

## 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.<sup>1</sup>

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:

---

<sup>1</sup> 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.<sup>2</sup>

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

---

<sup>2</sup> 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.").