

*Minutes*  
**DAGSBORO TOWN COUNCIL**  
**Bethel Center**  
**Monday, October 23, 2023**

**I. CALL MEETING TO ORDER**

Meeting was called to order by Mayor Baull at 6:00 p.m.

In attendance were: Mayor Brian Baull, Vice-Mayor Theresa Ulrich, Councilman William Chandler, Councilman Norwood Truitt, Councilman William Labor, Town Administrator Cynthia Brought, Chief Steven Flood, and Town Solicitor Greg Morris. See sign in sheet for others in attendance.

Mayor Baull asked Chief Flood to introduce the newest member of the Dagsboro Police Department K-9 Unit. Chief Flood introduced their new K-9 Officer Buzz and K-9 Handler Cpl. Wechtenhiser and stated that today was their first day working together.

Cpl. Wechtenhiser stated that Buzz is a 2.5-year-old German Shephard and they just got back from Tarheel Kennels in NC where he completed 3 weeks of training with Buzz. He added that Buzz is trained in drugs and article detection. He can also retrieve items thrown out of a car window, by detecting the human odor on the item. He stated that they learned drug sniffs for cars/warehouses and Buzz will be able to detect different odors that the human nose can't detect. Councilman Chandler asked what the life span of a working dog is. Cpl. Wechtenshiser stated that it varies. Councilman Chandler asked, "Does Buzz ride in the back seat of your vehicle and restrained?" Cpl. Wechtenhiser stated that Buzz rides in the back seat of the car but is not restrained. He added that in his vehicle, there is a heat alarm with 2 different thermostats, one on each side. If the vehicle reaches 85 degrees, the windows will automatically go down and an exhaust fan comes on to blow all the hot air outside. He also stated that if the alarm went off, they would receive notifications by phone. Vice-Mayor Ulrich asked if the heat alarm can be turned off. Cpl. Wechtenhiser stated that he turns it on at the beginning of his shift and then turns it off at the end of his shift. Glenn Rolfe, of The Delaware State News, asked if he is trained to detect marijuana. Cpl. Wechtenhsier replied, "No, not marijuana but other drugs." Mayor Baull asked for confirmation that Buzz is not considered an attack dog. Cpl. Wechtenhiser replied, "That is correct."

**II. PUBLIC COMMENT**

Emily Gaither, Membership Manager of the Bethany Fenwick Area Chamber of Commerce stated that the BFACC has an annual Valor Awards Ceremony which has been renamed, First Responder Awards. The ceremony was previously held in May but is being moved to the last Friday in February. There will be communications going out before the end of the year and she hopes to receive responses back from Dagsboro so they can be recognized in February.

Mayor Baull stated that he would like to thank everyone who made the Dagsboro Night Out a success including the Dagsboro Police Department, Dagsboro Fire Company, all the Sponsors and everyone who helped put the event together. He added that they had a great turn-out with a couple hundred people in attendance and looks forward to having it again next year.

**III. PUBLIC HEARING**

**a. AN ORDINANCE AMENDING CHAPTER 146 TO PROHIBIT THE PRODUCTION AND SALE OF MARIJUANA IN THE TOWN OF DAGSBORO**

No public comment was made. Public Hearing was closed.

**b. DISCUSSION AND POSSIBLE VOTE ON THE PROPOSED ORDINANCE AMENDING CHAPTER 146 TO PROHIBIT THE PRODUCTION AND SALE OF MARIJUANA IN THE TOWN OF DAGSBORO**

Vice-Mayor Ulrich stated that she was in favor of the Ordinance. Councilman Labor asked what the difference is from the usage laws that are already in effect. Town Solicitor, Greg Morris stated that Legislature is now allowing Municipalities to limit, restrict or prohibit the production and sale of marijuana and that this would include the entire Town of Dagsboro. Councilman Labor asked if this would include areas outside of our jurisdiction. Mr. Morris stated that it would only include the city limits of Dagsboro.

Councilman Chandler stated that this does not prohibit someone from using marijuana in town limits, it only prohibits the production and growth of marijuana. Mayor Baull asked how this would affect someone with a medical marijuana card. Town Solicitor Morris stated that this Ordinance would still prohibit the sale and manufacturing of marijuana in town limits. Councilman Labor asked how other towns handle this situation where businesses already exist. Mr. Morris stated that he has seen a few businesses, but they are out of Town limits. Councilman Truitt stated does this Ordinance prohibit the use of marijuana. Mr. Morris replied, "Absolutely not, it is permitted under Delaware Law."

Councilman Truitt made a motion to approve the Resolution to include Section 146-15 to prohibit the production and sale of marijuana in the Town of Dagsboro as it is presented. Councilman Chandler seconded the motion. All were in favor.

**IV. APPROVAL OF MINUTES**

**September 18, 2023 Town Council Meeting**

Councilman Labor made a motion to approve the Town Council Minutes as presented. Councilman Chandler seconded the motion. All were favor.

**V. CONSENT AGENDA**

**a. Police Department Report**

Chief Flood stated that the new speed trailer was not working, and they are waiting to receive a new radar head and hope to start using it in the next week or two.

He also stated that Axon installed the new in-car cameras the prior week and five vehicles were up-fitted with the cameras. Cpl. Wechtenhiser was in NC for training with K-9 Buzz therefore his vehicle and the two new vehicles will be upfitted when Axon comes back in February.

Chief Flood stated that Buzz is friendly, but they are not encouraging residents to come up and pet him because he is a police dog and doesn't want to take any unnecessary chances. He added that Cpl. Wechtenhiser and Buzz were at Person's Trunk or Treat this past weekend and Buzz was excited and overwhelmed with all the children.

Councilman Chandler stated that in Accomack County, they have a speed sign just like Dagsboro, but the signs flash with the speed and will alert driver to slow down if they are going over the speed limit by 10mph or more and asked if Chief Flood was aware of these signs. Chief Flood stated that he has seen these types of signs. Councilman Chandler felt like people react to these types of signs quickly.

Vice-Mayor Ulrich asked for confirmation on how many police vehicles would be lettered with Dagsboro Police on the side. Chief Flood stated that they will have 5 with lettering and 3 without. Vice-Mayor Ulrich stated that someone mentioned to her that they are the only Town with unmarked vehicles. Chief Flood stated that he disagrees with that statement.

- b. Treasurer's Report**
- c. Administrative Report**
- d. Building Official Report**
- e. Code Enforcement Report**
- f. Meeting Reports**
- g. Water Department Report**
- h. Prince George's Chapel Cemetery Report**
- i. Correspondence**

Town Administrator Brought stated that she has postponed the Planning & Zoning meeting due to her vacation, but since they have no new business on the agenda to date, the November meeting will be cancelled.

Councilman Labor asked if anyone has shown any interest in the upcoming election. Town Administrator Brought replied, "Not as of yet." She added that the 3 members that are up for reelection, Mayor Baull, Vice-Mayor Ulrich and Councilman Labor, all received an application in their packets and if anyone wishes to do a withdrawal form, they will need to contact her.

Councilman Chandler made a motion to approve the consent agenda as presented. Vice-Mayor Ulrich seconded the motion. All were in favor.

## **VI. NEW BUSINESS**

### **a. Snow Plowing Bids for the 2023-2024 Season**

Town Administrator Brought stated that they have only received one bid from David Gray and would like to extend the time and decide in November. All were in favor.

### **b. Set Halloween Trick or Trea Date—Typically 6-8 on Halloween, October 31, 2023**

Town Administrator Brought stated that she wanted to make the date and time clear to make sure all agreed. Vice-Mayor Ulrcih stated that she had heard the Town of Selbyville was cancelling their Trick-or-treating and had been asked if they would be having it in Dagsboro.

## **VII. OLD BUSINESS**

### **a. Schell Brothers (Layfield Property), DBF-Request by Schell Brothers for Reconsideration of the Town Council's September 18, 2023 decision that denied Preliminary Approval of proposed plans for a 237 Single family/Townhome Development off Clayton Street until such time as the plans reflect a second entrance/exit on Dagsboro Road.**

Jon Horner, Attorney for Schell Brothers, stated that they were present pursuant to Section 238-13 of the Town Code which allows an opportunity for any applicant that's aggrieved by a decision to request reconsideration in front of the Town Council. He added that his goal was to discuss what happened at the September 18, 2023 meeting and discuss the laws surrounding subdivisions and possibly have a reconsideration on the vote that occurred for the Layfield Property proposal.

Jon Horner stated that on September 18, 2023, there was a Public Hearing pursuant to the Code. During that time testimony was provided by the applicant, himself and Zac Crouch, Engineer for Davis, Bowen & Freidel, and the only relevant testimony given was from a member of the P&Z Committee who had previously voted in favor of the proposal. He added that the record showed that they submitted numerous documents and showed full compliance with the Town Code and a detailed traffic study that was done in conjunction with DeIDOT, discussing the safety of a single entrance as well as its compliance with DeIDOT's Code and Regulations. Mr. Horner stated that the Town Engineer reviewed the plans for compliance and in an emailed letter dated Sept. 12<sup>th</sup> indicated that the plans were compliant with the Town Code. The plans compliance was highlighted by two members of the Town Council since one member made a motion to approve the Preliminary Plans and the other member seconded the motion. He stated that another member of the Town Council specifically stated that, "Going along with approving the plan is telling every neighbor and friend that I have in this Town, that I have agreed to go along with a plan that currently has one access point on Clayton Street and I am not willing to do that because I have to do what is in their best interest." Mr. Horner stated that the same Council member also stated, "I know you have complied with all of the requirements, but I have to act in the best interest of the people that I represent." Mr. Horner stated, "That is 3 people on record that stated that the

proposed plan complies with the Town Code in addition to the Town Engineer and all the submissions in the record as well as the discussion in the public testimony.” He added that following the presentation, 3 members of the Town Council, without giving specific reason, voted against Preliminary Approval and to date, they have not received written reasons for the denial, as the Town Code requires but they do recognize the reason for it.

Mr. Horner stated that with this recap in mind, he wanted to discuss the laws regarding bi-right subdivisions in Delaware. He stated that this project is considered a bi-right subdivision which means that it is a subdivision that complies with the Zoning Code and is consistent with the use that is proposed for this property in the Town’s Zoning Code and complies with the comprehensive plans and the plan for development of the project. When a project is consistent with the Zoning Code, the role of the Town Council is considered to be ministerial or quasi-judicial, and in that role their job is to look at the plans, look at the submissions and take into account the public record that is made during the hearing and decide if that plan complies with the Town Code and if so, they are duty-bound by law, to approve it.

Mr. Horner referenced a case in Delaware, in this area of law, DiFrancesco vs. Mayor and Town Council of Elsmere. The Town of Elsmere argued that they had the power to reject a site plan that complied with their Zoning Ordinance and stated that “It is fairly debatable the project can adversely affect the public health, safety, welfare, comfort and convenience in the neighborhood.” In this instance, there were objections to the plan, concerns with traffic and the uses. The court stated that the Town could not reject an otherwise compliant plan, and quoted, “When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize any adverse impact on nearby landowners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances.” He added that the Court stated very clearly that people are entitled to rely on their Council to implement the use and if Code compliant, an approval must be given but Council does have the power to place reasonable conditions on the approval.

Mr. Horner referenced another case, East Lake Partners vs. City of Dover Planning Commission where the Commission rejected a Code compliant plan due to reasons including public opposition and traffic concerns. The Court stated that the Planning Commission has no power to reject the site plan because the residents do not want the land used for a project as permitted use under the applicable zoning classification. Addressing the traffic concerns, the Court identified that the testimony did not show any non-compliance with the Code and based on the traffic study, the proposed intersection would be able to handle the increased traffic. The Planning Commission argued that the general mandates who considered the general health, safety and welfare gave them the ability to deny the project and the Court rejected it.

Mr. Horner stated that, "The time for determining how land is to be properly used happens when the land is zoned and when the Code is drafted." He added that when a project complies, it must be approved but the Council can place reasonable conditions on the approval. He added that they have followed the Town Code and have complied with what was asked and there is nothing in the public record that shows a lack of compliance. He added that denying the Preliminary Approval is a violation of their constitutional rights and goes against applicable Delaware Law and this is why they are asking for reconsideration.

Mr. Horner stated that the proper remedy in this instance, given the law around subdivisions and bi-rights use, is that the Council is duty-bound to approve this plan. He added that if this plan receives approval with a condition that requires a second entrance, they will attempt to comply with that condition but would not be able to proffer that condition because he doesn't know if it is possible to accomplish. Since the September meeting, they have had meetings with DelDOT and are more optimistic about getting it accomplished but need to know what would be involved. If the second entrance requires significant frontage improvements with an estimated cost of 3-5 million dollars, they would not consider that to be a reasonable condition and would ask for the condition to require the second entrance to be built and open prior to the issuance of the final Certificate of Occupancy of the project. He added that if the Council would choose to give Preliminary Approval with reasonable conditions, they would probably come back to discuss the other half of the property that is in the County to decide whether to leave it in the County or annex it into the Town.

Councilman Labor asked for clarification on the final occupancy that was mentioned and what that means. Mr. Horner stated that if the Town set a reasonable condition about having a second entrance, that it would be ideal for them if the entrance wouldn't have to be completed until the final house is built and occupied. Councilman Labor asked if they estimated this project to be a 5-year plan. Mr. Horner stated that it depends on the market. He stated that it would not be beneficial to have a condition set for the second entrance to be completed early in the project because it will be used as a construction entrance first and would possibly be damaged. Mr. Horner stated that their plan would be to use the construction entrance to complete the project and then have it opened as a full public entrance.

Councilman Truitt asked, "When would the construction entrance be opened?" Jamie Sechler, of DBF, stated that when they move into Phase II of the project, the construction would be built so they can access the back portion of the property. He added that the construction of a second entrance would be about a 2-year process so they would not be able to wait until the last house is built to begin it. Jon Horner added that there is a more ideal place for a second entrance than where the construction entrance is at and hopes to be able to come back with the master plan of both properties so the entrance can be placed in the most ideal location.

Town Solicitor, Greg Morris asked, "Do you have any idea how long it would take the Dept. of Transportation to make a decision on what has been discussed?" Mr. Horner stated that the issue will be the amount of frontage improvements but feels obtaining the second entrance would be possible. Mr.

Morris asked what DeIDOT would need from the Town regarding the second entrance?" Mr. Horner stated that if given Preliminary Approval, they would start the designs for the second entrance and if they have pushback from DeIDOT in the design phase, then they would ask for the Town to reach out to their legislators and contacts for assistance.

Councilman Chandler stated that he has already reached out to DeIDOT and is very optimistic from the conversation and feels that they are going to be cooperative and helpful. He added that he would be willing to embrace the project, but it would need to involve an infeasible commitment to a second entrance. Jon Horner stated that his point is that they have a Code Compliant Plan with or without a second entrance, but they want to work with the Town. He added it would not be typical for an applicant to consent to a condition that they are not positive can be fulfilled. He stated to Councilman Chandler that if he is confident that the second entrance will be approved, then why should they give up their constitutional right to a Code Compliant Plan. Councilman Chandler stated that he did not agree that they were giving up a constitutional right but added that he doesn't feel the condition is unreasonable. He added that the concern is the heavy traffic on Clayton Street and felt the same concerns were heard at the P&Z meeting also. Councilman Chandler asked if they felt that a second entrance is a reasonable condition. Mr. Horner stated that he is unsure because at this time he lacks the facts on it and if DeIDOT tells them it would cost 5 million dollars for the second entrance, then no that would not be a reasonable condition. He asked, "If you are confident that it is a reasonable condition, then why haven't we received Preliminary Approval?"

Jon Horner stated that they would be willing to comply with a reasonable condition placed on the Preliminary Approval. Councilman Truitt asked if a condition could be placed on the last certificate of occupancy on a certain phase instead of at the end of the project? Mr. Horner stated that it would be best to have it later in the project since the entrance will first be a construction entrance. Greg Tobias, of Schell Brothers, stated that if the second entrance is completed early and still being used as a construction entrance, it will get damaged from the heavy equipment going in and out of the entrance.

Town Solicitor Morris stated that they are telling the Council that they can make reasonable conditions on this project, but he thinks an assessment can't be made until they hear DeIDOT's requirements. Mr. Horner stated that the problem is that their project is being delayed even though the plans have been before Town Council several times and concerns of the second entrance were raised but not to the point that they would be denied if they didn't have a second entrance. He added that the Town Engineer and Town Administrator were on the scoping zoom meeting for the TIS where the single entrance was discussed, and nothing was brought up about needing a second entrance. He added that they completed a TIS which was not required by the Code at that time. He stated that when they came before the Council for Preliminary Approval, they were denied even after they had made everything Code Compliant. Mr. Horner stated that they do not want any more delays to the project and if the plan is not approved then it will be a fight against getting a Code Compliant Plan approved as submitted but would rather work with the Town. Jamie Sechler stated that a reasonable condition could be that the second entrance construction needs to be started by the time 80% of the houses received their Certificate of Occupancy so that the second entrance can be utilized as a construction entrance.

Jon Horner stated that there are things that the Town can do to hedge that this ends up being reasonable. The long-term entrance improvements in connection with the other property will happen. When the other part of the property in the County is developed, those entrance improvements would most likely be required by DeIDOT. He added that their plan is to come back to the Town to discuss annexation of the County land. If it's developed in the County, the Town would have no say over its use but would receive the impact of the development without receiving any taxes, etc. Mr. Horner stated that he believes the Town has much more influence with DeIDOT and has control over what happens in the future with the County lands.

Councilman Labor asked what the outcome would be if a condition is set but later is deemed unreachable. Jon Horner stated that they would come back to Council and ask for a removal of the condition but there are things that the Town and applicant can do to make sure that wouldn't happen because when a project is delayed, it is bad for the applicant. He added that if the project receives Preliminary Approval with a condition, they will begin work on the condition immediately because they have a timeline they are working with and are not going to wait for DeIDOT to come to them and feels with the Town's help, it can happen.

Councilman Labor asked what it will mean legally if the Town believes the condition is reasonable and the applicant believes it is unreasonable, where does that leave them. Town Solicitor Morris stated that they would then go to court because the applicant would appeal the decision the Council made. Councilman Labor stated that the Town could place the condition from a legal standpoint and have the opportunity in the court of law to prove their side. Councilman Chandler and Mr. Morris both replied, "Correct." Mr. Horner stated that DeIDOT would not want a dispute between Schell Brothers and the Town because they weren't willing to work with them over a second entrance for safety.

Councilman Labor stated that he feels the Town Council needs to decide on what number of houses would be fair to set the condition on, based on safety and the volume of traffic. Mr. Horner stated that the project is proposing 237 homes. Greg Tobias stated that if the condition requires final acceptance of the road and there is still a lot of construction traffic driving on the entrance, this will damage the entrance. Councilman Chandler asked, "Why does there have to be final acceptance?" Greg Tobias stated that it would be a choice that the Town has. Councilman Chandler stated that they have done that before with other developments where they have asked for construction to be complete before the final topcoat is applied. Mr. Tobias stated that they do not have control over the DeIDOT road. He added for it to be accepted, they would have it have it finished and if there is a condition to have it completed early in the project, the entrance would get destroyed. Mr. Horner added that when the second entrance is open to the public, then the construction traffic would shift to use the first entrance routinely. Mr. Tobias stated that when a construction entrance is made too nice, the homeowners start using it, which is a concern for safety with the construction vehicles. Mr. Horner stated that they could have it stated, "to commence and pursue at a certain point" because it is difficult to get full acceptance with DeIDOT.



Councilman Labor stated that he is in favor of the project with a condition, but his concern is the volume of traffic and when the second entrance would be opened and how long it would take. He added that at some point when the "master plan" comes together, maybe there would be a better place for the second entrance. Greg Tobias stated that a timeline could be placed as a condition, but no one can predict what will happen economically. Jamie Sechler stated that he feels the better way to add the condition would be to start the entrance with a certain number of CO's and have the entrance completed by a certain number of CO's and those numbers would be up to the Council to decide on. Mr. Horner stated that during the build out, he feels that they would be getting the other half of the property approved, and if it's in the Town, they could look at the master plan and see where the best place for the second entrance would be. Councilman Labor stated that they needed to focus on what is before them right now. Jamie Sechler stated that they need to come up with a certain number of houses versus using a timeline because the traffic is going to be based off the number of units and the public can't use the second entrance until DeIDOT has finalized it.

Vice-Mayor Ulrich asked if they have plans on connecting the future development with this one. Mr. Horner stated that they have a concept design for the future phase that has plans for a second entrance at a different location. Vice-Mayor Ulrich stated that she is concerned with them taking the cul-de-sac and making it a temporary road. Mr. Horner stated that if that section becomes a second entrance, then it would not be a cul-de-sac. He added that their hope is to come back before the Council with a master plan and discuss the second half being annexed into Town. Vice-Mayor Ulrich asked how many entrances are planned for the second project? Mr. Horner stated that the Town would have more control over that if it were annexed in Town and if it stays in the County, DeIDOT will approve one entrance.

Councilman Truitt asked what type of timeline they felt DeIDOT would give for approving the second entrance. Jamie Sechler stated getting an approval from DeIDOT would take 60-90 days and to get it designed would take about 10 months.

Mayor Baull stated that they need to come up with a number that both sides are happy with. Councilman Labor suggested that the second entrance be started at 65% of the project which equals out to be 155 homes and be completed by 80% of the homes proposed. Councilman Labor stated that he does agree that time is needed to get the construction started before making the second entrance but also needs to consider the public concern. Councilman Chandler stated that he was thinking the entrance should be started at 50% and completed at 70% of the homes. Councilman Labor compromised and stated to start the entrance at 58% and finished with 75% of the homes. Mr. Horner stated that the Council offered a condition to commence and diligently pursue, prior to the issuance of the 138<sup>th</sup> building permit, and to be completed prior to the issuance of the Certificate of Occupancy for the 178<sup>th</sup> building.

Councilman Chandler stated that he was interested in Chief Flood's opinion on whether a single access is reasonable for this project and for the neighboring project which will add another 51 homes. Chief Flood stated that his viewpoint comes from 36 years of being in Public Service with the Police Dept. and the

Fire Co. In his opinion, the Town would benefit from having a second entrance in times of natural disasters. He added that in the past 2 years Dagsboro has had at least 3 tornado warnings and these storms can bring trees down, take houses off foundations, etc. and the First Responders are the ones that need to get the residents to safety. He stated that looking at the Town's best interest, it would be beneficial to have a second entrance because he must look at what could go wrong in the Town. Greg Tobias stated that during the construction period, there will be a construction entrance which emergency vehicles would be able to use until the second entrance is completed. Mr. Horner stated that they are usually told by the police that one entrance is better for them because if there is a situation they are responding to as there is only one way out but for the fire department felt two entrances are better for them.

Councilman Labor made a motion to give Preliminary Approval on the Layfield Property with the condition that construction on the second entrance must begin by the time the Certificate of Occupancy is given on the 138<sup>th</sup> unit and the completion of the second entrance must be completed and ready to use by residents by the completion of the 178<sup>th</sup> unit. Mayor Baull seconded the motion. Councilman Truitt voted in favor of the motion. Vice-Mayor Ulrich voted in favor of the motion. Councilman Chandler voted against the motion. The vote was 4-1 with Preliminary Approval given.

Councilman Chandler stated that he didn't vote against the motion because he disagreed with the substance of it but feels they need DeIDOT's decision, so they know what is going on. He feels that they can get a prompt decision from DeIDOT but wants certainty around the condition that is being made in the motion. Jon Horner stated that they would work hard to get certainty on the decision from DeIDOT. Councilman Chandler stated that he would be helping them with this.

Jon Horner stated that they want to comply with the conditions and plan to come back to discuss annexation. He added that their goal is to have a project that the Town is proud of.

#### **VIII. PUBLIC COMMENT**

No public comment was made.

#### **IX. ADJOURNMENT**

Councilman Labor made a motion to adjourn. Vice-Mayor Ulrich seconded the motion. All were in favor.

Meeting adjourned at 7:41 p.m.

Respectfully Submitted,  
Wendy Rayne, Finance Clerk