

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, OCTOBER 24, 2023

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, October 24, 2023, at 9:00 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 507 23
Approve
Agenda**

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

Motion Adopted: 5 Yeas

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

**Appeal/
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The Council considered an Appeal on the Sussex County Planning & Zoning Commission's decision to deny Subdivision Application No. S-2021-23 (Stillwater Harbor).

Mr. Moore read the guidelines and standards that the Council uses when making any decisions on appeals.

The Honorable Charles H. Toliver, IV, Retired Superior Court Judge introduced himself.

Judge Toliver reported that this is the appeal of the decision of the Planning & Zoning Commission decision for Stillwater Harbor Subdivision Application No. S-2021-23. The appellants are Stillwater Harbor, LLC represented by Mr. Forsten and Ms. Peet and the Sussex County Planning and Zoning Commission, are the appellees represented by Mr. Robertson.

Judge Toliver reported that Stillwater Harbor filed their opening brief on

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September 29, 2023. The Planning and Zoning Commission filed its answer on October 11, 2023, and Stillwater Harbor filed its reply on October 16, 2023. The transcripts for the prior hearings of the Planning and Zoning Commission were filed, dated April 27, 2023, May 11, 2023, June 8, 2023, and June 22, 2023. The notice of appeal was properly filed. It appears to be two issues of concern that Council needs to address. The first is that no action was taken within a 45-day period set forth in 9 Del. Code § 68-11 and therefore, the plan should be deemed approved. Second, that the plan complies with the Code and should be approved.

Mr. Richard Forsten, Esq. with Saul Ewing came forward; that also present was Mackenzie Peet, Esq. with Saul Ewing, Hal Steward a representative from Stillwater Harbor, LLC, the applicant and Jim Erikson, the project's engineer were also present.

Mr. Forsten reviewed the plan; the residential subdivision consists of 123 residential units on approximately 57 acres for an overall density of just 2 units an acre. The property is zoned MR (Medium Residential) and GR (General Residential). He added that if this site was developed to the max, they could get 4.36 units an acre which would be 238 units. This does use the Coastal Area cluster option, as a result, the project has 26 almost 27 acres of open space which is about 47% of the site. Mr. Forsten noted that the Code only requires 30%. The plan was submitted prior to the Drainage and Buffer Ordinance being adopted; however, this plan does comply with the newly adopted Ordinance even though it was grandfathered. The property is located within a Growth Area and located within Investment Levels 2 and 3. Mr. Forsten shared an aerial view of the property; a quarter mile down the road is the Riverdale community consisting of about 405 units and there are other residential units in the area.

Mr. Forsten provided a brief history of the project; the plan was first filed in 2021, went through PLUS, received comments from the Planning & Zoning Department, worked through all of the issues that typical you work through, the preliminary plan was submitted earlier this year to the Planning & Zoning Commission on April 17, 2023, a public hearing was held and on April 27, 2023, the record was left open at the end of that public hearing for members of the public and the applicant to submit additional follow up comments that were due by May 5, 2023. He added that the applicant filed some post hearing comments and there were some letters submitted by the opponents. He noted that there was public opposition to this project.

Mr. Forsten noted that there is an easement associated with the entrance. There was some concerns expressed about emergency vehicle access, therefore, his client went out and bought ground that had access to an easement so that the emergency providers could get to the property.

Mr. Schaeffer asked Mr. Forsten to show the location of Jackson Draine Lane and River Road. Mr. Forsten reviewed an aerial photo to show the

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location of the two roads.

Mr. Forsten stated that the Delaware Supreme Court has said “when it comes to subdivision plans and site plans alike, when people own land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in Ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby land owners and residents. To hold otherwise, would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the Ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the Zoning Ordinances”. Mr. Forsten stated that the Supreme Court has told local jurisdictions that if a plan complies with the specific things set forth in your Ordinances, then the plan should be approved subject to only reasonable conditions that might be imposed.

Mr. Forsten reviewed the motion from the Planning & Zoning Commission meeting. He noted that the maker of the motion first stated that this project is in an ecologically important area of the County. So, that was one of her reasons that the plan should be denied. He stated that he would submit that it is in a growth area under the Comprehensive Plan and is zoned for Medium and General Residential Uses. Therefore, there is no specific criteria that allows the Planning Commission to reject a plan because it thinks the property is ecologically important. Mr. Forsten stated that the very first reason given does not comply with the law. The second reason indicated that there were several concerns or primary concerns about this application including the impact of the subdivision on the landscape and surrounding area; it stated access onto River Road, conditions of that roadway and emergency access easement. Mr. Forsten stated that he is not sure how to respond to that due to the maker of the motion did not cite any specific criteria with which the plan did not comply. Mr. Forsten asked how he was supposed to respond as a property owner to address any concerns. He added that he responded to those concerns by making sure that the criteria with the Code was complied with. However, he cannot have a Planning Commission say we have concerns about your plan, so we are going to deny it; that is not fair to property owners and that is not what the law provides.

Mr. Forsten stated that the third reason, the Planning Commission stated was that there is a lot of testimony and opposition to this plan. It is in the law that public opposition is not a reason to deny a subdivision plan; if it complies, it is entitled to approval. Reason 4 states that you have to take access off a road that is 50 feet wide and the road here is only 46 to 42 feet wide. Mr. Forsten stated that the problem with that is that it will be 50 feet wide when the final plan is recorded by dedicating frontage along the front of the property to widen the right-of-way. Therefore, at most, this is a

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technical defect that gets corrected. The plan should be approved with the conditions that you make that correction. Mr. Forsten noted that there is testimony on the record that stated that the right-of-way would be expanded along the frontage. Therefore, that is not a valid reason to deny a preliminary plan approval. In order to get final plan approval, that right-of-way will need to be 50 feet wide, and it will be as a result of the dedication.

Mr. Schaeffer pointed out that at the time of the application, the applicant did not have 50 feet. Therefore, should an application be considered as it is submitted, or should the future be looked into as in what the applicant may or may not be able to accomplish. Mr. Forsten replied that if the rule was that the right-of-way had to be 50 feet at the time of application, there are a lot of properties in Sussex County that will never be developed. The way that the problem is fixed, you make the dedication to DelDOT as part of your plan. Mr. Forsten noted that the department did not state in their comments that the plan could not be accepted because the existing right-of-way was not 50 feet wide. It was known that they planned to widen their right-of-way 50 feet along their frontage. The additional 8 feet will be created when the plan is recorded. Mr. Forsten stated that this will get addressed as part of the final plan approval and when the final plan is recorded. Mr. Forsten stated that the applicant does own the land that they are dedicating to the right-of-way because it is along the front of their property. During the public hearing, it was said that DelDOT is going to require some off-site road improvements further down and it was stated that the applicant would not be able to make those improvements because there will not be enough room in the existing right-of-way where it needs to be completed. Mr. Forsten stated that it is premature because DelDOT has not advised what off-site improvements are needed. In addition, it is not known where they will be required and if they will fit or not. As part of the final plan approval, DelDOT requirements will need to be satisfied. Therefore, it will be 50 feet which will be shown on the final site plan and that is not a reason of denial.

Mr. Forsten stated that reason 5 was given because the maker did not feel that the applicant satisfied with the various requirements. He added that they are not specific criteria because what happened in the Ashburn case, the Planning Commission denied a plan based on general reasons. The Delaware Supreme Court was careful to say that if you are going to deny a plan, it has to be based on specific criteria and conditions can be applied. At one point, the maker of the motion stated that she did not believe there was enough being done to preserve enough trees. Mr. Forsten questioned how many trees did they want preserved? He added that he complied with the code and stating that trees are being cut down is not a reason to deny the plan.

Mr. Forsten then discussed reason 6 of the motion which discusses the concerns of the regional flooding. The fire company was the one that drew attention to the flooding. Mr. Forsten noted that the County Code has

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specific requirements about what to do if there is flooding, however, none of those apply to this project because the flooding is down the road from this project. Due to the concern of the fire company, the applicant got the easement for Jackson Draine Road so that there can be emergency access. In addition, he cited the provision of Delaware law that gives emergency providers the right to trespass if needed to respond to an emergency. Mr. Forsten stated that when they saw what was done, they withdrew their objection.

Mr. Forsten stated that reason 7 was off-site road improvements that he has discussed earlier. He noted that these improvements will have to comply with DelDOT requirements in order to get final approval. At this time, they are seeking preliminary approval.

There was discussion about the easement that has been discussed and it could be used by all of the residents of the community. Mr. Forsten stated that Stillharbor has a legal opinion that it can be used, however, the Commission asked to hear from their own attorney. Their attorney presented to the Commission on June 8, 2023, and concluded that it could not be used. However, he believes that Delaware law makes it clear that emergency vehicles can use the easement which was their intent.

In the motion, reason 9 discussed flooding and stated concerns that this project could make the flooding worse. Mr. Forsten reported that their engineer testified that this project would reduce the stormwater flow to the area of River Road and Chief Road where the flooding is occurring by 21%. The reason for that is modern stormwater management regulations state that you have to contain storm events on your property and treat them for quality and quantity. Therefore, the stormwater has to be managed on their property.

For reason 10, they were told that the project didn't comply with the Comprehensive Plan. He stated that it is in a Growth Area under the Comprehensive Plan. In addition, the property complies with the existing zoning and subdivision requirements. As property owner, he would believe that the County's zoning and subdivision codes comply with the Comprehensive Plan. He noted that the Comprehensive Plan is an advisory document. He does not believe that to be a true statement or a reason for denial.

The last reason, Section 99-9C of the Sussex County Subdivision Code was addressed and listed items set forth in the Code that the maker of the motion did not feel were adequately addressed. It was stated that the applicant has not adequately address the minimization of tree vegetation; he is not sure he can respond to that requirement since nothing was cited from the Code. She also stated that removal of the forest land risks increased flooding. Mr. Forsten stated that statement is not true; it was mentioned that this plan will reduce flooding because it will make stormwater on site. Mr. Forsten noted that they are preserving 12 acres of

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trees. These are the reasons that the Planning Commission made for the denial; he submitted that none of them are relying on specific criteria that provide a basis for rejecting the plan. He requested that the Planning Commission's decision be reversed simply on the insufficient motion and deem the Preliminary Plan approve.

The second argument is that the Delaware Code states that the Planning Commission is supposed to rule on a Preliminary Plan within 45 days of receiving it. The plan was submitted on April 17th, the public hearing was held on April 27th and the record was held open until May 5th for comments to be submitted. Mr. Forsten stated that the code states that the 45 days can be extended with the agreement of the applicant. Mr. Forsten reported that they made a post hearing submission on May 5th. Therefore, if that is considered the final submission of the plan, the Planning Commission did not decide until June 22nd which was outside of the 45 days. Mr. Forsten stated their Preliminary Plan is deemed approval as a result of them taking too long according to the Code. In addition, he submits that it is approved because the reasons they gave misapplied the law or ignored the evidence.

Mr. Schaeffer asked Mr. Forsten what date he suggests that the clock started for the 45-day period. Mr. Forsten replied that the Code states that the clock starts upon the submission of the plan by the applicant which would have been April 17th. Then, the code states that the time period can be extended with the agreement of the applicant. So, the record was left open until May 5th; they submitted their comment letter on May 5th. He would say the 45 days would have started on May 5th; therefore, June 22nd was just outside of the 45 days. Mr. Schaeffer asked if it was thought that the 45-day period would start once all of the information was received by the Commission as required. Mr. Forsten replied that the Commission asked to hear from their attorney who did not get back to the Commission until June 8th which is when the Commission states the time period started. Mr. Forsten stated that they never agreed to that time frame; at most, they agreed to May 5th.

Mr. Schaeffer commented about Jackson Draine Lane, which he stated appears to look like a 12-foot-wide unimproved road which has a private easement. Mr. Forsten referenced the code provision that allows a fire company to trespass as necessary responding to a fire or other emergency.

Mr. Rieley stated that the neighbors are not in agreement about them trespassing in the event of an emergency from what he understands. Mr. Forsten stated that it would only happen for a flood event which only happens maybe 4-8 times a year. In addition, the applicant met with the fire company in length about this and it satisfied their concerns. Mr. Rieley pointed out that the residents will not be able to use that access. He questioned if they would be stranded for potentially an extended period of time with no way in or out. Mr. Forsten stated that he was unsure, his understanding is that 4-wheel drive vehicles can get through the flooded area. They are going to reduce the amount of stormwater by 21% that goes

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(continued)** to that area. Mr. Rieley stated that it is his understanding that the regulations states that no more water shall leave the property after the construction is completed than did prior. So, there should be no net change; not a reduction. Mr. Forsten replied that they have to manage for quality, there is a 21% reduction. Mr. Rieley stated that would exceed what the regulation calls for. Mr. Rieley questioned how the reduction would be measured and monitored. Mr. Forsten replied that there is a lot of engineering that goes in a subdivision plan.

Mrs. Green clarified that Mr. Forsten was starting the time on May 5th for the 45-days. Mr. Forsten stated that was correct.

Judge Toliver asked if Mr. Forsten, his clients, or any representatives were present at the subsequent hearings and meetings specifically April 27th, May 11th, June 8th, and June 22nd. Mr. Forsten replied yes.

Recess At 9:55 a.m., there was a recess.

Resume At 10:04 a.m., the hearing resumed.

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(continued)** Mr. Robertson asked that the Council reread the motion to see all of the thought and deliberation that went into it. For example, one of the items that Mr. Forsten brought up was the third item, that somehow this decision was public opposition to it. He quoted the fact that there was a lot of testimony and opposition to the application which was true and was listed in the motion. However, the rest of the motion in that paragraph 3 states “while much of what was stated during the public hearing and the written information is relevant, subdivisions are not popularity contests, they have to be decided based on the appropriate factors and the record before the Commission. In this case, the record does not support the approval of this particular subdivision”.

Mr. Robertson stated that Commission did not misapply the Code in this case. There is substantial evidence that exists, and the Commission’s decision was based on an orderly and logical review. Mr. Robertson stated that there is no way that you could condition this into approval. For example, if the Commission had said that they were going to approve it contingent on eliminating the flooding; that is never going to happen. Therefore, it would have been conditioned in such a way that it was in fact a denial. Under Ashburn, you cannot condition this particular application into approval. The other Ashburn criteria is if the decision was an ad-hoc one that impose uncertainty on the owner which is the answer is no. Mr. Robertson stated that Stillwater knew that the road flooded and admitted that it knew that DelDOT closed it. The two-year delay that they mention was done so that they could figure out how to fix the flooding and they went out to acquire the additional piece of land.

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The inaccessible to the property should have been known to Stillwater when they purchased it. Mr. Robertson reported that everyone that testified in opposition knew that it flooded. Mr. Robertson referenced a comment made by Judge Clark who has lived in the area his whole life. He testified that it flooded when he was a child, and it is getting worse all of the time. There was a lot of testimony about how the flooding impacted the schools. One person stated, “during the school year there is the occurrence of sunny day flooding and storms that the school children who are normally dropped off at another point have to be dropped off at the local fire station because the buses can’t get through the flooding, and this certainly adds additional danger to the school children of the area”. Another person testified “you do get a phone call in the middle of the day, you are at work so you have to get to the firehall to pick your kids up, if you are flooded in, you can’t get to your kids to pick them up off the school bus and they are dropped out at the firehall”. A third person testified “I can testify to the fact that buses can’t get through, I have five children and I get called at 5:30 in the morning telling me that I have to drop my kids off at the fire station, you are going to have a whole another community in here and they are going to have kids and they are going to have to do the same thing and the only way that you are going to get through is the emergency access? So, in an emergency as a flood where they have to drive through salt waters, that is not ok”.

Mr. Robertson reported that DNREC did a study in 2015 about this area and River Road which is Exhibit C. The study stated that the Indian River Bay is coastal influenced and impacts several marsh areas within the community. The community is susceptible to frequent flooding due to coastal effects from the Indian River Bay and localized stormwater runoff; changes in development and the natural environment can intensify flooding issues for the community. Residential properties and roads area also flood frequently from local runoff because of stormwater drainage and transportation infrastructure that is undersized or in disrepair. The flooding can range from nuisance flooding of yards and residential roads to severe flooding of access roads which affects homes and businesses. These issues result in localized flooding and back water flooding from inland marsh.

Mr. Robertson reported that it was stated that the remedy is to raise River Road in this location from elevation of 2 feet up to a finished elevation of level 3 and 4 or to raise it 2 feet.

Mr. Robertson stated that Indian River Fire Company also knew of the issue out there. They were not just worried about emergency responders. In their first letter dated March 3, 2022, they discussed the flooding and drainage issues in the area. In addition, they stated that they remain outstanding with no corrective action. They noted that the proposed development is in an area that has been identified as one of DNREC’s high priority projects. In addition, they discussed that the proposed entrance way on River Road clearly lies in between two significant areas of roadway tidal flooding. They noted that these flooding conditions will impact safe

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passage of any perspective resident from these areas until the tidal concerns subside unless an alternative entrance or accessway is provided.

Mr. Robertson noted that on page 4, 5 and 7 of the April 27, 2023, transcript, the applicant's engineer stated, "flooding is still going to occur on that road, crest is still going to occur, but Stillwater Harbor shouldn't be impacting that, so, what are they, I'm sorry". On page 4, the engineer discussed that it is not going to make the flooding go away. He added that he knew since they have been through flood events it seems to be that when people you know, if you have heart conditions or other, you know, ailments, that is when it is going to flare up, I know you know with my experience at least that's the case. Mr. Robertson stated that the engineer summed it up by stating "we are never going to get rid of the flooding". The engineer added that the best solution was putting more people in there so that they can complain to DelDOT and DNREC to improve the situation.

Mr. Schaeffer questioned if the applicant has met the fire company's point about secondary access. Mr. Robertson responded that the fire company issued a letter stating that they had concerns about residents and EMS which is what hit the pause button the development. Mr. Robertson pointed out that it was another company that went out and purchased the other property. After that, the applicant went back to the fire company and advised them that they have an easement, and this solves the problem. Mr. Robertson stated that the fire company never looked into whether they have the right to use the easement.

Mr. Robertson reported that there was testimony from Mr. Erikson where they reviewed letters that were submitted discussing the flooding and they know about it. In addition, Commissioner Stevenson during the hearing asked if they were going to raise the road at some point and questioned where and how much of it. Mr. Erikson replied that they were not going to raise the road. In the DNREC evaluation, one of the remediation methods that they mentioned was to raise the road in several locations where the road is very low and floods. So, they attempted to acquire access to Jackson Draine Lane. Mr. Robertson shared a map that was included in the applicant's submission of the area. Mr. Robertson pointed out that the people that have a right to use Jackson Draine Lane are only the ones that signed a document. If you did not sign and own a property that is on the signature line, you did not have a right to use Jackson Draine Lane. Mr. Robertson noted that Stillwater was not one of the properties signed off on the easement and not one of the owners. Therefore, Stillwater does not have authorization to use Jackson Draine Lane. Mr. Robertson added that if it was conditioned to be able to use Jackson Draine Lane, he would submit that the County would be subjected to litigation from those property owners since they did not consent to that. The state provision as discussed by Mr. Forsten talks about fire companies and EMS being able to use roadways, however, that doesn't do anything for the residents that would live there.

Mr. Robertson reported that Stillwater knows that River Road is closed

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during flooding events. The road is undersized by County Code, Section 99-17; it does have to be 50 feet wide. Mr. Robertson pointed out that Mr. Erikson pointed out that it is undersized when he stated “the right-of-way itself in that area actually varies, it’s like 42 to 46 feet wide, so, it is an odd ball one. Normally, they are pretty standard 50, this one is variable, kind of weird dimensions”. Mr. Roberson noted that the Commission took all of this and other factors into consideration when it denied this application.

Mr. Robertson pointed out that there are 12 different findings in the motion. In number 6, about flooding has 8 sub findings and no. 8 regarding the easement has 6 sub findings. The motion considered multiple topics as reasons for denial. Of those, one of them was nonconforming with the County’s Comprehensive Plan. Mr. Robertson added that no. 10 of the motion discussed the County’s Hazard Mitigation Plan and under item 4 and 7, it discussed the issues with the roads. The developer stated that they were not going to fix or raise the road in their testimony. In addition, the private property owners in the vicinity who own land that would need to be acquired to raise or fix this road were not going to sell any land. The Commission cited the inability to use the easement in item 8 A-F. In addition, there was opposition to use the easement by everyone that had access to it which was all in the record and cited in the motion. The motion also talked about 99-9C which includes 17 specific items. The motion cited the adverse effect on area roadways and transportation and the unsafe pedestrian and vehicular movement to and from the site. In support of that, there is the documented road width, flooding, road closures and the unsafe passage for EMS and residents documented by the fire company. The lack of integration of the project into the existing terrain and landscape and that the project does not adequately address the preservation and natural feature and that the applicant has not addressed the minimization of tree vegetation and soil removal. Mr. Robertson reported that Secretary Scuse also submitted a comment into the record stating that the Delaware Department of Agriculture opposes the Stillwater Harbor development. Mr. Robertson read some of the letter that was submitted into the record. In addition, the Commission’s motion relied upon the record and the site plan that 78% of the existing forest is proposed to be removed.

Mr. Robertson reported that Stillwater is not flat; it is somewhat higher but there is a significant drop. Mr. Robertson added that the Commission had unanswered concerns about the grading that would occur at the top of the bank, the cul-de-sacs which come right up to that bank along with the tree removal and soil disturbance.

The final reason provided was the effect of the project on area schools. There was a lot of testimony about the existing problems with school children getting to and home from school. The Commission’s concern was why would they make that problem worse by adding 123 additional families with more children.

Mr. Robertson stated that there is tons of evidence in the record to support

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the denial. The Commission considered the application and requested additional information and then they issued a 20-page motion which was detailed. Based on this, the Council cannot reweigh the Commission's decision and it must uphold the Commission's decision. During one of the conversations, Commissioner Hoey-Stevenson said, "I don't want it to be one of those cases where somebody looks back at us and goes who let this happen".

Mr. Robertson then discussed the 45-day issue which he believes that they are compliant with State law. The State Code does establish the trigger date which must be the date that the record is closed which is governed by Title 9. Mr. Robertson stated that you must also read that together with Title 9 §69-61B which says that you also have to go through the technical advisory committee process. In addition, you need to read it with Title 9 §6962 which says that you have to go through the DelDOT process along with the PLUS comments process. If the application date was the date that the 45-days start, we would never comply which is not what the code says. In addition, he noted that they would not be able to comply with FOIA on getting public notices out 20 days in advance. Mr. Robertson noted that there were many dates that provided of when the 45-days started. They stated it was the date of their last submittal which was on April 17th which is when the 45-days should start. Mr. Robertson stated that he believes that defies logic because they could have submitted it back in March which would put you out 45 days before you even got to the hearing. Mr. Robertson noted that the date of submission is when the closure of the record occurs. If not, it would be asking them to act on something while the record is still open, and all of the information is not received. Mr. Robertson noted that it is important for everyone to have all of the information prior to a decision being made. Mr. Robertson added that Stillwater took advantage of the record being held open by submitting a letter and video after the public hearing. The record was held open on April 27th for three things which was clear. These items were written comment from anyone until the close of May 5, 2023, for a report from County Engineering with regard to the Resource Buffer shown on the preliminary site plan and for an analysis of the easement that was a subject of the application. Mr. Robertson pointed out that the applicant submitted a written submission on May 5, 2023, and they did not object to any of the three reasons of why the record was left open. Then, on June 8, 2023, it was clear that the record was closed which started the 45-days. Mr. Robertson added that information was received from Stillwater and others which was announced on May 11, 2023; if that date is used, the 45-day period would still have been met. Mr. Robertson noted that this was also discussed in the Coral Lakes appeal. In that appeal, it was stated "the Commission cannot be charged with making this decision on a plan until such time as all steps in the process have been completed including the public hearing and the record has been closed". Mr. Robertson went on to read additional information about the Coral Lakes appeal and noted that it was already decided in that appeal that the 45-days starts when the record is closed which in this case was June 8, 2023, and the Commission acted 14 days later.

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Mr. Schaeffer questioned the width of the roadway. Mr. Robertson replied that it is not just the width but also the elevation because it floods. There is testimony from Mr. Erikson that states that they were not doing anything to fix the drainage on the road. Mr. Robertson said that his position that it needs to be 50 feet which is a requirement of the code.

Mr. Schaeffer asked if it was believed to be required that the applicant provides secondary access to the residents. Mr. Robertson replied that he does.

Mr. Rieley commented that an emergency is an unforeseen event; this is not an unforeseen event because we know it occurs several times a year.

Mr. Forsten commented that the emergency is the fire and the event that they are going to; not the flood. Mr. Rieley questioned how the kids would get home from school. Mr. Forsten replied that he did not know, he hadn't thought about it. Mr. Rieley stated that he believes that needs to be known. Mr. Forsten added that he is happy to have further conversations about that and he understands the concern. Mr. Forsten provided information that their engineer provided on stormwater management. He stated that the net drainage towards Chief Road and River Road intersection will go from approximately 83 acres to approximately 54.25 acres. So, the rest will be handled on site. Mr. Rieley asked if that took in account that almost 80% of the trees on the property being eliminated which also take up substantial amounts of water. Mr. Forsten replied that the flooding occurs when there are tidal events and there is a big storm. So, the stormwater management system is designed for that. Mr. Forsten noted that the property owner could clear cut this property tomorrow if desired.

Mr. Forsten pointed out that every residential project in the area used to be a farm and there will be more farms that will be developed. He added that he has a plan that complies and there is a residential community nearby, Riverdale that is three times the size of this project. A reasonable condition would be for this project to have to contribute an amount of money towards the road improvements when they are completed.

Mr. Forsten noted that there is lots of criteria included in the code about flooding and what you have to do if there is flooding on your property. If desired, an Ordinance could be adopted saying that property owners can never cut down a tree again. If there are issues that need to be addressed, that is what reasonable conditions can be placed.

Mr. Forsten stated that the road will be 50 feet wide at the entrance and along the front of the property which is included in the record. On the 45-days, the code says the Commission shall approve or disapprove a plat within 45 days after the submission thereof. Otherwise, such plat shall be deemed to have been approved. Such period may be extended by mutual agreement between the Commission and the Applicant for the Commission's approval. Mr. Rieley pointed out that historically, the

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(continued)** **County runs 6-months out on applications. Mr. Forsten added that you would get the agreement of the applicant which did not happen here.**
Mr. Forsten commented that when you read through the motion, there is not specific criteria that they tie their concerns to which is the only reason you can reject a plan.

At 11:04 a.m., the hearing was closed.

**M 508 23
Go Into
Executive
Session** **At 11:04 a.m., a Motion was made by Mr. Hudson seconded by Mr. Rieley to recess the Regular Session and go into Executive Session to discuss matters relating to pending/potential litigation.**

Motion Adopted: 5 Yeas

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

**Executive
Session** **At 11:10 a.m., an Executive Session of the Sussex County Council was held in the Basement Caucus Room for the purpose of discussing matters relating to pending/potential litigation. The Executive Session concluded at 11:26 a.m.**

**M 509 23
Reconvene** **At 11:29 a.m. a Motion was made by Mr. Rieley, seconded by Mr. Hudson to come out of Executive Session back into Regular Session.**

Motion Adopted: 4 Yeas, 1 Absent

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

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

**M 510 23
Recess** **A Motion was made by Mr. Hudson, seconded by Mr. Rieley to recess until 1:00 p.m.**

Motion Adopted: 5 Yeas

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

**M 511 23
Reconvene** **At 1:00 p.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson to come out of Recess back into the 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

Minutes The minutes from October 17, 2023, were approved by consensus.

**Corre-
spondence** Mr. Moore reported letters were received from Nanticoke River Arts Council and Friends of Cape Henlopen State Park thanking Council for their support.

**Public
Comments** There were no public comments.

**Adminis-
trator's
Report** Mr. Lawson read the following information in his Administrator's Report:

1. Certificate of Achievement for Excellence in Financial Reporting

I am pleased to announce that the Government Finance Officers Association of the United States and Canada has awarded Sussex County its Certificate of Achievement for Excellence in Financial Reporting for the 2022 Comprehensive Annual Financial Report. This is the 21st consecutive year that the County has received this prestigious award acknowledging the financial report. The award is among the highest forms of recognition for governmental accounting and financial reporting.

Congratulations to Gina Jennings, Finance Director/Chief Operating Officer, Kathy Roth, Deputy Finance Director, and the accounting staff for their efforts in achieving this award.

2. Council Meeting Schedule

A reminder that Council will not meet on Tuesday, October 31st. The next regularly scheduled Council meeting will be held on Tuesday, November 7th at 10:00 a.m.

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

**Old
Business/
CU2350**

Under Old Business, Mr. Whitehouse presented 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 2.144 ACRES, MORE OR LESS" (property lying on the west side of Beaver Dam Road [Rt. 23], approximately 0.50 mile north of Hopkins Road [S.C.R. 286]) (911 Address: 30857 Saddle Ridge Way, Lewes) (Tax Map Parcel: 234-6.00-6.02) filed on

Old Business/ CU2350	<p>behalf of Beaver Dam Enterprises, LLC.</p> <p>A Public Hearing was held before the County Council on September 19, 2023. At the conclusion of the Public Hearing, a motion was made and passed to defer action on the application, holding the record open to receive a recommendation from the Planning & Zoning Commission and, once a recommendation was received, the public shall have a period of 5 days to submit additional written comments.</p> <p>The public record was closed.</p>
Old Business/ Ord. 23-11	<p>Under Old Business, Mr. Whitehouse presented a Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE FUTURE LAND USE MAP OF THE COMPREHENSIVE PLAN IN RELATION TO TAX PARCEL NO. 234-6.00-6.02” (property lying on the west side of Beaver Dam Road [Rt. 23], approximately 0.50 mile north of Hopkins Road [S.C.R. 286]) (911 Address: 30857 Saddle Ridge Way, Lewes) (Tax Map Parcel: 234-6.00-6.02)</p> <p>Mr. Whitehouse reported that this is traveling with CU2350, and the record has already been closed.</p>
Wolfe Neck Solar RFP	<p>Hans Medlarz, County Engineer presented a request for approval for Wolfe Neck Lagoon Solar RFP for Council’s consideration.</p>
M 512 23 Approve Wolfe Neck Solar RFP	<p>A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson that based upon the recommendation of the Sussex County Engineering Department that County Council approve a request for proposal from qualified solar developers to lease the effluent lagoon surface at the Wolfe Neck RWF.</p> <p>Motion Adopted: 5 Yeas</p> <p>Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea; Mr. Hudson, Yea; Mr. Rieley, Yea; Mr. Vincent, Yea</p>
T-Hangar/ CO No. 1	<p>Mark Parker, Assistant County Engineer presented change order no. 1 for T-Hangar Building, project A22-23 for Council’s consideration. Mr. Parker reviewed the items that were included in the change order.</p>
M 513 23 Approve CO No. 1/T- Hangar	<p>A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer that based upon the recommendation of the Sussex County Engineering Department that change order no. 1 for the T-Hangar Building, project A22-23 be approved in the amount of \$19,451.00.</p> <p>Motion Adopted: 5 Yeas</p> <p>Vote by Roll Call: Mrs. Green, Yea; Mr. Schaeffer, Yea; Mr. Hudson, Yea; Mr. Rieley, Yea; Mr. Vincent, Yea</p>

Starlight Meadows Election Results **Mark Parker, Assistant County Engineer presented election results and project authorization for Starlight Meadows Road Improvements – Chapter 96 Sussex Community Improvements for Council’s consideration. Mr. Parker reported that there was a total of 20 votes casted in the election; 17 were in favor for the program to proceed and 3 votes were opposed.**

M 514 23 Adopt Resolution No. R 019 23/Starlight Meadows **A Motion was made by Mrs. Green, seconded by Mr. Hudson to Adopt Resolution No. R 019 23 entitled “A RESOLUTION AUTHORIZING THE SUSSEX COUNTY ENGINEER TO PERFORM IMPROVEMENTS, AND THE SUSSEX COUNTY ENGINEER AND FINANCE DIRECTOR TO DETERMINE A UNIFORM ASSESSMENT RATE FOR BILLING, UPON SUBSTANTIAL COMPLETION OF THE IMPROVEMENTS, FOR THE STARLIGHT MEADOWS CHAPTER 96 SUSSEX COMMUNITY IMPROVEMENT PROJECT”.**

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 515 23 Cape Henlopen High School Cheerleaders **A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to give \$2,500 (\$1,000 from Mr. Schaeffer’s Councilmanic Grant Account, \$500 from Mr. Hudson and \$1,000 for Mr. Rieley’s Councilmanic Grant Account) to Cape Henlopen High School Cheerleading for the NCA Nationals.**

Motion Adopted: 5 Yeas

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

M 516 23 Cape Henlopen Education Foundation **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 Cape Henlopen Educational Foundation for their Teacher Grant 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 517 23 Mariner Middle **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 Mariner Middle School National Junior Society for NJHS 2023-24.**

**School
National
Junior
Society**

Motion Adopted: 5 Yeas

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

**M 518 23
Del-Mar-Va
Council Boy
Scouts of
America**

A Motion was made by Mr. Hudson, seconded by Mr. Rieley to give \$5,000 (\$1,000 from Countywide Youth Grant Account, \$1,000 from Mr. Vincent's Councilmanic Grant Account, \$500 from Mr. Schaeffer's Councilmanic Grant Account, \$500 from Mrs. Green's Councilmanic Grant Account, \$1,000 from Mr. Rieley's Councilmanic Grant Account and \$1,000 from Mr. Hudson's Councilmanic Grant Account) to Del-Mar-Va Council Boy Scouts of America for Scouting Support.

Motion Adopted: 5 Yeas

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

**Introduction
of Proposed
Ordinances**

Mr. Rieley introduced a Proposed Ordinance entitled "AN ORDINANCE TO AMEND THE COMPREHENSIVE ZONING MAP OF SUSSEX COUNTY FROM AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT TO A C-3 HEAVY COMMERCIAL DISTRICT FOR A CERTAIN PARCEL OF LAND LYING AND BEING IN GEORGETOWN HUNDRED, SUSSEX COUNTY, CONTAINING 5.46 ACRES, MORE OR LESS" filed on behalf of BCB Management, LLC.

Mr. Rieley introduced a Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A TREE SERVICE BUSINESS TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 1.94 ACRES MORE OR LESS" filed on behalf of Joshua Zuppo.

The Proposed Ordinances will be advertised for a Public Hearing.

**Council
Member
Comments**

There were no Council Member comments.

**M 519 23
Recess**

At 1:17 p.m., a Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to recess until 1:30 p.m. Public Hearings.

Motion Adopted: 5 Yeas

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

M 520 23 **At 1:30 p.m., a Motion was made by Mr. Hudson, seconded by Mr. Rieley**
Reconvene **to come out of Recess back into Public Hearings.**

Motion Adopted: 5 Yeas

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

Rules **Mr. Moore read the rules and procedures for public hearings.**

Public **A Public Hearing was held on a Proposed Resolution entitled**
Hearing/ **“RESOLUTION APPROVING AGREEMENT TO PROVIDE FIRE**
Dagsboro **FIGHTING SERVICES AND APPROVING ISSUANCE OF CERTAIN**
Volunteer **BONDS OR NOTES BY THE DAGSBORO VOLUNTEER FIRE**
Fire Dept., **DEPARTMENT, INC”.**
Inc.

Mrs. Jennings reported that Dagsboro Volunteer Fire Department would like to issue up to \$1,865,000 of tax-exempt bonds to refund prior debt originally issued to pay the costs for the construction of their fire station on the corner of Clayton Street and Railroad Avenue in Dagsboro.

In order for the bonds to qualify as federally tax-exempt, the bonds must be approved by the governmental unit where the fire department has entered into an agreement to furnish firefighting services. The approval can only happen once a public hearing is held.

Mrs. Jennings noted that these bonds are obligations of the Dagsboro Volunteer Fire Department and not Sussex County Government. The County Government simply provides a platform for the bonds to be tax-exempt.

There were no public comments.

The Public Hearing and public record were closed.

M 521 23 **A Motion was made by Mr. Hudson, seconded by Mr. Schaeffer to Adopt**
Adopt **Resolution No. R 018 23 entitled “RESOLUTION APPROVING THE**
Resolution **AGREEMENT TO PROVIDE FIRE FIGHTING SERVICES AND**
No. R 018 23 **APPROVING ISSUANCE OF CERTAIN BONDS OR NOTES BY THE**
 DAGSBORO VOLUNTEER FIRE DEPARTMENT, INC”.

Motion Adopted: 5 Yeas

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

Public **A Public Hearing was held on a Proposed Ordinance entitled “AN**

**Hearing/
CU2351**

ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A LANDSCAPING BUSINESS TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 12.06 ACRES, MORE OR LESS” (property lying on the east side of Gravel Hill Road [Rt. 30] approximately 1.1 mile north of Zoar Road [S.C.R. 48]) (911 Address: 22901 Gravel Hill Road, Georgetown) (Tax Map Parcel: 234-15.00-1.00) filed on behalf of Jose Velasquez

The Planning & Zoning Commission held a Public Hearing on the application on July 13, 2023. At the meeting of July 27, 2023, the Planning & Zoning Commission recommended approval of the application for the 7 reasons and subject to the 12 recommended conditions as outlined.

Jamie Whitehouse, Planning and Zoning Director presented the application.

The Council found that Mr. Paul Nordoff spoke on behalf of the Applicant, Mr. Jose Velasquez, who was also present. Mr. Nordoff stated Mr. Velasquez seeks a Conditional Use for a property he purchased two years ago, where he intends to run a small landscape business; that his residence is also located on the property; that he and his family live on the property; that he plans to run his landscaping business on the property; that there will be no environmental hazards; that any debris is taken off site; that they are ok with the conditions placed by the Planning & Zoning Commission.

There were no public comments.

The Public Hearing and public record were closed.

**M 522 23
Adopt
Ordinance
No. 2958/
CU2351**

A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer to Adopt Ordinance No. 2958 entitled “AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR A LANDSCAPING BUSINESS TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 12.06 ACRES, MORE OR LESS” for the reasons and conditions given by the Planning & Zoning Commission as follows:

1. The entire property is 12 acres in size, but the Applicant testified that only roughly 2 acres of the property will be occupied by the Conditional Use. With the conditions and limitations that are part of this recommendation, this is an appropriate location for this limited type of use.
2. The site is located within a Low-Density Area according to the Sussex County Comprehensive Plan. This low-impact type of use is appropriate within this Area.
3. The property is zoned AR-1 Agricultural Residential. The use of the property as a landscaping business is consistent with the underlying agricultural zoning of the property.

**M 522 23
Adopt
Ordinance
No. 2958/
CU2351
(continued)**

- 4. The use will not adversely affect area roadways or neighboring properties.**
- 5. A landscaping company provides a service to a wide variety of Sussex County residents and businesses, and it has a public or semi-public character that will benefit the residents and businesses of Sussex County.**
- 6. During the hearing there was information presented that this site is currently in need of clean-up with the removal of old logs, landscaping materials, and other debris. One of the conditions of approval must be that these items are removed and that the site is cleaned up within 3 months of the County Council's approval of this ordinance or else it shall become null and void.**
- 7. No one spoke in opposition to this application.**
- 8. This recommendation is subject to the following conditions:**
 - a. This use shall be limited to a landscaping business. The area set aside for the Conditional Use shall only be roughly two acres in size, and the location of the Conditional use area shall be shown on the Final Site Plan.**
 - b. The entire site shall be cleaned up within three months of the approval of this ordinance by Sussex County Council. This shall include the removal of all logs, cut vegetation, other landscaping materials, and debris. All untagged or unregistered motor vehicles or trailers shall also be removed from the site within this time period. This condition shall be monitored by the Sussex County Constable for compliance, and if the site is not in compliance within the stated timeframe, then this Conditional Use shall become null and void.**
 - c. No manufacturing shall occur on the site. This prohibition includes the shredding, crushing, or grinding of any materials and also includes the dyeing of mulch or similar materials.**
 - d. There shall not be any retail sales occurring from the site.**
 - e. One lighted sign, not to exceed 32 square feet per side, shall be permitted.**
 - f. The hours of operation shall be limited to 7:00 am through 8:00 pm, Monday through Friday, and from 7:00 am until 3:00 pm on Saturdays. There shall not be any Sunday hours. The Applicant shall be able to operate beyond these hours on an as-needed basis for limited situations such as snow removal, storm damage cleanup, and similar events.**
 - g. All dirt, stone, mulch, or similar materials shall be stored in bins or similar containments. These storage areas shall be shown on the Final Site Plan.**
 - h. The applicant shall comply with all DelDOT requirements, including any entrance or roadway improvements.**
 - i. Since this conditional use will only occupy a small portion of the property, the Final Site Plan shall show the area where this conditional use will be located. The area of the Conditional Use shall also be completely enclosed by fencing.**
 - j. The Final Site Plan shall clearly show all areas for vehicle and**

M 522 23
Adopt
Ordinance
No. 2958/
CU2351
(continued)

equipment storage and parking, and these areas shall be clearly marked on the site itself. There shall not be any parking or storage within the property's setbacks.

- k. Failure to comply with any of these conditions may be grounds for termination of the Conditional Use approval.**
- l. The Final Site Plan shall be subject to the review and approval of the Sussex County Planning and Zoning Commission.**

Motion Adopted: 5 Yeas

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

M 523 23
Adjourn

A Motion was made by Mr. Schaeffer, seconded by Mr. Hudson to adjourn at 1:44 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.}