



# Town of Milton

**Milton Town Council Meeting  
Wednesday, September 8, 2021 at 6:30 PM  
Executive Session starts at 5:00 pm  
Milton Public Library, 121 Union Street**

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**1. CALL TO ORDER**

**2. ROLL CALL**

**3. ADDITIONS OR CORRECTIONS TO THE AGENDA**

**4. AGENDA APPROVAL**

**5. EXECUTIVE SESSION:**

- a. Executive session for the Mayor and Town Council to receive legal advice and opinion from an attorney regarding potential litigation as permitted by 29 Del. C. § 10004(b)(4) and for the purpose of discussing the content of documents, excluded from the definition of "public record" under the Freedom of Information Act as permitted by 29 Del. C. § 10004(b)(6).

**6. DISCUSSION AND POSSIBLE VOTE ON EXECUTIVE SESSION ITEMS**

**7. MOMENT OF SILENCE**

**8. PLEDGE OF ALLEGIANCE TO THE FLAG**

**9. OLD BUSINESS- DISCUSSION AND POSSIBLE VOTE ON THE FOLLOWING ITEM:**

- a. Written decision of appeal filed by Mr. Barry Goodinson pursuant to Chapter 220, Zoning, Section 220-36(A) concerning the Planning & Zoning Commission's approval of a special permitted use to allow Cellco Partnership to erect a communications tower at 210 Front Street, further identified by Sussex County Tax Map and Parcel ID# 235-20.08-32.00.

Councilman Garde: While this item has been discussed and voted in a meeting on August 11, 2021, we are here to discuss the written and, therefore, formalize the decision by Mayor and Council which has already been made known to the applicant, the appellee and the appellant. I make a motion that we approve what was distributed today as Version September 8, 2021, as the written decision in this matter as delivered by our counsel. Councilman Collier second.

Mayor: Any discussion?

Councilman Garde: I think the written decision simply codifies in writing what we discussed and decided at the August 11 meeting. It is 10 pages and goes into quite a bit of detail on the reasons why the appeal was rejected and why Planning and Zoning decision was affirmed. It will be on website. But the

Motion includes approving and signing individually so I suggest that we individually vote upon motion that was made because we each have to sign this.

Roll Call Vote: John Collier, Rani Meredith, Rich Baty, Larry Savage, Sam Garde, Ted Kanakos, all verbally approved. Lee Revis recused herself.  
Motion carried. 6-0-1

**10. NEW BUSINESS- APPEAL HEARING, DISCUSSION  
AND POSSIBLE VOTE ON THE FOLLOWING ITEM:**

- a. Appeal filed by Charles Schwinabart, Michael Guerrieri and Wallace Goff pursuant to Chapter 220, Zoning, Section 220-36(A) concerning the Planning & Zoning Commission's approval of the preliminary site plan presented by Milton Attainable Housing, LLC for the Clifton Property, further identified by Sussex County Tax Map and Parcel ID# 235-14.00-123.00 and 2-35-14.00-123.01 and 2-35-14.16-1.00 and 2-35-14.16-2.00 and 2-35-14.16-3.00 and 2-35-14.164.00.

Mayor Kanakos: Read an opening statement and hoped that all would abide by it.

Good evening and thank you all for attending. This evening the Town Council will hear an appeal of the decision of the Milton Planning and Zoning. The decision granted preliminary site plan approval to Milton Attainable Housing, LLC. The preliminary site plan approval was for the construction of residential and commercial use on the parcel.

Appeals of the Planning & Zoning Commission are accountable under Town Code Section 220-36A. The Code Section states: The applicant or any interested person may appeal the decision of the Planning & Zoning Commission. The appeal is made to the Mayor and Town Council and shall be filed within 60 days from the date of the Planning & Zoning Commission's decision. The appeal was filed by Mr. Charles Schwinabart, and co-appellants Mr. Michael Guerrieri and Mr. Wallace Goff through and email dated July 17, 2021, and therefore was within the 60 days' time period required under the Code. In a moment I will outline some of the rules of procedure that will be followed this evening, but first I want to describe some of my expectations for the proceeding.

But first I want to describe some of my expectations for the proceeding. We are fortunate to live in a wonderful town where the people are passionate and opinionated about our town's growth opportunity, the preservation of our scenic fields and open spaces and our historic treasures. Naturally, there is going to be disagreements from time to time over how best to address what is facing our town. And that is what brings us here this evening. Circumstances such as these do not have to be confrontational, antagonistic, or combative. The Town Council and I are dedicated to listen to all points of view that will be expressed. Totally considering each of these views against the legal framework we have been provided and then making the best possible decision we can. But that will only be possible if everyone participating this evening maintains a level of decorum that is respectful of all participants. Every person is entitled to their point of view and the Town Council wants everyone to have an opportunity to speak without unnecessary interruptions. So, please, be mindful of my request that we proceed with an orderly proceeding.

Noted a moment ago, the appellant who filed the appeal is Mr. Charles Schwinabart and he is present this evening. The appellee, that is the entity whose decision is being appealed, is the Town's Planning & Zoning Commission. Our solicitor Mr. Seth Thompson will be representing the Planning & Zoning Commission this evening because he represented the Commission during the review of Milton Attainable Housing, LLC application. The applicant for the preliminary site plan approval is Milton Attainable Housing, LLC. The Mayor and Town Council are sitting as an adjudicate body to hear and decide the appeal We are represented by Mr. Glenn Mandalas who is the Town's Special Council for the appeal proceedings. Notice of this hearing was provided to the appellant, the applicant and the appellee. Notice of the hearing was also posted to the Town's website on August 31, 2021.

The rules of procedure adopted by the Town Council on June 12, 2021, provide that the hearing will be initiated by the Town's Project Coordinator, Mr. Tom Quass who will provide some background relating to this appeal. Next, we will hear from the Appellant, Mr. Schwinabart, the Planning & Zoning Commission and then Milton Attainable Housing, LLC. The parties will have at least one hour to present their cases from start to finish. After Town Council has heard from each of the parties, and asked questions of each of us, any person who is here this evening and desires to address the Town Council will be provided an opportunity to do so. In the interest of time, we ask that your statements not be repetitive.

After hearing statements from the public, the parties will have an opportunity to respond. And finally the parties will make closing statements. After that the case will have been fully submitted to the Mayor and Town Council for its consideration and decision. The rules require that a decision be made, and a written decision be issued within 60 days of this evening's appeal hearing.

Section 3.1 Rules provide the legal standard that the Mayor and Town Council utilize in making their decision. The Section provides: The Mayor and Town Council shall review the record of the matter before the Planning and Zoning Commission. Shall consider arguments presented on appeal and shall make a determination as to whether the decision was the result of an orderly and logical review of the evidence and involved the proper determination and application of Chapter 220. The appellant bears the burden of persuasion.

Finally, before we get started, I note for the record that there is a binder of materials that the Town prepared and provided to the parties. These materials were before the Planning and Zoning Commission when they approved the preliminary site plan, and they are hereby incorporated into record of this proceeding.

Are there any questions? Mr. Quass, please proceed by providing the Town Council with the background relating to this appeal.

Mr. Quass, Project Coordinator: The Milton Attainable Housing LLC submitted an application for preliminary site plan approval on 25 February 2021 and that is in Tab A along with the site plan. The DelDot Traffic Impact Study review letter and the Town Engineer Plan Review letter are at Tab B. The notification

for 18 May 2021 Public Hearing was made in the Cape Gazette on 30 April 2021 and posted on the Town website and Town Bulletin Board located at 101 Federal St. on 11 May 2021. See Tab C in your binders. The applicant sent notices to all properties within 200' of the subject property on 5 May 2021. You can see the list of mail receipts and return receipts in Tab D. The one thing to notice is that many of them just have an annotation for signature says Covid-19 or it doesn't have anything. Some people did get those, and some did not from my understanding. In discussion with the Postal Service, their supervisor stated that the protocol was not followed by the letter carrier. What was supposed to happen was that the letter carrier was supposed to contact the individual by distance and state are you going to accept this and write on the card whether or not they did and put it in their box and walk away and send the card back. What apparently did happen was all cards got sent back correctly to the applicant and some letter carriers did allow signatures on them, some did not, and some wrote down that they were the agents for those people on their route. That is in your binder as well under Tab D.

So the Public Hearing was held 18 May 2021 it started at 6:30 pm and the Town Manager provided staff support as I was not in Town. The Planning and Zoning Commission heard public comments from Betty Misikronos (?), Forest Webster, Jeffery & Patricia Wells. And that is in Tab E which is the P&Z Minutes which also show that P&Z voted 7-0 to approve the preliminary site plan with conditions as shown in the minutes. Tab F has the only written comments for the preliminary site plan hearing. That was from Sprinkler Coalition. They always send us something for all of these housing projects. They want sprinklers in every building. A variance for the amount of parking was what was one of the conditions of approval by P&Z which prompted the public hearing by the Board of Adjustment on 15 June 2021. At which time, Mr. Schwinabart who was present for that, that is when he noted that he never received any of the notifications. The appeal to the Planning & Zoning Commission of the decision by Mr. Schwinabart was placed in Town Hall drop box 17 July 2021 and, in an email, stating the reasons for the appeal which was received by the Town Manager 18 August 2021 and that is in Tab G. The Town Manager sent Mr. Schwinabart confirmation of receipt of the appeal and provide him rules of the appeals process and request an appeal statement from appellants on 3 August 2021 and that is Tab G&H. Also provided references for the Town Code that P&Z used for the process specifically for streets and entrances. Of note, under Tab B the DelDot Traffic Impact Study is dated in 2020 because that was done immediately after Plus Review process that was generated by the State. In there it specifically states that the entrance on Route 16 has to be 520' from Palmer St. down to their property. That is why it got placed in the center. That is it.

Mr. Mandalas: According to the rules, Mr. Schwinabart starts.

Mr. Schwinabart 24719 Broadkill Rd. directly across from the property. I want to preface my comments tonight with it is not our intention to stop this build, downsize it or anything else. We don't really have a lot of facts. I especially wanted to note when the development started my neighbor told me they sold the property and build apartments. I went to the realtor, and they wouldn't tell me anything. I went to the Town Hall and requested information and at this point had no plans. I was told I would be given notice by mail when there was a hearing that was affecting my property within 200'. That didn't happen. If

you look in the book, there were over 26 parties that were not given a chance to say yes or no. I never signed anything. When I found about this, I went to the postmaster, and I asked what was going on because certified mail is very important. We did not have a chance to come to the hearing. I did not know what really was going on. I don't have copies of anything. I have not been informed of anything. We trusted the Mayor and Council to protect our rights and getting notification. It was very obvious from the book that was prepared that the developer and the city knew there were missing cards and did nothing to correct the issue. The postmaster says they were not signed properly. We feel we have been wronged by decision.

Councilman Garde: You say you did not receive it?

Mr. Schwinabart: We received nothing. Normally we would receive a card in the mailbox which I did receive about the last thing we did. Had to go to the post office. We received nothing. Neither did my neighbor.

Mayor: You received no certified mail?

Mr. Schwinabart: No. We didn't receive anything whatsoever. The only way I knew about it was from people who sold properties and we did see an ad in the paper.

Mayor: You are saying that the postmaster said although it had a signature on it you could not identify the signature at all.

Mr. Schwinabart: It was not my signature. Believed that it was the mailman although most of them were not signed at all. Believe there are 26 that no one signed. But they were taken for granted as being notified.

Mayor: What did the Postmaster say?

Mr. Schwinabart: I could file a complaint to the US Postmaster. Have the guy brought in and asked why they did it this way. They had originally come up with a plan for Covid, but it wasn't being followed. Whatever the regulations were they weren't changed administratively, and they were changed by the City, they weren't changed by anyone with the authority. Because we did not get notice, we felt that everything after that should not have transpired. I am not faulting the developers at all because there are checkpoints. But I have been in real estate for 35 years. I am not fighting this. I moved here 22 years ago and not in the city limits. I love this town. I was manager of some of the largest properties in Baltimore and Worcester Counties. I don't welcome it, but it is going to come and it has to come. But would like to have control of it. I now have a retail establishment near my front porch that I don't know what the plans are; I don't know what is going to be at my front door; my neighbor is a police officer who works shift work, has 4 small children, and the driveway entrance to that property shines right into his house.

Mayor: Mr. Guerrieri?

Mr. Schwinabart: Yes. He is not here tonight. We don't know what we are going to do. A lot more traffic? A sign light all night?

Mayor: Is Mr. Goff here?

Mr. Schwinabart: Not here tonight he is working. I expect help from the city and the people in charge. That is basically why...I would love to work with the developers on what the neighborhood would like to see. This is our concern. I am not opposed to work with them at all. I am not trying to stop the development.

Mayor: You were not aware at all, at any time that Planning & Zoning meetings were schedule?

Mr. Schwinabart: No.

Mayor: All the neighbors who got all of these things.

Mr. Schwinabart: I went to my neighbors and asked if they heard about a meeting, and they said no.

Mayor: We have a long list of receipts of people who, in fact, did get them right along the road.

Mr. Schwinabart: There is a long list of people who did not sign and a list of those who supposedly got them.

Mayor: They got them but no proof they got them. That was part of Covid and the Pandemic. A lot of people took a certain amount of liberties especially the post man.

Mr. Schwinabart: That doesn't negate the fact did not provide legal notice and regardless of Covid, if the Court of Appeals said they were doing away with this for the time being this is what we are going to use, it wasn't done. If the City had stepped in that we will accept a handwritten notice, a processor server going to every house. You are dealing with people's property.

Mayor: The Town followed procedure by required the applicant to send these certified to the house. Certified letters with receipt they were delivered.

Mr. Schwinabart: Some were not.

Mr. Mandalas: Mayor, may I ask a question? I think I heard Mr. Schwinabart say that you did see an ad in the paper. Was that the ad for the preliminary site approval that we are discussing tonight?

Mr. Schwinabart: The property sale.

Mr. Mandalas: The property sale. Thanks.

Mayor: Since the applicant sent out certified letters that were received back. The number of people, you are representing yourself as well as two others, that received no, saying they did not sign and did not receive a certified letter. I have a signature on your receipt that is not yours.

Mr. Schwinabart: It is not mine. You see that signature. I can point out to you that the same signature appears on other cards.

Mayor: We noticed that. Wallace Goff has one also. That probably is the postman.

Mr. Schwinabart: They checked at the post office, and they didn't think it was his. I am just telling you what the local postmaster said to me. He looked at his signature on stuff like this and not his.

Mayor: I have a question that someone might answer. Are Certified letters delivered specifically by postman or is it part of the regular mail when it gets delivered. When you have 60 or 70 are they all distributed by same postman, or do they go into the general mail and delivered by whatever postman happens to be on that route that day?

Mr. Mandalas: I presume they go into the general mail and whichever postman happens to have that pouch of mail required to deliver under the certified rules. But I don't know. I think that is likely the way they are served.

Mayor: I am looking at signatures. Although they are not yours and Wally's is not his, and they haven't identified the postman who signed 20 different ones with the same name, the same scribble.

Councilwoman Meredith: Do you know who your regular postal carrier is?

Mr. Schwinabart: I don't know. I am retired so 90% of the time I am home. There is no reason for them to say to me I have something for you, would you like it?

Mayor: Did you question him after all of this?

Mr. Schwinabart: I didn't after I talked with the postmaster. I didn't want to go to him and say why didn't you distribute my mail.

Mayor: It might have been expedient for you to do that.

Councilman Garde: If I understand it correctly, the whole basis of your appeal is that you were not properly notified.

Mr. Schwinabart: The majority....

Councilman Garde: I mean the other things you wrote...

Mr. Schwinabart: Satisfy my conversations...

Councilman Garde: Even at preliminary those could also be discussed at final site plan approval which has not yet happened.

Mayor: Will he have the opportunity at the final site plan approval?

Mr. Mandalas: I believe he will.

Mayor: On the commercial aspect.

Mr. Schwinabart: Which the main aspect of our discussion. The commercial aspect. Deciding where the entrance is. The light shining in our houses. We don't know where the sign is going to be, will it be shining in our houses all night long.

Councilman Collier: I have a question for you. Obviously, you and your neighbors the other two co-appellants, alleged you did not receive the mail.

Did you speak to anyone else on your side of the road as to whether they received it or not?

Mr. Schwinabart: Yes.

Councilman Collier: The reason I asked the question is there were people who made comments and they happened to be the three properties east of your properties and I was just wondering if they happened to pay more attention or did, they get a notice or what? Are you able to confirm or deny that?

Mr. Schwinabart: I spoke to the gentleman to the west of me. He said he had not gotten one. The other gentleman up from me, Wally said he spoke to them, and they had not gotten one.

Councilman Collier: The reason I asked it seems funny that you said you didn't get a notice, yet these people made it to a meeting and all on the record as being present and making comments. And I would assume that what drove them to that meeting was receipt of the notice. Again, without them being ....

Mr. Schwinabart: I don't know what drove them to the meeting.

Councilman Collier: I understand that so I just wanted to see if you could confirm or deny whether they received the notice.

Mr. Schwinabart: I cannot.

Councilman Collier: Okay. Thank you.

Mr. Mandalas: Appropriate now to move on to the appellees.

Seth Thompson of Parkowski, Guerke & Swayze here representing the Milton Planning & Zoning Commission, the Appellee. Council has recently been asked to serve in this role with respect from a different appeal from the Planning & Zoning Commission. I won't reiterate what the Mayor has already gone through. I would note that this is a slightly different animal that we are dealing with in that we are dealing with a site plan review. I know that the Mayor and Council and it is beneficial for the public to understand that this appeal is technically about a different process vs. the one that you approved a written decision on earlier in the meeting. I thought it would be helpful to walk through the site plan process. It isn't something that the Mayor and Council are involved with in an appeal. There were a couple comments in the discussion with appellate, but I just want to make sure everybody understands how that process works.

In terms of the site plan process, it is #220-35 SS A talks about the intent. It indicates that Planning & Zoning is to review and approve site plans for permitted uses. Again the use itself is permitted under the Code; the site plan then is to delve into the details. And specifically, 220-35 talks about the fact that the objective is to evaluate site plans in order to minimize conflicts between the site layout and design, proposed uses and existing uses and natural site conditions and thereby minimize any adverse affecting the health, safety and overall welfare of the community. Planning and Zoning is not in a position to not deny an application for a site plan unless is somehow not compliant with Chapter 220.



How does the process work? There is an optional conceptual plan conference and then there is the preliminary site plan review. And that is really the stage where this application is. The public hearing occurs at preliminary site plan review. It is important to kind of understand that while there is a final site plan review afterward, the public hearing is at the preliminary phase. That is really for purposes of the Commission and Applicant receiving that public input so that they then can adjust their plans at that phase. They then take those preliminary plans that are approved either outright or with conditions, obviously this one was approved with conditions, they take those plans and then have to go back to outside agencies to get approval for Sussex Conservation District for DelDot, you know, any of the outside agencies that regulates specific elements of the project. I note that one of the conditions in this preliminary approval what they needed to get their outside agencies approvals. That is in your Code, so it is a little bit belts and suspenders. But obviously that is important to the Planning & Zoning Commission so that is why it is belts and suspenders. It is important to Town and that is why it is in your Code. It is required for every site plan. Nobody gets final site plan approval until they get all of the outside agencies' approvals that are applicable to the project.

In terms of the specifics, the Commission needs to determine whether there is full compliance with intent in the letter of Chapter 220, your Zoning Ordinance. What then happens after the public hearing, they are required to issue a decision within 30 days. And that needs to be a written statement to the applicant stating whether or not the plan is approved, conditionally or outright, or it is disapproved. Your Code specifically says that a copy of the minutes is a sufficient report and that is what we have here. Particularly noteworthy if the preliminary layout is disapproved, the Planning & Zoning Commission has to indicate the reasons for their findings. Again, they cannot arbitrarily, they have to say all right we are disapproving this because it does not meet x or y or z. If that happens, the applicant has to revise plans and resubmit. Looking at the conditions here and I think the conditions are important in the sense that they evidenced the level of detail that the Planning & Zoning Commission put into this project which, frankly, they do for all their projects. I always impressed with the level of attention and the commitment of time that this Town enjoys and receives from its public servants. In terms of the conditions there was some discussion previously about the parking waiver that was needed from the Board of Adjustment. Planning & Zoning stayed in its lane, so it did not have jurisdiction over that. Either you need to get the waiver, or you need to come back with a plan that has the appropriate number of parking spots. The second condition was that the P&Z noted some typos on the plan including references to the County when the project is in the Town of Milton. Again, that level of detail that the commission engaged in. The third is that the applicant needs to get all applicable agency approvals. We talked about that before. Said that the Applicant needed to finalize easements and water meter access for the Town and again focusing on detail. The fifth and final the Applicant needed to finalize plans for electrical recharge stations. Those conditions were attached to that preliminary approval. The exact language in the Code itself is that the applicant must submit for final approval all necessary permits and curb cuts from responsible local, county and state officials. One of those outside agencies is DelDot and that is important here when we are talking about the entrance permit. I am happy to delve into the specifics that were in Mr. Schwinbart's notice of appeal or at least the email that followed that up. But I

did want to make sure that we kind of understood what framework we are dealing with here. It is a site plan process; it was a preliminary approval, the next step would final approval. There would not be a public hearing at that point. But the public hearing was to occur at the preliminary phase. Unless there are any questions in terms of process, I am happy to delve into the detail.

Councilwoman Meredith: At the final site plan approval meeting, would there be public participation?

Mr. Thompson: There can be, but it is not a required public hearing and the reality of is that we kind of front load those public comments so that the applicant doesn't have to do a lot of heavy engineering and that has somebody come along and say, "Hey, here's an idea, why don't you do something differently." Typically, a final site plan approval is a much shorter meeting in the sense that the applicant comes, and it is checking things off to make sure they have done everything that was required of them. It is meeting all of the conditions that were placed on the preliminary approval and making sure they have all those outside agency approvals. Any other questions?

Councilman Garde: Not sure how to phrase this but it sounds to me like we are to, or the principal reason for the appeal, was a lack of notice. I am wondering if you have a comment as the appellee on the documents that were presented to us and that we looked at and can confirm that the receipts were returned but we have an appellant who says it may have been returned, but I never got it.

Mr. Thompson: I am not disputing Mr. Schwinabart's statement that it is not his signature. But I think the reality is if you are asking the question that is called for under your rules. It is two questions. #1 did the Planning & Zoning Commission engage in an orderly and logical review, and #2 did they misinterpret anything in Chapter 220. The answer remains the same regardless of the notice issue. But I am happy to address why I think that is the case. Do you know what I mean? In other words. Was it orderly and logical? I think the answer is yes. And it is a little bit of a square peg in a round hole. It is not like the Planning & Zoning Commission knew that the signature was not Mr. Schwinabart's. But again we are not disputing that, but I don't think we need to.

Mr. Schwinabart: Can I ask one question? It seems like due diligence to make sure the receipts are valid (inaudible) Not speaking into the mike. .

Mr. Thompson: In terms of the way that works, there was a comment earlier that your Code requires that the receipts be confirmed and that is not an exact quote. I think it is important that we work with the specific language here. . This is what your Code requires. The applicant shall mail notices of public hearing to the owners of all lands within the radius of 200' of from all boundary lines of the property for which site plan review is requested. The Town will provide applicant the required information included in the notification letter. Notices shall be mailed certified and postmarked at least 10 days prior to the date scheduled for the public hearing. A list of properties notified, proof of mailing and return receipts shall be provided to the Planning and Zoning Commission prior to the public hearing. That's it. All of that was done. I understand Mr. Schwinabart's frustration. The pandemic has had an effect on a lot of things. I am not giving a pass to the Post Office. The reality the Town and the Applicant are not in a position to guarantee that the post office does its

job. That doesn't make a lot of sense. Your Code doesn't require the Town of the Applicant to call each person and say, "Hey, is this really your signature?" That just doesn't make a lot of sense. It is not what your Code requires you to do that. The Town could change code, but that is not what the rules are currently. The important thing, too, that the Town Code also requires the public notice. The reality of a project this size is that it is not just the people within 200' that might care about that project. Mr. Quass went through and indicated where in your records the newspaper notice in the Cape Gazette was published. The fact is that some people 200' radius won't care. Some people outside of the 200' radius will care. The Code requires that the mailings go out and that was done and as a backstop presumably there is the ad in paper that everybody had the opportunity to see. Not only that these are open meetings with a notice 7 days in advance, on the website, and Town bulletin board. The other important thing here this isn't some one-off application. This is a project that has been going for an extended period of time because it underwent various processes. Mr. Schwinabart mentioned the fact that he was aware of the property being for sale and the owners told him that it was going to be apartments. The Town actually had the annexation process which included a public hearing at that time. This isn't something where the parcel is, "Surprise, I am doing this type of site plan and that is the only purview here.

Mayor: I have a question. What is the disposition, where they all returned to the post office?

Ms. Schwinabart: I have no idea. I asked how many they had not respond notices and she could not reveal that. I assume they would not give me any definition of what the process was.

Mayor: The questions I have is that if the postman went to your home by virtue of him sending in a receipt that it had been delivered. He saying it was delivered. I would like to know where are all of these undelivered certified letters floating around. You never got it late?

Mr. Schwinabart. No. Tons of mail had down in somebody's closet. Due to Covid, there were a lot of strange things happening.

Mayor: Since the letters can't seem to be found evaporated or somebody has them in a mailbag in the back of the post office. I can't see why they would not have been delivered even late. But would have been delivered.

Mr. Schwinabart: They were basically in front of the distance that I got the letter. So why would he not destroy them if he was not doing his job?

Mayor: It was certified mail, and I don't think it was in his benefit to do that. Whether it is part of his performance to take out 32 certified letters and comes back with 32 receipts. Even if he hasn't delivered them or somebody did not get them. Someone in your house might have signed for them. I am just inquisitive to what happened to all of these certified letters. I also say that when the postman brings back certified receipt it is indicative that he delivered it. Even if there is not a signature, the receipt comes back.

Mr. Schwinabart: My signature on that card, if I went for eviction or any other legal notice, my signature would be verified and that is what they would use in the law.

Mayor: Certified letters didn't come back. The postman says he delivered it by returning the receipt. That to me would indicate that you got the letter.

Mr. Schwinabart: But Mr. Quass, who I inquired to about some of this, he didn't even notice the irregularities in the receipt process. My process was at that point more than one person had notice this. Why didn't Planning pick up the ball and ask why isn't this developer or the Town, why are we not getting signed receipts?

Mayor: Mr. Quass, of all of the certified letters that were required to be sent out there was a definitive number? Do you know how many sent out?

Mr. Quass: Yes, there is a listing under Tab D, I believe it was in the 40's, I have to count.

Mayor: Did the certified letters sent out match the number of receipts?

Mr. Quass: Yes

Mayor: 41 is 41.

Mr. Quass: Yes

Mayor: Not one person did, you don't have one extra piece of mail.

Mr. Quass: We had one that was returned that could not be delivered to that address. The legal address could not be delivered. If you look in your tab, it says, "Return to Sender. No mail receptacle, unable to forward."

Mayor: The question I would have now comes from the applicant that they received or how many. The question would be you would have to have that letter back from the applicant if it was Return to Sender.

Mr. Quass: And they did.

Mayor: They did.

Mr. Quass: Correct. That is the legal address.

Mr. Mandalas: We have the appellate right now making a presentation. Let's stay focused on him for a moment.

Mr. Thompson: I will keep my remarks brief, too. Just to kind of come back to the issue in terms of notice. There are scenarios obviously where again the Town nor the Applicant isn't in a position to guarantee that the property received it. You can think of a scenario where an adult child is the one who signs for the green card and forgets about it and doesn't give it to the property owner. That is just one of those scenarios where the actual property owner, through no fault of the Applicant or the Town, doesn't receive the actual notice. The other thing that I heard Mr. Schwinabart say that I do want to flush out a little bit is he wanted more details about the project. The notice isn't a full set site plans and comments from public agencies. The notice is just as it says. It is a notice. It is putting someone on notice that an application has been filed. It is actually pretty easy these days especially given the fact that the Town is posting its packets online, but you are also subject to FOIA. If somebody wants to see documents related to a project, those are available I want to be

clear that legally notices are simply an opportunity to be heard. The notice itself does not need all of the plans in it. The member of the public has some duty once placed on notice to then follow.

Mayor: Mr. Schwinabart is doesn't matter if something is in the letter or not, he never received the letter.

Mr. Thompson: No, understood. But he did saw he was aware of the project. Which brings me back to my point the Town did have a public hearing with respect to the annexation petition. My point on that, maybe it is helpful to operate in the context of precedent. This is fairly unique issue based on my research but there is at least one case that was relatively helpful in kind of framing the issues for me. It is the Protect Our Indian River vs. Sussex County Board of Adjustment. Obviously Planning & Zoning is different than the Board of Adjustment, but the concept is relatively similar here. And the site is 215 West Law 24498971. It is from 2015, Judge Bradley, Superior Court, I believe. It dealt with the issue of somebody indicating they didn't receive their mailed notice. Judge Bradley looked at a few elements that are present in our particular situation here and kind of viewed it, I think he actually used the phrase no harm, no foul. He looked at a few of those elements that exist in our scenario. There was public participation. This isn't a scenario where the applicant or Planning & Zoning Commission is attempting to hide anything from the public or somehow stifle public comment. I think everybody's version of events is not that the applicant or the Town did anything untoward or anything like that. Well, wait a second. There was public comment, and it was on the very issues that the Appellant in that scenario wanted to discuss. And when you look at our minutes from the Planning & Zoning Commission, traffic was obviously a discussion. It was the issue that got the most public comments. It is one of those elements where you have to think, "Alright, was the issue raised?" I think the answer to that was, yes. They also indicated was the nature of the project known? And that was really my point in respect to this project being the subject of various town processes. This wasn't something that came out of the blue. Noted the postings on the agenda and that is what happened here, as well as the advertising in the newspaper. The one element in that case that was a little bit different is that the specific appellant also appeared at the public hearing. We obviously don't have that here. He showed up at the Board of Adjustment meeting but that was after the preliminary site plan meeting. But it does go to the fact that notice, that an argument that mail notice having not been received is totally defective. It does not support that idea. I am happy to address other elements in Mr. Schwinabart's appeal if you want me to. .

Councilwoman Meredith: I have a question about the certified mail part. All cards returned except the one that didn't have a forwarding address. What happens if a card is not returned? The certified mail cards.

Mr. Thompson: That is actually a scenario where we then we would have a problem under your Code. It is not our scenario. The exact language in the Code does cover that situation. A list of properties notified, copies of proof of mailing, and return receipts shall be provided to the Planning & Zoning Commission. If there was something that didn't come back, I think that the argument is that your Code does address that issue vs. If you could have

foreseen a pandemic and legislated to deal with that issue, more power to you. That is a high bar.

Councilman Garde: Interestingly enough it doesn't say signed receipts.

Mr. Thompson: It doesn't.

Councilman Garde: Mr. Schwinabart was potentially saying that due diligence of return receipts was not done adequately by somebody. It didn't have to be done by himself. He didn't sign it and I believe I heard him say that somebody should have done more due diligence with respect to signatures. I guess I am cutting a very narrow path through the words.

Mr. Schwinabart: It says that 41 sent out and 26 of those 41 were not signed agent of Covid. It is more than 50%. That is a problem with the intent with what they were sent for. Notify the public.

Mayor: You said they are not required to be sign?

Councilman Garde: I didn't say that. I said the language in the Code. I am talking about requirements. The language in the Code that I heard Mr. Thompson read said they receipts shall be returned or words to the effect.

Mr. Thompson: That is right.

Councilman Garde: Read it again.

Mr. Thompson: Do you want the entire?

Councilman Garde: No, just the one on the receipt.

Mr. Thompson: List of properties notified, copies of proof of mailing and return receipts shall be provided to the Planning & Zoning Commission prior to public hearing.

Councilman Garde: Proof of mailing and receipts have been... that is cutting it very fine, but...

Mr. Thompson: You could envision a scenario where...

Councilman Garde: I believe Mr. Schwinabart without question did not receipt it. But I am wondering what I am supposed to do with respect to the documents that are in front of me? Where the receipts are returned. And a return receipt is what is required by the postman. This is getting harder and harder to support our residents and to support the people who have a right to comment and letter of the law. This is getting harder and harder for me to decide because it seems like the letter of the law has been fulfilled. But Mr. Schwinabart is sitting here telling us that he never received the notice, and he has counted the number of signatures on here and that the majority of the return receipts do not have people. Some of them do. I mean Jane Collins signed hers.

Mayor: I would think that by virtue of delivering the certified letter and the postman bringing back a receipt, he is saying I delivered that.

Mr. Mandala: Let's not get into deliberations until each party has made their presentations. Let stick with the appellant for the minute.

Councilman Garde: What we have to decide that is confusing me at the moment because I think the letter of the law has been fulfilled. The intent to make sure that Mr. Schwinabart has a chance to make his comment to the applicant at the public hearing and that he was relying on receipt of a certified document to invite him.

Mr. Schwinabart: I disagree. My position is why was this created to have a signature on it, to have proof that I received the notice. I don't care what's in the notice. All it said was that there was a notice that there was a meeting. It doesn't tell me anything about the project on it for the most part. This was created to make sure it was a safeguard that I got legal notice and they were required to do that. If we don't need that.....

Mr. Mandalas: Members of Council, Mr. Thompson is in a one-hour clock so let's stay focused and there will be an opportunity for each of the parties to address the issues one more time so let's stay with the appellee at this time.

Mr. Thompson: I am happy to answer your questions as well. But I do want to touch on a few of the elements. We have been talking about the process. I guess the question is, "All right, well if Mr. Schwinabart had received notice, what would the result have been?" Would it have been any different than what occurred? Based on his notice of appeal or the email that followed the notice of appeal, I think that answer to that is no and here is why. Mr. Schwinabart lists as one of his issues an objection to the entrance on Route 16. As shown in record Route 16 it is a DelDot road. The traffic impact study was submitted to Planning & Zoning and as Mr. Quass indicated, DelDot dictated the entrance along that road. So that is not something that P&Z is going to be in a position to say, "Hey, we really need you to remove that to the corner of the property." That is not really their jurisdiction. I think going back to my prior point about this application being the subject of other public hearings, the location of the entrance on Route 16 wasn't a mystery up until May 18<sup>th</sup>. It has been known through the process. It was shown as part of the concept plan for the annexation process. That could have easily been known prior to May 18<sup>th</sup>. That is why I think the location of the entrance is not.... Put it this way. If the Mayor and Council sent the matter back to Planning & Zoning to consider that issue, I would be in the position of telling that is really DelDot's jurisdiction. As a basis for appeal to Planning & Zoning decision, it doesn't really fit in that scenario. In terms of the other issues that Mr. Schwinabart raised, he did not general safety concerns. I didn't hear much in his presentation about what those concerns are. The Commission obviously reviews to project for code compliance and one of the reasons we have those various code requirements is to address safety concerns. The other element is obviously the administrative agencies that go along with their approvals are empowered via the State Government, the Federal Government in order to address safety concerns. So a good example, just to go back to DelDot, if the safety concern was traffic on Route 16, again that is DelDot's jurisdiction. If the safety concern was the flow of water, that is really Sussex Conservation District's jurisdiction. I don't want to speculate in terms of what his safety concerns were, but to the extent they are covered by an outside agency, or that they are covered by your current Code, which is what it should be if they were within the Town's

jurisdiction, Planning and Zoning reviewed those. I will go back to the fact that the public comments that were made. You know, it was just not one or two people. There were a number of public comments received. There was even a comment with regard to sprinklers. If the safety concern was fire suppression, Planning & Zoning heard it. In terms of fourth item, the lights projecting in homes, I understand that Mr. Schwinabart lives across Route 16. Obviously, there is kind of a roadway between. It is not like they share a property line. But even if were to operate under the assumption that Route 16 wasn't a problem or kind of a buffer, if you will, Town Code already addresses how lighting works. Mr. Schwinabart mentioned what about the sign? When commercial businesses go in. #1 the commercial businesses are going to require their own site plan because currently the parcels are just being created. The actual buildings were not presented on this particular site plan. Your code already addresses the light for signs. In 220-63 E 11 for instance, Illumination: signs may be illuminated at night by back lighting or direct lighting only, provided the latter is so screened that do not cast any direct lighting upon any residence or street right-of-way. No sign or lighting device shall be of the flashing, intermittent or reciprocating type. Your Code already addresses that. In addition you have 220-42 that looks to me like the parking is going to be Route 16 and 220-42 A7 requires that outdoor lighting of off-street parking lots shall be designed to shield adjacent properties from the glare. Those rules already exist. The Planning & Zoning Commission wouldn't be in a position to vary those. There are going to exist on this project. Therefore, if the concern was that the lighting going to shine across Route 16 into those properties, they can't do that. Your Code already prevents it. I think they were the only issues. There was king of a general statement that there might be others. I didn't hear any in opening. I am happy to address anything that the Council thinks I missed or any questions with regard to my comments. Thank you.

Mayor: At the P&Z meeting when lighting, traffic and various other things were addressed, this was made public?

Mr. Thompson: That right. The meeting is in public, so the public comments were made, and the minutes reflect this and then the matter has been discussed in the discussion portion.

Mayor: I don't know if it is appropriate, but Mr. Schwinabart did you read the results of the P&Z meeting with regards to lighting and did you find something wrong with it?

Mr. Schwinabart: Nothing right now. The plans for the commercial properties have not been laid out what is going to be there and where the sign will be. A little concerned about the lighting on the entrance, the cars coming in late at night and shining into our homes. That is one of the concerns.

Mayor: At the P&Z meeting was that discussed?

Mr. Thompson: In terms,

Mayor: The lighting on I think four commercial pads.

Mr. Thompson The Planning & Zoning Commission looks at lighting plans because that is just something that obviously is a concern. I didn't see it reflected in the minutes themselves. But, again, the commercial building



themselves weren't part of this particular site plan review. If anybody has attended a couple of Planning & Zoning meetings, we often hear about downward lights, whether on the building, shielded to some degree to keep the light of the adjacent property.

Mayor: What I am concerned about with Mr. Schwinabart is what was discussed was that the same thing that he would have brought up.

Councilman Garde: I am sorry to interrupt, but as I understand it and it is becoming clearer, the only portion of the site which was annexed in with two zonings. It was annexed in with a residential zone and it was annexed in with a commercial zone. If I understand the discussions correctly, the only portion that was reviewed at this preliminary site plan approval was the residential portion. Is that true or false?

Mr. Thompson: With the caveat that the entrance goes through the commercial that fronts Route 16. The commercial buildings themselves were not shown on this site plan.

Councilman Garde: And commercial building signs were not part of the site plan approval.

Mr. Thompson: Correct. Not only do we have 16, but we have that commercial space.

Councilman Garde: Yes. Exactly.

Mayor: I think we may have gotten a long way off of the issue here this evening. Here's the thing. I don't know if appropriate now, the applicant followed the rules. Only one, I believe, was returned to the applicant. The postman by virtue of returning the green card, it did not have to be signed, indicated that he delivered it.

Mr. Schwinabart: Who said they did not have to sign it?

Mayor: Did we say they did not have to be signed?

Councilman Garde: I did not say that. What I said was the code is more narrow than a common sense interpretation. It simply says that they will be returned. And they were returned. Mr. Schwinabart has already respectfully commented that my comment is essentially, and I won't use the street term that some people use as FOS?, but my comment is irrelevant because he never got the notice. And that I should have been smart enough, in your mind, to have reviewed the non-signatures and assumed that were there was not signature, I was supposed to be smart enough to know that they didn't get it.

Mr. Mandalas: Again, let's not deliberate until....

Councilman Garde: I think that

Mr. Schwinabart : Council should have been smart enough to say what is wrong with these. 50% have not been signed.

Mayor: We don't require a signature.

Mr. Mandalas: Let's just to get everybody's case submitted.

Councilman Meredith: I have a question about lighting.

Mayor: We are working with Town rules and those are the rules that the applicant followed. I am interested in all of the people who did not receive certified mail, where are those letters? Where is the certified mail? It seems unlikely that they disappeared. That the postman threw them in the garbage. All he's required to do by sending back the receipt, even unsigned, is that he delivered it. I trust the postman.

Mr. Mandalas: These comments are good for deliberations.

Councilwoman Meredith: I have a question for Mr. Thompson about Planning & Zoning. Okay, so one of Mr. Schwinabart's concerns is that light will be projected into our homes all night. Did Planning & Zoning consider the exiting vehicle traffic lights that would be pointed at his home?

Mr. Thompson: I am going off memory, I don't think there was any specific discussion about exiting vehicle traffic lights. Meaning the lights on the vehicles themselves. This is not really Planning and Zoning's prevue.

Councilwoman Meredith: That is my next question.

Mr. Thompson: It is the DeIDot's entrance that gets approved on the DeIDot road. Which goes back to my overall point. I understand Mr. Schwinabart's frustration. I guess I try and look at the meat and what the merits are. What would be different? I think that the answer is nothing.

Councilwoman Meredith: Thank you.

Mr. Mandalas: Council, please proceed.

Mr. Thompson: I think I am all done. I would be happy to answer any other questions. If there aren't any, I really do thank the Council for its time.

Mr. Mandalas: If you have any questions for Mr. Thompson, now is the appropriate time to ask them and if not, we will move on to Mr. Horner.

Mayor: Let's move on.

Attorney Jon Horner: I won't bore you again with recitation of the standard review or the history of this application. I think we are a little bit beyond that. At this point I am going to jump into this mailing issue. I think a lot of the discussion has been misplaced. I think that you were correct, Mr. Garde, in looking at the Code and what the Code requires. The Code requires the mailing of these certified mails and then it requires the return of the certified receipts as Mr. Thompson read directly from the Code. The reason why the Code is done that way, and it is done that way uniformly in a lot of jurisdictions, is because it gives third parties an opportunity to essentially sabotage an application if they so choose. In no way am I implying that is what happened here. I truly believe what Mr. Schwinabart is saying. But let's just take it this way. Let's say I am against this project and a certified mail comes to me and I know it is coming and I just say that I am not signing for that. I refuse. I am not going to sign. If the standard were to be return signed cards, you would have the ability for one individual to completely derail a project. Now, in adverse proceedings as Mr. Schwinabart spoke to where it was a court proceeding

where I was sending you notice or serve as a processor, things like that, that is different. That is where you actually have to share that there was notice. And that is not the standard here. The standard was at the mailing went out and that we provided the documentation. And the Code actually even goes further, and it is actually in your general provisions, in the Code where it talks about notice and service and process in Section 113, right in the Preamble of the Code, where it says, "Service by mail shall deemed to have been completed at the time of deposit in the post office or any United States mailbox. The reason that is because as we stated, we do not control the post office. As the applicant, we also have invested rights in this process including capital risks, costs, all of these things. When a project is delayed, it has real impact on our property rights as the applicant and property owner. To take a scenario where mailing goes out and we are reliant on a third party to do it and rely on every single person to then receive that, to sign for it if that is the standard as Mr. Schwinabart's putting forth, it would make this process next to impossible. The same way, for example, at a public hearing we don't delay public hearings to make sure every single member of the public can be there because it is impossible. A lot of discussion has been around that and what I would say is that the standard is not that every single person receive notice by mail. The Code doesn't require that. The Code requires that the mailings go out and, as your Code states, service is deemed upon the placing of the mail. I think also there are other protections inherent in your Code to avoid situations like what has happened here including obviously the website and as well as the posting in the Cape Gazette. What was unfortunate was that Mr. Schwinabart did not receive this notice as he said. That in and of itself does not meet the standards set forth in your rules for rejecting the Planning and Zoning Commission action here. I am happy to entertain any specific questions on that. I would like to piggyback on Mr. Thompson's argument regarding some of the other underlying issues relating to safety, lighting and other issues. I like to make an analogy to what we call as harmless error to what we call in the world of appeals and litigation. What is says that even if there was a procedural or technical error if end result would have been the same, then that error was harmless. Now here I am saying there was no procedural or technical error. But just says, "Hey, there was." Let's assume, for the sake of argument, that did exist. And as Mr. Thompson said the issues that have been raised, and again they have been raised in a very broad manner in a couple sentence email and very briefly tonight the explanation tonight of the specifics of the issue, nothing he has said has risen to the level where it would undermine any decision or action taking by the Planning and Zoning Commission. As far as headlights exiting and leaving the property, that would be more in the prevue of DelDot but if the standard is we can't have headlights shining on the property across the street exiting and leaving the parcel, that is going to make a lot of property in this County and be completely undevelopable. I have to say I would not be able to leave my house, because my lights shine right in my neighbor's house. With respect to traffic, safety and other concerns, the safety issue in particular there is an analogous case that happened in the City of Lewes. I am sure everyone is familiar with the gigantic wind farm fan they have out there. A gentlemen sued basically saying look this wind farm it is unsafe and violates your zoning code. Your zoning code says it is generally around to promote the health, safety and welfare of the citizens. And the Court of Chancellor said was essentially that a general objection that something violates the safety of the community is not sufficient enough to say that the Code has been violated to

overturn an action by the Planning & Zoning Commission. To make that analogy of harmless error, again, I am only making that analogy to address the other points to say my first and main argument to you all is the code is the code. The Code is what you are required to follow. It is what we are required to follow. The Code makes it very clear that we need to just mail and comply with the return receipt requirements as we did and have done and there is no allocation that we have not. The Code goes further to say that notice deems to have occurred as soon as they are placed in the mailbox. We all know they were placed in the mailboxes. We have that evidence in the record as well. Code require that the mailings contain information that was required by the Planning Commission and those mailing do. They contain the same information that was contained in the notice that was published in the Cape Gazette. Compliance with the Code is what we are looking at and whether the Planning & Zoning Commission erred in us complying with the Code. And I would proffer they did not. That the Code was complied with the Planning & Zoning's decision was a result of logical deliberations and logical process and it doesn't meet the standard for overturning their decision. But, again, even if the notice was defective, that error was harmless because nothing that has been raised by the applicant would have changed the decision rendered by the Planning & Zoning Commission. I am happy to entertain any question.

Mr. Mandalas: Just to be clear. You mentioned the Lewes wind turbine case is that the ? case and do you have the citation.

Mr. Horner: I do. I knew you were going to ask for that that is why I wrote it down. Oh, you know what? I do not recollect the citation, but I can get that to you. It is the 2015. It is in the letter I wrote to you recently in Lewes if that helps.

Mr. Mandalas: Good

Mayor: So the Appellee and the Applicant everyone has spoken?

Mr. Mandalas: Everyone can respond.

Mr. Schwinabart: My only response was that when he was talking about the returned cards, the postal policy is they bring to my house certified and I say I am not signing it. There is a difference between someone just not getting it and somebody refusing it.

Mayor: In this case, the letter has disappeared. The post office said they don't have it. You asked them.

Mr. Schwinabart: I said they don't have, what they told me was they did not follow procedure and they were not signed and returned with signatures. I said to her can you tell me how many you didn't get, she said no.

Mayor: That is your standard you are using. We don't have that.

Mr. Schwinabart: I am going by the postal standard.

Mayor: I am just wondering what happened to all of the certified letters, at least three of them.

Mr. Horner: The standard, again, as you cited court cases if I was planning an eviction matter, adversial proceedings and service of process rules are specifically set forth in various court rules and procedures and that is a whole different standard than what we have in front of us here. If the Code was different and said you need to have a return card signed by every single person in the 200' radius, I wouldn't be able to sit here and hanging my hat on these harmless arguments. But that is not the case. That is not what the code requires here. Again, I have never personally refused a certified mail and I'm sure there are some I wanted to. But I do believe I have sent certified mail that other people did not want to receive. But there are other options for example the one person who does not have a mailbox who we required a return signature card, by that standard we would not have been able to meet that here. If someone just wants to turn the lights off and close the door every time, they see the mailman coming, I know there are some people in debt, bill collectors, they might do that, no problem. All of these problems it is not fair to put that onus on the applicant. The applicant has 200' radius the mailings went out, public posting was done. In fact, the standard of the 200' mailing, if you look at Delaware's Open Meeting Act, for compliance with open meetings, I believe, correct me if I'm wrong, this is more in you all's area, but I think it is just 7 days and it doesn't require specific mailings. It requires a public broadcasting of the event whether it be advertisement in the papers things like that. It is above and beyond that the Code requires these mailings. It is not something that is required by State Law. It is something that you all have done to say basically say we want to make sure our neighbors and the others in the community are more likely to receive notice. But there is no fool proof, 100% way to guarantee receipt of notice. And that is not what we are going for. We know that is impossible. And that is not what any code goes for because that would essentially require something crazy like the applicant going door to door, making sure they talked to everybody or handing things out one by one. It is just not what is done. The goal is to get as much community and civic involvement as possible. We tried that here. Not only has this project been a subject of multiple hearings and public hearings and meetings, but it has also been the subject of multiple Cape Gazette articles. It has been the subject of much deliberation and talk around Town. There are no nefarious reasons for not seeking public comment. We welcome public comments, and, in fact, I am lucky who I work for that we routinely reach out and speak with concern neighbors and citizens. Frankly, the positive of this, the largest area of concern for Mr. Schwinabart is going to be these commercial pieces. At this point in time, we have an entrance and that is the only thing that is truly approved that is directly abutting him. It is an entrance. It is going to have signage and lighting and then again, the Code requires the lighting to be down lighting. The Code states if it is a ground sign such as you see in other communities, the light can only shine directly on the sign, not onto adjacent properties. There is not a whole lot we can do about headlights. The good news is now Mr. Schwinabart is going to have an opportunity to be heard on the commercial pieces. I don't want to speak out of turn for Preston and Eric, but they certainly and Preston if you want to speak to this briefly, they certainly will welcome his input in the design and the process. And I think that is the bulk of where Mr. Schwinabart will want to have his input.

Mr. Preston Schell: Just to reiterate what Jon has said we are happy to meet with you and discuss the commercial properties when those come about and

make sure that the impact on yours and your neighbors is as minimal as possible.

Mr. Mandalas: Comments from the public.

Mayor: Any public comments? Anyone want to come up and comment. No public comment.

Mr. Mandalas: Closing remarks for the parties to make and then the case will be submitted.

Mr. Schwinabart: I appreciate the Town Council and the Mayor taking the time to hear the appeal. As I said in the beginning, I have no desire to stop the project. It will only make my property more valuable. I have already had offers on my lot. I don't want to move. If I had known about it in the beginning, I may have been able say can I come and see you and talk about the project. I have been in real estate development all of my life. I have always been one to go to the neighborhood myself and say this is what we are planning to do, what do you think? I just got that offer and appreciate that and may take him up on that. I appreciate being heard. Thank you.

Mayor: Mr. Thompson.

Mr. Thompson: Thank you, Mayor and Council. I reiterate Mr. Schwinabart's gratitude. I know this is an important issue and I know that the Council cares and the citizens care and that is really important and makes for a better Town. In terms of the legal standard here, I am not beat same drum over and over. I don't think Council heard anything tonight with respect Planning & Zoning engaging in any sort illogical or disorderly process. It sounds to me like the question really boils down to the application of Chapter 220 specifically the notice provision. We believe that the Planning & Zoning Commission and the Applicant complied with the letter of the law. And also with case precedent that I mentioned with respect to the other forms of notice. The project being an ongoing nature. The project receiving public comment on the issues and that really is important and I appreciate Mr. Horner's concept of harmless error here because the alternatives that the Council has under its rules are to reverse the Planning & Zoning Commission but that is only in the event that you found the project not to be orderly and logical and, again, I don't hear a lot for that. I don't think I heard that or that the Commission has applied the law. You could remand the matter that is the term we use; I don't think you use that specific term. But you could reassign the matter back to the Planning & Zoning Commission. I don't think that makes sense here. We haven't heard anything; I think I addressed the majority of the comments that Mr. Schwinabart made in his Notice of Appeal. I probably spent more time talking about those than others. But the reality is that those aren't something that the Planning & Zoning Commission would change in the event if they had heard his comments at the time. I understand Mr. Schwinabart frustration. I don't think that the Applicant and the Town can be in a position to serve as guarantor in terms of the mailing service. I am sure that is frustrating. But those of the rules of the road currently. Therefore, I would encourage the Council to consider upholding the Planning and Zoning Commission's decision as the product of an ordering and logical review. Thank you.

Mr. Horner: Thank you all for your time. You have heard from me and my view that the decision of the Planning & Zoning Commission was correct and accurate application of the Code. I will rest on that.

Mayor: I have a question. You had mentioned that once the certified letter is in possession of the post office, you had said what, considered delivered? letters

Mr. Horner: Correct. Section 113 which is the general provision of your Code essentially says that in the rest of this Code whenever the notice of service of process happens, general guidelines related to it. Here it says: Service by mail shall be deemed to have been completed at the time of deposit in the post office or any United States mailbox. I want to make a distinction here. The Code in 220 is not requiring service of process. The Code is requiring this mailing and return receipts and things like that. I point to this section as analogous sort for the rationale we do not as an Applicant and as a Town and City we are not responsible for the mail carrier or the mail service. The standard here is the review of the Planning & Zoning Commission's application of Section 220 and the proceedings. I submit to you that it is very clear that Section 220 was strictly complied with and again the burden of proof is with the Appellant here to show that the orderly and logical review of the evidence and proper interpretation of Chapter 220. Again, the burden is on the Appellant to say that the result of the Planning & Zoning Commission was not a product of that. Here I would submit to you that the Appellant has carried their burden and that Section 220 was properly applied and the Code was strictly complied with. Thank you.

Mr. Mandalas: At this point the case is submitted for the Town Council to deliberate and make a decision on it. I have a strange request of you, Mr. Mayor, if we could recess for about 10 minutes. I would like to have a conversation with the three parties.

Mayor: Okay. We will recess.

Councilman Collier: Motion to go into recess.

Councilwoman Meredith: Second. All approved.

Recess at 8:00 pm.

Motion to reconvene and second. All in favor. Reconvened at 8:10 pm

Mayor: We are back in session. Thank you. Mr. Mandalas, what do we have here?

Mr. Mandalas: I had an opportunity to speak to the parties during the recess what I sensed during the hearing is that Mr. Schwinabart has somewhat achieved the objective that he was here for and that was to get a seat at the table and have some input on how this property is developed. My understanding, and he will make a statement, that he is willing to withdraw his appeal at this point.

Mr. Schwinabart: I feel that on behalf of the other gentlemen that we can safely assume (inaudible)... I am willing to withdraw the appeal. .

Mr. Mandalas: If one of the other two choose to reconvene, deliberate and decide actually they can. He feels pretty confident that they will not.

Mayor: By virtue of them not being here this evening, do they have the ability to do that?

Mr. Mandalas: They filed as appellants he was their sort of representative, as a class, so I think they would.

Mayor: This could come back.

Mr. Mandalas: It could. I think he is saying that he is pretty confident that it will not.

Mr. Schwinabart : (inaudible)

Mr. Mandalas: We tried to reach them by telephone but as you know the cell service here is a little bit sketchy. Perhaps tomorrow you can get back to Mrs. Rogers.

Mayor: I would like to make one last comment for Mr. Schwinabart. You are a gentleman. We have not had at times people as considerate, thoughtful and reasonable like you. If you have any other issues which don't require an appeal, you come to Town Hall, you call me or anyone in Town Hall.

Mr. Schwinabart: I was shocked....

Mayor: You live in the County, and it might be 10 miles away or 10 feet away. But I thank you for your civility and making this a very successful evening.

Mr. Schwinabart: Thank you.

Councilman Savage: I thank you as well, sir.

Mayor: Make a motion to adjourn.

Councilwoman Revis: I make the motion to adjourn. Second by Councilman Collier. All in favor. Motion carried unanimously.

8:13 pm adjourned.