

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, JUNE 25, 2024

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, June 25, 2024, at 10:00 a.m., in Council Chambers, with the following present:

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

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

**Call to
Order**

Mr. Vincent called the meeting to order.

**M 344 24
Approve
Agenda**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, 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 June 18, 2024, were approved by consent.

Correspondence

Mr. Moore reported that correspondence was received from Shoes that Fit thanking Council for their donation.

**Public
Comments**

Public comments were heard.

Dr. Michelle Williams spoke about the Accessory Dwelling Unit Ordinance.

Mrs. Kim Hoey-Stevenson spoke about the work being done on Ordinances including the Buffer and ADU Ordinances.

Mr. Gawan Curtis spoke about housing in Sussex County and a land use permit application.

**Presentation
/Blue Zone
project**

A presentation was given by Ms. Kim Blanch regarding the Blue Zone project. Ms. Blanch provided an overview of Blue Zone projects and how they have impacted areas where they have been implemented.

**Brown
Appeal**

Mr. Moore reminded the Council that the hearing on the appeal was heard last week that was presided over by Judge Toliver. After that, the Council went into Executive Session where the matter was discussed.

**M 345 24
Brown
Subdivision
Appeal
Decision**

A Motion was made by Mr. Vincent, seconded by Mrs. Green, that in the matter of the Lorraine Brown Appeal, I move that the Council affirm the Planning and Zoning Commission's decision to deny the Subdivision Plan Application filed by Ms. Brown, the Appellant in this matter. I will provide reasons which are based on the standard of review read by our attorney, Mr. Moore, at the start of the hearing which are incorporated herein by reference. This is a summary only, which will not include citations and more expansive reasoning. Those can be found in the comprehensive written findings given to the Clerk of the Council with this motion to publish in the record and are incorporated by reference. Madam Clerk, here are the written findings for introduction into the record which are incorporated by reference and deemed part of this motion.

The Record Created Below Does Not Support Approval

Although Appellant's Notice of Appeal referenced various deeds, plots and information for the Council's consideration, these items were not presented to the Commission at the public hearing and, therefore, are not part of the record. Council is only permitted to consider evidence presented below. As such, all new evidence presented by Appellant cannot be considered by the Council in making its determination on the appeal.

While Council is sympathetic to Appellant's desire to create a lot for her daughter, if the Commission engaged in an orderly and logical review of the evidence, Council cannot substitute its findings for those of the Commission. The Commission provided numerous reasons to support its decision to deny the Application. Specifically, it is incumbent upon Appellant to provide substantial evidence at the Commission hearing that the Application is compliant with Sussex County Code § 99-9C. Unfortunately, Appellant did not address the seventeen (17) mandatory considerations for all subdivision applications outlined in Sussex County Code, § 99-9C.

In addition, as set forth in the Commission's response to the Appeal ("Commission's Response"), Appellant did not provide any evidence as to confirm the following information regarding the "undersized and unmaintained" Victory Lane:

(a) the ownership of Victory Lane; (b) [Appellant's] easement rights in Victory Lane; (c) whether [Appellant] has any right to burden Victory Lane with an additional lot; (d) whether there is currently any organized maintenance for Victory Lane or how a new lot owner would join in any maintenance obligations; (e) the safety of Victory Lane; or (f) compliance with the applicable setbacks and buffers for the new lot.

**M 345 24
Brown
Subdivision
Appeal
Decision
(continued)**

This was compounded by the preliminary site plan's lack of perimeter buffer and fifty-foot setbacks from surrounding agricultural lands, testimony in opposition to the subdivision due to the potential of exacerbating an existing runoff issue and encroachments onto the adjacent farmland. The Commission found that, without additional evidence, the record was insufficient to warrant approval and that, due to the extensive number of ongoing issues, this Application did not lend itself to approval subject to the imposition of reasonable conditions.

Conclusion

Based on the foregoing, there is substantial evidence in the record to deny the Plan based solely on Appellant's inability to comply with Sussex County Code § 99-9C, as well as the many unanswered questions regarding Victory Lane. The Commission's decision was the result of an orderly and logical review of the evidence, there was substantial evidence in the record to support its decision and it engaged in the proper interpretation and application of the chapter. The Commission's findings include detailed, thorough, and well-thought-out reasons for its unanimous vote to deny the Plan. Therefore, Council is required to uphold the Commission's decision.

Motion Adopted: 5 Yeas

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

Retirement

Paula Marvel was recognized for her upcoming retirement.

**Adminis-
trator's
Report**

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

1. Deputy Director of Public Safety - Emergency Management

I am pleased to announce that the County has named Timothy R. Cooper, a onetime paramedic with Sussex County EMS, as the new Deputy Director of Public Safety - Emergency Management. Mr. Cooper will lead the County's disaster preparedness efforts, while also coordinating with a variety of partners, including the Delaware Emergency Management Agency, the Delaware National Guard, and other agencies. Mr. Cooper holds dual degrees in emergency preparedness and homeland security and brings more than 30 years of experience in public safety. He will begin his new duties July 1st.

2. Government Finance Officers Association Triple Crown Award

**Adminis-
trator's
Report
(continued)**

I am pleased to announce that Sussex County is the first government in Delaware to receive the Triple Crown Award from the Government Finance Officers Association of the United States and Canada. The GFOA's Triple Crown Award recognizes governments that have received GFOA's Certificate of Achievement for Excellence in Financial Reporting, Popular Annual Financial Reporting Award, and the Distinguished Budget Presentation Award. Sussex County is now 1 of 356 local governments across the United States that have received this award. Please join me in congratulating Finance Director Gina Jennings and her staff for another job well done.

3. Holiday and Council Meeting Schedule

A reminder that County offices will be closed on Thursday, July 4th, to observe the Independence holiday. In addition, Council will not meet on Tuesday, July 2nd or Tuesday, July 9th. The next regularly scheduled Council meeting will be on Tuesday, July 16th.

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

**Artesian
WW MOU**

Hans Medlarz, County Engineer, Ret. presented a Memorandum of Understanding for Artesian Wastewater Management, Inc. for Council's consideration.

**M 346 24
Approve
Artesian
WW MOU**

A Motion was made by Mr. Rieley, seconded by Mr. Hudson, be it moved, based upon the recommendation of the Sussex County Engineering and Finance Departments, that the Sussex County Council approve the Memorandum of Agreement between Sussex County and Artesian Wastewater Management, Inc., 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**

**WS
Substantial
Completion**

Hans Medlarz, County Engineer, Ret. presented a substantial completion request for Western Sussex Unified Sewer District: Contract 5, project S19-29 for Council's consideration.

**M 347 24
WS
Substantial
Completion**

A Motion was made by Mrs. Green, seconded by Mr. Hudson, be it moved based upon the recommendation of the Sussex County Engineering Department, that substantial completion for contract S19-29, Western Sussex Unified Sewer District, Segment 5A be approved effective June 10, 2024, with any held retainage released in accordance with the contract documents.

Motion Adopted: 5 Yeas

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

Permission to Prepare & Post Notices/ Winding Creek Village/ Individual Water Meters

John Ashman, Director of Utility Planning & Design Review presented a request to prepare and post notices for Winding Creek Village Water District – Individual Water Meters. Mr. Ashman reported that in September 2017, eligible voters in the optimized water district boundary approved the creation of the Winding Creek Village Water District, based on a uniform service charge. The County has completed the design of the system, received the bids, applied for the supplemental funding and the apparent low bidder has agreed to maintain the price until the decision is made on the funding.

There has been multiple inquiries to revise the uniform service charge and introducing a metered component. The Engineering Department has explained that there would be additional costs associated with the metered system and the vote was made on a uniform service charge similar to the existing Dewey Beach water district. The change to the metered system would require another referendum. Members of the community advanced with their request for the addition of the metered component and the department informed them of the process and information needed. The first item was the need for 50 valid petitions from within the existing boundary. On June 4, 2024, the residents provided the department with a binder containing 69 petitions. Two were found to be ineligible resulting in 67 valid petitions. Therefore, the department would like permission to prepare and post notices for a public hearing explaining the impacts of the metered component.

Mr. Schaeffer questioned if the original vote was to ask if they wanted meters or if they did not want meters. Mr. Ashman replied that he does not believe that they were asked if they wanted meters. The proposal was for the unified rate because that is how most of the rates are established. He added that the County does not have a meter reading division.

Mr. Schaeffer stated that in his experience, it seems that a utility would always encourage meters to cut down on waste of water. He feels that it makes economic and environmental sense to put meters in.

Mr. Medlarz stated that there are no objections, however, the meter component was not discussed during the original public hearing. He added that they have a bid from the original proposal that does not include meters. When the public hearing is presented for the meter component, it will have to be provided by the individual owners up front. The County cannot go back for a second supplemental because it will not happen in time and the bid will expire.

Permission to Prepare & Post Notices/ Winding Creek Village/ Individual Water Meters (continued) Mr. Lawson stated that this subdivision does not have water service proposed to the whole community. As previously discussed, the request for meters was a late request that we are now working to consider. The Engineering Department is going to come up with a rate and then put that in front of the community for a vote.

Mrs. Jennings added that the County does not have a meter reading system, a billing system, or staff. So, to bear an additional cost for the County to create a metered system will most likely shock the customers of the cost. This is due to the fact that we are sewer utility, not a water utility.

M 348 24 Permission to Prepare & Post Notices/ Winding Creek Village A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, that be it moved by Sussex County Council that the Sussex County Engineering Department is authorized to prepare and post notices for the revised billing method for the Winding Creek Village water district 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

FAA Airport Program Robert Bryant, Airport Manager presented information related to the FAA Airport Improvement program for discussion. Mr. Bryant provided background and information relating to the proposed project.

M 349 24 Approve FAA Improvement Program 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 the Sussex County Council authorize the execution of a Federal Aviation Administration Airport Improvement program grant for new construction Taxiway Bravo, Phase 2 in the amount of \$3,473,464.00.

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/ Ord. 24-02/ ADU Under Old Business, Jamie Whitehouse, Planning & Zoning Director presented a Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE CODE OF SUSSEX COUNTY, CHAPTER 110, ARTICLE III, SECTIONS 110-9 AND CHAPTER 115, ARTICLES I, IV, V, VI, VII, VIII, IX AND XXVII SECTIONS 115-4, 115-20, 115-23, 115-29, 115-32, 115-40, 115-48, 115-53, 115-56, 115-64, AND 115-210 REGARDING ACCESSORY DWELLING UNITS”.

**Old
Business/
Ord. 24-02/
ADU
(continued)**

Mr. Whitehouse, Planning and Zoning Director reminded Council that a Public Hearing was held at the meeting of June 11, 2024. At the conclusion of the Public Hearing, Council deferred action on the Ordinance for further consideration.

Mr. Schaeffer questioned what was decided about owner occupancy of the main structure on the property. Mr. Robertson responded that the way that the Ordinance was introduced and has been discussed, staff concluded that it is difficult to enforce. It is tough to know who the owner is and verify that the person living there is actually the owner who is on the title. There are some many different issues, staff realizes that this is a concern. Mr. Roberson added that there may be some situations where it may not be owner occupied dwellings and ADUs, however, it is hoped that the large majority of the ADUs are owner occupied homes to provide more affordable housing units.

Mr. Robertson added that individual developers or homeowners' associations will still have the ability to self-govern when it comes to ADUs. If there is a restrictive conveyance that prohibit additional dwelling units on a lot within a subdivision, they will still exist and be enforceable.

**M 350 24
Amend Ord.
No. 24-02**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, to confirm that ADU can include the conversion of existing interior space in a ADU such as a basement, garage, or bonus room in lines 68-71 revise the sentence so that it now states "The dwelling unit may be attached to, or detached from the primary dwelling on the property and it may also include existing interior space such as finished basements that is converted into a separate dwelling unit".

Motion Adopted: 5 Yeas

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

**M 351 24
Amend Ord
No. 24-02**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, at line 70, after "servant quarters", insert "recreational vehicles (as that term is defined in Title 21, Section 101(60) of the Delaware Code)". This will ensure that the Accessory Dwelling Units are not merely vehicles or campers and are constructed to be used as dwelling units.

Motion Adopted: 5 Yeas

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

M 352 24

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, to delete any reference to the ADUs lot coverage. This is an unnecessary requirement

Amend Ord. No. 24-02 given the other dimensional requirements of an ADU including the maximum ADU size of 1,000 square feet and the limitations that the ADU cannot be large than 50% of the floor area of the primary dwelling. So, at lines 105 to 106, delete the sentence, “An accessory dwelling shall not have a lot coverage that is greater than 50%.”

Motion Adopted: 5 Yeas

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

M 353 24 Amend Ord. No. 24-02 A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, to delete the proposed new language inserted at Lines 116 through 119 and replace that proposed new language with the following instead: An accessory dwelling unit shall not encroach into the front, side or rear yard setbacks required by this Chapter. On a lot less than three acres in size, a detached accessory dwelling unit shall be located behind the single-family dwelling on the same lot.

Motion Adopted: 5 Yeas

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

M 354 24 Amend Ord. No. 24-02 A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, to revise the minimum lot size requirement contained in lines 122 by deleting the reference to “one-half acre in size” and replace it with “20,000 square feet”.

Motion Adopted: 5 Yeas

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

M 355 24 Amend Ord. No. 24-02 A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson, during the public hearing before the Planning & Zoning Commission and County Council, there were concerns stated that while the Ordinance makes a ADU a permitted use for lots above a certain size, it eliminated the existing ability in County Code to seek approval of a ADU for smaller lots by special exemption by the Board of Adjustment that should remain in the Code. Therefore, Section 4, lines 130-140, Section 6, lines 171-173, Section 7, lines 188-190, Section 8, lines 205-207, Section 10, lines 240-242, Section 11, lines 257-259 and Section 12, lines 280-282 should be amended so that the existing language in the Code which is shown as deleted in Ordinance stating “garage/studio apartment when not approved administratively by the Director of his or her designee, provided that at least one space for the

exclusive use of the tenant is included on the premises”, is replaced in each of those sections with “Accessory Dwelling Units, subject to the dimensional requirements of Section 115A (15(c), (d) and (e).

Motion Adopted: 5 Yeas

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

**M 356 24
Adopt
Ordinance
No. 3027/
ADU**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to Adopt Ordinance No. 3027 entitled “AN ORDINANCE TO AMEND THE CODE OF SUSSEX COUNTY, CHAPTER 110, ARTICLE III, SECTIONS 110-9 AND CHAPTER 115, ARTICLES I, IV, V, VI, VII, VIII, IX AND XXVII SECTIONS 115-4, 115-20, 115-23, 115-29, 115-32, 115-40, 115-48, 115-53, 115-56, 115-64, AND 115-210 REGARDING ACCESSORY DWELLING UNITS” for the reasons given by the Planning & Zoning Commission as follows and as amended by this Council:

- 1. There is a need for this Code change, and there is the need for additional housing options in Sussex County. This Ordinance will enable more housing options to become available throughout Sussex County.**
- 2. The current Code provisions are outdated and unduly burdensome. For example, the Code currently refers to “Garage/Studio Apartments” which is term with unnecessary restrictions. “Accessory Dwelling Unit” is a broader and more widely accepted term.**
- 3. This Ordinance eliminates the discretionary review of a potential “Garage/Studio Apartment” that currently exists and makes an Accessory Dwelling Unit a permitted use in all residential zoning districts if the minimum requirements are met.**
- 4. This Ordinance creates greater clarity and certainty with regard to the ability to establish Accessory Dwelling Units in appropriately sized locations.**
- 5. The minimum standards in this Ordinance are appropriate for the following reasons:**
 - A. No Accessory Dwelling Unit can exceed 1,000 square feet in size, and it cannot be larger than 50% of the floor area of the primary dwelling on a property. This is necessary to maintain appropriate densities in the residential zoning districts and not overburden existing internal and external roadways, utilities and other factors. Without this reasonable limitation, an Accessory Dwelling Unit could potentially become a full-sized second dwelling or duplex on a property (and therefore potentially double the density of the property or development), which is not the intention of this housing initiative and Ordinance.**
 - B. There must be at least one off-street parking space set aside for each Accessory Dwelling Unit. Many subdivisions are at capacity**

M 356 24

**Adopt
Ordinance
No. 3027/
ADU
(continued)**

given their roadway and on-and off-street parking designs for the existing homes. They cannot absorb the parking of additional vehicles associated with an Accessory Dwelling Unit. Therefore, requiring one additional off-street parking space for an Accessory Dwelling Unit is appropriate and reasonable.

- C. A property must be at least 20,000 square feet in size to accommodate an Accessory Dwelling Unit. This ensures that there is sufficient land area available for the primary dwelling, parking and compliance with setbacks. In addition, this minimum size avoids the special provisions of Ordinance No. 2557 regarding setbacks in small lots.
- 6. This Ordinance does not impact existing or proposed private restrictive covenants that may regulate the existence, use and/or location of an Accessory Dwelling Unit within a private development.

Motion Adopted: 5 Years

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

**Old
Business/
Ord. No.
24-03/
Perimeter
Buffers**

Under Old Business, Jamie Whitehouse, Planning & Zoning Director presented a Proposed Ordinance entitled “AN ORDINANCE TO AMEND CHAPTER 99, ARTICLES I, III, IV, V AND VI SECTIONS 99-5, 99-6, 99-23, 99-26, 99-27, 99-30, 99-31 AND 99-32 AND BY ADDING A NEW SECTION 99-21a, AND CHAPTER 115, ARTICLES IV, V, VI, VII, VIII AND XXVIII SECTIONS 115-20, 115-25, 115-29, 115-37, 115-45 115-53 AND 115-218 REGARDING PERIMETER BUFFERS AROUND RESIDENTIAL DEVELOPMENT”.

The County Council held a Public Hearing on the Ordinance at its meeting on June 11, 2024. At the conclusion of the Public Hearing, the Council closed the Public Record and deferred action on the Ordinance for further consideration.

Mr. Robertson reviewed proposed changes to the Ordinance.

The first proposed change was to simply the definition of clearing or cleared; it previously referred to Stormwater Management rules of DNREC. The suggestion was to simply that to state “The removal of trees and other vegetation by any means. “Clearing” or “cleared” does not include selectively removing dead or diseased trees or invasive species”.

Another proposed change was in regard to forest assessment. A definition of

**Old
Business/
Ord. No.
24-03/
Perimeter
Buffers
(continued)**

forest assessment report is added to clarify what the product of that assessment would be. In addition, forest inventory and groupings of trees were added as discussed.

In the definition of perimeter buffer, there was a comment that the purpose of a perimeter buffer was not clear. So, language was added to read “The Perimeter Buffer shall function to filter views from and into a subdivision in such a manner that improves the screening than if no landscaping was provided”. In the Perimeter Buffer landscape plan, it clarifies who will prepare that plan.

The next proposed changes discusses the requirements for planting trees within in the buffer. There was language added to state “shall be a species that typically achieves a height of at least ten feet”. In addition, there was language added to state that they should be planted “throughout the entire width of the Perimeter Buffer”.

On lines 360, 368-369, it is proposed to remove invasive species as presented by the Center of Inland Bays.

The next proposed change discussed what can and what cannot happen within the Woodlands Area of a Perimeter Buffer and Perimeter Buffer protection area. It was recommended to ensure that the Perimeter Buffer protection area also cannot be disturbed so that was added. In addition, it is being recommended to add “Permitted stump removal shall only occur by stump grinding that does not disturb the surrounding area or vegetation”.

A clarification was added in case there was mitigation requirements or offsite planning, that the plantings have to comply with the specific requirements as stated in the Code.

There was a specific line item added that states “Removal of any invasive species from the Woodlands is permitted”.

On line 428, a suitable grass mix was discussed for the ground cover, there was a suggestion to add wildflowers to allow more flexibility.

On line 466, it provides clarification of a date certain when it starts the two-year guarantee period. In addition, later the homeowner’s association reference was taken out.

In Section H which starts on line 475, it discusses more creative landscaping

**Old
Business/
Ord. No.
24-03/
Perimeter
Buffers
(continued)**

that can be done along the development’s frontage. The following language was added “This authorization shall only apply to a subdivision’s roadway frontage where its entrance is located. All other roadway frontages shall comply with the requirements of Subsections A, B and C above, as applicable”.

In line 503, the following language was added “The portion of any non-Woodland Perimeter Buffer within the entirety of the development that is adjacent to other existing or approved dwellings, or lots shall be planted in accordance with the requirements of §99-21A.A and C within 12 months of the issuance a Notice to Proceed for the first phase of the development”.

There were comments about making sure that this complied with C-4 projects because they are mixed use projects where they can be commercial and residential. Therefore, that section was deleted, and the following language was added “Any conditional use for attached or detached single-family or multi-family dwellings’ a residential planned community; or the permitted residential portion of a development in any zoning district shall comply with the requirements of §99-21A”.

**M 357 24
Defer
Action/
Ord. No.
24-03**

A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to defer action on a Proposed Ordinance entitled “AN ORDINANCE TO AMEND CHAPTER 99, ARTICLES I, III, IV, V AND VI SECTIONS 99-5, 99-6, 99-23, 99-26, 99-27, 99-30, 99-31 AND 99-32 AND BY ADDING A NEW SECTION 99-21a, AND CHAPTER 115, ARTICLES IV, V, VI, VII, VIII AND XXVIII SECTIONS 115-20, 115-25, 115-29, 115-37, 115-45 115-53 AND 115-218 REGARDING PERIMETER BUFFERS AROUND RESIDENTIAL DEVELOPMENT”.

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 Council’s consideration.

**M 358 24
Town of
Delmar**

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$3,000 (\$3,000 from Mr. Vincent’s Councilmanic Grant Account) to the Town of Delmar for their State Street park shade project.

Motion Adopted: 5 Yeas

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

Mr. Vincent, Yea

M 359 24 A Motion was made by Mrs. Green, seconded by Mr. Hudson to give
Town of \$1,000 (\$1,000 from Mrs. Green's Councilmanic Grant Account) to
Bridgeville Town of Bridgeville for their Back-to-School bash.

Motion Adopted: 5 Yeas

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

M 360 24 A Motion was made by Mrs. Green, seconded by Mr. Hudson to give \$6,000
Town of (\$6,000 from Mrs. Green's Councilmanic Grant Account) to the Town of
Greenwood Greenwood for their Downtown Revitalization plan/town square.

Motion Adopted: 5 Yeas

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

M 361 24 A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$9,925
Make-A- (\$2,150 from Countywide Youth Grant Account, \$500 from Mr. Schaeffer's
Wish Councilmanic Grant Account, \$2,775 from Mr. Vincent's Councilmanic
Grant Account, \$2,950 from Mr. Hudson's Councilmanic Grant Account,
\$1,150 from Mr. Rieley's Councilmanic Grant Account and \$400 from Mrs.
Green's Councilmanic Grant Account) to Make-A-Wish Foundation of
Philadelphia, Delaware & Susquehanna Valley for their Wishes
Transforming Lives program.

Motion Adopted: 5 Yeas

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

Proposed
Ord. Intro There were no Proposed Zoning Ordinances for introduction.

CC
Comments There were no Council Member comments.

M 362 24 At 11:59 a.m., A Motion was made by Mr. Hudson, seconded by Mr.
Go Into Schaeffer to recess the Regular Session and go into Executive Session to
Executive discuss matter relating to pending & potential litigation and land acquisition.
Session

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 12:00 p.m. an Executive Session of the Sussex County Council was held in the Council Chambers to discuss matters related to pending & potential litigation and land acquisition. The Executive Session concluded at 12:14 p.m.**

M 363 24 Reconvene **At 12:15 p.m., a Motion was made by Mr. Rieley, seconded by Mr. Schaeffer to come out of Executive Session 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**

E/S Action **There was no action related to Executive Session matters.**

M 364 24 Adjourn **A Motion was made by Mr. Schaeffer, seconded by Mr. Rieley, to adjourn at 12:15 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**

Respectfully submitted,

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

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

**APPEAL OF SUBDIVISION PLAN DENIAL
FOR LORRAINE BROWN, APP. NO. 2023-09**

This is an appeal of the Planning and Zoning Commission's (the "Commission") denial of a Subdivision Application No. 2023-09 (the "Application") filed by Lorraine Brown (the "Appellant") which was presented to the Commission at a hearing on February 21, 2024. The Application was to subdivide Sussex County Tax Parcel No. 430-5.00-5.02, a 4.57-acre parcel, into 2 single-family lots. The Application was unanimously denied on March 20, 2024. I move that the Council affirm the Commission's denial of the Application for the following reasons:

Standard Of Review

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. There was a hearing of record and the Council's review is limited to that record. 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.

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....”

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 the event Council determines that the Commission made an error in its application or interpretation of the law, Council's remedies are limited to remanding the application to the Commission for further review and consideration or reversing the Commission's decision. Sussex County Code, § 99-39B.(2)(a) and (b).

The Record Created Below Does Not Support Approval

Although Appellant's Notice of Appeal referenced various deeds, plots and information for the Council's consideration, these items were not presented to the Commission at the public hearing and, therefore, are not part of the record. Council is only permitted to consider evidence presented below. As such, all new evidence presented by Appellant cannot be considered by the Council in making its determination on the appeal.

While Council is sympathetic to Appellant's desire to create a lot for her daughter, if the Commission engaged in an orderly and logical review of the evidence, Council cannot substitute its findings for those of the Commission. The Commission provided numerous reasons to support its decision to deny the Application. Specifically, it is incumbent upon Appellant to provide substantial evidence at the Commission hearing that the Application is compliant with Sussex County Code § 99-9C¹. Unfortunately, Appellant did not address the seventeen (17) mandatory considerations for all subdivision applications outlined in Sussex County Code, § 99-9C.

In addition, as set forth in the Commission's response to the Appeal ("Commission's Response"), Appellant did not provide any evidence as to confirm the following information regarding the "undersized and unmaintained" Victory Lane:

- (a) the ownership of Victory Lane; (b) [Appellant's] easement rights in Victory Lane;
- (c) whether [Appellant] has any right to burden Victory Lane with an additional lot; (d)

¹ 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.

whether there is currently any organized maintenance for Victory Lane or how a new lot owner would join in any maintenance obligations; (e) the safety of Victory Lane; or (f) compliance with the applicable setbacks and buffers for the new lot.

Commission's Response at p.3. This was compounded by the preliminary site plan's lack of perimeter buffer and fifty-foot setbacks from surrounding agricultural lands, testimony in opposition to the subdivision due to the potential of exacerbating an existing runoff issue and encroachments onto the adjacent farmland. *Id.* The Commission found that, without additional evidence, the record was insufficient to warrant approval and that, due to the extensive number of ongoing issues, this Application did not lend itself to approval subject to the imposition of reasonable conditions.

Conclusion

Based on the foregoing, there is substantial evidence in the record to deny the Plan based solely on Appellant's inability to comply with Sussex County Code § 99-9C, as well as the many unanswered questions regarding Victory Lane. The Commission's decision was the result of an orderly and logical review of the evidence, there was substantial evidence in the record to support its decision and it engaged in the proper interpretation and application of the chapter. The Commission's findings include detailed, thorough and well-thought-out reasons for its unanimous vote to deny the Plan. Therefore, Council is required to uphold the Commission's decision.