

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, OCTOBER 1, 2013

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, October 1, 2013, at 10:00 a.m., in the Council Chambers, Sussex County Administrative Office Building, Georgetown, Delaware, with the following present:

Michael H. Vincent	President
Samuel R. Wilson, Jr.	Vice President
George B. Cole	Councilman
Joan R. Deaver	Councilwoman
Vance Phillips	Councilman
Todd F. Lawson	County Administrator
Gina A. Jennings	Finance Director
J. Everett Moore, Jr.	County Attorney

Call to Order	<p>The Invocation and Pledge of Allegiance were led by Mr. Vincent.</p> <p>Mr. Vincent called the meeting to order.</p>
M 454 13 Approve Agenda	<p>A Motion was made by Mr. Wilson, seconded by Mr. Phillips, to approve the Agenda, as posted.</p> <p>Motion Adopted: 5 Yeas.</p> <p>Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea; Mr. Phillips, Yea; Mr. Wilson, Yea; Mr. Vincent, Yea</p>
Minutes	<p>The minutes of September 17 and 24, 2013 were approved by consent.</p>
Corre- spondence	<p>Mrs. Deaver shared an email she received from Steven Swierzy asking that the Council pass a noise ordinance.</p>
Delaware Sports Commission /New Slam Dunk to the Beach Basketball Tournament	<p>Dr. Matt Robinson, Chairman of the Delaware Sports Commission and a sports management professor at the University of Delaware, announced the Commission's commitment to bring the Slam Dunk to the Beach high school basketball tournament back to Sussex County in 2014. The Tournament has been scheduled for December 27 – 29, 2014 and will be held at the Cape Henlopen High School. The mission of the Delaware Sports Commission (DSC), a non-profit, is to create economic development through sports for the State and Sussex County; the tournament could bring in millions of dollars in added revenue and would drive tourism to Sussex County in the off-season. Dr. Robinson advised that the ultimate goal is that the tournament will be self-sufficient and that the DSC has partnered up with a national sports marketing company, Position Sports, Inc., to help manage the day-to-day operations of the tournament.</p>

**Adminis-
trator's
Report**

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

1. Projects Receiving Substantial Completion

Per the attached Engineering Department Fact Sheets, Americana Bayside, Phase 6 and Seagrass Plantation, Revision 2, Phase 4 reached Substantial Completion effective September 24 and 25, respectively.

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

**Angola
Neck
SSD/
Contract
11-11**

Michael Izzo, County Engineer, presented a request to grant Substantial Completion effective September 19, 2013 for the Angola Neck Sanitary Sewer District, Angola Beach Road Grinder Pump System and Villages of Herring Creek Improvements Project. The project was funded by the USDA, Rural Utility Service. Mr. Izzo noted that there are punch list items that need to be addressed and that the quantities on the contract will be balanced; a Balancing Change Order will be presented to the Council for approval on a later date.

**M 455 13
Grant
Substantial
Completion/
Angola
Neck SSD/
Contract
11-11**

A Motion was made by Mrs. Deaver, seconded by Mr. Phillips, based upon the recommendation of the Engineering Consultants and the Engineering Department, that the Sussex County Council grant Substantial Completion effective September 19, 2013, for Sussex County Contract No. 11-11, Angola Neck Sanitary Sewer District, to Harry Caswell, Inc. and that final payment be made and any held retainage be released in accordance with the terms and conditions of the contract documents.

Motion Adopted: 5 Yeas.

**Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea**

**Old
Business/
C/U
No. 1965**

Under Old Business, the Council considered Conditional Use No. 1965 filed on behalf of Southern Delaware Botanic Gardens, Inc.

The Planning and Zoning Commission held a Public Hearing on this application on July 11, 2013 at which time action was deferred. On September 12, 2013, the Commission recommended that the application be approved subject to the following conditions:

- 1. The site shall be surrounded by a landscaped berm and heavy vegetation to screen it from neighboring properties. The location of the berm and the type of vegetation on the berm shall be shown on the Final Site Plan.**
- 2. The hours of public access to the operation shall be Monday through Sunday, 8:00 a.m. to dusk, with the exception of 11:00 p.m. closing times as appropriate for special events.**

**Old
Business/
C/U
No. 1965
(continued)**

3. All lighting shall be downward screened so that it does not shine on neighboring properties or roadways.
4. One lighted sign, not to exceed 32 square feet per side, shall be permitted.
5. All entrances, intersections, roadway improvements, etc. as required by DelDOT shall be completed by the applicant as required by DelDOT.
6. All parking shall comply with the requirements set forth in the Sussex County Zoning Code with all necessary parking contained completely on the site.
7. Stormwater management and erosion and sediment control shall be constructed in accordance with all applicable State and County requirements and shall be operated using Best Management Practices to provide a positive groundwater recharge. The Final Site Plan shall contain the approval of the Sussex Conservation District.
8. The Applicant stated during its presentation that the use would be funded through Federal, State and County funding sources. As part of any approval, Sussex County Council should consider a statement that the approval of the Conditional Use Ordinance should not be deemed by the Applicant to be a commitment to financial support by the County.
9. Any major change in the use shall require a new public hearing.
10. The Final Site Plan shall be subject to the review and approval of the Sussex County Planning and Zoning Commission.

On August 6, 2013, the County Council held a Public Hearing on this application at which time the Council deferred action and left the record open for the submission of a business plan.

Lawrence Lank, Director of Planning and Zoning, reported that in reference to the requested Business Plan, Delaware Botanic Gardens provided a cover letter and a Business Plan on August 30, 2013. The Business Plan was forwarded to County Administration for distribution to Council members.

Mr. Phillips stated that he has significant concerns regarding the Business Plan; however, he questions if that is something that can be discussed. Mr. Moore responded that the Council has to look at applications based on land use criteria and principles and that the Council cannot get into the position of looking at each store, development, etc. and try to determine whether or not it has a good business plan. Further, Mr. Moore stated that it was appropriate for the Planning and Zoning Commission to place a provision in Condition No. 8 indicating that “the approval of the Conditional Use Ordinance should not be deemed by the Applicant to be a commitment to financial support by the County”.

Mr. Phillips agreed that the Council does not need to micromanage businesses. He stated, however, that this application is unique in that the land that the Applicant is utilizing is land that at one time was purchased by the County, was put in the hands of the Land Trust (under certain

**Old
Business/
C/U
No. 1965
(continued)**

assumptions), and is now being considered for lease at \$1.00 to Southern Delaware Botanic Gardens. He further stated that it would seem that the Council would have a responsibility to the taxpayers that the project succeed.

Mr. Moore responded that the application before the Council is a zoning application and the Council has to use the legal principles for the land use application and that is all the Council can look at.

Mr. Cole stated that it is a lease arrangement and if the operation is not successful and viable, the property will go back to the Land Trust and it will remain in open space.

Mr. Phillips questioned how the land is titled. Mr. Lank responded that the Applicant is Southern Delaware Botanic Gardens, Inc. and the owner of the property is Sussex County Land Trust, Inc. Mr. Phillips stated that the County deeded the land over in fee to the Land Trust.

Mr. Phillips also questioned if the Council can consider the charge of the Land Trust with respect to this land and how that fits with the Botanic Gardens proposal. Mr. Moore stated that the land had already been deeded to the Land Trust; that the Land Trust is entering into a Lease Agreement with Botanic Gardens; and that it is not the County's land now. Mr. Phillips stated that the proposal does not conform to the vision of the Land Trust and how that land was given to them to be used; he questioned if this is a legal reason for voting. Mr. Moore responded that Mr. Phillips could argue that "the use was to be open space and you do not consider this to be open space".

The Council discussed the definition of open space and the deeding of the land to the Land Trust and Mr. Moore was directed to check into the documents, including the Charter of the Land Trust, to determine if there were any conditions placed on the land when it was deeded to the Land Trust.

Mr. Cole stated that two members of the County Council sit on the Land Trust Board and that the Board members, including the two County Council members, agreed to the proposal as it fits the definition of open space. He noted that the proposal is similar to the agreement that the County Council has with the James Farm.

**M 456 13
Defer
Action on
C/U
No. 1965**

A Motion was made by Mr. Phillips, seconded by Mr. Wilson, to defer action for one week on Conditional Use No. 1965 filed on behalf of Southern Delaware Botanic Gardens, Inc. while the County Attorney looks into the charter of the Land Trust and whether the application fits within the Charter's purpose and goals.

Motion Adopted: 4 Yeas, 1 Nay.

**M 456 13
(continued)**

**Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Nay;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea**

**Old
Business/
C/U
No. 1967**

Under Old Business, the Council discussed Conditional Use No. 1967 filed on behalf of Tidewater Environmental Services, Inc.

Lawrence Lank, Director of Planning and Zoning, reported that the Planning and Zoning Commission discussed this application under Old Business on September 25, 2013. On that date, Vince Robertson, Assistant County Attorney, advised that an issue has come to the attention of the County as to whether the Applicant had standing to apply for the Conditional Use on the subject property, or stated another way, whether the County has jurisdiction to consider the Applicant's Conditional Use for this property; and that while legal staff continues to review the issue, he asked that the matter be deferred for receipt of a legal opinion on the issue. The Commission has still not voted on this application.

The Council held a Public Hearing on this application on August 20, 2013. During the Public Hearing, Tom Brady, a resident in The Retreat, stated that the people in the development paid for the plant but TESI owns it; that the developer had to construct the infrastructure, which exists on land that TESI does not own – the land is owned by the community under a Sewage Disposal Easement; that this Easement says it is for the operation of the system at The Retreat; that the Easement has not been addressed; that The Retreat is fully built out; and that they propose to connect other homes outside of The Retreat to facilities that the residents of The Retreat have paid for. Mr. Brady submitted the Sewage Disposal Easement into the record. At the conclusion of the Public Hearing, the Council deferred action and left the record open for the County Attorney's comment on the Sewage Disposal Easement.

Mr. Moore reported that there has been a post-record agreement made between the parties and that he has received a copy of the agreement. He noted that the record of the Public Hearing was left open only for the specific purpose of looking at the Easement that was in place at the time of the application.

As a result of the review of the Easement, Mr. Moore stated that he considered whether or not the Applicant had a standing to bring the application before the Commission and Council. He stated that the Easement is limited to the people living in The Retreat and standing is conferred, according to Delaware Law, upon those persons who have some right, title or interest in the land and an easement would give right, title or interest in the land. The Sewage Disposal Agreement that was in play at the time of the Public Hearing does not establish Tidewater's interest or ability to use the property for its proposed Conditional Use of treating off-site waste. For this reason, Mr. Moore stated that he finds that the Easement that was in place when the Public Hearing took place was limited for that

Old Business/ development only, not for any other purposes, and further, that he finds that the Applicant did not have standing.

No. 1967 **Mr. Moore reported that an agreement has been put in place subsequent to**
(continued) **the Public Hearing that would correct the problem if a new application is**
 filed and that with the new agreement, the Applicant would have standing.

M 457 13	A Motion was made by Mr. Cole, seconded by Mrs. Deaver, to Adopt the
Adopt	Proposed Ordinance entitled “AN ORDINANCE TO GRANT A
Proposed	CONDITIONAL USE OF LAND IN A MR MEDIUM DENSITY
Ordinance/	RESIDENTIAL DISTRICT FOR A WASTEWATER TREATMENT
C/U	PLANT TO TREAT OFFSITE WASTE TO BE LOCATED ON A
No. 1967	CERTAIN PARCEL OF LAND LYING AND BEING IN LEWES AND
	REHOBOTH HUNDRED, SUSSEX COUNTY, CONTAINING 10.26
DENIED	ACRES, MORE OR LESS (Two Tracts)” (Conditional Use No. 1967) filed
	on behalf of Tidewater Environmental Services, Inc.

Motion Denied: 5 Nays.

Vote by Roll Call: Mrs. Deaver, Nay; Mr. Cole, Nay;
Mr. Phillips, Nay; Mr. Wilson, Nay;
Mr. Vincent, Nay

Reason for Denial	The application was denied based on the advice of Legal Counsel and for lack of standing.
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Requests **Mrs. Jennings presented grant requests for the Council's consideration.**

M 458 13 Councilmanic **A Motion was made by Mr. Phillips, seconded by Mrs. Deaver, to give \$1,000.00 (\$200.00 from each Councilmanic Grant Account) to the Olde Tymers Softball League for operating expenses.**

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea

M 459 13 Councilmanic **A Motion was made by Mr. Phillips, seconded by Mr. Cole, to give \$300.00 from Mr. Phillips' Councilmanic Grant Account to Boys to Men for the 100 Wave Challenge Event.**

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea

Human Service Grant	Mrs. Jennings stated that the grant request submitted by Good Samaritan Aid Organization will be considered under Human Service Grants.
Additional Business/ Public Comments	<p>Under Additional Business, Paul Reiger of Deer Forest in Georgetown discussed concerns regarding activities on a neighboring property. Mr. Reiger previously presented his concerns to the Council on September 24, 2013. Mr. Reiger again asked that the County make sure that the owner of the property has all necessary permits; that all violations are corrected; and that he believes some of the County's zoning restrictions are lacking.</p> <p>Rocco Lano of Frankford requested that Sussex County enact a dog leash law and he advised of problems in Plantation Park II where one resident refuses to control his dogs. He reported that only New Castle County has a leash law on the books and he distributed a copy of New Castle County's Animal Control Ordinance.</p> <p>Dan Kramer of Greenwood questioned why tax payments that are being sent in through the mail are not being processed in timely manner and he commented that the County is not enforcing its ordinances.</p>
Additional Business/ Requests for Future Agenda Items	<p>Mr. Cole requested that the following be placed on a future agenda: the two pending campground applications (for discussion and review only) and a potential loophole permitting buildings 60 feet in height.</p> <p>Mrs. Deaver requested that the following be placed on a future agenda: the many permitted uses listed under CR-1 zoning and a workshop on Adequate Public Facilities.</p>
M 460 13 Recess and Go Into Executive Session	<p>At 11:12 a.m., a Motion was made by Mr. Wilson, seconded by Mr. Phillips, to recess and go into Executive Session for the purpose of discussing issues relating to pending/potential litigation.</p> <p>Motion Adopted: 5 Yeas.</p> <p>Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea; Mr. Phillips, Yea; Mr. Wilson, Yea; Mr. Vincent, Yea</p>
Executive Session	<p>At 11:14 a.m., an Executive Session of the Sussex County Council was held in the Caucus Room of the Council Chambers for the purpose of discussing issues relating to pending/potential litigation. The Executive Session concluded at 11:30 a.m.</p>
M 461 13 Reconvene	<p>At 11:31 a.m., a Motion was made by Mr. Wilson, seconded by Mrs. Deaver, to come out of Executive Session and to reconvene the Regular Session.</p> <p>Motion Adopted: 5 Yeas.</p>

M 461 13
(continued)

**Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea**

E/S Action

There was no action on Executive Session items.

M 462 13
Adjourn

A Motion was made by Mr. Wilson, seconded by Mr. Cole, to adjourn at 11:31 a.m.

Motion Adopted: 5 Yeas.

Vote by Roll Call: Mrs. Deaver, Yea; Mr. Cole, Yea;
Mr. Phillips, Yea; Mr. Wilson, Yea;
Mr. Vincent, Yea

Respectfully submitted,

Robin A. Griffith
Clerk of the Council