

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, JANUARY 11, 2022

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, January 11, 2022, at 9:00 a.m., in Council Chambers, with the following present:

Michael H. Vincent	President
Cynthia C. Green	Councilwoman
Douglas B. Hudson	Councilman
John L. Rieley	Councilman
Mark G. Schaeffer	Councilman
Todd F. Lawson	County Administrator
Gina A. Jennings	Finance Director
J. Everett Moore, Jr.	County Attorney
Vincent Robertson	Assistant County Attorney

The Invocation and Pledge of Allegiance were led by Mr. Vincent.

**Call to
Order**

Mr. Vincent called the meeting to order.

**M 001 22
Approve
Agenda**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley, to approve the Agenda, as presented.

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**Election of
Officers**

Mr. Lawson noted the requirement that the County Council must elect officers for 2022.

**M 002 22
Appoint
President**

A Motion was made by Mr. Rieley, seconded by Mr. Hudson, that Mr. Vincent serve as President of the Sussex County Council in 2022.

Motion Adopted: 4 Yeas, 1 Nay

**Vote by Roll Call: Mr. Rieley, Yea; Mr. Hudson, Yea;
Mr. Schaeffer, Yea; Mrs. Green, Nay;
Mr. Vincent, Yea**

**M 003 22
Appoint
Vice
President**

A Motion was made by Mr. Rieley, seconded by Mr. Vincent, that Mr. Hudson serve as Vice President of the Sussex County Council in 2022.

Motion Adopted: 5 Yeas.

**Approve
2022** **Sussex County Council approves the 2022 Rules of Procedure, as presented.**

**Rules of
Procedure** **Motion Adopted: 5 Yeas.**

(continued) **Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

M 007 22 **At 9:08 a.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson,**
Go Into **to recess the Regular Session and go into Executive Session for the purpose**
Executive **of discussing matters relating to pending/potential litigation and land**
Session **acquisition.**

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

Executive **At 9:12 a.m., an Executive session of the Sussex County Council was held in**
Session **the Basement Caucus Room to discuss matter relating to pending litigation**
and land acquisition. The Executive Session concluded at 10:00 a.m.

M 008 22 **At 10:05 a.m., a Motion was made by Mr. Hudson, seconded by Mr. Rieley,**
Reconvene **to come out of Executive Session and reconvene the Regular Session.**
Regular
Session

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

M 009 22 **A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer to grant the**
Land **County Administrator the ability to negotiate and enter into a contract and**
Acquisition **proceed to closing on parcel identified as 2021W.**
Approval

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

Lockhaven **Mr. Moore shared that Mr. Shaeffer was not involved in the conversations**
Appeal **during the Executive Session or when any discussions took place**
Possible **considering this appeal.**
Action

Mr. Lawson commented that an appeal hearing was held on December 14,
2021, relating to this matter. At the conclusion of that hearing, Council
decided to not take action.

**M 010 22
Lockhaven
Appeal**

A motion was made by Mr. Vincent, seconded by Mr. Hudson relating to the appeal of the Planning and Zoning Commission's (the "Commission") denial of a subdivision application (the "Application") for Lockhaven Subdivision No. 2020-8 (the "Subdivision") filed by Lockwood Farms, LLC (the "Appellant"). I move that the Council affirm the Commission's denial of the Application for the following reasons:

The standard of review for appeals from Commission decisions does not permit Council to substitute its own opinion for that of the Commission, nor does it permit a rehearing of what was before the Commission. It was a hearing of record and the Council's review is limited to that record.¹

In reviewing the Commission's decision on appeal, Sussex County Code, § 99-39(2) states that:

"[t]he Council shall review the record of the hearing before the Commission and shall make a determination as to whether the Commission's decision was the result of an orderly and logical review of the evidence and involved the proper interpretation and application of the chapter...."

The Delaware Supreme Court held that the Commission's consideration of subdivision plan application acts in a manner that is "partly in a ministerial and partly in a judicial capacity"[and, therefore, on appeal the appealing body must] determine whether the decision is supported by substantial evidence and is free from legal error. Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, 962 A.2d 235, 239 (Del. 2008). The Council's review is "limit[ed] to correcting errors of law and determining whether substantial evidence exists to support the [Commission's] findings of fact" and that "[w]hen substantial evidence exists, [the Council] will not reweigh it or substitute [its] own judgment for that of the [Commission]."
See Rehoboth Art League, Inc. v. Board of Adjustment of the Town of Henlopen Acres, 991 A.2d 1163, 1166 (Del. 2010).

Therefore, if there is substantial evidence that demonstrates the Commission's decision was based on an orderly and logical review of the evidence and the law was accurately applied, the Council must uphold the Commission's approval.

In its December 13, 2021, appeal letter ("Appeal Letter"), Appellant states, and relies upon the principal, that, "[t]he Delaware Supreme Court has held that people who own land zoned for a specific use are entitled to rely on the fact that they can implement that use, provided the project complies with the subdivision ordinances subject to reasonable conditions

**M 010 22
Lockhaven
Appeal
(continued)**

imposed by the Planning Commission to minimize impact.” Appeal Letter, p. 1. However, the Appellant did not effectively address the mandatory considerations for all subdivision applications that are set forth in Sussex County Code, § 99-9C.

Sussex County Code § 99-9C sets forth seventeen (17) mandatory factors the Commission must consider in its decision whether to approve or deny a subdivision plan.² Of these factors, the record demonstrates that Appellant’s Application and presentation did not provide adequate or current information pertaining to eight (8) separate categories. Each of these deficiencies were outlined in the Commission’s reasons 2 through 9 for denying the Application. See *Commission Minutes*, October 13, 2021, pp. 2-4.

Though the attorney for the Appellee, mostly focused on one of the deficiencies during his argument, a review of the records shows many concerns.

More specifically, as addressed by the Commission in detail, Appellant did not adequately satisfy the following considerations:

- 3. This application does not adequately satisfy Section 99-9C(1) which requires the consideration of “an integration of the proposed subdivision into the existing terrain and surrounding landscape.” The subdivision has extensive wetlands and woodlands, all of which are located within individual lots. Even the buffers are located within the individual lots. There is no protection against future tree clearing or disturbance of the wetlands or the buffer areas by future lot owners.**
- 4. This application does not adequately satisfy Section 99-9C(2) which requires the “minimal use of wetlands and floodplains”. In this case, the wetlands are located solely within the lot lines. In fact, 13 of the 25 lots contain wetlands. This is not the “minimal use of wetlands”. Although there is a 50-foot wetlands buffer proposed, it is also located within each lot, which offers no guarantee that the buffer or the wetlands will be used or disturbed in the future once homes are built on the various lots.**
- 5. This application does not adequately satisfy Section 99-9C(3) which requires the consideration of the “preservation of natural and historical features.” While there are no known historic features on the site, 13 of the lots contain wetlands. The design of the subdivision is counter to the preservation of the natural areas since the lots are oriented to the perimeter of the**

**M 010 22
Lockhaven
Appeal
(continued)**

site where the wetlands and waterways are located, and not towards the interior of the site that was previously farmed and no natural features exist.

6. This application does not adequately satisfy Section 99-9C(4) which requires a consideration of the “preservation of open space and scenic views.” The design of the subdivision includes 14.75 acres of open space that is mainly oriented to the center of the site. The design does not preserve scenic views, particularly where the primary scenic view is the man-made lagoon and its view of the Broadkill River beyond it, all of which is located within a single lot (Lot 15) that is not accessible to the other lots within the development.
7. This application does not adequately satisfy Section 99-9C(5) which requires a consideration of the “minimization of tree, vegetation and soil removal and grade changes.” As already stated, all 38 acres of the existing forest is located within the individual lots. Although the applicant has stated that the forested areas will be preserved, the site plan that was submitted states that the “treeline is shown for estimated lot clearing. Actual lot clearing varies.” I am not satisfied that tree clearing will be minimized on these lots once homes are designed and built with rear yards, wells, and septic systems.
8. I am not satisfied that the Applicant has adequately addressed the provision for sewage disposal as required by Section 99-9C(8). The Applicant is proposing 25 individual septic systems and I am not satisfied that the soils are adequate based upon the information contained in the record, which includes a fifteen-year-old soil study from 2006 that reviewed a completely different site plan with two cul de sacs and a different lot layout. In December of 2015, which is now almost six years ago, DNREC indicated that 4 of the lots in that old subdivision design were marginal for On-Site Wastewater Treatment and Disposal Systems and that one of the former lots was not feasible for an on-site system at all. The developer has redesigned the subdivision to address the lot with the bad soils, but DNREC has not reviewed the current plan to confirm that each of the lots will have adequate soils for on-site septic systems.
9. This application does not adequately satisfy Section 99-9C(11) which requires the consideration of safe vehicular movement within the site and to adjacent ways and Section 99-9C(15) which requires the consideration of the effect on area roadways. The site is located along Round Pole Bridge Road, which is an unlined tar and chip roadway with no shoulders and failing pavement edges. DelDOT has stated that it has no plans for any improvement of this roadway. The proposed entrance to the site

**M 010 22
Lockhaven
Appeal
(continued)**

is approximately 500 feet from a 90-degree turn in the road, making it difficult to anticipate oncoming traffic. I am not satisfied that these circumstances provide for safe vehicular and pedestrian movement onto adjacent roadways and the entrance creates an unsafe effect on the already marginal Round Pole Bridge Road.

The Commission's findings include detailed, thorough and well-thought-out reasons for its unanimous vote to deny the Application, including, *inter alia*, inadequate wetland, scenic view and tree protection, as well as the questionable viability of on-site individual septic systems. Of utmost importance, and as outlined by the Commission's December 13, 2021 Letter, the proposed on-site individual septic systems were based on a 15-year-old soil evaluation from 2006 and a 6-year-old review thereof from 2015³, both of which were based on a totally different plan than was provided to the Commission with this Application and reviewed at the public hearing⁴. In fact, the DNREC review did not reflect the current Subdivision plan lot numbers;⁵ "that even under the old plan, several of the lots would need mound systems (being lots with different locations from the plan that was presented to the Commission"⁶; that, after repeated contacts to do so, the Appellant chose not to connect to the sewer which would have directly addressed this issue⁷; and that Appellant acknowledged that the plan contains "some bad areas" for septic systems⁸.

Moreover, the Commission expressed additional concern that the site is located in an environmentally sensitive area that "is bounded by Beaverdam Creek and the Broadkill River and contains 28.7 acres of wetlands...contains 38.44 acres of woodlands and 'pretty much everywhere you see woods has wetlands.'"⁹ This Application does not provide adequate assurance that the woodlands, wetlands and buffer areas will be protected¹⁰, especially since they are located on the lots themselves which will require on-site individual septic systems. The site plan even states, "treeline is shown for estimated lot clearing. Actual lot clearing varies."¹¹

The foregoing facts demonstrate many deficiencies in the Subdivision record presented to the Commission. These facts were collectively confirmed by statements in the record at the public hearing and, as Appellee explained in the Commission's December 13, 2021 letter (the "Commission's December 13, 2021 Letter"), there is substantial evidence in the record to deny the Subdivision plan based solely on Appellant's inability to adequately address the concerns raised by § 99-9C(8). *See Commission's December 13, 2021 Letter* at p. 2.

While the Appellant argues that approval is required subject to the imposition of reasonable conditions, imposing conditions based on Appellant's wide-ranging deficiencies under Section 99-9C would require the Commission to engage in a complete redesign of the Subdivision plan which is beyond the purview of its responsibilities.

**M 010 22
Lockhaven
Appeal
(cont.)**

The Commission's findings speak for themselves. The Commission's reasons for its unanimous denial of the Subdivision plan clearly demonstrate its decision was the result of an orderly and logical review of the evidence, that there was substantial evidence in the record to support its decision and that it engaged in the proper interpretation and application of the chapter.

¹ In addition, the Council is not permitted to consider any issues and arguments raised by Appellant on appeal that were not raised below as such issues are considered waived on appeal. *See, e.g., Hartigan v. Sussex County Bd. of Adjustment*, 2018 WL 1559938 *3 (Del. Super.); *Rehoboth Art League*, 991 A.2d at 1166.

² Sussex County Code, § 99-9C requires consideration of the following factors prior to subdivision approval:

- (1) Integration of the proposed subdivision into existing terrain and surrounding landscape.
- (2) Minimal use of wetlands and floodplains.
- (3) Preservation of natural and historical features.
- (4) Preservation of open space and scenic views.
- (5) Minimization of tree, vegetation and soil removal and grade changes.
- (6) Screening of objectionable features from neighboring properties and roadways.
- (7) Provision for water supply.
- (8) Provision for sewage disposal.
- (9) Prevention of pollution of surface and groundwater.
- (10) Minimization of erosion and sedimentation, minimization of changes in groundwater levels, minimization of increased rates of runoff, minimization of potential for flooding and design of drainage so that groundwater recharge is maximized.
- (11) Provision for safe vehicular and pedestrian movement within the site and to adjacent ways.
- (12) Effect on area property values.
- (13) Preservation and conservation of farmland.
- (14) Effect on schools, public buildings and community facilities.
- (15) Effect on area roadways and public transportation.
- (16) Compatibility with other area land uses.
- (17) Effect on area waterways.

³ *Transcript of June 24, 2021 Public Hearing* at p.15, line 22.

⁴ *Commission's December 13, 2021 Letter* at p. 2.

⁵ *Transcript of June 24, 2021 Public Hearing* at p. 20, lines 15-23.

⁶ *Commission's December 13, 2021 Letter* at p. 2, citing *Transcript of June 24, 2021 Public Hearing* at p. 19, lines 8-15 "It looks like DNREC is not excited about your plan".

⁷ *Transcript of June 24, 2021 Public Hearing* at p. 12, line 2.

⁸ *Transcript of June 24, 2021 Public Hearing* at p. 21, line 7.

⁹ *Commission's December 13, 2021 Letter* at p. 2-3.

¹⁰ *Commission's December 13, 2021 Letter* at p. 3, citing *Transcript of June 24, 2021 Public Hearing* at p. 29, lines 20-24 ("Unfortunately, if the best septic area gets into the deeper section of the woods, we don't want to put a septic in the worst area and then – you know, you want to clear those woods for that septic.")

¹¹ *Id.*

**M 010 22
Lockhaven
Appeal
(continued)**

Motion Adopted: 4 Yeas, 1 absent

**Vote by Roll Call: Mrs. Green, Yea; Mr. Hudson, Yea;
Mr. Rieley, Yea; Mr. Vincent, Yea;
Mr. Schaeffer absent**

Minutes

The minutes of December 14, 2021 were approved by consent.

Mr. Schaeffer returned to the meeting.

**Corre-
spondence**

Mr. Moore read correspondence received from Cape Henlopen Senior Center, Delaware Breast Cancer Coalition, Good Samaritan Aid Organization, Food Bank of Delaware and Multiplying Good in appreciation of grants received.

**Public
Comments**

Public comments were heard and the following spoke:

Michael Houlihan, Mayor of Delmar, DE spoke regarding the Old Business items on today's agenda addressing the amendments to the future land use maps.

Mr. Moore commented that the Public Hearing for this item was held on December 14, 2021. At that time, the record was left open for written comments, therefore, written comments can still be accepted at this time.

Mr. Jeff Stone representing SARG spoke about the process or lack thereof used by the County to consider potential changes to land use maps for the comprehensive plan. He believes that the 19-year-old document needs to be updated and modernization.

Mr. Todd Bauer from Delmar, DE spoke about the Jackson Branch tax ditch.

Mr. David See, 38297 Providence Church Road, Delmar, DE expressed concerns, and subsequent opposition to the proposed ordinance to change the density of land use in the County's comprehensive growth plan.

Ms. Lee came forward to discuss the procedure of land use maps. She expressed a concern of it being difficult to know what area is being proposed to change and expressed the need for more clarification.

**County
Council
Redistrict-
ing**

Mr. Moore reported that he has reviewed all the letters and emails received concerning both the process and the proposed maps presented during the Council meeting on December 14, 2021. Mr. Moore stated that the comments before the maps were presented were overwhelmingly in support of the League of Woman Voters maps. Since the maps have been unveiled, the comments have been supportive about the drafting of the maps.

Mr. Moore added that it has been asked several times regarding if an

**County
Council
Redistrict-
ing
(continued)**

election would be held after the process for all the districts. Mr. Moore stated that he was tasked with drafting maps and to ensure that they complied with the guidelines set by the courts.

Mr. Moore further explained that this is a state-wide issue that occurs in each County. After redistricting has occurred, there has never been special elections or truncated terms as stated in the Delaware Code for any of the Counties.

Mr. Moore is currently in the process of drafting an ordinance for introduction that he hopes to introduce at the next meeting. The software that has been used to draft the maps is the same software that is used by the Board of Elections that are being worked on to better identify properties and include the maps.

Mr. Moore reported that once the ordinance is introduced, a public hearing will be held. He emphasized that the public hearing will be held on the maps themselves.

**Adminis-
trator's
Report**

Mr. Lawson read the following information in his Administrator's Report:

1. Delaware State Police Activity Report

The Delaware State Police year-to-date activity report for November 2021 is attached listing the number of violent crime and property crime arrests, as well as total traffic charges and corresponding arrests. In addition, DUI and total vehicle crashes investigated are listed. In total, there were 189 troopers assigned to Sussex County for the month of November.

2. Projects Receiving Substantial Completion

Per the attached Engineering Department Fact Sheets, Welches Pond (formerly known as Fieldstone – The Grove at Love Creek) – Phase 1A (Construction Record) and Outer Banks South (Construction Record) received Substantial Completion effective December 13th and December 21st, respectively.

3. Council Meeting/Holiday Schedule

County offices will be closed on Monday, January 17th for the Martin Luther King, Jr. Holiday. Offices will reopen on Tuesday, January 18th, at 8:30 a.m. Council will not meet on January 18th. The next regularly scheduled Council meeting will be on Tuesday, January 25th at 10:00 a.m.

[Attachments to the Administrator's Report are not attached to the minutes.]

**Bank
Account
Resolution**

Mrs. Jennings presented for Council's consideration a Proposed Resolution authorizing signatures on the accounts of Sussex County Council with various financial institutions and investment firms due to the change in leadership.

**M 011 22
Adopt
R 001 22**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley, to Adopt Resolution No. R 001 22 entitled "AUTHORIZING THE SIGNATURES ON THE ACCOUNTS OF THE SUSSEX COUNTY COUNCIL WITH VARIOUS FINANCIAL INSTITUTIONS AND INVESTMENT FIRMS TO BE MICHAEL H. VINCENT, PRESIDENT; DOUGLAS B. HUDSON, VICE PRESIDENT; AND GINA A. JENNINGS, FINANCE DIRECTOR/CHIEF OPERATING OFFICER".

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**Update
FY22
Budget**

Mrs. Jennings provided an update on the FY22 budget. Mrs. Jennings reported that as of the first quarter, the general budget fund expenses were under budget by \$2 million. However, the revenues were over by \$10 million; all of which deals with Realty Transfer Tax. As the second quarter of the budget is ending, expenses are still under budget and revenues are still over budget due to Realty Transfer Tax. Mrs. Jennings reminded the Council that Realty Transfer Tax may only be spent on certain items. Mrs. Jennings asked for consideration to amend the FY22 budget by introducing a Budget Amendment Ordinance at the next meeting to spend the extra Realty Transfer Tax funds. Mrs. Jennings recommends spending \$12 million to include \$6.4 million to the Towns and the rest going to land acquisition for open space. Mrs. Jennings also requested to include the State passthrough grant revenue in the Proposed Ordinance.

It was agreed by consensus to have the Ordinance be brought back at the next meeting.

**Old
Business/
Proposed
Ordinance/
Land Use
Map
Amendment
(Delmar
Area)**

Mr. Whitehouse reminded Council that a public hearing was held on December 14, 2021, for this item. At the conclusion of that hearing, the record was left open to receive additional comments. Since that meeting, no additional comments have been received in relation to this Proposed Ordinance.

Mr. Whitehouse shared that since the December 14th meeting, staff has had discussions with the State Planning Office relating to the process of future land use map amendments. The outcome of those meetings will be reported to Council at a future meeting.

Mr. Vincent commented that after the last meeting, it was requested of Mr. Whitehouse to meet with State Office of Planning in relation to some issues

that were brought forward. As reported by Mr. Whitehouse, those meetings have started and will continue to occur until a resolution is agreed upon.

M 012 22
Defer Action
on Proposed
Ordinance/
Land Use
Map

A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer to defer and to leave the record open until the next meeting for public written comment for the Proposed Ordinance to amend the future land use map of the Comprehensive Plan in relation to Tax Parcel Numbers: 532-12.00-1.00, 532-12.00-27.00, 532-18.00-42.00, 532-18.00-44.00 and 532-19.00-1.00.

Amendment
(Delmar
Area) **Motion Adopted: 5 Yeas.**

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

Old
Business/
Proposed
Ordinance/
Land Use
Map

Mr. Whitehouse reminded the Council that a public hearing was held on December 14, 2021, for this item. At the conclusion of that hearing, the record was left open to receive additional comments. Since that meeting, 143 written comments have been received in opposition and 49 comments in support of this Proposed Ordinance.

Amendment
(Route 1) **Mr. Whitehouse has been in discussion with the State Planning Office in reference to this ordinance as well as the previous ordinance for the same reasons with the outcome to be brought back at a future date.**

M 013 22
Defer Acton
on Proposed
Ordinance/
Land Use
Map

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to defer and to leave the record open until the next meeting for public written comment for the Proposed Ordinance to amend the future land use map of the comprehensive plan in relation to Tax Parcel Numbers: 532-12.00-1.00, 532-12.00-27.00, 532-18.00-42.00, 532-18.00-44.00 and 532-19.00-1.00.

Amendment
(Route 1) **Motion Adopted: 5 Yeas.**

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

It was noted that even if these ordinances were approved, that does not mean that any parcel is applying or receiving a change of zoning. Furthermore, currently, there are no applications currently pending for any development West of Delmar or on Route 1. It was also noted that if an application was received, that would require additional public hearings.

Public
Hearing/
Ordinance
to Amend
Chapter 99
and 115

Mr. Whitehouse reported that on October 12, 2021, the County Council introduced an Ordinance to amend Chapter 99 and Chapter 115 of the Code of Sussex County regarding certain drainage features, wetlands, and water resources and buffers thereto.

The Planning and Zoning Commission held a public hearing on November

**(Wetland,
Water
Resources
and Buffers)
(continued)**

4, 2021. During the December 16, 2021, meeting, the Commission recommended adoption of the Ordinance subject to the recommended revisions.

As of today, there have been 99 written responses received of which some may be duplicates. Mr. Whitehouse commented that the majority of the comments are in support of the Proposed Ordinance that have been circulated to Council.

Mr. Vincent Robertson, Assistant County Attorney presented information regarding the buffer initiative history to amend Chapter 99 and 115 of the Code of Sussex County. Mr. Robertson pointed out that this incentive does not apply to undeveloped land or land that does not have a resource on it. The Proposed Ordinance only applies to lands that are in the development process and have a resource. In addition, this Proposed Ordinance is not intended to address density.

Mr. Robertson explained that this Proposed Ordinance is an attempt to get away from an arbitrary line on a plot which was done through buffer averaging. Incentives were also added to get better designs and some flexibility. During discussions, it was found that resource maintenance also needed to be addressed. The code needed updating to include terms to define, update language and address loopholes.

Mr. Robertson presented the goals, objectives, and strategies from the 2018 Comprehensive Land Use Plan that deal with or support the initiative of the current Proposed Ordinance.

The background and history of the working group was shared by Mr. Robertson. Staff also reviewed the Proposed Ordinance and provided input to get the Ordinance to the point of introduction.

Mr. Robertson presented the initiative details and discussed the four functions of a buffer that appear in the Proposed Ordinance. Mr. Robertson pointed out that it was an addition, that it is not subdivided. Therefore, the buffer area will be considered open space or common areas that will be owned by a homeowner's association.

The ordinance details were discussed by section of the Proposed Ordinance as follows:

1 – Definitions

2 – General Requirements and Restrictions

Section 2 requires that buffers be resource buffers to be depicted on the preliminary and final plot plans for each major subdivision.

3 – Preliminary Conference

**Public
Hearing/
Ordinance
to Amend
Chapter 99
and 115
(Wetland,
Water
Resources
and Buffers)
(continued)**

In this section, the definition of minor and major subdivision was amended which impacts when buffers would apply.

4 – Information to be shown

This section lists the information to be shown on a preliminary plat when submitted to include the buffer, location of the resources, access easements to the buffers so that maintenance can occur and the existing forest at time of application. It was also added to show the location of walkways and type of materials to be used in those walkways.

5 – Supporting Statements

This requires a resource and resource buffer management plan to be prepared and recorded as part of the subdivision.

6 – Information to Be Shown

This section lists the information to be shown on a preliminary plat when submitted to include the buffer, location of the resources, access easements to the buffers so that maintenance can occur and the existing forest at time of application. It was also added to show the location of walkways and type of materials to be used in those walkways.

7 – Plans

This section deals with construction plans reviewed by Mr. Whitehouse and Mr. Medlarz's offices as the project works through the process of being constructed.

8 – Definitions and Word Usage

9 – Height, Area and Bulk Requirements

10 – Resource Protection

10a. - Requires Resource Buffer widths and listed the Resource Buffer widths

The working group recommended the following resource buffer widths:

Public Hearing/ Ordinance to Amend Chapter 99 and 115 (Wetland, Water Resources and Buffers) (continued)

<i><u>Table 1: Resource Buffer Widths</u></i>			
<i><u>Resource Type</u></i> <i><u>(See Definitions, §115-4B)</u></i>	<i><u>Full Buffer Width (ft)</u></i>	<i><u>Zone A (ft)</u></i>	<i><u>Zone B (ft)</u></i>
<i><u>Tidal Waters</u></i>	<i><u>100</u></i>	<i><u>50</u></i>	<i><u>50</u></i>
<i><u>Tidal Wetlands</u></i>	<i><u>100</u></i>	<i><u>50</u></i>	<i><u>50</u></i>
<i><u>Perennial Non-tidal Rivers and Streams</u></i>	<i><u>50</u></i>	<i><u>25</u></i>	<i><u>25</u></i>
<i><u>Non-tidal Wetlands</u></i>	<i><u>30</u></i>	<i><u>15</u></i>	<i><u>15</u></i>
<i><u>Intermittent Streams</u></i>	<i><u>30</u></i>	<i><u>15</u></i>	<i><u>15</u></i>
<i><u>Ephemeral Streams</u></i>	<i><u>0</u></i>	<i><u>0</u></i>	<i><u>0</u></i>

10b. – Defines Resource Buffer Averaging

This allows for flexibility for the proposed development; however, it only applies to Zone B. With that average, it shall not be expanded more than double the width of Zone B Resource Buffer.

10c. – Lists the Resource Buffer permitted activities by Zone

This is shown in Table 2 in the Ordinance that describes what can and cannot occur in Buffer Zones A and B. Mr. Robertson pointed out that if it is not identified in the table than it is prohibited.

10d. – Defines the Resource Buffer Standards

This keeps established native forests and non-forest meadows predominated by non-invasive species.

10e. – Regulates Invasive Species Removal

As a result of the comments received, the Planning and Zoning Commission recommended deletion of selective cutting from this section.

10f. – Defines the Maintenance of Drainage Conveyances including for a Drainage Assessment Report

This section also establishes the need for an easement for future maintenance.

10g. – Defines Resource Buffer options to Incentivize the Retention of Forests and the Retention or Expansion of Resource Buffers

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Mr. Robertson shared that staff came up with how to incentivize good preservation practices.

10h – Defines the Resource and Resource Buffer Maintenance and Management Requirements

10i – Defines the Requirements for the Planning and Zoning Commission to grant an exception or modification

Mr. Robertson shared the criteria created that would need to be met before an exception or modification could be granted as follows:

When the Commission finds that special conditions or circumstances exist that are peculiar to the land or structure and that a literal enforcement of a specific requirement of this section would result an unwarranted hardship.

That the modification or exception request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.

That the granting of a modification or exemption will not adversely affect the functions of the Resource, or its Resource Buffer as set forth in the definition of that term. Waivers shall be in harmony with the general spirit and intent of this section and any subsequent regulations.

That the basis for the modification or exception cannot be achieved through Resource Buffer Width Averaging as provided by Sections 115-193B.

That is no event shall there be a modification or exception to the width of requirements of Zone A.

11 – Preliminary Site Plan requirements

12 – Final Site Plan requirements

13 – Effective date

Mr. Robertson reminded the Council that when this Proposed Ordinance was introduced, the effective date given at that time was six months from the date of adoption.

The recommendations of the Planning and Zoning Commission were then shared. The revisions included: several edits to provide better clarity in the Proposed Ordinance wording. Improving the information required on the preliminary plat submissions. Eliminating the term and activity of “selective cutting” and only permitting invasive species removal with licensed and/or certified oversight. Clarifying the language in Section 10 relating to conservation easement creation.

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It was then opened to the public for any comments.

Mr. Edward Launay from Environmental Resources, Inc. came forward to speak in support of the proposed ordinance in a professional capacity as well as a resident of Sussex County.

Mr. Launay explained that he was a member of the Wetland Working Group that helped in the preparation of the Proposed Ordinance. He recognized that the role of the Wetland Working Group was to develop a draft. Ultimately, the Wetland Working Group was disbanded, and that work product was the County's. He stated that the draft ordinance was the County's, and they have not amended and modified the ordinance. As an example, Section G., Resource Buffer Options was not a work product of the Wetlands Working Group.

However, certain aspects of this draft ordinance were critical components of the Wetlands Working Group contributions including deciding upon the Resource Buffer widths in Table 1 and developing Table 2, Resource Buffer zone. Table 2 lists activities which are not permitted within the Zone A and Zone B portions of the Resource Buffer.

Mr. Launay expressed concerns about how the section on "Walking Trails" is currently written. The current way it is written is substantially different from that of the Wetlands Working Group's March 4, 2020, draft. Mr. Launay requested that the two components related to walking trails in the Wetlands Working Group's March 4, 2020, draft replace the language on walking trails in the ordinance currently being presented today.

Mr. Launay stated that the error in the draft ordinance presented today may be an oversight since he reviewed various versions of the ordinance where corrections on this subject were not carried through. During the Planning Commission Hearing, a civil engineer commented on the topic of "walking trails", therefore, he realized after that meeting that the ordinance currently under review was not properly worded.

Mr. Launay provided copies of emails that he has sent to the County with the language of the March 4th draft. Incorporating the language on Walking Trails as it is in the March 4th draft is important because he does not believe that any member of the Working Group thought that allowing walking trails in the Zone A portion of the Resource Buffer was acceptable. He added that the March 4th draft allows only walking trails in the Zone B Resource Buffer. The draft also makes a single exception for a portion of walking trails that may need to cross through or over a Resource (wetland or stream) and the Zone A buffer, so as long as a suitable wetland permit is obtained from a regulatory agency.

Mr. Launay emphasized that the two-part definitions in the March 4th draft are important. He believes that it was likely just an oversight by the staff working on the ordinance and asked that it be corrected. If it was not an

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oversight, he asked that the wishes of the Wetland Working Group on this particular topic be respected. There should walking trails allowed in Zone A buffer except where a regulatory permit is issued for the incidental crossing of the buffered Resource.

Mr. Launay provided another recommendation or clarification that involves page 26 line 728. He believes that the word “located” needs to be replaced with the word “restored”. The current sentences as written does not seem to make sense.

Mr. Launay then discussed Section G. Resource Buffer Options (Lines 782 though 878). This section was developed by County Staff to “incentive the retention of forest” by augmenting various options beyond those already provided in the Resource Buffer Width Averaging, Section B of the ordinance.

Generally, he supports Section G of the ordinance with the condition that word additions, clarifications and other suggestions as he proposes herein are incorporated into the current draft.

Mr. Launay expects that Council Members will hear a wide range of options on Section G during these proceedings, many of which will be unfavorable. Understanding the benefits that Section G provides requires a good measure of “out of the box” thinking. As example, the way stormwater moves post development vs. predevelopment is one item to be considered. While parts of Section G perhaps focus more on providing enhanced water quality benefits, there may be unavoidable tradeoffs on other Resource Buffer functions should Section G be included in the final ordinance.

Another fair criticism of Section G is the complexity it adds to the interpretation and implementation of the ordinance. As a person familiar with the development of the ordinance, he recognizes that understanding the components of Section G and exactly how they work is currently a challenge.

However, despite having a few reservations and based upon his reading of Section G, including the discussion that he has had with the County staff about how it would be applied, he generally supports including it in the ordinance with his edits. He believes the cumulative benefits of Section G to the overall watershed merits it’s consideration. He shared that all the edits that he is proposing have been discussed with the County Engineer prior to this hearing and he believes he supports them.

The most important of these are the clarifications and edits are to Section G. 2a and 2c where it needs to be clearer the 2a(i) and 2c(i) is an offsite area that does not consist of natural existing forest, where 2a(ii) and 2c(ii) applies to an offsite Resource Buffer that is composed of natural forest. In the case of 2a(i) and 2c(i) it must also specify in the Conservation Easement that farming is not permitted within the offsite Resource Buffer. Without that

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clarification the intended benefits of the Item 2, Resource Buffer Options are not fully provided.

Mr. Launay then went on to discuss Section G, Conservation Easement Requirement. He stated that parts of this section require the additional protections through the implementation of a “Conservation Easement” of offsite Resource Buffers. Other than just stating the requirement, little information is provided.

He asked what would the Conservation Easement prohibit and permit? Exactly who will determine who is qualified to be a grantee and long-term steward of the area subject to the Conservation Easement. What role will the County have to see that the Conservation Easement is not modified by an outside party at a later date. What monitoring and reporting responsibilities will the designated conservation organization (Grantee) have.

Mr. Launay submitted an example of a “Declaration of Conservation Easement” which involved 313.66 acres of protected land that is part of the Americana Bayside residential planning community, west of Fenwick Island. As part of the Corps of Engineering permitting that project, protection of these 313.66 acres of natural lands was proposed. The template of the document is the general format which is currently used by the Philadelphia District Corps of Engineers.

Mr. Launay shared that his support of Section G is based upon the County developing their own very similar “Conservation Easement” that would become a standard agreement for all off-site Resource Buffer protection requirements. As in the Americana Bayside document, at a minimum the County would reserve the right to approve any future changes to that document, including consenting to any unforeseen action, even though they are not the actual grantee.

Mr. Launay would also expect that the final version of the ordinance specific that only a suitable organization as determined by some combination of the County Council, Planning Commission, or Planning Director be designated as the Grantee or steward of the County’s standard Conservation Easement. In addition, some minimum standard for the Grantee’s responsibility for routine monitoring and reporting back to the County about the conditions of the offsite Resource Buffer Conservation Easement must also be developed and implemented if Section G is included in the final ordinance.

Mr. Medlarz confirmed that Mr. Launay has shared his information with him, and he does support the modifications as presented.

Mr. Martin Ross 16366 Whitesville, Delmar, DE then came forward discussing the federal wetland regulations; the only non-tidal wetland laws or rules that currently exist and the oath of office.

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Mr. Ross shared that a few years ago during the Obama Administration, EPA proposed rules that would substantially expand federal wetland regulations. Several states supported by numerous Counties throughout the County filed a lawsuit against EPA in the court system to stop this action. Mr. Ross stated that Sussex County was one of those that supported that lawsuit. A US District County issued a stay on those regulations both confirming the standing of the lawsuit and stating that the lawsuit had merit. In 2016, the new President promised and delivered regulatory relief and the lawsuit was dropped. In 2020, a new President was elected that brought new and more restrictive rules that are being written with anticipated relief this Spring. Mr. Ross stated that once these new regulations are adopted, a new lawsuit will be filed.

Mr. Ross then discussed the history of wetlands which have been regulated since 1889. During this period, wetlands were easy to identify, and regulations were pretty straight forward. In 1972, the Clean Water Act was passed, the Rivers and Harbors Act was merged into the Clean Water Act virtually unchanged. There was one major change, the EPA was made administrator of the new Section 404. One the EPA became pushing the core very hard to expand the definition of wetlands and the core fought very hard against that expansion of regulatory authority. It was recognized that any expansion was outside of the original law. In the mid-1980s, EPA prevailed.

Mr. Ross discussed the lawsuits that he previously mentioned. The State's that sued claimed that the lands in question were not interstate waterways at all. They also claimed that the lands in questions were lands of the individual states. Lastly, they claimed that even if the court agreed that the lands were not land at all but water, then the water was waters of the individual states and not waters of the US. Under the current federal regulations according to DNREC, there are approximately 220,000 acres of freshwater wetlands in Sussex County.

Mr. Ross further explained that the Comprehensive Plan identifies land uses, establishes zoning districts to accommodate those land uses and tells the land use of the County.

Mr. Ross believes that this Proposed Ordinance would deny use of over 200,000 acres of private property for any intensive purpose. If it is redefined of what land and what is, then the oath of office that has been sworn is worthless. He added that private property ownership is a right not a privilege. Regulating the ability to use land to the point of being unable to use the land is a violation of those private property rights and a violation of the oath of office.

Mr. Ross stated that he is opposed to this Proposed Ordinance. This Ordinance violates the oath of office and place restrictions on property owners on properties that are desired to be preserved. He added that a way would be found to provide value for natural resource preservation and not

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reduce the value.

Mr. Ross encouraged the Council to vote no to this Proposed Ordinance.

Mr. Tom Bower from Delmar, who currently serves as a HOA President and Tax Ditch Commissioner came forward stating he believes that it should be a responsibility of the HOA. Many of the HOA's have enough trouble collecting their dues. This is just another form of an unfunded mandate that should not be allowed or tolerated.

Mr. Thomas Bower from Bethany Beach, DE expressed a concern regarding minor subdivisions and individual property owners.

Mr. Robertson replied that it does not apply to existing subdivisions and lots; only applies to new subdivisions that go through the approval process and major subdivisions; not minor subdivisions.

Mr. Chris Bason, Executive Director of the Delaware Center for the Inland Bays then came forward to speak on the Proposed Ordinance. Mr. Bason reviewed the Delaware Inland Bays Comprehensive Conservation Management Plan that was revised last year. Included in the plan, there are sixty-seven actions that focused on reducing nutrient pollution to achieve water quality, protecting, and restoring natural habitats, public education and engagement and mitigating and adapting to flooding and climate change. The County was one of seven plan signatories to that plan.

Mr. Bason shared a picture and discussed a highly functioning buffer located in Love Creek. Mr. Bason shared that the main problem is there is an excess nutrient in the water that does not allow light to hit the bottom of the water. Mr. Bason believes that increase action needs to occur to help with pollution; buffers can help with that. Due to multiple sources, the amount of nitrogen and phosphorus that is going into the water resources has increased over the years. In 2021, there was a record set of Inland Bays fish killed mainly due to low dissolved oxygen from pollution.

On an average, 51% of forest in a proposed Sussex development is cleared. From 108 Preliminary Land Use application over 2017-2019, two square miles of forest were intended for clearing.

Mr. Bason shared that from 2010 to 2017, Sussex County had the third highest number of homes built in a ten-year flood risk zone of any ocean coastal county in the US.

Mr. Bason discussed the Salt Marsh acreage that is important, however over 3,000 acres has been lost since the 1930s. The direct lost of Salt Marsh has stopped mostly related due to the Delaware Wetlands Act in the 1970s. However, marshes are now being lost to sea-level rise.

Mr. Bason discussed the achievements of this Proposed Ordinance. It

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includes consensus points of buffer work group regarding features, widths, activities, and site design flexibility (buffer averaging only), specifies purposes of buffer, requires management plan, excludes lot lines from the buffer, addresses invasive species and includes access to features through easement.

Mr. Bason reviewed the purposes of this ordinance. These include protecting the resources and their associated functions, improve/protect water quality via sediment filtration, reduce impact of nutrient loading on Resources, moderate water temperature, and enhance infiltration and stabilization of channel banks. Also, to provide wildlife habitat via nesting, breeding, and feeding opportunities; provide sanctuary/refuge during high water events; protect critical water's edge habitat; and protect rare, threatened and endangered species associated with each Resource and its upland edge. To enhance and/or maintain the floodplain storage functionality via reduction of flood conveyance velocities as well as dissipation of stormwater discharge energy.

Mr. Bason discussed buffer widths, and further explained that the wider the buffer the more functional, to a point. The minimum effective widths vary by buffer purpose and buffer type. The very wide buffers are needed for marsh mitigation and wildlife protection. The narrow parts of the buffer can reduce its effectiveness. The streamside buffers often recommended at 100 feet minimum. Mr. Bason pointed out that other jurisdictions do not allow buffer width averaging.

Mr. Bason commented that vegetation is a very important part of a buffer ordinance.

Mr. Bason reviewed his requested amendments to the Proposed Ordinance. First, requirement for protecting and restoring forest in Resource Buffer Standards (Section D begins at line 701). Removal of Resource Buffer Options (Section G begins at line 781). Clarify Maintenance of Drainage Conveyance and specify enforcement and penalties.

A quote from the Chesapeake Bay Executive Council from 2006 was shared relating to why buffers should be forested.

Mr. Bason explained that forests provide better water quality protection than a grassed buffer. The forested buffers remove 36% more nitrogen on average than grassed buffers. Forested buffers take up 11-37 pounds of nitrogen and 2-5 pounds of phosphorus per acre per year into wood. He added that soil organic matter is over twice as high in forested buffers. Forested buffers improve instream processing of nutrients, and they also support wildlife habitat and don't contribute pollution.

Mr. Bason shared why native forests are essential for habitat. The amount of forest in an estuary's watershed, particularly near the water, has significant positive influence on the health of the estuary's baygrasses,

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crabs, and marsh birds. Each layer provides habitat niche for wildlife and physical buffering. He added that native species are essential to support the foodweb.

Mr. Bason recommends eliminating non-forest buffer standards and requiring forest in all buffer areas except where otherwise permitted by activities list. Buffers without forest at time of application must submit native species planting plan and invasive species control plan to restore native forest to defined standard and time period. This would include a similar approach to forested and/or landscape buffer strip code as well as forest maintenance requirements in management plan. The requirements would include a diversity of Delaware native trees and shrubs. The planting and survival standards by stock size and natural revegetation would be allowed within 25 feet of mature native forest.

Mr. Bason discussed the resource buffer options description. He explained that retaining a forest in a buffer allows reduction of buffer width by half and allows reduction of development perimeter buffer. In addition, retaining forest connected to but not within buffer allows reduction in buffer width by half. He added that preserving wider wetland buffers allows reduction in development perimeter buffers.

Mr. Bason suggested the removal of resource buffer options of the ordinance. There is a need for flexibility in site design provided by buffer averaging. The options should not reduce width of buffers which are already on the low end of effectiveness. The options should not reduce the effectiveness of another ordinance with a separate purpose (perimeter buffer) to attempt to create an effective waterway and wetland buffer ordinance.

Mr. Bason provided a clarification of maintenance of drainage conveyances which is location in Section F2 of the Proposed Ordinance. Mr. Bason expressed his support of Page 27, Line 763 that reads “The location of any stream blockages such as debris jams, fallen or unstable trees, beaver dams or similar impediments to conveyance ...” He recommended adding the following language for clarification “that have high likelihood of causing flooding resulting in damage to property and infrastructure.” He also recommended to further define “positive conveyance.”

Mr. Bason believes that stormwater features do not belong in a buffer because they do not meet the purposes of the ordinance. Mr. Bason shared a picture of an area in Love Creek that was providing no habitat. Mr. Medarlaz explained that the table allows conveyance; this is a practice that is shown which is not allowed. It was further explained that the picture shared is a pre-developed site.

Mr. Bason requested provisions on enforcement to include penalties when buffers are torn down.

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Mr. Bason believes that many parts of the ordinance are good; the areas that need to be fixed will clear up problems. This is a good opportunity for water quality, wildlife and the way of life in Sussex County.

Mr. Jeff Seemans from Milton, DE thanked the Council for supporting this ordinance conceptually, and the members of the working group for the many hours of their time that they gave to help produce the ordinance to its current form.

Mr. Seemans commented on the enforcement of this ordinance. By his interpretation, there is no current section describing any penalties for the intentional or accidental destruction of these critically important wetland buffers. From his experience, there are five entities that could do damage to these buffers: a developer/land flipper, a builder, a rogue or careless site contractor, a HOA or a lot owner/homeowner.

Mr. Seemans commented that after all of the time spend on this ordinance, it would be an affront to this County Council and the members of the working group if these buffers were intentionally or even accidently disregarded and destroyed. His suggestion was to add a new separate section on enforcement and penalties. He believes that an actual posted physical sign should be completed. Mr. Seemans shared that the Critical Area Buffer Resources Guide of the State of Maryland describes a subsection entitled buffer signs:

Post permanent signs delineating the upland boundary of the Buffer with at least one sign per lot or one per each 200 linear feet of shoreline, whichever is applicable; and

Design each sign so that it:

**Is at least 11 inches in width and 15 inches in height;
Is placed at a height of 4.5 feet, but not attached to at tree;
Clearly states “Critical Area Buffer – No clearing or disturbance permitted.”**

Mr. Seemans provided two examples from the Critical Area Guide.

Mr. Seemans commented that financial penalties for the cutting of trees or shrubs within the prescribed wetlands, or the illegal filling or hard-surface construction within the buffer should be implied. He suggested that a dollar amount per square foot of disturbance if, for example, filling or hard-surface construction has taken place. He added that dollar amounts per cut tree would be difficult to calculate if the tree and its stump have both been removed. However, the financial penalty should be high enough to get someone’s attention.

He also recommends the removal of any illegal fill or hard-surface construction and mitigation replanting. The aforementioned Guide suggests

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a 4:1 mitigation ratio for any penalty for a violation.

Mr. Seemans also suggested to shorten the effective date. Currently, Section 13 has it as six months after adoption by Sussex County Council. He believes that it too long and too many applications will be filed to get in under the wire. The net result would be more trees lost; he suggests that it take effect immediately upon adoption.

Mr. Rich Borasso representing SARG then came forward to speak. Mr. Borasso stated that the Proposed Ordinance Amendment tackles the modernization of the 32-year-old buffer zones for wetlands ordinance. The Proposed Ordinance Amendments are focused on improved protection, property values and safety of its residents by requiring more extensive natural buffers between new residential developments in its wetlands and water. It also provides enhancements to the ensure that Sussex County drainage network is improved now and maintained in the future.

The goal of the working group that he was apart of was to provide recommendations to Sussex County Council for updating the County buffer ordinance as it applies to development projects submitted to Sussex County for new residential developments for major subdivisions, cluster subdivisions, residential planned communities, and residential conditional uses.

In September of 2019, the process update was presented to the Sussex County Council. At that time, it was reported that consensus was reached on the following aspects: resources subject to the ordinance, definitions of those resources, definition and function of buffers, buffer widths to protect each resource, two-zone buffer management approach, the width of each zone in each buffer, some activities allowed or prohibited in each buffer zone, buffer averaging permitted in Zone B and buffer and resources would not be located on any individual subdivided lots. At that time, area requiring further discussion included the criteria for buffer averaging, resource mapping, management requirements, waiver program and incentive programs.

Since that time, there have been County official discussions, one-offs between citizens and County Officials and informal WBWF member discussions. However, there has been no effort by the County to reconvene the working group to gain consensus. On September 14, 2021, Council discussed and voted to proceed with drafting of an ordinance. On November 4, 2021, the Planning and Zoning Commission held a Public Hearing and made a recommendation to move forward. Mr. Borasso pointed out during that hearing; the Planning & Zoning Commission voted immediate to approve this ordinance with no discussion.

This ordinance promotes and protects the health, safety, convenience, orderly growth, and welfare of the inhabitants of Sussex County.

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Mr. Borasso shared that SARF endorses A-F and H-I but not G. He further explained that he understands that any improvements to the resource wetland buffers are not intended to reduce density.

Mr. Borasso stated that the group consensus reached that not all buffers characteristics are equal, averaging offers flexibility to developers. He believes that the resource buffer options section is overly complicated, creates contradictions and holes throughout the proposed amendment. Lastly, the resource buffer options would be an enforcement nightmare for Sussex County.

Mr. Borasso then went on to discuss Section G of the Proposed Ordinance relating to resource buffer options. This section is designed to incentive the retention of forests as well as incentivize the retention or expansion of Resource Buffers or provide for additional functional benefit of Resource Buffers.

Mr. Borasso believes that there are contradicts with the purpose of the forested and/or landscaped buffer required in Chapter 99.

Mr. Borasso discussed the incentives of the retention of forests; he questioned the equivalent of what was being exchanged. Mr. Borasso expressed a lack of satisfaction with some of the buffer options. These options may address or remedy one of the three purposes in the function of buffers. Those functions include improve and protect the water, provide wildlife habitat and enhance or maintain flood storage. If an off-site easement cannot demonstrate equal or greater net benefits; then it should not be allowed.

Mr. Borasso asked if it is really about retention of forest and expansion of buffers, or it is an accommodation to allow developers to builder closer to water resources.

Mr. Borasso believes that Section G must be removed from the proposed drainage features, wetland and water resources and the buffers amendments.

Mr. James H. Baxter, IV 24933 Governor Stockley Road, Georgetown, spoke to represent agriculture and farming practices. Mr. Baxter believes that agriculture is doing a good job adopting these practices and moving them forward.

Mr. Baxter expressed the need to keep agriculture viable. Mr. Baxter stated that a ditch infrastructure has been relied on for several years. There can be conveyance problems in ditches. Mr. Baxter expressed a concern of how he could convince a developer that a ditch needs to be cleaned out to get water away to be able to maintain his farming business.

Mr. Baxter shared that agriculture was willing to give up a buffer along

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these conveyances in exchange for being able to maintain the ditches. He added that without a buffer or an easement, nobody is allowed to go on the land. Furthermore, selective cutting is not allowed; all these items need to be addressed. Mr. Baxter explained that the agriculture community was willing to give up buffer to have the maintenance option on conveyances.

Mr. Baxter believes that Section G needs to be kept in, but it needs to include the maintenance option which is the whole purpose of Section G.

Mr. Baxter expressed the need of keeping Zone A except for maintenance.

Ms. Christina Darby, 4408 Woodland Church Road, Seaford expressed the need of the Proposed Buffer ordinance to have “enough teeth”, however, it needs meaningful oversight or strict penalties. Without those things, it will all be for naught. She added that there should be repercussions for deforestation. Ms. Darby believes that this Proposed Ordinance is important for the protection of the future.

Mr. Keith Steck of Milton, President of DE Coalition for Open Government then came forward. Mr. Steck expressed his appreciation of the working group, County officials and staff for working diligently on this ordinance.

Mr. Steck believes that there is more work that needs to be done to revise the document prior to its adoption.

He will not speak on the technical issues, as he largely deferred to and not repeat comments by other speakers – notably from the Centers from the Inland Bay and the SARF, Sussex Alliance for Responsible Growth and those highly knowledgeable on the technical aspects.

Mr. Steck believes that increasing the buffer width to 100 feet of perennial nontidal rivers and streams in Table 1 is essential. Removing the allowance of non-forest meadow from the Resource Buffer Standards Subsection 10.D. and require the maintenance of the existing forest and replanting of non-forested areas with trees and shrubs to specific densities (lines 718-724).

Mr. Steck suggested the elimination of Subsection G of the Resource Buffer Option (lines 781-878) to keep options to endorse false equivalencies. He further explained that allowing these options is allowing for destruction. Allowing for the destruction of acres of adjoining property will harm, not benefit, the mature trees and other land saved. That destruction will destabilize soils and eliminate vegetation and its ability to absorb large quantities of water and act as windbreaks; once cut and destroyed, these resources and their benefits will be lost for decades if not permanently. This will place further burden on the adjoining saved resources, especially if the cut or destroyed area is paved and/or otherwise diverts water and wind to the saved areas.

Mr. Steck suggested to add a section on specific enforcement provisions and

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penalties for not following the law. He added that currently, there are no consequences for not following the law.

Mr. Steck commented that not all of the ordinance language is supported by evidence. He also believes that there are some issues with some of the definitions specifically the wetlands definition needs clarification.

Mr. Steck asked the rationale of why subdivisions and sizes of subdivisions are referenced in this ordinance. He believes that the discussions of subdivisions should be removed from the ordinance and consider those separately.

Lastly, Mr. Steck believes that the ordinance should be effective three months after adoption.

Ms. Lee commented that due to Zone A not being “touchable”, she opposes that option. Ms. Lee asked for consideration to investigate the process further.

Ms. Lee provided a handout with suggested changes to the Proposed Ordinance.

Mr. Dave Breen from 3122 Ringtail Drive, Lewes asked for consideration of the Council to have an environmental specialist be a part for the enforcement of the ordinance.

Mr. Breen discussed Hydrology and the need to have buffers in place due to storms. He added that storm events such as a Nor’easter can take years to get rid of the salt in the land.

Mr. Breen explained the need to keep mature forest in place and the reason why buffers should be kept.

Mr. Breen explained that it can be expected for Sea Level Rise to increase 2-2 ½ feet higher in the next ten years.

Ms. Marlene Mervine, Nanticoke Watershed Conservancy stated a quote from Amanda Gorman, “We have lost too much to lose.”

M 014 22 Recess

At 2:56 p.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson, to recess until 3:15 p.m.

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea; Mr. Hudson, Yea; Mr. Rieley, Yea; Mr. Vincent, Yea

M 017 22 **\$54,098.91, for a new contract total of \$5,254,121.09, contingent upon USDA concurrence.**

**Herring
Creek Pump
Station
Project
(continued)**

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

SCRWFT & Rehoboth Capital Improvement Projects **Mr. Medlarz presented information on the project that were all modifications to scope that were requested. He further explained that the largest request was the city requesting assistance to do the pump station work. He added that the city will pay that change order directly. The other change order is for the effluent force main through the outfall.**

M 018 22 **A Motion was made by Mr. Rieley, seconded by Mr. Hudson to accept the recommendation of the Sussex County Engineering Department, that Change Order Nos. 15 and 16 for contract C19-11, South Coastal WRF Treatment Process Upgrade No. 3 and Rehoboth Beach WTP Capital Improvement Program, Phase 2 – General Construction, be approved, increasing the contact by \$324,996.81 and \$88,132.23 respectively.**

SCRWFT & Rehoboth Project Change Order Nos. 15 and 16

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

M 019 22 **A Motion was made by Mr. Rieley, seconded by Mr. Hudson to accept the recommendation of the Sussex County Engineering Department, that Change Order Nos. 13 and 14 for Contract C19-17, SCRWF Treatment Process Upgrade No. 3 and RBWTP Capital Improvement Program, Phase 2 – Electrical Construction, for an increase of \$20,018.56 and a credit of -\$6,485.87 respectively.**

SCRWFT & Rehoboth Project Change Order Nos. 13 and 14

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

EMS Public Safety Building **Mr. Medlarz explained that this change order includes minor changes to outlet configurations. These changes will accommodate the selected A/V equipment. He added that the work is complex requiring scope modifications for eight trades and will close out the issue of the stairs.**

M 020 22 **A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to accept the recommendation of the Sussex County Engineering Department, that Change Order No. 5 for Contract C19-04, Sussex County Public Safety**

EMS Public Safety

Building **Building be approved, increasing the contract by \$58,245.80.**

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

DE Coastal **Mr. Parker reminded Council that a total of five bids were received and
Business** **opened publicly on November 18, 2021. After reviewing all of the bids, there
Park** **were numerous discrepancies found in multiple bids effecting potential
Improve-** **award recommendations. As a results, the Engineering Department and
ments** **Council approved the rejection of all bids on November 30, 2021, with an
 immediate project rebid.**

**The project was rebid on December 1, 2021, with a total of six bids received
and opened publicly on December 21, 2021. After a detailed review of the
bids, there were no major discrepancies found in the submitted bids. The
low apparent bidder was submitted by A-Del Construction with a total
project bid of \$3,839,433.00.**

M 021 22 **A Motion was made by Mr. Hudson, seconded by Mr. Shaeffer to accept the
DE Coastal** **recommendation of the Sussex County Engineering Department, that the
Business** **low total project Rebid for Project A21-11, Delaware Coastal Business Park
Park** **Improvements, be awarded to A-Del Construction in the amount of
Improve-** **\$3,839,433.00.**
ments

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
 Mr. Hudson, Yea; Mr. Rieley, Yea;
 Mr. Vincent, Yea**

Millville by **Mr. Ashman shared that this is an expansion of Sussex County Unified
the Sea** **Sanitary Sewer District in the Millville Area. The Engineering Department
Villages A-D** **has received several requests from GMB, LLC on behalf of their client, ASF
Expansion** **MBTS, LLC, Inc. the owners/developers of a project to be known as
of Sanitary** **Millville by the Sea.**
Sewer

**This request includes parcels 134-15.00-91.01, 134-15.00-16.00, 134-15.00-
19.00 and 134-15.00-18.00. These four parcels will make up Villages A thru
D and are proposed at 601 EDUs.**

**The project will be responsible for System Connection Charges of \$6,600.00
per EDU based on current rates.**

**Mr. Ashman requested permission to prepare and post notices for a Public
Hearing on the annexation of the area.**

M 022 22
Millville by
the Seas
Villages A-D
Expansion

A motion was made by Mr. Rieley, seconded by Mr. Hudson made a motion to authorize the Sussex County Engineering Department to prepare and post notices for the Millville by the Sea, Villages A-D expansion of the Sussex County Unified Sanitary Sewer District to include parcels 134-15.00-91.01, 134-15.00-16.00, 134-15.00-19.00 and 134-15.00-18.00 as presented.

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

Grant
Requests

Mrs. Jennings presented grant requests for the Council's consideration.

A Motion was made by Mr. Schaeffer, seconded by Mrs. Green, to give \$5,000.00 (\$3,000.00 from Mr. Schaeffer's Councilmanic Grant Account, \$500.00 from Mrs. Green's Councilmanic Grant Account, \$500.00 from Mr. Rieley's Councilmanic Grant Account, \$500.00 from Mr. Vincent's Councilmanic Grant Account and \$500.00 from Mr. Hudson's Councilmanic Grant Account) to William T. Spooner American Legion Post 17 for kitchen range replacement.

M 023 22
American
Legion Post
19 Grant
Request

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

M 024 22
Seaford
Tomorrow
Grant
Request

A Motion was made by Mr. Rieley, seconded by Mr. Hudson, to give \$2,000.00 from Mr. Vincent's Councilmanic Grant Account to Seaford Tomorrow for community event expenses.

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

M 025 22
Clothing
Our Kids
Grant
Request

A Motion was made by Mr. Rieley, seconded by Mr. Hudson, to give \$5,000.00 (\$2,500 from Mr. Rieley's Councilmanic Grant Account, \$500.00 from Mr. Vincent's Councilmanic Grant Account, \$2,000.00 from the County-wide youth account) to Clothing Our Kids for operating expenses.

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea

**Introduction
of Proposed
Ordinances**

Mr. Schaeffer introduced the Proposed Ordinance entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN A MR MEDIUM DENSITY RESIDENTIAL DISTRICT FOR MULTI-FAMILY DWELLINGS (42 UNITS) TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN GEORGETOWN HUNDRED, SUSSEX COUNTY, CONTAINING 9.72 ACRES, MORE OR LESS”.

Mr. Rieley introduced the Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AG-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A C-2 MEDIUM COMMERCIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN GUMBORO HUNDRED, SUSSEX COUNTY, CONTAINING 10.546 ACRES, MORE OR LESS”.

Mr. Rieley introduced the Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM A HR-1/RPC HIGH DENSITY RESIDENTIAL DISTRICT – RESIDENTIAL PLANNED COMMUNITY TO AMEND CONDITIONS OF APPROVAL OF CHANGE OF ZONE NO. 1858 (ORDINANCE NO. 2621) RELATING TO THE WORKFORCE HOUSING REQUIREMENTS, INTERNAL ROAD STANDARDS AND AMENITIES DEADLINES FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN BALTIMORE HUNDRED, SUSSEX COUNTY, CONTAINING 14.8455 ACRES, MORE OR LESS”.

The Proposed Ordinances will be advertised for Public Hearing.

**Council
Members’
Comments**

There were none.

**M 026 22
Adjourn**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to adjourn at 4:08 p.m.

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea;
Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

Respectfully submitted,

**Tracy N. Torbert
Clerk of the Council**

{An audio recording of this meeting is available on the County's website.}

