

**CITY OF NEWARK
DELAWARE
COUNCIL MEETING MINUTES
August 10, 2015**

Those present at 7:00 p.m.:

Presiding: Mayor Polly Sierer
District 1, Mark Morehead
District 2, Todd Ruckle
District 3, Rob Gifford
District 4, Margrit Hadden
District 5, Luke Chapman
District 6, A. Stuart Markham

Staff Members: City Manager Carol Houck
City Secretary Renee Bensley
City Solicitor Bruce Herron
Deputy City Manager Andrew Haines
Finance Director Lou Vitola
Planning & Development Director Maureen Feeney Roser
Planning & Development Manager Michael Fortner
Community Affairs Officer Ricky Nietubicz

1. The regular Council meeting began at 7:00 p.m. with a moment of silent meditation and the Pledge of Allegiance.
2. MOTION BY MS. HADDEN, SECONDED BY MR. RUCKLE: TO REMOVE ITEM 4-A, APPOINTMENT OF JAMES PARKS TO THE PLANNING COMMISSION TO FILL THE VACANT DISTRICT 4 TERM TO EXPIRE SEPTEMBER 15, 2018 FROM THE AGENDA.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

3.
 2. **ITEMS NOT ON PUBLISHED AGENDA**
 - A. Public

06:53

Shawn Tucker, Esq. represented the Newark Country Club in regard to the First Reading for an ordinance proposing the downzoning of his client's property. He submitted a letter earlier today regarding this matter and asked that it be made part of the record.

Mr. Tucker reported that he was involved with the original approval of the Newark Country Club plan. His client currently controlled 120 acres at the club. The plan was approved for about 271 units in 2008. He did not believe that plan had expired. The reason for that conclusion was set forth in his letter, but he thought it was clear that the sunset law was changed after the plan was recorded, not before, which would normally grandfather the plan under Delaware law.

The letter he wrote was a result of quite a bit of time spent listening to the transcript from the August 3rd Council meeting as well as the public notices that were issued and put on the City's website. Mr. Tucker said he did not like to write letters like he wrote today regarding this matter because he did not believe they should be here tonight with this matter on the agenda. He believed they got here the wrong way contrary to Delaware law and the Freedom of Information Act. He was hired on Friday when his client just learned about this through a letter from the City Solicitor. The Freedom of Information Act clearly required public notice if there was going to be a vote on a matter that would affect a particular property. In this case there was a vote to put this reading on the agenda on

August 3rd, but the notice did not give proper notification to anyone interested who read it that there actually was going to be a vote on the potential rezoning or downzoning of this property.

He was very familiar with FOIA and with land use applications and there was no way his client could have known this matter was going to advance tonight for introduction on a potential downzoning. For that reason it should not be read tonight. It should not be read and everyone should back up. The City Solicitor is very competent. He was certain both parties could discuss this in more detail. This should not proceed forward and he asked that the City consider this carefully before doing so.

Mr. Herron advised this was on tonight for a First Reading only. At some point before Council voted on the proposed rezoning it would need to be referred to the Planning Commission. Tonight was not the time for a debate on the legal arguments involved here. He saw no reason for Council to remove the ordinance from the agenda tonight.

Dennis Barba, president of Newark Country Club Board of Directors read a statement on their behalf.

“Our club has operated for decades in this city and when we fell on hard times due to declining membership, we attempted to work with the city in good faith on several alternative options for this property. After learning of our dilemma, only because of our honesty, the powers that have been decided to use that information against us and in fact and act in bad faith to downzone us.

A targeted spot downzoning that robs us of millions of dollars in property value. I'm here trying to ask that this spot downzoning ordinance be withdrawn from tonight's agenda for reading unless the city is ready to go on the record tonight to guarantee us that it will pay the club for the millions of dollars in the value that will be lost. It is truly disappointing that certain people in the city are trying to take advantage of our unfortunate economic condition right now by punching us in the gut while we are already down. If our neighbors truly wanted to help preserve this property as a golf course, they would have joined and helped us out. They would have been members of our club, but instead, the city is acting as a stalking horse attempting to take our property under the pretext of good planning instead of paying us for what it is worth. The advertisement for the notion to put this matter on the agenda tonight tells club members all they need to know about the city's intentions. The advertising of the meeting last Monday night did not give anyone or ourselves fair notice that the Country Club property was under consideration for a possible downzoning. It is troubling to me and my members that the city took information we shared with it honestly and freely and set up a phony process to put this matter on tonight's agenda.

This was clearly done in a misguided effort to block us from submitting an updated development plan for the property when people knew in advance it was likely to be coming. We will not stand for this bad faith. We're taking our property and taking our property to the tune of millions of dollars. If you move forward with this downzoning, which you initiated in bad faith, you will leave us no choice, but to seek relief in court. Remember, we came to you first to work with us to resolve this situation, not to litigate. Now, you have used our good intentions against us. To me, this is one of the most unbelievable acts I've ever seen the City of Newark conduct. Thank you.”

Jackie LeGasse, District 3, said she only took exception when her property, her home value or the Country Club (of which she is a member) was under attack. After the power plant situation residents were given the idea that City Council would run with transparency. So far, there were two members on City Council that were also members of the Newark Country Club voting against the club they belonged to. She found that to be a conflict of interest. She requested that the City either make the Country Club whole or let the members resolve their problems. She took exception to the ordinance and wanted it to be removed from the docket.

Donald Orr, Creek Bend Ct., a Country Club member, said the most telling thing here was the City's own zoning map. The City wanted to rezone the club's property RH when they were surrounded by RS. A lot of money was spent legally and otherwise getting all this development. They got put back as everybody knows, but the taxes that have been paid ever since then have been on individual lots. He heard that Mr. Chapman said there were going to be 500 houses built there. He would agree that quarter acre lots would allow that, but as far as he knew the development was for about half that number. He thought this was a misuse of power and was done surreptitiously. They have not given ample notice that they were even intending any of this and if he was a representative of this district, he would have been talking to the club. He would not just suddenly send a letter that arrives on Friday dated Tuesday or Wednesday that this was going to happen on Monday.

Newark Country Club members Ann Orr, Chris Doordan, Ron Holliday and Tom Baker ceded their time to Mr. Tucker.

Shawn Tucker, Esq. thought it was critical for Council to understand the seriousness of this situation which dealt with fundamental property rights for a property worth millions of dollars. This ordinance was unprecedented because of how it was targeted at one particular property that was listed in the City's current comprehensive development plan since 2008 as low density zoning. Nothing changed since that 2008 plan.

As his client indicated, they attempted to work with the City in good faith to discuss the future use of this property for the past year. He thought there were several options that could be considered here, but this ordinance put a gun to his client's head because under the law, because of what they believe to be a clear violation of FOIA, they must file a complaint with the Attorney General's office or they waive that right. They have only so many days to challenge this – they do not want to do it, they are not threatening to do it, but they have no choice but to do it, or they would be waiving their legal rights under the statute, which is why he started out by requesting that this body please consider removing this from the agenda so they were not forced in that position. His client does not want to litigate unless they were forced to litigate, unless they were forced to seek another forum so that its rights can be heard, considered, weighed and properly protected. Right now, they did not feel that could happen here based on how this matter ended up on the agenda this evening. What was particularly troubling to him was how the pending ordinance doctrine, which he referenced at some length in his letter, has been used in this case. It is a rare bird. It has been used at best one time based on his current research over 25 years ago. It was not well accepted in this jurisdiction and it appeared that in this case it had been used in exactly the way that the court said in the case cited that it should not be used and that is by one party who gained advance knowledge of a change and then used a mechanism to obtain an advantage.

In this instance, it was the opposite of what happened in the case cited. In this case, they had reason to believe that certain folks learned about the future/potentially eminent development of this property and that this action on August 3rd took place to head that off, only then to claim that the ordinance, the pending-ordinance doctrine applied and therefore his client's hands would be tied and would be unable to submit a plan. That was a bad faith application of that doctrine, to the extent that it was still even alive in Delaware, to the extent that it was even valid and available. In his opinion as a land use attorney of 15 years who represented both government and the private sector, that would be a bad faith use of that doctrine. The reason was because this was advertised in such a way, simple reference to your pending draft comprehensive development plan, no reference to a downzoning, but a reference only to that plan and a reference to a possible vote about that draft plan. The result of Council's meeting on August 3rd was not a motion about a vote regarding that draft plan. It was a motion to start a process to downzone his client's property. His client could not have possibly known that. If they did, they would have been there to discuss that and when he read in the newspaper about compromising and his client was not even at the table and they were the owner of the property and folks are talking about compromising, he found that stunning. Compromising with who? His client was the property owner and deserved a seat at that table. Based on what he saw thus far, this appeared to be a strategic use of

a doctrine that was not well settled in Delaware to deprive his client of its property value. He again requested that this body consider removing it from the agenda this evening. He believed it represented an intentional effort to violate his client's constitutional rights. If this was contrived and set up to happen this way with the vague notice that was provided, there were legal implications in that. That was why he said the City had a competent City Solicitor who was able to go into executive session as appropriate to discuss some of these consequences. These were property rights and were constitutionally protected and needed to be taken seriously.

The choice right now was either to file a complaint with the AG's office or to waive the legal right to do so and challenge how this hearing was brought about. There was no reason why people could not sit down at the table and work on this together and make it unnecessary to proceed in this fashion.

Andy LeGasse, District 3 and member of the Country Club, said the club was made up of professionals and hardworking people and was a great social outlet. It was an asset to the City and instead of degrading the value, the City should be standing behind the Country Club and promoting it. Because of the way this whole revelation came out last week, the members did not have time to react and it seemed to him like the power plant all over again. He hoped Council would consider withdrawing the bill from the agenda.

Bennie Dollard, food vendor in front of National 5 & 10 on Main Street, inquired about the process to get the size requirement changed for his vending cart from 4' x 6' to 5' x 10'. Mr. Morehead advised him that the process had to start with the Planning and Development Department and would eventually come to Council.

Fritz Land, Covered Bridge Farms, came to Newark after living in eight to ten other areas. He said Newark had been a very good place to live, always seemed to be fair as to what was going on and the people running it were always good. He was a member of the Newark Country Club since 1977. His concern was the information the Country Club received was very unfavorable as far as the club was concerned financially and asked that it be looked at and they thought it should revert back to what it was before. They thought the situation could and should be corrected.

John Morgan, District 1, was not a member of the Newark Country Club but shared comments that might be relevant to the situation. He was a member of the Boards and Commissions Review Committee established last year. One of the first things they did was approve a rubric for evaluating boards and commissions. They started out with governing authority which is some combination of State law and City code. The next item was whether the required qualifications were appropriate for the body and whether the people appointed already had the current qualifications or needed training. He felt it was appropriate to have some sort of training for people after they were appointed as long as the board or commission was not making important legal decisions. However, if there were controversial items that come before the Planning Commission or Board of Adjustment, there was no time for on the job training. He therefore urged that as Council makes further appointments to the Planning Commission and the Board of Adjustment, that they take a careful look at the qualifications of individuals before putting them there. He knew it was difficult to find qualified people who were willing to serve on these important boards and commissions because of the amount of time involved. He thought compensation should be considered and noted it was already provided for in the existing City code for members of the Planning Commission and Board of Adjustment.

Laura Del Percio, General Manager of Newark Country Club, read a letter on behalf of member Guy Johnson who was not present. "Honorable Mayor and City Council members, I'm writing to you as a 21 year member of NCC, former secretary of NCC Board from 2004 to 2010 and a retired attorney. The proposal before City Council to rezone or downzone the NCC property to half acre parcels is an unprecedented attack on NCC, introduced, as I understand, with no reasonable notice to the leaders of NCC. Although I am not a former real estate lawyer or a zoning expert, this proposal is clearly proposed taking by City Council of considerable financial value from NCC. The action clearly violates legal principles and case law in this area.

I'm amazed this proposal passed muster by City's attorney. If passed this proposal would significantly and adversely affect NCC's financial assets and its property and it could potentially negatively affect NCC's relationship with its local financial institution. This is a bad and illegal proposal wrought with significant legal ramifications for both the City of Newark and NCC. I don't understand the genesis of this proposal and hope it is not merely politically motivated. Again, this proposal is clearly an assault on NCC, an excellent corporate citizen of the City of Newark since 1921 and should be soundly defeated by the Mayor and Newark City Council members.

Unfortunately, I'm currently away from Newark and will not be able to participate in the public forums on this proposal. Therefore I am sending this to express my views and strongly urge each of you to vote no at this proposal at every future opportunity. Thank you for your consideration of my comments and I request that they be made part of public record regarding this ill-advised proposal."

Ms. Del Percio added that she was a member of Rotary and knew there were a few members on City Council who sit with Rotary. As Rotarians, they were sworn and make an oath that is a four-way test in everything that they do, they think and say within their personal lives and business. The four-way test is, is it the truth? Is it fair to all concerned? Will it build goodwill and better friendships and will it be beneficial to all concerned? She asked if this proposal passed the four-way test.

Charles Alexander, 271 Dallam Road, was a member of the Newark Country Club and lived within two blocks of the Country Club. Within the last year he moved here from Mississippi. He moved here because he thought it would be a good idea, and it has been. He loved being here. One thing he expected to be a little bit different but did not know if it was, was that the political process would be a little different than he was used to.

In an earlier life he was a community organizer – community organizers go into the community, see the self-interest of those who are generally not well represented and present that to the people that have political power. That was what he was here to speak to was that the City had regulations in the manner in which this government was operated. He would leave it to the lawyers about whether this was technically the right way to go about things. There was also the spirit of what we were about here, the spirit about which we go about things. It came to him that this had a sense of urgency that he did not understand about why we were running so fast. That always smelled bad, but he did not know that. He just asked to slow this down a bit which was within the City's power in whatever way they thought was best. Let the system work out and then if there were disagreements, there would be a vote and a decision.

John Carberry, Covered Bridge Farms, moved here in 1970 after a bunch of moves and found this to be a Norman Rockwell-esque town that he was intensely proud of. He said we solve our problems here without saying "my lawyer is bigger than yours" and that is what ought to be done here. He felt this was like The Guns of August and suggested backing away from the war and getting to the conference table.

Jeff Lawrence, District 3, stated his concerns about how the Country Club situation was being handled. He was one of a few people at the meeting last Monday and suspected the reason there were only 4-5 people there and a full room tonight was because people were now aware what was coming and last week they were not. Last week's meeting was guised as a comprehensive plan workshop but it was much more than that. This was an organized attempt at trying to take potentially millions of dollars away from somebody. He felt this was a violation of their property rights and was unfair. The rights of the Country Club versus what that might do to the community could be debated but it could not be done unless all of the proper people were brought to the table. He was amazed while sitting in the audience last week trying to figure out what was going on and how this was even a comprehensive plan workshop. Pre-written statements were being read, pre-written ordinances were being read and he still did not completely understand what happened, but felt this was an organized attack against the Country Club behind closed doors. Following the power plant issue he thought the City should over-compensate in their openness and their transparency. Yet they exhibited business as usual or maybe even worse. The politics aside of whether or not the property should

be downgraded or not, every single person should have voted against this last week simply for the way it was brought about and those who voted in support of it should feel ashamed. The residents already had to foot the bill for half million to \$600,000 lawsuit due to the power plant. He referred to a newspaper article about another lawsuit due to the Trader's Alley property. He said the residents always lose because they pay the legal bills. He felt neither the residents nor the Country Club wanted to be paying these fees and yet the City continued to behave poorly, bringing on lawsuits, shame to the City, anger to the residents and further split us apart.

4. 2-B. ELECTED OFFICIALS

45:31

State Representative Paul Baumbach supported the nomination of James Magee to the Property Maintenance Appeals Board and he was very impressed in his interactions with him.

He knew there was some discussion at the last City Council meetings regarding legislation that went through and about legislation that was passed but not signed. He pointed out that was not uncommon and he would not read much into that other than there was a lot of passing bills in the last few hours of June 30th and early July 1st and the Governor just takes some time to work through it.

He knew the realty transfer tax was threatened and removed as far as the State giving less of it to the City. His thought was the City needs to be prepared for it – it was certainly a possibility if not a probability of coming over time, maybe phased in over time, but the State is very short on resources and very long on obligations. If they did not do more on the resources, then they needed to be looking at obligations including obligations to give money to the cities, municipalities and counties.

5. 2-C. UNIVERSITY

(1) Administration

47:27

Caitlin Olsen, Assistant Director, Government Relations, shared several dates for upcoming events.

- August 29 was move-in weekend. Council was invited to welcome the students back to campus. The experience with Ms. Sierer was very successful last year and they wanted to build upon that. Anyone interested in participating should contact Ms. Olsen. Also on the 29th was another physical therapy family fun day for the community on STAR Campus from 11:00 to 5:00.

- September 4 was the first home football game at 7:00 PM versus Jacksonville.

6. 1-C-2. STUDENT BODY REPRESENTATIVE: None

7. 2-D. LOBBYIST

49:27

Mr. Armitage acknowledged Representative Baumbach's comments. He agreed it had been the norm for the Governor to be slow in signing passed legislation. In addition there was a new chief legal counsel which appeared to slow down the process.

There will be a special election for the 18th Representative District as Representative Barbieri has stepped down.

Mr. Armitage contacted Mr. Luft to let him know that he would be attending the League meetings and if there were no objections from the members of the Legislative Advocacy Committee, he would also be attending those.

This coming weekend, the State was hosting a council on state governments in Wilmington and one of the things he was asked to do was be a co-host of the dinner on Monday evening for the Delaware legislators. He asked if there were any objections to his doing that - there were no objections from Council.

Unsigned bills included the two open carry bills, the one regarding the pole taxes, the third party notification for termination of utilities and the expansion of background checks for employees at the summer camp.

8. 2-E. CITY MANAGER

52:13

Ms. Houck reported the four newest police cadets that graduated on July 31st from the State Police Academy have started their field training with the Police Department.

Two special meeting dates of Council were set last week:

- Monday, September 21 at 6:00 p.m. - refuse RFP
- Wednesday, October 7 from 5:00 PM to 9:00 p.m. - municipal broadband

The location for these meetings was changed to the Church of the Nazarene on Old Paper Mill Road since there was the potential that they may draw a larger crowd than could be accommodated in the Council Chamber.

9. 2-F. COUNCIL MEMBERS

53:56

Ms. Hadden

- Attended a webinar on social host laws as part of a group that she was a member of as a City representative and University of Delaware representative. It was a campus coalition on student alcohol abuse. She was gathering information to see if that may work in the City with the University of Delaware's assistance.
- Attended a public session with Forgotten Cats, the State of Delaware and PetSmart, where the city of Newark received the grant for the trap, neuter and release program for the feral cat population in Newark. It was very exciting and a good meeting.
- Attended the Madison Association community meeting.
- Met with a variety of constituents in person and in groups at her meet and greet to discuss a variety of issues and problems.
- Attended the National Night Out that the Police Department put forward and it was well done.
- Attended the Duck Donuts ribbon cutting last week. Everybody should stop by and support this new venture for Newark. It is a local owned business and they are very proud of it.
- Met with the kids at Dickey Park for their last day of Camp REAL. Ms. Sierer joined her and the police also were present and offered a free trip to the Trampoline Park for the children.

Mr. Chapman

- Had no comments at this time.

Mr. Gifford

- Thanked everyone for sharing their comments tonight.
- Attended the garden tour and enjoyed seeing all the different gardens around the districts.
- Commented that the tennis court resurfacing went really well.
- Madison Drive was having their annual picnic this weekend and he hoped to attend on Saturday.

Mr. Markham

- Was following in the paper about the transmission line from New Jersey that DEMEC and Delmarva were going to have to foot a fair amount of the bill for. He would like an update from DEMEC on if they see what the costs are that may be passed through to the City. It was not something the City could control, it was something PJM was doing. He thought it affected City residents.

Mr. Morehead

- Thanked everybody for coming.
- A new festival was scheduled on August 21st at 5:00 p.m. in front of the former location of the Newark Co-Op. It was being run by the Newark Arts Alliance and would

feature food trucks, arts, music, etc. He encouraged everybody to come out to the family friendly event.

Mr. Ruckle

- Received a call from Joe McGinnis of Lumbrook who shared the sad news that his mother Dorothy McGinnis passed away last night. He wanted to express thanks to the City for their plowing efforts at a time when his mother had to be rushed to the hospital. Mr. Ruckle also learned that another resident was aided in the same manner last year.
- Attended National Night Out which was a great event.
- A meeting was scheduled on August 18 at Fountainview with the City to go over the water meters and hope there will be some solutions that would be best for everyone.
- Thanked the residents of District 2 for coming out today along with everyone from the Country Club.

Ms. Sierer

- Thanked members of the Newark Country Club and all of those interested in the Club for being here this evening. It was important to hear their thoughts and concerns in order to move forward in the appropriate manner.
- On August 21st in addition to the Newark Arts Alliance event was the K-9 battle of the bars event which raised money for the K-9 police force. The event is at the Courtyard Marriott from 5-8:00 p.m. Ms. Sierer will be in the dunk tank at 7:45 p.m.
- The Mayor's second annual Masquerade Run, a 5K run and walk will be on October 31st, at 9:00 a.m., 8:00 a.m. registration. It will begin at the Delaware Technology Park and a lot of fun activities will be planned.
- Attended the last day of Camp REAL at Dickey Park for the kids on Madison Drive. She gave kudos to the Parks and Recreation Department and the Food Bank who provided their lunches for six weeks this summer. It was a very important program to assist them and was an important part of our community service.
- The backyard habitat tour was great fundraising effort put on by Karen Barker and Sheila Smith from Unitarian Universalist Fellowship Network to raise money for native plant programs in City parks.

10. 3. **ITEMS NOT FINISHED AT PREVIOUS MEETING:** None

11. 4. **APPOINTMENT TO BOARDS, COMMITTEES AND COMMISSIONS:**

B. Reappointment of Mary Ellen Green to the Board of Ethics for an At-Large Term to Expire February 15, 2020

01:02:45

Ms. Sierer reported that Mary Ellen Green was interested in being reappointed to the Board of Ethics. She worked with many homeless and working poor folks at the Emmaus House for 27 years and was interested in giving back to her community. She also served on the Housing Coalition for the State of Delaware for 18 years.

There was no public comment.

MOTION BY MS. SIERER, SECONDED BY MR. GIFFORD: THAT MARY ELLEN GREEN BE REAPPOINTED TO THE BOARD OF ETHICS FOR AN AT-LARGE TERM TO EXPIRE FEBRUARY 15, 2020.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

12. 4-C. **APPOINTMENT OF JAMES MAGEE TO THE PROPERTY MAINTENANCE APPEALS BOARD TO FILL THE VACANT AT-LARGE TERM TO EXPIRE DECEMBER 15, 2018**

01:04:15

Ms. Sierer noted that Mr. Magee was from District 4 and was a resident off and on for 25 years. He was interested in serving on the Property Maintenance Appeals Board and served on many committees in his professional and civic capacities.

Ms. Hadden stated that Mr. Magee was in her district, was articulate and cared about the community as evidenced by the type of business he runs. She thought he would be a great asset to the committee.

Mr. Morehead agreed with Ms. Hadden and knew him for four or five years. He chose to live downtown to be part of the community. He was very involved with building the type of community that we truly want. He would recommend Mr. Magee for any position that could use someone with his skills, talents and interests.

There was no public comment.

MOTION BY MS. SIERER, SECONDED BY MR. MOREHEAD: THAT JAMES MAGEE BE APPOINTED TO THE PROPERTY MAINTENANCE APPEALS BOARD TO FILL THE VACANT AT-LARGE TERM TO EXPIRE DECEMBER 15, 2018.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

13. 5. SPECIAL DEPARTMENTAL REPORTS:

- A.** Special Reports from Manager & Staff:
 - 1.** Boards & Commissions Review Committee Recommendation Regarding Advertising Committee Vacancies

01:07:20

Ms. Bensley reported on the recommendation by the Boards and Commissions Review Committee regarding advertising for committee vacancies. At their June 16th meeting the committee made a recommendation to be forwarded to Mayor and Council, recommending that the City use its website, and/or email list, and/or utility bill mailing to inform its citizens about current or future vacancies on the City's boards or commissions and about the procedures for submitting applications to fill such vacancies. This was passed unanimously by the group. The current procedure for vacancies is for the City Secretary's office to notify Council quarterly of any impending term expirations for the following quarter. Council members or designated staff then contact the incumbents to ascertain their interest. If there is determined to be a vacancy, Council members work to recruit individuals to fill those vacancies and submit nominees to be considered on the agenda by Council as a whole.

Currently, vacancies were noted on the boards and commissions list posted on the City's website. However members serving on expired terms are not listed as vacancies as often those members have agreed to serve until someone else is found to replace them. Since the application process began, there have been a few unsolicited applications by the form posted on the website, but that number is minimal. Two questions need to be considered by Council in deciding whether they want to implement this recommendation first, whether Council wishes to expand the advertising and promotion for the boards and commissions vacancies, but also if Council wishes to expand the advertising and promotion of the vacancies: should only vacant positions with no incumbent board member be advertised? Or should all boards and commission positions be advertised regardless if there was an incumbent member who would like to seek reappointment?

The Community Affairs Officer outlined a procedure in the attached memo that could be used for publicizing vacancies via the City's website and through the various other communication venues of the city. The staff recommendation would be that Council adopt the Boards and Commissions Review Committee recommendation to advertise the vacancies for the City's boards and commissions through those procedures. For incumbent members, staff would also recommend that the Council member or designated staff contact those members to ascertain their interest in continuing in their current capacity at least 30 days prior to the expiration of their terms. If the incumbent was not interested and/or if the Council member would like to seek additional applicants for the position, the position would then be advertised as vacant. It was also recommended that

Council members retain the discretion to submit the final nominee of their choosing from all applicants for consideration by Council as a whole.

Mr. Gifford said the staff recommendation was good for him. He liked the ability to be able to check with someone before the term ends and then if it is it can be posted as vacant. It looked like we had a methodology that would work on our website for vacant positions that are kind of like employment positions.

Mr. Markham agreed with the methodology. He said we need to make this quite visible on the website for people to find fairly easily. The other suggestion he had was even though we are listing the vacancies there should be a link to the entire boards listing so you can see who is on the board, when their term expires, etc. Even if it is not right there on that page, you should be able to get to it easily.

Mr. Morehead thought it would make sense to describe the board's responsibilities, the certifications we are looking for and how much time would be involved with the application. He asked if this was a direction to staff or a resolution. Ms. Bensley said this would be direction to staff.

Mr. Ruckle added that we still did not have a residency requirement, or defined what it meant to be a resident of Newark. He thought that should be addressed if these positions were going to be advertised. Rebecca Powers, Chair of the Boards and Commissions Review Committee, asked Mr. Ruckle to elaborate on the issue of residency. He said City Code did not define the term resident. Someone could pretend to live in the City and run for office or be a member of one of these boards. Ms. Powers thought the issue should be addressed but did not think it should hang this up tonight.

Mr. Gifford asked if the description of the skills desired was in the description of the boards and commissions listed on the website. Ms. Bensley noted that currently there was a list posted on the website of the boards and commissions book that was kept in hard copy at the City. Each board had a listing of its requirements, qualifications, what the board does, their Code citations, etc. that details their duties and responsibilities. Along with that is a list of the current membership. She felt this information could be more prominent and easier to find and said it was part of the overall discussion about the website. Mr. Gifford wondered if we needed to expand that information or just make it more visible. Ms. Bensley and Mr. Gifford agreed it should probably be a little bit of both.

Ms. Sierer asked for clarification about the procedure for advertising vacancies in utility bills. Ms. Powers thought the staff direction was that the link to the website would be there. Ms. Sierer questioned the procedure for the email list since she thought the board's motion and the staff recommendation were a little different. Mr. Nietubicz explained it would be similar to the cityofnewarkde.us/jobs link and people would be directed there. It created a clearing house for that sort of thing. If the City knew there were going to be several vacancies, staff could make sure the link goes out. It would not need to be promoted if there were no current vacancies. Ms. Hadden asked if there were email lists segregating out districts that could be more targeted. Mr. Nietubicz said there were a number of email lists collected over the years. One of the things staff was looking at doing was streamlining a lot of those because there were a lot of different lists that could be reorganized to be more useful in the future. He did not believe address data was collected with the email addresses collected, so there would not be a good way to sort them by district. That was something that could be looked at in the future. Ms. Hadden said she worked in a marketing office and some people tend to change their email addresses a lot. It was not always the best way to contact people.

The Chair opened the discussion to the public.

John Morgan, District 1, and vice chair of the committee, responded on the issue of residency requirements. In light of recent events he understood where there was a question about whether a candidate for Council was actually a resident of Newark. There could also be questions about who was allowed to vote in elections, especially if there was a close election. He thought it was not really pressing for this particular issue because nobody could be appointed to a City board or commission unless that person was

recommended by a Council member or the Mayor, and the majority of Council agreed. He felt there may be some variation – for example, someone who lived in Newark 30 years and then retired and wanted to spend four months out of the year in Florida. Was that person still a resident of Newark and would they be an appropriate appointee to a board or a commission? He suggested not dealing with the residency issue tonight for this particular purpose.

In regard to advertising when vacancies occurred, he described what was done at the University to staff committees. First an email message was sent to all current committee members asking them if they wanted to continue and most of them did. Then an email message was sent to the faculty asking them if any would like to fill a vacancy. Fortunately, there was nearly one person for each vacancy. He hoped something similar could be done in Newark and that the City could move to having district-based email lists that could be used. In the meantime he suggested that Council members who have their own email lists would use them to solicit nominations when there are vacancies.

MOTION BY MS. HADDEN, SECONDED BY MR. GIFFORD: THAT ADVERTISING AND PROMOTION BE EXPANDED FOR VACANCIES ON BOARDS AND COMMISSIONS AS OUTLINED IN STAFF'S MEMO DATED JULY 30, 2015.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

Ms. Bensley asked for clarification as to whether Council wanted to adopt the entire staff recommendation. Ms. Hadden wanted to have a discussion to see if they would like to do it for vacant positions only, or positions as stated in no. 2 - whether there was already an incumbent member, but they were up for possible reappointment.

Mr. Gifford said the staff recommendation had to take that into account, sort of a pre-notice to make sure that the position could be notified as vacant. Ms. Sierer added the staff recommendation on the back of this page included that and asked Ms. Hadden if that was her intent. Ms. Hadden said we heard the recommendation but we did not have the discussion – she did not know if Council felt a need to discuss that particular portion.

Mr. Chapman said his vote was representative of approving the entire staff recommendation. Ms. Sierer and Messrs. Gifford, Markham, Morehead and Ruckle agreed that was their understanding as well.

**14. 5-A-2. BOARDS & COMMISSIONS REVIEW COMMITTEE
RECOMMENDATION REGARDING THE STATUS OF THE MEMORIAL DAY
PARADE COMMITTEE**

01:22:29

Resolution 15-__: Removing the Memorial Day Parade Committee as a Council Appointed City Committee

Ms. Bensley reported at the July 28th meeting of the Boards and Commissions Review Committee, they made the recommendation to Council that the Memorial Day Parade Committee be removed as a Council-appointed committee, and be made an internal departmental committee within the Parks and Recreation Department. The motion passed unanimously by the members in attendance. The staff report that was reviewed by the group noted the committee had a narrow scope of duties, and the parade was the only City event that had a Council-appointed committee. There were other City funded and staffed events and activities, such as the recently launched community garden, which have internal committees that were not Council-appointed that were used to gain public input for other events. Making the Memorial Day Parade Committee an internal department committee would place it in line with the management of other city events and activities.

Staff recommended that Council adopt the Boards and Commissions Review Committee recommendation to remove the Memorial Day Parade Committee as a Council-appointed committee and to make it an internal departmental committee by approval of the attached resolution. The resolution would supersede Resolution 88-T, which initially formed the committee.

There was no public comment.

Mr. Markham noted the previous resolution from 1988 specified participants – he did not see that in the resolution replacing the previous one. It was Ms. Bensley's understanding in speaking with Parks and Recreation staff that there was no intention to change the parameters under which people or organizations would be eligible to participate in the parade.

Mr. Morehead asked if the resolution could be amended to include paragraph three of Resolution No. 88-T.

AMENDMENT BY MR. MOREHEAD, SECONDED BY MS. HADDEN: TO AMEND THE RESOLUTION REMOVING THE MEMORIAL DAY PARADE COMMITTEE AS A COUNCIL-APPOINTED CITY COMMITTEE TO INCLUDE PARAGRAPH THREE OF THE FORMER RESOLUTION NUMBER 88-T, WHICH STATES, "THE PARTICIPANTS IN THE PARADE SHALL BE LIMITED TO VETERANS' ORGANIZATIONS, MILITARY PERSONNEL, PUBLIC OFFICIALS, AND NONPROFIT ORGANIZATIONS WHICH THE COMMITTEE, IN ITS DISCRETION, FEELS ARE APPROPRIATE.

AMENDMENT PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

MOTION BY MR. GIFFORD, SECONDED BY MS. HADDEN: THAT THE RESOLUTION BE APPROVED AS AMENDED.

MOTION AS AMENDED PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

(RESOLUTION NO. 15-W)

15. 5-A-3. RECOMMENDATION AND REPORT ON GREEN ENERGY FUND REIMBURSEMENT PROGRAM RECIPIENTS AND LEVELS

01:26:21

Conservation Advisory Commission members Ajay Prasad, John Wessells and John Hornor were in attendance.

Mr. Prasad summarized the recommendation by the Conservation Advisory Commission regarding clean energy reimbursements. The green energy fund was a fund that accumulated because all City residents paid a percentage of their monthly electricity bill into the fund. In the past, this fund was used to pay for private green energy projects such as putting solar panels on your roof and so forth. In December 2012, the payouts were halted and instead, funds were diverted to help pay for McKees Solar Park. The intention was that these funds would be used until McKees Solar Park was paid for in full.

This brought up the question of how these funds should be used going forward after McKees. It was the recommendation of the CAC to do a three way split. The first part would be to continue funding private projects such as solar, wind, geothermal, etc. The second piece would be to continue to pay for public projects like McKees. The commission felt that projects like McKees benefit all residents and not just those who can afford to install systems at their own homes. The third piece was to fund municipal energy

conservation projects including projects like installing LED lights or high-efficiency pumps or replacing aging equipment in City facilities.

The next part of the recommendation regarded the incentive levels for private projects. Page three of the recommendation showed that the incentive levels were largely left identical to what they used to be before except for lowering the not-to-exceed caps. In the past, for photovoltaic, wind and fuel cell, the caps for residential and business used to be \$15,000 and \$30,000, respectively. The recommendation was to reduce the caps by a factor of two, to \$7,500 for residential and \$15,000 for business. The rationale for doing that was that system prices have fallen over the years and reducing the cap would help more citizens take advantage of this program.

Mr. Markham asked Mr. Vitola if he read the last financial report correctly, this funding could start now because of how the McKees funding is. Mr. Vitola said that was correct, but what he got from the memo was that the backlog of the private grants would have to be done first, and that would take roughly to November or December of this year. But then, yes, at that point this could go in the 1/3, 1/3, 1/3 model.

Mr. Markham's next question was about if one group did not use their third from the month, how that would be managed. Would it be rolled over or made available on a first come, first served basis. He did not want to end up with a huge surplus in one area and a huge deficit in another area. It was easier with one pot, but that would be the question: how they would manage that. He liked the idea of splitting it up. Mr. Prasad did not think they specifically addressed that in the recommendation, but in their discussions he thought they would be happy to leave it to the discretion of City Council as to how, if there was a backlog in one particular area, if they wanted to fund additional money, for a McKees type project, that would be fine.

Mr. Morehead asked Mr. Prasad if this amount of money was typically stable. It was Mr. Prasad's understanding there was about \$120,000 that accumulated in the fund year after year. Mr. Morehead's concern was with funding, specifically municipal energy conservation projects, that it goes into the capital plan and it becomes a budgeted amount. Thus there is a monthly fee that may go up or down tying to a budget that is typically fixed.

Mr. Gifford noted Mr. Prasad said there were some pending projects that were \$40,000+ and clarified those were private projects. Mr. Gifford asked how projects greater than \$40,000 would be handled. Mr. Prasad said the understanding was that all the projects that are in the pipeline right now would be taken care of.

MOTION BY MR. MARKHAM, SECONDED BY MR. MOREHEAD: TO FREEZE THE CURRENT BACKLOG AT ITS CURRENT LEVEL – THAT WOULD BE FIRST IN THE QUEUE TO BE PAID BACK. ONCE THAT IS PAID OFF, THE FUND WOULD BE SPLIT EQUALLY INTO THREE PIECES BETWEEN PRIVATE PROJECTS, MUNICIPAL PROJECTS AND PUBLIC RENEWABLE ENERGY GENERATION PROJECTS SUCH AS MCKEES. THE CHANGED PROPOSED INCENTIVE DETAILS THAT THE CONSERVATION ADVISORY COMMISSION HAS OUTLINED ON PAGE THREE WOULD THEN BE IMPLEMENTED.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

- 16. 6. **RECOMMENDATIONS ON CONTRACTS & BIDS:** None
- 17. 7. **FINANCIAL STATEMENT:** None
- 18. 8. **ORDINANCES FOR SECOND READING & PUBLIC HEARING**
 - A. **Bill 15-16** – An Ordinance Amending the Zoning Map of the City of Newark, Delaware, By Rezoning from BC (General Business) to BB (Central Business District) 1.074 Acres Located at 60 North College Avenue

01:36:30

(Secretary's note: The major subdivision hearing 9-A and Special Use Permit 9-B were also discussed at this time.)

Ms. Bensley read Bill No. 15-16 by title only.

MOTION BY MR. MOREHEAD, SECONDED BY MS. HADDEN: THAT THIS BE THE SECOND READING AND FINAL PASSAGE OF BILL 15-16.

Jeff Lang and Chris Locke, Esq., of Lang Development Group, LLC, represented property owners Todd Breck and his wife. Mr. Breck was also the architect of the project. Mr. Lang reported this was the site of what many people remembered to be the Down Under. The present Newark businesses Endless Summer and Del Sol will be occupying space in the new building.

The architectural design was a four-story building front and back and the Design Review Committee liked the design and thought it was not out of character. The Planning Commission thought the front of the building was a bit too large. That was since changed and Mr. Locke showed the new building design to give a perspective on the design presented to the Planning Commission.

There were outside areas in the front of the building for retail users. The front of the building was softened by making it shorter and introduced some balconies and awnings. Both entrances were maintained on the site and DelDOT was happy with the design and layout of the building and maintaining the two entrances.

The two large trees were kept, although the building elevation from the Main Street side did not show the large sycamore tree to provide a clear depiction of what the elevation would look like. The other tree was at the bottom of the site.

The site was over an acre and the density was much less than what was permitted under the Zoning Code. The density was reduced from 36 presented to the Planning Commission to 33 given the loss of usable space in front of the building.

Mr. Lang was excited about the project and thought it gave a nice new appearance to the important street. Given the investment that the University had done on the north campus, it was the start of a link between north campus and Main Street.

Ms. Hadden asked the location of the dumpsters which Mr. Lang referred to visually to provide direct access for the drivers. Ms. Sierer questioned the possibility of trash compactors – Mr. Lang said the issue they have seen with trash compactors was they were good for large sites but not with multiple property owners. They were good in closed facilities with loading docks but when they were exterior to a facility, they were not as efficient.

Mr. Ruckle questioned whether the lick and stick product would be used. Mr. Lang confirmed they would use full bricks.

Mr. Morehead asked if the southern driveway was both an entrance and an exit. Mr. Lang said it was and that it was maintained at the same width it is now, which he believed was 32 feet. There was further references to the visuals. Mr. Lang explained signage would be used to enforce the entrances and exits. Mr. Morehead said his experience with one-way streets coming to Council was that this often changed during the construction improvement process so he wanted to put a stake in the ground to at least have signage. Mr. Lang said that being local it was easier for them to manage the facility as far as policing potential issues like that.

Mr. Morehead said in light of that being a busy road, he we asked Mr. Lang to do whatever he could to maintain the one entrance and exit and the second exit and make sure the tenants understand. He asked if the parking would be marked for the public use clearly so that customers to the businesses know where they are allowed to park. Mr. Lang said they had extensive conversations with the business owners and they were very

concerned about making sure there was access to suitable parking. So they would be signing the site and managing it from a towing perspective. Mr. Lang said the nice thing was that the majority of parking under the building and these spaces that are outside of the building were dedicated for the residential use. All of the outside peripheral parking was dedicated for the commercial use. Thus, it would be easy to manage it and with the tenants and business owners on site assisting in the management, that was the most effective way to manage because they call Lang Development Group and they take care of it, rather than having fisticuffs in the parking lot trying to figure out who was parking in whose space.

Mr. Morehead expressed a concern about extending the central business district this far. His concept for the central businesses would bring us much closer to the DNP boundaries. He felt this was starting down the path of sprawl. Mr. Lang said to some extent his personal perspective on that was that this was going from a commercially-zoned property that could have much more commercial intensive use, to a use that is less intensive. To some extent, BB was less intensive use than the present use. A four-story office building could be built here with a garage, and it would be permitted under the present zoning. BB was a nice transitional zone at this location to the residential component that exists on Cleveland and protects this as not being over-built as a commercial location.

Mr. Markham asked how the height of this building compared to the surrounding which were primarily UD buildings. Mr. Lang thought that was one of the issues with the Planning Commission and the thought of reducing the height of the front of the building. As it compares to Willard Hall and Old College, it was not any taller at all than those buildings. Obviously the nursing building is much taller than this building. One South Main is a taller building than this. That was one of the big concerns of the Planning Commission about dropping the front of the building to give it a smaller feel.

Mr. Markham believed right now some of the parking spots were rented out to non-users of the building. Mr. Breck confirmed that currently they had excess parking in relationship to the 15,000 square foot of commercial space currently there. Therefore, they do rent out those spaces, and that will not be the case at the future building.

Mr. Markham was concerned whether there were any blind spots with the exits. It seemed to him that a left turn should not be allowed out of there for people coming down the hill and over the tracks. Mr. Lang said that was discussed at the meeting on-site with DeIDOT and they did not have an issue. Mr. Markham asked Mr. Lang to consider no left out of there. Mr. Markham also commented about the sidewalks because with north campus there were a lot of students there, and he did not want them spilling out into the street. Mr. Lang said in the first meeting with DeIDOT they were going to request a five-foot sidewalk and a three-foot grass area to push the snow off the street, off the sidewalk onto the grass area, and they were convinced to allow the continuation of the eight-foot sidewalk which presently exists in a portion of that area. Then it would be extended across the whole front of the property and that would make the travel pattern for the pedestrians much better.

Mr. Markham asked if anything different would be done for access to the railroad tracks. There was some screening there but there were issues with students and others not understanding where the tracks were not making smart choices in crossing the tracks. Mr. Lang said they were maintaining what existed along the entire property line. They will rebuild the fence if it was in disrepair and do additional landscape screening. The other discussion with DeIDOT was they were going to clean up the area that was not on the property that has big pieces of steel sticking up just between the edge of the property and the railroad tracks and will work with them if they wanted to figure out a way to put some additional fencing in between the no-man's land and the edge of the tracks.

Mr. Lang referred to visuals about the landscape designs and fencing and said that would be part of the final design and approval issues they had with the DeIDOT submission on the entrance plan.

Mr. Markham thought Mr. Dutt owned the first three properties here along Cleveland and asked if he submitted any type of primary plans about what he was doing. Ms. Feeney Roser responded that he had not.

Mr. Markham had a question about the BC to BB zoning. He understood why, but it was interesting. He believed the Shoppes at Louviers had the BB zoning. They requested it for some reason.

Mr. Gifford addressed the distance to the tracks. He thought this was about 61 feet to that corner section where there were a number of units in that area. He asked Mr. Lang what he would do about potential for emergencies. A car was hit by a train and dragged almost all the way to that street. A train was longer than 61 feet if it turned perpendicular to the tracks. While he thought an on-site person would be good in the event of an emergency, he wanted to hear what Mr. Lang's thoughts about the possibility of emergencies with phosphoric acid or oil.

Mr. Locke noted they were extremely limited – the property was owned by the railroad company but they would do what they could with fencing and posting no access signs, etc. In regard to an emergency plan for cars falling off the track, that was something that the municipal government, federal government, state government and Amtrak had to work together on to come up with an emergency plan.

Mr. Gifford said a lot of municipalities and states were talking about properties within half a mile of these tracks and freely admit the emergency personnel will not be able to help all the people and it was just a probability of where you are and where the train falls. This was really, really close. He was hoping for a plan to be put in place and might be able to support this kind of development if there was something provided in writing to applicants before they rented an apartment. That might be something applied to a lot of properties in Newark. Mr. Locke said they could put something in there that says this property is located by railroad tracks and refer them to CSX or come up with some contact numbers.

Mr. Lang explained they do provide residents with 24-hour access to someone in their organization. There were certain levels of emergency issues they respond to directly. They also work hand-in-hand with many of the City groups – fire, police, etc. When things happen in any of their buildings they respond immediately because they were so close by. Both he and Mr. Locke live within a couple of minutes of the majority of their buildings downtown as well as their maintenance department, maintenance people and on-site representatives are always alerting them to issues. He thought it was a very good thought to add an awareness note in their lease for buildings within a certain distance to make the students aware of that. He did not think some of the students that lived in any buildings around campus necessarily pay attention to that until they cross the tracks.

Mr. Gifford wanted people to have the freedom to do what they want but wanted them to be able to know up front that was a possibility. Mr. Markham asked about making a suggestion to staff for future projects that direction needs to be part of their project or their subdivision agreement going forward. Mr. Gifford said yes and he was happy that staff put something in the note to the Planning Commission to discuss.

Mr. Lang said they were more than happy to cooperate on that – he thought that was a benefit for everyone involved.

Mr. Gifford said he took a bike tour of all the homes close to the tracks and when he went to the property, there was quite a bit of trash all around the property and the trash compactor. He requested that the area be cleaned up. Mr. Breck offered his apologies and said they would take care of it.

Mr. Morehead noted that item 17 of the agreement was to provide an on-site property representative and asked if that would be on a 24/7 basis. Mr. Lang said they usually had either a person within their organization or a tenant they had a relationship with who would become their contact person at the building. In some instances there could be several people to make sure someone was available when things happen.

John Morgan, District 1, thought the biggest problem in the downtown area was that it was now two miles long from the College Square Shopping Center to the Park and Shop and about two blocks wide. This made it hard for anyone to walk through the entire downtown area. This development was going a bit north but was still within easy walking distance, so he was not bothered by that at all. On the issue of railroad safety he suggested minimizing the chance of a severe catastrophe if there was a derailment by having an embankment about 5' high and 10' wide. Mr. Lang did not think that was possible in addition to meeting the City's requirement to have a 6' landscaping area. The reason it did not extend all the way down was to try to save the large tree. Mr. Lang added that it was a trade-off of landscaping and a large tree versus the probability of something like that happening and the impact on the residents. It was important to note that none of the residents were on the first floor of this building.

Mr. Morgan thought the balconies looked nice, but remembered a balcony collapse in Berkeley, CA. The apartment complex was built in the last 10 years with balconies having room for about a dozen people, but they were not strong enough to support them and collapsed. As a result there were a number of deaths and serious injuries. He hoped these balconies would be over-designed to ensure that they would never collapse.

Mr. Breck explained the Code required 100 pounds a square foot and they usually over-design. It was in everyone's best interest to make sure the balconies were safe.

Mr. Markham remembered at one point in time the City was not allowing balconies on buildings and asked when that changed. The reason was not only students' and residents' safety but also items being propelled from balconies. Ms. Feeney Roser said more of the issue she recalled was parties on the outside and people throwing things onto the street from the balcony. She did not recall the strength of the balcony being an issue and thought they were allowed for at least the last five years. Mr. Markham did not remember this size – he remembered small balconies that were built in not hanging out.

Mr. Lang thought it went back to the convertibility of the units and the desire of the Planning Department and the initiative of Council to have product built that could eventually lead to a different type of use. This project lent itself very well to that. You obviously do not want huge balconies because of the management issue and part of their lease was that tenants could not do certain things on your balcony. They manage it. They had an issue initially at One South Main with a tenant that was misusing his balcony. They curtailed that activity. Mr. Lang said these balconies were not as big as they looked on the renderings. They were probably 8' wide by 6' or 8'.

Mr. Morgan requested and received confirmation that no parking waivers were necessary for the project.

Mr. Markham stated that the balconies concerned him and he would like them to be revisited at the final design. That was a request of staff.

Mr. Chapman asked Mr. Markham to elaborate on his specific concerns about the balconies so staff would have something to address and work with the developer. Mr. Markham recalled Council having a major concern about balconies – the number of people on them and items being thrown off and just recently a person fell down the steps of a deck and died. These balconies were one, two, and three stories up. His concern was of somebody injuring themselves more than them collapsing but also in terms of poor behavior of any residents.

Mr. Morehead also recited a balcony collapse and had a concern with these balconies since there was no size on any of the documentation which was not a requirement for bringing the plan to Council. When he looked at the balconies, they were roughly 8' wide and were projecting out from the building. He requested Council to have a conversation at some point about the system of projects coming to Council and what they do and do not see and what information they had to approve projects. He was concerned about the possibility of projectiles and said things that were engineered well did not necessarily get built to specification. He encouraged not only 100 pounds per square inch but many multiples of safety over and above.

Mr. Lang said he was glad to be talking about the sizing of the balconies because he was not sure how large these were. He was willing to agree that their balconies would not be any wider than 8' and extend from the building any more than 4'. That would give them the ability to cantilever it correctly within the confines of the design, control the structural integrity of it and not make it too large. They were presently, according to the architect design as shown on the plan 6' x 8' and to some extent he thought they were too big. Mr. Morehead asked since they were cantilevered could they be brought back to 8' x 4' on this plan. Mr. Lang confirmed that the building plans that would be submitted for permit would be 4' outside the footprint of the building at maximum. They might even be less and a maximum of eight feet wide.

Mr. Ruckle saw balconies as a Catch 22 because he saw them as safety for fires for someone in the building to get out and stand there and wait for the fire department to come and get them if their exit was blocked. He said they prevent people from smoking inside their house that caused most fires. As long as they were safe he did not have a problem with the balconies, but he did not want the projectiles.

MOTION BY MR. MARKHAM, SECONDED BY MS. HADDEN: TO AMEND THE ZONING MAP BY REZONING FROM BC TO BB, 1.074 ACRES LOCATED AT 60 NORTH COLLEGE AVENUE.

Mr. Ruckle was going to vote for the project. He looked at it as a natural progression of what the City was doing. The City did not have space, as it was less than a five mile radius, and with the City growing there was only one place to go and that was up. He did not think housing was oversaturated right now since the studies said the City had a shortage. This would be within walking distance to Main Street and the campus. He thought it was a great location for businesses and not needing a parking waiver was a real positive. He was all for this and knew District 2 loved redevelopment.

Mr. Morehead planned to support the project as shown to Council. He believed it did not conflict with the purposes of the Comprehensive Plan. He had a number of concerns regarding proximity to the railroad and a concern about the exit in proximity to the hill and lines of sight. He supported the rezoning.

Mr. Markham planned on supporting this because it conformed to the land use guidelines and Comprehensive Plan and because it met all applicable Code requirements. He expressed his concerns about sidewalks and exit, trains, etc. but believed it was a good fit for the area and would be supporting it.

Mr. Gifford would support the proposal. He believed it met the land use guidelines and Comp Plan IV and that it would not have a negative effect on the adjacent and would be compatible in terms of scale, design and intensity.

Mr. Chapman planned to support the rezoning from BC to BB. His understanding was that this conformed to the guidelines of the Comprehensive Plan and his understanding was that there should be no negative adverse effects to immediate parcels.

Ms. Hadden said with the discussion about the balconies and how the issue was resolved, it would not have a negative impact on the surrounding area. It met all Code requirements and was in keeping with the land use guidelines of the current Comprehensive Plan. Therefore, she approved and supported this request.

Ms. Sierer supported this request. In her opinion it met the Comp Plan and land use guidelines. It was compatible with Code requirements and she believed it was an improvement to North College Avenue.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

(ORDINANCE NO. 15-15)

19. 9. RECOMMENDATIONS FROM THE PLANNING COMMISSION AND/OR PLANNING & DEVELOPMENT DEPARTMENT

- A.** Request of Lang Development Group, LLC for the Major Subdivision of 1.074 Acres Located at 60 North College Avenue in Order to Demolish the Existing Building on the Site and Construct One Four-Story Mixed Use Building Consisting of 33 Upper Floor Apartments and 5,500 Square Feet of First Floor Office Space and Parking

(Secretary's Note: The Public Hearing for 9-A was held under item 8-A.)

MOTION BY MR. MARKHAM, SECONDED BY MR. RUCKLE: TO APPROVE THE MAJOR SUBDIVISION OF 1.074 ACRES LOCATED AT 60 NORTH COLLEGE AVENUE WHERE THEY WILL DEMOLISH THE EXISTING BUILDING AND CONSTRUCT ONE FOUR-STORY MIXED USE BUILDING.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

(RESOLUTION NO. 15-X)

20. 9-B. REQUEST OF LANG DEVELOPMENT GROUP, LLC FOR A SPECIAL USE PERMIT FOR 33 APARTMENTS IN THE BB ZONE AT THE PROPERTY LOCATED AT 60 NORTH COLLEGE AVENUE (SEE ITEMS 8-A & 9-A)

(Secretary's Note: The Public Hearing for 9-B was held under item 8-A.)

MOTION BY MR. MARKHAM, SECONDED BY MR. MOREHEAD: THAT THE SPECIAL USE PERMIT BE APPROVED IN THE BB ZONE FOR THE PROPERTY AT 60 NORTH COLLEGE AVENUE ALLOWING FOR 33 APARTMENTS WITH THE RESTRICTIONS THAT STAFF PLACED IN THE AGREEMENT.

Mr. Gifford asked if any of the details about the train issues or any other issues as an amendment or the balconies. Mr. Morehead understood we received agreement from the developer about the balconies and that was on record. Mr. Herron concurred that the developer was on record as agreeing to that tonight so it was enforceable.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

21. 8-B. BILL 15-20 – AN ORDINANCE AMENDING CHAPTER 13, FINANCE, REVENUE AND TAXATION, CODE OF THE CITY OF NEWARK, DELAWARE, BY AMENDING THE PERMITTED EXEMPTIONS FOR THE CHARGE OF REALTY TRANSFER TAX IN ACCORDANCE WITH STATE LAW

02:28:50

Ms. Bensley read Bill No. 15-20 by title only.

MOTION BY MS. HADDEN, SECONDED BY MR. MOREHEAD: THAT THIS BE THE SECOND READING AND PUBLIC HEARING OF BILL NO. 15-20.

Mr. Herron advised that the State code required that the statutory exemptions to the real estate transfer tax set forth in section 5401 of Title 30 must apply to any realty transfer tax and imposed by a municipal government. State code exempted conveyances between siblings; Newark's Code did not have a corresponding exemption. In order to avoid confusion and to bring our Code into compliance with the State law, he recommended that Council adopt the amendments adding transfers between siblings as the list of transactions which were exempt from the realty transfer tax.

Mr. Ruckle asked if this was for full siblings or half siblings or step siblings. Mr. Herron said that was what the State Code said and that was what Newark had to follow. Mr. Ruckle thought there had to be some type of documentation or proof that they were step siblings before waving the transfer tax. Mr. Markham assumed that these definitions appear elsewhere in the State Code. Mr. Herron presumed they were but the City really had no discretion and needed to follow this.

There was no public comment.

Question on the Motion was called.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

(ORDINANCE NO. 15-16)

22. 9-C. REQUEST OF THE DELAWARE VOLLEYBALL CLUB FOR A SPECIAL USE PERMIT FOR A COMMERCIAL INDOOR RECREATION FACILITY AT THE BUSINESS LOCATED AT 100 INTERCHANGE BOULEVARD

02:31:55

Mr. Fortner reported that the property zoning was MOR for the proposed indoor recreational facility. That use was permitted with a special use permit. In 2010 the zoning was changed to MOR to allow a commercial indoor recreational facility. The Delaware Junior Volleyball Club was granted a special use permit at that time at 200 Interchange Boulevard but decided not to operate their facility at that site. The site was subsequently occupied by Launch Trampoline Park. Now the Delaware Junior Volleyball Team wanted to move to Newark to the facility right next to Launch.

Mr. Steve Lenderman, Director of Delaware Juniors Volleyball Club, reported they were an indoor volleyball facility with about 36 volleyball teams. About 90% of their members lived in or around the City of Newark. They have won lots of tournaments, and bring lots of money into the City as far as hotels, restaurants, etc. They were currently just outside the City and were in business there for three years now. This was a better location for them with being closer to I-95 and was a nicer building.

Mr. Ruckle disclosed that about 20 years ago he worked with Mr. Lenderman. He did not see it as a conflict bringing the business to Newark. If anyone saw it as a conflict, he would step down and not vote. No objections were expressed by Council members.

There was no public comment

MOTION BY MR. GIFFORD, SECONDED BY MR. RUCKLE: TO APPROVE THE REQUEST OF DELAWARE VOLLEYBALL CLUB FOR A SPECIAL USE PERMIT FOR A COMMERCIAL INDOOR RECREATIONAL FACILITY AT THE BUSINESS LOCATED AT 100 INTERCHANGE BOULEVARD.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.
Nay – 0.

Ms. Sierer encouraged Mr. Lenderman to reach out to the Police Department who did a lot of events at Launch Trampoline as the sand court would be good with kids.

23. 10. ITEMS SUBMITTED FOR PUBLISHED AGENDA
A. Council Members: None

24. 10-B. OTHERS: None

25. 11. APPROVAL OF CONSENT AGENDA

02:36:14

MOTION BY MR. GIFFORD, SECONDED BY MR. MOREHEAD: TO REMOVE ITEM 11-I FROM THE AGENDA.

MOTION FAILED: VOTE: 2 to 5.

Aye – Gifford, Morehead.

Nay – Chapman, Hadden, Markham, Ruckle, Sierer.

Ms. Bensley read the Consent Agenda in its entirety.

- A. Approval of Council Meeting Minutes – July 27, 2015
- B. Receipt of Alderman’s Report – July 28, 2015
- C. Resignation of Andy Hegedus from the District 4 Position on the Planning Commission
- D. Reassignment of George Irvine from the District 4 Position to the District 5 Position on the Conservation Advisory Commission to the Term to Expire March 15, 2018
- E. Approval of Unicity Bus Service for State Fiscal Year 2015-2016
- F. **First Reading – Bill 15-21** – An Ordinance Amending Chapter 20, Motor Vehicles, Code of the City of Newark, Delaware, By Increasing Parking Meter Fines and Adding an Administrative Billing Fee – **Second Reading – August 24, 2015**
- G. **First Reading – Bill 15-22** – An Ordinance Amending Chapter 32, Zoning, and Chapter 16, Garbage, Refuse and Weeds, Code of the City of Newark, Delaware, By Adding Definitions Related to Accessory Use, Updating Code Sections Referencing Accessory Use, and Replacing the Term “Neighborhood” with “Surrounding Area” – **Second Reading – September 14, 2015**
- H. **First Reading – Bill 15-23** – An Ordinance Amending the Zoning Map of the City of Newark, Delaware, By Rezoning from RM (Multi-Family Dwelling – Garden Apartments) and RD (One Family Semi-detached Residential) to RA (High-rise Apartments) 1.21 Acres Located at 163, 171, 175, and 179 South Chapel Street and 52 Benny Street – **Second Reading – September 14, 2015**
- I. **First Reading – Bill 15-24** – An Ordinance Amending the Zoning Map of the City of Newark, Delaware, By Rezoning from RS (One-Family Detached Residential – 9,000 Square Feet Minimum Lot Size) to RH (One-Family Detached Residential – One-Half Acre Minimum Lot Size) 120.391 Acres Located at 300 West Main Street – **Second Reading – September 14, 2015**

MOTION BY MR. MARKHAM, SECONDED BY MR. CHAPMAN: THAT THE CONSENT AGENDA BE APPROVED AS SUBMITTED.

MOTION PASSED UNANIMOUSLY: VOTE: 7 to 0.

Aye – Chapman, Gifford, Hadden, Markham, Morehead, Ruckle, Sierer.

Nay – 0.

26. Meeting adjourned at 9:35 p.m.

Renee K. Bensley
Director of Legislative Services
City Secretary

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August 10, 2015

VIA ELECTRONIC MAIL & 1st CLASS U.S. MAIL

Mr. Bruce Herron, Esquire
City Solicitor's Office
City of Newark
220 South Main Street
Newark, DE 19711

Re: Objection to Newark Country Club "Council Initiated" Down-Zoning

Dear Mr. Herron,

This past Friday afternoon we learned from our client, the Newark Country Club, that on August 3, 2015 the Newark City Council initiated a down-zoning of the Newark Country Club property from its current well known and long established RS zoning designation to a new RH zoning designation. My client only learned of tonight's public hearing to advance the down-zoning ordinance approved on August 3rd by your client after reading your August 4th letter in which you describe this down-zoning as a "Council initiated rezoning". After discussing the likely effect of this down-zoning with various land use professionals, it is clear that such a down-zoning will reduce the fair market value of my client's property by approximately 7 million dollars. Such action on your client's part would be unprecedented in this jurisdiction, and, for the reasons set forth below would be contrary to law unless compensation for the taking of my client's property is paid in full by the City.

First, after reviewing the facts and circumstance surrounding this situation, it appears clear that this matter was placed on the agenda tonight in violation of the 29 Del. C., Ch. 100 "The Freedom of Information Act". The Freedom of Information Act requires a public body to provide notice, with a corresponding agenda, of important matters that will be discussed and possibly voted on at a particular meeting. As the Attorney General's office has explained time and time again: "the intent of FOIA is not merely to encourage transparency in government, *but to require it.*" Atty Gen. Op. 12-IIB09 (7-13-12)(emphasis added). Agendas that do not reference important topics of discussion, which is plainly the case here, violate Delaware's Freedom of Information Act notice requirement, rendering the actions taken at the meeting unlawful and voidable for good public policy reasons.

As you know, this matter was placed on the agenda for tonight only in the past 7 days, and then only following a vote by City Council held on August 3rd. However, the

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legal advertisement for City Council's August 3rd hearing did not give proper legal notice that a motion to begin a "Council initiated rezoning" of my client's property would be discussed let alone voted upon. Even if somehow my client were to believe that the City did not know the zoning status of the Newark Country Club's property would be discussed, your client was obligated by Delaware law to postpone any vote on the matter until after proper and lawful public notice was given.

Furthermore, it is appears clear to us based upon the current record that your client's violation of the Freedom of Information Act was the likely unintended result of the City's efforts to conceal this "Council initiated rezoning" from my client, as long as possible, in a bad faith attempt to invoke the pending ordinance doctrine cited in your August 4th letter to my client. You issued your August 4th letter the very next day, citing very specific case law that someone in the City, perhaps outside counsel, had previously researched in advance. The speed and efficiency of your letter, as well as your client's sudden desire to notify my client of this down-zoning, is both telling and breathtaking to say the least. It would seem that your client's sudden excitement to notify my client about its down-zoning scheme previously kept secret is derived from its mistaken reliance upon the pending ordinance doctrine.

Indeed, your client's reliance upon the pending ordinance doctrine is misplaced. Clearly, the City is now poised to rely on an unusual and improper application of the doctrine to prevent my client from developing its property pursuant to its current zoning designation. First, it is important to note that the pending ordinance doctrine does not originate in Delaware common law but comes from other jurisdictions, particularly Pennsylvania, and *is not* yet well settled law in Delaware. Indeed, based upon our research to date, the Delaware Supreme Court has not been called upon to specifically rule on the pending ordinance doctrine and the case cited in your August 4th letter was decided 25 years ago.

Unlike this situation, other jurisdictions have applied the pending ordinance doctrine to prevent a large number of preemptive permit and subdivision plan filings when developers learned that large scale changes to zoning are being considered. For example, the pending ordinance doctrine has been applied to changes in the definition of a zoning category impacting many property owners or to changes to the zoning map affecting many parcels. We are not aware of the pending ordinance doctrine used to tie the hands of the owners of a single parcel of land that is being selectively targeted for down-rezoning. In other words, if Delaware courts were included to apply the pending ordinance doctrine again, it would likely be only in cases where a zoning change affects multiple properties and to prevent "gamesmanship" by the landowners and developers. In this case, it appears to be your client's "gamesmanship" that our client requires protection from – not the other way around as presented in the case law you cited. As

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discussed below, it was your client, not mine, that came to understand develop of my client's property might be eminent.

Your client's proposed down-zoning also presents an inverse spot zoning problem for your client. A legislative body acts in an arbitrary and capricious manner when it selectively downzones a property by relying on the interests of neighboring property owners in a way that is not consistent with the master or comprehensive plan. There can be no doubt based upon the recent article in the Newark Post that the political influence of certain neighboring property owners has been brought to bear in order to preserve my client's property for their personal benefit. However, your client's adopted and State certified Comprehensive Plan has been in existence since 2008, and it does not call for the selective or targeted down-zoning of my client's property as is now being proposed. Further, this down-zoning was not recommended by the City's professional planners, who on August 3rd initially recommended, instead, that various other options for the Country Club property be considered as part of the pending *update* to your existing Comprehensive Plan. However, as you well know, your *draft* Comprehensive Development Plan Update has neither been adopted into law by the City, nor certified by the State Office of Planning yet. Both adoption of your new updated plan by the City Council and certification of your updated plan by the Office of State Planning must occur *before* the City can lawfully rezone any property in reliance thereon pursuant to Title 22.

Further, up until our client's receipt of your August 4th letter, our client had a good faith belief that development of the Newark Country Club was possible in accordance with the major subdivision plan approved in 2008. Indeed, the Newark Country Club has an approved major subdivision plan that allows for development according to the existing zoning of the property and the major plan.¹

While development of my client's property was postponed after the financial crisis, during the past year our client has attempted to work in good faith with City officials discussing on multiple occasions various options for the future use of its property. It now appears that while my client thought it was working in good faith with the City regarding potential future use of its property, certain City officials developed,

¹ It is important to note that our client's major plan was approved *prior* to the adoption into law of the City's mandatory 5 year sunseting ordinance. Furthermore, our client advises it has never received any notification from the Planning Commission that it was required to resubmit its current approved major plan for any reconsideration by the City to date. Accordingly, there is no legal basis for the City to conclude that the currently approved major plan for our client's property has yet sunsetted.

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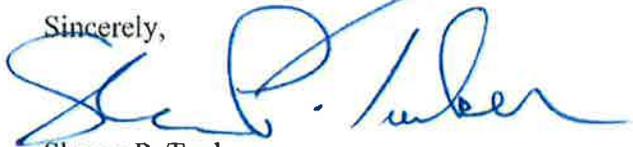
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and then concealed, a scheme to down-zone my client's property relying (mistakenly) upon the pending ordinance doctrine.

In closing I must say that if members of the City performed such acrobatics to assist a developer, the public outrage would be loud and strong - as it should. Similarly, and to be very candid, when members of the City perform such improper acrobatics to violate the property rights of its citizens the outrage should also be just as loud and just as strong.

In light of the above, and to avoid any confusion regarding tonight's hearing, my client objects to the reading and introduction of the proposed down-zoning ordinance which was advertised in violation of 29 *Del. C.*, Ch. 100, objects to the down-zoning ordinance because it is not grounded upon lawful zoning standards and professional planning principles, and otherwise objects to the down-zoning ordinance because the procedure used by the City to advance this ordinance runs contrary to basic notions of fundamental fairness and due process of law. If the City seeks to take my client's property for open space preservation or otherwise, it is required to compensate my client for the full market value of the taking, prior to any down-zoning by your client.

Sincerely,



Shawn P. Tucker

cc: Maureen Feeney Rosner, Planning & Development Director
Carol Houck, City Manager
Max Walton, Esq.
Mayor and Council