

Milton Town Council
Milton Library, 121 Union Street
Monday, December 30, 2013 at 6:00 p.m.

Transcriptionist: Helene Rodgvile
[Minutes are not Verbatim]

1. Call to Order – Mayor Jones
2. Moment of Silence
3. Pledge of Allegiance to the Flag
4. Roll Call – Mayor Jones

Vice Mayor Booros	Present
Councilman West	Present
Councilwoman Patterson	Present
Councilwoman Parker-Selby	Present
Councilman Collier	Present
Mayor Jones	Present

5. Additions or Corrections to the Agenda
Mayor Jones: Do I hear any additions or corrections to the agenda?
6. Agenda Approval
Mayor Jones: Hearing none, I would entertain a motion to approve the agenda.
Councilwoman Parker-Selby: I move to approve the agenda.
Councilman West: Second.
Mayor Jones: Any discussion? All those in favor say aye. Opposed. Motion carried.
7. New Business – Discussion and possible vote on the following items:
 - Request to Appeal Planning and Zoning Commission’s final site plan review and approval of Petroleum Equipment, Inc.’s application to construct an underground propane tank field on a portion of the open space in Cannery Village. The proposed propane tank field will be located in the area of the Community Center. The property is further identified by Sussex County Tax Map and Parcel # 2-35-20.00-57.00
Councilwoman Patterson: Madame Mayor and Council, I'm recusing myself from this matter and leaving the dais and joining the general public. Thank you.
Mayor Jones: Thank you.
Seth Thompson: Members of Council, I'd like to make some opening comments, since this is an application you typically haven't handled. We're here under Section 220-36, which is an appeal of a Planning and Zoning decision. It's important to understand what decision is being appealed. That appeal process only allows for sixty days, so the decision on the final site plan approval is what's before us today. It wouldn't include the preliminary, in terms of your ability to review Planning and Zoning's determination of the preliminary site plan;

however, you've been provided those materials, because you need to know what was approved at preliminary so that you can then judge the final application in terms of whether it met all of the conditions and other requirements that were placed upon the applicant, at the time of the preliminary. That's under our Section 220-35; that's the site plan process. I'll just read, in part, when it comes to the final site plan application, this is sub-section i-1, it says "After receiving approval, with or without conditions from the Planning and Zoning Commission on a preliminary site plan, an approval for all necessary permits and curb cuts from responsible, local county and state officials, the applicant may prepare it's site plan and submit it to the Planning and Zoning Commission for it's review and approval." Now here's the key language, "Final site plan approval shall include the same items as required for the preliminary plan approval." So again, when it comes to the final and really what you're doing... It's a little bit different than what your normal legislative role would be, this is what they would call a quasi-judicial-ministerial process; so you don't have the normal legislative discretion. This is something where you're essentially performing a function of making sure that the applicant has fulfilled all of the requirements that were placed upon it at the preliminary phase. Again, since you don't typically review site plans, this is something that's a little bit new to you, I would imagine. Hopefully, people understood all the materials Mr. Davis did a good job of putting together everything with his memo dated the 23rd. It's important when it comes to that site plan process, it's important to understand that the use that's been applied for is a Permitted Use. This one's specifically permitted under Section 220-80 as a public utility, so it's as if the property were zoned Residential and somebody were applying for a house, that they were building a house. You can't decide no, that's not an appropriate lot for a house. Again, it's a permitted use, so the landowner's able to do with it what they will, the site plan process is designed so that the Town can attach any sort of conditions that it deems appropriate in order to minimize any adverse affects on the neighboring property. Let me look at the exact language. This is typically done at the preliminary site plan phase. If you look at the beginning, it's 220-35(a), the intent. "The intent of site plan approval is to authorize the Town of Milton Planning and Zoning Commission to review and approve site plans for uses otherwise permitted in this chapter, in order to determine full compliance with the intent of the standards of the chapter. The objective is to evaluate site plans in order to minimize conflicts between the site layout and design of proposed uses and existing uses and natural site conditions and thereby minimizing the adverse affects affecting the health, safety and overall welfare of the community. Accordingly, all applications with the required document attachments are due for review and eligibility the first business day of the month following Planning and Zoning Commission's meeting." That's the process. That's the view that you would take. Now, of course, what we're reviewing tonight is an appeal of the final site plan application. The way your Town Code sets it up, the public hearing occurs at the preliminary site plan phase and presumably the intent for that is that you get the public comments and all the neighboring property's comments and the Commission provides it's comments to the applicant very early on, before they've done a lot of the engineering or made final plans, that sort of thing. So that's why the process is front loaded for the input at the preliminary phase. Here, we're dealing with an appeal of the final phase, so that's why the public comments wouldn't be appropriate tonight. Of course, it's an appeal. The appellant is going to be given the opportunity to say why he disapproves of what the Planning and Zoning Commission did in giving final site plan approval. I don't know if anybody is here from the applicant, but

they're going to be able to present their side, as well. Obviously, Mr Davis and myself and you have reviewed the materials that were attached to Mr. Davis' memo. So that's how I see the process going forward. I think it makes sense... First of all, I'll answer any questions you have of me, at this point. Then, after that, if we could hear from the appellant and then if we want to hear from the applicant, if there is anybody here. Any questions for me?

Councilman West: Have other alternative sites been looked at, because it seems like every time we turn around, they sold the land that this originally was supposed to be on. They knew that going in. None of us Council people knew that. Plus, I feel that not only putting it in this area, it is a safety hazard, in my opinion and I don't feel that it should be there and other alternative sites ought to be looked at.

Seth Thompson: The difficulty with that Councilman, is that again, if it's an approved use for that particular site, the Town is really outside of its jurisdiction to say why don't you consider putting it somewhere else. If it's an approved use, take for instance a commercially zoned property; if somebody comes in with an application and says I'm going to open a restaurant here, the Town isn't able to say well have you looked at a different site? As long as that's the Permitted Use then that person is seemingly going to be able to open that restaurant; whether it's a good idea or a bad idea, is really up to the applicant.

Councilman West: Right. My main concern is the safety issue, being that close to that clubhouse.

Seth Thompson: And to be clear, the site plan process isn't just a rubber stamp. You're allowed to attach conditions that protect the safety and welfare of the public and that sort of thing and I think the minutes do reflect that that very issue was presented to the Planning and Zoning Commission; whether other sites were considered.

Councilman West: Also, I'd like to know if Chestnut Properties is locked in with a contract with this outfit that's going to put this in? If not, there are other alternatives, Chesapeake Utilities already has a line back there to Dogfish that could be tacked into.

Seth Thompson: Understood. The issue is really that the property owner has the ability to contract with whomever they want, so again, it would be the equivalent of the Town trying to tell somebody to use builder X instead of builder Y, when they're building a house.

Councilman West: Yes, but I mean these are just alternatives that I'm throwing out there.

Seth Thompson: Understood and I appreciate the questions. I think they're important.

Vice Mayor Booros: I think my only question is, what you just said earlier, is the only thing we're here for tonight is to make sure that the contractor has done all the things that were placed upon him at the final site plan approval?

Seth Thompson: It wouldn't be that he did everything that he was required to do at final, it would be that he...

Vice Mayor Booros: He's done everything that Planning and Zoning has asked him to do, to be in compliance with. Is that the only thing we're sitting here for? Asking you why we allowed them to do something else and why it wasn't put in the other place... None of that matters right at this particular moment. We're here to address, did he do the things Planning and Zoning asked him to do?

Seth Thompson: That's right. The legal standard for the final site plan approval is that they did everything they were required to do in conjunction with the preliminary.

Vice Mayor Booros: Not health, safety, welfare, anything else; just that he did everything that was asked of him to do by Planning and Zoning.

Seth Thompson: That's right. If you think about it from a public policy standpoint, it's

important that people are able to move forward, with some level of certainty. That's why there's a 60 days deadline, otherwise somebody is going to be less likely to spend money on an improvement and develop a piece of property if they think that five years afterward, somebody's going to be able to come in and say I didn't really like your landscaping plan, for instance.

Vice Mayor Booros: No, I understand where you're coming from, I guess that's why there's public participation at the Planning and Zoning at the initial site plan process. You had to be there.

Seth Thompson: Correct.

Vice Mayor Booros: I was there and didn't speak because I was a member of Council, but I showed up at those meetings.

Seth Thompson: The Town Code does require notices and all of that to happen at the preliminary.

Vice Mayor Booros: They were all made and everybody had an opportunity to speak way back when.

Seth Thompson: That's my understanding. I don't know if Robin... Robin is nodding.

Robin Davis: Yes, the application was originally scheduled to be heard in February; due to a lack of a quorum, we had to reschedule to March. The applicant was required to send the notices to resident's within 200' of the property, which was done. The Town was responsible for putting notice in the paper for the February meeting; due to the change in the meeting, the Town had to bear the burden to resubmit all that information. A new newspaper notice was put in the Cape Gazette and certified letters were sent to resident's within 200' of the property, making them aware that they were going to have a public hearing at that March 19th meeting. There was a public hearing held? Planning and Zoning granted preliminary approval at that meeting. There were some off-site drainage issues that were discussed. Additional meeting was held in June, where Mr. Dyer from Chestnut Properties came and addressed the off-site issues.

Vice Mayor Booros: But there was no public participation at those other meetings?

Robin Davis: Not at that point, because they're not required. Yes, that is correct.

Vice Mayor Booros: But there was public participation at the very beginning?

Robin Davis: Correct, as required by the Code. Yes. Yes, there was. Those issues were resolved. The applicant then moved forward with final site plan, got the outside agency approvals, our Town Engineer reviewed final plans, submitted a comment letter stating that all the conditions were met, outside agency approvals were granted, on the agenda for the October Planning and Zoning meeting, Planning and Zoning reviewed the application and granted final approval at that meeting.

Councilman Collier: Mr. Davis, one question for you. I noticed in 188-37, Item 13 and what this relates to is Performance Guarantees Required. 188 is the sub-division ordinance, now while this is a Large Parcel Development, it is in fact a sub-division, as well. I'm wondering, it states that a performance bond or guarantee shall be furnished for the following, and the last item in that list is all utilities.

Seth Thompson: Councilman, if I could chime in. This development was approved under the prior sub-division ordinance, so the requirements might have been slightly different. For instance, I know that under the prior sub-division ordinance, it wasn't 125% of the cost, it was 100%.

Councilman Collier: And I understand that, but this application didn't come forward until

after the date that this was put into effect, so does that necessarily dismiss the requirement for a performance bond?

Seth Thompson: It wouldn't. The only thing is, the appropriate time for having required that performance would have been at the time the sub-division was approved, as opposed to the smaller, more micro level of the site plan.

Councilman Collier: I'm just curious, because this is a utility and obviously it wasn't constructed at the beginning and I don't even know if the intent for it was there at that time and that's probably a question we can't get answered; but I'm just curious. I noticed in reading the documentation that we were given prior to this meeting, that it was recommended by the engineer that a performance bond be obtained.

Seth Thompson: And there was one condition of a performance bond in terms of dismantling the temporary site. In terms of fixing the roadway, I believe the applicant presented testimony that that's an issue essentially not related, or at least his argument was that it wasn't related to the improvements on this site plan in terms of... In other words, the water problem was going to be there, whether or not the tank farm was moved.

Councilman Collier: I'm looking out there in the construction phase of the tank farm itself. I don't know whether there needs to be a performance bond. I just know what I read here and when it gives the example under all utilities, the very first thing is gas; but I have to put faith in what you tell me that this has been superseded, or this development supersedes this, even though the placement of the utility does not.

Seth Thompson: It is important to think, I think everybody's aware that the Town didn't require and probably should have required a performance bond back when the sub-division was approved.

Councilman Collier: It lists it for the following and I don't know whether this is as a lump, or this is separately or what, because now you have streets, sidewalks, curbs and I would think that you can combine in any fashion, form or shape or individually. If I were building the development and five or seven years in I wanted to put in a gas farm, I certainly wouldn't bond it for five or seven years, knowing that's how long it's going to be for it to be there.

Seth Thompson: Understood councilman. Typically when it comes to bonding, the Town Engineer draws up a cost estimate, the developer draws up a cost estimate and it includes all of those items and the Council's aware that when there is a bond in place, very often as the developer finishes certain items, he asks for a reduction in bond, based on how much has been completed. There isn't a bond in this sub-division. Although, again, as part of this site plan application, they're going to post a bond. I believe it's upon applying for the building permit, since they needed final approval...

Councilman Collier: Okay, well that was my question. Will that bond be placed and if it is, upon applying for the building permit, fine.

Seth Thompson: I just don't want to mislead you, that it's only related to dismantling the temporary. It's not in constructing the new facility.

Councilman Collier: Alright, thank you.

Mayor Jones: Just a real quick question, if I may, in reference to a correspondence from Chestnut Properties to Planning and Zoning dated June the 11th. I addresses the alleyway and possibility of it not withstanding the truck traffic. Chestnut Properties agrees to be responsible for remedial action, as well as correcting the water ponding issue in the alley upon the earlier of completion of the top coating, paving or six months from the date of this

letter. This letter is referred to a couple of times in the minutes of June 18th and one of the Board members asks about this letter and these promises. At that time Chestnut Properties is talking about trying to secure funds for the drainage repair. Mr. Thompson, even you say, further into those minutes on page 33, that was still a condition. Is that correct? Are these two items still a condition against this final site plan?

Seth Thompson: Yes, they became conditions, I believe there was a motion at the end of that meeting, the second meeting to amend the preliminary site plan approval to include what they discussed at that meeting, including the timing on the paving.

Mayor Jones: So item number two, which is questioned by members of the Commission... Would Milton have looked for this to be repaired by December or am I misunderstanding something?

Seth Thompson: No. I think that's accurate. I think that's what people...

Mayor Jones: It was ponded on that location as of Saturday, which was the day before the bad rain. So I just wanted to make sure that that correspondence that we have; it was questioned by the Commission; and you question it too. Alright, thank you.

Councilwoman Parker-Selby: Basically, I wasn't around when all this occurred on that particular Council and going by what I received in writing here, I've just been thinking and I did a personal visit myself today in the community, to see just what people were talking about. There's a confusion for me, because listening to and seeing the letters written to us, the Planning and Zoning Commission, which I've not made a meeting; that conflicted with several meetings I have had with other things; however, I want to question the fact that there's some concern about how this particular motion went through and so forth on particularly, one of the correspondences. Am I out of order to discuss this now?

Seth Thompson: Councilwoman, having read over the minutes, I think that that was the motion to give preliminary site plan approval, so again, we're here tonight dealing with the final site plan approval.

Councilwoman Parker-Selby: I understand everything you've said...

Seth Thompson: And I understand your concern and I understand the appellants concern there.

Councilwoman Parker-Selby: Yes, because I don't want to make a vote on something that things were not done properly, ahead of time, for us to be here tonight for this final situation and it's unfortunate that this appeal didn't get here ahead of time; but still, looking at what I saw today, I too would be concerned up and beyond an appeal situation from what I saw; just looking at what I saw was like... I too live near where propane is, from here to where the person is in the back; and that is a concern, health and safety. It's been like that since I was a little girl, but I see these brand new communities, we have to be more concerned, particularly when children and so forth are involved and all around. But this is really... I'm going to be very frank, it's something else. It's confusing, it's a shame that people didn't look into this better in the beginning; for us to have to sit here the night before New Year's Eve to ponder over something that mistakes were done in the past. There's nothing I can do about it, or any of us, but I want to get this some type of resolution for the people who live in that community. Just my comments. I'm sitting here listening and I know what we have to do, but I feel for the community, people too, for what the proposals are. So I just want to be... It's mind boggling for me folks, but I'll get some type of decision, hopefully the right one. I just wanted to say, I'm still confused because of how things were done, basically.

Seth Thompson: Right and certainly the Town needs to honor the process, needs to make

sure that everybody's upholding the Code of Conduct. Of course, part of that process too is the 60 day statute of limitations, so we can't go back revisiting...

Councilwoman Parker-Selby: I understand all that.

Vice Mayor Booros: Could I ask one question of Mr. Davis? Mr. Davis, just curious, the original tank farm, from the original Master Plan that I got a copy of, that shows that tank farm way the heck over on the other side of the Dogfish property. How many actual tanks and the size of the tanks, were originally approved at the original tank farm? Do you remember? I know we're showing ten on this. Ten tanks on this.

Robin Davis: Honestly, I do not know without looking and I don't have that plan with me. I do remember a conversation I had with our previous Town Engineer, Bob Kerr and he had discussed with me that there were initial plans to have a tank field that was going to be bigger than what was proposed and approved.

Vice Mayor Booros: Originally?

Robin Davis: Yes.

Vice Mayor Booros: And what I don't understand is when you've sold off a third of the neighborhood and the other third's for sale, down on the other side of Cave Neck Road, why would you need a much larger tank farm than what was originally proposed for the entire community?

Robin Davis: I actually think maybe I misspoke, but the original one was bigger than what we have now.

Vice Mayor Booros: Oh, I thought I have been told, that this one's bigger than what was originally proposed.

Robin Davis: I actually don't think it was going to be the ten tanks; it was going to be a smaller number of tanks, but they were going to be bigger tanks. Again, I'm just going off memory. I do not know that off the top of my head. I just know that speaking with the Town Engineer...

Vice Mayor Booros: But, Mr. Thompson, that's another thing that I don't have any right to be asking here tonight, because it should have been asked back in February.

Seth Thompson: That's right. We really need to stay within the...

Vice Mayor Booros: Okay. I'm just trying to clarify what I'm doing here and I think what I'm doing here is to make sure they've done what they said they were going to do, at this last final...

Seth Thompson: That's correct. As long as...

Mayor Jones: How about we go ahead and call Dr. Patterson to speak, if he'd like.

Dr. Jon Patterson: Thanks for letting me come up and speak to you folks. It's very, very interesting. There's a commonality here and this is what the attorney's talking about; is that you can't say anything, you can't do this, you can't do this. He's telling us he took almost an hour of our time to tell us all the things that we couldn't do. It's very interesting, because one of the things that occurred to me, was that anybody besides a Coding Officer go out and look at this place. It's a beautiful thing to say you only have to ask people within 200' of where it is; it doesn't even include the people that are there; that are right next to it; never mind all the rest of the people in the Cannery. So as I thought about that, I say well geez who went out there and took a look except the Coding Officer; so I'm reading through the last meeting, which did not allow any public comment anyway and there, Ms. Virginia Weeks, she abstained from the vote. She says I'm abstaining because I was not here at the beginning of this project and know nothing about how it was decided. Thank you. That's

number one. Number two, I did notice that Mr. Nicholson was on the Planning and Zoning Committee. He lives right across from the present propane area. It's in his interest financially, and otherwise, to have that moved. He took part in all those conversations. He even voted. Now those kinds of things undermine the whole process; because I think if anybody went out there and saw that, they would say this is not so good, for a number of reasons. One it's an unsightly utilitarian thing; it belongs in the back of the development. The second thing is, it's right by the pool and by the community center. What happens if there are safety issues with that. There are children that go back and forth. We all go back and forth. It's not going to enhance the value of anybody's property; that's not really the point though; so what the attorney's telling us, is it's too late; you can't do anything about it. That's the way it goes, man. But what they've done, is we have a small, unelected group of people and special interests that are dictating to us what we can do and can't do in the town and giving us a narrow, narrow window to say anything at all. As a matter of fact, they're even giving us a narrow area of 200', knowing this place is in a field; so there's very little time for anyone to have any input and even right now. Then we have a group of people that probably didn't even go out and take a look at it. But the attorney says there's nothing you can do about that now. Too bad. So I mean these are things we have to look at. Do we work for the Town or does the Town work for us? Those are the questions that we should have. I think we should really reconsider doing this, or try to work with the developer and say, hey listen, can't we do something else? It's an issue. But I think that at least people gave me some time to speak, because I'm not even sure whether we got the notice and how many people are within 200'; who knows, maybe 6 or 7 people maybe. I don't know. That doesn't seem quite fair. It would have been different if people had gone out and seen the place first, before they'd even come here and made vote. Thank you.

Mayor Jones: Thank you.

Seth Thompson: The one item I want to make clear, that obviously the process that's established in your Code is really within your control. If the Council wants to increase the footage; certainly an Ordinance amending the Code to do that, would be appropriate. That's something that you guys have within your control. At least from my vantage point, it looks like the process for notification was followed. Now, again, if Council doesn't feel that notification process is adequate, let's change it.

Councilwoman Parker-Selby: Well, I think just listening to Dr. Patterson's comments and from reading everything here, and being new to everything, that we need to look at reconsidering some options for this propane tank; that's my opinion. I'm just not comfortable with saying okay, just because the Code whatever. Like I said, after seeing it for myself, it kind of made me think a little more, even though I read these things. Reading things is one thing, but going to it in person and looking at it eyeball to eyeball, what have you, makes it much different in my mind how we should address it. Personally, I think we need to look at what kind of other considerations can be done before we say okay, this is how it has to be. That's just my comment.

Mayor Jones: Is there anyone else from Council that would like to speak?

Councilman Collier: Well for me, I have to say that I spent quite a bit of time researching this and reading and pondering our ordinances and everything else and every time I felt like I found a crack in the armor, somebody showed me something else that filled that crack and when it really comes down to the very final thing, then I have to make my decision based on what the ordinance directed me to do. We have one that's called General Exceptions,

Chapter 220. It relates directly to Public Utilities and says “nothing in this chapter shall restrict construction or use of underground or overhead distribution facilities of utilities which serve the public operating under the laws of the State of Delaware”. It goes onto one final sentence, “Other facilities may be constructed subject to site plan approval.” Well it went through the process. People were given the opportunity. I understand the comment about the 200' thing. I happen to live in this Town long enough to have endured my own battle, such as this, and I lived at 220'; but I guess I pay attention to. I saw the public notice and I would like to think I was very instrumental in the general presentation before the Town becoming a lot less than it was originally intended. Being on that side of the fence and I have been there, on your side, you have to participate. You have to speak up and you have to make yourself known. The people that sit on our Planning and Zoning Board, they have to live within these rules that we're given; but they also, they're given the opportunity to hear the public sentiment and a lot of times, public sentiment guides their decision. So, I guess what I'm saying is, maybe this neighborhood, in a sense, might have failed themselves by not making it to the preliminary hearing, when the public was available for participation. Mr. Dailey, you may shake your head, but you get more than your fair opportunity to speak and I can't imagine why you let anybody miss it.

Jeff Dailey: I don't shake my head. I'm in disbelief. Absolute disbelief. This is the Achilles Heal in our Town government. We're standing here tonight and this can come up time and again. My apologies.

Councilman Collier: I've sat here and I've listed pros and cons; they've met the requirements of the Fire Marshall. We even have something in your very LPD Plan that says, no bulk storage of materials for sale by a business; but because it's considered a public utility, that squashes that idea. That was the hole in my armor. It got sealed. We're asked for me to make my comment. I'm making my comment. I have not voted on this issue, as of yet and please don't consider my comment a vote. It's just left me with a very difficult decision to try to make on behalf of all the citizens of this Town. I felt compelled to at least share what I have gone through in trying to come to an equitable decision. Thank you.

Mayor Jones: I just would like to say that I did visit the site. On Saturday I walked it with Councilman Collier, both sites, as a matter of fact; the existing tank farm and the proposed location. Being bound by our only capacity this evening, is to review the process by which this particular request followed. That's a very narrow window, when we are fully aware; I don't anyone here on Council, that is not fully aware that there are a lot of unhappy resident's in Cannery Village, but rules are also binding to us and in reviewing processes all we get and that's all we're able to vote on this evening and we never like to disappoint people, but we've been charged with one item and that is to review the process by which the developer came to the Town and followed, or did not follow. When Dr. Patterson spoke, I'm concerned about one ugly issue that keeps rearing it's head in reference to a potential ethics violation. Mr. Thompson, you sat with this Commission on each one of these meetings; you guided them when it was time to vote and I feel sure that you would have stepped in if there was an inappropriate vote taken by one of the members of the Commission or a motion made. Is there anything in your professional opinion that that topic alone deserves review?

Seth Thompson: Certainly, knowing what I know now and unfortunately that's the difficulty in my position; I don't always know people's own personal interests; so that's why the individual members are charged with monitoring their own conduct, their own Conflicts of Interest. It would be preferable if that person hadn't voted. Obviously it was a motion that

passed by more than just the very narrowest of majorities; so we're here, as a Council tonight, to see if that final site plan approval was appropriate, based on what was attached in terms of conditions at the preliminary site plan phase. It's an appeal. You're substituting your judgment in place of the Planning and Zoning Commission at that stage of the process. So, basically, this is the chance to correct that problem and again, I tend to err on the side of caution. I certainly understand the concern that if somebody has a direct financial interest in a vote, then they shouldn't vote. There's an argument that the tank was temporary anyway, so it was going to be moved; but I think the Council needs to make it's determination based on the record that it was in front of us, in terms of the facts; not necessarily whether or not somebody should have voted. Because again, you are now voting as a Council in place of the Planning and Zoning Commission on the final site plan application, based on the record you have in front of you.

Unidentified Speaker: Can we open the floor again for comments?

Seth Thompson: The problem with this is that it was closed... The record...

Unidentified Speaker: We're hearing a lot of how everything went in the past; the mistakes that were made in the past, but it seems such an awful shame that those mistakes are allowed to move forward and nullify what clearly is the will of everybody in this room.

Seth Thompson: The difficulty is that we need to honor the process and so the process is set up and it was adopted by a prior Town Council that they felt balanced everybody's competing interests. We have to honor the public's wishes and that's why we get the input at the beginning. But we also need to safeguard the rights of property owners and applicant's; they need to be able to rely on what approvals they have been given. That's the difficult position that the Town is in.

Mayor Jones: Is there a need at this point to ask if there's anyone here from Chestnut Properties from the propane group?

Seth Thompson: It would be good, because, just like an appeal to Court, they're obviously an interested party. Is there anybody from Chestnut Properties or Poore's? Did you want to address any of the concerns that were raised?

Charles Sockwrighter, I work for Poore's Propane and I'm also a resident of Milton: The main issue that I wanted to bring up is the temporary tank field is maxed out and it has to be moved. I'm not saying it has to be where it is, I know we have approval for it; we got approval; but I think one thing that everybody should know is that tank field can't continue to sustain the houses that are on it; because it was only temporary and it's unfortunate that because of Chestnut Properties, we don't have our permanent tank field, which was a 30,000 gallon tank and we're putting ten 2,000's in now to give us the rate that we need to take care of the load that the development has on the... Initially it was all done in the initial stages that the tank field would be over where it initially was and when they sold that property, unfortunate for us, we're kind of caught in the middle of this. It gave us no place to put a tank field and the temporary tank field, if it gets too many more houses on it and it keeps getting cold, people aren't going to have heat. It's not my decision, but that's... That temporary tank field are above ground tanks; they're a lot more dangerous; it has an actual vaporizer that heats the gas up. The permanent tank field that we had the approval for, is a lot safer than what's there now.

Unidentified Speaker: Basically what you're saying is, if they continue to build...

Charles Sockwrighter: It's going to be tough...

Mayor Jones: I'm sorry, Mr. Sockwrighter.

Charles Sockwrighter: I don't know what else to say. That's all I wanted to say. I heard a question about yes, there was a 30,000 gallon tank initially for the development and it would have what's called a vaporizer that heats the gas up to carry the load and ten 2,000's will carry the load of what's there now. That's why the 30,000 gallon tank was for the whole big development; because it had a bigger vaporizer to carry the Btu's. If we do what we're going to do now, we don't need to burn propane to heat it up, to carry the load. I guess that's... I don't know... That's the only thing I wanted to speak about or needed to. We feel that we're unfortunately caught in the middle of this. Initially we had it all planned out to be the supplier of propane and a way to do it and then somehow, it got out of hand when it was sold. I don't know.

Mayor Jones: Mr. Sockwrighter, just a question for you. You may not know the answer. The proposed new location, is it anymore advantageous for distribution than say where you are now; meaning the lines and how they run?

Charles Sockwrighter: Actually, where we are now, can't be used because there's a 12" water main running through there underground and that area almost isn't big enough with the setbacks and the requirements from the Fire Marshall and the Public Service Commission. We have all those safety issues and factors that we have to look at.

Mayor Jones: At your present location?

Charles Sockwrighter: Yes. We have to look at that at this one that was approved too. We have to get prior approval from the Fire Marshall and everything to go forward with it. There are setbacks and safety features and issues that we have to go by; where the tank field is now, it can't be used as a permanent tank field location. That's a good question and that's something I should have brought up. It won't work there, at that particular spot next to the pond.

Mayor Jones: Thank you. Did anyone else have any questions of Mr. Sockwrighter? Is there anyone here on behalf of Chestnut Properties? Mr. Thompson, correct me if this is not correct, Council, you've reviewed your paperwork, your preliminary site plan, which led to the final site plan. We've been charged that that is within our authority to review and determine if that process was completed properly per the procedure and code ordinance, or any other applicable laws on our books. It is my understanding that that is what Council is charged with making a decision on. Councilman Collier?

Councilman Collier: I have an eleventh hour question for Mr. Thompson. In reading over the minutes, again, of when this final plan was approved; I think that what I read here is and part of the motion was that they honor the conditions placed in the letter by Mr. Dyer regarding the water ponding and what have you; so if that be the case, that that was part of the original motion and that that six month period has expired; would that essentially nullify the approval?

Seth Thompson: The difficulty is you're going back in time to when Planning and Zoning granted that final approval. In other words, the six months hadn't run at that period of time.

Councilman Collier: I would have assumed it from the date forward of that approval, is when it would have run. Is that correct? And that date was June 18th?

Seth Thompson: I think the final approval was after that, wasn't it?

Councilman Collier: I'm reading minutes from 6/18 where it appears the final approval was made.

Seth Thompson: I think it was in September.

Councilman Collier: Maybe I'm misreading what I have here, but I thought that there was a

preliminary approval and I thought was reading final. Now I may be reading the wrong set of minutes.

Seth Thompson: There was a meeting in between, where Planning and Zoning had requested that one of the principles of Chestnut Properties...

Councilman Collier: Alright, we have the September meeting. I have the minutes for that; maybe I picked up the wrong set, so here I've spoken out of turn again. Okay, I have the right set now and the dates on the bottom are confusing sometimes. So if that was the final site plan approval, that kind of shoots that in the rear end. Excuse me. So at this point, until that six month period of time expires, from whatever date the final approval was granted, it's valid, but at the end of the six month period, if they have not remediated the problems, does that void that approval? That's my question, now rephrased.

Seth Thompson: No, the Council is putting itself in the shoes of Planning and Zoning...

Councilman Collier: I understand that. I'm just asking the question for the future.

Seth Thompson: He needs to honor that six months.

Councilman Collier: Alright, that's all I needed to know. Thank you.

Mayor Jones: It does say six month's from the date of his letter.

Seth Thompson: It does.

Mayor Jones: It does not say from the date of the approval of the site plan.

Seth Thompson: That's correct. If you look through the minutes, Planning and Zoning had an extensive discussion in terms of what realistically the Town could do in the event that he didn't comply with that.

Councilman Collier: Like I said, I've read this stuff until my eyes have crossed. That's all I have.

Unidentified Speaker: Can I ask a question? Is it the date of the letter or the other? I just got confused.

Seth Thompson: I'm sorry. Just to clarify, the answer is that it's the date of the letter, based on the letter. But again, Planning and Zoning discussed the fact that there isn't some great recourse that they really have and I think the minutes reflect the fact that Planning and Zoning was put in the position of just basically hoping that he would follow through and if it withheld approval, then you obviously have the concerns that Mr. Sockwright mentioned and that were mentioned in the minutes; that the current temporary facility is potentially not adequate.

Councilman Collier: I guess what I'm driving at is that Planning and Zoning made that a condition of their approval; at what point does that approval become null and void if the conditions are not met?

Seth Thompson: I think that kind of puts the cart before the horse in that that approval included that condition; so the approval came first in the sense that if...

Councilman Collier: But it was an approval with conditions. That's what I'm failing to grasp here. If it's an approval with conditions, if you don't meet the conditions does that, in effect, nullify the approval?

Seth Thompson: It wouldn't nullify the approval, but it allows the Town to pursue whatever recourse it has against...

Vice Mayor Booros: Could that recourse be a stop work order, until they fix it?

Seth Thompson: I mean, I would have to look at the Code, but that presumably is what we would do if anybody was not following their site plan. Right?

Councilman Collier: So essentially, we could even go so far as tonight, based on that, refer

this back to Planning and Zoning for reconsideration. Is that possible? That's what I want to know.

Seth Thompson: I think that's apples and oranges. The enforcement action is something different from the actual approval. It sounds to me like it's an enforcement issue, at this point and Robin might know off the top of his head, but if for instance, somebody files a site plan and gets final site plan approval and is building something that doesn't comply with that approval, Mr. Davis, do you know...

Robin Davis: Not off the top of my head. No.

Seth Thompson: That would be the equivalent situation.

Councilman Collier: Generally, I believe your stop work order is the thing that they do, if they're in process; but if the conditional approval expired before the process begins; where does that leave us?

Seth Thompson: It's interesting. It could fall under... I'm trying to think if the Clean Hands Ordinance covers it and a building permit wouldn't be issued.

Councilman Collier: I kind of think it's a pertinent question and I don't know how we get it answered at this point.

Robin Davis: There's already a building permit issued for the work at that site.

Seth Thompson: Okay.

Councilman Collier: Now is that for the tank farm? I don't imagine you issued a building permit for the drainage correction.

Robin Davis: No, that's just for the tank farm itself. Correct.

Councilman Collier: Okay, well, now we've got horse before cart. I thought that in the approval process they had to correct... is that a simultaneous correction, or is that a fix this first, then do that?

Seth Thompson: I don't know if the building permit was issued prior to the six month expiration; I suppose that's possible, but it sounds like we're getting into an enforcement issue, as opposed to whether or not the final approval was appropriate.

Councilman Collier: Okay, well I had to ask the question, because I thought it was important.

Seth Thompson: It's certainly a valid point. It's an important one.

Councilman Collier: So I really have nothing else. I'm not sure that I have the answer that folks would like to hear, but I did ask the question. Thank you Mr. Thompson.

Seth Thompson: I try. Hopefully I'm clarifying, but I truly think that that is something different, that the final approval is different from enforcing what they're supposed to be doing under that approval. Arguably, if the approval were removed, they wouldn't have to do it.

Councilman Collier: I guess I'm comparing it to home law. Home law, my Dad said you'll get passing grades, or this isn't going to happen. So when the marking period came in, if the grades didn't pass, it didn't happen.

Seth Thompson: I would equate it... I think it's just easier to envision somebody not following, physically, a site plan. But I think it would be the equivalent situation.

Councilman Collier: I'm just looking at it from the simple-minded man's direction, I suppose; not being a student of the law.

Vice Mayor Booros: So tabling this issue, until we find out whether or not the enforcement could take place, and then bringing back this appeal before Council, is not an issue.

Seth Thompson: When you say not an issue, meaning not an avenue?

Vice Mayor Booros: Is it an avenue? I don't know, from the Poore's guy whether or not this current tank farm is going to last through the month of January. He could tell me no it's not going to last through the month of January, but then again the new tank farm, is it going to be in before the end of the month of January?

Seth Thompson: I want to say that the record reflected they were going to build within 30-45 days. That might have been the dismantling, but one said 30-45 days. I'm not sure if it was construction or removing.

Vice Mayor Booros: The man's here in the room, so I'm sure he could tell us.

Seth Thompson: It is in the minutes, but it sounds to me councilman you're... Mr. Sockwrighter... you could ask...

Vice Mayor Booros: There are two questions here. Number one is the current tank farm going to make it through the winter, or were you planning on having the new tank farm in before the winter?

Charles Sockwrighter: We weren't going to have the new tank farm, if we started on it now, it wouldn't be ready until spring. We're going to get through the winter with the current tank farm.

Vice Mayor Booros: Okay. Thank you. That was my first questions.

Charles Sockwrighter: We can do that.

Vice Mayor Booros: So my second question is, if the man didn't do what the man was supposed to do, so Planning and Zoning might choose to revoke their approval, if they have the authority to revoke that approval, since he didn't take care of the drainage; why are we acting on this appeal tonight? That would also afford somebody the opportunity to speak with Mr. Dyer and the principles here to see if there is another location; since people didn't show up at first meeting; like Mr. Dailey and I did and speak their piece. I showed everybody. I showed up. I don't have to show up, but I go to those meetings and that's why, because once it occurs, you don't get a chance to say anything else. But why do we have to act on this tonight if there's a possibility somebody wants... Mr. Dyer knows that the community is here and they absolutely don't want this to happen; he didn't live up to that one thing he said he would do, under the condition of the approval of the site plan; why are we acting on this right now? It's not exactly like the tank farm is going to be built tomorrow. By the time... We're not putting the resident's of Cannery Village in any danger of not having their gas fireplaces on for the Christmas Holiday.

Seth Thompson: Legally, again, I think that's an enforcement issue.

Vice Mayor Booros: I understand that, but legally, can we table this until the enforcement issue is resolved?

Seth Thompson: The problem is that Planning and Zoning wasn't able to consider that issue, because it wasn't before Planning and Zoning in September; so you're standing in the shoes of the Planning and Zoning Commission reviewing what was in front of them...

Vice Mayor Booros: And they should have asked about the fact... well the six month's wasn't up.

Seth Thompson: That's right. So that's the difficulty.

Councilman Collier: Again, Mr. Thompson, in my mind a condition with approvals, is a condition with approval. It's an approval with conditions and if you don't meet the conditions, doesn't that, in a sense, nullify the approval?

Seth Thompson: Again, I think that falls under...

Councilman Collier: I don't know where that falls. It's not addressed anywhere that I could

find in our ordinances, so does it now go to Delaware Code, or what? I don't know that it's even addressed in there, because I read the Delaware Code regarding zoning and such...

Seth Thompson: Right, the State Code really just enables, it authorizes the Town to enact it's own zoning, so I have a feeling you would fall under, you meaning this situation, would fall under the zoning enforcement, which I believe is towards the back of the ordinance, under Remedies, I should say, Article XIII.

Vice Mayor Booros: So as enforcement, if he didn't do what he said he was going to do and the six months is up and enforcement comes along, can the Town withdraw his approval to move this tank farm given to him by Planning and Zoning, because he didn't live up to what he said he was going to do; and make him start this process all over again with the public hearing and everything before Planning and Zoning? What is our enforcement?

Seth Thompson: The difficulty is that your Code doesn't provide for that. You do have an expiration, in the event that somebody doesn't go forward; but there isn't anything in your Code that would somebody on notice that if they didn't comply with any conditions, it would effectively...

Councilman Collier: 220-87 doesn't apply in this case?

Seth Thompson: No, that deals with Conditional Uses.

Councilman Collier: It's a little different. I just wanted to be sure. Again, not being a student of the law. So 220-91 is Enforcement?

Seth Thompson: Right and then in terms of Remedies, you'd look at 220-95, starting there.

Vice Mayor Booros: I can't believe we can't withdraw the approval, if they didn't live up to it and make them start the process over again. Don't be clapping, unless you're coming to the public hearing next go round. Come on. Come on, Seth.

Seth Thompson: Your Code doesn't provide for it.

Vice Mayor Booros: What does it provide us to do then?

Seth Thompson: You can go through the enforcement remedies under Article XIII.

Vice Mayor Booros: I don't have it in front of me, so what does it provide us to do; tell these people in the audience what it allows us to do.

Seth Thompson: Basically, the Code Enforcement Officer can site the person and it's a fine punishable not less than \$100 nor more than \$350, or imprisonment for a period not more than 15 days, or both, with each week being a separate offense.

Vice Mayor Booros: Until he fixes the water?

Seth Thompson: Until he satisfies the condition; but if you think about it this way and I'm kind of spit-balling at this point, but if somebody didn't follow their landscaping plan, or they've planted a four-foot tree instead of a seven foot tree...

Vice Mayor Booros: You wouldn't given them their occupancy permit to serve breakfast the next morning...

Seth Thompson: But you also wouldn't make them go through the entire site plan process again. You would say that they didn't follow through with their approval.

Councilman Collier: Alright well, the deeper we dig, the more confused I become.

Mayor Jones: May I ask a general question of the Council? Your packages contain minutes, they contain applications, they contain comments from our engineer, they include maps of the existing farm and the proposed farm; actually the bare land and how it will look, we have photos in here of other locations and how it will look. We have more minutes. This is all procedure leading up to the final site plan. In your review of all these components, you are being asked if you see any violation in procedure...

Vice Mayor Booros: Or whether he's met all the conditions placed upon him?

Mayor Jones: No. No. No. Whether or not the final site plan was appropriately approved.

Seth Thompson: And I think you're probably saying two sides of the same coin; that whether Planning and Zoning applied the law and followed the procedure in the Town Code and you're saying and that procedure is essentially...

Vice Mayor Booros: Has he done it?

Seth Thompson: Right.

Vice Mayor Booros: So it's both. Yes, I think they followed the procedure. No, I don't think he's fixed it. But that doesn't solve the problem that these people out here are asking for.

Mayor Jones: No it doesn't. It has also been very clear that Council has not been given the authority to dictate where, where the developer must put the farm and if I am correct in saying our Planning and Zoning Commission also did not have that authority to dictate. To dictate.

Seth Thompson: That's right. If something is a permitted use, the site plan process is really attaching conditions to safeguard the public and minimize any adverse affect on the neighboring properties, but it can't be an outright denial of that use. You would need to change your Code to say that that's not a Permitted Use in that zone; that sort of thing. If somebody comes in with an application for a hotel in a residential neighborhood, in an R-1, then that isn't appropriate. That's not a Permitted Use, so the application wouldn't even be accepted. Here we're dealing with a Permitted Use of a public utility and the site plan process is designed to minimize any sort of hazards that the application poses; but it can't simply negate that use.

Mayor Jones: I would like to ask Council for a motion to take a 10 minute recess.

Councilwoman Parker-Selby: I move we take a 10 minute recess.

Councilman Collier: Second.

Mayor Jones: All those in favor say aye. Opposed. Motion carried. (Recess began at 7:07 p.m.) All those in favor to resume say aye. Opposed. Motion carried. (Meeting resumed at 7:26 p.m.) We have a couple of more questions raised by Council. Who would like to speak first?

Councilman Collier: Mine has been asked and answered, thank you.

Mayor Jones: Okay, any other questions.

Vice Mayor Booros: Yes, I'll ask one question. On the 200' notification that's given, since all the members of Cannery Village are also members of the Pool Club, should they all have been given a notice, since they're all affected by the Pool Club?

Seth Thompson: I will look at your Ordinance, but I believe it's the property-owner, so whoever is listed as the property-owner of that parcel.

Councilman Collier: That's correct.

Robin Davis: That's correct.

Councilman West: Who are the owner's of that Pool Club?

Seth Thompson: I don't know if they've turned it over. My understanding is the development hasn't been turned over to the Homeowner's Association. So I think it's probably still under the developer's ownership.

Vice Mayor Booros: That's a question I think I'd like an answer to, at some point.

Seth Thompson: Yes, I'm looking at 220-35(g), entitled public hearing, and the applicant shall mail notices of such public hearing to the owner's of all lands within a radius of 200' from all boundary lines of the property for which site plan review is requested. So it's the

property ownership.

Jeff Dailey: Point of information.

Mayor Jones: Mr. Dailey, I'm sorry, I can not allow that. Mr. Davis, I have a question for you, just to put something to rest, if you will. The original site plan, way back, showed that tank farm... Master Plan, I apologize, Master Plan, showed the original proposed tank location to look pretty much in the vicinity of maybe access to Route 88, but it definitely was land that went with the sale of the 40 acres to Dogfish. At that time, mixed reviews, procedurally, has there ever been the need to update that Master Plan, once that land was sold, because to my knowledge, that has never been done and I am ignorant as to whether or not, it was required to be done.

Robin Davis: There have been discussions about the Master Plan. The actual original Master Plan was never recorded and in looking at the Master Plan, I don't even know if the Master Plan actually shows the location of the tank field. It's shown on the sub-division plans, so the Master Plan is more just an overall, pretty concept plan of what you would like the development to look like. Then you start breaking it down, as in this development, as in Heritage Creek, it's done in phases. They come back to Planning and Zoning and do Phase 1 of the sub-division plan; that's where you'll actually see where the details of the site for the propane facility; where it was going to be. At that time, when Phase 3A was coming through Planning and Zoning, they just had an area that said, this is where the site of the propane tank field is going to be. They would have had to have gone through the same process as they went through to go back for the site plan process, once they said okay, we're going to put it there. But once it got sold, they had to find another location for it.

Mayor Jones: But there was never the need to have any proper plan updated reflecting the sale of and the reason I'm asking is, if it had been required to go for update or revision, showing the sale of that property; maybe it would have given someone the opportunity to see that the proposed, or potential tank farm, was no longer on the table, because it went with the piece of the sold parcel. My basic question is still the same, no need to update a plan in whatever phase it is, when that land was sold?

Robin Davis: Again, the Master Plan from what I can gather was never finalized, the original. Again, the tank location or the look of the tank farm was not on the Master Plan anyway. Again, that probably doesn't answer your question. The Master Plan probably should be, now that these individual areas have been divided up or broken up; probably should have some sort of new plan put in place, to kind of give an idea, but the Master Plan would only show just the concept of...

Vice Mayor Booros: Mr. Davis, that Master Plan also said things about how much common ground would be based upon how many pieces of property were going to be there, or how much of it would be commercial vs. how much of it was residential; was that all on the Master Plan?

Seth Thompson: Vice Mayor, it really just listed numbers of homes and the types of those homes, as well as certain shops.

Vice Mayor Booros: So approvals on how much commercial land had nothing to do with how many properties were originally going to... See I thought that the zoning on that commercial property was contingent upon how many residences there were going to be in that community.

Robin Davis: It's noted on the Conditions of Approval.

Seth Thompson: Right, in the ordinance that...

Robin Davis: It's not on the plan, but it's on the Conditions of Approval.

Vice Mayor Booros: It said, if they sold off 40 acres, that changes it, doesn't it; the conditions of that approval?

Robin Davis: It doesn't give an exact figure, what it says is I think it's one acre per 50 dwelling units.

Vice Mayor Booros: So have we changed the zoning on the commercial property, because they no longer have those dwelling units in the pipeline?

Robin Davis: It's that one acre per 50 is in R-1. The R-1 in an LPD allows for some commercial types. The commercial area, which is 3B, still remains the same.

Vice Mayor Booros: Even though the number of residential units has decreased significantly?

Robin Davis: They will just be allowed to have less acreage in the R-1 to be used for commercial.

Vice Mayor Booros: Okay.

Seth Thompson: During the recess, too, Mr. Davis kindly pointed out to me that while the building permit was issued, the developer would need to come back to get a Certificate of Compliance and at that point, obviously, if they haven't complied with all the conditions placed on the approval, they wouldn't get the Certificate of Compliance; so they wouldn't be permitted to use the land.

Mayor Jones: Anything else to add Mr. Thompson? Members of Council? I would entertain a motion to table.

Vice Mayor Booros: So moved.

Councilwoman Parker-Selby: Second.

Mayor Jones: Any discussion?

Seth Thompson: And so that the Council's aware, you're standing in the shoes of Planning and Zoning; your Code provides for 60 days for Planning and Zoning to make a decision on a final site plan; you would seemingly be under the same timeframe.

Mayor Jones: Any further discussion? All those in favor say aye. Opposed. Motion carried.

8. Adjournment

Mayor Jones: Motion to adjourn.

Councilman West: I make a motion to adjourn.

Vice Mayor Booros: Second.

Mayor Jones: All those in favor say aye. Opposed. Motion is carried. Meeting adjourned at 7:35 p.m.