



PLANNING & ZONING

AGENDAS & MINUTES

MINUTES OF THE REGULAR MEETING OF AUGUST 27, 2009

The regular meeting of the Sussex County Planning and Zoning Commission was held Thursday evening, August 27, 2009, in the County Council Chambers, County Administrative Office Building, in Georgetown, Delaware.

The meeting was called to order at 6:00 p.m. with Chairman Wheatley presiding. The following members of the Commission were present: Mr. Robert Wheatley, Mr. Rodney Smith, Mr. Michael Johnson, Mr. I.G. Burton, III, and Mr. Martin Ross with Mr. Vincent Robertson – Assistant County Attorney, Mr. Lawrence Lank – Director, and Mr. Shane Abbott – Assistant Director.

Motion by Mr. Smith, seconded by Mr. Johnson, and carried unanimously to approve the Agenda as circulated. Motion carried 5 – 0.

Motion by Mr. Smith, seconded by Mr. Burton, and carried unanimously to approve the Minutes of August 13, 2009 as corrected. Motion carried 4 – 0 with Mr. Johnson abstaining.

OLD BUSINESS

C/Z #1650 – application of **CANNON ROAD INVESTMENTS, LLC** to amend the Comprehensive Zoning Map from an AR-1 Agricultural Residential District to an AR-1-RPC Agricultural Residential District – Residential Planned Community for a certain parcel of land lying and being in Indian River Hundred, Sussex County, land lying west of Route 5 (Indian Mission Road) and on both sides of Road 307 (Cannon Road), to be located on 134.565 acres, more or less.

The Commission discussed this application which has been deferred since June 25, 2009.

Mr. Johnson stated that he has reviewed the public testimony, the record and files pertaining to this application and reviewed the pertinent files of the Stonewater Creek Subdivision (2004), Ivy Branch Associates (2006) and Pelican Point (2006) all of which were precursors to this application for change in zone from AR-1 to AR-1-RPC Agricultural Residential District – Residential Planned Community for 135 + acres; that originally this 135+ acre parcel was part of a much larger Stonewater Creek Subdivision; that in April 2006 this parcel was part of a larger 200-acre parcel that was approved for a cluster subdivision; that numerous conditions were placed on this parcel as part of the cluster subdivision application approval and are part of the public record; that in September 2006, at the request of the Applicants, this 200 acre parcel of the larger Stonewater Creek Subdivision was requested and approved by the Commission to become

a separate subdivision with its own amenities and is now known as Pelican Point; that the conditions placed on this parcel when it was approved as a cluster subdivision remained; that this 2006 cluster subdivision was approved for 360 lots on 200 acres; that before us now, the Applicants have requested that approximately 135 + acres of the larger 200 acre parcel be changed from AR-1 to AR-1-RPC to permit twin homes, town homes, attached homes and/or condos (the Applicants were not quite sure what to call them either) as part of the development; that in addition, on this approximately 135 acres, the Applicants are seeking to increase the number of residential units from 168 to 252, which represents a 50% increase; that the Applicants have proposed reducing the sidewalks from both sides of the street to only one (1) side; that one of the conditions originally approved for this parcel was a sidewalk on both sides; that the Applicants are not proposing any amenities to be located in this AR-1-RPC development of 252 housing units; that more density, less pedestrian mobility and safety (proposed reduction in sidewalks to one side), and no amenities in this AR-1-RPC proposal does not constitute a superior living environment, nor design ingenuity; that approval of this project, as submitted, may have a negative impact on the neighboring community; that at the public hearing residents of Stonewater Creek Subdivision were concerned that twin homes and smaller homes on smaller lots will likely negatively impact neighboring properties valuations in an already depressed housing market; that the Applicants did not adequately address these concerns; that one purpose of the RPC design ingenuity is "protecting existing and future developments"; that when this larger 200 acre parcel was approved as a cluster subdivision in 2006, all of the issues of Section 99-9C of the Subdivision Ordinance were addressed, and the cluster subdivision was a superior design; that at the same time, the cluster subdivision was not likely to negatively impact the original Stonewater Creek Subdivision and its existing residents; that I felt then, in 2006, and feel today that the approved cluster subdivision would have complemented Stonewater Creek Subdivision; that I am satisfied that that application meets the purpose of RPC design ingenuity to protect existing and future developments; that with this application before us today, I am concerned that it will have a negative impact on Stonewater Creek Subdivision, of which it originally was a part of; that furthermore, the Applicants stated that the amenities for this proposed AR-1-RPC are in Phases 4 – 7 of Pelican Point; that Phases 4 – 7 are not part of this requested AR-1-RPC; that there is no timeline for the development of Phases 4 – 7, let alone any proposed timeline for the provision of amenities in Phases 4 – 7; that there is no guarantee that Phases 4 – 7 will ever be constructed and the residents of the proposed AR-1-RPC could end up with no recreational amenities at all; that there are no proposed parks, benches, gazebos, let alone a swimming pool or clubhouse or multi-sports courts; that the lack of recreational amenities is indicative of poor design and inferior living environment; that although the recreational amenities were/are to be located in Phases 4 – 7, not providing any significant amenities in the AR-1-RPC with the proposed increased density does not create a "superior living environment" or a "unified development" as discussed in the "Purpose" section of the Zoning Code for RPCs; that this is at least the third requested change for this parcel; that the Planning and Zoning Commission has accommodated the Applicants in the past with some of their requested changes based upon superiority of design and additional protections for the environment and open space; that however, with this application, I do not find any resemblance of superiority of design and additional environmental protections to justify a change from AR-1 to AR-1-RPC; that, therefore, Mr. Chairman, based upon the aforementioned records and the public hearing, I move that the Commission recommend denial of C/Z #1650, application by Cannon Road Properties, LLC, for the aforementioned reasons and the following:

- 1) The proposed project is not in character with the nature of the area. Twin homes/duplexes are out of character with other single-family dwellings in the surrounding area. There are no nearby townhouses or condo communities.
- 2) There was no justification presented why the Commission should grant an increase in density of 50% over and above the previously approved subdivision of 1.8 homes per acre. The Applicants stated that the increased units result in a density of 1.87 units per acre for the AR-1-RPC. However, the total density for Pelican Point would become 444 homes on 200 acres, or a density of 2.22 units per acre, which is in excess of the allowable density under the Subdivision Ordinance. Under the current cluster subdivision ordinance, after the 25% set aside for infrastructure, the net density is approximately 1.5 units per acre. The existing cluster subdivision of Pelican Point is 1.8 units per acre or 360 units on 200 acres. The Applicants already have a greater density than allowable under the current cluster subdivision ordinance.
- 3) The Commission has previously approved a subdivision on this parcel and subsequently approved the parcel for development as a cluster subdivision. Therefore, the Applicants are able to develop the land without a change of zone.
- 4) A denial of this application does not prevent the Applicants from developing the land in accordance with County Ordinances.
- 5) The 2008 Sussex County Comprehensive Land Use Plan Update identifies future land use of this area as Low Density.
- 6) AR-1-RPC zoning is not appropriate for the proposed project site because the project is adjacent to other single-family homes. This project does not create a superior living environment and does not provide for design ingenuity while protecting existing and future uses. Twin homes, smaller lots and smaller homes, coupled with the lack of recreational amenities are not indicative of a superior design or superior living environment.
- 7) While this application is part of the larger Pelican Point cluster subdivision, the proposed AR-1-RPC increase in housing units results in a density greater than allowable under the AR-1 District and should not be permitted.

Motion by Mr. Johnson, seconded by Mr. Burton, and carried with 4 votes, that C/Z #1650, the application of Cannon Road Investments, LLC, be forwarded to the Sussex County Council with the recommendation that the application be denied for the reasons stated. Motion carried 4 – 0 with Mr. Ross abstaining.

Subdivision #2007-42 – application of **FENWICK COMMONS, L.L.C.** to consider the Subdivision of land in an AR-1 Agricultural Residential District in Baltimore Hundred, Sussex County, by dividing 13.35 acres into 27 lots, (Environmentally Sensitive Developing District Overlay Zone), located at the southwest corner of the intersection of Route 54 and Road 394.

The Commission discussed this application which has been deferred since July 23, 2009.

Mr. Smith stated that as the Applicant recognized in the presentation, this project hinges on County sewer being available to the project; that this requires the project to go through the sewer annexation process; that I am going to move that the Commission grant preliminary approval for the subdivision so that the Applicant can move forward with the project and the sewer design and

annexation process; that the project cannot receive Final Site Plan approval and then begin construction unless it is annexed into a County Sewer District through that process, which requires approval from County Council.

Mr. Smith stated that he moves that the Commission grant preliminary approval of Subdivision #2007-42 for Fenwick Commons, LLC based upon the record and for the following reasons:

- 1) The Applicant is seeking approval of a subdivision within the AR-1 zone and the Environmentally Sensitive Developing District Overlay Zone. The Applicant is seeking clustered lots as permitted under the Overlay Zone with a minimum area of 7,500 square feet.
- 2) A subdivision on this site will not have an adverse impact on the neighboring properties or community.
- 3) The subdivision will not adversely impact schools, public buildings, area roadways or public transportation.
- 4) The proposed subdivision meets the purpose and standards of the Subdivision Ordinance.
- 5) The design addresses the requirements of Section 99-9C of the Subdivision Code.
- 6) The subdivision will have no more than 27 lots on 13.35 acres. This results in a density that is within the maximum density permitted in the AR-1 zone.
- 7) The subdivision will be served by central water and sewer.
- 8) This preliminary approval is subject to the following:
 - A. There shall be no more than 27 lots within the subdivision.
 - B. The Applicant shall form a homeowners' association responsible for the perpetual maintenance of streets, roads, any buffers, stormwater management facilities, erosion and sedimentation control facilities and other common areas.
 - C. The stormwater management system shall meet or exceed the requirements of the State and County. It shall be constructed and maintained using Best Management Practices.
 - D. All entrances shall comply with all of DelDOT's requirements, and an area for a school bus stop shall be established. The location of the school bus stop shall be coordinated with the local school district.
 - E. Road naming and addressing shall be subject to the review and approval of the Sussex County Mapping and Addressing Departments.
 - F. 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.
 - G. A 30-foot forested Agricultural Buffer shall be shown along boundaries bordering on any land used primarily for any agricultural purpose. The Final Site Plan shall also contain a landscape plan for all of the buffer areas, showing all of the landscaping and vegetation to be included in the buffer areas.
 - H. As stated by the Applicant, the 1.4 acres of existing forest shall be preserved. The undisturbed forested areas shall be shown on the Final Site Plan.
 - I. No wetlands shall be included within any lots.
 - J. A system of street lighting shall be established.
 - K. As stated by the Applicant, sidewalks shall be located on one side of all streets in the subdivision.

- L. The subdivision shall be served with Sussex County sewer in the West Fenwick Planning Area of the Fenwick Island Sanitary Sewer District or another County sewer district, subject to the requirements of the Sussex County Engineering Department and the expansion of the Sewer District by Sussex County Council prior to Final Site Plan approval.
- M. As proposed by the Applicant, within 2 years of the issuance of the first residential building permit, the developer shall construct all of the recreational amenities.
- N. The Restrictive Covenants governing the project shall include the Agricultural Use Protection Notice and the Wetlands Notice.
- O. A minimum of one (1) parking space shall be provided to access the existing graveyard on site.
- P. All silt fencing shall be located to the interior side of all buffer areas.
- Q. This preliminary approval is contingent upon the Applicant submitting a revised Preliminary Site Plan either depicting or noting the conditions of this approval on it. Staff shall approve the revised Plan upon confirmation that the conditions of approval have been depicted or noted on it.
- R. The Final Site Plan shall be subject to the review and approval of the Planning and Zoning Commission.

Motion by Mr. Smith, seconded by Mr. Burton, and carried with 3 votes to grant preliminary approval of Subdivision #2007-42 as stated. Motion carried 3 – 0 with Mr. Johnson and Mr. Ross abstaining.

Subdivision #2008-1 – application of **ALBERT J. BIERMAN** to consider the Subdivision of land in an AR-1 Agricultural Residential District in Dagsboro Hundred, Sussex County, by dividing 52.79 acres into 8 lots, and a variance from the maximum allowed cul-de-sac length of 1,000 feet, located east of Road 469, 520 feet north of Road 329.

The Commission discussed this application which has been deferred since August 13, 2009.

Mr. Ross stated that he would move that the Commission grant partial preliminary approval of Subdivision #2008-1 for Albert J. Bierman, based upon the record and for the following reasons:

- 1) The proposed subdivision, with the conditions imposed on it, meets the purpose of the Subdivision Code in that it protects the orderly growth of the County. It also meets the requirements of the Subdivision Code, and the items listed in Section 99-9C of the Code have been favorably addressed.
- 2) The proposed subdivision density is less than the density permitted in the existing AR-1 zoning.
- 3) The proposed subdivision will be a restricted residential development and will not adversely affect nearby uses or property values.
- 4) The proposed subdivision will not adversely impact schools, public buildings and community facilities or area roadways and public transportation.
- 5) DNREC has indicated that the site is suitable for individual on-site septic systems on 4 lots and this Preliminary Approval is for those 4 lots only.
- 6) This preliminary approval is subject to the following conditions:

- A. There shall be no more than 8 total lots within the subdivision. This preliminary approval is only for the 4 lots that currently have septic feasibility statements from DNREC. The Preliminary Site Plan shall be revised to show these 4 lots as "Phase I", with the other 4 lots that do not have preliminary approval being "Phase II".
- B. The Applicant shall form a homeowners' association responsible for the perpetual maintenance of roads, any buffers, stormwater management facilities, erosion and sedimentation control facilities and other common areas.
- C. The stormwater management system shall meet or exceed the requirements of the State and County. It shall be constructed and maintained using Best Management Practices.
- D. All entrances shall comply with all of DelDOT's requirements.
- E. Road naming and addressing shall be subject to the review and approval of the Sussex County Mapping and Addressing Departments.
- F. 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.
- G. A 30-foot forested Agricultural Buffer shall be provided as shown on the Preliminary Site Plan. The Final Site Plan shall also contain a landscape plan for all of the buffer areas, showing all of the landscaping and vegetation to be included in the buffer areas.
- H. This preliminary approval is contingent upon the Applicant submitting a revised Preliminary Site Plan either depicting or noting the conditions of this approval on it. Staff shall approve the revised Plan upon confirmation that the conditions of approval have been depicted or noted on it.
- I. The Final Site Plan shall be subject to the review and approval of the Planning and Zoning Commission.

Motion by Mr. Ross, seconded by Mr. Smith, and carried with 4 votes to grant preliminary approval of Subdivision #2007-42 as stated. Motion carried 4 – 0 with Mr. Johnson abstaining.

Subdivision #2008-2 – application of **LEE LITTLETON** to consider the Subdivision of land in a GR General Residential District in Little Creek Hundred, Sussex County, by dividing 8.76 acres into 6 lots, located south of Road 454, 310 feet east of Road 457.

The Commission discussed this application which has been deferred since August 13, 2009.

Mr. Ross stated that he would move that the Commission grant preliminary approval of Subdivision #2008-2 for Lee Littleton, based upon the record and for the following reasons:

1. This is a subdivision that previously received Final Approval in 2001, but was voided because substantial construction had not commenced on it in the 5 years following Final Approval.
2. The proposed subdivision still meets the purpose of the Subdivision Ordinance in that it protects the orderly growth of the County.
3. The land is zoned GR General Residential which permits single family residential development. The proposed subdivision density is also significantly less than the allowable density for GR land.

4. The subdivision will be consistent with the area and will not adversely affect nearby uses or property values.
5. The subdivision will not adversely impact schools, traffic, public buildings and community facilities.
6. This preliminary approval is subject to the following conditions:
 - A. There shall be no more than 6 lots within the Subdivision.
 - B. The stormwater management system shall meet or exceed the requirements of the State and County.
 - C. All entrances shall comply with all of DelDOT's requirements.
 - D. The Applicant shall establish a homeowners association or similar means of providing for the perpetual maintenance of all stormwater management areas, open space and Smith Court, and the portion of Carr Boulevard fronting Subdivision 2008-2 as proposed by the Applicant.
 - E. The Final Site Plan shall be subject to the review and approval of the Planning and Zoning Commission.

Motion by Mr. Ross, seconded by Mr. Smith, and carried with 4 votes to grant preliminary approval of Subdivision #2008-2 as stated. Motion carried 4 – 0 with Mr. Johnson abstaining.

PUBLIC HEARINGS

C/U #1846 – application of **JOSEPH M. AND MELISSA R. CRISPIN** to consider the Conditional Use of land in an AR-1 Agricultural Residential District for a contracting business to be located on a certain parcel of land lying and being in Lewes and Rehoboth Hundred, Sussex County, containing 41,542 square feet, more or less, lying north of Route 9, 2,800 feet west of Route 261, and being Lot 10 within Stamper Farms.

Mr. Lank provided the Commission with copies of the site plan for this application.

Mr. Lank advised the Commission that a Commercial Entrance Permit was granted for the site for A-1 Fencing Company.

The Commission found, based on comments received from the County Engineering Department Utility Planning Division, that the site is not located in a current County operated or maintained sanitary sewer or water district; that the site is located in the North Coastal Planning Area; that the use and the existing individual on-site septic system are proposed; that conformity to the North Coastal Planning Area Study is required; that the proposed project is not in an area where the County currently plans to provide sewer service; and that a concept plan is not required.

The Commission found that Joseph Crispin was present with Tommy Cooper of Cooper Realty and that they stated in their presentation and in response to questions raised by the Commission that Mr. Cooper has been a licensed Real Estate Broker since 1972; that the current Ordinance No. 1794 for Conditional Use #1598 for Debbie Porter will be complied with; that a roofing company is proposed; that all bidding is prepared by the use of building prints; that some vehicles and all equipment will be stored in the accessory building; that the roofing company will abide by all conditions established by Ordinance No. 1794; that the roofing company should

generate less traffic; that no material will be stored outside; that the existing solid wooden fencing will remain; that an unlighted sign is acceptable; and that some vehicles will be stored outside, but inside of the fenced area.

The Commission found that there were no parties present in support of or in opposition to this application.

At the conclusion of the public hearings, the Commission discussed this application.

Mr. Johnson stated that he would move that the Commission recommend approval of C/U #1846 for Joseph M. and Melissa R. Crispin for a contracting business based upon the record made at the public hearing and for the following reasons;

- 1) This property previously received Conditional Use approval for a fencing company under Ordinance No. 1794. This application is seeking approval for a contracting business, which is not materially different from the prior approval.
- 2) The Applicant has stated that he will abide by the conditions imposed on the prior Conditional Use by Ordinance No. 1794.
- 3) The use as a contracting business will generate less traffic than the prior fencing company.
- 4) This approval is subject to the following conditions:
 - A. This Conditional Use shall incorporate the same conditions as Ordinance No. 1794.
 - B. The Final Site Plan, approved as part of Ordinance No. 1794, shall remain in effect and be valid for this Conditional Use.

Motion by Mr. Johnson, seconded by Mr. Burton, and carried unanimously to forward this application to the Sussex County Council with the recommendation that the application be approved for the reasons and with the conditions stated. Motion carried 5 – 0.

In reference to C/Z #1687 and C/U #1845, Chairman Wheatley announced that the Applicant, through a letter from Dennis Schrader, Attorney, has requested permission to consolidate the hearings into one presentation and acknowledging that decisions will be rendered on each application separately. Chairman Wheatley granted permission to proceed with a consolidated public hearing.

C/Z #1687 – application of **RICK BANNING** to amend the Comprehensive Zoning Map from an AR-1 Agricultural Residential District to a MR Medium Density Residential District for a certain parcel of land lying and being in Lewes and Rehoboth Hundred, Sussex County, land lying northeast of Plantation Road (Road 275), 710 feet southeast of Shady Road (Road 276), to be located on 18.33 acres, more or less.

C/U #1845 - application of **RICK BANNING** to consider the Conditional Use of land in a MR Medium Density Residential District for multi-family dwelling structures to be located on a certain parcel of land lying and being in Lewes and Rehoboth Hundred, Sussex County, containing 18.33 acres, more or less, lying northeast of Plantation Road (Road 275), 710 feet southeast of Shady Road (Road 276).

The Commission found that on August 17, 2009 the Applicant provided an Exhibit Booklet for the Commissions' review and that the Booklet contains a letter from George, Miles & Buhr, LLC (GMB) in reference to these applications with a background/project description, and conclusions; a letter from GMB in reference to these applications relating to stormwater management, public water supply, public wastewater collection, transmission and disposal, traffic, threatened/endangered species, tidal/non-tidal wetlands, provisions for open space, provisions for public and private infrastructure, economic, recreational and other benefits, historic or cultural resources, conformance with current Sussex County Comprehensive Plan, and conclusions; copies of the Change of Zone and Conditional Use applications; a reduced set of the 7 sheets of the Preliminary Site Plan; a copy of the Preliminary Land Use Service (PLUS) comments, dated January 15, 2009; a copy of the Applicants response to the PLUS comments, dated March 11, 2009; a copy of the final response from PLUS, dated March 31, 2009; a copy of the Sussex County Rental Program Request for Proposal, dated March 11, 2009; a copy of a congratulatory letter from the Sussex County Community Development and Housing Division, dated July 22, 2009, referencing that the County Council preliminarily approved the application as qualifying for the County Rental Program and offering expedited public hearing scheduling; a series of maps in reference to Existing Land Use, Future Land Use, Potential Municipal Annexation Areas and Areas of Concern, Strategies for State Policies & Spending, Developed & Protected Lands, County Water Service Areas, Water Supply, Wellhead & Excellent Recharge Areas, County Wastewater Service Areas, Wastewater Service Areas that have received Certificates of Public Convenience and Necessity, Zoning of the immediate area, and aerial photographs showing the area around the site and the site superimposed on an aerial; a legal description and a copy of a deed to the property; a copy of the recorded Record Plan for the previously approved 80 unit multi-family project which is now void due to lack of development; a listing of property owners within 200-feet of the site; a copy of the Tax Map of the general area; a cover letter from JCM Environmental in reference to the Brownfield cleanup of the site with a copy of the Brownfield Voluntary Cleanup Program Agreement, signed on March 16, 2009; a Brownfield Certification and Funding Eligibility letter from DNREC Division of Air and Waste Management, dated January 29, 2009; a copy of a deed from SSEW Associates, LLC to Robino Cottagedale, LLC with attached legal description; a copy of a letter from DNREC Air and Waste Management, dated January 17, 2008 in reference to the Jackson Pit; a copy of the Second Final Plan of Remedial Action on the Jackson Pit, dated August 2003; another series of maps in reference to Floodplains & Wetlands, the site located on a FEMA map of the area, the site located on a USGS Quad map, a Soils map, a State Resource Area map, a portion of the Sussex County School Districts map depicting the site location; a pre-design meeting memo with Sussex Conservation District; a DelDOT letter, dated December 1, 2008, in reference to the need for a Traffic Impact Study; a copy of the Traffic Impact Study, dated October 15, 2008; a copy of the Draft response to the Traffic Impact Study from McCormick Taylor, Inc., consultant to DelDOT, dated February 24, 2009; a drawing of typical street sections; a willing and able to serve letter from Tidewater Utilities, Inc., dated March 23, 2009; a copy of the first review comments from Sussex County Engineering, dated May 18, 2009; a copy of the GMB response to Sussex County Engineering, dated August 17, 2009; and proposed Findings of Fact and Conditions suggested by representatives of the Applicant.

The Commission found that on July 23, 2009 a Booklet on the Sussex County Rental Program was provided to the Planning and Zoning Department for the record and that the Booklet contains a memo from the Sussex County Community Development & Housing Department (Department) advising staff that Mid Atlantic Development Ventures, LLC has received preliminary approval from the County Council and their Department to participate in the Program, and that their Department gives consent that the project may move forward with expedited review in the planning and zoning process, a copy of a letter from the Department to the Applicant again advising that the project can be expedited in the planning and zoning process and that the expedited review is based on the Applicant's commitment to provide 32 affordably priced rental units to the program; a copy of the Applicant's request for proposal; a site context map; a copy of the site plan for C/U #1522 for 80 multi-family dwelling units; a legal description and copy of a deed to the property; a copy of the PLUS response from GMB, dated March 11, 2009; a copy of the Existing Conditions map of the site; a copy of the site plan for the project; a copy of a water service availability letter from Tidewater Utilities, Inc., dated September 8, 2004; and a memo in reference to public sewer availability, dated January 20, 2009.

Mr. Lank provided the Commission with copies of all letters, memorandums, and E-mails from State and County agencies received to date. The copies included the previously referenced request from Dennis L. Schrader, Esquire, to consolidate the public hearings; an E-mail from Dan Parsons, Historic Preservation Planner, with attached memo referencing Land Use Planning Act references to C/U #1522, a project summary sheet for C/U #1522, a site location map for C/U #1522, and an E-mail in reference to C/U #1522; a copy of an April 27, 2009 letter from DNREC Air and Waste Management in reference to certification of the Jackson Pit as a State Brownfield; a copy of an August 25, 2009 letter from DNREC Air and Waste Management in reference to C/Z #1687 and C/U #1845; a copy of an August 14, 2009 letter from DelDOT in reference to the Traffic Impact Study review with an attached response from McCormick Taylor, Inc.; a copy of an August 27, 2009 memorandum referencing review comments from the County Engineering Department Utility Planning Division; and an August 27, 2009 memorandum from Dan Parsons, Sussex County Historic Preservation Planner. These copies did not include comments already incorporated in the Applicants Exhibit Booklet.

Mr. Lank provided the Commission with copies of all petitions, letters, memorandums, and E-mails from interested parties in opposition to this application as received to date. The copies included a petition from the residents of Eagle Point Condominium containing 84 signatures; a cover letter and petition from the residents of Henlopen Landing Subdivision containing 60 signatures; and letters from Mary E. Cox, Shirley T. Ford, Lauren Rowe, Stephen E. Tustin, Joe and Debbie Chickadel, Charles R. Bowmaster, Susan Foehrkolb, Larry and Pat Kaplan, Carol and Neil Jarom, Larry Foehrkolb, George Whitehouse, Kenneth and Betty Magaro, James and Susan Curtis, Warren and Lucy Richards, Teresa J. Day, Debbie Bumann, Kathleen Buck, Theresa Jablonski, Joseph T. Chickadel, Linda G. Gargin Bennett, Sharon Kreitzer, Richard Foti, Mike and Rosanne Phillips, Francis T. Fishbourne, Gretta L. Wolter, Marion C. Forman, the Nanticoke Indian Association, Inc. with attachments, Cassandra H. Coursey Marshall, David and Mary Citro, the Israel United Methodist Church, Thomas Pargoe, Karen McCauley, Jane Koshutko, Leslie A. Vandiver, Dale Houck, Kenneth A. McDonald, Jr., Betty Trudel, Michael E. Pilkenton, Mable Granke for the Citizens Coalition, Inc., and Wendy R. Eaton.

The Commission found that Rick Banning was present with Dennis L. Schrader, Attorney with Wilson Halbrook & Bayard, PA, Linda Smith, James Willey, Professional Engineer with GMB, David Savikas, Environmental Scientist with JCM Environmental, and Derrick Kennedy, Traffic Consultant with Orth-Rodgers & Associates, Inc., and that they stated in their presentations and in response to questions raised by the Commission that the site is behind Home Depot and adjacent to Eagle Point Condominium project; that the Remediation Plan for the Jackson Pit has been approved by DNREC; that Tidewater Utilities, Inc. is willing and able to serve the project with drinking water and fire protection; that the County is willing to serve the project with central sewer upon the development making certain improvements to the sewer system; that the County approved the site for 80 multi-family units in 2004 (C/U #1522); that the 80 unit project was never built and the Conditional Use for that project is now void; that they are proposing to rezone the property to MR Medium Density Residential with a Conditional Use to build 216 apartment units on 18.33 acres; that some of the units are proposed to be developed based on the Sussex County Rental Program recently adopted; that the site is located in the Environmentally Sensitive Developing District Overlay Zone according to the County Comprehensive Plan Update; that the site is located in an Investment Level 2 according to the Strategies for State Policies and Spending; that streets and driveways will be private; that no wetlands have been found on the site; that the site is a certified Brownfield site according to DNREC; that the project plans meet all buffer, parking, separation distances, and setbacks required by the Zoning Code; that the Delaware State Housing Authority has stated that there is a need for rental and workforce housing in the area; that the site adjoins multi-family projects to the northwest and northeast, and a single family subdivision to the southeast; that the building will have pitched roofing with a mixture of siding and stone walls, and that the buildings will contain "Green" building components; that sidewalks on both sides of the streets will be provided; that buffers will be landscaped according to a landscape plan that will be subject to the approval of the Commission; that bio-retention areas and rain-gardens will be provided and will be developed and maintained with Best Management Practices; that a swimming pool, wading pool, community center with fitness center, tot lot, walking trails and open recreation areas will be provided; that the site is not located on any protected lands, wellhead areas, recharge areas, annexation areas or areas of concern; that the developer has voluntarily agreed to clean up the site; that a Voluntary Clean-up Agreement has been executed; that the buildings will be Green Building certified; that 32 units will be made available to the County Rental Program; that the Office of State Planning Coordination, in response to the PLUS response, has stated that they have no objection to this project; that a connector stub street is proposed to the Thompson property to the south; that nine (9) 24 unit buildings are proposed with a mix of 1, 2, and 3 bedroom units; that the units will range in size from 750 square feet to 1,100 square feet; that the Rental Program units will be mixed throughout the project; that the proposed density equals 11.8 units per acre; that Phase I of the construction will include all of the recreational amenities, landscaped buffers, and 72 units with 12 Rental Program units; that sewer capacity is available according to County Engineering; that Tidewater Utilities, Inc. is willing to serve central water; that an elevated water storage tank exist adjacent to Eagle Point II; that they will comply with all requirements and regulations relating to the protection of any human remains and grave sites; that the Traffic Impact Study was performed by Orth-Rodgers & Associates, Inc.; that the scope of work on the Traffic Impact Study included evaluation of 7 intersections and the site access and required morning peak hour evaluation and Saturday peak hour with calculations to the year 2013; that all intersections warrant mitigation; that there were no specific improvements triggered by this project; that the

entrance will be built to DelDOT specifications and that the developer will be required to provide an equitable contribution to the other intersection improvements; that the intersections reviewed and the recommended improvements are included in the McCormick Taylor report to DelDOT, pages 3 through 6; that some groundwater contamination was found on the site; that recent samplings report no concerns; that Methane gas needs remediation; that DNREC has certified the site as a Brownfield in need of mitigation; that \$140,000 in grants for studies of the site have been spent to date; that JCM Environmental will monitor the site during the cleanup; that market research of the County indicates that there is a need for workforce housing; that the County has had a 20% increase in population in the last 5 years; that there are waiting list for this type of housing; that all possible tenants will have to go through criminal and credit checks; that sprawl is a low density use of land; that this site could be considered in-fill since it is surrounded by housing on 3 sides; that DNREC supports this project since it will cleanup a concern for the area, the Jackson Pit; that the State Historic Preservation Office (SHPO) did not comment until late; that they are aware of the gravesites on the Eagle Point project and that they are willing to work with the SHPO to make sure that any gravesites discovered will be protected; that all infrastructure is available to the project; that the Office of State Planning Coordination supports the project; and that they have provided suggested Findings of Fact and Conditions for the Commissions consideration.

The Commission found that Lindsay Hall and Timothy Ratsep of the DNREC Air and Waste Management Division were present in the audience and that the Chairman asked if they would participate and respond to some questions and that they advised the Commission that 14 test pits have been dug and that wood, construction debris, some plastics, papers, asphalt, concrete and some household trash was discovered in some of the test pits; that Methane gas was discovered in some locations; that Methane gas is non-toxic; that some venting has already been done and that more venting may be necessary during the clean-up; that the site is considered a Brownfield which must be cleaned up; that the access road also needs to be tested; that this project is a cooperative investigation between the State and the developer; that the developer is voluntarily working to clean-up the site; that soil samples indicate no levels of concern; that the solid waste material is to be removed; that no Methane gas was found on adjacent properties; that the site is a groundwater management zone where no wells may be drilled; that Cannery Village in Milton and the Wilmington Waterfront project were also Brownfield sites; that they are not being paid by the developer to be at this public hearing; that once all testing is performed an Operation and Maintenance Plan will be required; that DNREC can stop the project at anytime; and that an Environmental Consultant must be on-site during all site work.

The Applicant and his representatives continued and responded to questions raised by the Commission that the County Council adopted the Rental Program with required criteria, one of which includes a certain percentage of a project must be units under the Rental Program; that on this project a minimum of 32 units will be provided; that the units are not Section 8 housing units; that the tenants are required to have certain family incomes; that the tenants could be senior citizens, pensioners, or first time home searchers; that the units are not available to anyone under the age of 18; that the project will be reviewed and coordinated with the involvement with the County Community Development and Housing Department; that C/U #1522, the original Conditional Use for the site, has expired for lack of construction; that they have not contacted the Eagle Point project for discussions about interconnectivity; that DelDOT wants

interconnectivity; that the residents of adjacent projects object to interconnectivity since they maintain the streets, sidewalks, etc. and the proposed residents of adjoining properties would not be required to participate in such maintenance; that they are proposing a 20-foot wide forested buffer around the perimeter of the site and street trees; that the final landscaping plan will be subject to the review of the Commission; that the landscape plan submitted proposes the planting of 275 White Oak, 275 Sweetbay Magnolia, 275 Red Cedar, 275 Red Maple, and 275 Loblolly Pine; that the targeted housing market is subject to fair housing regulations on a first come/first serve basis; that the PLUS comments referenced 108 children; that the site plan proposes a swimming pool, community center with fitness center, tot-lot, entrance features, a 0.75 acre recreational open space, and a 2 acre open space area for sports activities; that in reference to interconnectivity they are proposing a sidewalk connection to the Eagle Point existing sidewalks behind the stormwater management pond; that no street connection is proposed to connect to Eagle Point; that the site will be brought up to grade; that gravesites have been found and are fenced in for protection on the Eagle Point site; that 3 of the gravesites boundaries have been monumented; that a stub street connection is being located for future access to the Thompson property; that the Rental Program also provides that tenants must be residents of Sussex County for at least one year; that leases are normally signed for one-year terms, but longer leases are available; and that DelDOT cannot require interconnection to private streets.

The Commission found that Ken Broman of Eagle Point, Jack Murphy of Plantation East, Larry Jackson, Chief of the Nanticoke Indian Association, William Daisey, Assistant Chief of the Nanticoke Indian Association, State Representative Peter Schwartzkopf, Mable Granke for the Citizens Coalition, Inc., Harvey Morris for the Israel United Methodist Church, Steven Smith of Eagle Point, Elizabeth Collard of Eagle Point, Betty Deacon of Sandy Brae, Henry Glowiak for the Citizens Coalition, Inc., David Citro of Eagle Point, Craig Lack of Eagle Point, Robert Brelinsky of Eagle Point, Glenden Jackson, an adjacent property owner, Robert Sendeck of Henlopen Landing, James Curtis of Eagle Point, Dennis Coker, Chief of Lenape Indian Tribe of Delaware, Linda G. Cangin Bennett of Eagle Point, Teresa Day of Eagle Point, Thomas Pargoe of Eagle Point, Russell Huxtable of Eagle Point, Mary Cox of Eagle Point, and Brooks Freeman, a resident of the area, spoke in opposition to this application and expressed concerns that the site is not behind Home Depot, it is behind Eagle Point; questioning if an environmental impact study has been conducted; hoping that the site will be a clean site; questioning if it is worth the cost to clean up the site; that the area is quiet; questioning why cluster everything in one area; expressing concerns about traffic and traffic accidents on Plantation Road; questioning if all gravesite locations have been established; Methane gas concerns and fears; questioning the impact on the water aquifer; questioning if a resident gets sick who is responsible, DNREC, the developer, or who; that 9 buildings with 24 units each could generate 500 to 1,000 residents; that it is difficult now to get out onto Plantation Road from the site; that the Israel United Methodist Church is a historic feature of the area and will be impacted; questioning the cost of the clean-up; that the site is fine as it is; that wildlife live on the site; that wildlife is being pushed out onto the road; that the land should be donated to the wildlife; that no one will admit that they are responsible for the materials dumped on the site; questioning if other gases have been found in the investigation and if those gases are hazardous to humans; that several months ago the developer asked if he could move the fence around the existing gravesites by 2-feet; that the answer was NO! and that if the fence is moved a mere 8-inches it will be sitting on top of the head portion of an adult coffin in the gravesite; that the Nanticoke Indian Association opposes

the location, not the use; that other suitable locations are available and referenced an unimproved parcel on Beaverdam Road currently owned by the State; that both Federal and State Laws exist to prevent desecration and destruction of gravesites; that these Laws must be complied with; that Native Americans, similar to people from most cultures have a religious and spiritual reverence for the remains of their ancestors; that the preservation of the graves of our ancestors is a critical issue for us and the Association will do everything within its power to prevent such desecration and destruction; that the gravesites need to be identified; that buffers of at least 40-feet from the gravesites need to be established to protect the site; that the Eagle Point project site plan shows the 40-feet buffer; that the developer is asking for an up-zoning to allow for greater density and is proposing to increase the density from 80 units to 216 units; that this site is problematic at best; that the site should not be developed; that there are traffic, environmental, water, and school issues that have not been addressed; that Eagle Point residents purchased their units with the understanding that 80 units would be built on the site, not 216; that the intersections referenced as needed in the Traffic Impact Study could be years down the road for improvement by DelDOT since DelDOT does not have the funds to make the improvements; that the only current discussion for improvement on Plantation Road is the intersection of Plantation Road, Postal Lane and Cedar Grove Road; that the County should be concerned about DNREC involvement with the developer; that this Brownfield has been there for years and no one wanted to get it cleaned up; that the residents of the area do not think that County government looks out for their concerns; that the rezoning should be considered on its own merit, without the Conditional Use; that the property should be cleaned up before any application is considered for residential density; that the members of the Israel United Methodist Church oppose this application because the entrance to and exit from the church parking lot areas already pose a difficult and dangerous pathway to Plantation Road; that the future of assuring that our citizens and children live in a safe environment remains within the power of the County decision; questioning if representatives of DNREC will be on site during all site work; that buffers are not wide enough; questioning the height of the units; that the project looks like proposed military barracks; that the area should remain rural; that area residents support the Nanticoke Indian Association and the Israel United Methodist Church in their opposition; that the pollutant data reported is unreliable and understated; that DNREC has failed to follow its own "Chain of Custody" toxic sample requirements; that field sample collection, tracking, and reporting does not meet DNREC requirements; that blocking absorption of rain water can contaminate the well-head; that impervious cover can force pollutants into the aquifers that supply drinking water; that the monitoring well data report shows some very toxic chemicals are present and referenced Hexachlorobenzene and Pentachlorophenol; that Chromium VI was also reported; that toxic chemical data presented is unreliable and cannot be the basis for any land use decision; that toxic water samples from three monitoring wells were hand carried from Lewes to New Castle for testing with no Chain of Custody seal; that without a chain of custody, some of the volatile toxic chemicals could easily have evaporated resulting in inaccurate low levels being reported by the lab; that in the Chromium study, major discrepancies cloud the data integrity and render it unfit to serve as any basis for any land use decision; that extreme diligence in a Brownfield project requires that new monitoring wells must be dug, new water and soil samples taken, new, accurate toxic chemical concentration data generated before any zoning change can even be considered; that the pit property comes within 50 yards of the well-head water supply for thousands of residents; that population growth, development, and changing land use practices have resulted in increasing pressure on this essential natural resource; that over 2,000 well locations have been

evaluated; that over 500 wells fell outside their specified tax parcel; that unconfined aquifers exist under the pit whose recharge depends on surface water absorption; that there are mapped wetlands on the site; that State regulated Paustrine emergent and Paustrine forested wetlands are mapped on this parcel; questioning if the site is in compliance with the Federal provisions of the Clean Water Act; questioning if the US Army Corps. of Engineers, has officially approved a completed field wetlands delineation; that the aerial photograph exhibited is not up to date; that the pit was used to sell dirt and later used for backfilling with construction debris, garbage, trash, asphalt, concrete, car batteries, refrigerators, etc.; that it is an impossible dream to be able to turn left from the entrance location onto Plantation Road; that another public hearing is proposed in October for a day care center on an adjacent lot which creates more traffic and more concern for children safety; that the previous developer stated that all materials have been removed; that the material has not been removed; that the dirt lane has had used motor oil spread on it to cut down dust; questioning how a recommendation can be made to the County Council without knowing the answers to a complete investigation of the pit; questioning what Eagle Point will benefit by cross access easements; questioning emergency traffic; questioning if property values will be impacted; that total clean up of the site should be preformed prior to any construction; questioning why the project is being reviewed in an expeditious manner; that the site has been on the superfund listing since 1991; that a bad business decision has been made; that DNREC had authorized Kent County to dump sludge on the Eagle Point site; that the site was a uncovered pit full of debris at one time; that some of the debris was burned and it burned for weeks; that the entry is diminished by 10-feet due to the Church cemetery; that the density and use is out of character with the area; that more testimony is needed based on the concerns expressed by the area residents; questioning why set up the County Council for a future "Love Canal"; and that the State does not have the funds to make all necessary improvements to Plantation Road.

On October 22, 2009, at the request of the Planning and Zoning Commission, the following comments of The Honorable State Representative Peter Schwartzkopf were incorporated more specifically into the record of this public hearing as follows.

The Commission found that State Representative Peter Schwartzkopf spoke in opposition to this application stating that the only current discussion of improvement on Plantation Road is the intersection of Plantation Road, Postal Lane and Cedar Grove Road; that this Brownfield has been there for years and no one wanted to get it cleaned up; that the Planning and Zoning Commission is not acting in the public's best interest; that the Commission is the last breath defense of Plantation Road; and that the residents of the area do not think that County Government looks out for their concerns.

The Commission found that Larry Jackson submitted another letter for the record; that Mable Granke submitted another letter for the record; that Elizabeth Collard submitted copies of a promotional rendering of the original proposal for the site for 80 units, an aerial photograph from the PLUS report, photographs of the site from Eagle Point, a copy of a portion of the site plan, and a copy of the proposed planting plan; that Craig Lack submitted a copy of his factual opposition report for the record; that Bob Brelinsky submitted a copy of his testimony and copies of a map of the referenced wetlands on site; that James Curtis submitted a letter for the record; that Dennis Coker submitted a letter for the record; that Mary Cox submitted a copy of her

intended testimony; and that letters were submitted in opposition on behalf of the Plantations East Homeowners Association and Wolfgang von Baumgart.

At the conclusion of the public hearings, the Commission discussed this application.

Motion by Mr. Johnson, seconded by Mr. Burton, and carried unanimously that the record be left open on C/Z #1687 for receipt of the County Rental Agreement and that action be deferred for further consideration. Motion carried 5 – 0.

Motion by Mr. Johnson, seconded by Mr. Burton, and carried unanimously that the record be left open on C/U #1845 for receipt of the County Rental Agreement and that action be deferred for further consideration. Motion carried 5 – 0.

OTHER BUSINESS

Subdivision #2007-45 – Deerfield Meadows, L.L.C.
Amended Findings

Mr. Abbott advised the Commission that there was some confusion about the motion on this application since the subdivision was presented as a cluster subdivision with 0.5 acre lots with on-site septic and individual wells; that the State DNREC had granted septic feasibility for septic systems on 0.5 acre lots; and that the Applicant had stated that a 5-foot asphalt walking path shall be provided on one side of all streets.

Mr. Smith stated that he had prepared the motion on August 13, 2009 and that he sees the confusion and stated that he would move that the Commission amend Finding #1 to read “The Applicant is seeking approval of a clustered subdivision within the AR-1 zone. The Applicant is seeking clustered lots with a minimum of 21,780 square feet (0.5 acre)”; that Finding #8 be amended to read “The subdivision will be served by on-site septic systems and individual wells”; and that Condition “L” be amended to read “As stated by the Applicant, a 5-foot asphalt-walking path shall be provided on one (1) side of all streets”.

Motion by Mr. Smith, seconded by Mr. Burton, and carried with 3 votes to amend the motion on Subdivision #2007-45 as stated. Motion carried 3 – 0 with Mr. Johnson and Mr. Ross abstaining.

Meeting adjourned at 10:45 p.m.

Amended on October 22, 2009 per the request of the Planning and Zoning Commission.