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

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, October 11, 2022, at 9:00 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 465 22 Approve Agenda **A Motion was made by Mr. Hudson, seconded by Mrs. Green, to approve the Agenda as presented.**

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**

The Council considered an Appeal on the Sussex County Planning and Zoning Commission's decision to approve 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. It was noted that one of the participants was not present, he asked if Counsel had information regarding Mr. Bartley; all parties replied that they did not. Judge Toliver suggested to wait until 9:15 a.m. for Mr. Bartley to arrive; there was no objection.

Mr. Moore noted that in the scheduled order, the Hicks appeal was scheduled to go first.

Mr. Mette stated that on behalf of the Hicks appeal, they are prepared to move forward; their appeal is independent from Mr. Bartley's appeal.

M 466 22 Recess **A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to recess until 9:15 a.m.**

M 466 22 Recess (continued)

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 467 22 Reconvene

At 9:13 a.m., a Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to reconvene.

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**

Mr. Moore read the following statement.

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You will notice that Mr. Rieley is not here this morning. In spite of the lack of any prior involvement, consideration, conclusion and/or predetermination of the merits of the Coral Lakes II appeal in any form or fashion, he wanted to avoid any appearance to the contrary to the citizens of Sussex County and in deference to any possible concerns of the parties. He thus has decided to recuse himself from any involved in the Coral Lakes II appeal that might have resulted from an interview in a public forum/podcase earlier this past summer posted on social media. That interview referenced the existence of the Coral Lakes subdivision process. In addition, he wanted me to affirmatively state that he has not discussed the matter of the Coral Lakes II appeal in any form or fashion with any other members of the Sussex County Council. He has recused himself voluntarily to preserve the integrity of the process and to erase even the appearance of impropriety.

In light of that recusal, Mr. Moore stated that for the record, he has spoken to each member of Council, and each has indicated to him that he or she has had no prior discussion, consideration, bias, or opinions of any kind formed regarding the outcome or any other aspect of this matter from the date this matter was remanded to the Planning and Zoning Commission on June 23, 2022.

Judge Toliver reported that this is the appeal of the decision of the Planning and Zoning Commission for Coral Lakes Subdivision Application No. 2021-6. The appellees are Schell Brothers and the Planning and Zoning Commission, and the appellants are Mr. Bartley and the Hicks appellants represented by Mr. Mette.

Judge Toliver reported that a meeting was held with the parties via teleconference to discuss the submissions and the preliminary issues that have been resolved. The appellees followed their submissions on September

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21, 2022, and the appellants filed their submissions on October 5, 2022, which is in addition to their notice of appeal. Judge Toliver reviewed the procedures for the hearing. Judge Toliver reported that this appeal results from the decision of the Planning and Zoning Commission on June 23, 2022, following the remand from the County Council on May 24, 2022.

Mr. Luke Mette, Esq. from Armstrong Teasdale, LLP came forward representing the Hicks appellants. Mr. Mette reported that the appellant parties include Jill Hicks, William Hicks, Susan Petze-Rosenblum, Sergei Boboshko and Kerry Russo. Mr. Mette stated that he will refer to them as the Hicks appellants.

Mr. Mette stated that the arguments on this appeal were straight forward and simple. He is arguing that the record of the actual and unscripted reasons given by the Planning and Zoning Commission members for their June 23rd vote demonstrated that the decision was not the result of an orderly and logical review of the evidence and applicable provisions of the Subdivision Ordinance. But rather, the result of the Commissioners voting the way that their Counsel told them or advised them to vote. Mr. Mette shared the vote of three out of five of the Commissioners votes. Mr. Mette added that the reasons were not the result of the Planning and Zoning Commission or the Commissioners review of the evidence in an open session. It is being argued that the only record evidence changed from the prior denial of the Application in March to its approval in June was the statements set forth on the slides shown and the impact of Council's advice and direction on the vote.

It is also being argued that the Planning and Zoning Commission failed to abide by the Council's May 24th remand in two ways. First, the Planning and Zoning Commission did not consider the entire record to include all evidence and facts of the Application in open session. The only thing that happened in open session was a motion that was read, immediately so moved, seconded, and voted on without any debate.

Also, the Planning and Zoning Commission did not issue a written decision that was required in the Council's remand. A written decision was not issued that contained the Commission's findings and conclusions. The briefs from the Planning and Zoning Commission and Schell Brothers did not respond to any of the arguments that are being made by him. Instead, they try to avoid looking at what was done on June 23rd. Their direct response in their briefs to the actual reasons given by the Commissioners for their June 23rd vote. They ran from the record; they do not even quote the relevant highlighted section of Commissioner Stevenson. They did not even mention the significance of the highlighted sections shown for Commissioners Wingate and Mears statements for their votes.

Mr. Mette stated that the Planning and Zoning Commission is the body charged by statue and by Delaware law with reviewing and voting on Applications and stating their reasons for the decisions for the Council's

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review. The Code specifically requires that the Planning and Commission should act, review, and decide. It is being submitted that the Planning and Zoning Commission cannot simply advocate it's duties by simply delegating them to Counsel because it is convenient or because that is the way that is has always been done.

Mr. Mette shared a case in the Delaware Supreme Court, *Tony Ashburn & Son Inc.* This case stated that a Planning Commission most certainly has a measure of discretion, and they cannot simply rubber stamp an application. It is being submitted that the Planning and Zoning Commission discretion must be exercised not advocated and that here, the Planning and Zoning Commission simply rubber stamped what their attorney told them to do without making any independent determinations of their own.

Schell and the Planning and Zoning Commission's direct response in their briefs to the argument that the Planning and Zoning Commission failed to comply to the County Council's remand instructions by failing to further consider the entire record in an open session and to issue a written decision containing findings and conclusions consist with law. Mr. Mette submits zero direct response to his argument because there is nothing in the record. There is nothing in the record that indicates that the Planning and Zoning Commission considered in open session the motion that was read verbally for eleven minutes, so moved, seconded and vote that was completed with no discussion or consideration. There is no written decision from the Planning and Zoning Commission; they point to a June 23rd notice of decision that was not signed or adopted by the Planning and Zoning Commission. It simply lists the conditions; it does not identify the reasons for the vote. In their briefs, it points to what the lawyers did and the Counsel's verbal motion, a notice of decision that is not a decision, take a look at a pre remand record which resulted in a denial of the application. Mr. Mette stated that case law is clear that their attempts to muddy the record and to confuse the Council can only strength his argument that remand is necessary. The Planning and Zoning Commission members must state their reasons and they have to be clear and not muddy.

Mr. Mette stated that the Council is the governing body of Sussex County who can remand the Planning and Zoning Commission's June 23rd decision as done previously. The County Council is in charge of what happens next.

The Planning and Zoning Commissioners are required by Delaware case law to state their reasons for their votes on June 23rd. In the remand order given by the County Council on May 24, 2022, required that as well. The Counsel for the Planning and Zoning Commission specifically directed the Commissioners to state their reasons for their vote and they did so. Mr. Mette stated that at least three votes out of five were directly based on instructions from the Planning and Zoning Commissions counsel rather than an independent judgement of the Commissioner themselves. Commissioner Stevenson abstained because "I was told what our counsel said was that we can't deny it". Commissioner Mears who had previously

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voted against the application in March, stated in his vote "Unfortunately, as counsel explained, it complies with the Subdivision Code and Zoning Code. Therefore, I vote yes based on the reasons in the motion". Commission Wingate voted "Mr. Chair, I am a yes for the extensive -- because of the extensive explanation by counsel and the condition imposed". Mr. Mette stated that counsel does not vote; he is not a member of the Planning and Zoning Commission. These three members did not make their own independent determination of Code compliance. It is being submitted that this record cannot stand on appeal before the County Council. Attorneys and judges do not tell the people that are voting how to apply the law and they did not exercise it. Mr. Mette stated that this not how government is supposed to work and is contrary to the language in the County Code and any notation of good government.

Mr. Mette stated that the record is clear in this; there must be a remand.

Mr. Mette further discussed the arguments that Schell and the Planning and Zoning Commission discussed in their briefs. First, they rely on the June 23rd verbal motion which is still not written, it took 11 minutes and 11 pages to read into the record by the Planning and Zoning Commission's counsel for whoever wants to make it. Immediately after the motion was read, the motion so moved, seconded and then a vote was taken. There was no debate or discussion to the reasons why they were voting the way they were voting.

In addition, the motion was not considered in an open session. Mr. Mette stated that it could not have possibility been considered in open session; perhaps, it was discussed in an executive session which would create FOIA problems. Mr. Mette stated that it is being questioned if the Commissioners independently articulate their reasons for their votes.

Next, the pre-remand record resulted in the Planning and Zoning Commission denying the application in March. This Council ordered the Planning and Zoning Commission to conduct a further consideration of the entire record again in open session. Mr. Mette further explained that this decision cannot be held based on a record that they interpret in their briefs and on a motion that they read that was not debated.

Mr. Mette pointed out that you do not have to speculate what was going on and questioned why they did a 180 and turned it down. If there is any doubt at all, there must be a remand. The June 24th notice of decision does not report to be an actual decision that was not signed or state any reasons of decision. It is being submitted that the June 23rd decision did not comply with the County Council's May 24th remand instruction that the Planning and Zoning Commission conduct a further review of the entire record, all evidence, and facts of this application in open session. Mr. Mette pointed out that it is being questioned if Schell's application complied with applicable law that enacted in 2021 (Superior Design requirements). The application was filed on November 25, 2020 and was not filed by Schell

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Brothers. In addition, it is questioned whether this impacts which version of the Code should apply to the application; 2020 or 2021. The record of this decision does not indicate that the Commissioners made that key finding of code compliance. The June 23rd decision did not comply with the remand requirement that the Planning and Zoning Commission issue a written decision pertaining findings and conclusions that are consistent with law.

Mr. Mette stated that good government and Delaware law requires more respectful than what the Planning and Zoning Commission did on June 23, 2022. Regardless of how busy they are or how many they have coming through the pipes; they have to do their job. The Planning and Zoning Commission must make independent findings of fact and conclusions of law regarding code compliance. A subdivision approval is not a check the box exercise but rather an important decision especially in Sussex County given the amount of development. The County Council can insist that the Planning and Zoning Commission comply with the remand order given and Delaware Law and Code by stating their reasons for their vote and exercise their discretion rather than advocate.

Mr. Terry Bartley came forward to present his appeal. Mr. Bartley stated that given the Council is well acquainted with the facts of this application and the procedural requirements, only the arguments of each ground of appeal will be provided.

The Commission failed to provide adequate notice. Sussex County Code §99 (A) and the Delaware Code 9 §6812 regulated Coral Lakes public hearing notice as follows:

Any public hearing required by this chapter shall be held within the County and notice of the time and place thereof shall be published in 2 newspapers of general circulation in the County. Notice shall be published at least 15 days before the date of the hearing. In addition, notice of the hearing shall posted on the property itself. The notice shall state the place at which the text and maps relating to the proposed change may be examined.

The record of the hearing for Coral Lakes has affidavits for the placement of two advertisements. Neither advertisement states the place of which the text and maps relating to the proposed change may be examined. Delaware Supreme Court Chief Justice Herman in 1982 land case stated, "the objective of the required notice is to announce the purpose, dates, and times of the hearings and to describe the area to be subdivided and advise public of its right to inspect the relevant documents in advance and its right to be heard at the hearings". For the public avail themselves of their rights, specifically to inspect the relevant documents in advance, it is imperative for them to know where the documents are located. Chief Justice Herman in the same case continued by the use of the word "shall" indicates the legislative intent requiring mandatory compliance.
The enabling *§6812* must be strictly followed. *Id.* The Commission by failing to strictly adhere to *9 Del C §6812* resulted in the improper

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interpretation and application of the Sussex County Code.

The Commission's advertisement's wording: "Additional information pertaining to the applications may be reviewed online at sussexcountyde.gov prior to the meeting." Does not meet the requirement of 9 Del. C. § 6812. The website sussexcountyde.gov is not a place. A website does not address the part of the public who do not have internet access and the website is a large website. To comply, the Commission would at least have to give an URL address. Just as buildings have a street address, webpages also have unique addresses to help people locate them. The required Property Sign Notice for the Hearing states, "text and maps of this application may be examined at the county administrative office building." The required newspaper advertisements for the Hearing states "additional information pertaining to the applications may be reviewed online at sussexcountyde.gov prior to the meeting." Logically the Commission cannot claim there are two different places at which the text and maps relating to the proposed subdivision may be examined. One of the notices must be in error. Given that Planning and Zoning Department is an actual place, then the advertisements reviewed online must be an error.

Mr. Bartley further stated that appellant Hicks testimony raised the issue that the notice did not comply with §6812. The following passage of Appellant Ms. Hicks' testimony from the transcripts of the Hearing states: "and even the difference in the site plan on file with P&Z could be requested on December 18th, 9 days ago and the plan provided to the public and the online packet 3 days later on January 21st of which there were changes made. Therefore, we request that a current PLUS review be performed." Cleary *§ 6812* requires one place where the public can review all the documents relating to a subdivision. The Commission cannot have multiple locations with different documents in each location where the text and maps relating to the proposed subdivision may be examined. Ms. Hicks notified the Commission that the documents located in the Planning and Zoning office are different then documents contained on the online packet. As a matter of fact, majority of the online packet consisting of hundreds of pages is still not on file in the Planning and Zoning office. Given that the Council's decision must be based on the record, he hopes that Council takes the time to go through the official record from Planning and Zoning.

The right to inspect the relevant documents in advance of the hearings is governed by *§6812* by setting the timeframe for the meaning of "in advance" as at "least 15 days before the date of the hearing." Clearly the Delaware Legislature would not require a notice state, "the place at which the text and maps relating to the proposed change may be examined" and not require the documents be there. That would have the public inspecting the documents which do not accurately reflect the subdivision application. The Commission is not free to arbitrarily set a date shorter than 15 days. Ms. Hicks notified the Commission that the online packet was only available to the public for 7 days before the hearing. Given the Applicant had over a year to prepare a record of support, fundamental fairness would require

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they make available to the public the online packet which was a 276-page report within the statutory required 15 days. In summary, there were three locations with text and maps were located for Coral Lakes. First, the official record located in the Planning and Zoning office which does not contain hundreds of pages of the online packet. Secondly, online where the Planning and Zoning agenda was located. From Ms. Hicks testimony, we know that this only available seven days before the hearing. Third, the online land use document; this is the only location online that had Coral Lakes listed when the Cape Gazette ad was published and when the 15-day period past. Unfortunately, there were no text or maps listed. Mr. Bartley stated that he visited the site several times prior to the hearing to review the information and there was never any information listed. The Commission's failure to provide proper notice was a fundamental error. The "fundamental error" doctrine is an exception to the rule that issues cannot be raised for the first time on appeal. Given land use has Constitutional protections, notice requirements would be a matter of due process. In fact, courts have said that "fundamental error must be equivalent to a denial of due process."

Mr. Bartley stated that all wetland simply means all wetlands. The applicant when deciding to develop these parcels understood that wetlands would be the defining feature of this application. The Coral Lakes is a cluster subdivision application which are governed by Code §115-25. Logically, the application would look to the Code that section to find the regulations of what governs wetlands. Wetlands for cluster subdivisions are regulated by Code § 115-25 E "design requirement for cluster development [states that] all lots shall be configured to be contained completely outside of all wetlands." The Applicant should then develop a record of substantial evidence to support the Commission's findings of fact. The Applicant did not mention, consider, or develop evidence for the Application complying with Code § 115-25 E in its record of support. There is no evidence that the Commission mentioned, considered, or developed evidence for finding the Application complied with Code § 115-25 E in the record of support. Commission gave no evidence to support the notion that meaning of Code § 115-25 E all wetlands only include jurisdictional wetlands. The applicant's Counsel made the false argument that all wetlands only apply to definition of wetlands containing §115-93. Buffer zones are wetlands, tidal and non-tidal waters, however, §115-93 states: "definition as used in this section shall have the following meaning indicated: the applicant's process is identifying and excluding non-jurisdictional wetlands should only be utilized when applying buffer regulations and should not be applied to cluster development regulations. The County Council regulates land use in Sussex County, not the federal government. Any federal regulations should be enforced in addition to the zoning code regulations and not in place of." The Army Corps of Engineering provide an approved jurisdictional determination that lists three wetlands: Wetland C 12.75 acres, Wetland D 5.31 acres and Wetland E 0.30 acres. The applicant record report shows an upward of 18.36 acres of non-jurisdictional wetlands. On page 6 of the PLUS review, a representative from DNREC stated "the newest project application proposes to disturb/fill upwards of 25 acres of non-tidal

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wetlands. These non-tidal wetlands provide significant water quality, benefits and habitats for plants and animals species. By filling these wetland areas and building homes and infrastructure upon them will direct result in an adverse drainage and flooding impacts for future residents." DNREC is a state agency that is charged through the PLUS process to give recommendations concerning the environment and wetlands specifically. In addition, DNREC gives the Commission evidence that the required design element §115-25E states that all lots shall be configured to be completely outside of all wetlands will not be met. The Commission is not free to ignore this and must give their reasons on the record as to why they did not agree with the testament. The record has no evidence that the Commission considered the Code. The Commission did not address DNREC's submission that filling these wetland areas then building homes and infrastructure upon them will directly result in adverse draining and flooding impacts for future residents. This resulted in the improper interpretation and application of Sussex County Code 115-25E.

The record fails to affirm that the application follows the code. The Commission failed to comply with Code §99-8 (B) which requires that the preliminary plat shall be checked by the staff to determine its conformity with the county's Official Zoning Map, other pertinent features of the Comprehensive Plan of the County, applicable zoning and other regulations and the design principles and standards and requirements for plat submission as set forth in this chapter. The Planning and Zoning staff prepared the Review to comply with the "preliminary plat shall be checked by the staff" requirement of Code §99-8 (B). In the staff review letter, the Planner notified the applicant and the Commission that the Preliminary Site Plan did not contain a grading plan and an easement for the site plan. The Code §99-23 (N) requires "The preliminary plat shall be drawn in a clear and legible manner and shall show the proposed grading plan when excavation, recontouring or similar work is to occur in conjunction with development of the subdivision." The Response in addressing the grading deficiency of The Code §99-23 (N) identified in the Review replied as follows:

Comment j. Please submit a grading plan.

Response j. A grading plan will be submitted with the Final Site Plan.

The Response is clear the Applicant knew the Plan did not comply with the Code §99-23 (H), and §99-23 (N). Their replies: "all easements will be shown on the Final Site Plan" and "a grading plan will be submitted with the Final Site Plan", are proof positive that they did not complete these two requirements. The easement and grading drawings are requirements of the preliminary plat, not the final site plan. Applicant's record of support does not contain the required easement and grading drawings. There is only one logical conclusion, the Applicant's record of support through the Response is an admission by the Applicant that the Plan does not comply with the Subdivision Code.

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There is no evidence in the Record that the Planner or Staff received the Response. There is no evidence in the Record that the Planner or Staff made any determinations concerning the Applicant's assertions that they cured the thirty-five identified deficiencies. The Commission's Counsel addressed the importance of this step at the first Appeal of Coral Lakes. 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' subdivision code. Based on the Record one must conclude that the Commission, the Director, and the Staff just accepted the Applicant's word that the plat submitted was compliant.

The Commission in their motion to approve the Plan included Condition (S.) "The Final Site Plan shall include a Grading Plan for the site." The Commission concurred with the Applicant that the preliminary plat does not have the required grading plan. Conditions placed on subdivision approvals are intended as "reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents." Conditions are not intended as curative measures to address any Plat deficiencies of specific criteria found in ordinances. The mere fact that the Commission required the applicant to include a Grading Plan in the Final Site Plan shows that the Plan is not in compliance with §99-8 (B).

The Commission's failure to hold a fair and orderly public hearing. Mr. Bartley stated that for an application that has had a lot of controversy, there is one thing is agreed on, when the record was closed. All parties agreed that the record was closed on January 27, 2022. In Council's decision to remand the application back to the Commission, the Council instructed the Commission to further consider the entire record, all evidence, and facts of this application in an open session and consult with their legal counsel to take a legal vote. The Commission at its June 23, 2022, meeting included Coral Lakes as an agenda item to comply with the Council's instructions. First up at the meeting, was the Commission's legal Counsel consultation with the Commission concerning the application. This consultation comprised of six pages of transcribed testimony to discuss the well-settled law on subdivisions in Delaware. This discussion reviewed eight citations of court cases, the Delaware Code, the Zoning Code, the Subdivision Code, and Commission's Rules of Procedure. The Counsel's discourse ended with: So, again, in summary, under well-established Delaware law, if a subdivision satisfies the requirements of the Zoning Code and the Subdivision Code, then it must be approved. Next up was to take a public vote thereon based on the "entire record." However, there was a problem, the Plan must satisfy the requirements of the Zoning Code and the Subdivision Code. So, it can fulfill the if/then condition of Counsel's summary above. As previously established, there was an evidentiary defect

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in that the Record is void of any oral or written presentation that the Director or the Staff determined that the Plan conformed with the Zoning and Subdivision Code.

At the conclusion of Counsel's remarks, he stated the following: "So, based upon the law that I have described, I'd now ask Mr. Whitehouse to confirm, for the record [emphasis added], whether Subdivision 2021-06 for Coral Lakes complies with the Subdivision and Zoning Code." Mr. Whitehouse replied, "And it does, Mr. Chairman. The bulk area open space density and buffer requirements within Chapter 115 are complied with and the design requirements in Chapter 99 are also met."

Counsel's question and answer session with the Director was clearly a curative step to address the evidential defect in the Record. But at what cost? Now there is a procedural defect in that evidence was added to the Record, after it was clearly closed. In a twist of irony, the Director's declaration that the application complied with the Code outside of the Record, must be construed as an admission that he never confirmed that application conformed with the Code on the record.

The Council instructed the Commission to consult with their Counsel. Their Counsel consults that if the application complies with the Zoning and Subdivision Code, they must approve it. Then the Counsel has the Director, outside the record, confirm that the Plan does comply with the Zoning and Subdivision Code. Given these set of circumstances, one must conclude that the procedural error was fatal to the application, in that Counsel and the Director's actions were prejudicial to the Application receiving a fair, orderly, and logical review.

The Commission by allowing and considering evidence presented outside of the Public Hearing record allowed for decision that was a result of an orderly and logical review of the evidence.

Mr. Bartley stated that 9 Del. C §6811 gives the residents of Sussex County the right of action to challenge a site plan approval by the Sussex County Planning and Zoning to the Sussex County Council. This section states "any approval or disapproval of Subdivision Application may be appealed to the County Government within 30 days of the official action of the County Government". The Commission and Applicant failed to recognize this fact when citing cases to challenge his standing.

Mr. Bartley stated that given these errors, Council's only just and reasonable course of action is to reverse the Commission's decision to approve Coral Lakes.

M 468 22 Recess

A Motion was made by Mr. Hudson, seconded by Mrs. Green to do a 5-minute recess.

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 469 22 Reconvene

At 10:13 a.m., a Motion was made by Mr. Hudson, seconded by Mrs. Green to reconvene.

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**

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Vince Robertson, Esq. of Parkowski, Guerke and Swayze came forward representing the Planning and Zoning Commission. Mr. Robertson explained that this is a usual situation in that fact that he is defending a client that is being challenged because they listened to the law.

Mr. Robertson shared that Coral Lakes was a coastal area subdivision; it was not a cluster subdivision. The superior design standards that apply to cluster subdivisions do not apply. Therefore, subdivisions such as this one are by-right; if the code is followed on a subdivision, then it must be approved. The Commission is allowed to impose conditions of which 21 were imposed in this case.

This law is not disputed by anyone; people may not like the law, but it is not being disputed.

Mr. Robertson explained the standard of review on one of these appeals which is governed by Section 99-39 of the Subdivision Code. He noted that what needs to be looked at is whether the commission correctly applied and interpreted the code and whether there was an orderly and logical review. He believes that both of these occurred, therefore, the Planning and Zoning Commission's decision should be affirmed.

Mr. Robertson addressed the Hicks appeal first that argues three reasons for reversal. One, that the Commission did not follow County Council's instructions, that the Commission did not conduct an orderly and logical review and the record fails to demonstrate that the Commission's decision was the proper application of the law.

With regards to Council's instruction to remand, they specifically directed the Commission to consult with their attorney. The Hicks appellants never dispute the legal advice provided by him; in fact, they cite the same law. In addition, this is not the first time this legal advice was given, the first vote for Coral Lakes, Commissioner Stevenson asked for an explanation on how subdivisions are treated in Delaware. Mr. Robertson explained that he was appointed and directed by County Council to explain the law to the

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Commission.

With regard to the motion itself, this was not the first time the Commission saw this motion. In March, nearly an identical motion was made and there were 4 votes given to deny but no reasons provided. They had 3 months to consider what that motion said and was considered again in June. Mr. Robertson noted that all of the Hicks appellants ignore the motion itself and never talk about the findings or conditions given in that motion. Instead, they suggest that each member of the Commission has to restate the motion entirely whenever voting on it which is not required. The motion was read by him which is permitted. However, the motion was made by Mr. Mears and seconded by Ms. Wingate and then an independent vote was conducted. He pointed out that nobody had to make the motion or second the motion and each person could vote the way they wanted. Mr. Robertson pointed out that it was the same motion that was made back in March at which time, Ms. Stevenson during the 3/10/22 meeting admitted that we worked very hard on this to include the Commission. Then going into June, it was their motion. The County Council cannot ignore or look past the motion itself and the specific findings.

Next, Mr. Robertson discussed if there was an orderly and logical review. This was a remand that was based on the record that was previously heard. When you look at the hearing, the Commission discussed several items to include but not limited to: wetlands, impacts on adjacent developments, interconnectivity, stormwater design, DelDOT questions, drainage, archaeological studies, and adjacent landing strips. Then the motion that made it the first time and on remand stated that it was based upon the record. There was an orderly and logical review because it was based on the record that occurred at the hearing in early 2022. There was specific finding relating to density and the bonus density lots was denied for the protection of trees and federal wetlands. The motion also addressed the Henlopen TID, DelDOT requirements, 17 items of §99-9C and there were conditions that related back to that. In addition, it addressed central water and sewer, coastal area provisions of the Comprehensive Plan, required perimeter and wetland buffers and preservation of trees and other vegetation. It also addressed that there had to be at least 30% of the site be contiguous open space, maintenance of street, roads, stormwater management facilities, buffers, and common areas by HOA. It also discussed sidewalks, street lighting, amenities, internal street design and road naming. It also required an entire street to be removed and relocated in that subdivision. In addition, it discussed the agricultural use protection notice, the existence of a nearby airfield, a notice requiring nearby neighbors to be aware that there is hunting activities in the area. It also discussed what should happen if there were nearby grave sites located in the subdivision.

Mr. Robertson stated that although the Hicks appellants would ask you to ignore those findings and conditions; they cannot be ignored. There were also cites to the record for each of those in pages 13-15 of his written submission.

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Next, the Hicks appellants discussed the case of Tony Asburn case about how their cannot be a rubber stamp. They further explain that the Commission has the further right to scrutinize the layout of the project as shown on the site plan and attach conditions to it. Mr. Robertson explained that it is exactly what happened. In addition to the 16 findings, there were 21 conditions of approval doing exactly what East Lake and Ashburn allowed. Finally, Council has already determined that an orderly and logical review occurred on its first decision on this subdivision, and it cannot reopen that prior finding.

With regard to Mr. Robertson reading the motion, there is no issue with that. It is supported by Mason Manual of Legislative Procedure which allows others to read a motion and is consistent with legislative motion practice in the State and here in Sussex County. There were examples provided of that to minutes and that included Terrapin Island which was approved by this Council on appeal. Mr. Robertson noted that the Hicks appellants never disputed a legal advice that was incorporated into the motion. In summary, the motion that was made, seconded, and approved was by its own terms based upon the record; 16 separate findings and 21 conditions. The three votes in favor of that motion adopted it as their own.

Mr. Robertson stated that Mr. Mette spent some time reviewing court cases that talk about how a court needs to know exactly in detail why the subdivision was approved. At County Council unlike Planning and Zoning, a short title is read, someone states "so moved"; then each Council person has to give his or her reasons why their voting on that motion. When the motion substance is only so moved, the response "I vote yes" does not cut it; you need more reasoning so that a court on appeal can decided why you voted yes. Here, there was a very specific motion made with 16 separate findings and 21 detailed conditions. It is clear to any reviewing court why it was approved. Mr. Robertson discussed the Gibson vs. Sussex County; in Gibson, the court quoted the Commission specific reasons given in its motion like what was done here and found that this was "articulated reasoning with a thorough and rational review". It looked at the motion, not the individual votes. Here, Tate vs. Miles, TD Rehoboth, Gibson, and Terrapin Island confirm that the Commission motion does provide adequate justification for the Commission's decision and gives everyone reasoning why Coral Lakes was approved.

With regard to the question of a written decision, it was issued by the Commission staff on June 24, 2022. This was in accordance of the requirements in Title 9 that discuss the type of decision that should be issued in the case of a disapproval. In this case, it was an approval, however, a written decision was still issued. Mr. Robertson noted that Planning and Zoning Rule 15.4 should also be looked at that provides further guidance. It states provided a decision by the Commission on an application, a copy of the written shall be sent by the applicant which did occur. A written decision was issued and sent. There is no requirement that it needs to be signed by individual Commission members here in Sussex County. It was

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sent to the applicant as required by Title 9 and the Planning and Zoning Commission Rules.

In summary regarding the Hicks appeal, the Planning and Zoning Commission did follow the Council's instruction. Their decision was an orderly and logical review. In addition, it is not disputed that the record demonstrates that the decision was the proper application of the law.

Mr. Robertson then addressed the Mr. Bartley's argument. He noted that he did not appear at the hearing or submit anything into the record during hearing. He stood by and did nothing during the hearing when he could have participated. During the hearing, it is the time to raise your concerns about a subdivision and make then known to the Planning and Zoning Commission, Then, fall back to them on appeal which did not occur. In addition, he does not live close proximity to the subdivision and does not allege in any way how he is an aggrieved party. He did not show up to the hearing; this is a minimum requirement of Section 99-39 and Mr. Bartley did not satisfy it. Mr. Robertson stated that he submits that his appeal should not be considered by Council.

The first issue raised by Mr. Bartley was the notice requirement which not raised previously and cannot be raised now on appeal. This is in accordance with Judge Tolliver's September 16, 2022, ruling. Mr. Bartley referenced a statement by Ms. Hicks relating to PLUS review that has nothing to do with the legal notices that were published, mailed to people, and posted on the property. It is clear that the notices worked; there were 11 people spoke and there were numerous letters submitted. Of all of those people that were in attendance, there were no complaints about notice raised during the hearing. He does cite the Title 9 requirements for hearing notice, but they do not support his claim. The purpose was stated, the date, place and time were stated. In addition, the area to be subdivided was described and it showed where the right to inspect was located. A physical place was listed, and a website was also provided which has been strived to do so more documents can be provided. The website is a place to go to locate the documents if you do not desire to travel to Georgetown. In addition, the phone number is provided by anyone that is unable to figure out any of the previous discussed options out. Therefore, there is no issue with notice.

Mr. Bartley discusses the Commissioner's alleged failure to hold a fair and orderly public hearing. Mr. Bartley focuses on Mr. Robertson's statement about the law and Mr. Whitehouse's statement about the information in the record that is complied with the zoning and subdivision codes. Mr. Robertson stated that his statement was fully compliant with Council's directive to consult with legal Counsel. Mr. Whitehouse only confirmed what was already in the record which was complaint with the Council's directive to consider the record and all evidence and facts of the application. Further, it is appropriate for the Commission's staff to advise the Commission. Mr. Whitehouse is such a member of the Commission and staff that he is authorized to sign plots on behalf of the Commission each

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year. In fact, if staff participation was considered testimony or evidence, no record would ever be closed.

With regard to site plan compliance, it was not raised during the hearing below and should not be considered for the first time on appeal. Mr. Bartley raised two issues, one has to do with easements and the other has to do with the grading plan. With regards to easements, he claims there were none shown. Mr. Robertson explained when you come in for a preliminary site plan approval no easements exist. Engineering is done after the preliminary site plan approval is received. Therefore, it was accurate for what existed at the time. In regard to the grading plan, they were shown on the plan, and it was required as condition S of the Commission's motion.

In regard to wetlands, Mr. Robertson stated that the problem is that Mr. Bartley does not explain what he means by what a wetland is. Mr. Robertson explained that there are two types of wetlands; Regulated vs. Unregulated (in areas that happen to be wet). Wetlands are defined in the Code as federal (regulated by Corp. of Engineers or state (regulated by DNREC). Mr. Bartley expects the County to regulate other soil types or damp ground areas but never provides any authority for that because there is none. In addition, Mr. Bartley cites Section 115.25E that all lots must be configured to be outside of all wetlands. Mr. Robertson stated that 115-25E does not apply to this subdivision due to it being a Coastal Area Subdivision. Those requirements are within an AR-1 subdivision which are two different standards. In the site plan, there are 5.65 acres of non-tidal wetlands that are regulated by the Army Corp that will be saved. Mr. Robertson noted that the request for bonus density was denied by the Commission so that lots would be pulled away from them. Mr. Bartley claims that there were 18.36 other acres of land that happen to be wet at times that should not be touched. However, there are no regulations to support that. The regulated wetlands were protected by the conditions of the approval.

Mr. Bartley also raised points about the density calculation. Mr. Robertson stated that density is based on what the zoning code says. At the time of subdivision, the lot is the entire parcel which is how density is determined. Mr. Robertson further explained that it is not based on site plan design, it is based on what the code says.

Mr. Robertson stated that nobody has disputed that the Planning and Zoning Commission misapplied or misinterpreted the County Code or the law that he read to the Commission in his explanation. In addition, Council directed him to give him that advice. The Planning and Commission's findings were the result of an orderly and logical review. Mr. Robertson pointed out that there were 16 findings and 21 conditions of approval which shows that it was not a rubber stamp. Finally, Council's instructions on remand were followed. For all of those reasons, he submits that the Commission's decision should be affirmed.

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Mr. Jon Horner, General Counsel for Schell Brothers came forward. Mr. Horner stated that Coral Lakes is a bi-right application meaning the application is zoned AR-1 and the proposed use of the project is residential single-family housing consist with the AR-1 zoning.

The appellants today consist of immediate neighbors of the project as well an individual that lives miles away from the project. Mr. Horner stated that those appellants are asking Council to disregard the law, constitution, property rights and the sound orderly and logical review of the Planning Commission because they do not want this project near them. For the Hicks appellants, they live next door to the project and have enjoyed wooded views from their homes as well as the unrestricted use of that forest. They immediately opposed this application for the reason to preserve the forest which is the exact same forest that was cut down to build their homes and the roads serving their homes. Mr. Horner stated that if given the option, we would all like to have a forest in our background that we did not have to pay for rather than homes. Or, given the option, tell our neighbors what to do with their land or to tell our neighbors that we want their land to remain untouched. Luckily for the applicant, the rule of law still prevails in this Country and neighboring property owners desire to control the use of someone's land is trumped by the property rights of the owner of that land. The same property right that allowed each of the appellants to build their homes are the same property rights that demand the affirmation of the approval of this application.

Mr. Horner stated that the Council may only reverse the decision of the Planning and Zoning Commission upon a finding that the Commission made an error in its interpretation of the applicable sections of the Subdivision Code or that the Commission's findings and conclusions were not the result of an orderly and logical review of the evidence. If there is substantial evidence that demonstrates the Commission's decision based on an orderly and logical review of the evidence and the law was accurately applied, the Council must uphold the Commission's decision. As this Council stated in the Terrapin Island appeal, the Council's review is limited to correcting errors of law and determining whether substantial evidence exists to support the Commission's findings of fact and that when substantial evidence exists, the Council will not reweigh it or substitute its own judgement for that of that of the Commission.

Mr. Horner stated that Mr. Bartley lacks standing to purse this appeal under Delaware Law and legal precedence as well as under the Sussex County Code. Therefore, his appeal must be dismissed. Delaware Courts have stated that for an individual to having standing, they must demonstrate the interest they seek to protect or within the zone of interest and alleged a related injury in fact. Mr. Horner noted that Mr. Bartley does not allege or even attempt any particular harm that is concrete; this is because he does not live by the Coral Lakes project; he lives miles away and there is no harm by this project. Therefore, he does not meet that requirement and the appeal must be dismissed under Delaware Law.

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Looking next at the Sussex County Code, Mr. Bartley cannot say that he was aggrieved by the Commission. A review of the record shows that he did not write letters, did not sign petitions, or participate in the public hearing stage at all. Mr. Horner noted that any party with standing can appear which is not the case here.

Mr. Horner stated that there are several cases cited in their briefs that state you do not have a constitutional protected right in the by-right land use of another landowner. It is that landowner that has the constitutional protected right. The cases cited by Mr. Bartley dealt with rezoning or conditional uses; not by-right subdivisions.

Mr. Bartley alleges that the public notice for the public hearing was inefficient because it did not state the place that the texts and maps related to the proposed change may be examined. Mr. Horner replied that this information was provided including a phone number, address, and website. Mr. Horner noted that this issue was not noted by anyone during the public hearing process. Mr. Horner emphasized that Mr. Bartley did not participate in the public hearing process at all and was given ample opportunity to do so. Regardless, the public hearing notice was complied with properly.

Next, Mr. Bartley argued that an orderly public hearing was not held. Mr. Horner stated that the Commission is allowed to consult with its staff including its attorney and Planning and Zoning staff. Furthermore, Mr. Whitehouse's statement was not new; it was a confirmation of facts already in the record. This Council has already found in the prior appeal that the process was orderly. Mr. Horner noted that even if you agreed with Mr. Bartley's statement that Mr. Whitehouse's statement somehow constituted new testimony in a public hearing, the remedy would be to disregard the statement. Even if that were done, there is still substantial evidence to uphold the Commission's decision. The appropriate staff review occurred which is undisputed, the staff provided a response letter and then the applicant responded to those comments. The Planning and Zoning staff specifically Mr. Whitehouse then confirmed that the plan met code. Mr. Horner stated that the plan complies with the code as confirmed by Mr. Whitehouse and the extensive record. The review by staff as required by §99-8B occurred and the staff confirmed that it complied.

Mr. Bartley also wrongly states that the application does not comply with the code because the application has lots configured within the wetland areas. This is a Coastal Area Subdivision and not a Cluster Subdivision; the provisions cited by Mr. Bartley are not applicable to this project. Mr. Horner noted that there are regulated wetlands on the property that are located at the rear of the property and will not be disturbed. The areas where the lots are located do not contain any wetlands that are regulated by federal, state or county law. Recently, the County passed a buffer ordinance that reaffirms the intend not to regulate these low isolated wetlands as it does not contain any buffers or regulation of these low isolated areas.

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Mr. Bartley also argued the calculation of the density of the proposed subdivision. Mr. Horner stated these issues were never raised below, therefore; it should not be considered on appeal. However, even if it were considered, Mr. Bartley is wrong. The density is a function of zoning and is calculated for a property based on the zoning for the property. Therefore, the density for the Coral Lakes property is established and calculated prior to the submission of plan and does not change with the submission of a plan. At the time it was calculated for Coral Lakes, the project was two tax parcels or two lots. Density is determined in the zoning code not the subdivision code. Here, at the time density is calculated, the entirety of the Coral Lakes project consisted of a gross area as defined by the code of 152.34 acres which allows for 304 lots; exactly what was approved here. Mr. Horner explained open space further. Mr. Horner explained that if Mr. Bartley's interpretation of the Code was applied, it would create an endless loop of redesigns for projects.

Mr. Horner stated that the Planning and Zoning Commission conducted an orderly and logical review of the record and properly applied the law when approving Coral Lakes. Therefore, this Council should affirm the decision of the Planning and Zoning Commission.

Ms. Kate Mowery, Attorney from Richards, Layton, and Fingers came forward representing Schell Brothers. Ms. Mowery stated that it is remarkable that the argument today is that the Commission did something wrong by following the advice of their legal Counsel. It is not being argued that the law provided was incorrect and the Hicks appellants do not object to the way it was presented or the actual substance; it is the fact that the Commission should not have followed the advice of Delaware law. In addition, that somehow legal Counsel made the decision for the Commission by reading that Delaware law into the record. Ms. Mowery stated that what legal Counsel did here was appropriate and followed the law.

Ms. Mowery discussed prior precedent; this same Council confirmed Terrapin Island preliminary plat approval last year. Ms. Mowery stated that the applications were almost identical. The only difference is here in the Coral Lakes application, there were additional evidence of careful consideration was provided. Therefore, it cannot be that the Council found that process logical and orderly and the proper application of law and not this one.

Ms. Mowery stated that the Hicks appellants are stating that Schell is fleeing from the record which is the opposite. Schell accepts the record as it stands which shows an orderly and logical review and proper application of the law. The Hicks appellants want to ignore the 12-page transcript motion made by Commissioner Mears. Ms. Mowery discussed the motion of which was very detailed, and it is clear to show that a clearly and logical review of evidence. Ms. Mowery noted that the Council found a motion similar to this format in the Terrapin Island project. Additionally, for the Coral Lakes

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project, the Commission did more than just this motion, each Commissioner stated reasons for his or her vote which was more than what was done during the Terrapin Island vote. On remand, the reasoning for their vote was requested by Council. Mr. Mowery reviewed each Commissioner's vote and their reasons that they provided. Each of those votes showed individual consideration and induvial articulation. Further, there is no evidence that legal Counsel directed the Commissioner's on how to vote. There were also two members of the Commission that did not vote in favor of the application approval which shows there was individual thoughts by each member and that legal Counsel did not direct the vote.

The Commission complied with remand instructions and precedent. Ms. Mowery shared the procedures that were completed during the Coral Lakes and Terrapin Island projects. Based on this record, it cannot be that where the same procedures done in one appeal and affirmed that it is not in the second.

Ms. Mowery asked for the decision to be affirmed.

Mr. Mette came forward for rebuttal. Mr. Mette stated that in the January 27, 2022, record, there were numerous record that his clients testified and providing specific impact to them. As to the notion that the Planning and Zoning Commission only have to state their reasons if their disapproving application is not what Delaware Law or the Council's remand order stated. Therefore, the reasons people gave for their vote cannot stand; there is an independent basis for the appeal under the law. The public body must state its reasons for their vote which did not happen here. Mr. Mette stated that Terrapin is not controlling here and did not involve these facts at all. Mr. Mette is not stating that they should not rely on advice from Counsel; he is stating that Counsel does not get a vote and Counsel cannot tell them how to apply the law. As to the motion being read; he is stating that the motion was not considered in open session not that Counsel made it. Property rights must be balanced of why public body should states its reasons.

Mr. Bartley came forward to rebuttal. Mr. Bartley stated that he visited the site several time and there was no information listed. In addition, hundreds of pages of the online packet are still not on file at the Planning and Zoning office. Therefore, the official record does not have hundreds of pages of their testimony. It was DNREC that said the wetlands were being filled which was part of the PLUS review and they are required to respond to that.

M 470 22 Go Into Executive Session

At 11:18 a.m., a Motion was made by Mr. Schaeffer, seconded by Mr. Hudson 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: 4 Yeas, 1 Absent

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

Executive Session **At 11:24 a.m., an Executive Session of the Sussex County Council was held in the Council Chambers to discuss matters relating to pending/potential litigation and land acquisition. The Executive Session concluded at 11:57 a.m.**

M 471 22 Reconvene **A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to come out of Executive Session to go back 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**

E/S Action

Preliminary Matters/ Standard of Law **Mr. Moore reviewed some preliminary matters and standards in the law that are applicable to both appeals. It is important to focus on the standard of review. As you will see, this standard does not permit the Council to substitute its own opinion for that of the Commission, nor does it permit a rehearing of what was before the Commission. It is, and was, a hearing of the record that you have heard already.**

In reviewing the Commission's decision on appeal, the Sussex County Code 99, Section 39, Subsection 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 a preliminary subdivision plan application acts in a manner that is "partly in a ministerial function 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".

The Council's review is "limit[ed] to correcting errors of law and determining whether substantial evidence exists to support the [Commission's] finding 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]." In other words, even if some Council members think it is not how they would have voted, they are not permitted to substitute those views here – if there is substantial evidence to support the

Preliminary Matters/ Standard of Law (continued)

Commission's decision and if the law was not misinterpreted.

The Appellants have the burden of proof to demonstrate that the Commission did not engage in an orderly and logical review of the evidence and erred in its application of the law or that there was no orderly and logical review of the evidence. 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 addition, the Council is not permitted to consider any issues and arguments raised by Appellants on appeal that were not raised below as they are considered waived on appeal.

After hearing each appeal, the Council may:

1. **Affirm the Commission's decision**
2. **Reverse the Commission's decision; or**
3. **Remand the matter back to the Commission for further review and consideration.**

If the Council remands the matter back to the Commission, it may direct the Commission to hold a new hearing within a specified time period and following the hearing, it can direct the Commission to issue a written decision containing findings and conclusions. The Council may reverse a decision only if the Commission made an error of law or the Commission's decision was the result of an orderly and logical review of the evidence and the applicable law.

For the two appeals before Council today, each will be dealt with separately in the order they were heard. They will be referred to as the Hicks Appeal and the Bartley Appeal. The first appeal to be acted on is the Hicks Appeal.

M 472 22 Coral Lakes Hicks Appeal Decision

A Motion was made by Mr. Vincent, seconded by Mr. Hudson, In the matter of the Hicks Appeal, I move that the Council affirm the decision of the Planning and Zoning Commission on remand in its approval of Application No. S-2021-06 filed by Schell Brothers, LLC for Coral Lakes (F.K.A. Coral Crossing) for the reasons outlined below and based on the standards as read by our attorney, Mr. Moore, which are incorporated herein by reference.

1. **The Commission Complied with the Council's Remand Instructions**

The Hicks Appellants argue that the Commission did not comply with the Council's instructions on remand which stated:

> **"[T]his matter [is] 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**

M 472 22 Coral Lakes Hicks Appeal Decision (continued)

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."

Council finds that the Commission complied fully with these instructions. On June 23, 2022, the Commission reconsidered this matter in open session at a Commission meeting. The Commission's reconsideration included a comprehensive statement of the law by the Commission's legal counsel, confirmation from the Planning and Zoning Director Jamie Whitehouse that the Applicant's submission met all of the requirements for preliminary approval, a public vote based on 16 findings and 21 conditions enumerated in the motion for approval as read by counsel (3 "yes" votes, 1 "no" vote and 1 abstention) with each Commissioner stating the reasons for his or her respective vote), and, by letter dated June 24, 2022, a written decision was issued to the Applicant in accordance with the Planning and Zoning Commission's Rules of Procedures, Rule 15.4 ("[f]ollowing 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.").

In addition, the motion was specifically "based on the record made during the public hearing." The Commission was not required to hold a new hearing or restate the entire record in open session. The Commissioners were required to review and reconsider the entire record, then vote in open session and provide reasons for their vote.

The comprehensive motion, vote, and reasons for such votes demonstrates the Commission's thorough consideration of the issues surrounding this Application as outlined in the record, thus confirming that the Commission engaged in an orderly and logical review of this Application based on the entire record prior to approving the Preliminary Subdivision Plan. In fact, Council had already found that the Commission engaged in an orderly and logical review of this Application following the initial appeal hearing filed by the Applicant thus negating the need to revisit it here.

The fact that legal counsel read the motion is immaterial. The motion itself was made by Commissioner Mears following the reading when he stated, "So moved". Moreover, in accordance with Rule 11.1 of the Planning and Zoning Commission's Rules of Procedure, the Commission follows Mason's Manual of Legislative Procedure. If a written motion is submitted, Section 156(3) permits a person other than the Commissioner making the motion to actually read the motion into the record.

M 472 22 Coral Lakes Hicks Appeal Decision (continued)

Mr. Whitehouse's confirmation that the Application complies with the Subdivision and Zoning Code cannot be interpreted as the Commission delegating its authority to a staff member. It is common practice for Mr. Whitehouse to review and comment on subdivision applicants' compliance or noncompliance with the applicable Code provisions. In fact, Sussex County Code, §99-8B mandates that staff review. However, Mr. Whitehouse does not make the final decision and does not have a vote; the final vote to approve or deny a subdivision application lies in the Commission only.

2. The Commission's June 23rd Decision was the Result of an Orderly and Logical Review of the Evidence

The Hicks Appellants object to the Commissions' legal counsel providing legal guidance on the record and insinuates that this is akin to the "Commissioners voting the way their attorney told them to vote". This argument is flawed in several ways.

First, the Council expressly instructed the Commission "to consult with its legal counsel" during the process on remand. Clearly this was done, and it was done in open session thus providing complete transparency to the public.

Second, although each Commissioner provided reasons for his or her vote, it is important to note that one Commissioner voted "nay" and one Commissioner abstained. Had legal counsel or staff controlled their votes as the Hicks Appellants allege, one would expect that vote to be a unanimous approval. In order to perform an orderly, logical, and thorough review, the Commission needed to not only have the facts and documentation available to it but the applicable law as well. This was this done and resulted in the imposition of extensive conditions of approval, including the denial of bonus density lots, reconfiguration of the lots, and more. These conditions must be complied with, or the project will not get built.

The Hicks Appellants also reiterate their objection to Mr. Whitehouse's confirmation that the Application complied with the applicable Code provisions. The Sussex County Code mandates staff review as to conformity with County requirements. However, the ultimate decision lies with the Commission.

3. The June 23rd Approval Was Based on the Proper Application of the Law and Regulations.

The Hick Appellants allege that the Commission's approval on remand "should be reversed because the record does not demonstrate that the decision involved a proper application of applicable law and regulation." The crux of their argument rests on the assertion that the

M 472 22 Coral Lakes Hicks Appeal Decision (continued)

Commission did not publicly deliberate or determine compliance with the law at the June 23rd meeting, but rather the Commission's legal counsel provided an extensive review of the law and the facts, and Mr. Whitehouse's confirmation that Application complied with the applicable ordinances. The Hicks Appellants fail to take into account the extensive written, record below, the public hearing, public input, agency input, several deferred votes to allow time for additional consideration, and more. The Commission has been reviewing this matter for months. The Code does not require the Commissioners to individually review all of the evidence and comment on it in open session. It does, however, require that each provide reasons for their vote which, upon remand, did occur.

Motion Adopted: 4 Yeas, 1 Absent

Vote by Roll Call:

Mrs. Green stated that based on the motion given and testimony given today and the three votes to affirm, I vote yes;

Mr. Schaeffer stated that he has made his opinion clear on this subdivision over the past few months and he does not believe there is any mistake as to how he feels about it. However, his review today is very limited in scope, and he believes firmly that the Planning and Zoning Commission did apply a logical review of the application and the submittals. He did not find that there has been any errors in their application of the law and he believes that the Planning and Zoning Commission reviewed and considered substantial evidence and took it into consideration when they made their decision. Therefore, he will affirm the Planning and Zoning decision and he approves of President Vincent's motion, and he votes yes;

Mr. Hudson stated that he agrees with the reasons and the motion and the decision of the Planning and Zoning Commission that they made an orderly and logical decision, I vote yes;

Mr. Vincent stated that he agrees of everything that he read as a motion and he thinks that everything was done properly, my vote is yes;

Mr. Rieley, absent.

M 473 22 Coral Lakes Bartley Appeal

A Motion was made by Mr. Vincent, seconded by Mr. Hudson, In the matter of the Bartley Appeal, I move that the Council affirm the decision of the Planning and Zoning Commission on remand in its approval of Application No. S-2021-06 filed by Schell Brothers, LLC for Coral Lakes (F.K.A. Coral Crossing) for the reasons outlined below and based on the standards as read by our attorney, Mr. Moore, which are incorporated herein by reference.

M 473 22 Coral Lakes Bartley Appeal (continued)

1. The Commission Provided Adequate Notice of the Hearing

Mr. Bartley alleges that the Commission did not provide adequate notice of the public hearing claiming that the notice failed to include "the place at which the text and maps relating to the proposed change may be examined." Mr. Bartley's argument fails on multiple levels. The Commission hearing was advertised in two (2) newspapers (the Delaware State News and Cape Gazette), copies of which have been attached to the Commission's Response together with the corresponding affidavits of publication. Not only do the advertisements include the place, date, and time of the public hearing at which the "text and maps" will be discussed and available for examination, but the advertisements also include a statement that, "[a]dditional information pertaining to the applications may be reviewed online at sussexcountyde.gov prior to the meeting or by calling 302-855-7878. Office hours are Monday through Friday, 8:30 am to 4:30 pm." This provides two (2) additional avenues to review the "text and maps" at issue prior to the public hearing. Moreover, the hearing was well-attended by the public, many of whom spoke and/or submitted letters to the Commission. This confirms the notice was adequate.

In addition, Mr. Bartley did not raise an objection to the form of notice at the public hearing. The Council is not permitted to consider any issues and arguments raised on appeal that were not raised below as they are considered waived on appeal. This was confirmed by the Presiding Judge in this matter who ruled, "even if timely raised, an argument or evidence not part of the record below, cannot be considered on appeal."

2. The Commission Held a Fair and Orderly Public Hearing

Mr. Bartley also contends that the Commission "[f]ailed to hold a fair and orderly public hearing." His argument is flawed on its face. First, in its decision on the first appeal brought by the Applicant, Council already found that the Commission engaged in an orderly and logical review of this Application and, therefore, the issue as to whether the hearing was orderly is moot.

Mr. Bartley also contends that a statement made by Jamie Whitehouse, the Sussex County Planning and Zoning Director, confirming that the Applicant's plan meets the requirements of the Subdivision and Zoning Code somehow opened the record which triggered the public's right to comment. Mr. Whitehouse's statement did not add evidence to the closed record; it was a statement as to the application of the Code to the evidence in the record and is precisely what the Council instructed the Commission to reconsider on remand.

The Appellant claimed that the Commission did not adequately

M 473 22 Coral Lakes Bartley Appeal (continued)

consider this project, but the record shows that it did. The record in this case is voluminous. There was a lengthy application which contained information concerning property ownership, plots, maps, developer information and more.

3. The Record Demonstrates the Application Conforms to the County Code

Mr. Bartley argues that neither the Planning and Zoning Director or staff checked the preliminary plat to ensure conformity with the applicable County zoning and subdivision regulations. First, by not raising this issue below, Mr. Bartley is barred from asserting it on appeal.

Second, Mr. Bartley's argument is not supported by the record. The record is replete with evidence contrary to this argument. In its January 11, 2022 letter, the Department staff reviewed the Application and provided comments, each of which were addressed by Schell in writing prior to the public hearing, and were available for the Commission's consideration at the public hearing.

The Commission's Response further outlined numerous ways in which the Plan followed the County Code. These were considered by the Commission on remand as part of the record.

In his Reply, Mr. Bartley raises a new argument that the easements and grading plan were not properly addressed by the Commission, because they were not included on the Preliminary Site Plan. This argument, again, was not raised by Mr. Bartley below and, therefore, it is barred on appeal. However, it is important to note that these items will be part of the Final Site Plan. In fact, Mr. Bartley acknowledges that Condition S mandates that the Final Site Plan contain a grading plan. Condition S also states that no building permit will be issued without a grading plan and, no certificates of occupancy will be issued without a grading certificate showing compliance.

4. The Wetlands Were Properly Considered

Mr. Bartley next argues that the wetlands were not properly considered, and that the lot design will disturb "upwards of 25 acres of non-tidal wetlands". Mr. Bartley's interpretation of both the subdivision plan and the applicable law is incorrect. The record includes information pertaining to Wetlands Delineation as to federal wetlands which are under the U.S. Army Corps of Engineers' jurisdiction. The isolated low areas identified by the U.S. Army Corps of Engineers do not meet the DNREC's definition of wetlands and, therefore, do not meet the County's definition of wetlands and are otherwise unregulated.

M 473 22 Coral Lakes Bartley Appeal (continued)

Low wet areas do not, in and of itself, constitute regulated wetlands. There are no DNREC Wetlands on this site. There are, however, 5.65 acres of federal wetlands which the Commission specifically protected by denying the "bonus density lots" which were originally located adjacent thereto. While there are regulated non-tidal wetlands on this site, all of the proposed lots will be configured outside of those regulated wetlands, as well as the non-regulated non-tidal wetlands that meet the definition by DNREC consistent with the County Code. There will also be 50-feet buffer from the non-tidal jurisdictional wetlands, which is twice the Code's 25-feet buffer requirement.

Finally, Condition B expressly provides that, "No lots shall contain any Federal or State wetlands. All Federal or State wetlands shall be clearly shown on the Final Site Plan."

5. The Density Was Accurately Calculated

Mr. Bartley has raised an objection to the density calculation. However, this issue was not raised below and, therefore, is barred on appeal.

That being said, Mr. Bartley's density calculation is erroneous. Because it is located in a Coastal Area, Coral Lakes falls under Section 115-194.3C. which uses the "density of the underlying zoning district for developments using central wastewater collection and treatment systems" with the "allowable density" being determined based on the "lot area and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193." Coral Lakes is located in an AR-1 Zoning District which permits two units per acre.[1] The site contains a total of 152.34 acres. Because there are no tidal tributary stream or tidal wetlands, the total acreage is multiplied by 2 which is an "allowable density" of 304 units.

6. The Appeal Fee is Not Subject to Council's Jurisdiction.

Mr. Bartley has raised an issue as to the appeal fee charged in this matter under Ordinance # 2868. On August 23, 2022, Mr. Bartley filed suit in the Court of Chancery captioned, Terrance Bartley v. County Council of Sussex County, Delaware, C.A. No. 2022-0743, challenging the appeal fee. As such, this is not the proper venue for deciding this issue.

7. Mr. Bartley's Assertion of Future Rights Concerning the Final Subdivision Plan Has No Bearing on this Appeal.

Mr. Bartley makes an assertion that, under 9 Del. C. §§ 6810 and

[1] Sussex County Code, §115-25B(3).

M 473 22 Coral Lakes Bartley Appeal (continued)

6811, he has the ability to appeal the Final Site Plan once it is recorded. This argument has no bearing on the current appeal and, therefore, does not warrant discussion.

Motion Adopted: 4 Yeas, 1 Absent

Vote by Roll Call:

Mrs. Green stated that based on the motion and testimony given here today, I vote yes;

Mr. Schaeffer stated that he has been very clear on his opinion of this Subdivision, however, his review today is very limited in scope, he agrees with what President Vincent's motion, he believes that the Planning and Zoning Commission did act in an orderly and logical review of the record and evidence presented, he found no errors in law and he will vote yes;

Mr. Hudson stated that he agrees with the reasons in the motion and the decisions of the Planning and Zoning were logical and orderly, I vote yes;

Mr. Vincent stated that he agrees with the motion as he read and vote yes;

Mr. Rieley, Absent.

A Motion was made by Mr. Schaeffer, seconded by Mrs. Green to recess.

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

Mr. Rieley joined the meeting.

At 1:02 p.m., a Motion was made by Mr. Schaeffer, seconded by Mr. Rieley to come out of recess and back into Regular Session.

M 474 22 Recess

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 September 27, 2022 meeting were approved by consensus.

Correspon-dence

Mr. Moore read correspondence thanking Council for their support for the Beach to the Band event.

There were no public comments.

Public Comment

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

M 475 22 Approve Consent Agenda

Use of Existing Sewer Infrastructure Agreement, IUA 1205 Heritage Shores Phase 4F (Western Sussex Area)

Motion Adopted: **5 Yeas**

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

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

Adminis-trator's Report

1. **<u>Delaware State Police Activity Report</u>**

   The Delaware State Police year-to-date activity report for August 2022 is attached listing the number of violent crime and property crime arrests, as well as total traffic charges and corresponding arrests. In addition, DUI and total vehicle crashes investigated are listed. In total, there were 191 troopers assigned to Sussex County for the month of August.

2. **<u>Project Receiving Substantial Completion</u>**

   Per the attached Engineering Department Fact Sheet, Hailey's Glen – Phase 2 (Construction Record) received Substantial Completion effective September 28th.

3. **<u>Alvana "Beverly" Wilson</u>**

   It is with sadness that we note the passing of former county employee Beverly Wilson on Thursday, September 29th. Beverly began her career with Sussex County Government in July 1989, with a total of 14 years of service, her last position was Security Guard at the Airport. We would like to extend our condolences to the Wilson family.

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

SCWRF General

John Ashman, Director of Utility Planning and Design presented Change Order No. 25 for general construction for Project C19-11 for Council's

Construct-Ion/CO No. 25

consideration. The headworks at the SCRWF are covered and the ventilated air treated for odors. The contract included unit pricing repair items for the headworks. The damage was discovered during the rehabilitation work in the headworks and grit tanks indicated corrosion way above the anticipated levels.

M 476 22 Approve CO No. 25/Project C19-11

A Motion was made by Mr. Hudson, seconded by Mrs. Green, that be it moved based upon the recommendation of the Sussex County Engineering Department, that Change Order No. 25 for Contract C19-11, South Coastal WRF Treatment Process Upgrade No. 3 & Rehoboth Beach WTP Capital Improvement Program Phase 2 – General Construction, be approved increasing the contract by $126,590.76.

Motion Adopted: **5 Yeas**

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

SCWRF Electrical Construct-ion/ CO No. 19

John Ashman, Director of Utility Planning and Design presented Change Order No. 19 for electrical construction for Project C19-17 for Council's consideration. The Off-Site Manufacturer Course Training specified in the construction documents is being removed which will create a credit.

M 477 22 Approve CO No. 19/ Project C19-17

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 Change Order No. 19 for contract C19-17, SCRWF Treatment Process Upgrade No. 3 & RBWTP Capital Improvement Program, Phase 2 – Electrical Construction, be approved, for a decrease of $17,758.13.

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 478 22 Milton Arts Guild Inc.

A Motion was made by Mrs. Green, seconded by Mr. Schaeffer to give $1,000 ($1,000 from Mrs. Green's Councilmanic Grant Account) to Milton Arts Guild Inc. for their facility expansion 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 479 22 Milton Historical Society

A Motion was made by Mrs. Green, seconded by Mr. Hudson to give $1,000 ($1,000 from Mrs. Green's Councilmanic Grant Account) to Milton Historical Society for upgrades to their financial system to a Cloud-Based POS system.

Motion Adopted: 5 Yeas

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

M 480 22 Clear Space Theatre

A Motion was made by Mr. Schaeffer, seconded by Mrs. Green to give $1,500 ($1,500 from Mr. Schaeffer's Councilmanic Grant Account) to Clear Space Theatre for their 2023 Spring Productions.

Motion Adopted: 5 Yeas

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

M 481 22 Children's Beach House, Inc.

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give $2,000 ($1,000 from Mr. Schaeffer's Councilmanic Grant Account and $1,000 from Mr. Hudson's Councilmanic Grant Account) to Children's Beach House, Inc. for their Youth Development Program.

Motion Adopted: 5 Yeas

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

M 482 22 Family Promise of Southern Delaware

A Motion was made by Mr. Schaeffer, seconded by Mrs. Green to give $1,000 ($1,000 from Mr. Schaeffer's Councilmanic Grant Account) to Family Promise of Southern Delaware for their Eviction Prevention 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 Ordinance Introduct-ions

Mr. Schaeffer introduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR AN AMENDMENT OF CONDITION "N" OF THE CONDITIONS OF APPROVAL IN

ORDINANCE NO. 2766 (CONDITIONAL USE NO. 2201) RELATING TO THE SALE OF CAMPSITES WITHIN A CAMPGROUND/RV PARK TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 8.0 ACRES, MORE OR LESS"

Mr. Schaeffer reintroduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR MULTI-FAMILY (2 UNITS) TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 4.79 ACRES, MORE OR LESS"

Mrs. Green reintroduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT AND A C-1 GENERAL COMMERCIAL DISTRICT FOR A SOLAR FARM TO BE LOCATED ON A PORTION OF A CERTAIN PARCEL OF LAND LYING AND BEING IN CEDAR CREEK HUNDRED, SUSSEX COUNTY, CONTAINING 25.327 ACRES, MORE OR LESS"

Mr. Vincent reintroduced 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 PORTION OF A CERTAIN PARCEL OF LAND LYING AND BEING IN BROAD CREEK HUNDRED, SUSSEX COUNTY, CONTAINING 25.012 ACRES, MORE OR LESS"

Mrs. Green reintroduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A 5.8 MEGAWATT GROUND MOUNTED SOLAR FARM TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN CEDAR CREEK HUNDRED, SUSSEX COUNTY, CONTAINING 32.90 ACRES, MORE OR LESS"

Council Members' Comments

Mrs. Green asked if there was an update on the fire occurred at one of the EMS stations. Mr. Lawson stated that the shoreline on the back of one of the paramedic vehicles caught on fire. The one bay that the vehicle was in was damaged. That bay will be taken down to the studs and will be rebuilt.

M 483 22 Adjourn

A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to adjourn at 1:15 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.}