out to the Art League attorney for this meeting. Since the February 2015 meeting the Art League has donated an easement to the Delaware Division of Historical and Cultural Affairs. Please be aware that now the Division of Historical and Cultural Affairs will be partners in any MOU or changes to the property.

Considering all parties – the town, the Art League, and the State wish to have this property preserved and to be a landmark, it would not be appropriate to recommend certification to the Governor until this issue is resolved.

On August 26, 2015 at the PLUS meeting the Town of Henlopen Acres requested that the issue of certification of the comprehensive plan be forwarded to the Dispute Resolution Committee. The request was also documented in a letter to me dated August 26, 2015. According to 29, Del Code, § 9103(d), dispute resolution, the Office of State Planning Coordination is the governmental body that determines if an issue should be considered by the committee. At this time, I do not feel all avenues have been explored. There has been no meeting, as I suggested, of the attorneys and there is now another partner (Historic and Cultural Affairs) that to my knowledge has not had an opportunity to meet with the town and the Art League to work through

the issue of the proper designation on the maps and proper verbiage in the text of the comprehensive plan.

All other recommendations received by the town through the PLUS process (PLUS letter dated March 2015) are still valid and the State agencies once again ask that the town consider these comments before forwarding your plan to this office for certification. Please note that additional changes to the plan, other than those suggested in this letter, could result in additional comments from the State. Additionally, these comments reflect only issues that are the responsibility of the agencies represented at the meeting

Thank you for the opportunity to review this Comprehensive Plan. If you have any questions, please contact me at 302-739-3090.

Sincerely,

A handwritten signature in cursive script that reads "Constance C. Holland". The signature is written in dark ink and is positioned above the typed name.

Constance C. Holland, AICP
Director, Office of State Planning Coordination

EXHIBIT F

Town of Henlopen Acres

104 Tidewaters
Henlopen Acres, Delaware 19971

302-227-6411
Fax: 302-227-3978

Mayor

David Lyons

Commissioners:

Andrew Brittingham

Timothy Hidell

Frank Jamison

Joni Reich

Beatrix Richards

John Staffier

October 13, 2015

Ms. Constance Holland, State Planning Director
Office of State Planning Coordination
122 William Penn Street, Suite 301
Dover, DE 19901

Town Manager:

Thomas Roth

RE: Comprehensive Plan

Dear Ms. Holland:

Maintenance

Manager:

Alexander McClure

Your September 22, 2015 letter declining to forward the 2015 update of the Comprehensive Plan of the Town of Henlopen Acres to the Cabinet Committee on Land Use Planning Issues violates the express provisions of the Subsection 9103(d) of Title 29 of the Delaware Code. The Town respectfully urges that you reverse your position and promptly forward the update to the Cabinet Committee for dispute resolution and further review, as the law requires.

Security

Supervisor:

Lee Stewart

The specific issue that your letter cites to explain your position is your claim that (Letter at 2)

The comprehensive plan Existing Land Use Map shows the Rehoboth Art League property as "Institutional." However, the zoning map/code for the Town of Henlopen Acres does not include an "Institutional District." The Town must work to rectify this nonconforming issue before the plan can be certified.

Member:

Association of
Coastal Towns

Sussex County
Association of
Towns

Delaware Rural
Water Association

Delaware League of
Local Governments

Contrary to your claim, the alleged non-conformity does not exist. As explained in the Town's July 17, 2015 letter (copy attached) transmitting the final, formally adopted update to your office, the Town's Existing Land Use Map (Map 6) no longer shows the RAL property as "Institutional." Instead, the map has been clarified to show that property as "Residential-Subject to Legal Non-Conforming Use." Map 6, therefore, is now fully consistent with the Town's zoning map and zoning code, and accurately reflects the current status of the RAL property.

The Town's July 17, 2015 letter to you also addressed your proposal, raised at the February 25, 2015 PLUS meeting at your offices and reiterated in your September 22 letter, that attorneys for the Town and RAL meet to discuss the draft Memorandum of Understanding ("MOU") that the town had provided to RAL in October, 2014. Specifically, the Town explained that until the RAL provides substantive comments on the draft MOU, the proposed attorneys' meeting would be premature and pointless.

The Town stated further in its letter that if the RAL does provide good faith, substantive comments – something that it still has not done – the Town would certainly be willing to engage in further discussions with the RAL, a process which could include an attorneys’ meeting.

Your September 22 letter ignores the Town’s position on the suggested attorneys’ meeting and, instead, chastises the Town for not having “reached out to the Art League attorney for this meeting.” (Letter at 2). The letter, however, fails even to mention, much less criticize, the RAL’s failure to provide a substantive response to the draft MOU.

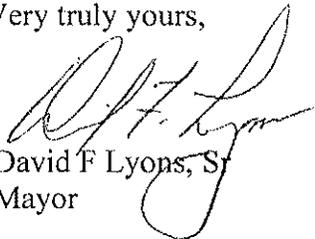
The claimed legal basis for your refusal to forward the Plan update to the Cabinet Committee is your assertion that under Subsection 9103(d) of Title 29 of the Delaware Code, “the Office of State Planning Coordination is the governmental body that determines if an issue should be considered by the committee.” (September 22 Letter at 2). Neither that subsection, however, nor any other provision of the Code provides any such right, responsibility or discretion to your office or, indeed, to any other governmental body. Instead, that subsection clearly and unambiguously provides that when your office makes an objection to a filed plan, and when your office and the filing county or municipality have failed to reach an agreement regarding the objection after 45 days, “the Office of State Planning **shall** report the extent of the agreement and areas of continued disagreement to the Cabinet Committee on State Planning Issues for dispute resolution.” (emphasis added). Referral of the matter to the Committee is not discretionary and is not dependent upon you or your office determining that “an issue should be considered by the committee.” Rather, if an unresolved objection causes your office to decline to certify a plan to the Governor for approval, referral of the matter to the Cabinet Committee after a period of 45 days is mandatory. Were that not so, your office could hold a submitted plan in suspension indefinitely, in contravention of Subsection 9103(f) of Title 29 of the Code, which confirms that “The final decision on the adoption of the comprehensive plan is that of the municipality or county”.

In this case, the dispute between your office and the Town regarding the RAL property has been ongoing for several years. The specific 10 year update to the Town’s Comprehensive Plan now at issue was first submitted to you for PLUS review on January 12, 2015. You objected to the treatment of the RAL property at the meeting regarding the update held at your offices on February 25, 2015, and reiterated your objections in your March 24, 2015 written comments. The Town thereafter fully addressed your comments on other issues and modified Map 6 of the update as described above to eliminate any perceived inconsistency regarding the RAL property. The update as so modified was formally and unanimously adopted by the Town’s Planning Commission and its Board of Commissioners on July 10, 2015 and was formally submitted to your office on July 17, 2015. The Town’s July 17 transmittal letter specifically requested that if you declined to certify the update to the Governor for approval due to your objections regarding the RAL property, you forward the update to the Cabinet Committee for further processing, as required by Subsection 9103(d) of Title 29 of the Code. Your representatives reiterated your long held objections on the RAL issue at a meeting held at your offices on August 26, 2015 which you did not personally attend, and the Town once again requested referral of the matter to the Cabinet Committee. At the request of your representatives, the Town

reiterated that request in yet another letter dated August 28, 2015. By your letter of September 22, 2015, you have confirmed that the Town's updated Plan is satisfactory in all respects, except for failing to resolve the RAL issue to your satisfaction, and you, therefore, refused to certify the update to the Governor for approval.

Since (1) you and your office have objected to the treatment of the RAL property in the Town's 10 year update to its Comprehensive Plan, and since (2) your office and the Town have failed to reach an agreement on that matter after a period of 45 days, indeed much longer than 45 days, and since (3) you have declined to certify the update to the Governor for approval because of this unresolved objection, it follows necessarily under Subsection 9103(d) of Title 29 of the Code that your office must now refer the update to the Cabinet Committee on State Planning Issues for dispute resolution. Your refusal to do so in your September 22 letter exceeds your authority and violates the express provisions of Subsection 9103(d). If you fail to rectify that violation and do not refer the update to the Cabinet Committee within fifteen (15) days of your receipt of this letter, the Town will be forced to seek a court order requiring you to do so.

Very truly yours,



David F Lyons, Sr
Mayor

cc: Town Solicitor
Meredith Stewart Tweedie, Chief Legal Counsel
Director of the Office of Management and Budget
Secretary of Transportation
Secretary of Finance
Secretary of Agriculture
Secretary of Education
Secretary of Natural Resources and Environmental Control
Secretary of Safety and Homeland Security
Secretary of Health and Social Services
Director of Delaware Economic Development Office
Director of State Housing Authority
Senator Ernesto B. Lopez
Representative Peter C. Schwartzkopf

Memo Attachment C

Written position Statement
Office of State Planning Coordination
11/17/2015



**STATE OF DELAWARE
EXECUTIVE DEPARTMENT
OFFICE OF STATE PLANNING COORDINATION**

MEMORANDUM

TO: Cabinet Committee on State Planning Issues

FROM: Connie Holland

RE: Henlopen Acres comprehensive plan staff report

DATE: November 17, 2015

The following chronology details the language in the former and current draft plans. Please be aware that the town has not followed through with the implementation of these plan elements:

July 9, 2004 - Plan certified by Governor

Page 4 (Municipal Development Strategy) of the 2004 certified plan refers to the Rehoboth Art League by stating:

The plan recommends that this property only be used as art gallery, art school, or other community purpose, as specified by the deeds of 1930 and 1982. If the Rehoboth Art League, Inc., ceases to exist and no successor organization is formed to continue the art gallery, art school, or community purpose, the property reverts to residential land use only. The Town further recommends that the Peter Marsh House, accessory structures, landscape, and gardens not be modified significantly as to diminish the historic characteristics of the property or as a departure from the residential character of Henlopen Acres

On page 12 of the plan (Future Land Use) it states:

The plan recommends a review of the Zoning Code to separate the legislative planning and zoning administration function from a quasi-judicial variance process. The plan also recommend revising the special-exception process, replacing it with a conditional-use process to provide the review of land uses and structures not provide by right in the zoning code by the Environmental Approval Committee and Town Commissioners.

It also states:

The plan recommends that the Special Exception process for allowing land use activities in addition to those land uses by right be replaced by a Conditional Use process. The Conditional Use permit would be required for land use activities not allowed by right. The current Zoning Code provides for these land uses by special exception: art galleries, art studios and art classrooms, theater and theater classrooms in the Residential District. The recommended Conditional Use process would require review of these land uses in addition to the by-right Residential use by the Environmental Approval Committee and with approval by the Town Commissioners. The Conditional Use process would allow the Town Commissioners to (1) set conditions on how the property will be used, limits on changes to the property and structure and (2) require review if the property owner changes or the organization engaged in the use changes. The plan recommends that the Board of Adjustment review only errors in administration of the Zoning

2004 Zoning map shows the Art League Property as (R) Residential and the Current Land Use as (I) Institutional. The Future Land Use map shows the property as (R) Residential.

February 2012 - Reviewed draft update through PLUS

One of the certification items listed at that time:

The comprehensive plan review as presented does not include a completed set of land use maps in accordance with Del Code. The Town should work with either the previous contractor or a contractor of their choosing to develop the necessary maps to meet minimum certification.

In addition, the State Historic Preservation had the following comments regarding the plan being reviewed (only included portion related to zoning change)

- Further, and perhaps more importantly, the Plan as submitted does not acknowledge the cultural activities of the Rehoboth Art League through a zoning designation, but rather suggests that the use of the Rehoboth Art League site remain a conditional use granted by the municipal government. This provision could have a chilling effect on preservation efforts related to the Rehoboth Art League campus, as any proposed renovations would have to meet the standards for conditional use.
- Historic and Cultural Affairs recommends that Town explore designating a separate zoning category for the Rehoboth Art League, one which acknowledges the decades-long role the Rehoboth Art League campus has played in supporting cultural activities. These activities are a benefit to the local community, the county, and the state as a whole.
- In 2010, HCA signed an affiliation agreement with the Rehoboth Art League. This agreement has resulted in the State of Delaware being formally affiliated with the Rehoboth Art League, and allows for the reciprocal use of buildings, land, collections, and staff between HCA and the Rehoboth Art League. HCA took this important step in

order to further strengthen the preservation efforts related to the Rehoboth Art League campus.

- HCA realizes the preservation challenges facing the Rehoboth Art League and has been in discussions with RAL about the use of other preservation mechanisms—covenants, easements, and trusts—which may help to preserve this important Delaware cultural property. Nevertheless, HCA urges the Town to revise the draft comprehensive plan to address the above-cited aspects which may in fact be detrimental to the Town’s stated interest in preserving its historic character.

August 2012 – Reviewed draft update through PLUS

The PLUS response letter stated, as a certification item, “The Town needs to resolve the issue of the Rehoboth Art League, a nonconforming use within the Town.”

June 27, 2014

Connie Holland attended a meeting and discussed how the town could resolve the Rehoboth Art League issue.

February 2015 – Reviewed draft update through PLUS

The PLUS letter stated, as a certification item:

Rehoboth Art League – The comprehensive plan Existing Land Use Map shows the Rehoboth Art League property as “Institutional”. However, the zoning map/code for the Town of Henlopen acres does not include an “Institutional District”. The Town must work to rectify this nonconforming issue before the plan can be certified.

According to the 130-17, permitted uses of the residential district in your zoning code art galleries, art studios, and art classrooms, theater and theater classrooms, are permitted when authorized as a special exception, except where one of the principal activities is one which is customarily carried on for profit as a business.

Your 2004 comprehensive plan recommended (section 2.3b) “recommends that the Special Exception process for allowing land use activities in addition to those land uses by right be replaced by a conditional use process.....” In addition, section 2.3b states “that this would allow the Town Commissioners to (1) set conditions on how the property will be used, limits on changes to the property and structure and (2) require review if the property owner changes or the organization engaged in the use changes.”

To date, the town has not completed this recommendation, leaving the Rehoboth Art League as a special use exception in your residential section.

It is our understanding that The Rehoboth Art League has sought, through the town, a change of zone or a conditional use for their property, because, as it stands, they have been unable to work with the town for decision regarding needed repairs to the structure.

The State is aware that the Rehoboth Art League and the Town of Henlopen Acres have been in communication regarding his issue but there has been no resolution reached. The Office of State Planning cannot move this plan forward for certification until an agreement is reached between the Town and the Rehoboth Art League.

During the PLUS meeting, I suggested that the attorney for the Town of Henlopen Acres and the attorney for the Rehoboth Art League set a meeting to discuss a Memorandum of Understanding that has been drafted and/or to resolve this issue.

August 2015 – Reviewed draft through PLUS

The PLUS letter stated, as a certification item:

At the February 2015 PLUS meeting the possibility of a memorandum of understanding was discussed between the town and the Rehoboth Art League. At the meeting staff requested that the attorneys for both parties meet to discuss the memorandum and hopefully come to an agreement. It is my understanding that the town has not reached out to the Art League attorney for this meeting. Since the February 2015 meeting the Art League has donated an easement to the Delaware Division of Historical and Cultural Affairs. Please be aware that now the Division of Historical and Cultural Affairs will be partners in any MOU or changes to the property. Considering all parties – the town, the Art League, and the State wish to have this property preserved and to be a landmark, it would not be appropriate to recommend certification to the Governor until this issue is resolved.

Conclusion

Since the certification of the Town plan in 2004, which stated a proposed resolution to this issue, the town and the Rehoboth Art League have been unable to resolve the issue of the discrepancy between the maps and the text. There has been no clear path to a resolution identified by the town should this plan update be certified.

To further complicate this issue the State Historic Preservation Office now has an easement on this property and a vested interest ensuring the preservation of the structures and their use. It is my understanding the town has not reached out to the Art League nor the SHPO to amend the current draft plan to include this new information and develop a mutually acceptable path forward.

Holding a plan for certification issue is not unique to Henlopen Acres. It is often done when there is a discrepancy between Delaware Code requirements and the plan being reviewed. In this case there is clearly a discrepancy between the plan text and the Future Land Use map. For

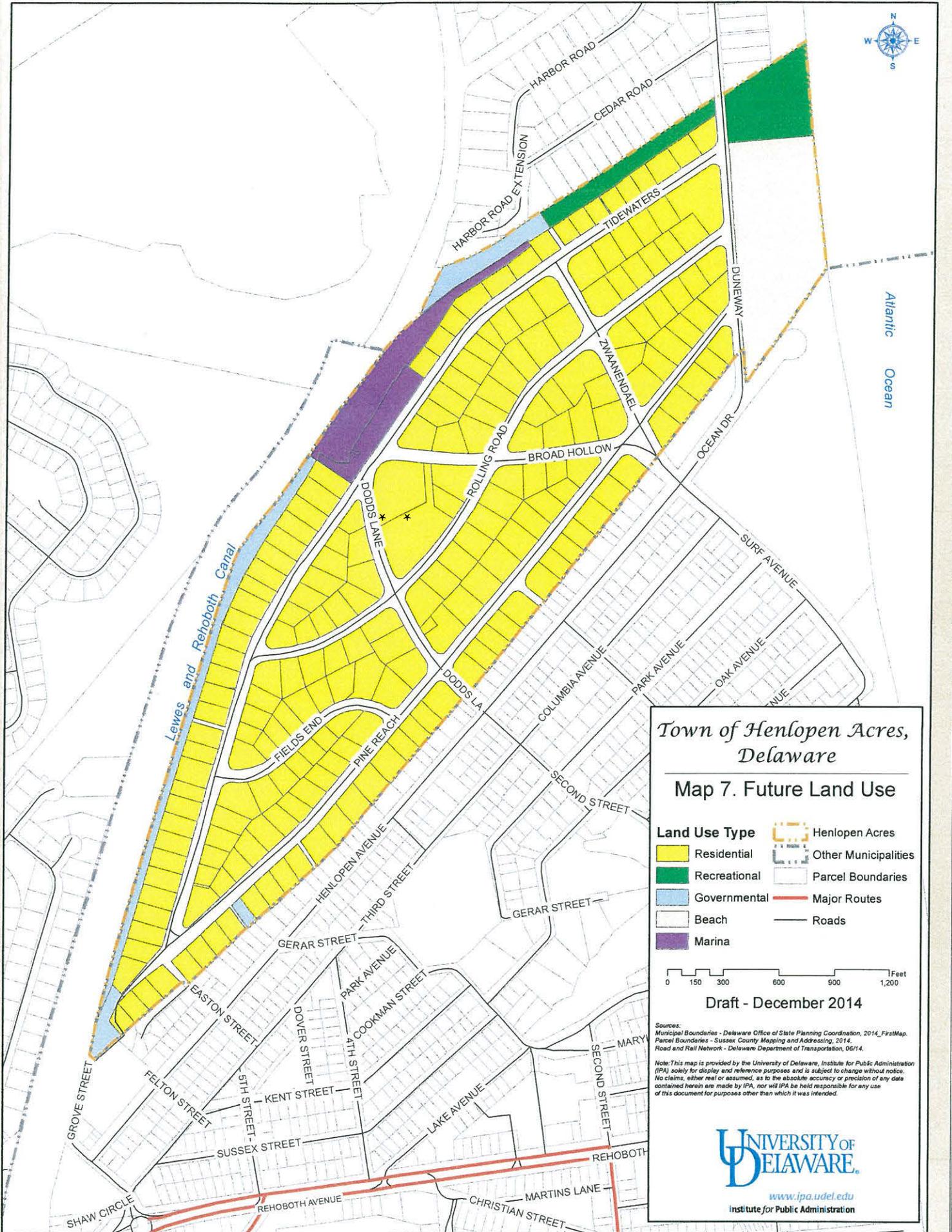
municipal plans both the plan text and the maps have the force of law; therefore, the discrepancy must be addressed prior to certification.

Recommendation:

The Rehoboth Art League is a significant historic structure and institution within the Town of Henlopen Acres that the State has a vested interest in protecting. The Town proposed legal protection for the Rehoboth Art League as a part of their 2004 comprehensive plan which was certified by the Governor; however, to date, no legal protections have been implemented by the town.

As such, the town is not in compliance with their currently certified plan. The review of their current draft plan update does not provide any additional confidence that the town will enact legal protections. Therefore, the Office of State Planning Coordination is recommending that the plan not be certified by the Governor until the issue of the nonconforming use is resolved by the text and the map being brought in to compliance with one another and with the Delaware Code. This ensures predictability for all parties involved.

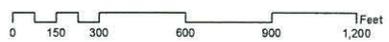
Attachment: Future Land use map showing example of code requirement discrepancy
PLUS letter from most recent review



Town of Henlopen Acres, Delaware

Map 7. Future Land Use

- Land Use Type**
- Residential
 - Recreational
 - Governmental
 - Beach
 - Marina
 - Henlopen Acres
 - Other Municipalities
 - Parcel Boundaries
 - Major Routes
 - Roads



Draft - December 2014

Sources:
 Municipal Boundaries - Delaware Office of State Planning Coordination, 2014, FirstMap.
 Parcel Boundaries - Sussex County Mapping and Addressing, 2014.
 Road and Rail Network - Delaware Department of Transportation, 06/14.

Note: This map is provided by the University of Delaware, Institute for Public Administration (IPA) solely for display and reference purposes and is subject to change without notice. No claims, either real or assumed, as to the absolute accuracy or precision of any data contained herein are made by IPA, nor will IPA be held responsible for any use of this document for purposes other than which it was intended.



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**STATE OF DELAWARE
EXECUTIVE DEPARTMENT
OFFICE OF STATE PLANNING COORDINATION**

September 22, 2015

Mr. Thomas Roth
Town of Henlopen Acres
104 Tidewaters
Henlopen Acres, DE 19971

RE: PLUS review 2015-08-02, Town of Henlopen Acres Comprehensive Plan

Dear Mr. Roth,

Thank you for meeting with State agency planners on August 26, 2015 to discuss the proposed Comprehensive Plan for the Town of Henlopen Acres. This meeting was to discuss changes to the comprehensive plan resulting from the February 25, 2015 meeting.

The Preliminary Land Use Service (PLUS) letter from the above referenced meeting noted three certification items. At the August 26, 2015 meeting, we discussed the certification items as follow

- Public Participation Section (p. 1) – The town noted in the plan that 13 meetings were held between 2011 and 2014. Please expand the public participation section to include what was discussed at those meetings, what were the public comments at those meetings, and what the Town did to address the issues brought forth in the meetings. In addition, the plan should include specific information about the meetings regarding the Rehoboth Art League, where the town is in those discussions, and the path forward for resolving those issues.

The town has updated the comprehensive plan to discuss the meetings and the public participation in more depth. The changes to the draft plan reviewed at the August 26, 2015 PLUS meeting are sufficient to meet this requirement.

- Intergovernmental Coordination (p 26) – The plan states that the neighboring jurisdictions were notified regarding the update and that the City of Rehoboth made numerous comments regarding the plan. Please expand the Intergovernmental Coordination section to include what comments were made and if any revisions were made to the draft plan as a result of those comments.

The town has updated the comprehensive plan to discuss the meetings and the public participation in more depth. The changes to the draft plan reviewed at the August 26, 2015 PLUS meeting are sufficient to meet this requirement.

- As noted by Sussex County, on page 11 of this letter, the plan should note that Sussex County operates the waste water system that serves the Town of Henlopen Acres. Page 18 of the plan states the Town's waste water is connected to the Rehoboth Beach facility at Wolf's Neck. This is incorrect. Waste water from the Henlopen Acres Sanitary Sewer District (HASSD) is conveyed to the Rehoboth Beach Sewage Treatment Plan (RBSTP). The RBSTP treats and disposes wastewater into the Lewes-Rehoboth Canal. The facility is located at 20543 Roosevelt Street, on the bank of the Lewes-Rehoboth Canal. Wolf Neck plant references should be deleted and RBSTP data included.

Per Janelle Cornwell of Sussex County, the comprehensive plan has been updated to correct the information regarding the wastewater.

- Rehoboth Art League – The comprehensive plan Existing Land Use Map shows the Rehoboth Art League property as “Institutional”. However, the zoning map/code for the Town of Henlopen acres does not include an “Institutional District”. The Town must work to rectify this nonconforming issue before the plan can be certified.

At the February 2015 PLUS meeting the possibility of a memorandum of understanding was discussed between the town and the Rehoboth Art League. At the meeting staff requested that the attorneys for both parties meet to discuss the memorandum and hopefully come to an agreement. It is my understanding that the town has not reached out to the Art League attorney for this meeting. Since the February 2015 meeting the Art League has donated an easement to the Delaware Division of Historical and Cultural Affairs. Please be aware that now the Division of Historical and Cultural Affairs will be partners in any MOU or changes to the property.

Considering all parties – the town, the Art League, and the State wish to have this property preserved and to be a landmark, it would not be appropriate to recommend certification to the Governor until this issue is resolved.

On August 26, 2015 at the PLUS meeting the Town of Henlopen Acres requested that the issue of certification of the comprehensive plan be forwarded to the Dispute Resolution Committee. The request was also documented in a letter to me dated August 26, 2015. According to 29, Del Code, § 9103(d), dispute resolution, the Office of State Planning Coordination is the governmental body that determines if an issue should be considered by the committee. At this time, I do not feel all avenues have been explored. There has been no meeting, as I suggested, of the attorneys and there is now another partner (Historic and Cultural Affairs) that to my knowledge has not had an opportunity to meet with the town and the Art League to work through

the issue of the proper designation on the maps and proper verbiage in the text of the comprehensive plan.

All other recommendations received by the town through the PLUS process (PLUS letter dated March 2015) are still valid and the State agencies once again ask that the town consider these comments before forwarding your plan to this office for certification. Please note that additional changes to the plan, other than those suggested in this letter, could result in additional comments from the State. Additionally, these comments reflect only issues that are the responsibility of the agencies represented at the meeting

Thank you for the opportunity to review this Comprehensive Plan. If you have any questions, please contact me at 302-739-3090.

Sincerely,

A handwritten signature in cursive script that reads "Constance C. Holland". The signature is written in black ink and is positioned above the typed name and title.

Constance C. Holland, AICP
Director, Office of State Planning Coordination

Cabinet Committee on State Planning Issues

Dispute Resolution – OSPC v. Town of Henlopen Acres

Office of State Planning Coordination Report

November 19, 2015



Comprehensive Plans in Delaware

- Required by Title 22, Section 702 of Delaware Code:

(b) Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, and the general uses of land within the community, and critical community development and infrastructure issues. The comprehensive planning process shall demonstrate coordination with other municipalities, the county and the State during plan preparation. The comprehensive plan for municipalities of greater than 2,000 population shall also contain, as appropriate to the size and character of the jurisdiction, a description of the physical, demographic and economic conditions of the jurisdiction; as well as policies, statements, goals and planning components for public and private uses of land, transportation, economic development, affordable housing, community facilities, open spaces and recreation, protection of sensitive areas, community design, adequate water and wastewater systems, protection of historic and cultural resources, annexation and such other elements which in accordance with present and future needs, in the judgment of the municipality, best promotes the health, safety, prosperity and general public welfare of the jurisdiction's residents.

Note: Highlighted text indicates requirements for small towns, under 2000 population



Importance of the Comprehensive Plan

- In municipal plans, both the text and maps have the “Force of Law”
- Plan identifies vision of the community
- Plan identifies policies for growth and development
- Plan identifies future land use for all parcels
- Land use regulations (aka zoning) must be consistent with the plan
- Annexations must be consistent with the plan



How to Prepare a Comprehensive Plan

- Professional Planners usually prepare municipal plans;
- May be on staff (larger towns) or consultants
- OSPC provides guidance to planners and local officials in the form of a checklist
 - Original checklist developed in 2002, revised in 2003 and in effect until May 2015
 - Update to checklist published May 2015, in effect currently
- Checklist provides guidance, but also lets plan preparers know how their plan will be evaluated



Comprehensive Plan Checklists

- 2003 Checklist (in effect when Henlopen Acres Plan was written)

Land Use Plan

Summary: The land use plan evaluates existing land use within a municipality, then recommends proposed land use categories for all parcels in the community. The land use plan should be expressed as both text and a map or map series. The Land Use Plan represents a composite of recommendations for the community, and should be derived after an analysis of all relevant data found elsewhere in the plan.

Land Use Plan. The Land Use Plan must include *policies, statements, goals, planning components and a map* which serve to define the proposed land uses for all areas within the municipality's jurisdiction. Particular attention should be given to the recommended land uses for lands which are vacant and likely to be developed. The Land Use Plan must show the desired future land uses for each parcel in the municipality. This data will form the basis for the required update of the zoning ordinance within 18 months of plan adoption.



How Comprehensive Plans are Reviewed

- OSPC employs Principal Planners (aka “Circuit Rider Planners”).
- All are professional planners, two are AICP certified.
- Principal Planners review plans for compliance with code requirements based on professional standards for comprehensive plans, as summarized in the checklists.
- Plan elements specific to other agencies (i.e. transportation, housing, environmental, etc.) are reviewed by professionals in each agency via the PLUS process
- “Certification Items” are identified through this review as code requirements that must be addressed prior to certification by the Governor.



How to address “Certification Issues”

- Typically, Principal Planner works with the municipality, their planner or consultant, and the agency (if necessary) to resolve the issue.



How to address “Certification Issues”

- **Example: City of Harrington 2013 Comprehensive Plan (PLUS 2013-04-04)**
 - Certification Issue: “Exhibit 17 – it is difficult to tell the difference between the colors for low density residential and medium density residential. Please select colors that clearly show the distinction between the two land uses.”
 - Potential Problems: zoning disputes; unable to process annexations; zoning held invalid; potential legal action should residents oppose zoning; lack of predictability for land owners and developers.
- Resolution: Principal Planner worked with consultant to ensure mapping was clarified, high quality print outs provided to City and OSPC. Plan was certified.



How to address “Certification Issues”

- **Example: 2009 Ellendale Plan Update (PLUS 2009-05-03)**
- **Certification Issues:**
 - Plan Update contains text and maps that supersede and / or conflict with other text in plan.
 - Plan Update does not identify future land use for annexation areas on maps
 - Plan Update does not include text describing future land use categories
 - Plan Update includes two conflicting versions of the Future Land Use Map
 - Potential Problems: zoning disputes; unable to process annexations; zoning held invalid; potential legal action should residents oppose zoning; lack of predictability for land owners and developers
- **Resolution:** Principal Planner worked with Town and consultant to clarify intended maps and text; revised plan was submitted and certified



What can happen if comprehensive plan is not consistent with desired Future Land Use

- Potential for legal action
- Example: O’Neill v. Town of Middletown, 1069-N (Del. Ch. 1-18-2006)
- Facts:
 - Middletown’s comprehensive plan showed subject property for future manufacturing use (chip plant)
 - Economic conditions changed. Commercial development was desired. Plan was not changed
 - Middletown rezoned property to commercial. An aggrieved citizen sued
- Result: rezoning held invalid; Town had to update plan
- Lesson: the **text** and **maps** in the comp plan have the **Force of Law**; must be consistent and represent the vision of community

