

**SUSSEX COUNTY COUNCIL - GEORGETOWN, DELAWARE, OCTOBER 19, 2021**

A regularly scheduled meeting of the Sussex County Council was held on Tuesday, October 19, 2021, at 9:00 a.m., in Council Chambers, with the following present:

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

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

**Call to  
Order**

Mr. Vincent called the meeting to order.

**M 450 21  
Approve  
Agenda**

A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer, to approve the Agenda, as posted.

**Motion Adopted: 5 Yeas.**

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

**Appeal/  
Subdivision  
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Island**

The Council considered an Appeal on the Sussex County Planning and Zoning Commission's decision to approve Subdivision Application No. 2020-13 (Terrapin Island).

Mr. Vincent introduced The Honorable Charles Toliver IV, Superior Court Judge Retired, who would preside over the appeal hearing and rule on matters of procedure.

Judge Toliver reviewed the basic matters of procedure for the appeal hearing. He advised that subdivision appeals are totally based on the record and that no new evidence would be allowed.

In accordance with Sussex County Code §99-39B(2), the Council shall act on the record of the hearing before the Commission within sixty (60) days from the receipt of the transcript on September 3, 2021.

It was noted that, in accordance with Sussex County Code, if the Council finds that the Commission misapplied or misinterpreted the applicable sections of the chapter [of Sussex County Code §99-39B(2)] or that its findings were not the result of an orderly and logical review of the evidence

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**and the applicable provisions of the chapter of the Sussex County Code (§99-39B(2)), the Council can either affirm, reverse, or order a new hearing before the Planning and Zoning Commission within a specific period of time and/or issue a written decision with findings.**

**Richard Forsten, Attorney representing the Applicant for the Terrapin Island Subdivision Application No. 2020-13, stated they do object to any attempt to raise issues that were not raised at the hearing before the Planning and Zoning Commission.**

**Michele Forzley stated that she and Keith Steck would be presenting the appeal on behalf of a group of 165 appellants. She noted that the 165 people who filed this appeal are from two communities, Bay Front and West Bay Park, and other parts of the County and along Camp Arrowhead Road. Ms. Forzley noted for the record that Bay Front Homeowners Association is not an appellant.**

**Ms. Forzley stated that, in their presentation, they would be talking about the submitted statement (dated August 6, 2021) and supplemental statement (dated October 11, 2021).**

**Ms. Forzley stated that the appellants are in opposition to the proposed development because it is in violation of a number of Code provisions. She noted that all of the materials (922 pages) in the application folders in the Planning and Zoning Office were not included in the paperless packets; that not all of the materials were presented to the Commission before the Public Hearing on June 24, 2021 and that some of the materials in the record were submitted on June 24th just prior to the Commission's hearings, i.e. proposed findings and conditions submitted by the Applicant on that day. She further noted that there is a question as to what is the record and what was before the Commission on June 24th.**

**Keith Steck presented on some of the topics that are the basis of the appeal: errors in the record that raise the question of what was approved, gaps in the application including confusion on ownership; the application omitting any reference to the easement that was in favor of the Bay Front Homeowners Association; rejection should have occurred at the staff level; the first step of an orderly and logical review was not performed; the matters of street design and cul-de-sacs and safety issues; and multiple instances of a misapplication of the Comprehensive Plan and its maps on such topics as infill and urban rural designations. Mr. Steck stated that there are a number of problems and errors in the record and he reviewed those errors including (1) errors in the application, i.e. preliminary site plan information was supposed to be on the plat and the issue of ownership is not clear; (2) the record is incomplete (does not include emails, phone records and minutes of staff meetings with developers and does not include the February 2020 contract); (3) the misapplication of the Comprehensive Plan, (4) errors in the minutes, especially in comparison to the transcript (i.e. the name of the owner of the**

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property, the reference to the Contract, and the Motion by Commission Member Stevenson); (5) the question of the validity of the minutes of the Planning and Zoning Commission dated June 24, 2021; (6) there is no contract in the file between the landowners and the developers; (7) multiple instances of misapplication by the Applicant (i.e. the Army Corp granting the permit for the road over the wetlands); (8) the Applicant challenging the validity of the Investment Level 4 status in the PLUS report; (9) the characterization of the project site and the area as urban and the Applicant incorrectly portraying the property as an infill project in an urban area; (10) there are no provisions in the County's Subdivision Ordinance nor the Sussex County Code for infill development; (11) the site is in a pristine rural area, an area of environmental importance; (12) the Applicant failed to address their reasons for disregarding the PLUS report, and (13) the Director failed to prepare a report as required by Section 115-194.3(B)(3).

Ms. Forzley stated that no Bay Front easement was shown on the plat as required by §99-20 and 23 Del. C. §81-209 and in the staff letter; there was a deed in the file but no easement was shown; that a decision by the Planning and Zoning Commission can effectively negate the easement which is what they ultimately did, because there is nothing in the record that discusses an agreement with the easement beneficiary; and that there is a condition in the decision that says that the Developer will give Bay Front an access through the road that they want to put in but there is no discussion on consent on the part of the easement-holder.

Ms. Forzley discussed the location of the property in a Coastal Area and in a Growth Area, and the designation as being in a Level 4 Area. She referenced what the Comprehensive Plan says about the Coastal Area: only appropriate forms of concentrated new development are allowed, especially when environmental features are in play, and in regard to Level 4, special scrutiny should be applied in spending decisions and development proposals, and additional consideration should be taken into account.

Ms. Forzley discussed the special considerations: wetland buffers (tidal and non-tidal), setbacks, forested buffers, and areas of disturbance over wetlands (the proposed roads over wetlands). She stated that there are three locations for tidal wetland 50 foot buffers; that the Developer has placed the buffer in the wetlands and the Planning and Zoning Commission approved a plat showing it out in the Bay; that the tidal wetlands are to be mapped and regulated by DNREC; that this is a flood prone area; that there is a continuous non-tidal setback of 25 feet; that the forested buffer is applied incorrectly; and that there are areas of disturbance over wetlands. Ms. Forzley presented the definitions of buffer zones, the mean high-water line of tidal water, and forested buffers in accordance with the Code of Sussex County. She discussed where the buffers are to be placed and discussed the effects on the proposed project when the tidal wetland buffers and the forested buffer are applied incorrectly.

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**At 10:20 a.m., Mr. Vincent declared a ten minute recess.**

**The Council reconvened at 10:32 a.m.**

**Richard Forsten, Attorney on behalf of the property owners and the Developer/Applicant, was present with Jim Fuqua, Attorney representing the Applicant on the Subdivision Application; Mark Davidson, Project Engineer; and John Stamato on behalf of the Developer, Ribera Development, LLC.**

**Mr. Forsten stated that so much of what has been said is irrelevant to the question that is before the Council today, which is – is this plan entitled to preliminary subdivision plan approval. He stated that he doesn't care if this property is characterized as urban or suburban or rural; that the County's Zoning Code permits development in rural areas on property with the AR designation; that there are 1,100 homes within a mile of this property and yet somehow the Appellant states that this is a pristine, agricultural, rural area; that the property is in an Investment Level 4 which is a State designation and which is entirely irrelevant to whether or not preliminary subdivision plan approval was properly granted or not; that the Investment Level 4 Area extends to the north and south of the Terrapin Island project, which are developed areas; that if something is not raised in front of the body (the Planning and Zoning Commission), you cannot then complain on appeal that a particular issue was not addressed and it is not grounds for reversal; that the owners have been identified; that if the opponents had a problem with that, they should have asked that question at the Public Hearing before the Planning and Zoning Commission; that it was stated that material was missing from the paperless packet but it was not told what material was missing; that the paperless packet was on the website prior to the public hearing; that it should have been stated at the public hearing if someone thought materials were missing so that the materials could be provided; that there was also a complaint that materials were presented at the public hearing, i.e. the conditions submitted by the Applicant, which is standard practice; that they were told there was an easement not shown on the plan and so the plan should be invalidated; that there was claim that the Bay Front HOA had an easement but they are not in attendance complaining about that; that if Bay Front has an easement, the Applicant could not find it; that at the end of the road in Terrapin Island, they are going to give Bay Front an easement to get to their beach, so they will have vehicular access to their beach; that there is currently no vehicular access to that beach; that the buffers are not in the wetlands and the buffer begins at the edge of the wetlands; that they have a 50 foot buffer from tidal wetlands as delineated by DNREC; that DNREC's approval is one of the many approvals they will need to proceed with this project; that they anticipate getting the wetlands permit any day; that they will need to obtain a permit from the Army Corps; that when this plan was submitted to the County over a year ago, there was no buffer requirement for non-tidal wetlands; that in February 2021, the County approved a buffer regulation; however, when the new buffer**

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**regulation was approved, it was stated that it did not apply to any plans under review, and, therefore, it did not apply to this project; that this was stated at the public hearing; that they are providing a 25 foot building setback from the non-tidal wetlands; that in terms of wetlands, they have done everything right; that the Appellant showing pictures and drawings with unmeasured lines and lines not drawn to scale does not prove anything; that in regards to the forested buffer, the provisions in the Code (§115-25 F) became applicable to plans effective February 2021 and it does not apply to this plan; that in regard to the 30 foot wide vegetated buffer (§115-25 E), it does not apply to this plan; and that if the Appellant had complaints about these issues, they should have brought them to the Planning and Zoning Commission’s public hearing.**

**Ms. Forzley presented her rebuttal and closing remarks. She stated that there are multiple letters from the Bay Front community outlining all of the issues the Appellants raised; that they have not raised issues from a substantive point of view in terms of Code applicability in this appeal that they have not already raised; that the appeal standard talks about the record and the record is all of it, it is not just what was presented on June 24th; and that the record is the minutes, the transcript, paperwork, opposition, etc. – it is everything that has been submitted.**

**In response to questions raised by Judge Toliver, Ms. Forzley stated that she does not think all of the opposition’s material was in the paperless packet that was given to the Planning and Zoning Commission prior to the public hearing or that was made available to the public; and that on the night of June 24th, some of that material could not be found in the file, and since then, some of it could not be found in the file, and that subsequently, it has been found and is now in the record. She also referenced the contract which was also not included in the record. In response to further questions, Ms. Forzley stated that she does not have a list of the missing documents.**

**Ms. Forzley stated that the standard of review says that if there is a misinterpretation or misapplication of sections of the chapter, or the findings were not the result of an orderly and logical review of the evidence and the applicable provisions of the chapter, that the Council only has to find an error before it can make a decision to reverse; and that the Appellant has given multiple examples of errors. Ms. Forzley referenced the easement again and she stated that it’s not enough that the Applicant says they are going to give an access – there is no agreement with the holder of the easement that it is acceptable and it’s not okay for the Planning and Zoning Commission to make a decision that essentially overrides a deed easement. Ms. Forzley referenced the tidal wetlands and the 50 foot and 25 foot buffers and stated that the maps that were used were given to them by the Applicant; that it is a critical issue where the 50 foot buffer goes and it is not explained anywhere in the record; and that if this buffer issue was resolved correctly, this plan could never have been approved.**

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Ms. Forzley stated that she is concerned about what took place at the Planning and Zoning Commission's public hearing on this matter and she referenced the Oath of Office that the Planning and Zoning Commission members take.

In conclusion, she stated that the Planning and Zoning Commission did not apply special scrutiny in its review and did not conduct an orderly and logical review of the evidence. She also stated that the property is not suitable for construction which is what the PLUS report states. She also expressed concern about how the opposition was treated by the Planning and Zoning Commission's Chairman and she stated that the Planning and Zoning Commission turned a blind eye to this non-Code-compliant property, and that they have no confidence that the Commission would do the right job if the application is sent back to them. She asked that the Council reverse the decision of the Planning and Zoning Commission.

Ms. Forzley presented suggestions/recommendations to the County regarding the subdivision application and appeal process and regarding the makeup of the Planning and Zoning Commission.

Vince Robertson, Assistant County Attorney, stated that he represents the Planning and Zoning Commission; however, he noted that it was previously determined in a pre-hearing conference on process and procedure that the Planning and Zoning Commission was not a party to this appeal and that he is abiding by that even though he does not agree with it. However, he advised that he felt compelled to state, on behalf of the Commission, that the Commissioners do take seriously their Oath of Office and the jobs that they do; that the Commissioners' job is to follow the law (the Code). Mr. Robertson also stated that the Commission did not ignore the buffer or misapply it, as was stated previously; that this is a preliminary stage and has to go through all agency comments; that the application may not get Final Site Plan approval if it does not get all the necessary agency approvals; that the Commission is not the expert on where wetlands lines are; that the Commission relies on the comments of engineers and State agencies; that the Commission did make that a condition of approval; and that the implication that there wasn't a consideration of that is not based on the record.

Mr. Robertson read Condition H of the Commission's decision: "There shall be a buffer that is at least 50 feet wide from the mean high-water line of all tidal waters, tidal tributary streams, tidal wetlands, perennial rivers and nontidal streams." He stated that this is what the Code says and the Commission went further than that and added: "There shall be a minimum disturbance of trees and other vegetation within these buffer areas. Required silt fencing shall be installed upland of these buffer areas (using the edge of the buffer nearest the interior development) to avoid disturbance. Construction activities within the buffer area shall be minimum. Any disturbance in the buffer area shall be indicated on the Final Site Plan and the "Limits of Disturbance" shall be indicated on the Final Site Plan." Mr.

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**Robertson stated that wherever that line might fall, it will be determined by engineers and reviewed by DNREC and possibly the U.S. Army Corp of Engineers.**

**Mr. Robertson noted that there were more than twenty (20) conditions of approval stipulated by the Commission which shows a thoughtful deliberation on the application.**

**Judge Toliver clarified his statement in the pre-hearing conference in regards to Planning and Zoning Commission not being a party to this appeal and he noted his understanding of Mr. Robertson's position.**

**Judge Toliver stated that the Council should consider everything that the Planning and Zoning Commission considered and whether the law was properly applied.**

**Mr. Moore referenced the Appellant's supplemental statement dated October 11, 2021 and specifically, Paragraph 9, regarding Conflicts of Interest, and he commented on an unsolicited letter, dated August 11, 2021, from David White of the Office of Disciplinary Counsel regarding Supreme Court Rule 72 – *Pro Hac Vice* before Local Boards/Administrative Agencies. It was noted that this letter was received prior to this matter (this subdivision appeal) and does not pertain to this appeal. It was also noted that the letter does not apply to Ms. Forzley in this matter and that Ms. Forzley is an Attorney but presented to Council on this matter as an Appellant.**

**At 11:49 a.m., Mr. Vincent declared a 10 minute recess.**

**The meeting reconvened at 11:58 a.m.**

**Judge Toliver stated that the appeal proceedings were at an end.**

**(Note: These minutes are not a transcript of the appeal hearing, rather, they are a summary of presentations and comments made. An audio recording of this meeting is available on the County's website.)**

**M 451 21  
Go Into  
Executive  
Session**

**At 11:59 a.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson, to recess and go into Executive Session for the purpose of discussing 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 12:10 p.m., an Executive Session of the Sussex County Council was held in the Basement Caucus Room to discuss matters relating to pending/potential litigation. The Executive Session concluded at 12:55 p.m.

**M 452 21 Reconvene Regular Session** At 12:57 p.m., a Motion was made by Mr. Rieley, seconded by Mr. Hudson, to come out of Executive Session and to reconvene the 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 on Executive Session matters.

Mr. Schaeffer joined the meeting.

**Minutes** The minutes of October 12, 2021 were approved.

**Comments** There were no public comments.

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

1. Project Receiving Substantial Completion

Per the attached Engineering Department Fact Sheet, Peninsula Lakes – Phase 8 (Construction Record) received substantial completion effective October 13, 2021.

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

**Report on CU 2262** Jamie Whitehouse, Planning and Zoning Director, reported on Conditional Use No. 2262 filed on behalf of Matthew Hete.

The Sussex County Council held a Public Hearing on this matter on October 12, 2021 at which time the Public Hearing was closed and the public record was left open for the recommendation of the Planning and Zoning Commission.

Mr. Whitehouse stated that the purpose of the matter being placed on the agenda on this date is to announce the receipt of the Planning and Zoning Commission's decision.

Mr. Whitehouse reported that the Planning and Zoning Commission held a Public Hearing on this matter on September 9, 2021 at which time action was deferred. On October 13, 2021, the Commission recommended approval with the following conditions:



**Report on  
CU 2262  
(continued)**

- a. The maximum number of residential units shall be 4.
- b. All entrance, intersection, roadway and multi-modal improvements shall be completed by the Developer in accordance with all DelDOT requirements.
- c. There shall be a 75-foot buffer along the road frontage that complies with the requirements of Section 115-22 of the Zoning Code for multi-family dwellings in the AR-1 District.
- d. The Applicant shall submit as part of the Final Site Plan a landscape plan showing the proposed tree and shrub landscape design, including the buffer areas.
- e. The project shall be served by Sussex County sewer. The Developer shall comply with all Sussex County Engineering Department requirements including any offsite upgrades necessary to provide service to the project.
- f. The project shall be served by central water to provide drinking water and fire protection.
- g. Construction and site work on the property, including deliveries of materials to or from the property, shall only occur between 7:00 a.m. and 5:00 p.m. Monday through Friday. There shall be no construction activities at the site on Saturdays or Sundays. A 24 inch by 36 inch "NOTICE" sign in English and Spanish confirming these hours shall be prominently displayed at all entrances to the site during construction.
- h. Street naming and addressing shall be subject to the review and approval of the County Mapping and Addressing Department.
- i. The Final Site Plan shall contain the approval of the Sussex Conservation District for the design and location of all stormwater management areas and erosion and sedimentation control facilities.
- j. All streetlights shall be downward screened so that they do not shine on neighboring properties or roadways.
- k. The Applicant must pay the bonus density fee required by Chapter 62, Section 62-7 of the Code of Sussex County for the two additional units in excess of two units per acre.
- l. The Final Site Plan shall be subject to the review and approval of the Sussex County Planning and Zoning Commission.

**Introduction  
of Proposed  
Ordinances**

Mr. Vincent stated that, as of this date, the public has five (5) days to comment, in writing, on this matter. The record will remain open until the close of business at 4:30 p.m. on Monday, October 25, 2021 (due to the fifth day falling on the weekend).

Mr. Schaeffer introduced the Proposed Ordinance entitled "AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR THE USE OF COMMERCIAL DELIVERIES OF PARTS TO BE SOLD OFFSITE TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN INDIAN RIVER HUNDRED, SUSSEX COUNTY, CONTAINING 0.99 ACRES, MORE OR LESS" (Conditional Use No. 2273) filed on behalf of Michael Parsons (Tax I.D. No. 234-5.00-49.00) (911 Address: 30274 Pecan Drive, Lewes).

**Introduction of Proposed Ordinances (continued)** Mr. Schaeffer introduced the Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE FUTURE LAND USE MAP OF THE COMPREHENSIVE PLAN IN RELATION TO TAX PARCEL NO. 532-12.00-1.00, 532-12.00-27.00, 532-18.00-42.00, 532-18.00-44.00 AND 532-19.00-1.00”.

Mr. Schaeffer introduced the Proposed Ordinance entitled “AN ORDINANCE TO AMEND THE FUTURE LAND USE MAP OF THE COMPREHENSIVE PLAN IN RELATION TO TAX PARCEL NO. 235-23.00-2.02 (PORTION OF), 235-23.00-1.00, 235-23.00-1.04, 235-23.00-2.00, AND 235-23.00-2.01”.

The Proposed Ordinances will be advertised for Public Hearing.

**M 453 21 Adjourn** A Motion was made by Mr. Rieley, seconded by Mr. Schaeffer, to adjourn at 1:03 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,

Robin A. Griffith  
Clerk of the Council

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