

MILFORD CITY COUNCIL
MINUTES OF MEETING
October 24, 2011

A Meeting of Milford City Council was held in the Joseph Ronnie Rogers Council Chambers at Milford City Hall on Monday, October 24, 2011.

PRESIDING: Honorable Mayor Joseph Ronnie Rogers

IN ATTENDANCE: Councilpersons Steve Johnson, Garrett Grier III, S. Allen Pikus, Dirk Gleysteen, Owen Brooks, Jr., James Starling, Sr. and Katrina Wilson

City Manager David Baird, Police Lieutenant Kenneth Brown and Recording Secretary Christine Crouch

City Solicitor David Rutt, Esquire

CALL TO ORDER

Mayor Rogers called the City Council Meeting to order at 8:50 p.m.

INVOCATION AND PLEDGE

The Pledge of Allegiance followed the invocation given by Councilman Starling.

RECOGNITION

City Manager Baird Presentation of DEMEC Shovel to Mayor and Council

Mr. Baird stated that as the DEMEC boardmember appointed by City Council, he is presenting the ceremonial shovel to Mayor Rogers from the Beasley Unit 2 groundbreaking at DEMEC last week.

COMMUNICATIONS

All items included in packet.

UNFINISHED BUSINESS

Wawa Settlement Issues

Mr. Pikus noted there was environmental work required at the Wawa site prior to its sale in order to ensure it meets all state and federal regulations. He said the work is complete at a cost of \$7,000 to \$10,000. As a result he moves the bill be paid from the Wawa Lease Revenue Account, seconded by Mr. Brooks. Motion carried by a 6-0-1 (Grier abstaining) vote.

Mr. Gleysteen votes yes noting the work was necessary because of the sale of the property.

NEW BUSINESS

Appointment of Election Workers/2011 Washington Street Water Plant Referendum

Mr. Pikus moved for approval of the following Election Board and Election Workers for the November 19, 2011 referendum:

Election Board (previously appointed):

Tamela Mallamo
Joanne Leuthauser
Phyllis Fox

320 Lakelawn Drive
509 Ashley Way
200 E. Clarke Avenue

Election Workers:

Carole Mason
Rita Cartwright
Donna Merchant
Karen Boone
Teresa Franklin

153 Barksdale Court, Hearthstone Manor
711 Truitt Avenue, Extended
108 Franklin Street
402 N.E. Fourth Street
5 Lucia Circle

FY2011-12 Budget Transfer Request/Enforcement and Inspections

City Building Inspector Don Williams submitted the following request to City Manager Baird:

I am requesting a transfer of \$10,000 from Revenue Account #101-0000-311.20-10 to the Property Maintenance Account #101-1045-429.68-20. This will allow enforcement of Property Maintenance issues to continue.

Mr. Baird explained the funds are needed for the cleanup of properties and grasscutting expenses which have exceeded the amount placed in this year's budget. However, those property owners have been billed and these funds will cover the lag between the time the expenses were incurred and the reimbursement.

After the city manager confirmed the Revenue Account contains monies reimbursed from grasscutting bills paid from last year's violations, Mr. Pikus moved for approval of the request as submitted, seconded by Mr. Starling. Motion carried.

FY2011-12 Budget Transfer Request/Police Department

The following police department budget request was submitted by Chief Hudson:

*\$15,000 from Wawa Account 101-0000-359.10.10 to Legal Expense 101-1610-421.30-20
\$10,000 from Wawa Account 101-0000-359.10.10 to Contract Services 101-1610-421.30-10*

Finance Committee Chair Pikus advised the \$15,000 was needed to settle a recent legal matter and the \$10,000 will pay for the maintenance agreement for the security cameras downtown that were originally paid by the Parks and Recreation Department.

Mr. Pikus moved for the transfer of \$25,000 from the Wawa Revenue account with \$15,000 into the Police Legal Expense Account and \$10,000 into the Police Contract Services Account, seconded by Ms. Wilson. Motion carried.

Bicycle and Pedestrian Plan/City Planner Gary Norris & P&R Director Gary Emory

Mr. Norris advised that a \$25,000 grant was secured from DNREC for this project.

He then presented and reviewed a brief PowerPoint entitled Walk It, Bike It, Share It (see attached).

Gary Emory then referenced the Mispiration Riverwalk and the need to create a bike-pedestrian trail. He pointed out this is a good way to connect various points of interest in the future development of Milford. He noted that Goat Island is a year away from completion and will complete the trail from Silver Lake; the extension will connect DuPont Nature Center to the watershed to Abbotts Mill.

He emphasized the promotion of healthy lifestyles and eco-tourism stating that Milford is on the right path.

The path will be incorporated into the road work that is currently planned.

SE Water Project Agreement/MBT Land Holdings LLC

Economic Development Committee Chair Grier recalled the referendum that was passed in 2008 for a new water tower and related project. He noted it is the end of 2011 and the project has not yet been started. As a result, he called for an Economic Development Committee Meeting on October 12, 2011. Public Works Chairman Brooks and Finance Committee Chairman Pikus were also present. At that time, there were some issues discussed including infrastructure and expansion matters.

At the meeting, it was agreed that the location of the water tower needed to be a top priority. There have been recent discussions with MBT Land Holdings LLC in regard to a test well on their site. The referendum provided up to \$5 million in borrowing for the water project which included a \$25,000 budget for the test well.

He stated that MBT will be asked to execute the agreement; if they are unwilling, we will proceed with the second option. As chairman of the Economic Development Committee, he feels this is very important the city proceed.

He explained that with a positive test well, the agreement asks the property owner to donate 6.5 acres for use by the city for the water expansion project.

Mr. Baird stated the agreement provides for the installation of a test well for determining water quality and long term capacity, water quality and capacity testing as the basis for determining feasibility for installation of more water system improvements. In exchange, the property owner would donate 6.5 acres as well as a 1,600-foot long and a 55-foot right of way that would connect the proposed area to be dedicated to the city with Sharps Road for access. The agreement is contingent upon the successful test well for water quality and quantity and approval by USDA of the location. The city would begin to put the test well in once both parties signed the agreement. If everything comes back positive, the transfer of the property will occur within one month or 30 days of the satisfactory determination of the test well and approval by USDA.

He added that with positive results, the property for the water treatment facility power and production wells would be dedicated to the city along with the easement.

The city manager then referenced the map outlining the description of the property.

Mr. Baird then read a letter from David Hitchens of Key Properties Group granting permission to the City of Milford to establish temporary water testing on the site. He pointed out the letter does not address the transfer of land should council approve the utility agreement.

He concluded by stating the deadline is in advance of the November 14, 2011 council meeting at which time he will report on their decision.

Mr. Grier moved for approval of the water testing agreement on the MBT Land Holdings LLC, seconded by Mr. Johnson. Motion carried by unanimous roll call vote.

Mr. Grier votes yes adding that the water project is long overdue and this is the first step to having that accomplished.

Mr. Pikus votes yes echoing Mr. Grier's comments.

Mr. Gleysteen stated he votes yes noting it is an important step in the future development of the southeast area of Milford.

Mr. Brooks votes yes stating this has been discussed since before 2008.

Mr. Johnson, Mr. Starling and Ms. Wilson all voted yes.

ADJOURN

With no further business, the Council Meeting was adjourned at 9:12 p.m.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Terri K. Hudson".

Terri K. Hudson, CMC
City Clerk/Transcriber

*MILFORD CITY COUNCIL
MINUTES OF MEETING
October 24, 2011*

A Workshop Session of Milford City Council was scheduled in the Joseph Ronnie Rogers Council Chambers of Milford City Hall, 201 South Walnut Street, Milford, Delaware on October 24, 2011.

PRESIDING: Honorable Mayor Joseph Ronnie Rogers

IN ATTENDANCE: Councilpersons Steve Johnson, Garrett Grier III, S. Allen Pikus, Dirk Gleysteen,
Owen Brooks, Jr., James Starling, Sr. and Katrina Wilson

City Manager David Baird, Police Lieutenant Kenneth Brown and Recording Secretary
Christine Crouch

City Solicitor David Rutt, Esquire

Mayor Rogers advised the Workshop agenda item has been postponed until November.

Respectfully submitted,



Terri K. Hudson, CMC
City Clerk/Transcriber

MILFORD CITY COUNCIL
MINUTES OF MEETING
October 24, 2011

The Milford City Council held a Public Hearing on Monday, October 24, 2011 in the Joseph Ronnie Rogers Council Chambers at Milford City Hall, 201 South Walnut Street, Milford, Delaware to hear the application of:

Morris and Ritchie Associates, Incorporated on behalf of Griffin Realty, LLC
Modification of a Conditional Use to Allow a Planned Unit Development (Milford Ponds Subdivision)
East of US Route 113 at intersection of West Heirloom Way, South of Seabury Avenue, Milford, Delaware
Area of Petition is 107.50 +/- Acres; Current Zoning is R-1, R-2 and R-3.
Tax Map No(s): 1-30-6.00-108.00, 1-30-3.00-6.00-167.00 thru 1-30-3.00-6.00-550.00;
1-30-3.00-6.00-557.00; 1-30-3.00-6.00-558.00

PRESIDING: Honorable Mayor Joseph Ronnie Rogers

IN ATTENDANCE: Councilpersons Steve Johnson, Garrett Grier III, S. Allen Pikus, Dirk Gleysteen,
Owen Brooks, Jr., James Starling, Sr. and Katrina Wilson

City Manager David Baird, Police Lieutenant Kenneth Brown and Recording Secretary
Christine Crouch

City Solicitor David Rutt, Esquire

Mayor Rogers called the Public Hearing to order at 7:02 p.m.

Adoption of Ordinance 2011-12

City Planner Gary Norris advised that this proposal is for a modification to the approved conditional use for a PUD. Several meetings/hearings have been held. The planning commission recommended approval of the modification of the conditional use for this applicant in August.

Richard Forsten of Saul Ewing presented the application on behalf of the property owner Griffin Realty along with Kenneth Usab of Morris & Ritchie Associates.

Mr. Forsten presented a map of the entire project showing its proximity to Route 113 on the south side of the city. He reported that some sewer connections/laterals are visible but no construction on houses or structures has begun.

He explained the original developer, Slenker Land Corporation, abandoned the project at which time it reverted back to the lender. Mr. Forsten pointed out that what makes the 177-acre project unique is that when it was financed, 107 acres were mortgaged in his client's name and the other 70 acres were mortgaged in EB Land Corporation's name. Unfortunately, that action is what has created some problems with the site. He noted the sewer pump station was placed on the EB Lands property though it is designed to serve the entire project; they are not allowing them to use it without concessions.

Mr. Forsten reported that talks with EB Lands began in 2009 though no progress was made. As a result, Griffin Realty chose to proceed with a modification to the PUD which will allow them to do what they need on their 107 acres. They are asking for a modification that will separate Griffin Realty from EB Land.

He referenced the area designated on the map as Phase I which was previously approved by city council. He also noted the actual property line and associated lands with split ownership. He further explained that the pump station on the EB Land side will not work for his client if they do not honor the easements and other issues in the original plan.

He then presented a map exclusively showing the property owned by Griffin Realty. Mr. Forsten said it takes the original approved PUD with the existing boundary lines and creates a plan with complete stormwater management, sewer and other utilities solely on the Griffin property. The modification allows them to proceed with the development of the property.

Changes associated with the revision include the relocation of the clubhouse, which is slightly smaller than originally planned though the pool remains.

He noted on the original plan, there were seven points of interconnection between the two properties. One of the points has to be eliminated to provide a stormwater pond.

Mr. Forsten said the plan on their property originally showed 390 lots; as a result of the reconfiguration, ten more lots will be added.

He emphasized they are addressing the PUD modification tonight adding that they will need to come back with their subdivision plan at which times additional questions and issues can be addressed.

He then explained that the property owner of the parcel along Route 113 requested an interconnection into their entrance. In 2002-2003, DeIDOT originally agreed the interconnection would be a good idea though they have since changed that opinion. He said if traffic is southbound on Route 113, vehicles can turn left into the site. They fear that southbound traffic will use the entrance to access the Cypress Hall Commercial site.

He then referenced another crossover where vehicles can make a u-turn to get to the Cypress Hall property.

He said the same applies to exiting traffic heading northbound; it will become a defacto entrance and exit for the Cypress Hall property. As a result, DeIDOT does not require it nor does Griffin Realty want it.

Mr. Pikus clarified that Griffin Realty does not want an interconnection between their property and the Cypress Hall property. Mr. Forsten agreed stating he believes it will end up increasing traffic at the intersection and within their community.

Mr. Forsten referenced the location of the current pumping station adding it should be moved north fifty feet. It was confirmed the pumping station is tied into the city system.

Mayor Rogers then opened the floor for comments. He asked that anyone in favor of the application to speak.

Esquire Robert Gibbs of Wilson, Halbrook and Bayard stated he is present on behalf of Cypress Hall property owners Bruce and Susan Geyer and Joan Palmer. The property is located immediately south of the proposed entrance to the Griffin Realty property. He referenced a letter he sent to the Mayor and City Council stating the reasons the owners feel DeIDOT's original preliminary approval should be considered. They stated that if the residential community is developed behind the commercial property, they would have direct access onto Route 113 and a cross access easement to the abutting property would be required. This would allow a left in/right into the commercial and a right in/left out already associated with the commercial parcel.

Mr. Gibbs stated that DeIDOT's opinion on their preliminary approval changed during the time this property sat idle. Their original 2004 letter stated 'Mr. Geyer is permitted one right in and one right out' as is shown south from the proposed entrance. The letter also states 'the residential developers would be required to provide the necessary reciprocal cross access easement.' The actual location of the cross vehicular access should be as close as possible to the rear of the Geyer property. He noted on the diagram it would be the furthest east.

He feels there may be a number of ways to design it to allay the fears of the developer; but without some interconnection, there are various traffic patterns created. People who go into the residential development will typically go into the commercial area. Mr. Gibbs noted that in most planning scenarios, those items are viewed as important and integral to the planning.

He stated that the developer implied that vehicles coming southbound will come into the entrance and turn directly into the commercial site. He agrees that makes sense; otherwise, vehicles have to go further south and make a u-turn to come back into the development which has only one entrance/exit on Route 113.

Mr. Gibbs does not understand the logic behind their more recent decision that states 'the approved entrance plans for the residential project and recent conceptual meetings regarding potential redesign for the market rate residential units collectively invalidate the 2004 letter requiring a cross-access on the basis of conflicting movements within the boulevard style entrance.'

Mr. Gibbs understands that if it is not designed right, it could result in minor traffic problems when people try to exit the commercial site into the boulevard access. He said that was partially addressed in the drawing submitted though there may be a better plan to warrant council to require it be worked out because inter-connectivity makes good sense. With interconnection, persons entering the commercial property will exit back onto Route 113 to enter the other entrance.

He said four examples were then given with references to the drawing.

Mr. Gibbs questioned DeIDOT's position though they may have forgotten about the previous recommendation. He explained the intent of the conditional is to maintain a measure of control over uses that have an impact on the community. General conditional uses may be desirable in certain locations for the convenience and welfare but they must use the property in a manner that assures neither an adverse impact upon adjoining properties nor the creation of a public nuisance. He thinks this will be supported with traffic numbers with the additional trips that will be created by having the limitation DeIDOT previously recognized as almost common sense and will have a negative impact and create a public nuisance.

They feel there is some substance to this request and they hope it can be worked out with a common entrance. His clients are willing to share responsibility for participation in a cross access and the cost of an entrance redesign or modification.

Mr. Johnson asked if DeIDOT has the final say; City Solicitor Rutt confirmed that entrances and related traffic patterns fall under DeIDOT's jurisdiction.

Mr. Gibbs then clarified that his comments are in relation to the application. He emphasized that council should consider the entrance issue when weighing the factors for the conditional use.

Mr. Rutt asked if there was an inter-connective street when the first approval was made in 2006; Mr. Gibbs stated no.

The solicitor then confirmed that Mr. Gibbs is requesting a new condition be added to the PUD for a cross access agreement. Mr. Gibbs stated that DeIDOT previously stated that with the main entrance onto Route 113, there should be consideration given to a cross access to an immediately adjacent commercial property which will minimize multiple trips out into the corridor. He reiterated that he does not understand why DeIDOT would reverse their position at this late date unless they did not realize it was on record previously. Thereby, he believes that thrusts it into the council's jurisdiction because they will become streets in Milford.

It was confirmed that DeIDOT approved it in December 2004; Mr. Rutt noted it was not part of the city's initial approval. Mr. Gibbs added that his client brought the issue before the planning commission and other meetings over the past several years.

Mr. Gleysteen stated that at some point the previous plans for the Cypress Hall commercial property contained a proposed connection between Cypress Hall and the rear of this project. He asked if that was something the original PUD was making accommodating; he noted the row of homes now planned that would not allow that to occur.

Mr. Gibbs then introduced Tim Metzner of Davis, Bowen and Friedel (DBF) who was responsible for the original Milford Ponds design. He verified the plan was included in the original PUD and something that Mr. Geyer and the owners of Milford Ponds were working on to create more interconnection. He advised there were also some agreements being discussed for shared stormwater and sewer.

He noted that DeIDOT's jurisdiction is off Route 113 only. Any interconnection within the plan is solely between the city and the property owners.

On the entrance, Mr. Baird asked if the cross access easement is an issue with DelDOT or the city; Mr. Metzner said originally DelDOT has jurisdiction. However, they have gone on record as saying they have approved the entrance (Route 113) and will not make any changes or alterations. Anything off Route 113 is an inner street and city council has the ability to call for conditions under the planning approval process.

Mr. Rutt asked if DelDOT does not have jurisdiction, why were they involved; Mr. Gibbs explained they went to DelDOT originally to ask their position on their requirements in the event of a residential development and a commercial development. He said the first 2004 DelDOT letter addresses the two possibilities. It states the residential development does not obtain US Route 113 access. Under those conditions, they stated the Geyer property may have a single right in/right out. In this case, construction to implement the cross access agreement between the two properties would not be desirable. However, in the case where the residential development is granted US 113 access, a cross access easement should be entered into for all the reasons previously stated.

He emphasized the residential people will use the commercial and the commercial traffic will go through the residential area. If they could get into the residential without going back out on Route 113, that would be done.

Councilwoman Wilson then stated that tonight this is a decision on the modification of a PUD. She stated the development plans will still have to come back before council. She asked if this is something that needs to be worked out before council acts on the modification. She asked Mr. Gibbs if that would be more difficult for his clients.

Mr. Gibbs explained that the process for an amendment to a conditional use allows for public comment. As an adjacent property, they feel this is the appropriate time for the shared entrance to be considered.

It was confirmed by City Planner Gary Norris that the planning commission recommended approval of the proposed amendment. As stated, it will come back before the planning commission when the subdivision preliminary and final plans are submitted.

Attorney Stephanie Hansen of Young, Conaway, Stargatt & Taylor then addressed council after introducing Brian McGregor who represents EB Land. She then provided the background on how this issue has gotten to this point.

Ms. Hansen explained that in 2003, East Bay Homes (now EB Land) had a contract to purchase four parcels of land from two property owners. She noted the four parcels on the map that make up the Milford Ponds PUD.

She explained that East Bay assigned the contract for four parcels to Slenker Land Corporation; Slenker then proceeded with the land planning and engineering. They received city and agency approvals and received PUD approval in September of 2004. Slenker became WS Milford Properties that was purchased in 2005. WS Milford secured a loan from Acacia Federal Savings Bank which became Griffin. Slenker also secured a loan from East Bay which became EB Land. A minor subdivision, based on the approved PUD, was prepared by WS Milford to define the boundaries of the land that were encumbered by both mortgages. She then presented the minor subdivision.

Ms. Hansen advised that EB Land has a mortgage on two parcels (A & C); Acacia/Griffin had a mortgage on the remaining parcel. WS Milford then processed a final plan for Phase I which was approved and recorded in June 2006. When the final plan for Phase I was recorded, the boundaries had changed from those shown on the minor subdivision plan as Parcel B.

She then referenced an overlay outlining the boundaries on the minor subdivision and the parcel lines upon which the mortgage documents are based. Noted was the portion recorded as Phase I; parts of Phase I are on land that was later foreclosed on by Acacia and land that was later foreclosed on by EB Land.

The Phase I plan is located primarily but not exclusively on Parcel B (Acacia). Portions of lots, open space, sewer pump station, stormwater pond #4 and some utilities and roads are located on Parcels A & C.

Ms. Hansen reported that Phase II received final plan approval from city council on April 2008. The plan was recorded in July 2008. Phase III has received preliminary plan approval at the time the PUD was approved in 2004.

She reiterated that Phase I has final plan approval and substantial construction; Phase II has final plan approval and some construction because of the infrastructure going into the stormwater pond; Phase III has preliminary plan approval which was granted at the time of the PUD approval in 2004.

Mr. Brooks confirmed that Phase I is owned by two different entities; Ms. Hansen stated that is the problem. She said the Phase I approved and recorded is actually on two lands owned by two different entities.

Ms. Hansen then addressed the portions of Phase I on the EB Land property and the block of 12 lots. She said if you approve the PUD modification that Griffin is requesting, some of the lots become illegal. They become smaller than the minimum 5,000 square foot lot size. Another two lots are actually split between the two owners. She said Griffin combined the lots but leaves EB Land with two slivers of land.

She reinforced the fact the stormwater management pond is on EB Land property which was part of Phase I as well as the open space and pump station. She also pointed out that Griffin stated they are still maintaining 6 points of ingress and egress/interconnection into the development and emphasized that the one not being maintained is an important one (referenced on map). The phase that is part of EB Land deadends into open space.

Ms. Hansen emphasized that they indicate this modification will have no impact on the EB Land property. However, it will have a significant impact on the property owner. It creates illegal lots and a road which goes no where. It forces EB Land to redesign its property and seek new approvals even with respect to the property with the Phase II approval.

Mr. Pikus said that two of the lots in Phase I become illegal lots; the balance of the lots (to the left) belong to EB Land and are part of Phase I. He confirmed those lots are planned to be developed in Phase I with the exception of the two that become nonconforming. He asked what pumping stations serve those lots adding those lots belong to EB Land. She said it would be the same pumping station that is part of the development plan.

She reiterated the pumping station is on the EB Land; they are asking council to approve it so they can move the pump station. There is an existing pump station with piping that is ready to be turned on. But Griffin wants the re-approval so they can create a new pump station on their property and abandon the current pump station.

Mr. Pikus asked if EB Land was given permission to develop the remaining lots; Ms. Hansen stated no.

Ms. Wilson said it sounds like council is being put in the middle of these issues. She asked if EB Land had submitted their application first, how would that have affected the Griffin property. She noted that Griffin came through with the first request but if EB Land submitted first, it would have impacted the Griffin side. Ms. Hansen stated Ms. Wilson is correct. She added there is a note on the plan for the larger PUD that states the plan cannot be changed without the consent of the other land owner.

Ms. Hansen then advised the application is coming before council, with a 7-1 recommendation from the Planning Commission though they feel the recommendation should be set aside. She added that a letter was sent to city council federal express. They felt that was needed because at the second meeting of the planning commission they were unable to speak and include some items in the record. She feels the biggest issue is that Phase II has final plan approval. It was presented at the Planning Commission hearing and is the only final plan approval. Not knowing there was also final plan approval on Phase II at the time of the vote, was a very important fact they were unaware of and EB Land did not have the ability to tell them. The letter was sent to the city solicitor and Mayor and City Council so everyone had the information.

She recalled the meeting in which the solicitor was going to update council on this matter and they wanted to make sure they had this information before this hearing.

Ms. Hansen confirmed they were unable to speak at the second Planning Commission meeting. City Solicitor Rutt explained that at the first Planning Commission hearing, Ms. Hansen gave a long, detailed presentation similar to what she is presenting tonight. Mr. Rutt asked that it be put into writing and that the applicant be given the opportunity to respond to a number of issues presented the first time. At the second hearing, the applicant responded. The intent was to prevent it from becoming

a back and forth commentary; Ms. Hansen had given her opinion and the applicant was asked to give their opinion. At that point, the comment session was closed.

Mr. Rutt said the comment about the Phase I was stated at the original planning hearing with the understanding that only Phase I had been approved which is something that could have been discussed in the letter that was subsequently sent. Mr. Rutt confirmed that Phase II was approved.

Ms. Hansen said she would like for the record to reflect they appreciate the time the city has taken to consider this application and their attempt to act as a mediator between the two parties. She claims the two are trying to negotiate a solution. Discussions have been occurring since 2006 though they have not been frequent. No agreement has not yet been reached though negotiations continue as recently as this afternoon.

Ms. Hansen explained that they are asking city council not to make the decision and instead let the two parties work it out among themselves. She agrees there are a lot of technical and legal issues involved. She said council is welcome to make the appropriate decision though they are asking that the parties continue to handle.

Mr. Pikus questioned Ms. Hansen's statement that council's job is not to be a mediator; Ms. Hansen said they can be mediators if they wish though they are asking otherwise.

Ms. Hansen then continued by stating that EB Land and Griffin are married with respect to the plan. Each owns a portion of a multi-phase interdependent development plan that contains a note (General Note 6) that makes it impossible to revise the plan without the consent of the other. It states that no revision can be made to a recorded subdivision in Sussex County without the written consent of 75% of the lot owners of the recorded plat and the owners of the adjacent lots to the revision. She noted that EB Land owns 46% of the lots in this PUD and is an adjacent lot owner to the revision and has not consented to the revisions requested. As a result, Griffin Realty's attempt to revise the Milford PUD is in violation of this note and the application should not be approved.

She stated that Mr. Forsten has stated and the solicitor agrees, that reference to the term "Sussex County" in the note revealed that this was just a boilerplate note that the original engineer inadvertently included on the plan which did not mean anything. Ms. Hansen says this is not true and the note was intentionally requested by the original developer and Sussex County was specifically mentioned in the note because that is where the plan was recorded. It was not meant to infer the plan was subject to any Sussex County development, ordinance or regulations. Everyone is aware the plan is under the jurisdiction of the City of Milford.

She said the note also reflected the intent of the original developer not to allow changes to the approved PUD without consent of the people that would be most affected which includes Mr. Geyer.

Ms. Hansen reported that Griffin has instead decided to apply for a change to the plans and bypass further discussions with EB Land by asking the City of Milford to resolve the dispute. By doing that, they are bypassing a requirement on their own record plan to obtain the consent of adjacent land owners.

She said they also believe the modification request should not be approved because they think the procedure followed by Griffin Realty to modify this was improper. The Milford Ponds PUD was approved as a conditional use. The city code does not define what qualifies as a modification of a conditional use and does not address the procedure for modifying the conditional use. However, the practice of the city has been that if the modification was not substantial and there were existing utilities in the ground and no changes were being made to the utilities, then the application would be processed as a modification to a conditional use.

In this case, she pointed out the changes to the plan that are substantial. The complete replacement of a newly installed sewage pump station that was never used; the need to cut new services into existing water and sewer lines; the redesign and replacement of an existing stormwater managed conveyance system and basins; the redesign of the existing approved utility plans to accommodate additional streets and housing; the elimination of a major collection street (Flower Garden Drive); the removal of the 55 plus age restriction on this development; an increase in the units in this phase; the removal of the 525 linear feet tree-lined boulevard which led to a 2.1 acre centralized open space area; the elimination of the 2.1 acre centralized open

space; the removal of the 14,000 square foot community center/clubhouse with the replacement of a 1,500 square foot meeting room and the reduction of the minimum townhouse lot width from the previously approved 24 to 18 feet. Cumulatively, these changes substantially alter the character of the PUD.

Ms. Hansen pointed out that Griffin disagrees and believes that the question of interpretation and whether this is a modification is ultimately one for the city. The solicitor agreed with Mr. Forsten and stated that because the applicant had been directed by the planning director to proceed by this process the city cannot change course.

EB Land agrees that the decision rests with the city whether this is a modification. To state council does not have the ability to correct what is otherwise a wrong interpretation by the planning director is to take away the authority of the city council.

Mr. Pikus asked if a modification of the 55 plus community require a new traffic survey; Mr. Rutt answered that would be part of what Griffin has indicated would be performed if the concept of the PUD modification is approved. It is still required to go through the site plan approvals. Part of the overall approval process is to get the site plan which includes a traffic and complete review by all the agencies.

Mr. Gleysteen stated that in Phase I more than 75% is owned by Griffin; he asked the city solicitor's position on whether that constitutes a violation of the clause for the entire PUD. Mr. Rutt said the county has no 75% requirement. He explained that the note was placed on the document by the engineer at the time. He would think that if Griffin is coming in to seek a modification, the notes are also subject to modification. He understands that is an issue and council will have to decide if they can seek that modification or whether they need EB Land's approval.

Mr. Gleysteen then asked EB Land what their position would be on the entrance to the Geyer property if everything moved forward; Ms. Hansen said they have not discussed that though she feels EB Land would not have a problem with the interconnection.

Mr. McGregor of EB Land then stated that the modification for the entrance is not on land owned by EB Land but is on land owned by Acacia/Griffin though they would be supportive.

Ms. Wilson stated that she wants to comment on Ms. Hansen's statement regarding the planning commission and city planner/planning commission's recommendation. She said council relies heavily on them to do the legwork and research to make councils' lives easier. She said for Ms. Hansen to imply they are not qualified to make a recommendation or qualification for the modification is inappropriate. She noted that City Planner Norris has a great deal of experience and knowledge and she is confident with any issue he brings before council.

Mr. Johnson asked if there are any potential proposals for the use of the EB Land. Ms. Hansen stated they would like to use and develop the land exactly as was approved on the previous PUD. Mr. Rutt asked if EB Land is willing to pay 46% toward the development costs. Ms. Hansen said they are unprepared to make that commitment.

Ms. Hansen was asked if they are close to an agreement as she indicated they are continuing to negotiate. Mr. Pikus pointed out there appears to be more and more issues arising. It appears that both parties are coming before council to solve their problems. He feels they need to resolve their problems first. He noted we want economic development and are anxious for the land to be developed; however, the differences need to be resolved among the parties. Mr. Pikus does not feel this is councils' responsibility.

Mr. Gleysteen then added that it was stated that the parties have been negotiating since 2006; this is 2011 and it appears that an agreement is no closer. Griffin realizes this and they have invested a substantial amount of money into the development of a new plan. He is tired of looking at this eyesore over the years. He feels that Griffin is showing some initiative by bringing this to city council. While there are problems, at least they are moving forth. He was also offended by Ms. Hansen's comments about the planning commission not allowing her to speak. He was a member of the commission for four years and does not recall denying anyone the opportunity to speak.

Mr. Gleysteen said that with the recommendation of the planning commission and wanting this development to move forward as a complete project, he is receptive to this plan.

Ms. Hansen said she wants to mention some additional legal arguments which EB Lands wants on the record. She said that EB Land believes that to approve the application would effectuate an unconstitutional taking or deprive EB Land of vested rights it has in the project. EB Land has a current record plan approval of Phase II with work substantially underway. They also have a PUD and preliminary approval of Phase III. With these approvals, the land has a certain value. If the application is approved, it wipes out EB Land's ability to develop its property in accordance with the recorded plan on Phase II and the PUD/preliminary approval of Phase III. As a result, it strips the land of its value. This is the unconstitutional taking of land arises as well as a disturbance of EB Land's vested right to develop the property in accordance with the record plan and PUD approval particularly for Phase II.

Ms. Hansen continued by stating the EB Lands could not be built as planned because of the removal of Flower Garden Drive as was previously mentioned. She explained that the interconnectivity was lost and the street would now end in a cul-de-sac. The recorded lots would then become illegal. As a stand-alone development, EB Land property would not meet the current standards for open space per the current code.

She advised that Mr. Forsten and EB Land disagree as to whether there would be a substantial diminution in the value of EB Land that would rise to the level of the taking in violation of the 5th Amendment to the Constitution. She said the city solicitor agreed with Mr. Forsten on the basis that EB Land has not submitted an appraisal that would document the reduction and value. However, they believe it is self evident that a change in the value of the land from a property with a record plan to a record without a valid record plan would constitute a substantial diminution of value.

She feels this is ultimately an issue that would be properly decided by the courts.

She stated that secondly, the crux of Mr. Forsten's argument is that EB Land cannot have a vested rights claim because of the money that EB Land has spent on the property which was primarily spent to reacquire the property in foreclosure. Ms. Hansen said the analysis is not that simple. EB Land had already paid for the land once when it originally purchased the land. The credit bid it made at foreclosure was a separate expenditure which is something they believe would be recognized by a court.

She said lastly the principles of equitable estoppel should prevent the city from approving the application. She explained that equitable estoppel arises when a party, by their conduct, intentionally or unintentionally leads another in a reliance upon that conduct, to change position to their detriment. Equitable estoppel is recognized by the Delaware Courts. In this case, EB Land, acting in good faith and upon the approvals of the city in Phases A and C, substantially changed its position in buying the property at foreclosure for \$1.5 million. Had the approvals not been in place, the bid by EB Land would have been significantly reduced and the property sold for far less. They believe this will be inequitable and unjust for this city to impair or destroy the rights to develop these phases that EB Land acquired.

Ms. Hansen stated that Mr. Forsten argues that the equitable estoppel is not applicable because among other things, the city's approval of the PUD plan does not mean the plan can never be changed. The city solicitor's opinion is that no equitable estoppel argument is applicable because the plan can sunset. She said the solicitor relied on the number of EB Land arguments that were raised. They have addressed the erroneous analysis it was part of. It was based on the fact that Phase II did not have final approval but does have final plan approval and substantial construction. Therefore, it cannot sunset.

In closing, she said the Milford Ponds PUD was approved by the city as a comprehensive development plan. Each plan was dependent upon the other for the entire development in order to meet the requirements of the code. There were no problems with the PUD under a single ownership. With two owners, agreement and coordination between the two parties is paramount. She emphasized that Griffin desires to bring their problems here for the city to resolve.

Ms. Hansen said they are requesting council vote no on the application and let the two parties work it out among themselves.

She noted that Mr. Forsten stated that EB Land would not recognize the valid easements on the property. If they were valid easements on the property, that would take away a large portion of the reason they are attending this hearing. She said there are no recorded easement agreements for the utility lines. However, that is only one of the multitude of problems and how intermixed and intermingled the two entities are.

Ms. Hansen believes they may be closer to an agreement because there has been a lot of discussions among the parties and the last offer that EB Land sent to Griffin was close. She feels there has been significant movement over the past five years and the fact they are still talking as of this afternoon is indicative of that.

Mr. Rutt then referenced the illegal lot that Ms. Hansen discussed; he asked if she agrees that EB Land could seek a variance on the lots. Ms. Hansen stated sure.

Mr. Rutt said that EB Land could also revise its plan on its property just as Griffin is attempting to do. Ms. Hansen said that is correct.

Mr. Rutt recalled asking Ms. Hansen and Mr. Forsten to look at the modification of deferred purchase money promissory note which was between WS Milford and East Bay (paragraph 3.2). Mr. Rutt said it states "in the event that at anytime of any foreclosure, borrower has constructed non-public stormwater management ponds and sanitary sewer pump station within the boundaries of the foreclosed premises or outside the boundaries of the foreclosed premises, which facilities are designed in accordance with the master plan to serve the premises in whole, or in part. The use of such completed facilities shall be available to the foreclosed premises to the extent of capacity in common with any utilization of any facilities by the Phase I property."

He asked Ms. Hansen what that means to her; Ms. Hansen explained that it says if EB Land forecloses on its property and there are infrastructure elements like the stormwater management ponds or the pump station, that is not on land owned by EB Land, that EB Land has the ability to use those infrastructure elements so long as that was something called for in the original plan. She said that was written at a time when they did not know where the pump station was going. It sounds odd to be saying it now, but at the time, no one knew the pump station would end up on EB Land.

She said if EB Land takes title to the property, you take your property back in foreclosure, but you can go ahead and use those infrastructure pieces that are on Griffin's land. She felt it would have worked fine had all the land remained under the same ownership. The problem is it went to foreclosure and Griffin or Acacia were never part of the agreement. As soon as they foreclosed on the property, their mortgage was first in time and before the agreement was written. That whole section became null and void. She said this was an agreement made between EB Land and the developer. Acacia is not on the document; Griffin is not on the document.

She explained the developer is saying to EB Land we are modifying this loan and we are going to come to some kind of accommodations of why we will be allowed to modify this loan. If I foreclose on this, I can actually use the pump station and stormwater management on the other area. Otherwise, I can't develop my property. And the developer agreed.

Ms. Hansen said that will work when no one forecloses or when only one person forecloses and the other land is still owned by the developer. However, an agreement cannot be made if the land is on someone else's property. It would only work without a third party in the mix.

Mr. Rutt pointed out that paragraph 3 states this assignment will be expressly subject to any existing assignment of the collateral to the existing lender that provided financing. He asked if that was Acacia; Ms. Hansen stated yes it was. Mr. Rutt noted that Acacia was in the picture at the time this was done. Ms. Hansen said they did not own the property at that point. The other party was still not in default.

Brian McGregor of EB Land then stated that Ms. Hansen talked about the background and how they became involved. He explained that they sold the land to Slenker. Slenker got a construction and development loan from Acacia. Acacia and Slenker came back and said they don't want to give them a mortgage for the whole piece, but if they will take a mortgage on a piece of it, that would work. They said no, they would rather just sell the land but then agreed to take a mortgage on a portion of it. The property was then divided with the preliminary plans and lots assigned. They said they only want a first lien and Acacia agreed and said they will take a second. But if they ever foreclose, they will take the property back. Everyone agreed at that time. Time passed and Slenker gets in trouble. There was an inner creditor agreement with Acacia that stated that if Slenker gets in trouble and we are ready to foreclose, they wanted an opportunity to cure the default before the property was taken. They went to Acacia and said they have no choice because Slenker was not paying and the property has to be foreclosed and taken back. Acacia said for them to go ahead, they have no interest in curing the issue.

Mr. McGregor said when the plan was recorded, it was a big mistake because it did not meet the underlying minor subdivision plan. When Phase I was recorded, it was a different plan. Half was on the encumbered land. It was not their land at the time, but was encumbered by their mortgage. The sewer pump station, stormwater management pond, roads and utilities were on their property.

They started negotiating when that occurred in 2006 and are still discussing it. They do not want to get in a position where Acacia develops their property and the EB Land sits idle for 25 years until the utilities can get to them.

He said that if Acacia gets approval, they would like them to give EB Land an opportunity to develop and bring in the utilities into their property to they can develop. But that has not been accomplished.

Mr. Gleysteen said it appears the encumbered properties closely mirror Phase I, Phase II and Phase III. It appears to him there may have been a plan at some point to separate out different phases if there were financial problems. Mr. McGregor explained they used the original preliminary plan and drew a line around the lots under the two ownerships. However, the final plan was not identical to the preliminary plan, which he implied occurs all the time. The final plan was recorded and the sewer pump ended up on the EB Land property and the open space became part of the Phase I plan. He is sure it is because Slenker nor Acadia ever anticipated defaulting on the mortgage.

Mr. McGregor said this was created because the land was different and the minor subdivision did not match.

Mr. Gleysteen confirmed the mortgages followed Phase II and Phase III of the preliminary. Mr. McGregor stated that both the EB Land and Acacia followed the minor subdivision plan.

Mr. Gleysteen stated if the final approval adhered exactly to the original plan, would there be a problem with allowing Griffin to do what they wish with Phase I. Mr. Gregory stated he would have a problem because they want the ability to develop their property. Though they never intended to get the property back, now that they have it, they do not want to wait for utilities. None of the utilities in Phase I are their responsibility. They are unable to go on the Griffin land to develop the utilities for their land.

He concluded by saying that they need a pump station and other things to develop their property. Otherwise, at some point in the future, they may get utilities which could be 15 or 20 years and possibly never.

Mr. Forsten then responded to Rob Gibb's comments regarding the interconnection along the front of the parcel. He agrees that is something that can be considered later in the subdivision process for many reasons including DeIDOT's statement in the letter sent by Mr. Gibbs that the interconnection is now incompatible. Though that should not be an issue, this evening, they will continue to discuss that issue with the Geyers and the planning commission. He said if the city agrees the interconnection is needed, they will abide by that.

Mr. Forsten reiterated that these two parties have been trying for years to come to some resolution in this matter. However, it has not happened. He said when the city initially indicated they would not consider the request and canceled the September 2011 hearing, EB Land pulled its offer and asked them to purchase the land for \$2 million. When the meeting was rescheduled, EB Land made another offer and went back to the offer they originally pulled.

He feels that Griffin has made a generous offer of \$300,000 which can be spent on infrastructure or in whatever manner they wish, but they prefer to develop according to the original plan. However, after this length of time, they realized that would not happen and is the reason they came up with a new plan that only utilizes the Griffin Realty property. They plan to move the pump station 50 feet though it is still in a position to be utilized by EB Land should they develop. It was designed to work with the existing infrastructure including the sewer lines already in place.

Mr. Forsten said that EB Land essentially wants it both way; they state they want to develop according to the existing plan, but then ask for \$2 million or require the infrastructure be put in for their use.

He recalled when Mr. Rutt stated that EB Land owns 46% of the lots and asked if they were willing to pay for 46% of the infrastructure though their answer was no. He said their pump station was paid for by money advanced by Acacia

Bank/Griffin Realty to Slenker at a cost of \$300,000. It will eventually be used by EB Land when they develop though they have not paid a cent toward it.

Mr. Forsten noted that Mr. McGregor then stated he was willing to work with Griffin if they installed the infrastructure so they could begin to develop their property. That is why Griffin decided enough is enough and made the decision to present an application. They have maintained six or seven interconnections and have done everything possible to maintain the developability and usability of their property. He agrees there will be a couple lots reduced below the minimum lot size. Currently there is split ownership though a minor subdivision can clean the problem up.

He referenced Ms. Hansen's arguments in regard to vested rights, the taking of property, equitable estoppel, etc. noting those arguments were made to the planning commission. City Solicitor Rutt responded in writing and the planning commission found them to be without merit and recommended approval of the application.

He asked for councils' support reiterating the planning commissions' recommendation for approval.

Mayor Rogers asked for any additional questions.

When asked the next step, Mr. Forsten stated that their next step will be final subdivision approval that will set the revised lot lines, revised stormwater management and other associated issues. He emphasized they want to move forward with the property because it has been sitting idle for too long.

Mr. Brooks asked for clarification; Mr. Forsten stated that if the plan is approved and no agreement is made with EB Land, they will move the pump station and start marketing the lots. He said there are existing lots that could have been marketed if they were able to use the pump station. In the meantime, they will construct some models. Unfortunately, right now, the pump station is the holdup.

He concluded by stating that they would not be spending this money if they did not plan to move forward with the project.

Mr. Johnson asked how Griffin Realty will react if council approves this application and the interconnection; Mr. Forsten explained the front commercial property has asked for the interconnect as part of this modification. He feels that should be addressed during the subdivision process and will be considered at that time. If seriously considered, he believes traffic numbers will be needed. His concern is that all the southbound traffic on Route 113 will want to turn into the crossover and into the commercial project. Mr. Forsten said he could be wrong though they are willing to discuss that during the subdivision process.

Mr. Baird stated that Mr. Forsten said the sewer was an issue preventing this project from currently moving forward and asked if there were any other issues. Mr. Forsten stated the sewer is holding things up at this point. All other infrastructure is there. He said if there was an agreement on the pump station and the sewer was ready to operate, they could begin marketing and building models as he previously stated.

Mayor Rogers then asked if anyone from the public wished to speak. No one responded and the public hearing was closed.

Mr. Gleysteen moved to adopt Ordinance 2011-12 with the provision that if Mr. Geyer wishes to commission the traffic study for the entrance to the commercial property and there are no associated safety issues, that should become part of the modified PUD, seconded by Ms. Wilson:

Ordinance 2011-12

Modification to Conditional Use-Morris and Ritchie Associates, Incorporated on behalf of Griffin Realty, LLC

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILFORD, DELAWARE APPROVING THE MODIFICATION OF A CONDITIONAL USE TO ALLOW A PLANNED UNIT DEVELOPMENT FOR MORRIS AND RITCHIE ASSOCIATES, INCORPORATED ON BEHALF OF GRIFFIN REALTY LLC ON 107.50 +/- ACRES IN AN R-1, R-2 AND R-3 DISTRICT LOCATED EAST OF US ROUTE 113 AT THE INTERSECTION OF WEST HEIRLOOM WAY,

SOUTH OF SEABURY AVENUE, MILFORD, DELAWARE, FORMERLY KNOWN AS CENTRAL PARKE AT MILFORD/MILFORD PONDS. TAX MAP NO(s): 1-30-6.00-108.00, 1-30-3.00-6.00-167.00 thru 1-30-3.00-6.00-550.00; 1-30-3.00-6.00-557.00; 1-30-3.00-6.00-558.00.

Whereas, the City of Milford Planning Commission initially reviewed the application at a Public Hearing on May 17, 2011 and on August 16, 2011, presented item for consideration by the City Council; and

Whereas, Milford City Council held an advertised Public Hearing on October 24, 2011 to allow for public comment on the application; and

Whereas, it is deemed in the best interest of the City of Milford to allow the Modifications to the Conditional Use for a Planned Unit Development as herein described.

Now, Therefore, the City of Milford hereby ordains as follows:

Section 1. Upon the adoption of this ordinance, Morris and Ritchie Associates, Incorporated on behalf of Griffin Realty, LLC is hereby granted an Amended Conditional Use Permit in accordance with the application, approved plans and any conditions set forth.

Section 2. Construction or operation shall be commenced within one year of the date of issuance or the conditional use permit becomes void.

Section 3. Dates.

Adoption Date: 10-24-11

Effective Date: 11-04-11

Mr. Pikus asked the solicitor if this is opening the door for potential problems; Mr. Rutt explained that any vote opens the door for an appeal or other legal action. However, council has the right to approve, approve with conditions (motion), deny or defer action.

Motion carried by the following 5-2 vote:

Mr. Johnson stated yes that he believes this property could sit forever without anything happening. He said there is a plan on the table and feels it should be supported.

Mr. Grier votes yes stating he agrees with Councilman Gleysteen in regard to the conditional use for the Geyer interconnection. He would like that to be considered and for this to move forward in preparation for the next steps for site plan and subdivision approval. He also would like to see some activity there.

Mr. Pikus votes no stating that he does not feel council should be in a position to settle two arguments. He was concerned about the statement made about the Geyer request and believes permission should be given for that. The first comment was they would consider that but they do not want that which he feels can be discussed later.

Mr. Gleysteen votes yes and acknowledges there are two owners involved in Phase I. He said the predominant owner of that property is Griffin who have put forth the initiative to move this project forward and believes it is in the best interest of the city.

Mr. Brooks votes no along with Mr. Pikus, but agrees that Mr. Geyer should have his entrance. He said the gentleman said they are ready to move forward but feels that this time next year, there is a good chance they will be in court still discussing this. Therefore, he votes no.

Mr. Starling votes yes noting they came in with a plan that can be worked with. If the other group comes in with a plan they can work with, he will support that as well. He hopes that in the meantime both parties can work this out.

Ms. Wilson votes yes based on the period of time they have been trying to negotiate, noting the previous five to six-year time frame during which time nothing was accomplished. She also votes yes based on the planning commission's review of the application and information and their recommendation. She also agrees they have a plan which means they have laid their money out and believes we should provide them that opportunity.

The city manager then asked for the city attorney's opinion on Section 230-58 (Zoning Code) and asked if it needs to pass with a simple majority or a 3/4 majority.

Mr. Rutt explained that only applies 'in the case of an unfavorable report or recommendation for denial'. He explained that in this case, the recommendation is to approve.

With no further business, the Public Hearing adjourned at 8:50 p.m.

Respectfully submitted,

A handwritten signature in cursive script that reads "Terri K. Hudson".

Terri K. Hudson, CMC
City Clerk/Transcriber