

Mayor & City Council
January 10, 2019
WORKSHOP
MINUTES

The Mayor & City Council held a workshop on **January 10, 2019 in Council Chambers at Lewes City Hall**, in accordance with proper notification, with the following members present: Mayor Ted Becker, Deputy Mayor Fred Beaufait and Councilpersons Dennis Reardon & Rob Morgan. Also present were: City Manager Ann Marie Townshend, City Planner Thomas West and Recording Secretary Alice Erickson. Councilperson Bonnie Osler was not in attendance.

1. Call to Order: *Mayor Becker* called the meeting to order at **7:00pm**.

Mayor & City Council held a public workshop to discuss the AX-RES & AX-MIX wetlands density calculation. Information was provided regarding the Annexation Regulation Ad-Hoc Committee's report and a copy of the city's letter written by city manager Ann Marie Townshend to the editor of the cape gazette regarding the city's decision on the Brittingham development.

Atty. Glenn Mandalas gave a statement, acknowledging the executive session agenda could have been better prepared and clearer. Typically, the city of Lewes does a very good job being transparent on meeting agendas. The agenda was proper as per FOIA regulations but could have been better. As to the reason for the decision that was made at that meeting and whether it should be applicable to pending applications or not, he did provide legal advice that may have supplied some of the basis for council's decision. Further, the practice of applying subsequent ordinances to pending applications, in Delaware it is very, very common that it is not applied to a pending ordinance. It has been discussed how vested rights and equitable estoppel might apply in a court of law, but that aside, the common practice in Delaware is to not apply a new ordinance to a pending application.

Deputy Mayor Beaufait explained the issue with the Brittingham property is not the topic of tonight's meeting and if that is what members of the audience have come to discuss, they will be out of order. Council has made a decision that is not up for question. The topic tonight is about the ordinance and what the county has changed and if the city of Lewes wants to make an amendment to follow suit.

Councilperson Morgan disagreed, stating the Brittingham property is the only property to which the AX-RES zoning ordinance would apply. When tonight's workshop was scheduled it was with the understanding that there would be discussion on the Brittingham property. It is true that on Monday council passed a motion that a future change to the AX-RES ordinance would not apply to Brittingham, but that decision is not irreversible. It seems to him that it is extremely germane if anyone wants to address the Brittingham application.

David Ennis, 50 Harborview Road stated he has never been more upset with city council. He read from the letter written by Ms. Townshend. He feels the letter was improperly written. It states, "there have been many concerns expressed in the community about the decision of Lewes Mayor & Council to subject the subdivision application for the Brittingham property, Lewes Waterfront Preserve, to the provision of the Annexation Residential AX-RES, currently in place and to not apply any future changes to that zone." He stated that is not true, they exempted it.

City Manager Ann Marie Townshend clarified the letter states "to the provisions currently in place", not to any future changes.

Mr. Ennis stated if the subject is in a letter handed out in the lobby, could that allow for an adjustment to the agenda for discussion.

Atty. Mandalas stated the agenda can't be amended based on materials provided. He thinks there is some limited allowance to discuss what has happened, and that is why these comments are appropriate. The mayor has indicated he will take comments at the start of the workshop. He agreed it is not specifically noted on the agenda but there is some inherent relationship of this subject to the Brittingham property.

John Hurlock, 3364 Canary Creek Drive, stated the residents are very angry and frustrated with the process. They don't know how it got to this point, why the city is allowing 90 townhouses on a road with no townhouses. It was questioned what is happening behind the scenes and would like to see the sales agreement between the city, the Brittingham's and Mr. Setting. He questioned if the city has a copy of the agreement?

Mayor Becker stated the city does not have a copy of the sales contract and it is not a part of the city's annexation process.

Mr. Hurlock questioned when Mr. Setting entered the picture? *Councilperson Reardon* explained Mr. Setting filed an application for annexation in August 2018.

Mr. Hurlock questioned when the density was increased so dramatically? *Councilperson Reardon* explained there were many public meetings when the annexation zones were drafted. Then a recommendation was forwarded to city council and they approved it. *Mr. Reardon* stated he would be happy to go over and explain it to Mr. Hurlock, but that process has been completed.

Mr. Hurlock stated he feels there were things that happened that the public should have been made aware of. *Mr. Reardon* disagreed. All meetings were held in an open forum.

Francis Murphy, 128 New Road, questioned who currently owns the property?

Ms. Townshend explained the property is owned by a corporation, which is the Brittingham family, and it is under contract with Setting Properties. The Brittingham family provided the city with a letter giving Mr. Setting the authority to act on behalf of the property in terms of the application.

Atty. Mandalas explained Mr. Setting is the contract purchaser and has an equitable interest in the property, and therefore has some legal right in the property. The Brittingham Corporation remains the fee simple owner. There is nothing on file with the Sussex County Recorder of Deeds stating Joe Setting has any interest in this property.

Mr. Murphy requested clarification that the Brittingham's should be doing things instead of Mr. Setting because he is the purchaser of the property and not the owner.

Atty. Mandalas explained that the city's subdivision process, which is typical of other jurisdictions, permits the equitable owner, as long as the fee simple owner gives authorization, to come forward with the application. That is what has happened in this situation. The city does not have any details of the financial arrangement between the Brittingham's and Mr. Setting. Our only concern is if the legal owner of the property has given the contract purchaser permission to bring an application before the city and that has happened.

Gail Van Gilder, 516 E. Cape Shore Drive, requested clarification that Mr. Setting has an option to purchase the property and that he has put down a deposit for the right to exercise that option. *Atty. Mandalas* stated they do not know the details of the contract. Typically, a deposit is put down and a time period to complete the sale. *Ms. Van Gilder* stated it would be helpful to know what that timeframe is.

Ms. Townshend stated in her 20+ years as a professional planner, she has never had access to a contract between a developer and a seller. The transaction is private, and municipalities do not require that information. The city's role is to apply the zoning and subdivision regulations. There is no exemption. An application for subdivision was filed in December. The decision was that it would not apply to that application which had already been filed. At this point there isn't an ordinance.

Maryanne Ennis, 50 Harborview Road, questioned why they excluded the Brittingham property for consideration for the density on tidal wetlands. Mr. Setting does not have any equitable tie to the property and will not lose anything. She feels this is a procedural point, something Mr. Mandalas stated is not correct. He did not use the pending ordinance because he didn't think it was valuable in this situation. She thinks it is, reading as follows: in essence the town suggest that a municipal governing authority may: 1) reject or return a lawfully filed application that is based upon a use clearly permitted under the current zoning code, 2) then amend the zoning code to prohibit that use, 3) thereafter, refuse to consider any submitted application." Given this, she feels city council needs to reconsider if they are going to eliminate Brittingham for consideration on this zoning change.

Ms. Townshend stated she believes they received the application prior to the December 14, 2018 meeting so it was received before there was discussion about the ordinance. Mr. West is checking it out.

Councilperson Morgan stated he thinks the fact that the application was filed on a particular date doesn't address if the developer had invested substantial equity in the property. It is irrelevant to whether the pending ordinance doctrine would apply.

Atty. Mandalas stated he agrees there is no pending ordinance doctrine issue. It would be vested interest or perhaps equitable estoppel. When getting into the detail of the contract they would need to have the parties present to defend themselves.

Marta Narmack, 128 New Road, stated even if there wasn't a formal pending ordinance, there was discussion about it. They should have been put on notice with that discussion.

Mark Cortney, 33625 Blue Heron Drive, questioned why council is defending the Brittingham property. What is going on behind the scenes the public doesn't know about?

Deputy Mayor Beaufait stated absolutely nothing is going on behind the scenes. If this property had stayed in Sussex County, they could have had 138 townhouses. The county has allowed townhouses on Gills Neck Road and could very easily allow it on New Road.

Mr. Cortney made very angry disrespectful statements to and about city council and was escorted out of council chambers by a Lewes police officer.

Mr. West reported the application was received on December 7, 2018.

Debra Evalds, 10 Harborview Road, clarified some specific information regarding the density that could be allowed under Sussex County versus where they are now. Right now, they are at 90 units which is based on 2.5 units per acre, with the wetlands included.

Deputy Mayor Beaufait explained the basis is 2 units per acre, but for cluster option 2 they allow 30% over. *Mr. West* stated it is 2.6 units per acre.

Ms. Evalds continued that under that premise if they exclude the wetlands, there would be only 58 units. That is a big difference for everyone that lives on the north end of Lewes and are concerned about this development in regard to runoff onto their own properties.

Councilperson Reardon corrected it is not wetlands, it is tidal wetlands. The county ordinance stated they have to measure the mean high tide of the tidal wetlands and it doesn't include all of the wetlands. Currently the county does not know how they are going to do it. They think that when an application is filed, they will have to have a survey done that will delineate the mean high tide line, which would be the tidal wetlands.

Ms. Evalds stated she understands that. The original bill put forward by IG Burton included all wetlands but were removed. The one that passed is just tidal wetlands. The PLUS application says 11.41 acres of wetlands for the Brittingham parcel. When looking at the maps from the state of Delaware, the property shows tidal wetlands as per these maps.

Ms. Townshend clarified that the online state wetland maps were developed using aerial photography and in order to determine what wetlands are regulated by the state there would need to be a wetland delineation.

Ms. Evalds agreed. There should be no dispute there are a lot of tidal wetlands on this property. It is adjacent to Canary Creek which is coming off the bay. Based on current information, 90 units are proposed. If they excluded 11.41 acres of wetlands, it would be reduced to 58 units. If using the same calculation that the county is offering which was just approved for the Groome property, it would bring it down to 48.78 units on the Brittingham parcel. She doesn't think it is guaranteed the county would approve townhouses east of Route 1. She feels the trend is moving towards not approving townhouses. She has always felt they could trust the city of Lewes to do the right thing, but she is very disappointed and upset about council's action.

John Hurlock, 3364 Canary Creek Drive, gave comments and concerns about the development of the Brittingham property.

2. AX-RES & AX-MIX Wetlands Density Calculation

- Review of Sussex County amendment (ORDINANCE NO. 2618) related to the calculation of permitted density in Annexation areas
- Review of City of Lewes Annexation Zones calculation of permitted density
- Discussion of current City of Lewes zoning code provisions related to wetlands
- Evaluation of possible wetlands exemptions from yield calculation in Annexation Zones

City Planner Tom West reviewed portions of the Sussex County Code that have been changed regarding the exclusion of tidal tributary or tidal wetlands in the calculation of density in the AR-1 Cluster option. Ordinance No. 2618 was adopted early December 2018 and addresses Chapter 115 Zoning, Article III Provisions Applicable to all Districts, Article IV AR-1 and AR-2 Agricultural Residential Districts and Article XXV Supplementary Regulations with respect to the Calculation of Permitted Density.

Mr. West reviewed **Section 1. Sussex County Code, Chapter 115, Article III, Section 115-15.1 Definitions.** “For purposes of calculating the permitted density or allowable density in all districts, the **gross area**, as defined herein, **shall be divided by the applicable lot area stated in each district** unless otherwise specifically set forth therein. **“Gross area” “shall include the lot areas and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193.”** This is an important part because what it is saying is wherever gross area is used, it is applicable to certain types of development in the county, primarily cluster development. It does not apply to conditional uses, multi-family or townhouses which are permitted elsewhere. This lays the foundations for the other parts.

There has been a lot of discussion about how the county will delineate tidal wetlands §115-193. As of this amendment they haven’t changed this section; it is basically the same.

Wetlands Delineation - §115-193:

TIDAL TRIBUTARY STREAM A stream under tidal influence, either connecting fresh or salt water.

TIDAL WETLANDS Areas under the jurisdiction of Title 7, Chapter 66, of the Delaware Code, as the chapter appears as of the date of the adoption of this Article, as regulated and mapped by the Department of Natural Resources and Environmental Control.

Mr. West stated they have a pending ordinance on wetland buffers, Section 119-53, which is where they are coming up with how to delineate wetlands. They are still using the Army Corp process which is still using the DNREC mapping. What is on the books is the same way it has been regarding delineation of wetlands.

Mr. West stated Section 2 updates the formula for the AR districts: **Section 2. Sussex County Code, Chapter 115, Article IV, Section 115-25 (“Height, area and bulk requirements”)** shall be amended by the addition of the underlined language and deletion of the language in brackets, as follows:

§115-25. Height, area and bulk requirements.

- A. Minimum lot sizes for lots using a wastewater disposal system located entirely on that lot and generally defined as an **on-site septic system.**
- (2) Cluster development option. *New language is* **“Gross area shall include the lot area and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193.”**

Mr. West stated A. (2) is for the cluster development option when it is an onsite septic system. The density is about 2 units per acre. This is calculated by dividing the gross area by 21,780 square feet. With the new addition, the tributary stream or tidal wetlands would be subtracted out. Also, in the AR-1 is when there is central sewer instead of on lot systems. Again, they have added in the part for Gross Area, but the density calculation is different for cluster with central sewer.

- B. Minimum lot sizes, dimensions and open space for lots using a **central sewer system** as defined by § 115-194A:

- (3) If a developer pays a fee to create space for active and passive recreation areas, the maximum number of dwelling units permitted would be determined by dividing the gross area by 10,890 square feet. This is only for cluster development. **“Gross area” shall include the lot area and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193.** When doing cluster in Sussex County it is 30% open space for these methods.

Mr. West stated these are the bulk of the changes for the AR-1 zone. It is applicable to the Cluster Lot Options.

Section F. Review procedure for cluster development [a] **The yield plan shall be completed to scale, and accurately depict potential lots, streets and storm drainage facilities. The potential lots shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193. However, the yield plan is not required to contain the same level of engineering detail required for a subdivision plan.**

Mr. West explained this reiterates exclusion of tidal tributary and tidal wetlands when considering yield plan.

Mr. West stated the last part of the new amendment is Section 3 which applies to the ES-1 Environmentally Sensitive Development District Overlay Zone (ESDDOZ). **Section 3. Sussex County Code, Chapter 115, Article XXV, Section 115-194.3 (“ES-1 Environmentally Sensitive Development District Overlay Zone (ESDDOZ)”)**

In Sussex County there are overlay zones that apply to areas around Lewes.

- (3) The maximum density shall be the allowable density of the underlying zoning district for developments using a central water and wastewater collection and treatment system.... **For purposes of this paragraph, the “allowable density” shall be determined by calculating the lot area and the area of land set aside for common open space or recreational use but shall exclude any area designated as a tidal tributary stream or tidal wetlands by §115-193.**

Mr. West stated the county’s amendment is still evolving. They have formed work groups to look at the wetland buffers and to review the amendments again. As of right now, these are the impacts for the county’s AR-1 zone where the cluster lot options remove the tidal tributary and tidal wetlands as defined by the DNREC maps that they have been using for some time.

Mr. West reviewed the city of Lewes Code Chapter 197 Zoning 197-50 Cluster Development added as a part of the Annexation Districts. He reviewed the formula. The denominator is the same as the cluster lot option in the AR-1, 21,780 square feet. It starts out at 2 units per acre with 30% open space. It does not exclude for wetlands as this point.

Lewes has two options. Cluster Option 1: maximum permitted residential units = base permitted residential units
Cluster Option 2: maximum permitted residential units = base permitted residential units + 30% base permitted residential units.

The county and the city ordinances do not compare “apples to apples”. Townhouses are not allowed in the county by right but by conditional use. Another key issue is stormwater management basins, which are not permitted in open space in the city but in the county, they are allowed as a part of the open space. There are more factors than the density calculation.

Mr. West explained how wetlands are handled in the city Chapter 197 Zoning Article IX. Environmental Protection Regulations 197-74 Wetlands. There are some similarities in the definitions between the city and the county. They both look at the Army Corp process if doing a wetland delineation. The official map is the 1988 DNREC map. It is a good reference, but it needs to be updated.

Also, the city defines wetlands, but it doesn’t differentiate between tidal or non-tidal wetlands, it is all wetlands. Wetlands can not be a part of any lot in the city. If the council does something similar to the county, which is to just exclude tidal wetlands, they would have to amend the ordinance and then go through the process of how to delineate them.

Councilperson Morgan stated the Army Corp's definition is irrelevant to the county at this point. The Corp regulates wetlands far beyond nontidal. *Mr. West* stated the Corp defines what to look for in a wetland. Any delineation goes back to the Corp's requirements and what gets regulated after that is different. In Delaware, they are breaking wetlands into different groups and are only going to regulate some of them. *Ms. Townshend* stated DNREC does not regulate nontidal wetlands. They regulate tidal wetlands but only what they mapped in 1988. Everything else is still regulated by the Corp. The Corp has a larger regulatory footprint than DNREC. The map *Ms. Evalds* has is more current but is not the state regulatory map. The footprint of the tidal wetlands has increased since 1988, probably more than the state map shows. Part of the challenge of amending the ordinance is making sure the definitions get you what you want.

Councilperson Morgan stated if the city wants to regulate tidal wetlands and define them more currently than the county does, we would have to use something other than DNREC's 1988 map. *Mr. West* stated the Corp does not have maps but provides the process. The map that *Ms. Evalds* has is good, but it is not the official map. It is a good reference but is not regulatory. A site would have to be surveyed.

Ms. Townshend explained the process is set by the Army Corp. Developers would have to hire a wetland scientist to delineate and submit it to the Corp for a jurisdictional determination. If the city were to regulate tidal wetlands, we would need to seek input from the Corp to obtain their definitions.

Deputy Mayor Beaufait questioned if DNREC is referring to the mean tidal or the maximum tidal. They are different. *Mr. West* stated mean tidal is calculated over a 19-year period. *Ms. Townshend* stated they are referring to the mean higher high water.

Deputy Mayor Beaufait stated the question is should the city modify its density formula. This is a legitimate question which needs more investigation and study to make sure tidal wetlands are defined appropriately. There are other issues as well.

Mayor Becker stated this is the same issue the county is struggling with now in terms of what is the definition and what are the delineations. He has spoken with Sussex County Councilperson IG Burton and they do not have definitions yet, but they are working on it.

Marta Nammack, 128 New Road, stated they are very concerned about flooding and it will only get worse with continued development. The less impervious surface the better. She distributed research on Impacts of Impervious Surfaces on the Environment. Until we know how to delineate the wetlands, let's over estimate. The city needs to make an ordinance and get it on the books before more development comes in. Hopefully it will be retroactive to the Brittingham application.

Amanda Wagner, 16063 New Road, stated she is concerned with the Canary Creek Bridge. Do they know what will happen with the flooding issue? She has lived on New Road since 1989 and she sees it getting worse and worse every year.

Mayor Becker explained DelDOT is working on plans for the replacement of the bridge. Preliminary information states the limits of disturbance will be about 1700 feet in length. He believes they will be raising the bridge to 3-feet over the 100-year flood level. DelDOT will be weighing in on the Brittingham development.

Ms. Townshend stated she asked DelDOT to make sure in their PLUS comments on Brittingham they address the issue of the bridge so that when the planning commission gets the comments, they have the benefit of what DelDOT is doing in terms of the bridge elevation.

Gail Van Gilder, Cape Shore Drive, stated regarding the wetland density calculation, there are only a few areas of nontidal wetlands in Lewes. It will be the property owners objecting to their property being taken that will be the biggest obstacle. We need to find out where they are now so those property owners can be a part of the conversation up front. We need to have those conversations and determine who is willing to work with the city on this issue. Part of this has to be an explanation of the importance of the drainage and flooding issues. Let's be practical about what is going to work and get buy in by the affected property owners. It is very important to the city to move forward with this issue. There isn't a more important issue for Lewes than drainage. It is a problem all over town. Cape Henlopen Drive and Freeman Highway flood just as bad. She feels money brought in from the annexation should be used to address the drainage issues.

Mr. West explained the planning commission will be hosting a water workshop to discuss many of these issues. It will be held on February 21 at 4:30pm at the Rollins Center.

David Ennis, 50 Harbor View Road, suggested council consider changing procedural steps. The action of last Monday was a procedural step that most of the community was very unhappy with after the fact and now there is a push back. They need the DeIDOT report and the Byway's Corridor Management Plan before taking more action. Council needs to slow down so they can make good decisions.

Tom Panetta, 125 Washington Avenue, Planning Commission, stated DeIDOT is now building to the FEMA 100-year plus 3-foot standard to address sea level rise. The city needs to be addressing this the city's in ordinances, especially for new developments. *Mayor Becker* stated council has done something similar in the new floodplain ordinance, recognizing at what level the city would address new infrastructure and development.

Gail Van Gilder, Cape Shore Drive, stated it is a sad day for Lewes to have these types of disagreements with our city council and it worries her. She appreciates the value of annexation but is opposed to the way it came out. It is important to have a positive resolution to compromise on the annexation issues. If they continue down the road the way they are, no one is going to want to annex into the city of Lewes.

Melanie Mosier, 426 Seagull Drive, stated she is a retired land planner and has worked for many developers in communities similar to Lewes. She has seen many different kinds of ordinances attempting to deal with environmental sensitive lands which is what they are discussing. Wetlands both tidal and nontidal, are certainly something that is frequently handled relative to density. She has seen them clustered together so that what they have to do is take the gross acreage and subtract out flood plain, wetlands, and road right of way so that what they were dealing with for density was reasonable. What was actually usable on the property. She would like to propose some amendments relative to the density issue because they are dealing with environmentally sensitive lands. First of all, could there be a higher standard for stormwater management to address the concerns of the neighbors. Perhaps there could also be a maximum percentage of impervious area if developing on a site with tidal wetlands. A standard for reforestation because trees play an important role in managing water. She would propose grading limits within the wetland and buffers.

Mr. West explained there is a requirement for wetland buffers and grading is not allowed within that buffer. There are also limits to the amount of impervious surface.

Ms. Mosier stated if there is a substantial change to a property, relative to zoning or annexation, the property must be publicly posted at least one month prior to any hearing and notice has to be published in local newspapers. This would be helpful to preventing misunderstandings or lack of participation.

Mr. Hurlock questioned as far as the Brittingham development, within your power is there anything that can be done to reverse what it looks like is going to happen.

Ms. Townshend explained the planning commission has not started their review of the proposed development so there will be many opportunities for public participation on the subdivision plan. They haven't gotten to that point in the process and will be addressed in the coming months.

Mayor Becker stated the site plan has not been reviewed by the planning commission and won't be until next month. The parks & recreation commission have reviewed the plan and will be submitting a report to LPC. There is the Corridor Management Plan and the Historic Lewes Byways Committee will have to weigh in. There will be comments from the PLUS review which will include comments from DeIDOT and what they are planning for the Canary Creek bridge and how it will impact this parcel which is currently unknown. There are many opportunities for things to change. There are a lot of factors that need to be looked at regarding this parcel.

Deputy Mayor Beaufait stated the proposed 90 units is theoretical. The number of units has to be able to fit on the parcel along with other constraints. There are other factors that need to be taken into consideration.

LPC Chairperson Drew McKay explained their tentative schedule for the Brittingham development.

- February 20th regular LPC meeting will address the application and preliminary consideration of the Brittingham property,
- A public hearing will have to be scheduled, tentatively sometime in March
- Another meeting to draft LPC recommendations to city council, and keep the public record open and recorded on the city's website,
- A recommendation will probably be made in April to city council

They will make a recommendation to city council who will then make the final decision. They will consider as much as possible the implication of all the factors in making their recommendations. If there are ordinance changes, they feel would be relevant for the future, they can make those at the same time. The planning commission is very interested in this development and all discussion will be done in a public forum.

Mr. West explained that all the development plans and information will be posted to the city's website under Plans and Maps, Plan Reviews. What is available is a listing of major subdivisions and site plans and under each development will be a list of available documents. Public comments will also be compiled and posted.

Fran Murphy, 128 New Road, questioned if there is anything that will change council's mind and reverse their decision on exempting the Brittingham parcel.

Councilperson Morgan stated he was in the minority on that decision. There is always a possibility but at this point it would require new information.

Deputy Mayor Beaufait stated he is waiting to hear from the planning commission. A lot of the comments tonight really had nothing to do with council's decision. There are a lot of issues that were not discussed tonight that will come into play. Any change would require new information. He does not believe in changing the rules once a process has started. It is not fair. Mr. Setting agreed to annexation under a specific ordinance and a specific zoning district, which was approved by Mayor & City Council. A new ordinance would take 2-3 months.

3. Adjourn: There being no further comments, the meeting adjourned at **9:00 pm**.

Minutes submitted by,

Alice Erickson
Recording Secretary