

**MAYOR & CITY COUNCIL  
SPECIAL MEETING  
March 14, 2019  
MINUTES**

The Mayor & City Council met on **March 14, 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 Solicitor Glenn Mandalas, City Planner Thomas West and Recording Secretary Alice Erickson. Councilperson Bonnie Osler and City Manager Ann Marie Townshend were not present, but Ms. Townshend was on the speaker phone.

1. **Call to Order:** *Mayor Becker* called the meeting to order at **10:00am**.
2. **Consideration & possible action on the application of any future AX-RES (Annexation Residential) zoning district amendments (including but not limited to the density calculation formula) to the Lewes Waterfront Preserve major subdivision application** (*In accordance with the recommendation in the Attorney General's Office decision dated February 15, 2019, Mayor and City Council will reconsider action taken at a Special Meeting on January 7, 2019.*)

*Deputy Mayor Beaufait* explained the process that has led to tonight's meeting, as follows:

Annexation is a stated "priority" in the city's 2015 Comprehensive Plan. The Annexation Regulation Review Committee was established in 2016. They held their first meeting in July 2016 and the last meeting was in November 2017. There was a total of 26 public meeting over a 17-month period. The committee submitted their report to city council, which was forwarded to the planning commission for review and comment. The planning commission reviewed the proposed AX districts in open public meeting and returned a positive recommendation to city council. Mayor & City Council held a public hearing in May 2018 and the AX Districts were approved by council in May 2018. From the beginning to the end of this process there have been numerous opportunities for the public to be involved in the process and to express their opinions.

In October of 2018, city council held a public hearing with respect to the annexation of the Brittingham property, and it was approved in November 2018. During this entire process Sussex County had not changed their ordinance with respect to their AR-1 Zone or their Cluster option. Late in the process the Annexation Regulation Review Committee became aware that the county was considering a change but there was no assurance as to what the changes might be or any indication that a change would be approved by the county council. Moreover, the expectation was that any change would be a long time in the making. There was no reason to delay in the city's efforts to establish the AX Zones or delay the annexation of the Brittingham property. The developer submitted a site plan for the development of the property before the county officially adopted their change in density.

Mayor & City Council have given the Annexation Regulation Review Committee a new charge to review the AX Zones and make recommendations to adjustments that might be made. The committee began its work in February, and it will likely be August or September before the approval process is finalized and any changes are in place.

*Councilperson Morgan* questioned if during the 26 public meetings held by the Annexation Regulation Review Committee how many members of the public attended? *Deputy Mayor Beaufait* stated there were maybe a handful, but he did keep a count.

*Councilperson Morgan* questioned if he thought it was reasonable to expect citizens to attend 26 meetings? *Mr. Beaufait* stated it was not his responsibility to bring the public into each meeting. They were announced and posted just as all city meetings are and the public has the choice to attend or not attend. He feels the public was fully informed as to what the committee was addressing.

*Councilperson Morgan* stated it sounds like *Deputy Mayor Beaufait* has already made up his mind about the issue before council today. *Deputy Mayor Beaufait* stated that is an inappropriate question. *Mr. Morgan* disagreed, it bears on recusal. *Mr. Beaufait* stated he does not intend to recuse himself. *Mr. Morgan* asked him to consider recusing himself. *Mr. Beaufait* stated he would not.

*City Solicitor Mandalas* stated he has spoken with council regarding their decision to recuse themselves. A decision to recuse is with each individual council member. Councilperson Morgan has raised a question and Deputy Mayor Beaufait can make the decision to recuse or not. He asked them to use comments made in private conversations to make that determination.

**Thierry Poirey, 19 Harborview Road.** *Mr. Poirey* stated members of the community were sold on the annexation of this property as being necessary in order to reduce the density that would be allowed if developed in the county. It now appears that this decision will have the exact opposite affect and will result in a higher density than if left in the county. This decision by council is consistent with what he has witnessed over the past four years. This council is systematically making decisions that favor maximum density and basically completely ignore the wishes of the community. He questioned why this council is making decisions that are contrary to what the community wishes. This is a political question. Why don't you represent your constituents?

*Mayor Becker* stated the decisions that have been made have been based on what is allowed by the City Code. They have amended the code several times, sometimes to reduce development and in some case to make development more compatible with the community at large. He doesn't believe they have ever gone out of their way to work with any developer. Council is bound by the City Code as to what they can enforce.

*Mr. Poirey* stated today council is free to make a decision any way they want. The community will see if they make their decision in the direction that the community wants, even if that means the city will have to defend its position in court or whether they will give in to the wishes of the developer. That is what they are here to witness today.

*Atty. Mandalas* stated there is a political aspect to this question, but there is also a very legal aspect. In his view the question before city council today is not a question of should there be more or less density on the Brittingham property. It is the question if the developer has obtained some level of rights to process under the City Code that existed when the application was filed. It is more a question of has this developer obtained vested rights to proceed, and if yes, any new ordinances should not apply. If you don't believe vested rights have been achieved, then a new ordinance could be applied. He has explained that vested rights is a highly fact intensive analysis, it is not a clean or easy consideration. There is very much a legal aspect to council's decision today.

*Mr. Morgan* questioned what the purpose is of a preliminary site plan approval in the subdivision process. *Atty. Mandalas* explained most view it as once there is a preliminary plan approval, it sends a message to the applicant that the plan is in line with the code and there is an expectation that if the developer proceeds along the path they are on, it is likely be approved. It is not a foregoing conclusion but at that point for financing purposes it signals they are along the right path. *Mr. Morgan* stated at that point it would be reasonable for the developer to commit significant resources to the project. Has that happened here? *Atty. Mandalas* stated preliminary approval has not been granted for this development.

*Deputy Mayor Beaufait* responded to Mr. Poirey's comments regarding density. The county could have allowed 138 units and the city is allowing only 93 units. We did not exceed the county's density.

**Doug Spelman, Samantha Drive.** *Mr. Spelman* agreed this is a legal matter. He made comment on how he sees they have gotten here today. There have been a number of steps. A group of concerned Lewes citizens were trying to fight what was happening on the Groome Church property, the building of 293 homes for which they had the right to build under AR-1. Council put forward \$500,000 to protect New Road from development. While they were distracted fighting for the Groome property, the annexation committee looked at a group of rules and guidelines and came up with a new zone that was more liberal than the county and in affect was doing exactly what they were fighting against. It permitted higher density, permitted shorter setbacks and in fact they forgot that the county would have required 75-foot setbacks, not 15 feet. The goal was to protect the city from the evil county that approves everything. Of course, that is not what happened. We the citizens of Lewes would have been way better off dealing with the county. The ad-hoc committee went out, as was their right under the goal of trying to develop property responsibly, they sought developers and were successful. They spoke with developers, there was nothing illegal about that at all. They enticed the developer to come into the city asking them what do you need to develop this property successfully and with that input the AX-RES was created. The two zoning classifications have various setbacks and other requirements in them and again the ad-hoc committee forgot about the setback issue. While it was easy to overlook, it was a major omission. With that, city council decided it was important enough to request the Annexation Regulation Review Ad-Hoc Committee, replacing two of its members, to look at the short comings of the AX zones.

The problem and goal for those citizens present is that, and the reason for the FOIA complaint... Mr. Spelman read from his notes as follows: "On January 7<sup>th</sup> at a public meeting, the Brittingham property developer was granted an exemption from any possible future zoning changes. The attorney general advised Mayor & Council to provide reasons for a vote at a future meeting." But implicit in that is that the exemption given to them was not proper. Their group maintains that the city acknowledged there were deficiencies in the AX-RES for setbacks, buffers, open space, wetlands, which are all being reconsidered by the annexation committee. There are some legal questions that Solicitor Mandalas touched on, pending ordinance, vested rights, equitable stopple, these are all legal issues that with guidance they can get through. The conclusion is they are asking council to withdraw the exemption from the property. The property will be developed, and it should be developed but it should be developed appropriately.

*Councilperson Reardon* stated Mr. Spelman made many implications in his comments that he doesn't agree with and takes exception to. In his opinion, the reasons Mr. Spelman gave as to why things were done are not correct.

*City Planner Tom West* stated there has been discussion as to what could happen in the city versus the county. That is open to debate and they won't know until it is submitted. What the committee did was to create a zone that has a range of densities. The county has a zone that has a range of densities. The city's range is less than the range of densities in the county. The committee created a zoning district that council adopted. The developer wasn't here until after the zones were approved. The points about density have to be taken in context with the zones that were created, there is a range within the city and the county, and the city is the same as the county.

*Mayor Becker* stated the AX zones were already defined before Mr. Setting came to the city to discuss annexation. The building codes were not designed for Mr. Setting. *Mr. West* agreed, that is correct.

*Councilperson Reardon* stated there was no outreach to any developer in this area. There was outreach to the owner of the property, Mr. Brittingham, to see if he was interested in annexation. There was a discussion with him a long time ago.

*Mr. Spelman* questioned if there were any discussions with Mr. Setting or any development prior to granting the annexation on January 7<sup>th</sup>. *Councilperson Reardon* confirmed there was no conversation with Mr. Setting prior to the annexation ordinance being passed. *Mr. Spelman* stated he would accept that.

*Councilperson Morgan* stated he didn't feel the question was being answered. *Mr. Spelman* stated he feels the zoning was shaped by the needs to make a profitable situation for a developer. *Councilperson Reardon* clarified the question is, was there any conversation with a developer prior to mayor & council adopting the AX zoning ordinance. The answer is there were no conversations with any developer prior to the approval of the zoning ordinances by the Mayor & City Council. *Mayor Becker* clarified they were adopted in May 2018.

*Councilperson Morgan* stated so there is not a misunderstanding because he is hearing a different question from the answer given. Was there any conversation with the developer before council voted to annex? *Councilperson Reardon* stated there was no conversation with the developer before council's approval of the annexation zoning ordinance. *Deputy Mayor Beaufait* clarified that once the AX zones were adopted, Mr. Setting came to the city to request an explanation of the AX zones so they could consider annexation into the city.

*Mr. Spelman* stated once he realized what was going on and read all the minutes, there is only reference to three public comments being made during the 26 meetings. Even though it is a citizen's responsibility to see what is going on, clearly there was no outreach by council or the committee to seek engagement from the community.

**Janice Hillman, 301 Samantha Drive.** *Ms. Hillman* stated what she is hearing is there are several different zoning rules that could be applied to different needs of the city. It seems to her that this is a higher density zoning allowed on this property and seems contrary to the goals of Lewes and the community in that their goal is to preserve wildlife and the wetlands. To keep New Road as a designated scenic corridor this seems to run counter to what she sees as the goals of Lewes.

**Marta Namack, 128 New Road.** *Ms. Namack* stated she supports previous comments made. She doesn't agree there is a vested interest already in the property. She feels the property rights of the residents need to be considered. Given the flooding in area, it will only get worse. They need to prepare for the inevitable flooding that is coming which will reach all of their properties. It is not just the density, but the regulation which should apply to all annexed property, especially this one which is right next to Canary Creek. Anything that doesn't infiltrate into the soil, is going right into Canary Creek and there will be less room for other water to go into Canary Creek and it will back up onto our property. There is an ordinance that doesn't allow water from one property to drain onto another one. She understands it is hard to enforce. Why would we allow more impervious surface which we know will affect other people's property through Canary Creek? She hopes they will reconsider their decision and not exclude the Brittingham property from any further amendments to the annexation ordinance.

*Councilperson Morgan* stated in light of AG's decision, he assumes the decision made by council after an executive session that was not held properly would not be on the books anymore. *Atty. Mandalas* stated he doesn't believe that is correct. The AG's office has stated they don't have any authority to invalidate a vote, so the vote took place and is on the record. It could potentially be invalidated by a court of law. *Mr. Morgan* stated he thought that by rescheduling the meeting, they were going to redo the vote in an effort to atone. *Atty. Mandalas* agreed the AG's office suggested remedial action which would be to take the vote again in a public setting and that is the purpose of this meeting.

**Francis Murphy, 128 New Road.** *Mr. Murphy* asked council to not grant an exemption to the Brittingham developer at this time. They have express numerous reasons by email and by letter that he is sure they have all read.

**Brian Aldred, 120 New Road.** *Mr. Aldred* stated the issue is to determine if the town has the legal ability to adopt new ordinances to the Brittingham subdivision. It is his belief, based on the research he has done, that the town had the authority to do that before the land was set to be developed and immediately after it entered into the city of Lewes by annexation. Title 22, Chapter 3, Section 301 of the Delaware Code "...towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land..." It is his belief that it is common practice for towns, local governments to enact new ordinances to apply to the challenges they face. It for that reason that on December 4, 2018 Sussex County Council adopted a measure to exclude wetlands from the calculation of land density. As a result, there have been no other legal challenges from any other active development with regards to that. He wants to address how the town defines open space at this time from the City Code. It states that open space has to be arranged "to permit ingress, egress or passage over and through the area". So essentially it has to be traversable, able to walk across it and that is not possible on swamp land. The Canary Creek development is a model on how to preserve half of the parcel for open space and include development. The town has a legal right to pass a new law on the calculation of open space and exclude wetlands from it.

**Debra Evalds, 10 Harborview Road.** *Ms. Evalds* stated after the vote on January 7th, the public outcry was very strong. The people spoke. She is very active in these issues in the city of Lewes and has not heard a single person that agrees with that decision. She urges council to not exempt any development from pending legislation. There is a movement in Sussex County and here in Lewes, to open up our eyes and look at what is going around us. New Road has been a frozen lake for the past two weeks. Some place this has to stop. Let's work with Sussex County in getting better setbacks, better protection for our wetlands and please do not allow this exemption.

**Ken Sosne, 407 Samantha Drive.** *Mr. Sosne* stated he is in opposition. New Road has been totally impassable and is collapsing so they have lost one egress to the city. By putting 90 homes there, it will create other issues.

**Len Shyles, 301 Samantha Drive.** *Mr. Shyles* stated he is in opposition for reasons given. He doesn't think the constituents that council represents are being well represented if you don't follow the will of the people on a matter that deals with the general welfare. He thinks a very convincing case has been made that these choices will serve a very small public at the expense of the larger public. That is counter to council's mission. He hopes they will vote against it.

**Maryanne Ennis, 50 Harborview Road.** *Ms. Ennis* stated she feels the annexation committee meetings were not well advertised nor did they let the people know what was going on. The main point is that all along at the planning commission and annexation committee meetings they talked about following Sussex County. The public should be informed about what is going on. The developer should have known the city was following Sussex County. As far as the pending ordinance they should have been aware that whatever Sussex County was going to do, the city would

follow. Consequently, she feels they should oppose keeping all the ordinances that were there when Mr. Setting brought his application in because they should have been aware the city was going to follow whatever the county did.

**Madeline Lewis, 588 Pilottown Road.** *Ms. Lewis* stated she has lived in Lewes for 25 years. When she first moved to Lewes, the city council was the people. Over 25 years she has seen that erode to the point that they have to be mindful of what city council is up to and read between the lines. She is retired now and has more time. Because of the nature of things, what's happening with the water and marsh lands, she intends to become much more active. She urged council to change their vote for the people of Lewes.

**Nancy Moore, 117 Rodney Avenue.** *Ms. Moore* stated it is a wonderful thing that they have hired a hydrologist. She doesn't understand how any decision can be made on land use and development until they receive her report. She requested waiting for the report and take it into consideration.

**Mr. Jim Fuqua, Attorney for the applicant Mr. Settings.** *Mr. Fuqua* stated the purpose of today's meeting, despite a lot of things that have been said, is that city council made a decision that was challenged under a Freedom of Information Act complaint that it shouldn't have been done in executive session. There was a decision made and the purpose of this meeting is to do it in a public setting. That's why we are here. The question is if council is going to reinforce that decision or not. The second thing is, he and Mr. Setting are not the enemy. They are doing what is permitted by the City Code to be done. He understands there are people opposed to it, but it isn't right to treat Mr. Setting as if he is doing something wrong. He is not asking for any modifications or a variance. He is not trying to do something that isn't permitted. They are trying to do what is permitted in Lewes. The meetings by the annexation committee were all properly noticed, just like every other meeting in Lewes is done. He understands people may not have appreciated the significance of it or really understood what the impact would be, but it was done properly. Also, the comment about why we are here today, it is not politics, it is a legal question. The legal question is vested rights, a legal doctrine. The city attorney has advised on what that is and he thinks it is something that applies to this application. He also recognizes there are politics involved in everything and that is just a reality. This application whether it is opposed by one person or a 100 people or 1,000 people, does not change the basic law. These decisions are based on the zoning ordinance. It is not a popularity contest and despite comments that the town is governed by the people, it is actually governed by the law. The new regulations were adopted after numerous meetings and a lot of time and effort. It wasn't something done irrationally, or lightly and was done with the intention to encourage developers to annex into the city of Lewes. What happened with Mr. Setting was exactly what was intended to happen. The word exemption or exception is not correct. This developer has the status of vested rights, which legally gives him the right to not be impacted by future legislation. Beyond the legal doctrine, there are two other important things. First is *fairness*. In your judgement would it be fair to change the rules on this proposal, Mr. Setting's application, where he has acted in good faith. He reviewed the city and the county's ordinances, the zoning law for annexation residential and based on that he retained professionals to design a site plan that is fully in compliance with the ordinance. He has had meetings with city staff, discussions with city staff and basically has proceeded with annexation in the city with that zoning designation. Would it be fair to change the rules now for someone that has acted in good faith? Secondly is *integrity*. How would the integrity of city council be viewed if it determined to alter the very law that council very carefully and intentionally enacted, a law that Mr. Setting relied upon. If you want to change the law in the future, that is the right of the city. He is not here to say what law is right or wrong. That is for council to determine and is within their right to do so, however on this application that is already pending before the city and has relied upon, we think that would be improper and incorrect. He would not even go to the question of legality, it is a question of *fairness, good faith and integrity*.

**Doug Spelman, Samantha Drive.** *Mr. Spelman* stated they are not here to diminish or belittle Mr. Setting. He is an honorable gentleman. They rely on agendas to know what is happening with city council and its committees. Today's agenda reads "Consideration and possible action on the application of any further AX-RES (Annexation Residential) zoning district amendments (including but not limited to the density calculation formula) to the Lewes Waterfront Preserve major subdivision application. *(In accordance with the recommendation in the Attorney General's Office decision dated February 15, 2019, Mayor and City Council will reconsider action taken at a Special Meeting on January 7, 2019. Mayor & City Council will reconsider action taken at a special meeting on January 7, 2019.)*" Council has the opportunity to re-vote and to vote as their consciences tell them. Based on his attendance at all the new ad hoc committee meetings there have been, there is the question of recusal by the chairperson Mr. Beaufait. Mr. Beaufait is a good and honorable man as well and he doesn't mean to diminish him, but his goal is different than some of the people in this room. Affording too much liberty and too much freedom to the developer's cause, there was a statement

made at the last meeting that Mr. Beaufait stated he values both the citizens and developers *equally*. He would contend that equation should not exist. We the people should have at least 51% of the opinion. Finally, on the vested rights issue, how does the vested rights of a developer trump the vested rights of 2900 people. The city of Lewes, our residents are entitled to your representation. They ask that council reconsider what the people of Lewes want.

*Deputy Mayor Beaufait* stated council has a responsibility to not only the people of Lewes but to the developers and others that come before them. They have a responsibility to hear them out and weigh all the issues. He did not say they gave more weight to anyone.

**Thierry Poirey, 19 Harborview Road.** *Mr. Poirey* stated first, there is no vested rights. This is a serious legal question that should not be adjudicated here. The city should protect the citizens and litigate this issue all the way to the Supreme Court if necessary. Secondly, there is no unfairness to the property in making sure it is developed as it would have been if it had not been annexed. The property right now is getting a windfall and all the city would do if it applied the same regulations regarding the wetlands as the county has now decided to apply, was simple to remove this windfall that fell on this property which would not be better off the way it is proposed to be developed if we had not taken all these meetings. We didn't let things run their natural course and as a result the value of this property has now sky rocketed compared to what it would be if nothing had been done. All we are asking the council to do is to put things back to where they would be normally anyway. When we talk to fairness, you don't have to feel guilty, you don't have to listen to this man telling you have to feel guilty if you represent the citizens because in all fairness, the developer will be short changed. He will not be short changed. Right now if you decide to maintain this regulation, he will benefit from a windfall.

*Mr. Fuqua* stated he is not here to argue somebodies' feelings or emotions. The fact is, Mr. Setting looked at this property based on the laws of Lewes. There is no windfall. He contracted to purchase based on the laws of Lewes. He disagreed that the people should have 51% of the say is this. There is equal protection under the law. Everyone is entitled to the same benefit of the law and the same protection of the law. That is very fundamental to our whole society. The rule of law is what governs. Vested rights is a legal doctrine. There is a question of fairness and integrity.

**Marta Namack, 128 New Road.** *Ms. Namack* stated the question of fairness is to the existing property owners who are threatened by the flooding. The property should be developed but let's develop it the way we plan to have all the other parcels annexed into the city so we can be proud of our city.

**Madeline Lewis, 588 Pilottown Road.** *Ms. Lewis* stated the Attorney General's Office of the State of Delaware is why we are there. They received a complaint and determined council had the right to re-vote this issue. That's why we are here, because of the law.

**Debra Evalds, 10 Harborview Road.** *Ms. Evalds* spoke to fairness and integrity. Developing a property to the maximum allowed under the law is not fair to the neighbors or those living downstream on Canary Creek. Integrity. There have been earlier comments by Mr. Setting at the public meeting at the library that have led people to question if he will even be the developer of the property. She feels the people of Lewes would like that answered.

*Mr. Fuqua* stated any land use decision is irrelevant to who develops the property. What they are addressing is how the property would be developed. In fact, if they get into who develops the property, the courts have already ruled that is totally improper. It shouldn't be a personal decision. As of right now Mr. Setting is planning to develop the property.

**Maryanne Ennis, Harborview Road.** *Ms. Ennis* stated Atty. Mandalas made a comment at a previous planning commission meeting about development and zoning. He said something like when you zone a property it has to be in accordance with the neighboring properties. She questioned if there are any other rows of townhouses along New Road of which he is familiar. *Atty. Mandalas* stated it is one factor. He knows about Canary Creek.

*Ms. Ennis* questioned if he is saying townhouses are not consistent with the other properties along New Road? *Atty. Mandalas* clarified that a zoning decision should be consistent with the character of the neighborhood. The city of Lewes has created a new zoning district therefore this is a new neighborhood character that is being created. A transition zone is being created by the annexation zones. *Ms. Ennis* stated this is not consistent with the neighborhood and could be a litigated. They are not threatening but they have funds available. It is debatable and

they could go into litigation about it. Mr. Setting knew the city was making changes consistent with Sussex County and Mr. Setting should have been aware it was a pending situation that some of the zoning specifications had not been fully decided. For this reason, she thinks they should consider a pending ordinance and go to town and say we're going to overturn what was decided in the last meeting.

*Atty. Fuqua* stated they are here today on the question they are all well aware of.

**David Ennis, Harborview Road.** *Mr. Ennis* stated he has attended many meetings and wanted to point out something of a legal nature. Many of the meetings they attended had a one hour opportunity to speak and then there was a meeting to decide the outcome without any public discussion by the members of council. He feels that due process has failed the citizens of Lewes. They didn't digest the citizen's comments in any of those meetings and went directly into an outcome. The city is hiring a hydrologist being paid for by tax payers. Mr. Fuqua and Mr. Setting are not paying. It seems to him the delay they are looking for could be achieved if council would require Mr. Setting to conduct an archeological study. *Mr. Fuqua* stated this is irrelevant. *Mr. Beaufait* agreed. *Mr. Ennis* stated this would be a compromise to have the archeological study done and give time to have the hydrologist study done and then they can make decision based on the information not on hearsay. *Mayor Becker* clarified that this property is under review by the planning commission at this point. Today's decision is about whether or not council is going to exclude them from future changes to the zoning ordinance.

Councilperson Reardon stated they have heard many, many comments over a long period of time from the public. He has listened and considered every one of them and now he will go forward with his decision on this issue. *Mr. Reardon* made the following statement:

The City of Lewes in the 2015 Comp Plan identified annexation as a priority. The Annexation ad hoc committee was formed. As was stated this process started in July 2016 and two new annexation zoning districts were adopted by the City in May 2018. Setting Properties in reliance on the existing established standards and permitted uses filed an application for Annexation of the Brittingham Property in August 2018. After a recommendation by the Annexation Comm. the property was annexed into the City and was assigned the AX-Residential zoning district. Setting Properties had the option to file a subdivision application with Sussex County. However, they chose to pursue annexation and development within the City. In December 2018 Setting Properties, again relying on existing standards and permitted uses, filed an application for a major subdivision. Subsequent to that application being filed the County adopted an Ordinance excluding tidal wetlands from the density calculation. The City then entered into discussion as to whether or not to modify its density calculation in the Annexation zoning districts and include the Brittingham Property in any such modification relying on the Pending Ordinance Doctrine This Doctrine is based on the concept of vested rights and is judged by good faith reliance on existing standards. In this instance, Setting Properties invested in the annexation process based on their reliance of the existing standards and permitted uses of the AX-Residential zoning district. It is a matter of equity that any modification of the AX zoning districts not include this property. Also, there is no certainty in the process for the City or owner if the rules change once the process is initiated. Some folks have implied that if the City did not annex this property it would not be developed. Using Point Farm as an example we know this is not the case. The City and the owners were engaged in the annexation process and eventually for various reasons the owner withdrew the application. The owner then made an application to the County for essentially the same major subdivision. The County approved that application and the development is currently under construction adjacent to Canary Creek. Some folks have expressed concern about townhouses on this parcel. Without prejudging the application, I would like to point out there currently are 3 townhouse communities in Lewes. Pilot Point, Port Lewes and Canary Creek which is just off New Road. In conclusion, I do not believe any ordinance change should be applied to the Brittingham Property.

*Deputy Mayor Beaufait* made a statement as follows:

We have heard a lot of misinformation today and it is most unfortunate. Shouldn't change the rules once a process has started. We are here to consider whether or not to impose a change in the ordinance for the AX-Residential Zone on the Brittingham development. I have heard and understand that members of the audience see this as an opportunity to correct a concern that they have with the Brittingham development – hence, oppose the proposed policy. But the issue is more complex than just that. This policy, if council passes it, is in line with many other cities and counties. One major concern I've heard expressed numerous times is the objection to townhouses and the assumption that the county would not allow townhouses. There is absolutely no basis for this assumption as evidenced by the fact that the county just recently

approved some 24 townhouses on 7 acres on Gills Neck Rd. As for the Brittingham property, the county could allow, under its new density formula, more units than the city, under our current density formula. That is a fact. We have to be realistic about this and NOT make a judgement based on emotions. Under question is the idea of maintaining the AX Residential zone as it is currently defined in our code, and under which the Brittingham property was annexed. Without question, for me, it is the right thing to do. I've said it before: it is wrong to change the rules once the process has started and as I was quoted in the Gazette, in a baseball game you don't decide in the fourth inning to it takes four strikes for an out and three balls for a walk. You don't change the rules once the process has started. A policy of not imposing a change in the rules once a process has been initiated is in line with that of other cities and counties. I view the City Code as the foundation for a binding agreement for a developer with the City. It states clearly that if one wants to develop property within the city, this is what we expect. Annexation of the Brittingham property was based on such an agreement and that is the current code at the time, and it would be wrong for us to unilaterally change the terms now. Changing the rules at this time with respect to the Brittingham development would be the end of any annexation effort and make a mockery of the comp plan. The properties contiguous with our city limits would continue to be developed under the rules of the county. You may recall the purpose of the annexation zones developed was to provide a transition between what the county does and what the city currently does. That is exactly what it does, it provides a transition.

**Thierry Poirey, 19 Harborview Road.** *Mr. Poirey* in an angry outburst stated they have read statements prepared before the meeting. They have absolutely ignored what people have said. Shame on you.

*Mr. Poirey left the meeting.*

*Councilperson Morgan* stated vested rights is basically a legal term for fairness. At a certain point the developer has invested too much to fairly ask them to change the rules. The vested rights doctrine, as Atty. Mandalas has stated, is fact intensive and is an uphill battle for the developer. *Mr. Morgan* stated it is particularly an uphill battle for the developer before preliminary site plan approval, which in the City Code, is the trigger for making a big investment. When a developer takes on a project, they take on some risks. One of those risks is a change in the environment. It can't be an arbitrary change, it has to be a lawful change. In his opinion it is perfectly reasonable at this point to expect the developer to adhere to the community's judgement of what is reasonable. The question of fairness is not just vested rights for the developer, the question of fairness also goes to the community. He would suggest that regardless of 26 meetings, thinly attended, thinly advertised, that we have seen from the meetings held more recently, the community feels this was sprung on them. They didn't have a fair opportunity to give input or that council is listening to the community even now. He thinks that vested rights as an aspect of fairness and notice to the community as an aspect of fairness are both things they need to consider. Second point, this is a zoning decision in substance. Whether they call it a change to the text of the zoning ordinance, council is saying they are going to exempt a particular development from a zoning regulation. That strikes him as awfully close to spot zoning. He thinks they need to be very careful about enacting spot zoning on behalf of a particular developer to whom a couple of the council members have grown close.

*Mr. Morgan* stated to clear the air, he requested *Mr. Beaufait* explain what meetings and conversations he has had about this in private.

*Mr. Beaufait* questioned the city solicitor whether it is appropriate to answer this question. Atty. Mandalas stated there is no legal requirement to answer this question.

*Mr. Beaufait* stated they had one meeting when Atty. Fuqua and *Mr. Setting* were present. *Ms. Townshend* and *Mr. West* were also present. They asked about the ordinance and what it meant and what they could do under the ordinance. They gave no personal information, no personal assurances, they simply explained the ordinances. Then right after the New Year, after the January 7<sup>th</sup> council agenda had been set, *Mr. Setting* called him and asked if there was anything he could do for the meeting, such as make a presentation. The only thing he told him was to be calm and let council do its business. That is all he said. Then *Mr. Setting* called him and told him that if he stayed in the county, he could put up 138 townhomes. *Mr. Beaufait* told him they had done all the due diligence, just be calm and let council do its business. These are the only conversations he had with the developer. He has no investment in what *Mr.*

Setting is doing. It is his business and he resents the insinuations that he has any, any motive to do anything special for Mr. Setting or the Brittingham property. You sir are out of line.

*Councilperson Morgan* stated then, Mr. Deputy Mayor, you had a private meeting, behind closed doors, unannounced and not requested by council and on which you did not report to council, with the chair of the planning commission about the Brittingham development, did you not.

*Mr. Beaufait* stated he is not a trial.

*Mr. Morgan* requested Mr. Beaufait recuse himself.

*Mr. Beaufait* stated he will not, why don't you.

*Mr. Morgan* stated he has not had private conversation with the developer.

*Mr. Morgan* stated he has concern this is spot zoning. His own feeling is the decision they are going to make is contingent on what the council later decides about a change in zoning ordinance. They may not change the zoning ordinance and in which case the density calculation wouldn't apply to Brittingham any more than anybody else. But it may and if council does adopt the wetland density exclusion, then the difference in the number of houses on this parcel is going to be something between 90 and 70. That is significant and is not the kind of decision that merits this kind of concern. What does concern him is the way we have gotten here and the process. What he would strongly suggest is this be defer this so that council can digest what they have heard, rather than reading from scripts, and so they can hear from Councilperson Osler who has not had a chance to. She could listen to the audio, it would be very instructive, I think. Maybe we should all listen to audio of this. I suggest we give our colleague a chance to take part in this out of respect to the public interest, and so we have a full council on this important question.

*Mayor Becker* stated this has been a very emotionally charged meeting and it is important to step back a bit and talk about the history of this community. Many of you have been here a long time, and many are recent arrivals to the community. We all have a very strong interest in not losing the integrity of the community. It is important to know, Lewes could have annexed all the properties out to Route 1 in the 1980s and 1990s. Council took no action at that time to do it. We could have controlled what is going on along the New Road, Gills Neck Road and Savannah Road corridors. That is unfortunate and would have made a big difference in the way this community went forward. He thinks it is important to recognize that Mayor Smith was interested in doing that back in the late 1990's, but council showed no interest, so they let it go. We did annex land that was not contiguous and then the state changed its laws requiring contiguity. This property by virtue of backing up to Pilottown Reserve, is contiguous to the city. Throughout that time, we heard a lot of cries from the community for the need to hire a planner and he has been a very strong proponent of that, and he is very glad the city hired our planner, Tom West. He has proven to be a very valuable asset to the city. That hiring was done with the idea that it was important to develop a stronger working relationship with the county and figure out ways to work together with the county and with any development to make sure it was to the benefit of the city and less impactful. In 2016 prior to hiring Mr. West, council appointed an annexation committee, recognizing again that annexation was the only way to have control over what was going on at the city's borders. County council is made up of five members, of which only one represents our area and in many cases, it has been with a slim majority they have been able to get some of the successful decisions that have benefited Lewes. He also pointed out he was very much a part in the late 1990's and early 2000's opposing the development that was proposed for where the Canalfront Park is located. The Canalfront Park has been recognized state-wide as a jewel in this community and has made Lewes the jewel that it is in the recognition be the state, but elsewhere. They opposed the developers on that property and were successful. It took nearly 10 years and cost thousands of dollars. He has been a supporter of reasonable development. They were very fortunate that they won. We need to step back and look at where we are and where we aren't. We can't keep inserting ourselves in the county and expect to have results. County council has changed and there are new members. We need to make sure that what we are doing is going to have a positive impact on the city and when possible, make sure it is in benefit in adding residents to the city. Annexation is only one tool that we have, but to make it work they have to attract developers who are willing to be annexed. They have to do that voluntarily, we cannot force annexation. To get the developers to step forward, we have to make sure they understand the city's regulations and guidelines and that is no easy task. We appointed a committee in 2016 and it took two years to develop the annexation ordinance. While it has been pointed out that the 26 meetings may not have been easily identified on the city's website, if you went to the city's calendar, each of those meetings were noticed as annexation committee meetings. It is not hard to find the city calendar on the website. Once attracted, they have to have confidence the city code is something they can rely on and move forward. If we

change the conditions, as we saw with Point Farm, they decided not to seek annexation and went to the county. He had been approached that the county would never approve that development and in less than three months it was approved, and those houses will be six feet higher than anything allowed in the city. They will also be smaller lots and on narrower streets. There is a good possibility that the county will not act in the best interest of the city of Lewes. It is very important to look at the options. We work with the developers as they come in, they look at our zoning regulations as we have them on the books and they act accordingly or do we let them go to the county, as has been suggested. I think our chances of shaping development are much stronger if it is being done inside the city of Lewes. Canary Creek is a good example of how the city and residents worked with the developer and came up with a plan that is much more acceptable and has been very successful. At current point this proposed project has already started a critical review by the planning commission. I believe our planner and members of the LPC are very capable and will act to ensure that this project is given a very thorough, professional and very careful review. It has been mentioned that the hydrology report will be very important. The way this process is going, that is a very real possibility that the hydrology report will be finished before this project gets out of the planning commission. That is a critical component. There will be a public hearing by the planning commission and if it gets preliminary approval and goes forward to final approval, there will be another public hearing by the planning commission. There will also be a public hearing by city council. He believes there are a lot of checks and balances along the way, none of which they would have if this development went to the county. Mr. Setting developed this plan based on the ordinance as it was written in a good faith effort. He sought definition from what is on the books. For that reason, he feels they have an obligation to be respectful of everyone in the room, but also if we are to have any chance of attracting any future annexation and have any integrity with any developer or any other parcel to come into the city, we need to be respectful of the zoning ordinances that were on the books at the time of annexation and the time of request. He appreciates everyone's concern. He has done this personally for 40 years and is very interested in the city. He has been here for over 40 years trying to improve this community. This was a backwater community when he arrived and all of you wouldn't have been here had it not have been for some of the things that have happened over the last 40 years, in particularly over the past 15 years. He thinks they are better off working with the plan they have and let the planning commission and city planner work with the developer to ensure that they get the best possible results that will benefit the city in the long run.

*Mayor Becker* stated he is sorry that Councilperson Osler was not able to be present and was very interested in her being here, but they were not able to arrive at a date convenient for everyone. She can certainly listen to the recording and respond if she so chooses.

**ACTION:** *Councilperson Morgan made a motion to suspend consideration of this question until all council members can attend a meeting.*

*Mr. Morgan* clarified that Mayor Becker can second the motion under the rules of order. *Mayor Becker* stated he doesn't see any benefit to seconding the motion at this point.

**ACTION:** *The motion dies for lack of a second.*

*Mayor Becker* called for another motion.

**ACTION:** *Councilperson Reardon made a motion, that based on legal advise due to the fact that Setting Development had relied in good faith upon the regulations within the Annexation Residential Zone, there has been a potential vesting of rights and any amendments made to the AX zones would not be applied to the subdivision application filed for the Brittingham property, seconded by Deputy Mayor Beaufait.*

*Councilperson Morgan* called for discussion. That motion relies on the doctrine of the vesting of rights. It has been discussed, but he pointed out that apparently it doesn't govern the Deputy Mayor's thinking. His thinking is, you don't change the rules of the ball game after it starts, not that you analysis whether there is sufficient investment has been made to justify applying a change to a developer. Mr. Beaufait's reasoning apparently does not fall with the vesting of right doctrine.

*Deputy Mayor Beaufait* stated he finds it interesting that Mr. Morgan knows what he thinks.  
*Councilperson Morgan* stated that if what you say reflects what you think, then I do.

*Mayor Becker* called for the vote. *Atty. Mandalas* stated it must be a roll call vote.

**ACTION:** **Councilperson Reardon stated he is voting in favor of the motion** for the following reasons: *The City pursuant to the 2015 Comp Plan identified annexation as a priority and adopted two new annexation zoning districts to further that effort; Setting Properties in reliance on the existing established standards and permitted uses applied for Annexation of the Brittingham Property into the City; that application was approved by the City; then Settings Properties, again relying on existing established standards and permitted uses, applied for a major subdivision on the property; after that application was received by the City, the County adopted an ordinance to modify the density calculation excluding wetlands from the density calculation; the City discussed and considered applying any future ordinance change regarding density calculation to the Brittingham Property based on the Pending Ordinance Doctrine; that Doctrine is based on the concept of vested rights and is judged by good faith reliance on existing standards and permitted uses; in this instance, Setting Properties invested in the annexation process based on their reliance on the existing standards and permitted uses of the AX Res zoning district; it is a matter of equity that modification of the AX zoning districts not include this property; also there is no certainty in the process for City or the owner if the rules change after the process is initiated.*

**Deputy Mayor Beaufait voted in favor of the motion** for the following reasons: *In line with what Councilman Reardon has stated, I believe this is the right thing to do; more importantly, it is wrong to change the rules once a process has been imitated or is in progress; the request for annexation was based on the fact that the property would be zoned as AX-Residential as defined in our code at that time; that our code presents a binding agreement to anyone wanting to develop within the city; to change the rules at this stage would, I believe, do irreparable damage to the City's reputation; we cannot impose an ordinance that does not even exist at this time and likely won't be in place before August or September, and finally; if we were to change the rules now it would be the end of any effort to annex any of the land contiguous to the city limits, thus, leaving it to be developed and the county's control.*

*Councilperson Morgan* voted against the motion for the following reasons: *He believes that should be governed by legal doctrine, not by rules of the ball game; he thinks fairness to the citizens and to the developer are both considerations they need to take into account; we should not prejudge whether a particular spot should be specially zoned if we do adopt a change in the zoning density calculations; he also feels Councilperson Osler should be present for this discussion and is a shame they are making this decision without a full council.*

**Mayor Becker voted in favor of the motion**, for the following reasons: *given the developer has proceeded with the proposal based on an annexation code that allowed option 2, which is the option he selected, as a part of his decision to seek annexation, the annexation zones were fully adopted prior to any discussions with Mr. Setting and he sought clarifications regarding the options available and made a selection of option 2; he does not believe this is spot zoning, he thinks it is what was allowed within the annexation zone at the time it was adopted in May 2018; it is regrettable that more people did not participate in the development over a two years period and the final adoption that occurred in May 2018, perhaps the zoning regulations would have been different; the decision made by county council was arrived at within days of our consideration of the annexation of Mr. Setting's property. They are making careful decision on how it might be amended but as Mr. Beaufait as stated, we a months away from a new regulation with the continued work by the annexation committee. He feels if we are inconsistent with this one, we will send the wrong message to any future annexation and the only way to control development is to have them annexed into the community. We will not be able to look to the county to help us on a consistent basis. He regrets that Councilperson Osler is not present to participate in the discussion.*

*The motion carried with a majority vote of 3-1.*

*Deputy Mayor Beaufait* suggested the council extend an invitation to Mr. Setting to discuss the overall development of the property, considering the issues that have been expressed.

*Mr. Fuqua* stated they are already in meetings with the planning commission and did not believe it would be proper.

*Mr. Beaufait* stated it is just a suggestion and will leave it on the table.

3. **ADJOURNED:** The meeting adjourned at **11:50am**

Minutes submitted by,

Alice Erickson  
Recording Secretary