

SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, OCTOBER 8, 2013

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, October 8, 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
David N. Rutt	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 463 13
Amend
and
Approve
Agenda**

A Motion was made by Mr. Wilson, seconded by Mrs. Deaver, to amend the Agenda by changing the order of the Agenda, moving the item under Michael Izzo in front of the item under Vince Robertson; and to approve the Agenda, as amended.

Motion Adopted: 5 Yeas.

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

Minutes

The minutes of October 1, 2013 were approved by consent.

**Corre-
spondence**

Mrs. Deaver referenced correspondence received from the Sussex County League of Women Voters regarding a Public Forum on Extreme Weather Events which will be held on Tuesday, October 8, 2013 (1:00 to 3:00 p.m.) at the Beebe Medical Center. One of the speakers will be Joe Thomas, Director of the Emergency Operations Center for Sussex County.

**Bond
Require-
ments and
Process
Improve-
ments**

Mr. Lawson reported that staff has been working on a variety of issues relating to the County's Bonding Requirements and Process for Chapter 99 Improvements. Chapter 99 of the County Code requires a Performance Bond or other guaranty, such as a Letter of Credit, for residential development governed by the Chapter. The amount of the guaranty must be no less than 125% of the cost of improvements. The bonding requirements also apply to sediment control and stormwater management, which fall under the jurisdiction of the Sussex Conservation District. Mr.

**Bond
Require-
ments and
Process
Improve-
ments
(continued)**

Lawson advised that staff would be presenting the details of these efforts, including: (1) a progress report on the No Bond Program which was enacted January 2012, (2) a new proposed bond reduction process which will require a Motion by Council for approval, and (3) a change in the County's bond requirements which will shift Sussex Conservation District bonds over to that agency for their administration.

Vince Robertson, Assistant County Attorney, reported that, in January 2012, a No Bond Process was approved so that developers, if they wanted to, could elect to proceed without incurring the cost of posting a bond, with the requirement that they could not sell lots or units to third parties. This was looked at and approved based on the financial lending markets that were in existence at the time, the economy, and the housing market. Since, that time, there have been several developers that have used the No Bond Process. There is a sunset provision in the current ordinance of January 10, 2014; therefore, there will need to be a new ordinance that is introduced and considered by the Council to extend that.

Mr. Robertson stated that, in recent years, the County has faced requests by developers to reduce the original bond amount based upon work that has been completed. For example, the County requires 125% of the cost of the work to be bonded at the outset of a project (unless a developer chooses a No Bond Process). When a developer completes some portion of the work on the site, he or she often wants to reduce the bond amount (and therefore, the cost to the developer for carrying the bond) to reflect the remaining amount of work. Mr. Robertson stated that, the problem with this is there has been no uniformity and no thresholds, standards, limitations have been set. This has led to uncertainty and unpredictability in the development community and it has also led to administrative burdens for the Engineering Department. To reach a solution, the County convened a group of stakeholders in the process, including developers, engineers, land use attorneys, land planners, site work contractors, representatives from the banking industry, and County staff. Most, if not all, of the participants agreed that uniformity is needed so that requests can be efficiently acted upon, with developers also understanding the process by which they could make a Bond Reduction request. Ultimately, a proposal was formulated, which resulted in the County Bonding Protocols, which establishes that all developments or phases are entitled to a one-time bond reduction of not less than 50% of the value of the original bond; in no event would the bond be reduced to less than \$50,000.00. Also, on infrastructure governed by the Public Works Division, there would be no reduction permitted prior to the installation of at least one layer of hot mix on all included roads. The Protocol establishes a reasonable and fair means of dealing with Bonding and Bond Reduction requests. It allows County Engineering to more efficiently deal with the requests, and it provides a uniform set of guidelines applicable to all developers so that there is no uncertainty among the development community as to the manner in which the County will address Bond Reduction requests.

**Bond
Require-
ments and
Process
Improve-
ments
(continued)**

Michael Izzo, County Engineer, discussed the pricing schedule that was developed by the Engineering Department. He explained that there is a difference in the way the program has been administered and the way it needs to be done and that, in reality, the way it needs to be set up is to take into consideration how much it would cost the County to complete the work, including additional costs that would be incurred by the County that would not be incurred by the developer, i.e. legal expenses, inflation, as-built surveys, and fixing previously completed work that has degraded. Mr. Izzo reviewed a cost schedule that has been set up for the purpose of bidding out construction for these projects. He noted that typically there is not enough money to correct all the problems and the County determines priority problems to correct; however, when the funds run out, no further work is done by the County as the County does not incur costs (with the exception of some legal expenses). It was noted that a lot cannot be transferred and a building permit cannot be obtained until the work is completed or a bond is in place.

David Rutt, Assistant County Attorney, stated that under Chapters 90 and 99 of the County Code, there is a reference to bonds held by Sussex County for stormwater drainage and management facilities that are actually under the control of the Sussex Conservation District (SCD). The County's Department of Public Works currently serve as an agent for bonds required by the SCD; however, this arrangement places the County in a position of assuming an obligation for holding the bonds while having no right or power over the work the bonds guarantee. Mr. Rutt reported that the SCD has agreed, effective January 1, 2014, to hold and administer its own stormwater and sediment control bonds; any costs of administration and litigation will also become their responsibility.

David Baird, District Coordinator, Sussex Conservation District, reported that the District Board has agreed to take on this responsibility and is proposing to hold and administer its own bonds to ensure that construction of the stormwater management practices is accomplished with the approved sediment and stormwater management plan. He acknowledged that this would not streamline the current process; it actually breaks it apart with the County and the SCD requiring separate bonds. Mr. Baird stated that there are exemptions from SCD bonding requirements and he reviewed those exemptions. He noted that the securities for the bonds collected by the District would be set at 150% of the improvements and that the reason for this is to ensure adequate coverage since the value of sediment and stormwater improvements is significantly less than the harder improvements; regarding the reduction of bonds, the SCD will allow for a one time reduction up to 50% of the original amount of the bonds. Mr. Baird stated that the No Bond Requirement that the County currently allows would not be an option on bonds issued by the SCD. Mr. Baird noted that the only things the District will be bonding are the sediment and stormwater improvements that are located outside of any public right-of-ways. Mr. Baird reported that the District Board has not yet taken formal action; however, at the Board's meeting in September, the Board members

Bond Requirements and Process Improvements
(continued)

agreed that they are comfortable with the proposal, as presented, and the Board is awaiting action by the County. Further, the Board did express concern about the additional administrative costs that will be incurred by the District; however, they will factor that into the costs associated with the issuance of the bonds.

Mr. Robertson advised that the County's No Bonding Requirement sunsets under the current ordinance on January 10, 2014 and that staff and Legal Counsel would like to have an ordinance ready for introduction to extend that, but not indefinitely (approximately one to two years). Additionally, in the same or a separate ordinance would be the decoupling of the SCD from the County. Mr. Robertson stated that the Proposed Protocols do not require an ordinance amendment and can be acted on.

M 464 13 Adopt Bonding Protocols

A Motion was made by Mr. Cole, seconded by Mrs. Deaver, that the Sussex County Council adopts the Sussex County Bonding Protocols prepared by the Sussex County Engineering Department concerning bond reductions and the conversions of No Bond projects to bonded ones based upon the recommendation of County Administration and for the reasons presented.

Motion Adopted: 5 Yeas.

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

Administrator's Report

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

1. **Sussex County Emergency Operations Center Call Statistics**

Attached please find the call statistics for the Fire and Ambulance Callboard for September 2013. There were 14,425 total calls handled in the month of September. Of those 9-1-1 calls in September, 77 percent were from wireless phones.

2. **Project Receiving Substantial Completion**

Per the attached Engineering Department Fact Sheet, Sandbar Village, Revision 1, received Substantial Completion effective October 3, 2013.

3. **Advisory Committee on Aging & Adults with Physical Disabilities for Sussex County**

A reminder that the Advisory Committee on Aging & Adults with Physical Disabilities for Sussex County will be hosting *The LIVE Conference: Live Healthy...Live Active...Live at Home* from 9:00 a.m. to 4:00 p.m. on Wednesday, October 9, at the CHEER

Administrator's Report (continued)

Community Center, 20520 Sand Hill Road in Georgetown. A copy of the conference agenda is attached.

4. Brian H. Farrelly

It is with sadness that we inform you that Brian H. Farrelly, County pensioner, passed away on October 4, 2013. Mr. Farrelly worked for Sussex County from September 1988 until his retirement in September 1996. He retired from the Public Works Division where he worked as a Utility Construction Technician I. We would like to express our condolences to the Farrelly family.

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

North Millville Expansion of the BBSSD/ Approval of Sewer Installation in SR 26 Mainline Project

Michael Izzo, County Engineer, noted that, several months ago, the Council took action to extend the Millville Sanitary Sewer District and that this extension lines up with DelDOT's SR 26 mainline project. Mr. Izzo stated that this presented an opportunity for the County to enter into a partnership with DelDOT to install sewer as part of DelDOT's mainline project which would result in a savings to the County, i.e. reducing road restoration costs and improving overall contractor mobilization. As a result of the partnership, DelDOT included the County's sewer extension in their bid process. DelDOT's overall bid came in at \$24.9 million; their Engineer's estimate was \$29.6 million. The County's estimate was \$2,418,000 for sewer work and it appears that the price, based on the low bidder, George & Lynch, Inc. will bring it in at \$2,128,000. Mr. Izzo noted that including the sewer work in the DelDOT project will benefit the local residents.

M 465 13 Authorize Sewer Installation in SR 26 Mainline Project

A Motion was made by Mrs. Deaver, seconded by Mr. Cole, that the Sussex County Council authorizes the Engineering Department to move forward with the installation of sanitary sewer in the DelDOT SR 26 Mainline Project (Contract No. T200411210.01) as bid by the low bidder, George and Lynch, Inc., and in accordance with the corresponding Utility Agreement.

Motion Adopted: 5 Yeas.

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

Discussion of Height Regulations in Code

Vince Robertson, Assistant County Attorney, provided an explanation of what the County Code says with regard to height limits. The individual zoning districts in Chapter 115 of the Code typically reference a 42 foot height limit. However, there is an entirely separate section governing height found in the Supplementary Regulations set forth in Chapter XXV of the Zoning Code. Specifically, Section 115-179B of the Code establishes a separate height limit for certain buildings. That section says that, except in airport approach zones defined by the FAA, "public and semi-public, or

**Discussion
of Height
Regulations
in Code
(continued)**

public service buildings, hospitals, institutions or schools, when permitted in a district, may be erected to a height not exceeding 60 feet ...”. Under that section of the Code, there are several classifications or groupings of buildings that are entitled to utilize the 60 foot limit: public and semi-public buildings; public service buildings, hospitals, institutions, or schools. These classifications or groupings are further limited to those types of buildings that are permitted in the specific district where they are intended to be located. Additionally, if the 60 foot height limit is applied, Section 115-179B also requires that the side and rear yard setbacks must be increased by one foot for each foot of height over and above the height regulation set forth in the applicable zoning district (typically 42 feet). Mr. Robertson stated that Section 115-4 of the Code contains the definition of “public” – “public” is simply defined in Section 115-4 as “open to common use, whether or not public ownership is involved.” Mr. Robertson noted that this is a very broad description of the term “public”. He stated that the definition of “public and semi-public” must also be considered in the context of Conditional Uses. Under the Zoning Code, Conditional Uses must be generally of a “public or semi-public” character” and are approved that way by the County all of the time for all sorts of business ventures.

Mr. Cole expressed concern that, for forty years, it has been interpreted that 42 feet was the height limit, and it was the intent of the County that 42 feet was the limit with the exception of schools and hospitals (or a similar use). Mr. Cole requested that this issue be placed on the next Council Agenda for discussion and action, possibly to be addressed with a moratorium so that, for a certain period of time, the County would not accept any applications for structures exceeding 42 feet in height.

Mr. Phillips spoke in opposition to a moratorium and suggested that Mr. Cole meet with staff to draft an ordinance amendment.

Mr. Rutt stated that a moratorium would amend the Code/stop an ordinance requirement; however, it would require the public hearing process as would an ordinance amendment.

Mr. Cole asked Mr. Rutt to investigate whether or not a public hearing would be required in order to approve a moratorium on applications exceeding 42 feet in height.

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

Under Old Business, the Council discussed 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 the Commission deferred action. On September 12, 2013, the Commission recommended that the application be approved with conditions.

Lawrence Lank Director of Planning and Zoning, advised that on August 6, 2013, the Council deferred action on this application and left the record

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

open for 30 days for the applicants to provide a Business Plan. In reference to the requested Business Plan, Delaware Botanic Gardens submitted a cover letter and a Business Plan on August 30, 2013. Mr. Lank reported that the Business Plan was forwarded to the County Administration Office for distribution to the Council.

The Council discussed this application at their meeting on October 1, 2013 at which time action was deferred again for the purpose of looking into the Charter of the Sussex County Land Trust to determine whether the application fits within the Charter’s purpose and goals.

Mr. Rutt reported that Legal Counsel was asked to look at this application and the use proposed to determine if it is consistent with the Mission Statement of the Sussex County Land Trust. It was looked at from three points: (1) whether the application was properly filed in compliance with the applicable procedures (it is Legal Counsel’s opinion that it was); (2) whether the Applicant is a proper party and interest (it is Legal Counsel’s opinion that it is); and (3) whether the application is prepared in accordance with Land Use Principles. Mr. Rutt stated that the sole remaining matter before the Council is to consider the criteria under the Code to determine if it meets the criteria and that this determination must be based solely on the record that is currently before the Council (what is in the public record as it exists on this date). Mr. Rutt stated that Legal Counsel is submitting the information, for informational purposes only, not for decision-making purposes, since the record before the Council is what the Council must decide on. Mr. Rutt stated that Legal Counsel looked at the Mission Statement for the Botanic Gardens which is “dedicated to creating a world class educational, inspirational, and sustainable public botanic garden in Southern Delaware for the benefit and enjoyment of the public”. The underlying property was transferred from the Sussex County Land Trust in May 2006 and a review of the Deed did not reveal any specific restrictions on the use of the property. Mr. Rutt stated that the issue is - Is the mission of the Land Trust consistent with the proposed uses of the property: a botanic garden and related visitors center, conservatory, theatre, nature center and parking? Based on a review, it is Legal Counsel’s opinion that the Land Trust’s Mission is broadly stated and would include the protection of natural, cultural, and recreational resources and thus, is consistent with the proposed uses. The Land Trust’s Mission statement reads “Sussex County Land Trust is a non-profit conservation organization dedicated to protecting natural, cultural, agricultural and recreational resources through land preservation, stewardship and education for today and tomorrow”. Mr. Rutt stated that it is Legal Counsel’s position that the proposed uses do meet the Mission Statement and the Mission Statement does not prohibit the application from going forward.

Mr. Phillips stated that he has obtained from the Sussex County Land Trust the Memorandum of Understanding (MOU) between the Sussex County Land Foundation and Southern Delaware Botanic Gardens, Inc. It was

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

noted that this document is a part of the application/record and therefore, can be considered. Mr. Phillips stated that he has reviewed the MOU and there are serious concerns about all the physical features that the Applicant plans to construct if they raise the money; however, he has come to the conclusion that those physical features are necessary to meet the educational component of the Land Trusts' Mission Statement. Mr. Phillips stated that he is disappointed that the Business Plan cannot be considered and that he has serious concerns of what is missing in that Plan. He stated that he wished to state his reasons for supporting the application and that most of the reasons are found in the MOU.

Mr. Wilson expressed his concerns about the proposal and his opposition to the use of the land, as proposed.

**M 466 13
Adopt
Ordinance
No. 2322/
C/U
No. 1965**

A Motion was made by Mrs. Deaver, seconded by Mr. Cole, to Adopt Ordinance No. 2322 entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR BOTANIC GARDENS AND RELATED VISITOR CENTER, CONSERVATORY, THEATER, NATURE CENTER AND PARKING TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN DAGSBORO HUNDRED, SUSSEX COUNTY, CONTAINING 36.99 ACRES, MORE OR LESS" (Conditional Use No. 1965) filed on behalf of Southern Delaware Botanic Gardens, Inc., with 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.
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

**M 466 13
Adopt
Ordinance
No. 2322/
C/U
No. 1965
(continued)**

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.**

Motion Adopted: 4 Yeas 1 Nay.

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

**Old
Business/
C/Z
No. 1725
and
C/U
No. 1951**

Under Old Business, the Council discussed the applications of Jack Lingo Asset Management, LLC for a RV Resort and Campground (Love Creek RV Resort and Campground).

Lawrence Lank, Director of Planning and Zoning, noted that included in the Council packets was a 10-page report outlining a history of the action on the applications. The report includes a record of the minutes of the Planning and Zoning Commission and the Commission’s recommendations. (The report is a part of the record.)

On August 22, 2013, the Planning and Zoning Commission recommended that Change of Zone No. 1725 and Conditional Use No. 1951 be approved.

The County Council held a Public Hearing on the applications on February 19, 2013 at which time action was deferred and the record was left open for the Traffic Impact Study from DelDOT and for the following additional information (based on questions raised by Mr. Cole): (1) Are cabins permitted per the County’s Land Use Plan and ordinances? (2) Is any part of the applications not in compliance with the County Land Use Plan and ordinances? (3) Ask DelDOT if there is a need for a Traffic Impact Study for Cedar Grove Road in both directions. (4) What are the tax revenues from other campgrounds.

In reference to the above, Mr. Lank advised that the Traffic Impact Study was received on June 6, 2013 with a cover letter which references that DelDOT accepts the review letter from Johnson, Mirmiran & Thompson, Inc., the Applicant’s traffic engineering consultants, and that DelDOT concurs with the recommendations.

In his report, Mr. Lank provided the following answers to the questions raised by the Council:

In reference to Question No. 1: “Are cabins permitted per the County’s Land Use Plan and ordinances?” Answer: The Comprehensive Plan Update makes references to campgrounds activities within State Parks, but does not make any specific references to cabins. The Zoning Ordinance, Chapter 115 of the Code of Sussex County makes references to “parks and

**Old
Business/
C/Z
No. 1725
and
C/U
No. 1951
(continued)**

campground for mobile campers, tents, camp trailers, touring vans, and the like”, but does not specifically reference cabins for camping. The references in the Code are referenced as a type of Conditional Use in different sections of the Code, i.e. AR-1, and in the Conditional Use Article of the Code, Article XXIV, and require certain criteria to qualify as a campground. Camping cabins have been permitted by the Planning and Zoning Commission in several campgrounds since camping cabins are another style or type of camping unit. There are several campgrounds in Sussex County that have cabins used for camping purposes, i.e. Holly Lakes Campground, Big Oaks Campground, Delaware Seashore State Park, etc.

In reference to Question No. 2: “Is any part of the applications not in compliance with the County Land Use Plan and ordinances?” Answer: There are some setback issues and lot size issues that were picked up in the review of the site plans by staff and people showing interest in the site plans, i.e. distances from camping sites to dwellings, square footage of some of the campsite lots. Be reminded that these issues came about during the public hearing process. If the Council approves the use, the site plan will then have to be submitted to the Planning and Zoning Commission for review and consideration, and shall be required to include all of the criteria required in the Code and all of the Conditions of Approval depicted or noted on the site plan.

In reference to Question No. 3: “Ask DeIDOT if there is a need for a Traffic Impact Study for Cedar Grove Road in both directions.” Answer: DeIDOT had previously established the roadways that needed to be considered as a part of the Traffic Impact Study, i.e. Cedar Grove Road, Ward Road, Plantation Road, Postal Lane, Mulberry Knoll Road, and Route 24 and their related intersections. The Study determined that if the project is approved certain roadway improvements should be required, i.e. full site entrance, westbound site entrance, northbound Cedar Grove Road, southbound Cedar Grove Road; the Developer should enter into agreements with DeIDOT to fund 20% of improvements planned for Route 24/Mulberry Knoll Road intersection; that the Developer should be required to identify routes to and from the project that are well-suited for RV traffic; that the Developer should be required to identify a target number of RVs that would be seasonal, as opposed to short-term, site rentals; and that certain bicycle, pedestrian, and transit improvements should be required.

In reference to Question No. 4: “What are the tax revenues from other campgrounds?” Answer: Documentation in the file for the project provides an overview between this proposal and the Holly Lake Campground, the largest and closest campground to the site. The Holly Lake Campground has existed for many years and is located on Route 24 and Holly Lake Road. The report indicates that Love Creek Campground and Resort, with an estimated assessed value of \$676,891.00 would generate a total annual revenue of \$85,265.95 for County, library, and school taxes, and sewer service charges, and a total one-time revenue of \$1,192,932.00 for realty

**Old
Business
(continued)**

transfer taxes, connection fees, plan review and inspection fees, and building permit fees. And that by comparison, the Holly Lake Campground, with an estimated assessed value of \$70,400.00 would generate a total annual revenue of \$2,357.76 for County, library, and school taxes. There were no one-time revenues provided for the Holly Lake Campground.

**Old
Business/
C/Z
No. 1729
and C/U
No. 1963**

Under Old Business, the Council discussed the applications of Ida C. Faucett, Faucett Heirs, LLC and Massey's Landing Park, Inc. for a campground.

On June 27, 2013, the Planning and Zoning Commission recommended that Change of Zone No. 1729 and Conditional Use No. 1963 be approved.

The County Council held a Public Hearing on the applications on June 18, 2013 at which time action was deferred and the record was left open for comments from Michael Izzo, County Engineer, regarding the archaeological issue; memos from Legal Counsel for the Applicant and the Opposition; and a response from DelDOT for clarification of traffic issues.

In reference to Mr. Izzo's comments, Mr. Izzo responded to Everett Moore, Esquire, that the comments submitted by Dan Parsons regarding the applications were meant to be recommendations for consideration as proposed conditions of approval, and he apologized for any confusion that resulted.

In reference to the requested memorandums from Legal Counsel for the Applicant (James A. Fuqua, Jr., Esq.) and the Opposition (Mary R. Schrider-Fox, Esq.), Everett Moore, County Attorney, has advised me that he has talked to both parties' Legal Counsel and that the legal issue has been resolved and that there is no longer a necessity to hold the record open for these issues.

In reference to the request for a response from DelDOT for clarification of traffic issues, Mr. Lank stated that he wrote to T. William Brockenbrough, Jr., County Coordinator for DelDOT, on July 3, 2013 and advised Mr. Brockenbrough that the County Council held a Public Hearing and received substantial opposition who expressed concerns and complaints; that the County Council was provided comments from DelDOT which referenced a 2005 Traffic Impact Study Review, dated November 23, 2005, and that it is the Oppositions' opinion that the Traffic Impact Study should be more recent since this is 2013. Attached to the letter to Mr. Brockenbrough was a copy of the letter from Stephen A. Raign, Project Engineer for Kercher Engineering, Inc. Mr. Lank asked Mr. Brockenbrough if DelDOT feels that a new Traffic Impact Study is necessary, and asked him for clarification on this issue.

Mr. Lank advised that Mr. Brockenbrough responded with a letter received on July 25, 2013, a copy of which was provided to Council members for review.

**Old
Business/
Public
Comments
Closed**

It was noted that, in reference to the applications of Jack Lingo Asset Management, LLC and the applications of Ida C. Faucett, Faucett Heirs, LLC and Massey's Landing Park, Inc., that all requests for additional information have been submitted and received and therefore, the public comments on both applications are considered closed.

Requests

Mrs. Jennings presented grant requests for the Council's consideration.

**M 467 13
Council-
manic
Grant**

A Motion was made by Mrs. Deaver, seconded by Mr. Cole, to give \$1,100.00 (\$220.00 from each Councilmanic Grant Account) to Beebe Medical Foundation for the Annual Beebe Ball to benefit Beebe's School of Nursing.

Motion Adopted: 5 Yeas.

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

**M 468 13
Council-
manic
Grant**

A Motion was made by Mrs. Deaver, seconded by Mr. Phillips, to give \$300.00 from Mrs. Deaver's Councilmanic Grant Account to the Overfalls Foundation for vessel maintenance 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 469 13
Council-
manic
Grant**

A Motion was made by Mr. Wilson, seconded by Mr. Phillips, to give \$1,000.00 (\$200.00 from each Councilmanic Grant Account) to Delaware Hospice for a golf outing fundraiser, with the stipulation that the funds remain in Sussex County.

Motion Adopted: 5 Yeas.

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

**Additional
Business**

Under Additional Business, Paul Reiger of Deer Forest in Georgetown referenced his complaint that he previously discussed under Additional Business on September 24 and October 1, 2013. He noted that he has found that Kent County has a "New Statutory Procedure for Suits Enforcing Deed Covenants or Restrictions" and he asked why Sussex County does not have this. (Mr. Reiger submitted a copy of the procedure.)

Mr. Rutt responded that the Court of Chancery has a process for Homeowners Association disputes.

M 470 13 **At 12:06 p.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 and land acquisition.**
Go Into
Executive
Session

Motion Adopted: 5 Yeas.

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

Executive **At 12:08 p.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 and land acquisition. The Executive Session concluded at 12:39 p.m.**
Session

M 471 13 **At 12:40 p.m., a Motion was made by Mr. Wilson, seconded by Mr. Cole, to come out of Executive Session and to reconvene the Regular Session.**
Reconvene

Motion Adopted: 5 Yeas.

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

M 472 13 **At 12:40 p.m., a Motion was made by Mr. Cole, seconded by Mr. Phillips, to recess until 1:30 p.m.**
Recess

Motion Adopted: 5 Yeas.

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

M 473 13 **A Motion was made by Mrs. Deaver, seconded by Mr. Cole, to reconvene at 1:33 p.m.**
Reconvene

Motion Adopted: 5 Yeas.

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

Legal
Counsel **Vince Robertson, Assistant County Attorney, was present as Legal Counsel.**

Public **A Public Hearing was held on the Proposed Ordinance entitled “AN**
Hearing/ **ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN**
C/U **AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR EXCAVATION**
No. 1969 **OF A BORROW PIT TO BE LOCATED ON A CERTAIN PARCEL OF**
LAND LYING AND BEING IN BALTIMORE HUNDRED, SUSSEX

**Public
Hearing/
C/U
No. 1969
(continued)**

COUNTY, CONTAINING 7.2 ACRES, MORE OR LESS” (Conditional Use No. 1969) filed on behalf of Melvin L. Joseph Construction Co., Inc.

The Planning and Zoning Commission held a Public Hearing on this application on September 26, 2013 at which time action was deferred.

See the minutes of the Planning and Zoning Commission dated September 26, 2013.

Lawrence Lank, Director of Planning and Zoning, read a summary of the Commission’s Public Hearing.

Mr. Lank distributed copies of an Exhibit Book previously provided by the Applicant.

Mr. Lank stated that, since the Commission’s Public Hearing on September 26th, he has received: 1) five letters in support from Patricia Via, Jean Robinson, Virgil Chandler, Frank Robinson, and Lisa Todd, and 2) a petition containing approximately 70 names in opposition to the application.

The Council found that Ken Adams, President of Melvin L. Joseph Construction Co., Inc. was present with Dennis Schrader, Esq. of Morris James Wilson Halbrook & Bayard, LLP, Robert L. Stickels of Melvin L. Joseph Construction Co., Inc., and Mark Davidson of Pennoni Associates, LLC. Mr. Adams, Mr. Schrader and Mr. Davidson stated in their presentations and in response to questions raised by the Council that the company has been operating the adjoining borrow pit, called the Gibson Pit, for approximately 40 years; that the Gibson Pit site contains approximately 14 acres of which 2 acres has not been disturbed; that the Gibson Pit site is gated; that keys have been made available to public safety agencies for access to the dry well; that no fuel is stored on the site; that water trucks, sweepers and broom trucks are available when needed to control dust; that the only entrance is on Burbage Road; that the frontage along Powell Farm Road will never be used for truck traffic; that materials removed will be used for fill for construction projects in the area; that normal activity hours on the site will be on Monday through Friday from 6:00 a.m. to 6:00 p.m. and Saturday from 6:00 a.m. until 12:00 Noon; that there will be no Sunday activities; that they are proposing to include the Gibson Pit site in their plans for reclamation of the project and that the reclamation will bring the Gibson Pit into compliance with current regulations; that aerial photography depicts borrow activities on this site since 1954; that they are proposing to borrow approximately 3.5 acres of the 7.2 acre site; that the proposed borrow pit will connect to the existing Gibson Pit; that the remaining 3.7 acres of the site will be left undisturbed; that they propose to complete excavation of the current site and then move to the new site; that all but the last 2 acres have been dug at the existing site; that the two pits will be connected to make one pit; that no off-site materials will be brought onto this site; that the existing entrance on Burbage Road will be the only access to this site by extending the access

**Public
Hearing/
C/U
No. 1969
(continued)**

road from the Gibson Pit site to this site; that they have met with DelDOT representatives who support the use of the existing entrance; that the entrance has recently been paved and the apron extended into the site; that the site is not located in a flood plain; that there are no regulated wetlands on the site; that no endangered species were reported on the site; that 2:1 slopes are proposed with 10 foot safety benches; that they will improve those areas of the 50 foot buffer with additional tree plantings where needed; that the service road will be located outside of the buffer areas; that the borrow area will be no closer than 300 feet to Powell Farm Road; that the borrow area will be no closer than 200 feet to any adjacent dwellings; that no buildings are proposed to be erected on the site; that Preliminary and Final Site Plans will be submitted for Planning and Zoning Commission review and approval; that once the project is fully excavated, the 2:1 slopes and landscaping will be provided; that they would like it to be clear that they are doing a voluntary reclamation of the Gibson Pit; that vegetated area buffering of the site should not cause any negative impact on property owners along Powell Farm Road; that a Traffic Impact Study was not required by DelDOT; that no permanent or temporary office will be erected on the site; that they will not start excavation until they receive all appropriate agency approvals; that a need exists to provide materials to serve projects in the area; that the landscaping provided will include native species; that they will comply with all County requirements; that areas of the site that have been previously disturbed will be improved; that when the site slopes are repaired and brought to 2:1 slopes, they will also be stabilized, seeded, planted, and then left to remain in a natural state; that some berms already exist; that the borrow pit area will be posted with warning signage about trespassing and deep water; that a neighbor oversees the site and reports any trespassing; that this site was timbered approximately 10 years ago; that they are proposing to start digging from the far corner back out toward the Gibson Pit; that they are intending to use excavators, but may dredge; that they will maintain an average depth of 25 feet; that they have estimated that there may be 180 vehicles trips per day; that according to DelDOT this number of trips should not impact Burbage Road; and that the Exhibit Book contains two letters from DelDOT; that the application will not affect the church and cemetery in the area as there is a 50 foot buffer between the two sites; that entrances are gated and locked; and that the demand for borrow is starting to increase.

The Applicant submitted proposed Findings of Fact and proposed Conditions of Approval for Council's consideration.

Mr. Cole expressed concerns regarding the unsafe slopes of the current pit; the pit going into the water table and possible contaminants; the depth of the pit; the time period for reclamation of the pit; and how the pit will be reclaimed. Mr. Cole stated that even though there is an existing small borrow area with a required 50 foot buffer, that portion within the buffer should be filled and maintained as a buffer.

Mr. Phillips questioned if a wooded buffer would be maintained.

**Public
Hearing/
C/U
No. 1969
(continued)**

Mrs. Deaver expressed concern about the safety of children and she questioned if fencing could be provided.

In response to questions and concerns raised by the Council, the Applicant stated that, if the application is approved, they will reclaim the existing property; that they would agree to a maximum 25 foot depth to avoid the water table; that a wooded buffer will be created and the existing wooded buffer will not be disturbed; and that there is a berm on both sides of the Burbage Road entrance that is approximately 60 feet wide and that the berm would have to be scaled to gain entrance; and that within the existing small borrow area with a required 50 foot buffer, that portion within the buffer will be filled and maintained as a buffer.

Public comments were heard.

There were no public comments in support of the application.

Claudia Howard and Lois Mumford spoke in opposition to the application. Ms. Howard expressed concerns about noise, traffic and the safety of children in the area; she stated her opposition to the number of trucks and truck trips on Powell Farm Road; and she questioned why a section of the property was cleared. Ms. Mumford stated that young people from Sherwood Acres cross the borrow pit property and vandalize the Church and cemetery grounds; that they hope there is some way the area can be fenced; and that they hope the buffer area will be greater than 50 feet.

The Applicant stated that vegetation (no trees or soil) was removed near the old entrance so that the property could be surveyed and that they propose to gate the old entrance. Additionally, the Applicant stated that, on the cemetery side of the property, they do not propose to remove the existing, mature vegetation/trees. The Applicant stated that the only traffic they have created on Powell Farm Road is when they mowed the small area near the old entrance for survey purposes. The Applicant also noted that this parcel of land was purchased in June 2013.

Mr. Cole asked that the following be added as a condition: The existing vegetation will remain.

The Public Hearing was closed.

**M 474 13
Close
Public
Record on
C/U
No. 1969**

A Motion was made by Mrs. Deaver, seconded by Mr. Cole, to close the public record on Conditional Use No. 1969 filed on behalf of Melvin L. Joseph Construction Co., Inc.

Motion Adopted: 5 Yeas.

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

**M 475 13
Defer
Action on
C/U
No. 1969**

A Motion was made by Mr. Wilson, seconded by Mr. Phillips, to defer action on Conditional Use No. 1969 filed on behalf of Melvin L. Joseph Construction Co., Inc., pending receipt of a decision by the Planning and Zoning Commission.

Motion Adopted: 5 Yeas.

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

**M 476 13
Adjourn**

A Motion was made by Mr. Wilson, seconded by Mr. Cole, to adjourn at 2:39 p.m.

Respectfully submitted,

**Robin A. Griffith
Clerk of the Council**