



Sussex County Council Public/Media Packet

**MEETING:
October 15, 2013**

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SAMUEL R. WILSON JR., VICE PRESIDENT
GEORGE B. COLE
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Sussex County Council

AGENDA

OCTOBER 15, 2013

10:00 A.M.

Call to Order

Approval of Agenda

Approval of Minutes

Reading of Correspondence

Todd Lawson, County Administrator

1. Discussion and Possible Introduction of a Proposed Ordinance entitled “AN ORDINANCE TO AMEND CHAPTER 99 OF THE CODE OF SUSSEX COUNTY, ENTITLED “SUBDIVISION OF LAND” IN ORDER TO EXTEND THE TIMEFRAME IN WHICH LANDOWNERS MAY PERFORM SITE WORK OR CONSTRUCT CERTAIN IMPROVEMENTS WITHOUT POSTING A BOND OR PERFORMANCE GUARANTY”
2. Discussion and Possible Introduction of a Proposed Ordinance entitled “AN ORDINANCE TO AMEND CHAPTER 90 OF THE CODE OF SUSSEX COUNTY, ENTITLED “SEDIMENT CONTROL AND STORMWATER MANAGEMENT” AND CHAPTER 99 OF THE CODE OF SUSSEX COUNTY, ENTITLED “SUBDIVISION OF LAND” IN REGARD TO THE BONDING AND GUARANTIES REQUIRED FOR SURFACE DRAINAGE FACILITIES AND EROSION AND SEDIMENTATION CONTROL FACILITIES UNDER THE JURISDICTION OF THE SUSSEX CONSERVATION DISTRICT”
3. Administrator’s Report



Vince Robertson, Assistant County Attorney

1. Continued Discussion of Height Regulations in County Code
2. Discussion and Possible Introduction of a Proposed Ordinance entitled “AN ORDINANCE TO AMEND CHAPTER 115 OF THE CODE OF SUSSEX COUNTY RELATING TO HEIGHT REGULATIONS”

Michael Izzo, County Engineer

1. Letter of Credit – The Woods at Oyster Rock (Ext. of Scallop Court)

Joseph Wright, Assistant County Engineer

1. Consultant Selection for the North Coastal Planning Area

Julie Cooper, Project Engineer

1. Pine Street Parking Facility Project
 - A. Substantial Completion
 - B. Balancing Change Order & Return of Retainage

Old Business

Conditional Use No. 1969
Melvin L. Joseph Construction Co., Inc.

Grant Request

1. Town of Millville for festival expenses.

Introduction of Proposed Zoning Ordinances

Any Additional Business Brought Before Council

Executive Session – Land Acquisition pursuant to 29 Del. C. §10004(b)

Possible Action on Executive Session Items

12:15 P.M. – Sussex Outdoors Summit at Stockley Center, Georgetown

Sussex County Council meetings can be monitored on the internet at www.sussexcountyde.gov.

In accordance with 29 Del. C. §10004(e)(2), this Agenda was posted on October 8, 2013 at 4:55 p.m., and at least seven (7) days in advance of the meeting.

This Agenda was prepared by the County Administrator and is subject to change to include the addition or deletion of items, including Executive Sessions, which arise at the time of the Meeting.

Agenda items listed may be considered out of sequence.

###

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 Requirements and Process Improvements (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**

MOORE & RUTT, P.A.

ATTORNEYS AT LAW

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J. EVERETT MOORE JR.*
DAVID N. RUTT**
JAMES P. SHARP***
DORIAN ROWE KLEINSTUBER
SHANNON R. OWENS

Reply To _____ Georgetown
_____ Milford

* Del. and D.C.
** Del. and Penna.
*** Del. and MD.

MEMORANDUM

TO: TODD LAWSON, COUNTY ADMINISTRATOR
FROM: DAVID N. RUTT, ESQ.
DATE: SEPTEMBER 27, 2013
RE: PROPOSED ORDINANCE AMENDMENT
REGARDING BONDING

Chapters 90 and 99 of the Sussex County Code reference bonds held by Sussex County for stormwater drainage and management facilities under the control of the Sussex Conservation District (SCD). That is, surface drainage and erosion and sediment control facilities outside of the road rights of way. Even though Sussex County has no right or power to review or approve plans or to inspect the work performed for such stormwater facilities, Sussex County assumed the obligation of holding the bonds. Bonds for purposes of this memorandum include letters of credit. This has raised questions regarding the authority to administer the bonds and, in turn, questions of liability.

The bonds have historically been held by the Department of Public Works (DPW) which verified that estimates for the work were submitted and that bonds were obtained in an amount of 125% of the estimate. DPW would physically hold the bonds for SCD, thus acting as SCD's agent. SCD maintained inspection of the work to be performed for stormwater management and would advise DPW of the progress and if bonds needed to be called. The County then would assume the task of calling the bonds on behalf of SCD at no expense to SCD. During the "boom" years this was not an issue, but as the economy slowed, it became evident the County was placed in the middle of any disputes between Developers and SCD regarding the scope of work to be performed or completed, the amount of the bond, and the necessity of calling a bond if SCD determined the Developer was in default. This came to a head in the litigation regarding The Reserves Spa & Resort.

In that action Sussex County called all of the bonds it was holding, including bonds for sewer, roads and drainage in the rights of way, as well as stormwater facilities under the jurisdiction of SCD. Though Sussex County argued it had no control over the stormwater management facilities, SCD was not made a party to the litigation and the

Court deemed Sussex County responsible. Its theory was that Sussex County identified SCD in its Code essentially as its "Agent" for purposes of assuring such work was performed and thus the County was ultimately responsible for all aspects of the project including stormwater management. To reach that conclusion the Court focused on the fact the County held and then called the bonds. In other words, the County had the final authority based on the vote of County Council to call the bonds and in the case of The Reserves did so.

This issue was discussed internally with County staff and then in meetings with SCD. As a result, SCD has agreed that, effective January 1, 2014, it will hold and administer its own bonds. All cost of administration, including any litigation fees, will be SCD's responsibility. SCD and DPW will maintain open lines of communication to coordinate their respective tasks to assure projects proceed as they have in the past. Attached are the agreements generated by SCD and acknowledgment of this acceptance.

Also attached is a proposed amendment to the Sussex County Code. This will amend the Code in two respects. First, Chapter 90 of the Code entitled "Sediment Control and Stormwater Management" is amended by eliminating reference to the bonds the County was holding under Section 99-32 of the Code. The amendment does not affect the obligation of Developers to comply with all stormwater management practices and requirements under the jurisdiction of SCD.

The second amendment is to Chapter 99 entitled "Subdivision of Land" and, in particular, to Section 99-32. That is the specific section of the Code which required the County to obtain and hold bonds for "surface drainage facilities, erosion and sedimentation control facilities." These are all aspects of a project which by State law fall within the jurisdiction of SCD. The amendment removes that language from the County Code and, effective January 1, 2014, the responsibility for bonding will be assumed by SCD.

Attached is the Ordinance amending the Sussex County Code. I am available to answer any questions.

ORDINANCE NO. ___

AN ORDINANCE TO AMEND CHAPTER 90 OF THE CODE OF SUSSEX COUNTY, ENTITLED “SEDIMENT CONTROL AND STORMWATER MANAGEMENT” AND CHAPTER 99 OF THE CODE OF SUSSEX COUNTY, ENTITLED “SUBDIVISION OF LAND” IN REGARD TO THE BONDING AND GUARANTIES REQUIRED FOR SURFACE DRAINAGE FACILITIES AND EROSION AND SEDIMENTATION CONTROL FACILITIES UNDER THE JURISDICTION OF THE SUSSEX CONSERVATION DISTRICT.

WHEREAS, Sussex County Code, Chapter 99, Section 99-32 currently requires bonding and guaranties for all surface drainage facilities and erosion and sedimentation control facilities and requires Sussex County to collect such bonding and guaranties; and

WHEREAS, the Sussex Conservation District is the delegated agency in Sussex County for the administration of Delaware’s Sediment and Stormwater Regulations and shall require its own bonding for such facilities effective January 1, 2014; and

WHEREAS, the duties of the Sussex Conservation District include approval of sediment and stormwater management plans and inspection of the subject properties for compliance which is a condition for the issuance of building and other permits by Sussex County pursuant to Sussex County Code Chapter 90; and

WHEREAS, Sussex County Council desires to amend the Sussex County Code to remove the requirement of applicants to provide bonds to Sussex County for all surface drainage facilities and erosion and sedimentation control facilities under the jurisdiction of the Sussex Conservation District.

NOW THEREFORE, THE COUNTY OF SUSSEX HEREBY ORDAINS:

Section 1. The Code of Sussex County is hereby amended by deleting the current Section 90-8 in its entirety and as shown in the brackets below:

[§90-8. Performance bonds and guaranties.]

[The performance bond and guaranties required in § 99-32, Article VI, of Chapter 99, Subdivision of Land, of the Sussex County Code includes as a condition the satisfactory completion of the sediment control and stormwater management plan as certified to the County by the Sussex Conservation District.]

Section 2. The Code of Sussex County is hereby amended by deleting the bracketed language in the current Section 99-32 as follows:

§99-32. Bonds and guaranties.

- A. As a condition of approval of improvement plans, the County Council shall require the subdivider to post a performance bond or other guaranty for any improvements required by the application of this chapter in an amount sufficient to construct the improvements and in a form acceptable to the County Attorney. The amount of such bond shall be no less than 125% of the cost of improvements. Bonding and guaranties may be required for street and road improvements, [surface drainage facilities, erosion and sedimentation control facilities,] water supply facilities, sanitary sewer facilities, forested and/or landscaped buffer strips, all areas approved as open space as defined in § 99-5 and other improvements deemed necessary by the Commission or required by the Subdivision Ordinance.**

Section 3. This Ordinance shall become effective on January 1, 2014.

Synopsis

This Ordinance modifies Sections 90-8 and 99-32 of the Sussex County Code in order to remove the provision that Sussex County will require bonding and guaranties for surface drainage facilities and erosion and sedimentation control facilities required by the Sussex Conservation District.

Deleted text is shown in brackets.

PROPOSED

ORDINANCE NO. __

AN ORDINANCE TO AMEND CHAPTER 99 OF THE CODE OF SUSSEX COUNTY, ENTITLED "SUBDIVISION OF LAND" IN ORDER TO EXTEND THE TIMEFRAME IN WHICH LANDOWNERS MAY PERFORM SITE WORK OR CONSTRUCT CERTAIN IMPROVEMENTS WITHOUT POSTING A BOND OR PERFORMANCE GUARANTY.

WHEREAS, Sussex County Code currently allows landowners to perform site work and make certain improvements without posting a bond or other guaranty until January 10, 2014, and at such time, the provisions related thereto shall automatically sunset and expire; and

WHEREAS, Sussex County Code permits the above-referenced work to occur without posting a bond or other guaranty, provided that no lots shall be transferred and no residential building permits or zoning permits shall be issued until the work is completed or a bond or other performance guaranty is provided to Sussex County; and

WHEREAS, Sussex County Council desires to amend the Sussex County Code to extend the time period to January 1, 2015 in which landowners may perform site work or construct certain improvements without posting a bond or performance guaranty subject to the conditions contained therein.

NOW THEREFORE, THE COUNTY OF SUSSEX HEREBY ORDAINS:

Section 1. The Code of Sussex County is hereby amended by deleting the bracketed language in the current Section 99-32 and inserting the underlined language as follows:

- D. Notwithstanding the preceding subsections of this section, no performance bond or other guaranty shall be required for improvements required by the application of this chapter upon lands owned by the party seeking to construct the improvements; provided, however, that no lots shall be sold or transferred and no residential building permits or zoning permits shall be issued until: (1) all required improvements are constructed and receive substantial completion; or (2) a bond or guaranty is posted in accordance with Subsections A, B and C of this section. In the event no bond or performance guaranty is provided, a notice in the form acceptable to the County Attorney shall be recorded in the office of the Recorder of Deeds putting the public on notice that no transfer or sale of lots is permitted in the development until such bond or other guaranty is provided as required by this section. This Subsection D of § 99-32 of Chapter 99 of the Code of Sussex County shall automatically sunset and expire [two years from the date of its adoption] on January 1, 2015.

Section 2. This Ordinance shall become effective upon its adoption.

Synopsis

This Ordinance modifies Section 99-32 of the Sussex County Code in order to extend the time period to January 1, 2015 in which landowners may perform site work and construct certain improvements without posting a bond or other guaranty, subject to the conditions contained therein.

Deleted text is shown in brackets. Additional text is underlined.

Privileged & Confidential

MEMORANDUM

TO: COUNTY ADMINISTRATOR
Todd F. Lawson

FROM: ASSISTANT COUNTY ATTORNEY
David N. Rutt

RE: Height Restrictions in *Sussex County Code*

DATE: October 11, 2013

Background

Sussex County Council, pursuant to its authority granted in Delaware Code, Title 9, Chapters 68 and 69, regulates zoning in the unincorporated portion of Sussex County. Sussex County Code ("County Code"), provides limitations on the maximum height of buildings and structures within certain zoning districts. The zoning districts typically set the maximum height at forty-two (42) feet. However, Article XXV ("Supplementary Regulations"), Section 115-179 ("Height Regulations") of the County Code provides that "public and semipublic or public service buildings, hospitals, institutions or schools, when permitted in a district, may be erected to a height not exceeding 60 feet." The definition of "public" set forth in County Code Section 115-4 is broadly stated: "open to common use-, whether or not public ownership is involved."

County Council desires to narrow the exception for buildings subject to the maximum of sixty (60) feet by excluding public, semipublic, and public service buildings, as currently defined. County Council has requested guidance regarding the procedures necessary to institute a moratorium and/or amendatory ordinance to enact such a change to the zoning regulations.

Issue

The issue is whether Council should adopt an ordinance to amend the height restrictions in the County Code or adopt a moratorium until a Code amendment can be made effective, or some combination thereof.

Brief Summary of Conclusion

Provided that Sussex County complies with procedural requirements set forth in Title 9, Chapters 69 and 70 of the Delaware Code, Sussex County may either adopt a moratorium ordinance or an ordinance to amend the height restrictions. It is recommended that County Council proceed to adopt the amendatory ordinance, as it would be the more efficient method.

Analysis

1. The Requirements to Enact a Change to the Zoning Regulations Are Contained in Chapters 69 and 70 of the Delaware Code.

Delaware Code states that "changes" to "any other provision of any zoning regulation" must be submitted to the Planning and Zoning Commission. 9 Del. C. §6911. Height restrictions are clearly considered zoning regulations under the State Code, as referenced in Chapter 69 entitled "Zoning," 9 Del. C. §6902, which states that the County government may "...regulate the location, height, bulk and size of buildings and other structures,..." [emphasis added]. The requirements to enact a change to the zoning regulations are mostly contained in 9 Del. C. §7002(m) and 9 Del. C. §6911 and can be generally summarized as follows:

- 1) Introduction of ordinance at regular or special meeting of Council;
- 2) Distribution of copies of ordinance;
- 3) Publication of ordinance or title in two newspapers of general circulation and posting of notice on property;
- 4) Submission to Planning and Zoning Commission, which schedules a public hearing after additional public notice;
- 5) Notice of public hearing;
- 6) Public hearing during County Council meeting; and
- 7) Vote by Council to adopt or reject ordinance.

Please note that Delaware Code also contains abbreviated procedures for emergency ordinances affecting life, health, property, or the public peace, but these procedures are likely inapplicable in these circumstances where the subject language has been in the County Code for more than twenty (20) years.

2. A Moratorium May Be Enacted by an Ordinance that Follows Applicable State Code Procedures for Zoning Regulation Modifications.

State courts across the country vary in their analysis of the necessary procedures to enact a moratorium. The treatise, *Rathkopf's The Law of Zoning and Planning* acknowledges this:

“An important issue with respect to the validity of interim zoning and building moratoria is whether these temporary measures must be enacted pursuant to the notice and hearing procedures set out in zoning-enabling statutes. A number of state courts have exempted interim measures from the procedural requirements applicable to ordinary zoning ordinances. However, in many states, courts have held interim zoning and stop-gap ordinances invalid as a result of procedural defects in adoption of these measures.” *Rathkopf’s The Law of Zoning and Planning* § 13:12 (4th ed.).

Although many states have adopted varying conclusions regarding this issue, Delaware courts have not yet definitively settled how the issue will be handled in Delaware. In the recent case of *Upfront Enterprises, LLC v. The Kent County Levy Court*, Kent County enacted an ordinance to impose a moratorium on the acceptance of certain land use applications without first submitting the ordinance to its planning commission, and the court held that the ordinance was void *ab initio*. 2007 WL 1862709 (Del. Ch. at *4) (as clarified by 2009 WL 1531576 (Del. Ch. at *2)). In reaching this result, the court focused on the question of whether the ordinance was considered a change to a zoning regulation pursuant to 9 Del. C. § 4911, which is a nearly exact reproduction of the Code Section applicable to Sussex County, 9 Del. C. § 6911. *Id.* 9 Del. C. § 4911 states the following:

"9 Del. C. § 4911. Changes in zoning district; map or regulations; procedure.

(a) The county government may, from time to time, make amendments, supplements, changes or modifications (herein called "changes") in accordance with the comprehensive development plan with respect to the number, shape, boundary or area of any district or districts, or any regulation of, or within, such district or districts, or any other provision of any zoning regulation or regulations, but no such changes shall be made or become effective until the same shall have been proposed by or be first submitted to the Zoning Commission."

However, the court specifically refused to address whether a moratorium may be enacted administratively, calling it an “interesting question, which need not be resolved now.” 2007 WL 1862709 (Del. Ch. at *2). The court further expands on its refusal to address the underlying authority for a moratorium:

“[T]he present debate is not over the source of the County’s power to enact the Ordinance; the question, instead, turns on whether the ordinance causes a change in a County zoning regulation. Regardless of whether the Ordinance is based upon the delegated zoning power or on the separately delegated police powers, this Court still, as a matter of applying 9 Del. C. § 4911, must determine if the Ordinance caused a change to a zoning regulation. The debate about the source of authority, while interesting and perhaps important in a different context, is of no help in resolving the question precisely framed for the Court.” *Id.* at *3.

Other than clarifying that an ordinance that causes a “change...to any provision of any zoning regulation” requires the consideration of the planning commission, *Upfront Enterprises* does not shed light on other methods for the proper enactment of a moratorium.

The *Upfront Enterprises* case is definitive that an ordinance for a moratorium may pass muster if it follows the State Code’s procedural requirements, including submission to the planning commission. Therefore, my recommendation is to enact an ordinance, either an amendatory or moratorium ordinance, in compliance with the procedures set forth above in Section 1 of this Memorandum. Since an amendatory ordinance would take the same amount of time and process as a moratorium ordinance, it is recommended to begin the process of adoption of the amendment to the Code.

3. Delaware Caselaw Makes Limited Reference to a Moratorium via County Council Motion.

Interestingly, in one earlier Delaware case, *Glassco v. County Council of Sussex County*, opponents to a rezoning argued that Sussex County Council could not rezone a property due to an earlier moratorium enacted by Council via motion (or perhaps via resolution, as the court uses the terms interchangeably). 1993 WL 50287 (Del. Ch. at *4). The court discusses a moratorium enacted by a motion at a County Council meeting in 1985, stating as follows:

“In my opinion, one Council may not legally bind a later Council by a self-proclaimed moratorium to refrain from the exercise of a statutorily granted power. It may announce its own policy by that method and fairness among applicants requires it to apply that policy rationally, while it obtains.” [emphasis added]

However, the court’s approbation of County Council’s ability to bind itself (but not future Councils) to a moratorium by motion is not part of the holding of the case; the court does not rely on this reasoning in its decision, stating that “I need not base my decision on this point, however, as I conclude as a matter of fact the record establishes that Council did enact the December 1986 resolution...” Although the *Glassco* case provides some arguable basis to enact a moratorium by motion, a moratorium by motion is not my primary recommendation. We can discuss this issue in more detail at your convenience.

In sum, the County’s strongest legal position is to follow the statutory procedures to enact a change to a zoning regulation. It is then more efficient to proceed to enact the amendatory ordinance directly, since the process for a moratorium ordinance and amendatory ordinance would be subject to the same procedures.

Please do not hesitate to contact me with additional questions regarding this matter.

ORDINANCE NO. ____

AN ORDINANCE TO AMEND CHAPTER 115, ARTICLE XXV, SECTION 115-179B OF THE CODE OF SUSSEX COUNTY, ENTITLED "HEIGHT REGULATIONS" IN REGARD TO THE HEIGHT OF CERTAIN BUILDINGS.

WHEREAS, Sussex County Code, Chapter 115, Article XXV, Section 115-179B currently permits (except in airport approach zones defined by the FAA) "public and semi-public, or public service buildings, hospitals, institutions and schools, when permitted in a district" to be constructed to a height not exceeding 60 feet; and

WHEREAS, Sussex County Code, Chapter 115, Article I, Section 115-4 defines "Public" as merely "open to common use- whether or not public ownership is involved" and said definition is very broad and would apply to many different types of buildings where the public is invited when applied to Section 115-179B of the Sussex County Zoning Code; and

WHEREAS, Sussex County Council desires to amend the Sussex County Code, specifically Section 115-179B thereof, to state that only government buildings, hospitals, institutions and schools may be constructed to a height of 60 feet when those uses are permitted in a district and are not located in an airport approach zone.

NOW, THEREFORE, THE COUNTY OF SUSSEX HEREBY ORDAINS:

Section 1. The Code of Sussex County is hereby amended by deleting the phrase "public and semi-public, or public service buildings" from Section 115-179B as shown in brackets and adding the phrase "buildings owned by a political subdivision of the State of Delaware, the Federal Government or any agency thereof" as shown underlined:

§ 115-179. Height Regulations.

B. Except within an area defined as an airport approach zone by the Federal Aviation Administration, [public and semipublic or public service buildings,] buildings owned by a political subdivision of the State of Delaware, the Federal Government or any agency thereof, hospitals, institutions or schools, when permitted in a district, may be erected to a height not exceeding 60 feet and churches and temples may be erected to a height not exceeding 75 feet when

the required side and rear yards are each increased by at least one foot for each one foot of additional building height above the height regulations for the district in which the building is located.

Section 2. This Ordinance shall take effect upon its adoption by Sussex County Council. It shall not apply to any structures or buildings exceeding 42 feet that have a valid Building Permit issued by Sussex County prior to the adoption of this Ordinance.

Synopsis

This Ordinance modifies Section 115-179B of the Sussex County Zoning Code to only allow government buildings, hospitals, institutions and schools to be built to a maximum height of 60 feet when those structures are permitted in the underlying zoning district. Churches and Temples are unaffected by this amendment. It applies to any new building not currently approved with a valid Sussex County Building Permit.

Deleted text is shown in brackets, additional text is underlined.

PINE STREET PARKING FACILITY
SUSSEX COUNTY PROJECT 12-24, ENGINEERING FILE ADM 2.23-A
BALANCING CHANGE ORDER SUMMARY
October 8, 2013

ITEM NO.	ITEM DESCRIPTION	UNIT	BID QTY	UNIT PRICE	TOTAL BID PRICE	ACTUAL QUANTITY INSTALLED	FINAL ITEM COST
A-1	CONTRACTOR MOBILIZATION	LS	1	\$ 7,882.00	\$ 7,882.00	1	\$ 7,882.00
A-2	CLEARING AND GRUBBING	LS	1	\$ 5,755.00	\$ 5,755.00	1	\$ 5,755.00
A-3	EARTHWORK & GRADING	LS	1	\$ 3,355.00	\$ 3,355.00	1	\$ 3,355.00
A-4	HDPE TRENCH DRAIN, GRATES AND CONCRETE CHANN	LF	124	\$ 68.00	\$ 8,432.00	124	\$ 8,432.00
A-5	ACE WITH NEW 4" CONCRETE SIDEWALK 6' WIDE; INSTA	SY	90	\$ 65.00	\$ 5,850.00	87	\$ 5,655.00
A-6	IG CURB ON PINE STREET & REPLACE WITH GEORGETO	LF	118	\$ 48.00	\$ 5,664.00	118	\$ 5,664.00
A-7	TALL GEORGETOWN TYPE 2 CURB - PARKING LOT INTER	LF	300	\$ 28.25	\$ 8,475.00	300	\$ 8,475.00
A-8	INSTALL GRADED AGGREGATE BASE COURSE	CY	240	\$ 54.40	\$ 13,056.00	238	\$ 12,947.20
A-9	TALL WMA, SUPERPAVE, TYPE C, 160 GYRATIONS, PG 64	TON	190	\$ 88.00	\$ 16,720.00	273	\$ 24,024.00
A-10	TALL WMA, SUPERPAVE, TYPE B, 160 GYRATIONS, PG 64	TON	7	\$ 88.00	\$ 616.00	0	\$ -
A-11	INSTALL PRIVACY CHAIN-LINK FENCE	LF	87	\$ 39.00	\$ 3,393.00	87	\$ 3,393.00
A-12	INSTALL 24" DEEP SOILD AMENDMENT FOR FILTER STRIP	SY	140	\$ 45.00	\$ 6,300.00	145	\$ 6,525.00
A-13	INSTALL PRECAST CONCRETE WHEEL STOPS	EA	8	\$ 45.00	\$ 360.00	8	\$ 360.00
A-14	INSTALL PAVEMENT PAINTING	LS	1	\$ 615.00	\$ 615.00	1	\$ 615.00
A-15	INSTALL WILLOW OAK TREE	EA	1	\$ 267.00	\$ 267.00	1	\$ 267.00
A-16	INSTALL TUSCARORA CREPE MYRTLE	EA	4	\$ 161.00	\$ 644.00	4	\$ 644.00
A-17	INSTALL DELAWARE #57 STONE IN DRIVEWAY	CY	10	\$ 59.70	\$ 597.00	10	\$ 597.00
A-18	INSTALL PERMANENT SEEDING	SY	300	\$ 6.50	\$ 1,950.00	300	\$ 1,950.00
A-19	INSTALL NEW SIGNS WITH BREAK-AWAY POSTS	EA	3	\$ 240.00	\$ 720.00	3	\$ 720.00
A-20	SAWCUT EXISTING PAVEMENT	LF	178	\$ 3.00	\$ 534.00	185	\$ 555.00
B-1	REMOVE & REPLACE UNSUITABLE SUBGRADE WITH TYF	CY	900	\$ 25.00	\$ 22,500.00	190	\$ 4,750.00
B-2	GEOTEXTILE PAVEMENT UNDERLAYMENT	SY	1300	\$ 3.00	\$ 3,900.00	0	\$ -

TOTAL BID \$ 117,585.00 ACTUAL COST \$ 102,565.20
BALANCING CHANGE ORDER AMOUNT \$ (15,019.80)

ORDINANCE NO. ____

AN ORDINANCE TO GRANT A CONDITIONAL USE OF LAND IN AN AR-1 AGRICULTURAL RESIDENTIAL DISTRICT FOR EXCAVATION OF A BORROW PIT TO BE LOCATED ON A CERTAIN PARCEL OF LAND LYING AND BEING IN BALTIMORE HUNDRED, SUSSEX COUNTY, CONTAINING 7.2 ACRES, MORE OR LESS (Tax Map I.D. 1-34-11.00-207.00)

WHEREAS, on the 31st day of July 2013, a conditional use application, denominated Conditional Use No. 1969 was filed on behalf of Melvin L. Joseph Construction Co., Inc.; and

WHEREAS, on the ____ day of _____ 2013, a public hearing was held, after notice, before the Planning and Zoning Commission of Sussex County and said Planning and Zoning Commission recommended that Conditional Use No. 1969 be _____; and

WHEREAS, on the ____ day of _____ 2013, a public hearing was held, after notice, before the County Council of Sussex County and the County Council of Sussex County determined, based on the findings of facts, that said conditional use is in accordance with the Comprehensive Development Plan and promotes the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Sussex County, and that the conditional use is for the general convenience and welfare of the inhabitants of Sussex County.

NOW, THEREFORE, THE COUNTY OF SUSSEX HEREBY ORDAINS:

Section 1. That Chapter 115, Article IV, Subsection 115-22, Code of Sussex County, be amended by adding the designation of Conditional Use No. 1969 as it applies to the property hereinafter described.

Section 2. The subject property is described as follows:

ALL that certain tract, piece or parcel of land, lying and being situate in Baltimore Hundred, Sussex County, Delaware, and lying east of Powell Farm Road (Road 365) approximately 0.5 mile north of Burbage Road (Road 353) and being more particularly described by the legal description in Deed Book 4153, Page 230 in the Office of the Recorder of Deeds in and for Sussex County, said parcel containing 7.2 acres, more or less.

This Ordinance shall take effect immediately upon its adoption by majority vote of all members of the County Council of Sussex County, Delaware.

OLD BUSINESS
October 15, 2013

This is to certify that on September 26, 2013 the Sussex County Planning and Zoning Commission conducted a public hearing on the below listed application for Conditional Use. At the conclusion of the public hearing, the Commission moved and passed that this application be forwarded to the Sussex County Council with the recommendations as stated.

Respectfully submitted:

COUNTY PLANNING AND ZONING
COMMISSION OF SUSSEX COUNTY

Lawrence B. Lank
Director of Planning and Zoning

The attached comments relating to the public hearing are findings of the Planning and Zoning Commission based on a summary of comments read into the record, and comments stated by interested parties during the public hearing.

CONDITIONAL USE #1969 – MELVIN L. JOSEPH CONSTRUCTION CO., INC.

Application of **MELVIN L. JOSEPH CONSTRUCTION CO., INC.** to consider the Conditional Use of land in an AR-1 Agricultural Residential District for excavation of a borrow pit to be located on a certain parcel of land lying and being in Baltimore Hundred, Sussex County, containing 7.2 acres, more or less, lying east of Powell Farm Road (Road 365) approximately 0.5 mile north of Burbage Road (Road 353) (Tax Map I.D. #1-34-11.00-207.00).

The Commission found that the Applicants submitted a survey/site plan with the application on July 31, 2013, and Exhibit Booklets on September 16, 2013. The Exhibit Booklets contain a cover letter; a copy of the Application form for the Conditional Use; a copy of the deed to the property; a zoning map of the area; a copy of a portion of the State Strategies and Investment Levels map; a series of aerial maps, i.e. a recent Google map, a 1954 Orthophoto, a 1961 Orthophoto, a 1968 Orthophoto, a 1992 Orthophoto, a 1997 Orthophoto, a 2007 Orthophoto, and a 2012 Orthophoto; site plans; copies of letters from DelDOT, dated July 23, 2013 and August 5, 2013; suggested proposed Findings of Fact; and suggested proposed Conditions of Approval.

The Commission found that the County Engineering Department Utility Planning Division provided comments on September 24, 2013 in the form of a memorandum and referencing that

the site is located in the Beaver Dam Planning Area; that Ordinance 38 construction will not be required; that central sewer has not been extended to the area at this time; that conformity to the South Coastal Area Planning Study – 2005 Update will be required; that if the parcel requires sewer service in the future, the owner could install infrastructure to an approved connection point; and that a concept plan is not required.

The Commission found that on September 16, 2013 the Applicants provided four (4) letters in support of the application to expand the existing borrow pit onto the proposed site.

The Commission found that five (5) letters in opposition have been received.

The Commission found that Ken Adams, President of Melvin L. Joseph Construction Co., Inc. was present with Gene Bayard, Esquire of Morris James Wilson Halbrook & Bayard, LLP, Robert L. Stickels of Melvin L. Joseph Construction Co., Inc., and Mark Davidson of Pennoni Associates, LLC, and that they stated in their presentations and in response to questions raised by the Commission 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 local emergency 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 am to 6:00 pm, and Saturday from 6:00 am 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 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 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 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 there was an incident that happen years ago when a gentleman trespassed onto the site and swung out over a pond in the pit, and he was paralyzed at impact; 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 area intending to use excavators, but may dredge; that they will maintain any 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; that they have received 4 additional letters in support from Beth Cumby, Josh Cain, Casey Whitney, and James Gibbs; that they submitted suggested proposed Findings of Fact as follows: 1) This is an application by Melvin L. Joseph Construction Co., Inc. for a conditional use to excavate a borrow pit for the removal of sand, gravel and stone on Powell Farm Road (SCR 365) in Baltimore Hundred, Sussex County, pursuant to §§ 115-22 and 115-172B of the S.C. Zoning Code; 2) The conditional use is 7.2 acres, more or less, and is identified on the Tax Maps of the Sussex County Department of Finance as T.M. No. 1-34-11.00-207.00; 3) The conditional use site is immediately adjacent to a pre-existing borrow pit of the applicant and will be an extension thereof; 4) A borrow pit is a public or semi-public use that is essential and desirable for the general convenience and welfare, which, because of possible impacts on neighboring properties requires the exercise of planning judgment; 5) The granting of this application will provide a borrow pit for the processing and removal of sand, gravel, and stone, to be used in the construction of private and public works projects in the immediate area and the southeastern region of Sussex County; 6) The conditional use requested will promote the health and safety of the inhabitants of Sussex County and any nearby projects that have been or may be approved for development; 7) By the use of the appropriate conditions of approval, the impact of the borrow pit on neighboring properties may be reduced; and that they submitted suggested proposed Conditions as follows: 1) A final site plan of the project shall be subject to review by the Commission prior to the commencement of operations. The final site plan shall include the present and proposed pits, all side slopes, excavation phasing, and reclamation plans; 2) Reclamation plans shall indicate finished grading, seeding, and planting schedules designed to create a pleasing appearance. The applicant shall notify the Office of the Planning and Zoning Commission in writing on or before April 1st of each year as to the status of the reclamation plans for the following year; 3) No materials may be brought from off the site for processing, mixing or similar purposes; 4) The entrance to the borrow pit shall be from the Burbage Road entrance of the adjacent borrow pit; 5) Any roadway and entrance improvements required by DelDOT shall be completed by the applicant; 6) Entrances to the borrow pit shall be secured when the pit is not in operation; 7) The hours of operation of trucking activities shall be from 6:00 a.m. to 6:00 p.m. Monday through Friday and 6:00 a.m. to 12:00 p.m. on Saturday. There shall be no borrow or trucking activities on Sunday; and 8) The operation of the borrow pit shall be controlled to provide reasonable protection to surrounding properties, as follows: A. A 50 foot buffer, 30 feet of which shall be vegetated buffer, shall be maintained along the perimeter of the

site, except where it adjoins the adjacent pre-existing borrow pit; B. A water truck will be available to control dust from road traffic when conditions require; C. No materials may be stored on an access roads or buffer areas; D. No fuel may be stored on-site for borrow pit operations; E. No stumps, branches, debris or similar items will be buried on the site; F. Markers and signs shall be placed at appropriate locations to designate pit areas; G. The pit shall have 2:1 slopes and the slopes shall be seeded and planted to control erosion; H. No more than 180 loads per day of materials may be hauled from the site; and I. The pit operations shall be consistent with the Mine Safety and Health Administration (MHSa) requirements; 8) This conditional use shall expire forty (40) years from the date of its granting. Every five (5) years after the commencement of excavation, the Planning and Zoning Commission shall perform an inspection of the site and shall request written comment from all appropriate State agencies so that the Planning and Zoning Commission in order to verify compliance with the then existing regulations. After twenty (20) years, the property owner shall complete at its expense an environmental resources and impact study, as that phrase is defined by the DNREC, or its successor. Upon confirmation by DNREC of the owner's compliance with the then-existing regulations, the permit shall continue for the remaining period of twenty (20) years; and 9) The applicant shall secure all other licenses and permits required for the use of the premises as a borrow pit from all state or federal agencies with jurisdiction over the use of the property and shall otherwise comply will all applicable rules, regulations, statutes or ordinances relating to the use of the premises as a borrow pit.

The Commission found that there were no parties present in support of the application.

The Commission found that Joyce Logan, Claudia Howard, and Florence Mumford, all area residents, were present in opposition to this application and stated that the borrow pit started around 1951; that they are concerned about the safety of children in the area; that the existing pit does not have any safety features; that a church in close proximity to the site operates a summer kids camp and they are concerned about the children; that the church has plans on improving the cemetery and is concerned about damage and trespass on the cemetery site; that trees have already fallen onto the cemetery property; that they oppose any further digging; that they oppose the number of trucks and truck trips; that area roadways cannot handle the anticipated truck traffic; that there is frontage for the property on Powell Farm Road and they are concerned about the use of that frontage for access to the pits; that they are concerned about noise; that they question the proposed truck routes to be utilized; that they question what happens to lands left undisturbed; that they question if the property will, in the future, be developed residentially; and they questioned the setback from the church property.

The Commission found that Mr. Davidson responded that the borrow pit will be reclaimed as a pond, that a minimum of 50 feet setback will be maintained from the church property line, and that the maximum number of trucks per day will be 180 trucks.

The Commission found that Mr. Bayard responded that the applicants will comply with the Findings proffered.

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

Mr. Smith stated that he would like to review all of the letters received.

On September 26, 2013 there was a motion by Mr. Smith, seconded by Mr. Ross, and carried unanimously to defer action for further consideration. Motion carried 5 – 0.

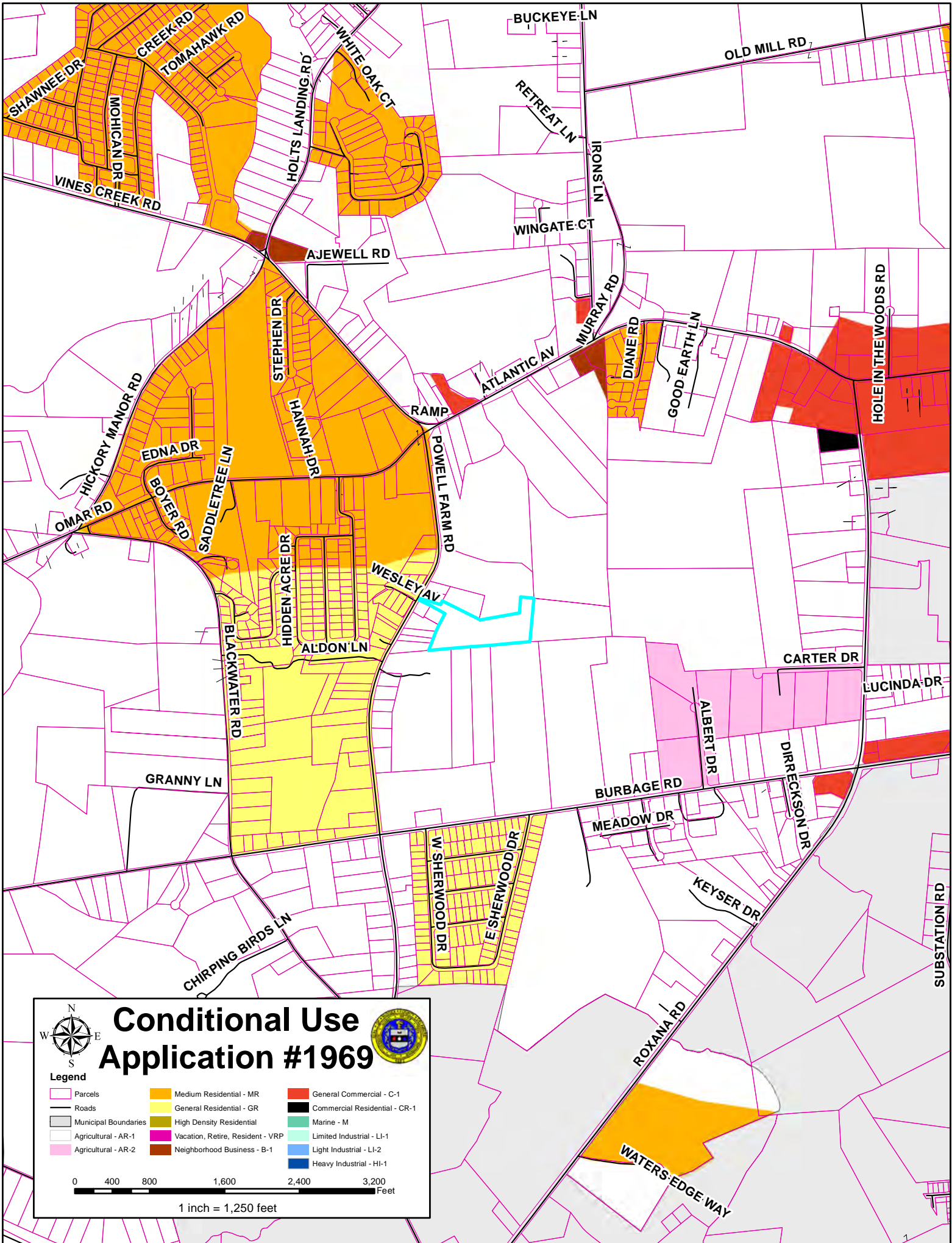
On October 10, 2013 the Commission discussed this application under Old Business.

Mr. Smith stated that he would move that the Commission recommend approval of C/U #1969 for M. L. Joseph Construction Co., Inc. for the expansion of an existing borrow pit based upon the record made at the public hearing and for the following reasons:

- 1) This application is for a 7.2 acre expansion of an existing borrow pit.
- 2) A need exists in the area for dirt, sand and gravel, and existing borrow pit sources are becoming depleted. The material removed from this site will be used throughout the County for a variety of residential and commercial uses and road construction.
- 3) The project, with the conditions and stipulations placed upon it, will not have an adverse impact on traffic or the neighboring properties or community.
- 4) As a source of fill dirt available to the entire County, the project is essential and desirable for the general convenience, safety and welfare of the current and future residents of the County.
- 5) Vegetated buffers will be established along the boundaries of this land and lands of other ownership.
- 6) The site is adjacent to an existing active borrow pit owned and operated by the Applicant. The existing pit pre-dates zoning, and is permitted as a legal non-conforming use. The Applicant has committed to reclaiming the existing pit area as part of this expansion, even though that is not legally required of the Applicant for this non-conforming use.
- 7) This recommendation for approval is subject to the following conditions and stipulations:
 - A. No materials shall be brought from off the site for processing, mixing or similar purposes.
 - B. Water or a water truck shall be available to control dust from road traffic when conditions require.
 - C. The only entrance to the pit shall be from Burbage Road. There shall not be any access via Powell Farm Road, and the portion of the site that fronts on Powell Farm Road shall be fenced or gated to prevent access.
 - D. Any roadway and entrance improvements required by DelDOT shall be completed by the Applicant. All entrances shall be secured when the borrow pit is not in operation.
 - E. The hours of operation shall be between the hours of 6:00 a.m. to 6:00 p.m. Monday through Friday and 6:00 a.m. until 12:00 Noon on Saturdays. No Sunday hours shall be permitted.
 - F. No materials shall be stored on any access roads or within any buffer areas.
 - G. The access road shall be on the eastern edge of the property, as shown on the site plan.
 - H. No fuel shall be stored on-site.
 - I. No stumps, branches, debris or similar items shall be buried or placed in the site of the borrow pit.

- J. The borrow pit shall have 2:1 slopes and the slopes shall be seeded and planted to control erosion.
- K. A final site plan, including all pit slopes, excavation phasing, and reclamation plans shall be reviewed and approved by the Planning and Zoning Commission prior to the commencement of operations. Reclamation plans shall indicate finished grading, seeding and planting schedules designed to create a pleasing appearance.
- L. As proffered by the Applicant, the existing non-conforming borrow pit, known as the “Gibson Pit”, shall be reclaimed. The reclamation plan for the “Gibson Pit” shall be included with the reclamation plans for this Conditional Use.
- M. The Applicant shall comply with all State and County erosion and sediment control regulations.
- N. Permanent concrete markers and signs shall be placed at appropriate locations to designate the boundaries of the subject property and pit areas. The boundary markers shall be raised and marked so that they are clearly visible to anyone nearing the site.
- O. Every 5 years after the start of excavation, the Office of Planning and Zoning shall inspect the site and request written comments from all appropriate State agencies so that the Planning and Zoning Commission can review the comments and verify their compliance with all regulations.
- P. The Applicant shall comply with all of the requirements set forth in Section 115-172B of the Sussex County Zoning Ordinance.
- Q. The borrow pit shall be surrounded by a buffer strip a minimum distance of 100 feet from any street lines, 200 feet from any dwelling of other ownership, and 50 feet from all other property lines of other ownership. The buffer area shall be a vegetated buffer of existing vegetation or native species vegetation.
- R. The area of the old pit on the site that intrudes into the 50 foot buffer area shall be filled and landscaped to form part of the continuous buffer around the perimeter of the site.
- S. As proffered by the Applicant, the Conditional Use shall expire 40 years from the date the Ordinance is adopted, if and when, by the County Council.
- T. As proffered by the Applicant, after 20 years, the property owner shall complete at its expense an environmental resources and impact study, as that phrase is defined by DNREC or its successor agency. Upon confirmation by DNREC of the owner’s compliance with the then-existing regulations, the permit shall continue for the remaining 20 year period that the Conditional Use is valid.
- U. 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. Ross, 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.

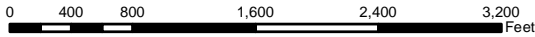


Conditional Use Application #1969



Legend

- Parcels
- Roads
- Municipal Boundaries
- Medium Residential - MR
- General Residential - GR
- High Density Residential
- Vacation, Retire, Resident - VRP
- Neighborhood Business - B-1
- General Commercial - C-1
- Commercial Residential - CR-1
- Marine - M
- Limited Industrial - LI-1
- Light Industrial - LI-2
- Heavy Industrial - HI-1



20.16 Ac.S.

Lands N/F of WARRINGTON

Lands N/F of GRAY

Lands N/F of GRAY

UNION WESLEY METHODIST CHURCH

8.37 AC.

Lands N/F of CHURCH

195

Lands N/F of DELOACH

2.00 AC.

Lands N/F of BANKS

207

Lands N/F of TURNER

8.67 AC.S

Lands N/F of CUMBY

Lands N/F of JOSEPH

Lands N/F of PHILLIPS

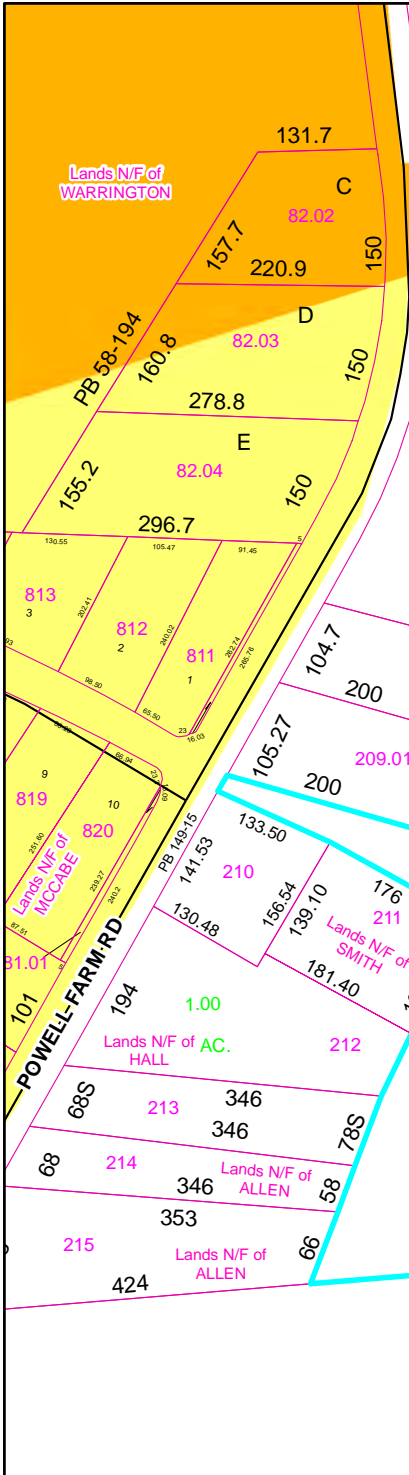
220

218


23.74 AC.

6.13


6.50



HOGSTEN CROSSING RD



Conditional Use Application #1969



Legend

Parcels	Medium Residential - MR	General Commercial - C-1
Roads	General Residential - GR	Commercial Residential - CR-1
Municipal Boundaries	High Density Residential	Marine - M
Agricultural - AR-1	Vacation, Retire, Resident - VRP	Limited Industrial - LI-1
Agricultural - AR-2	Neighborhood Business - B-1	Light Industrial - LI-2
		Heavy Industrial - HI-1

0 65 130 260 390 520 Feet

1 inch = 208 feet

Lands N/F of CUMBY

Lands N/F of PHILLIPS

Lands N/F of JOSEPH

220

218

23.74 AC.

6.13

6.50

20.16 Ac.S.

Lands N/F of WARRINGTON

Lands N/F of GRAY

Lands N/F of GRAY

UNION WESLEY METHODIST CHURCH

8.37 AC.

Lands N/F of CHURCH

Lands N/F of DELOACH

2.00 AC.

Lands N/F of BANKS

POWELL FARM RD

Lands N/F of SMITH

207

Lands N/F of TURNER

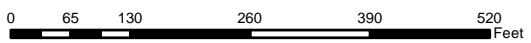
8.67 AC.S

HOGSTEN CROSSING RD

Conditional Use Application #1969



- Legend**
- Parcels
 - Roads
 - Municipal Boundaries
 - Agricultural - AR-1
 - Agricultural - AR-2
 - Medium Residential - MR
 - General Residential - GR
 - High Density Residential
 - Vacation, Retire, Resident - VRP
 - Neighborhood Business - B-1
 - General Commercial - C-1
 - Commercial Residential - CR-1
 - Marine - M
 - Limited Industrial - LI-1
 - Light Industrial - LI-2
 - Heavy Industrial - HI-1



1 inch = 208 feet

6.50

6.13

23.74 AC.

Lands N/F of PHILLIPS

Lands N/F of GUNBY

220

218



The Town of
Millville
a beautiful way of life

36404 Club House Road, Millville, DE 19967

Phone: **302.539.0449** • Fax: **302.539.0879**

17 September 2013

George B. Cole
Sussex County Councilman
29271 Woods Edge Drive
Ocean View, DE 19970

Dear George,

It's that time of year again when I solicit funding for our annual "Millville Great Pumpkin Festival." This year marks our 5th year bringing the community together for a day of fun which will be held on October 5th, 10 till 2.

The citizens of Millville and the Town Council would be most appreciative if the Sussex County Council could donate monies to us once again as you have done in the past to keep economic development alive in Millville. You've always found our projects worthy of your consideration and I hope you will continue.

Once again, thanks in advance if you will be able to help us out!

Respectfully,

Deborah Y. Botchie
Town Manager



Sussex Outdoors Summit

Delaware is on the Move

Tuesday, October 15, 2013

From 9:30 a.m. to 1:15 p.m.

Stockley Center

26351 Patriots Way, Georgetown, DE 19947

Host: John Hollis

Please plan on joining:

Governor Markell

Dennis Forney

Dr. Karyl Rattay

Secretary Landgraf & the Stockley Task Force

And

Jason Danner, Vice President of Kelly Benefit Strategies