

MILFORD CITY COUNCIL
MINUTES OF MEETING
February 23, 2009

On Monday, February 23, 2009, the City Council of the City of Milford held a Public Comment Session in the Joseph Ronnie Rogers Council Chambers of Milford City Hall at 201 South Walnut Street, Milford, Delaware, prior to the commencement of the official City of Milford Council Meeting in order to allow the public to comment about issues of interest that impact the City of Milford.

PRESIDING: Vice Mayor Katrina Wilson

IN ATTENDANCE: Councilpersons Irvin Ambrose, Michael Spillane, John Workman, James Oechsler, Jr., Owen Brooks, Jr., Douglas Morrow and James Starling, Sr.

ALSO: City Manager David Baird, Police Chief Keith Hudson and City Clerk/Recorder Terri Hudson

COUNSEL: City Solicitor Timothy Willard

Vice Mayor Wilson declared the Public Comment Session open at 7:14 p.m.

Lucius Webb of 20516 Sapp Road, who is a realtor, commented about Hearthstone and the housing potential in this market.

Mr. Webb said there are approximately 6,000 improved or unimproved lots available in the city and the greater market of Milford. He asked council to think about what the direction is for Milford and the type of residents who want to come to Milford and how much inventory is needed. He provided a number of statistics noting that only six new construction homes or condos were sold on the Sussex County side during the past 12 months.

He reported the housing market is declining about 1% per month and dropped at least 20 plus percent the last twelve months. The last Hearthstone home was sold in November of 2008 for \$187,000 though the owners purchased the home in October of 2006 for \$235,000 for a net loss of over \$48,000.

He asked what type of housing is needed in Milford and do we want to subsidize the developer to build that type of housing which there is no demand for. He said he does not think it is our role of us to subsidize the developer who may have subsidized some of your campaigns or your money but should instead support programs where the developer on his own means can stand alone and not need the support of the general public. He asked council to vote their conscience and what the market is.

Because of traffic hazzards, he feels the developer should be responsible for a fly over on Route 1 and why should the general citizens pay for the things he has benefitted from and the encumbrances he has placed upon the rest of us.

Spyro Stamat of 10284 Webb Farm Road, Lincoln, said that anybody that thinks you can just continue to build houses and that's a good thing needs to look at the density of New Jersey. He said more people mean higher taxes as every study that has been done has shown that. His major problem with council is that they do not seem to attract industry or jobs to match the housing.

He read a statement he prepared called Dear Tenant dated January 1 which stated he will be decreasing his tenants rental fees. The letter spoke in opposition of the \$50 annual fee charged by the city per rental unit. He feels the fee has added to the cost of living which has made it very difficult and expensive to live in Milford so the average working family can no longer live and work in the city. He spoke in opposition of utility rates which are used as a revenue source. He said we have reached a point where we can no longer trust our own government and the future remains uncertain.

Vice Mayor Wilson said council appreciates the comments, but any future comments should not include anything derogatory.

Charles Campbell of 113 Hickory Branch Court, Hearthstone Manor spoke about the swales and the speed limit at Hearthstone. He said the swales are a danger and a public safety issue by the people who walk there, drive there and cut driver there. He noted the fifteen mile speed limit though there are no consequences for anyone speeding because the Hearthstone streets have not been turned over to the city. He asked that council revisit the situation.

With no other persons signed up, Vice Mayor Wilson closed the Public Comment Session at 7:29 p.m.

Respectfully submitted,

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

Terri K. Hudson, CMC
City Clerk/Recorder

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ALSO: City Manager David Baird, Police Chief Keith Hudson and City Clerk/Recorder Terri Hudson

COUNSEL: City Solicitor Timothy Willard

Vice Mayor Wilson called the Council Meeting to order at 8:07 p.m.

Award/Proposal of Engineering Services/Sewer Inflow & Infiltration Study

Mr. Baird referred to the URS proposal included in the packet. He recalled the I & I work that was approved by the public last February. He reported that I & I accounts for between \$500,000 to \$600,000 a year in fees being paid to Kent County as a result of water entering the system that does not go through water meters. The goal is to reduce treatment costs and enhance capacity available for future needs.

The contract consists of two phases. Phase 1 covers our immediate needs in the vicinity of North Front Street and Truitt Avenue, for a cost not to exceed \$68,800.00. There is a suspected damaged sewer line along Northeast Front Street and Truitt Avenue as well as one at the river crossing. Some GIS work and manhole inspections will be done that were not addressed previously. Phase II provides more studies and measurements to determine any I & I problems for a cost of \$152,400.00. The total contract is \$221,200.

Mr. Baird recommends we move forward with the contract; though the proposal says four to six weeks, they are prepared to move immediately. The total duration is four to six months before a final report will be provided on the second part of the analysis.

Mr. Brooks verified that the information from the previous I&I study has been shared with this contractor.

Mr. Ambrose confirmed that the money in excess of \$200,000 will be paid up front; once the bonds are issued, that account will be reimbursed.

Mr. Ambrose moved to award the contract to URS in two phases for a total of \$221,200.00 to be paid from the sewer reserve fund, seconded by Mr. Brooks. Motion carried by unanimous roll call vote.

Adoption of Resolution/City Match Funds/DMI Streetscapes Project

This was discussed at the last meeting and a vote taken. However, because it was not on that agenda, the recommendation was for a confirmatory vote this evening. The city manager then read the resolution into record.

Mr. Brooks asked for clarification of how the \$375,000 would be paid. Mr. Baird advised that funds are available through the general fund balance and our finance director has set aside those dollars pending formal action by city council.

Mr. Workman moved to adopt the following resolution, seconded by Mr. Oechsler:

WHEREAS, the City of Milford and Downtown Milford, Inc. partner on numerous projects to support the economic vitality of the Downtown Business District; and,

WHEREAS, Downtown Milford, Inc. has received a grant in the amount of \$250,000 from the Delaware Community Redevelopment Fund for Streetscape Improvements along Northeast Front Street; and,

WHEREAS, the Delaware Community Redevelopment Fund requires the local community provides local matching funds in the amount of \$375,000; and,

WHEREAS, Milford City Council is in full support of the project as proposed by Downtown Milford, Incorporated; and,

WHEREAS, the City recognizes the funding provided through the grant and the matching funds will not be sufficient to complete the full scope of the project; and,

NOW THEREFORE BE RESOLVED, the Milford City Council will provide \$375,000 as the matching fund for the grant award received by Downtown Milford, Inc.; and,

BE IT FURTHER RESOLVED, the City is committed to working in partnership with Downtown Milford, Incorporated on efforts to fund the full scope of the project.

IN WITNESS WHEREOF, I hereunto set my hand and caused the Seal of the City of Milford to be affixed this 23rd day of February 2009.

Vice Mayor Katrina Wilson

Motion carried by unanimous roll call vote.

Adoption of Resolution/2009 Delaware Drinking Water State Revolving Fund Application

Mr. Baird said he has been working with Randy Duplechain of DBF regarding some water system improvements. The resolution endorses the application for two projects to the Drinking Water State Revolving Fund Loan Program. A completed application and endorsement by city council is required to proceed.

The city manager explained the stimulus dollars coming through the EPA for drinking water projects will be funded through the State Revolving Fund Program. To be eligible, the city will need to be on the project priority list. An application will need to be submitted to be considered for that program as well.

The Washington Street Water Plant Rehabilitation project has a preliminary engineering estimate of \$2,083,796; the maintenance and rehabs on the elevated storage tanks is \$934,398.

Mr. Baird advised that Delaware will receive just under \$20 million of the federal stimulus package. Of that amount, 80% must be set aside for municipalities and 50% will involve grants to communities.

Mr. Baird read the resolution into record.

Mr. Oechsler moved to adopt the following resolution, seconded by Mr. Morrow:

WHEREAS, the State of Delaware Office of Drinking Water Administers the Drinking Water State Revolving Fund Loan Program (DWSRF); and,

WHEREAS, funds are available for loans and grants to communities with public drinking water systems; and,

WHEREAS, additional funds are available to the Delaware DWSRF program through the American Recovery and Reinvestment Act; and,

WHEREAS, the City is required to submit a loan application in order to be eligible for consideration to be funded through

the DWSRF; and,

WHEREAS, it is a requirement of the DWSRF application for the elected body to endorse the application.

NOW THEREFORE BE IT RESOLVED, the Mayor and City Council of the City of Milford support the submittal of DWSRF applications for the following projects:

- 1. Elevated Storage Tank Rehabilitation*
- 2. Washington Street Water Plant Rehabilitation*

IN WITNESS WHEREOF, I hereunto set my hand and caused the Seal of the City of Milford to be affixed this 23rd day of February 2009.

Vice Mayor Katrina Wilson

Motion carried by unanimous roll call vote.

Adoption of Ordinance 2009-1/Silicato-Wood Partnership LLC-Educational Daycare/Kids Cottage

Mr. Spillane reported that he had been threatened by Silicato that if he votes on anything tonight, he could be fined, put in jail or imprisoned. He asked Mr. Silicato if he would go ahead and take away the threat this evening. Vice Mayor Wilson asked the city solicitor for his advice; Mr. Willard said he is privy to the correspondence Mr. Spillane is referring to. Mr. Willard said he had previously rendered an opinion. He stands by his opinion and believes he does not have the problem represented in the correspondence that would allow him to recuse himself.

Ms. Wilson agreed noting that Mr. Spillane is an elected official who should vote appropriately; anything else is unnecessary at this time.

City Planner Gary Norris then reported that these applications were before the planning commission who recommended approval of the conditional uses as is noted in the adopting ordinance. He added the site plans were also approved by the commission at that time.

The city manager recalled that the three ordinances were previously introduced, public hearings were held and this is before council for final consideration.

Mr. Brooks moved to adopt the following ordinance, seconded by Mr. Morrow:

ORDINANCE NO. 2009-1

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILFORD, DELAWARE PERMITTING A CONDITIONAL USE AT TAX PARCEL MD-16-174.15-01-01.00 (Portion of) TO ALLOW AN EDUCATIONAL DAYCARE/KIDS COTTAGE

Whereas, Silicato-Wood Partnership, LLC has filed an application with the City of Milford for a Conditional Use on 2.1 +/- Acres at 608 Northeast Tenth Street, Milford, Delaware to allow for the operation of an Educational Day Care/Kids Cottage; and

Whereas, the Planning and Zoning Commission ("Commission") conducted a Public Hearing on December 16, 2008 pursuant to notice required by law; and

Whereas, subsequent to the Public Hearing and discussion by the Commission, the Commission elected by a 5-0 vote to forward the application to the City Council with a recommendation for approval with condition(s); and

Whereas, following a duly advertised Public Hearing on January 26, 2009, the City Council concurs with the recommendation of the Planning Commission and those condition(s) stated in Resolution No. PC-08-026 as adopted by the Planning Commission.

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

Section 1. The City Council accepts the recommendation made and entered into by the Planning Commission in support of the Conditional Use to allow the operation of an Educational Day Care/Kids Cottage at 608 N.E. Tenth Street, Milford, Delaware.

Section 2. The City Council hereby approves the Conditional Use application to locate a 12,255 square foot Kids Cottage Educational Daycare in a C-3 Zoning District.

Section 3. In granting the conditional use, the City Council designates the condition(s) set forth in Resolution No. PC08-026 adopted by the Planning Commission on December 16, 2008.

Section 4. Construction or operation shall be commenced within one year of the date of issuance or the conditional use permit becomes void.

Section 5. This ordinance shall take effect and be in force ten days after its adoption.

Adopted by City Council this 23rd day of February, 2009 and Effective on the 5th of March, 2009.

Motion carried by a 7-1 vote.

Mr. Spillane was the lone no vote stating that KinderCare is too close to Route 1 and because the hotel is being built there, he is afraid for the kids as it is easy on, easy off Route 1 and something could happen.

Mr. Oechsler recalled a question asked by Mayor Marabello at the Board of Adjustment hearing regarding a sign; he has heard that a high sign was planned and wanted confirmation that all signs will be within code.

Developer Dennis Silicato was present and responded he does not anticipate a sign variance noting that all signs will be to code. If the plan is changed, he understands they would be required to come before the proper authority for a variance though this appears to be misinformation.

Mr. Workman moved to adopt the following ordinance, seconded by Mr. Oechsler:

Adoption of Ordinance 2009-2/Silicato-Wood Partnership LLC-Comfort Inn/Hotel

ORDINANCE NO. 2009-2

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILFORD, DELAWARE PERMITTING A CONDITIONAL USE AT TAX PARCEL MD-16-174.15-01-01.00 (Portion of) TO ALLOW AN 84-ROOM HOTEL/COMFORT INN

Whereas, Silicato-Wood Partnership, LLC has filed an application with the City of Milford for a Conditional Use on 2.59 +/- Acres located on the southwest side of State Route 1, 425' southeast of Northeast Tenth Street, Milford, Delaware to allow for the operation of an 84-Room Hotel;

Whereas, the Planning and Zoning Commission ("Commission") conducted a Public Hearing on December 16, 2008 pursuant to notice required by law; and

Whereas, subsequent to the Public Hearing and discussion by the Commission, the Commission elected by a 5-0 vote to forward the application to the City Council with a recommendation for approval with condition(s); and

Whereas, following a duly advertised Public Hearing on January 26, 2009, the City Council concurs with the recommendation of the Planning Commission and those condition(s) stated in Resolution No. PC-08-029 as adopted by the Planning Commission.

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

Section 1. The City Council accepts the recommendation made and entered into by the Planning Commission in support of the Conditional Use to allow the operation of an 84-Room Hotel/Comfort Inn located on the southwest side of State Route 1, 425' southeast of Northeast Tenth Street, Milford, Delaware.

Section 2. The City Council hereby approves the Conditional Use application to locate a 45,000 square foot hotel in a C-3 Zoning District.

Section 3. In granting the conditional use, the City Council designates the condition(s) set forth in Resolution No. PC08-029 adopted by the Planning Commission on December 16, 2008.

Section 4. Construction or operation shall be commenced within one year of the date of issuance or the conditional use permit becomes void.

Section 5. This ordinance shall take effect and be in force ten days after its adoption.

Adopted by City Council this 23rd day of February, 2009 and Effective on the 5th of March, 2009.

Motion carried by a vote of 7-1 with Mr. Spillane casting the lone no vote. Mr. Spillane stated that because KinderCare was passed, he votes no because the hotel is too close to KinderCare.

Mr. Starling moved for adoption of the following ordinance, seconded by Mr. Morrow:

Adoption of Ordinance 2009-3/Silicato-Wood Partnership LLC on behalf of Two Farms, Incorporated t/a Royal Farms-Car Wash

ORDINANCE NO. 2009-3

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILFORD, DELAWARE PERMITTING A CONDITIONAL USE AT TAX PARCEL MD-16-174.15-01-01.00 (Portion of) TO ALLOW FOR THE OPERATION OF A CARWASH AT THE ROYAL FARMS SITE

Whereas, Silicato-Wood Partnership, LLC has filed an application with the City of Milford for a Conditional Use on 3,42 +/- Acres located on the southwest side of State Route 1, 1,000' southeast of N.E. Tenth Street, Milford, Delaware to allow for the operation of a Car Wash; and

Whereas, the Planning and Zoning Commission ("Commission") conducted a Public Hearing on December 16, 2008 pursuant to notice required by law; and

Whereas, subsequent to the Public Hearing and discussion by the Commission, the Commission elected by a 5-0 vote to forward the application to the City Council with a recommendation for approval with condition(s); and

Whereas, following a duly advertised Public Hearing on January 26, 2009, the City Council concurs with the recommendation of the Planning Commission and those condition(s) stated in Resolution No. PC-08-024 as adopted by the Planning Commission.

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

Section 1. The City Council accepts the recommendation made and entered into by the Planning Commission in support of the Conditional Use to allow the operation of a Car Wash located at the Royal Farms site on the southwest side of State Route 1, 1,000' southeast of N.E. Tenth Street, Milford, Delaware

Section 2. The City Council hereby approves the Conditional Use application to locate a 5,269 square foot Car Wash in a C-3 Zoning District.

Section 3. In granting the conditional use, the City Council designates the condition(s) set forth in Resolution No. PC08-024 adopted by the Planning Commission on December 16, 2008.

Section 4. Construction or operation shall be commenced within one year of the date of issuance or the conditional use permit becomes void.

Section 5. This ordinance shall take effect and be in force ten days after its adoption.

Adopted by City Council this 23rd day of February, 2009 and Effective on the 5th day March, 2009.

Mr. Brooks then referred to the Royal Farms in Greenwood and Bridgeville that have areas for tractor trailers to park and asked if this will be allowed at this store. Mr. Silicato said that is something that would be policed by the city and would depend on city ordinances. He noted that he is not the owner of the Royal Farms.

Mr. Silicato then clarified this vote is for a conditional use to allow a carwash; the convenience store with gas pumps was previously approved by council. This is back before council as a result of a clerical error when the application did not include the carwash. Mr. Willard agreed recalling that when it was previously approved, it was for the entire parcel.

Responding to a question regarding a time frame for construction, Mr. Silicato reported they would like to go to bid as soon as the approvals are received, hopefully in March or April on the site work. They are close to obtaining all approvals with the final comment from the Department of Transportation and DNREC approvals. All those approvals must be in hand before they are able to go back to the planning commission for a final subdivision. They hope to start the site work later this summer or fall which should take approximately six months.

With questions about Grottos, Mr. Silicato advised that the owner prefers to open in the spring or fall and not the summer. Their plans are to open in the spring or fall of 2010.

Motion carried by a 7-1 vote with Mr. Spillane casting the lone no vote.

Mr. Spillane voted no because the carwash will add cars and trucks coming in and getting back out on Route 1 and he does not feel it is safe until an overpass is put in over Route 1.

Adoption of Ordinance 2009-4/Taxation/Senior Citizens Property Tax Reduction

Mr. Ambrose said it was recommended to increase the individual and joint income levels by 50% for senior citizens who qualify for a reduction in property taxes. He reported that last year, total deductions were approximately \$7,000. Though there is no way to predict the exact impact on this year's budget, he feels that even if it doubles to a cost of \$14,000, it is worth the savings to many of our seniors.

Mr. Ambrose moved to adopt Ordinance 2009-4, seconded by Mr. Starling as follows:

CITY OF MILFORD ORDINANCE NO. 2009-4
Amends Chapter 204 of the City of Milford Code
Taxation

NOTICE IS HEREBY GIVEN the following Ordinance is currently under review by City Council of the City of Milford:

ORDINANCE NO. 2009-4

AN ORDINANCE TO AMEND THE CODE OF THE CITY OF MILFORD, CHAPTER 204 THEREOF, ENTITLED TAXATION, FOR THE PURPOSE OF AMENDING THE CONDITIONS FOR SENIOR CITIZEN EXEMPTION OF REAL PROPERTY TAX.

WHEREAS, the City Council recognizes a need to adjust the income levels for senior citizens to qualify for the senior citizen tax exemption on real property tax.

NOW, THEREFORE, THE CITY OF MILFORD HEREBY ORDAINS:

Section 1. Section 1 of Chapter 204, Taxation, of the Code of the City of Milford is hereby amended to read as follows:

§ 204-1. Conditions for senior citizen exemption on real property tax.

Every person 65 or more years of age having an income not in excess of \$15,000 per year, exclusive of social security and railroad pensions, and residing in a dwelling owned by him or her which is a part of his or her real property shall be entitled, on proper claim being made thereof, to exemption from taxation on \$20,000 of assessed valuation of such real property, in the aggregate, and in the case of jointly owned property or property owned by husband and wife, such exemption shall be granted where the income of both does not exceed \$25,500 per year, exclusive of social security and railroad pensions.

Section 2. Dates.

Projected Adoption Date: February 23, 2009

Date Effective: October 1, 2009

Motion carried by unanimous roll call vote.

Approval of Mosquito Control Spray Policy/DNREC

Vice Mayor Wilson announced that in previous years, this agreement was presented for council action. Because this is automatically done annually, the city manager has asked that he be permitted to approve future agreements without the involvement of council.

Mr. Baird said that DNREC requires local municipalities endorse their spray policy.

Mr. Brooks moved for approval of the Mosquito Control Spray Policy, seconded by Mr. Morrow. Motion carried with no one opposed.

Council members had no problem with the city manager handling future Mosquito Control Spray Policy agreements.

Hearthstone Code Issues

City Manager Baird prepared the following written summary of facts in regard to the swale issue at Hearthstone Manor which was added to the packet today:

As directed by City Council at your February 9, 2009 meeting, I have reviewed the Clearview Drive swale in Hearthstone Manor. This report includes facts as retrieved from written documentation and personal conversations with individuals beginning when the property was annexed into the City continuing forward to Friday, February 20, 2009. This report is only a summary of the facts as made available to myself and does not offer any type of recommendation. Therefore, this report should only be used as a representative summary of the issue.

1. Hearthstone Manor was annexed into the City of Milford on April 24, 2000 (Source: City Council Minutes)

2. *Final Plans for the section of Hearthstone Manor that includes Clearview Drive was approved by the Planning Commission on October 21, 2003, City Council on November 24, 2003 and approved for construction by the City Planner on April 1, 2004. (Source: Planning Commission, City Council Minutes, Copy of signed construction plans)*
3. *The street cross-section approved on the construction drawings is in accordance with City specifications with the exception of the side slope grade. City specifications require a maximum slope of 4:1. The approved plans show a minimum slope of 4:1 (Source: Copy of signed Construction Plans)*
4. *A revised record plan for Phases 2, 3, and 4 was approved by the City on September 2, 2004 and recorded (Book 87 Page 274). It appears the change in the record plan removed the single family homes from Madison Drive, N. Madison Ct. and S. Madison Ct. from the record plan for phases 2, 3, and 4.*
5. *Note 1 on the revised record plan for Phases 2, 3, and 4 approved by the City on September 2, 2004 states, "Subdivision streets constructed within the limits of the right-of-way, dedicated to the public use, shown on this plan for the respective phase are to be maintained by the City of Milford following completion of the streets by the developer to the satisfaction of the City. The City assumes no maintenance responsibility within the dedicated right-of-way until the streets have been inspected and accepted by the City. The following rights-of-way of "Homestead Boulevard" "Hickory Branch Lane" and Phase I of "Kingston Terrace" shall be dedicated immediately upon recordation regardless of status of dedication to the City. The multifamily roads are private and will be the responsibility of the developer until a homeowners association can assume maintenance responsibility. The City will have the right to ingress and egress the multifamily roads for the purpose of maintaining utilities that are the responsibility of the City of Milford and for trash removal."*
6. *A letter dated April 19, 2006 was sent to Michael Fannin, Country Life Homes indicating the swale system that was installed in the Spring of 2005 is holding water and is not draining within a 24-hour period. The letter further notes the residents have witnessed Country Life Homes making unsuccessful attempts to rectify the problem. The letter further states the residents are concerned with drainage in the rear yards and that construction of the villas will cause further drainage problems. The residents request a meeting with the developer to discuss the drainage issues and asked that property owner Brenda Richards be the point of contact for a response. The letter is signed by 11 property owners. (Source: Letter from Property Owners dated 4/19/06)*
7. *A letter dated May 2, 2006 to Brenda Richards from Michael Fannin, states that during a significant rainfall event on April 22-23, 2008, "the collector ditch in front of your home on Clearview Drive tolerates a one inch or so rainfall and re-absorption occurs within 48 hours" He further states Country Life Homes will actively monitor the situation with Ms. Richards to ensure the stormwater management system works within the guidelines and will also provide updates at the quarterly HOA meetings as things progress. (Source: Letter from Michael Fannin dated 5/2/06)*
8. *A letter dated August 8, 2006 from Country Life Homes to the Homeowner's along Clearview Drive indicates that Country Life Homes will be making modifications to the swale system along Clearview Drive to provide a better system of front swale drainage. (Source: Letter from Jim Caulfield dated 8/8/06)*
9. *August 24, 2006 meeting with City Engineer, Beth Krumrine (DNREC) and Jessica Watson (Sussex Conservation District) and Clearview Drive residents to discuss drainage concerns along Clearview Drive. DNREC explained the environmental advantage of open swale drainage systems and residents expressed concerns over the open swale system. (Source: Conversation with Mark Mallamo and meeting notes)*
10. *During April, 2007, the City Engineer designed a closed storm drain system for the swale located along the north side of Clearview Drive. The City purchased the material and began to install the pipe. At this time, representatives from Key Properties Group informed the City this was neither their property nor the City's responsibility and directed City personnel off of the site. (Source: Conversations with City Personnel, Mark Mallamo and Tim Webb)*
11. *A memo dated October 2, 2007 from Tim Willard, City Solicitor, to Richard Carmean and Mark Mallamo states it appears to Mr. Willard the swales appear to be built in compliance with the Milford recorded plot. Mr. Willard also advises the 4:1 minimum versus maximum issue appears to be approved through the variance and waiver provisions as*

defined in the subdivision code. Mr. Willard further suggests the City can suggest or implement some modification of the system to address the residents concern or the HOA can pursue the matter with the developer independently. (Source: Tim Willard memo dated 10/2/07)

12. In a December 6, 2007 letter to Mrs. Vivian Ginn, Jessica Watson from the Sussex Conservation District indicates SCD would have no objection to a closed stormdrain system along Clearview Drive as long as the design engineer could demonstrate that the pipe was sized to safely convey the 100-year storm and allow the ponds to function as intended in the original design. (Source: Letter from Jessica Watson dated 12/6/07)

13. Tim Willard sends Mrs. Vivian Ginn a response to her February 18, 2008 letter to Mayor Rogers regarding the swale on Clearview Drive. Mr. Willard states that from his research he has found the plan not to be in conflict with what was built. He states "Therefore, in my opinion this matter is closed as it applies to the City." Source: Tim Willard letter to Vivian Ginn dated 3/6/08)

14. During the October 13, 2008 City Council Workshop, Councilman Spillane asked the swale issues at Hearthstone Manor be revisited by City Council. Councilman Spillane distributed information related to the swales on Clearview Drive. Mr. Spillane makes the case that the swales as they exist are a safety issue for the residents in the area. City Council discussed the matter and requested the City Manager speak with Mr. Fannin and to report back at a future meeting. (Source: October 13, 2008 Workshop Minutes)

15. On October 27, 2008, Elmer Fannin, Cliff Crouch, and David Baird meet to discuss issues surrounding Key Properties Group. The discussion includes Clearview Drive Swales, Billboards on Parcel 405 and Tax Assessments. Mr. Fannin reiterates his position the swales function and were reviewed and approved by the City and are therefore in compliance with City specifications. He further requested that the City refer any complaints concerning Hearthstone Manor to himself and Key Properties Group so that they could be aware of the concerns and take appropriate action to address such concerns. Mr. Baird informed Mr. Fannin the swales were not constructed to City specification and discussed the possibility of pursuing the option first proposed in April 2007. Mr. Fannin indicated the Hearthstone Manor Homeowners Association was responsible for the maintenance of the swales and any issues would need to be addressed by the HOA. This was confirmed in a follow-up letter from David Baird to Elmer Fannin dated Nov. 3, 2008 (Source: Nov. 3, 2008 letter from D. Baird to E. Fannin)

16. Mr. Jim Griffin, attorney for Mr. Fannin, responds to Mr. Baird's letter of Nov. 3 with the following points: (1) Key Properties has not received any direct complaints from persons who own property on Clearview Drive, (2) Mr. Willard's letter to Mrs. Ginn dated March 6, 2008 indicating the swales are in compliance and the City considers the matter closed, and (3) if there is a documented engineering problem that is confirmed by SCD, than his client will take reasonable steps to correct such problem. Mr. Griffin further claims his client does not believe "the City should, or legally may, use taxpayer money to resolve a complaint which my client believes was made by Mr. Spillane and which has not been documented or confirmed by Sussex Conservation District as a bona fide drainage issue" (Source: J. Griffin letter to D. Baird dated Dec. 12, 2008)

17. Tim Willard, David Baird, Elmer Fannin and Jim Griffin meet to discuss issues in Mr. Baird's Nov. 3 letter and Mr. Griffin's Dec. 12 response. Mr. Fannin disagrees with the City's approach and states he does not object to the City creating a closed system on Clearview Drive as long as the City assumes ownership and maintenance responsibility for the entire drainage system in Hearthstone. (Source: Jan. 12 Council Minutes)

18. The information from No. 17 was reported to City Council at its meeting on January 12. Mr. Dave Hitchens representing Key Properties Group makes remarks on behalf of Mr. Fannin and his desire to have a cooperative and productive working relationship with the City and Council. City Council directed the City Manager to report back with a status report on Jan. 26, 2009 and hold a meeting with the property owners, SCD, Developer and the City to seek a resolution on the swales. (Source: January 12, 2009 and Jan. 26, 2009 Council Minutes)

19. The City facilitated a meeting on February 6 as stated in No. 18 that was attended by property owners, SCD and the City. Mr. Fannin responded on Feb. 4, 2009 he would not be in attendance as his position had not changed since Mr.

Griffin's letter of Dec. 12, 2008. During the meeting, Mr. Mallamo reviewed the status of the swales and residents voiced their displeasure with the swales in their current state.

20. At its February 9, 2009 meeting, City Council directed the City Manager to conduct a fact finding on this subject and report back at its Feb. 23, 2009 meeting. (Source: Feb. 9, 2009 Council Minutes-Draft)

21. On February 18, 2008, City Engineer Mark Mallamo provides a report to the City Manager indicating the specifications as defined in the City's subdivision ordinance. Mr. Mallamo's findings are based on survey work he conducted in the field on Clearview Drive over the past week. He notes the following:

a. Plan deviation of the minimum vs. maximum 4:1 slope.

b. The maximum depth of 2.9 feet is in compliance with the City requirement of 3.0 feet. The average depth is 2.15 feet.

c. While the shoulder width varies, the shoulder width is generally deficient with an average width of 3.78 feet

d. The side slopes vary with the depth and are also affected by the location of utilities such as electric transformers, water meter pits and sewer cleanouts. The steepest slope is 1.4:1 and the flattest is 4.4:1. The average slope on the roadside of the swale is 4.1:1. The average slope on the back side of the swale is 2.8:1. In many cases this back slope was made steeper due to conflicts with the meter pits or transformers.

Vice Mayor Wilson thanked the city manager for preparing the report which lists and includes all the facts.

Mr. Workman asked if Mr. Baird had contacted the engineers to obtain the documents that were archived. The city manager spoke with Davis, Bowen and Friedel but they were unable to provide any inspection records on the work done at Hearthstone.

Mr. Workman then asked the city solicitor if that information should be available to the city upon request. Mr. Willard said that if they had the inspection reports, the city would be entitled to it, but it appears they did not have access to it.

Mr. Baird clarified that DBF did not have the information with regard to field inspections reports. He added that construction took place in 2005 and 2006. He also explained the field inspection reports would show any deviations approved in the field.

When asked by Mr. Brooks if the city received copies of those field inspection reports at the time, Mr. Baird said that under normal situations they would be available; however, the city does not have copies either.

When asked for a recommendation by Mr. Baird, he said this is one of those issues that everyone needs to step up and accept some responsibility. The best way to handle this situation is to sit down and come to some compromise though it won't be easy. To litigate something like this, with everyone having some sort of responsibility, it is not in the city's best interest.

Executive Session - Pursuant to 29 Del.C. §10004(b)(4); Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation

When Vice Mayor Wilson asked for a motion to go into executive session per the agenda, Mr. Ambrose asked to speak against going into executive session. He said Hearthstone II Phase I major subdivision reconsideration has been debated publicly in the past and he feels it should again be debated again in public. Government is supposed to be transparent and going into executive session defeats the transparency, particularly considering the number of times council has gone into executive session lately.

Mr. Baird explained the agenda was structured so that council had a choice of discussing the matter in executive session or in open session. However, going into executive session would require a majority vote of city council.

Mr. Willard said that the purpose was to reconsider the Hearthstone II Phase I final subdivision action; since that took place there have been several letters from Hearthstone's Attorney Jim Griffin. One asked for council to reconsider a vote to approve Hearthstone II or they would ask a court to order council to grant approval. That legitimately falls under litigation which is one of the three reasons council is able to go into executive session. However, it is councils' decision whether or not to go into executive session.

Mr. Brooks agrees there have been many executive sessions to discuss this matter; he also prefers it be discussed in open session so it can be taken care of; Mr. Workman and Mr. Oechsler concurred.

Hearthstone II/Phase I Final Major Subdivision/Reconsideration

Solicitor Willard referred to the considerable record on this matter. He explained that procedurally, the final plat was before council and because Hearthstone II Phase I is a planned unit development (PUD), it falls under the subdivision code procedure. It received preliminary approval with a conditional use and the final subdivision approval in being done in phases. That was before council at the end of November with a recommendation from the planning commission for approval.

He recalled that at that time, there was a lengthy debate. A motion was made to approve the final but failed to receive four votes. Since that time, Hearthstone's Attorney Jim Griffin asked that council to reconsider the plan. The request for reconsideration included an offer to increase the parking spaces from 2.3 to 2.5 and additional walking trails which was recommended by the planning commission but not included in the formal proposal.

Mr. Willard explained that the subdivision code does not have a reconsideration provision which does not mean it cannot be reconsidered because council is the ultimate arbitrator. He said there are questions that if it is reconsidered, should another public hearing be scheduled at which time the additional proposals would be considered. Or, council has the option to reconsider by examining the record and making another decision to approval or disapprove. Because the project is big and unique, the record is large enough that he feels it may merit reconsideration.

In his letter, Mr. Griffin cited the Ashburn case in Kent County. Ashburn submitted a subdivision application to the Kent County Planning Services. The Kent County Regional Planning Commission rejected Ashburn's subdivision application though it was in compliance with all zoning and subdivision requirements.

Ashburn appealed the denial to the Kent County Levy Court and then to the Superior Court, arguing that the commission lacked the power to deny the application because it complied with the applicable subdivision and zoning code requirements. The Superior Court rejected Ashburn's arguments because it felt the Commission under Delaware and Kent County Codes had the right to reject the plan despite its conformance with all the legal requirements. The Delaware Supreme Court reversed the decision finding that the Commission had exceeded its authority. The court said the commission may condition its approval of Ashburn's subdivision application based on non-code factors but cannot use the power to deny a conforming application outright.

Mr. Willard further explained that if a legislative body has concerns, whether parts of the code are being adhered to or whether the state has concerns, conditions should be added. Therefore, the law on final site plan approval favors the land owner if there are no code deviations.

The solicitor said another consideration is when someone appeals a decision on a subdivision or land use decision, the record on that vote should be very clear. Each decision of the councilperson voting against the application must have and state a valid reason.

Vice Mayor Wilson feels the issue has been discussed in depth and council has been properly informed. She feels it is appropriate for a vote to be taken. She believes the matter should be resolved for the developer and everyone else involved in this process. There have been opinions provided by the solicitor, city manager and information obtained from city staff that should be considered. She feels that at this point, nothing new can be offered.