

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, MAY 24, 2022

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, May 24, 2022, at 10:00 a.m., in Council Chambers, with the following present:

Michael H. Vincent	President
Douglas B. Hudson	Vice President
Cynthia C. Green	Councilwoman
John L. Rieley	Councilman
Mark G. Schaeffer	Councilman
Todd F. Lawson	County Administrator
Gina A. Jennings	Finance Director
J. Everett Moore, Jr.	County Attorney
Vince 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 243 22
Approve
Agenda**

A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer, 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**

Minutes

The minutes of the May 17, 2022 meeting were approved by consensus.

**Corres-
pondence**

There was no correspondence.

There were no public comments.

**Public
Comment**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley to approve the following item under the Consent Agenda:

**M 244 22
Approve
Consent
Agenda**

**Use of Existing Sewer Infrastructure Agreement, IUA 1131
Seychelles, Ocean View Area**

Motion Adopted: 5 Yeas

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

**FY 2023
Budget
Presentation**

Mr. Lawson and Mrs. Jennings presented the proposed \$294.1 million budget for Fiscal Year 2023.

Mr. Lawson noted that the economic constraints including rising inflation and supply chain limitations are having an affect on the County. Yet, local activity including the residential building market and the demand for County services remains at an all-time high. As a result of these and other factors, the development of the FY23 budget was one of the most difficult in recent years. He added that while the real estate market remains very healthy, the County is starting to see the building related activities taper slightly. In FY21, the County experienced record-breaking numbers for building permits and has now seen a decrease in activity in FY22 as it ends. The County is projected to process 8% fewer permits in FY23 as compared to FY22. However, the base line for the building market continues to outpace by 18% from the last peak which was in 2006. So, while the year-to-year activity is trending down, the market baseline remains in an overall strong position. Mr. Lawson reported that the proposed FY23 budget is \$294.1 million which represents an overall increase of \$16.1 million. The increase is being driven by inflation with cost drivers being fuel, insurance, equipment, utilities, and supplies. As a result of these monumental increases, the decision had to be made to exclude new incentives and limit purchases to constrain the County's already expanding budget. The County's charges for services were reviewed and any unnecessary spending was trimmed. These efforts allow the County to continue to provide the services its residents and visitors come to expect while not passing onto the taxpayers the additional cost of general operations.

Mr. Lawson noted that the County receives a bulk of its revenue each year from both property taxes and Realty Transfer Taxes known as RTT; with RTT being the largest revenue resource. In recent years, the use of RTT funding has grown to the point that RTT previously accounted for under 25% of the County's revenue; this year, it is approaching 40%. Mr. Lawson stated this is a trend that the County needs to address while looking to the future. Mr. Lawson added that relying on RTT for operations presents a risk due to the nature of the funding. In this year's budget, RTT is \$7.9 million beyond FY22's original budget and is approximately 60% of what was collected in FY21. While a trend shows that the FY23 amount is a short-term attainable level, it remains at a level that is above of what was actually collected only 6 years ago. Although RTT is the single greatest source of revenue, it is limited to the County's most critical services including paramedics, fire and ambulance companies, police, 9-1-1 dispatchers, economic development, assessment, and public works. Thus, we continue to keep pace with the population and demand for our critical services through the use of RTT. However, should RTT drop below anticipated levels, it is likely at some point in the future the County will need to seek additional revenue from the taxpayers. It is important to note that most of the revenue could be affected by economic factors out of our control. The pandemic, supply chain interruptions, national labor shortages and global inflation are prime examples.

**FY 2023
Budget
Presentation
(continued)**

Mr. Lawson highlighted some of the County’s successes of the current fiscal year: reinstated the paramedic student program at DelTech; completed the first full year of the call-taking model at the 9-1-1 Center, which required processing 124,792 9-1-1 calls; assisted more than 245 households with housing repairs; organized successful referendums establishing Pintail Pointe and North Georgetown sewer areas; distributed 1,690 COVID-19 home testing kits; closed ExciteSussex Loans in the amount of \$1.1 million – retaining 144 jobs to date; continued to fund the Western Sussex Business Park underway; phase II of the Delaware Coastal Business Park is underway; finalized the lease on a 7-acre lot at the Delaware Coastal Business Park, bring the number of tenants to four; implanted a new tracing process for the reopened civil ticketing complaints; partnered with Delaware Division of Libraries to circulate MiFi devices and Chromebooks allowing students and employees that need computer access to succeed; implanted the County’s first Transportation Improvement District generating over \$3.9 million in written agreements; invented a permit dashboard with DelDOT to track applications and streamline communication; recorded a total of 80,579 documents, highest year on record; turnaround time for electronic filings averaged 12 minutes or less; completed 23 Existing Wastewater Use Agreements totaling \$1.5 million and implanted a new “open checkbook” software for the public to see real-time expense reporting. Mr. Lawson noted that the complete list of successes are included in the budget presentation and can be viewed on the County’s website.

Mr. Lawson discussed various one-year activity showing years 2020, 2021 and 2022 projected activity. The activities discussed included constable complaints tracked, building code inspections, bills issued annually, deed documents recorded, register of will revenue, water and sewer EDUs, Miss Utility tickets, utility inspections and sewer annexations completed.

Mr. Lawson showed a graph representing 20 years of activity for building, dwelling and residential permits. Mr. Lawson pointed out that a tapering off is projected for these types of permits.

Mrs. Jennings noted that as a government entity, the County is not protected from inflation costs which is seen throughout this budget.

The budget summary is as follows:

**FY 2023
Budget
Presentation
(continued)**

Fund	2022 Original Budget	2022 Revised Budget	2023 Proposed Budget	Difference from Original
General Fund	\$77,719,321	\$89,935,321	\$85,635,830	\$7,916,509
Capital Projects – GF	\$25,750,000	\$31,306,000	\$28,370,000	\$2,620,000
Water Fund	\$1,750,817	\$1,750,817	\$2,006,649	\$255,832
Sewer Fund	\$45,777,826	\$45,777,826	\$51,313,948	\$5,536,122
Capital Projects – WS	\$72,250,000	\$72,250,000	\$72,200,000	(\$50,000)
Pension	\$9,266,448	\$9,266,448	\$9,281,168	\$14,720
American Rescue Plan	\$45,495,460	\$45,495,460	\$45,340,373	\$(155,087)
Total	\$278,009,872	\$295,781,872	\$294,147,968	\$16,138,096

Mrs. Jennings presented revenue highlights of the FY23 budget:

- **No increase in taxes; \$32.4 million in reserves are being used in the General Fund and Capital Budgets; \$30.4 million is RTT reserves**
- **Tax revenue is up \$602,000, or 4.0%**
- **Building related revenues are up to \$2.5 million, or 21%**
- **Realty Transfer Tax Revenue is up to \$7.9 million, or 31.7% compared to original budget**
- **Change in library fees, planning and zoning charges, EMS special event fee and the bulk water rate**
- **\$35 annual increase in water rates (\$15 of Rehoboth water and \$20 for other operating cost)**
- **\$24 annual increase in sewer rates**
- **4 sewer areas will see a decrease in assessment rates**

Mrs. Jennings shared the expense highlights of the FY23 budget:

- **Very few operational initiatives are proposed due to the increase in cost for daily operations**
- **Additional Trooper through a MOU with the State of Delaware**
- **EOC improvement**
- **Paramedic equipment replacements**
- **I.T. equipment purchase**
- **Increased public safety support (new employees and additional fire funding)**

The cost drivers in the FY23 budget include:

- **Employment costs**
- **Repairs and maintenance contracts**
- **Reassessment project**
- **Insurance (liability, cyber, vehicle, workers' comp., etc.)**
- **Utilities (including fuel)**

Mrs. Jennings noted that most of these items have to do with public safety and the cost drivers have to do with inflation.

Mrs. Jennings reported that building related revenue has seen an increase.

**FY 2023
Budget
Presentation
(continued)**

For RTT, there is \$32.8 million included in the FY23 budget. Mrs. Jennings shared pie charts showing how much the budget is relying on RTT funding. In the original budget for FY22, 32% of RTT funding was used to balance the budget; in the amended FY22 budget, 41% of RTT funding was used. In the proposed FY23 budget, 38% RTT funding is being used to balance the budget.

Mrs. Jennings shared the RTT expenses for the FY23 proposed budget. In the FY21 budget, RTT was used 100% for public safety. In the FY22 budget, 94% was used for public safety, 5% for economic development and 1% for public works. In the proposed FY23 budget, RTT expenses are budgeted for 86% public safety, 10% assessment, 3% economic development and 1% public works.

Mrs. Jennings then discussed restrictive reserves. She noted that in 2018, the savings were starting to be spent. In FY23, it is planned to use \$917,000 of reserves.

Mrs. Jennings reported that it is being proposed to increase all late fees for overdue materials for libraries to \$0.25. Currently, books are \$0.10 and DVD's are \$1.00. This would maintain uniformity and standardization across all libraries in Sussex County. The independent libraries and their Board of Trustees have voted unanimously for this change in fee structure.

Another proposal is to increase the special event fee for EMS from \$60 to \$75 and EOC from \$40 to \$50 with contracts that are entered into after July 1, 2022. Mrs. Jennings noted that this fee has not change since 2018 and the cost to send a paramedic using OT and our vehicle is no longer being covered by the current charges.

The Planning and Zoning Department is also proposing to increase or add charges for services. The increases include conditional use, change of zone and board of adjustment applications. Other charges such as minor subdivisions code changes are adjusted as well. Mrs. Jennings explained that the fees do not adequately cover the cost of the requested services. A summary of the proposed changes are as follows:

Description	Current Charge	New Charge
Minor subdivision (1 – 5)	\$0	\$0 - \$200 plus \$20/lot
Lot adjustment/consolidation	\$0	\$150
Variance application	\$400	\$500 - \$800
Amend Comp Plan/Zoning Ordinance	\$0	\$1,000
Conditional Use	\$500	\$500 - \$1,000 plus \$50/dwelling unit
Major Subdivision Application	\$500 plus \$10/lot	\$1,000 plus \$50/dwelling unit
Commercial Site Plan Review (by right applications within an approved zoning district)	\$0	\$100/1,000 SF capped at \$5,000

**FY 2023
Budget
Presentation
(continued)**

Mrs. Jennings reported the larger general fund expenditures by function: public safety (31.3%), grant-in-aid (25.8%), general government (23.1%), library (4.2%), planning and zoning (3.9%), community development (3.5%), constitutional offices (3.2%), engineering (2.6%) and economic development (2.4%).

Mrs. Jennings noted the following budgeted expenditures: employment costs (49.7%), grant-in-aid (25.8%), contractual services/utilities (11.2%), programs and projects (4.6%), supplies/fuel (2.9%), machinery and equipment (2.3%), professional services (2.1%), other financing uses (0.9%) and training and travel (0.5%).

Mrs. Jennings shared that there are 16 new positions included in this budget. The majority of the positions (14) have to do with public safety. In this budget, there are 4 additional dispatchers and 4 additional paramedics. Also included is starting back up the Del Tech program with 6 paramedic students. Additionally, there are positions in engineering, human resources, marriage bureau and community development. Mrs. Jennings noted that some of these positions are being funded with ARPA funds which are temporary funds. If it is desired to keep them once those funds run out, RTT funds can then be used. There is also a part-time position being added in Economic Development to help with the kitchen incubator. Mrs. Jennings showed a chart displaying staff from 2009 until now. She noted that the increase of staff members mostly has to do with public safety.

Mrs. Jennings discussed grant-in-aid: public safety (\$10.2 million), economic development (\$3.5 million), libraries (\$2.8 million), community assistance (\$1.7 million), open space (\$1.4 million) and accommodation tax eligible expense (\$2.0 million).

Mrs. Jennings reviewed public safety; there is an increase of about \$1.2 million over the FY22 budget. As previously mentioned, the State Police is going up to include an additional trooper to make it 23 funded by Sussex County. Local Law Enforcement is staying the same and Fire/BLS has increased. The increase is based on a request from SCVFA for \$36,400 per company to help with EMT wages and \$25,500 for CAD equipment for their special operations vehicle. Mrs. Jennings noted that funding for public safety comes from RTT and the pass-through building permit fire service fee.

Mrs. Jennings reviewed the sewer funds; it has increased year over year. This year, the sewer budget is seeing a \$6 million increase, mostly due to inflation. Mrs. Jennings shared how the sewer fund is supporting the increase. She further explained that it is being done by multiple ways. First, some requested purchases were forgone, an increase is being requested in the service charge of \$24/year (8.1% increase), as expansion occurs, new services are coming on and increasing the use of connection fees. The current rate is \$296; the proposed rate is \$320.

**FY 2023
Budget
Presentation
(continued)**

Mrs. Jennings reviewed the assessment rates; they are decreasing in some areas. She further explained that as we continue to grow our system, this debt in each area will be brought down.

Mrs. Jennings reviewed the water funds; the major increases are repairs and maintenance and the Ellendale Artesian contract to repair the Dewey Beach water tower. Mrs. Jennings explained how the water fund is supporting the increase. These include: using some savings, adding an EDU for every irrigation system (24), 4 new connections plus Ellendale's revenue, increase the cost per EDU by \$35 annually, fire service fee created last year, tower rents increased and penalty and interest income. The current rate is \$342; the proposed rate is \$377.

Mrs. Jennings reviewed GF capital revenue sources: reserves (\$26,292,500), intergovernmental grants (\$2,027,500) and interest (\$50,000).

Mrs. Jennings reviewed GF capital expenditures. She noted that due to property acquisitions, Administration costs are higher than airport and business. Typically, airport and business are the highest cost. She added that when the budget was amended last year for open space to preserve land, there is about \$3 million left over. In addition, \$3 million was added for this year, therefore, there is a total of \$6 million for open space for purchases made by the County.

Mrs. Jennings reviewed sewer and water capital expenditures; many are ongoing projects.

The budget book and presentation can be found on the County's website at www.sussexcountyde.gov. Budget comments can be sent to budget@sussexcountyde.gov.

Mr. Rieley introduced the Proposed Ordinance entitled "AN ORDINANCE ESTABLISHING THE ANNUAL OPERATING BUDGET FOR FISCAL YEAR 2023"

Mr. Rieley introduced the Proposed Ordinance entitled "AN ORDINANCE TO AMEND CHAPTER 62, ARTICLE III, §§ 62-7 AND 62-8B AND CHAPTER 99 §§ 99-14 AND 99-39 OF THE CODE OF SUSSEX COUNTY RELATING TO THE ESTABLISHMENT OF FEES IN THE ANNUAL BUDGET"

Mr. Rieley introduced the Proposed Ordinance entitled "AN ORDINANCE ESTABLISHING ANNUAL SERVICE CHARGES, ANNUAL ASSESSMENT RATES FOR COLLECTION AND TRANSMISSION AND/OR TREATMENT AND CONNECTION CHARGES FOR ALL SUSSEX COUNTY WATER AND SANITARY SEWER DISTRICTS"

The Proposed Ordinances will be advertised for a Public Hearings, which will be held on June 21, 2022.

Board and Commission Appointments

Mr. Lawson presented various board and commission appointments for Council's consideration. The Aging Committee has two appointments; one by Mr. Hudson – Linda Forte which is a reappointment for a term to conclude May 2023 and one by Mr. Schaeffer – Scott Phillips who is returning to the committee for a term to conclude May 2023. For the Board of Adjustments, Mr. Vincent has a reappointment of Kevin Carson for a term to conclude June 2025, Mr. Schaeffer has a reappointment of Jeffrey Chorman for a term to conclude June 2025 and Mr. Rieley's has a reappointment of John Hastings for a term to conclude of June 2025. The Farmland Preservation Advisory Board has one appointment from Mrs. Green of Jennifer Scott for a term to conclude May 2026. In addition, Mr. Lawson explained that the Farmland Preservation Advisory Board requires one member from the Council to serve as Chairman; it is his understanding that the Council would like to appoint Mr. Rieley to that role. For the Library Advisory Board, Mr. Schaeffer has an appointment of Candace Collette Vessella for a term to conclude June 2026 and Mrs. Green's has an appointment of Dorothy Rowan for a term to conclude June 2026. For the Planning and Zoning Commission, Mr. Vincent has a reappointment of Bob Wheatley for a term to conclude June 2025.

M 245 22 Approval of Various Board and Commission Appointments

A Motion was made by Mr. Hudson, seconded by Mr. Rieley that be is moved that Sussex County Council approves the various appointments to the select boards and commissions 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

Administrator's Report

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

1. Projects Receiving Substantial Completion

Per the attached Engineering Department Fact Sheets, Coastal Station – Phase 2 (Construction Record) and Sycamore Chase (FKA Willow Run) – Phase 1.1 (Construction Record) received Substantial Completion effective May 16th and May 19th, respectively.

2. Delaware State Police Activity Report

The Delaware State Police year-to-date activity report for April 2022 is attached listing the number of violent crime and property

Administrator's Report (continued)

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 191 troopers assigned to Sussex County for the month of April.

3. Holiday and Council Meeting Schedule

A reminder that County offices will be closed on Monday, May 30th, to observe the Memorial Day holiday. In addition, Council will not meet on Tuesday, May 31st. The next regularly scheduled Council meeting will be held on Tuesday, June 7th at 10:00 a.m.

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

**LBPW
WWTF
Planning
Study**

Hans Medlarz, County Engineer presented a request for co-funding for the Lewes Board of Public Works Wastewater Facility long range planning study for Council's consideration. The request is to fund 50% of the long-term planning study.

**M 246 22
Approve
LBPW
WWTF
Planning
Study**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley that be it moved, based upon the recommendation of the Sussex County Engineering Department, that County Council approve to fund 50% of a long-range study for the Lewes Board of Public Works, in the amount of \$124,250.00, contingent upon the Lewes Board of Public Works approval utilizing allocated ARPA.

Motion Adopted: 5 Yeas

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

**FY 2022
General
Labor &
Equipment**

Hans Medlarz, County Engineer presented a balancing change order for FY 2022 General Labor and Equipment Contract, Project 22-01 for Council's consideration. Mr. Medlarz explained that the contract was broken out into two bid packages; bid package A included the general responses and bid package B included the specialized drilling, jacking and boring, etc. Therefore, there are two contract extensions based on performance.

**M 247 22
Approve
JJID/
Contract
Extension**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley that be it moved, based upon the recommendation of the Sussex County Engineering Department that Change Order No. 2 of JJID's bid package A, for contract #22-01, FY22 general labor and equipment, be approved, which increases the contract amount by \$650,000 for a new total of \$3,400,000 and to approve the first one-year contract extension in the amount of up to \$2,000,000, at the unit prices previously bid.

Motion Adopted: 5 Yeas

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

**M 248 22
G&L/
Contract
Extension**

A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer that be it moved, based upon the recommendation of the Sussex County Engineering Department that Change Order No. 2 of George & Lynch's bid package A, for contract #22-01, FY22 general labor and equipment, be approved, which increases the contract amount by \$600,000 for a new total of \$4,600,000 and to approve the first, one-year contract extension in the amount of up to \$2,500,000 at the unit prices previously bid.

Motion Adopted: 5 Yeas

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

**M 249 22
Approve
G&L Bid
Package B**

A Motion was made by Mr. Rieley, seconded by Mr. Hudson that be it moved, based upon the recommendation of the Sussex County Engineering Department that Council approve George & Lynch's Bid Package B, for contract #22-01, FY22 General Labor & Equipment contract, for the first, one-year contract extension in the amount of up to \$1,500,000.00, at the unit prices previously bid.

Motion Adopted: 5 Yeas

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

**FY21 Ocean
Outfall
Inspection**

Mark Parker, Assistant County Engineer presented repair and inspection actions for the FY21 Ocean Outfall Inspection, Project G21-06 for Council's consideration. Mr. Parker explained that there are some additional repairs needed to the exposed portion of the pipeline at the ocean floor as well some additional observations in the surf zone.

**M 250 22
Approve
FY21 Ocean
Outfall**

A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer, that be it moved upon the recommendation of the Sussex County Engineering Department, that the proposal from Specialty Underwater Services for repair and addition inspections services related to the Ocean Outfall System in the amount of \$64,250 be approved.

Motion Adopted: 5 Yeas

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

**Mr. Hudson, Yea; Mr. Rieley, Yea;
Mr. Vincent, Yea**

**GMB/
Design &
Bid
Phase/Oak
Acres**

John Ashman, Director of Utility Planning and Design Review requested permission to authorize GMB to design the gravity collection system for Oak Acres to connect the pumpstation. The infrastructure will serve 55 parcels and will be an hourly contract.

**M 251 22
Approve
Design &
Bid
Phase/Oak
Acres**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley that be it moved upon the recommendation of the Sussex County Engineering Department, that the engineering services agreement with George, Miles & Buhr be approved in the amount not to exceed \$68,940 for the design, permitting and bidding phases of Sussex County project S22-24, Oak Acres.

Motion Adopted: 5 Yeas

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

**GMB/
Design &
Bid Phase/
Pintail
Pointe**

John Ashman, Director of Utility Planning and Design Review requested permission to authorize GMB to design the new pumpstation and force main for Pintail Pointe to connect to the existing regional force main. The infrastructure will serve 39 parcels and will be an hourly contract.

**M 252 22
Approve
Design &
Bid Phase/
Pintail
Pointe**

A Motion was made by Mr. Rieley, seconded by Mr. Hudson that be it moved upon the recommendation of the Sussex County Engineering Department, that the engineering services agreement with George, Miles & Buhr be approved in the amount not to exceed \$81,450 for the design, permitting and bidding phases of Sussex County project S21-16, Pintail Pointe.

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/
CZ1967**

Mr. Whitehouse presented a Proposed Ordinance entitled "AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDNETIAL DISTRICT TO A MR MEDIUM RESIDENTIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 43.777 ACRES, MORE OR LESS" filed on behalf of Henlopen Properties, LLC. Mr. Whitehouse reminded Council that a public hearing was held before them on April 26, 2022. At the conclusion of that hearing, a motion was made to defer action on the application for a period of two weeks to May 6th to allow the

Lewes Board of Public Works and any other member of the public to submit their reports on the wellhead protection issue. Subject to that, the applicant would have an additional period of time until May 20, 2022 to submit any response to that document. Mr. Whitehouse confirmed that both of those documents were submitted in time as per the date specified in Council's motion and have been circulated in paperless packets.

**M 253 22
Close Public
Record/
CZ1967**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to close the record for a Proposed Ordinance entitled "AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A MR MEDIUM RESIDENTIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 43.777 ACRES, MORE OR LESS".

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/
CZ1968**

Mr. Whitehouse presented a Proposed Ordinance entitled "AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A C-2 MEDIUM COMMERCIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 3.041 ACRES, MORE OR LESS" filed on behalf of Henlopen Properties, LLC. Mr. Whitehouse reminded Council that a public hearing was held before them on April 26, 2022. At the conclusion of that hearing, a motion was made to defer action on the application for a period of two weeks to May 6th to allow the Lewes Board of Public Works and any other member of the public to submit their reports on the wellhead protection issue. Subject to that, the applicant would have an additional period of time until May 20, 2022 to submit any response to that document. Mr. Whitehouse confirmed that both of those documents were submitted in time as per the date specified in Council's motion and have been circulated in paperless packets.

**M 254 22
Close Public
Record/
CZ1968**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to close the record for a Proposed Ordinance entitled "AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A C-2 MEDIUM COMMERCIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 3.041 ACRES, MORE OR LESS".

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/
CU2334**

Mr. Whitehouse presented a Proposed Ordinance entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN A MR MEDIUM RESIDENTIAL DISTRICT FOR MULTI-FAMILY (267 UNITS) TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 43.777 ACRES, MORE OR LESS” filed on behalf of Henlopen Properties, LLC. Mr. Whitehouse reminded Council that a public hearing was held before them on April 26, 2022. At the conclusion of that hearing, a motion was made to defer action on the application for a period of two weeks to May 6th to allow the Lewes Board of Public Works and any other member of the public to submit their reports on the wellhead protection issue. Subject to that, the applicant would have an additional period of time until May 20, 2022 to submit any response to that document. Mr. Whitehouse confirmed that both of those documents were submitted in time as per the date specified in Council’s motion and have been circulated in paperless packets.

**M 255 22
Close Public
Record/
CU2334**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to close the record for a Proposed Ordinance entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN A MR MEDIUM RESIDENTIAL DISTRICT FOR MULTI-FAMILY (267 UNITS) TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES & REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 43.777 ACRES, MORE OR LESS”.

Motion Adopted: 5 Yeas

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

Mrs. Jennings presented grant requests for Council’s consideration.

**M 256 22
Mid-
Atlantic
Symphony**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$1,000 (\$500 from Mr. Schaeffer’s Councilmanic Grant Account and \$500 from Mr. Hudson’s Councilmanic Grant Account) to the Mid-Atlantic Symphony Orchestra Society, Inc. for their program expansion.

Motion Adopted: 5 Yeas

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

**M 257 22
Nanticoke**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$2,000 (\$2,000 from Mr. Vincent’s Councilmanic account) to Nanticoke

River Arts Council

River Arts Council for general operations.

Motion Adopted: 5 Yeas

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

**M 258 22
Lewes Fire
Department,
Inc.**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to give \$2,000 (\$1,000 from Mr. Schaeffer's Councilmanic Grant Account, \$500 from Mr. Hudson and Mr. Rieley's Councilmanic Grant Accounts) to Lewes Fire Department, Inc. for sUAS (Drone) program aid.

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**

Mrs. Green introduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A SOLAR FARM TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN CEDAR CREEK HUNDRED, SUSSEX COUNTY, CONTAINING 39.33 ACRES, MORE OR LESS"

Mr. Vincent introduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A SOLAR FARM TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN LITTLE CREEK HUNDRED, SUSSEX COUNTY, CONTAINING 50.69 ACRES, MORE OR LESS"

**Council
Member
Comments'**

The Proposed Ordinances will be advertised for Public Hearings.

There were no Council Member comments.

**M 259 22
Go Into
Executive
Session**

At 11:17 a.m., a Motion was made by Mr. Hudson, seconded by Mr. Schaeffer, to recess the Regular Session and go into Executive Session for the purpose of discussing matters relating to pending/potential litigation, and land 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 Session **At 11:30 a.m., an Executive session of the Sussex County Council was held in the Basement Caucus Room to discuss matters relating to potential/pending litigation, and land acquisition. The Executive Session concluded at 11:57 a.m.**

M 260 22 Reconvene **At 12:01 p.m., a Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to come out of Executive Session and into Regular Session.**

Motion Adopted: 4 Yeas, 1 Absent

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

M 261 22 E/S Action/Parcels 2022-H, I, J **A Motion was made Mr. Schaeffer, seconded by Mr. Hudson to authorize the County Administrator to negotiate, enter into a contract and proceed to closing on parcels identified as 2022-H, 2022-I and 2022-J.**

Motion Adopted: 4 Yeas, 1 Absent

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

M 262 22 Recess **A Motion was made by Mr. Hudson, seconded by Mrs. Green to recess until 1:30 p.m.**

Motion Adopted: 4 Yeas, 1 Absent

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

M 263 22 Reconvene **At 1:30 p.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson to come out of recess back into 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**

Appeal of Denial of Subdivision Application No. 2021-06/ Coral Lakes **The Council considered an Appeal on the Sussex County Planning and Zoning Commission's decision to deny Subdivision Application No. 2021-06 (Coral Lakes, F.K.A. Coral Crossing).**

Mr. Vincent introduced The Honorable Charles H. Toliver, IV, Superior Court Judge Retired, who presided over the appeal hearing and ruled on matters of procedure.

**Appeal of
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(continued)**

Judge Toliver reported that today hearing is an appeal by Schell Brothers, LLC represented by Ms. Mowery, Mr. Moyer and Mr. Micha from Richards, Layton & Finger. The respondent is the Sussex County Planning and Zoning Commission represented by Mr. Robertson from Parkowski, Guerke and Swayze.

Judge Toliver reviewed the basic matters of procedure for the appeal hearing. Judge Toliver reported that he met with Counsels on or about May 5th to outline the procedures. In addition, both sides submitted written submissions and the Planning and Zoning Counsel had the first opportunity to respond to what had already been filed on May 13th. Schell Brothers then replied on May 19th. He advised that subdivision appeals are totally based on the record and that no new evidence would be allowed. The record reflects that the last submission to start the process was on January 18, 2022. There was a hearing on January 27, 2022, at which time a decision was deferred. A further hearing was conducted on February 10, 2022, where the matter was presented again. On March 7, 2022, there was a request to grant application due to the failure to comply with the 45-day rule. On March 10, 2022, the denial of the application to approve. The appeal was completed on April 4, 2022, within the 30-day period of time. The standard is clear, was Commission's decision to resolve the orderly and logical review of the evidence and did it involve the proper interpretation and application of the law and/or chapter of the law involved. Judge Toliver stated that he considers there are three errors of law. One being there was no automatic approval and the 45-day period had expired, second being that there is a failure to act upon the motion to grant it following the request and the third being a failure to state a basis for the decision; there was no basis for the denial due to all of the criteria having been met according to the appellants.

Kate Mowery, Attorney at Richards, Layton & Finger, P.A. was in attendance to present the Appeal on behalf of the Appellant, Schell Brothers, LLC. Also in attendance with her was Jeff Moyer, Phil Micha from Richards, Layton & Finger as well as Jon Horner, Counsel from Schell Brothers. In addition, engineers from GMB were also present who have been working on the project.

Ms. Mowery stated that the question here is whether the Commission's March 10, 2022, denial of Schell's preliminary subdivision plat was the result of an orderly and logical review of the evidence and involved the proper interpretation and application of the law. Ms. Mowery added that on both points, the Commission fell far short in this circumstance. The Commission did not perform an orderly and logical review of the evidence and did not apply the proper interpretation and application of the law. Ms. Mowery noted that the Council members are sitting in a different role than they normally do. In this situation, the members are here to apply the law to the facts and review the Commission's decision to determine if it applies to County Code and State Statue.

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Ms. Mowery stated that in the determination today, the Council has full discretion to reverse the decision of the Planning and Zoning Commission which is what she is advocating. Ms. Mowery referenced Subdivision Code 99-39(B)(2)(b) which states “the Council may reverse a decision upon: a finding that the Commission made an error in its interpretation of the applicable sections of this Chapter; or the Commission’s findings and conclusions were not the results of an orderly and logical review of the evidence and the applicable provisions of this chapter”.

Ms. Mowery discussed the timeline of the Application. On November 25, 2020, was the initial submission of Schell Brothers preliminary plat application. On January 18, 2022, Schell provided application materials in support of approval of its Plat to the Commission pursuant to Rule 15.3.1 of the Rules of the Planning and Zoning Commission [10 days prior to the hearing]. January 27, 2022, a public hearing was held on the preliminary plat application and Commission deferred a decision. February 10, 2022, the Commission deferred assessment and no assessment was scheduled for February 17, 2022, which was the next scheduled meeting of the Commission. On March 7, 2022 [48 days from 1/18 submission] Schell wrote to Commission pursuant to 9 Del. C 6811 requesting that the Commission deem the Plan approved because it had been over 45 days since submission. On March 10, 2022, Commissioner Stevenson moved for approval of the plat, explained how the evidence in the record supported the motion, the motion was seconded and then denied in a vote 4-1 with no findings or conclusions provided in support of the denial. On April 4, 2022, Schell Brothers appealed to the Council with transcript. June 3, 2022 is the deadline for a decision from Council pursuant to Subdivision Code 99-39(B)(2)(c) [60 days from date of transcript].

Ms. Mowery mentioned that the March 10th was a shock to many involved; what appeared to happen was that the Commission yielded to the opinions of a small but vocal group of individuals that had opposed Schell’s project. She added that there was no basis provided under the law for denial. Ms. Mowery noted that almost two-thirds of the opposition letters submitted to the Commission in opposition were from just three communities adjacent to Coral Lakes. The opposition letters that were received did not provide a reason for denial. All of the requirements of the subdivision and zoning codes were met and there is not a disagreement on that in the Commission’s response. Ms. Mowery noted that political whims and personal opinions have no place in the Commission’s subdivision considerations.

During the March 10th meeting, Mr. Robertson correctly explained that there are guardrails to protect applicants and ensure a fair process in the subdivision process. One of those guardrails is 9 Del. C. § 6811 which has been referred to as of the 45-day requirement. This code section states, “the Commission shall approve or disapprove a plat within 45 days after the submission thereof; otherwise, such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the Commission

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upon demand”. Ms. Mowery noted that the importance of this is so that applications do not sit for a long period of time in limbo and ensure that all applicants receive a fair process.

Ms. Mowery stated that the Delaware Supreme Court has also spoken on other guardrails that define the Commission’s power and discretion to approve or disapprove a subdivision plat. Ms. Mowery referenced the *Tony Ashburn vs. Kent County Regional Planning Commission* case. In this case, the Delaware Supreme Court explained that the Commission acts in a quasi-judicial capacity in terms of subdivision applications and does not have unfettered discretion to deny and otherwise legally conforming subdivision application. In addition, the Commission must review the application and if within compliance with the codes, approve it. She added that it does have some discretion in taking in consideration different factors, but those would be considered in terms of conditions on the approval. If the code is not met, then it can be denied. In this situation, everything met the code and yet, the application was denied. The Delaware Superior Court gave reasons for these guardrails in the *Tony Ashburn vs. Kent County Regional Planning Commission* decision. Ms. Mowery read the following from the decision “When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and resident. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinance. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances”. Ms. Mowery stated that in this case, the Commission’s decision did just that; left Schell Brothers with a lot of uncertainties with respect if they could rely on their permitted uses conferred on their land. She added that this was after Schell had spent substantial time and resources on its application.

Ms. Mowery stated that the Commission is aware of these guardrails. In addition, during the March 10th meeting, Mr. Robertson correctly defined these guardrails on Schell’s application. During that meeting, Mr. Robertson stated “subdivisions are by Delaware Code and Delaware Law, the Delaware Supreme Court as a matter of fact, they are governed by the County subdivision and zoning code”. She added that if it is a permitted use and meets all of the requirements of the specific code, the zoning of the subdivision code is permitted. In addition, it is conditioned on certain aspects but that also has to be based upon the record. She added that Mr. Robertson added that a lot of people feel like it should be approved in this location, or it shouldn’t be approved because there is too much traffic, or it shouldn’t be approved because there are other subdivisions in the area, or they just don’t want it and believe the land should be left vacant. Ms. Mowery further explained that Mr. Robertson explained to the Commission

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that is not what the law says, he then went on to explain the Commission's guardrails and to reiterate that a decision cannot be based on opinions. Instead, the Commission must review the evidence in the record against the zoning and subdivision codes and if compliance, approve the application. Ms. Mowery noted that the Commission did not heed that advice and went through those guardrails and instead it appears they took their judicial caps off and put legislative caps on. Due to those reasons, it is grounds for a reversal today.

Ms. Mowery discussed what she believes to be three errors that were made by the Commission. The first argument is the Commission's failure to approve or disapprove Schell's preliminary plat within 45-days of its submission pursuant to 9 Del. § 6811 as an error of law and a failure to logically and orderly review the evidence. There was also an error in not deeming the plat approved when Schell demanded it be so after 45 days. Ms. Mowery further explained that Schell submitted their original application in November 2020 and the final materials and support were submitted on January 18, 2022. As of March 7, 2022, which was 48 days after the January submission, the Commission had not approved or disapproved the plat. So, Schell reached out to the Commission asking the plat to be deemed approved and the Commission did not do so. Ms. Mowery stated that was a clear violation of the DE Code as previously discussed. Schell's interpretation is based on the expressed language that submission of a plat is exactly that; the date the plat is submitted to the Commission which in their view is November 2020 and at the very latest, January 18, 2022. Ms. Mowery stated that the Commission's view is that they acted within the 45-day window because the submission does not occur until the close of the record after a public hearing and there were less than 45 days between the close of the record on January 27th and decision on March 10th. Ms. Mowery stated that the Commission's interpretation does not follow the expressed language of the code. Ms. Mowery stated that there is no support for that position. In addition, language is being added in to suggest that the Commission should approve or disapprove a plat within 45-days after the submission and public hearing thereof which is not in the statute, the Sussex County Code or the Commission's procedures. In fact, the sources that the Commission cites are in support of Schell's position. In the subdivision code, the procedures are laid out, where the submission is separate in part of the public hearing. In Section 99-8, the title states "Submission of the Preliminary Plat" which lays out the process for submitting your preliminary plat. In the next Section 99-9, the title is "Public Hearing on Preliminary Plat Approval or Disapproval". Ms. Mowery pointed out that it is another separate section on Public Hearing; there is nothing that suggests that one has to be completed in order for there to be a submission.

Ms. Mowery stated that there is good reason for this, the Commission's interpretation would basically allow it to hold open the record for as long as they wanted. In the Commission's response, it states that there may be questions or allow public comment, this means that the hearing could remain open as long as they wish; that would deny procedural due process

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to the applicants as previously discussed. The Commission also argued that it is not practical to have the submission of the plat application in November 2020 be the deadline to trigger the 45-day deadline rule because there is too much work to be done. Ms. Mowery stated that if the procedure that is required as part of the subdivision application takes longer than 45 days, then they need to be amended and are in violation of the Delaware Code as presented. For these reasons, it is apparent that the Commission erred in its application of the Delaware Code and interpreted the Subdivision Code in violation of the Delaware Code and did not proceed with an orderly or logical review of the evidence. Ms. Mowery stated that the remedy is approval by Council of Schell's plat application as the application was submitted to the Commission. For this violation, the 45-day requirement, the remedy is reversal; approval of the plat as submitted. Ms. Mowery explained that there is nothing else provided in this code provision for any other remedy other than being deemed approved as submitted. She added that remanding here does not make sense; it would further violate the 45-day requirement set by the Delaware Code and extend the time Schell's application is in limbo.

The second argument for Schell on the appeal is that all of the requirements were met of the Subdivision and Zoning Codes and the Commission did not approve the plat. This is a legal error under Supreme Court law and a failure to proceed with an orderly and logical review. As explained earlier, the Commission's power to review land use applications was delegated by the General Assembly but also has some guardrails. She added that the Commission did not stay in those guardrails. Ms. Mowery reviewed the "guardrails", per Commission counsel: Guardrails are set on the Commission's consideration of a subdivision. It cannot be "based on opinions. It has to be made based on the record and applying that record to the law." (pp.171-72). If the project meets all requirements of the zoning and subdivision codes then it is permitted. (p. 169)

As a result of this clear misapplication of the Sussex County Code and illogical review, the Council has the discretion per 99-39(B)(2)(b) to reverse the Commission's denial and approve Schell's application. Ms. Mowery stated that it should be approved as submitted since no reasons were given for denial. In addition, the motion itself presented by the Commission stated all of the reasons Schell met all of the requirements of the subdivision and zoning codes. For the denial, there were no reasons given to the extend the Council wishes to place conditions on the cluster subdivision, it is proposed that the Council include only those submitted by Schell in its Coral Lakes proposed conditions of approval submitted on January 18th. Ms. Mowery stated that remand is inappropriate because there is nothing to fix on remand. All of the evidence has been gathered, questions have been answered, opposition heard, and the record was closed. Therefore, to send it back down for another hearing is only prejudicial to Schell who has already put forward its entire presentation in support of its application.

The third argument in Schell's appeal is that the Commission provided no

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findings and conclusions for its denial of their preliminary plat rendering their decision illogical and not orderly. This is a violation of 9 Del. C. § 6811, Section 15.4 of the Commission’s Rules of Procedure and procedural due process. The Commission did not argue that it did provide any findings and conclusions in support or denial and the record provides reasons for approval including the Commission’s motion itself. The only remedy is reversal, the Commission had a complete record and a chance to issue its decision by applying the law to evidence which they failed to do properly. Ms. Mowery stated that Schell should not be punished for the Commission’s failure to follow the law.

Ms. Mowery provided reasons that reversal is required which were previously discussed. Here based on the record and the Commission’s action, it is a clear-cut situation where reversal is necessary to address the errors.

Mr. Rieley asked if Ms. Mowery was suggesting that if it was remanded back to the Planning and Zoning Commission, that there would be no possibility that they could deny the application. Ms. Mowery replied that she believes that it should not be remanded at all because the hearing was closed. In addition, the Commission stated that no additional questions were needed and a motion to approve the plat was made. Everything included in the record was in support of the plat application being approved and all of the subdivision and zoning ordinances were met.

Mr. Schaeffer asked what rule was not met when the Commission did not provide reasons for their vote. Ms. Mowery replied 9 Del. C. §6811, it says “the grounds of disapproval by any plat shall be stated upon the records of the Commission and a copy of such statement shall be furnished to applicant.” Mr. Schaeffer asked if the debate and decision prior to the vote considered a reason for denial or approval. Ms. Mowery replied no, that is prior to the actual disapproval itself.

Vince Robertson, attorney for the Sussex County Planning and Zoning Commission and Parkowski, Guerke and Swayze came forward to present on behalf of the Planning and Zoning Commission. Mr. Robertson stated that the 45-day requirement was the heart of this and how the County processes any subdivision application. Mr. Robertson added that it is the Commission’s position that they have been complaint with State Code in that regard. There was reference in Schell’s submission that there was a conflict with County Code, however, this is all driven by Title 9. Mr. Robertson explained that State Code Title 9 establishes both the trigger date and a great deal of the prehearing processes; Chapter 99 fills in the gaps in what is set out in Title 9. Mr. Robertson explained that Section 69-61B establishes the “TAC” (Technical Advisory Committee), it discusses sending out these subdivision applications to other state agencies for review. Title 9, Section 6962 talks about DelDOT and the interplay between Sussex County and DelDOT on a subdivision application. Mr. Robertson explained the substantial lift for the County, DelDOT, applicant and the engineers

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involved. He added that it often includes a TIS review letter that does not come back quickly due to a lot of technical work and negotiations that go into them. Mr. Robertson emphasized that you have to read Section 68-10 and 68-11 not by themselves but with the other provisions of the State Code.

Mr. Robertson pointed out that you must then have staff review; the argument is that if the plat is compliant, it must be approved. Mr. Robertson explained that you are not able to just take someone's word that it is complaint, there has to be a staff review that occurs to ensure that the plat submitted is complaint with the County's subdivision code. Then, there are public notices requirements that have to be met per Section 68-11. This requirement includes publishing in two newspapers in general circulation which takes about 3 to 4 weeks of lead time to make newspaper deadlines to hit the hearing dates. In addition, there are FOIA requirements that must be complied with in terms of agendas. Mr. Robertson referenced Title 9 Section 68-11 which states "no plat shall be acted on by the Commission without affording a hearing thereon as outlined in Section 68-12 of this title and notice of the time and place of which must be sent by registered mail, etc.". Despite what Schell has argued that the public hearing is not part of the submission, the language in Section 68-11 references that you have to have a public hearing. In that same section, it discusses the 45-days, therefore, when all of that is read together, the logical conclusion is that the 45-days starts after the closure of the public record on any application for a subdivision. Mr. Robertson stated that even if it was possible that all of that could occur within 45-days, last minute information and data would be dealt with and a meaningful hearing, deliberation and vote would be just about impossible.

For the 10-day rule if applied, it would shrink that timeline even further because then you would be down to essentially 35 days to gather all of your information and know what it is. In addition, the applicant would need to present a meaningful submission and public hearing to the Commission and be able to make a presentation that makes sense. In this case, this was not a 10-lot subdivision, it was a 315-lot subdivision. Mr. Robertson explained that it would be difficult to gather all of that data within 45-days, make a public hearing and have one shot at it because there would not be an opportunity to defer taking action to consider all of the information that was thrown at everyone in 45-days. Mr. Robertson stated that it does not make sense from a statute point of view or a commonsense point of view.

Mr. Robertson added in addition, there is a pipeline of applications going on that makes it even further impractical. Mr. Robertson stated that Schell suggested that the 10-day rule in the Planning and Zoning Commission's rules is the date of submission. Mr. Robertson replied that is not so, it is the closure of the public record and there is some language in that rule that supports that. The first point is that it states in the rule "it applies to information to be presented in support of an application". Mr. Robertson added that has to do what is going to be relied upon during that public hearing to include the notebook, power points, etc. so that the Commission

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has the information, and the public has the opportunity to review it. Mr. Robertson explained that the reason behind that is so that there is a good public discourse and that the Commission is not sandbagged with information at the last minute that nobody is aware of and not able to be prepared for. The second point under that rule states “whatever is provided must be given to the Commission secretary not later than 10 calendar days prior to the meeting of the Planning and Zoning Commission at which the application is to be presented and heard”. Mr. Robertson pointed out that this also means that this sets the last possible day for providing the information; it does not state the earliest possible day for providing that information. So, under Schell’s argument that the 10-day rule applies in the Planning and Zoning Commissions rules, if that is the case, anyone could submit documents 46-days prior to the hearing and then on the day prior to hearing, notify the Commission that the 45-days have expired so their submission must be approved without ever having a public hearing on the application. In addition, the applicant can gain the system by providing its information 46-days for example prior to the hearing and then claim that it’s application could be approved which does not make sense.

Mr. Robertson explained that this is the due process impact of what is being dealt with in this case. There is another element of due process that is important here and that is of the public. On these subdivisions, public hearings must be held to ensure that the law is complied with and participants in that public hearing process are members of the public. So, the 45-day requirement rule cannot be interpreted in a way to exclude the public from participating in the process.

Mr. Robertson added that if the 45-day rule requirement is used that Schell is arguing for, a due process violation would be received. This would occur potentially because not only not having a public hearing but that 45-days might run in the midst of the public hearing. A complete record is needed to be able to decide in favor of or against a subdivision application. Mr. Robertson noted that often times there is information missing from a subdivision application; the complete information is not received from DeIDOT or the information from DeIDOT is not understood because additional information is required. Due to timing or unclear information, there may be questions regarding septic feasibility or sewer capacity for a subdivision. In addition, there are questions that come out of the PLUS review process which occurs frequently. Mr. Robertson stated that if we were to stop this process because of some 45-day date circled on a calendar without holding the record open to get answers to these questions, a disservice to the public, ourselves and the applicant have been completed. He added that it would almost force the Commission to act on something with an incomplete record which may not shine a favorable light on an applicant. Therefore, it is in everyone’s best interest to have a complete record that can possibility be made with regard to these hearings.

A discussion was held about the interpretation of the 45-day rule.

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Mr. Robertson stated that there is only one logical conclusion that complies with due process, the provisions of all of Title 9 not just 68-11, although 68-11 does require a public hearing; that the closure of the public hearing and the closure of the record is the date of submission which triggers the start of that 45-day period. In addition, he believes that there is no dispute that the Commission acted within 45-days of the close of the public record. It is the Commission's opinion that when the record closed, that 45-day clock started to run and they acted on the 42nd day, therefore, it was compliant.

Mr. Robertson spoke about the matter of remanding this matter back to the Commission violating the 45-day rule because it extends it even further. He stated that he disagrees with that because Section 68-11 talks about approval or disapproval occurring within 45-days. He added that the disapproval occurred within the 45-days; it happened on the 42nd day which ends the calculation of 45-days.

Mr. Robertson stated that the vote itself did follow an extensive public hearing with information presented by all sides. The Commissioners were engaged in that process throughout the questions and discussions that were raised by them. The motion was read, and Mr. Robertson gave his explanation of the law which he stands by; the vote was taken and was voted down 4-1. However, it is the Commission's opinion that the vote technically complied with the requirements in that it failed to receive those 3 votes. Under the Commission's rules, whenever there is a failure to receive 3 votes, that motion is deemed to be disapproved. Under the rules of the Commission, there was that vote and it failed because it did not get the 3 votes. Mr. Robertson pointed out that nobody has claimed that there was an error in the hearing itself. For example, nobody is suggesting that there was evidence that was considered that should not have been or that was evidence that was outside of the record was considered in the vote or anything improper with regard to the hearing itself.

Mr. Robertson suggested that the remand go back to the Commission and be limited to the vote itself in accordance with the well-established law in subdivisions and not be a complete do over of the entire hearing since the hearing itself is not an issue.

Mr. Robertson stated that the 45-day requirement is a long-standing process that Sussex County has adhered to and was also done in this case. The only logical outcome is that the 45-day starts when the record is closed, otherwise, that is not consistent with all of Title 9 and the process that is necessary in these hearings. In addition, it violates the due process of the Commission, public and an applicant. It was a 4-1 vote denial that complied with all of the rules of the Commission.

Mr. Schaeffer asked if the Commission offered the applicant a written decision after the hearing. Mr. Robertson replied that he does believe so unless staff did. Mr. Whitehouse added that the minutes of the meeting were typed up and published in the Commission's usual way. However,

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there was not written decision given to the applicant.

Ms. Mowery came forward in response to Mr. Robertson's statement. Ms. Mowery stated there is no basis in a statute that submission is after a public hearing. She added that the statute is clear and not subject to interpretation; the Commission is offering reasonable interpretation which she does not agree with; the statute should be applied as stated. With respect to the implications that Mr. Robertson spoke about, Ms. Mowery stated that she is not in disagreement that the different processes should occur. However, they have to happen within 45-days of the submission to be within the statute. She added that the work could be done prior to submission as a solution. There are ways that the Commission could have drafted its code that the work could get done within the 45-days or get done prior to submission and then the 45-days would cover the hearing and public comment that is being suggested that needs to occur. Or if the work has not been done, the application could be denied. Ms. Mowery stated that she believes that it is not fair to say that because there is a lot of procedure to happen and a lot of processes to occur that a statute is not applied as written. With respect to the 10-day rule, it is Schell's position that the submission of the application occurred in November 2020 which was the submission of its original application. The January submission was the last possible date where there is a submission to the Commission; that date was being used as a back up date. With respect to the public's constitutional rights, there is circumstances that the public does not have a protectable constitutional right. So that argument would be legally incorrect. Ms. Mowery stated that just because there was a vote does not show orderly and logical review of the evidence itself. In addition, the way in which votes are being taken before the Commission has recently changed and decisions are now being provided along with the votes which suggests that it was not properly done previously. Ms. Mowery shared the reasons that reversal is required as previously discussed.

Judge Toliver stated that the hearing is concluded.

**M 264 22
Go Into
Executive
Session**

At 2:22, a Motion was made by Mr. Hudson, seconded by Mr. Rieley to go into Executive Session to discuss pending/potential litigation.

Motion Adopted: 5 Yeas,

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

At 2:26 p.m., an Executive session of the Sussex County Council was held in the Basement Caucus Room to discuss matters relating to potential/pending litigation. The Executive Session concluded at 2:50 p.m.

**M 265 22
Reconvene**

At 2:53 p.m., a Motion was made by Mr. Hudson, seconded by Mr. Rieley to come out of Executive Session into 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**

Mr. Moore and Judge Toliver reported that there is a motion to be presented.

President Vincent gave the gavel to Vice President Hudson.

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A Motion was made by Mr. Vincent, seconded by Mr. Rieley, this is an appeal of the Planning and Zoning Commission’s (the “Commission”) denial of a subdivision application (the “Application”) for Coral Lakes Subdivision No. 2021-06 (the “Subdivision”) filed by Schell Brothers, LLC (the “Appellant”). 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.

In reviewing the Commission’s decision on appeal, Sussex County Code, § 99-39B.(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....”

Sussex County Code, § 99-39D. further states that:

D. The standard of review to be applied by the Council is that a decision approving or disapproving a plat shall be upheld unless the appellant can demonstrate that the Commission made an error in its interpretation of the applicable sections of the Subdivision Ordinance and/or that the Commission's findings and conclusions were not the result of an orderly and logical review of the evidence and the applicable provisions of the Subdivision Ordinance.

The Delaware Supreme Court held that the Commission’s consideration of subdivision plan applications 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

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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.

I will now review the issues before Council as outlined by Judge Tolliver and referenced in the parties' submissions in support of their respective positions.

I believe the Commission acted upon the Application within 45 days of its submission.

In its Attachment to Notice of Appeal ("Notice of Appeal"), Appellant alleges that the Plan should have been automatically approved when the Commission did not act on the Plan 45 days after it had been submitted. See Notice of Appeal, ¶¶1, 16-17, 21-23. Appellant's argument is based on 9 Del. C. § 6811, which states in part:

"[t]he Commission shall approve or disapprove a plat within 45 days after the submission thereof, otherwise such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the Commission upon demand."

Appellant calculated this 45-day window based on its determination that January 18, 2022 constitutes its "submission" date which was, in fact, ten (10) days prior to the January 27, 2022 public hearing date at which time the record was closed. Interestingly, for purposes of this appeal, Appellant did not consider the initial Application submission date (November 25, 2020) as the date which would trigger the 45-day period.¹ For the reasons set forth below, I find the Commission's argument in the Commission's Response to be compelling. See generally, Commission's Response, pp. 4-10.

The Commission's Response explains that this date would have been unrealistic and contrary to its longstanding practice that, "the Commission has never considered the 45 Day Requirement to start on any day other than the date that the record closes on the subdivision's public hearing, since no other date is feasible." See Commission's Response, p. 9, FN 10. The Commission would not have received vital information from various

¹ However, Appellant noted in a footnote that, "Schell arguably submitted a plat over a year prior to the January 18, 2022 date when Schell submitted its plat application for approval to the Commission." See Notice of Appeal, p. 4, FN 2. See also Notice of Appeal, p. 7, FN 3.

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sources which are required under the Sussex County Code and Delaware Code², as well as additional input sought and received during the process.³ The Commission's position is further bolstered by Rule III of the Delaware Supreme Court's, "Supreme Court Internal Operating Procedures" which supports construing "submission" as the date upon which all evidence is before the Court.⁴

The Commission cannot be charged with making its decision on a Plan until such time as all steps in the process have been completed, including the public hearing, and the record has been closed. If construed as Appellant alleges, the 45 Day Requirement would have commenced on January 18, 2022. This interpretation would have required the Commission to begin the review and deliberation process prior to the public hearing, which is a great source of information on a variety of issues from various sources that may affect the property subject to the Plan and during which the record is sometimes left open for receipt of additional information from agencies or staff. It would be antithetical to begin the review process before the Commission is in possession of all relevant facts, supporting documents and comments from various agencies, staff and the like.

On March 10, 2022, the Commission voted to deny the Plan by a 4 to 1 vote. See, Notice of Appeal, p. 5, ¶ 18; Commission's Response, p. 3. This vote took place 42 days after the record was closed, which is clearly within the 45-day window.

I believe the Commission engaged in an orderly process; however, there is no evidence of a logical review of the record.

Appellant alleges that the Commission's conclusion was not the result of an orderly and logical review of the evidence and applicable provisions of the subdivision ordinance. See Notice of Appeal, p. 15. I agree, in part. A

² The Commission's Response outlined the steps required of the Applicant following the Application's initial submission. These steps include, but are not limited to:

- a. Planning and Zoning staff ("P&Z Staff") review of the plat for conformity with the zoning district, the Code and Comprehensive Plan. *See Sussex County Code*, § 99-8B. *See also* Commission's Response, p. 6.
- b. P&Z Staff's referral of the plat to its "Technical Advisory Committee ("TAC") for comment and recommendation" (*see Sussex County Code*, § 99-8B.), noting that "TAC includes, but is not limited to DeIDOT, DNREC, the State Fire Marshal, the County Engineer, the local school districts and several other state and county agencies and departments." *See Sussex County Code*, § 99-4. This is mandated by 9 *Del. C.* § 6962(b). *See also* Commission's Response, p. 6.
- c. DeIDOT's contribution to the process alone includes a Preliminary Traffic Analysis, followed by a Traffic Impact Study, if required by DeIDOT. *See* Commission's Response, p. 7.

³ Appellant obtained additional input from a variety of other sources. *See* Commission's Response, p. 8 as confirmed in Schell's Exhibit Book (*citation omitted*).

⁴ *Supreme Court Internal Operating Procedures, Rule III*, states:

"Each Justice is obligated to decide all assigned matters within 90 days of submission ... For cases where oral argument is scheduled, a matter is deemed submitted on the later of the date of the oral argument or the completion of the supplemental briefing."

Emphasis added.

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public hearing was held on January 27, 2022. As set forth in the Commission’s Response, at the hearing and during deliberations, the Commission reviewed the submitted documentation and discussed a variety of issues pertaining to the site, including, but not limited to, wetlands, drainage on the adjacent site, interconnectivity, stormwater design, DelDOT issues, adjacent developments, an archeological study, the adjacent airplane landing strip, and more.⁵ However, to be logical, it is tantamount to the process that all evidence be reviewed and analyzed such that the parties are clear as to the reasons for the Commission’s decision. We were unable to determine how the evidence was analyzed, because the Commission failed to provide any reasons in support of its vote. Therefore, while the process itself was orderly, it is not clear that the review was logical.

I believe the Commission erred when it failed to provide adequate reasons for its denial of the Application.

Appellant alleges that the Commission erred by failing to provide reasons in support of its vote to deny the Application. Specifically, Appellant stated: [T]he Commission only provided findings and conclusions to support a motion to approve Schell’s Plat, yet ultimately voted against that motion and disapproved Schell’s Plat. As a result, the Commission has provided no findings and conclusions to support disapproval of Schell’s Plat in clear violation of 9 Del. C. § 6811 which requires the grounds of disapproval to be stated upon the record of the Commission and a copy of such statement to be furnished by Schell.

See Notice of Appeal, p. 1. Appellant further notes that the Commission’s own Rules of Procedure require the Commission to provide a written decision.

15.4 Following a decision by the Commission on an application, a copy of the written decision shall be sent to the applicant, or the agent or attorney for the applicant.

While the Commission engaged in an orderly review process, the decision does not reflect a logical review, because the Commission failed to provide any reasons in support of its vote to deny. In fact, the Commission’s own attorney drafted proposed findings (Tr., pp. 157-167) and then on the record gave opinion as to those findings. His advice was ignored. Tr., pp. 168-172.

The law is well-settled in Delaware that the zoning bodies must provide reasons to support its vote. Country Preservation Association of Kent County v. Kent County Levy Court, 1991 WL 153063, at 3 (Del. July 26, 1991), is similar to this matter in that the councilmembers, “made no

⁵ See generally, Commission Response, pp. 10-12 (citing Transcript of January 27, 2022 hearing (“Tr.”), pp. 43-52, 102-103, 146-153, 157.

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statements as to the reasons for their votes.” In *Country Preservation*, the Court cited *Tate v. Miles*, 503 A.2d 187 (Del. Jan. 9, 1986), in which “the Supreme Court stated that the zoning body must ‘[create] a record or [state] on the record its reasons for a zoning change....’” *Tate* at 191. As cited in *Country Preservation*, the Delaware Supreme Court in *New Castle County v. BC Development Associates*, 567 A.2d 1271, 1276 (1989), discussed this requirement in more detail, stating: *Tate* allows [the zoning body] a measure of flexibility. [The zoning body] need not draft a detailed statement of findings of fact and conclusions of law in order to explain a given zoning regulation. However, insofar as [the zoning body] simply “creates a record” and relies upon that record to justify its decision, the record must prove to be an adequate substitute for a more formal explanation. Thus, [the zoning body’s] reasons must be clear from the record. If several possible explanations for a given decision appear on the record, the reviewing court must not be left to speculate as to which evidential basis [the zoning body] favored. (footnote omitted). *Country Preservation*, at 1. The bottom line is that, “it is not enough that the [zoning body’s] decision appears reasonable or that there was evidence to support those who decided to vote [a certain way on] the rezoning application. The record must establish the basis for the [zoning body’s] decision. *Id.*

We now need to review the remedies available to Council. Following the Appeal hearing and Council’s consideration of all facts and evidence before it, *Sussex County Code*, § 99-39B. (2) provides that Council may rule as follows:

If the Council finds that the Commission misapplied or misinterpreted the applicable sections of this chapter or that its findings were not the result of an orderly and logical review of the evidence and the applicable provisions of this chapter:

(a) The Council may send the matter back to the Commission for further review and consideration and, if the Council considers it necessary, it may direct that the Commission hold a new hearing, specify the time period within such hearing shall be held and direct the Commission to issue a written decision containing findings and conclusions following the rehearing [, or]

(b) The Council may reverse a decision only upon a finding that the Commission made an error in its interpretation of the applicable sections of this Chapter; or the Commission's findings and conclusions were not the result of an orderly and logical review of the evidence and the applicable provisions of this chapter.

Sussex County Code, § 99-39B. (2)

Even though the record is before Council and the Appellant has provided its reasons in support of a reversal of the Commission’s decision, I believe

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that, because it is the public body which heard all of the evidence and reviewed the record in total, resolution of this matter is within the Commission's purview. This is especially important to determine whether the Appellant met all of the criteria required for approval. As such, I believe that a reversal is not the appropriate remedy. For the reasons above, I find as follows:

1. That the Planning and Zoning Commission timely considered and ruled on the Application and did not violate the 45 Day Requirement.
2. That the Commission engaged in an orderly process such that the Applicant filed the Application, the Commission received and reviewed the comments and reports from various state agencies, the public, etc., a public hearing was held, and the Commission discussed the issues before it; and
3. That the Commission did not provide the required written reasons that would permit this body to determine whether there was a logical review of the Application.

Therefore, for the reasons above which are considered a part of this motion, I move that this matter be remanded to the Commission for further consideration of the entire record, all evidence and facts of this Application in open session, to consult with its legal counsel, take a public vote thereon, with instructions to clearly state in the record reasons in support of the Commission's vote and, in accordance with 9 Del C. § 6811 and the Commission's Rules of Procedure, Section 15.4, to issue a written decision containing findings and conclusions that are consistent with the law. This process shall be completed on or before August 31, 2022.

Motion Adopted: 3 Yeas, 2 Nays

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

The gavel was given back to President Vincent.

**M 267 22
Adjourn**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to adjourn at 3:05 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.}