

**CITY OF NEWARK
DELAWARE**

**PLANNING COMMISSION
MEETING**

April 7, 2015

7:00 p.m.

Present at the 7:00 p.m. meeting were:

Chairman: Alan Silverman

Commissioners Present: Bob Cronin
Andy Hegedus
Willard Hurd
Edgar Johnson
Robert Stozek

Commissioners Absent: Frank McIntosh

Staff Present: Maureen Feeney Roser, Planning and Development Director
Mike Fortner, Development Supervisor
Mark Morehead, District 1
Robert Gifford, District 3

Chairman Silverman called the Planning Commission meeting to order at 7:00 p.m.

Mr. Silverman: A reminder for those of you who would like to speak tonight, we have sign-up sheet on the rail back by the back steps. It is an individual card. I believe the secretary will bring those up as we proceed and you will speak in the order in which the cards are presented. There is no particular pro and con used at the moment.

Before we get started, I would like to introduce our new Planning Commissioner, Bob Stozek. Bob brings 30 years of experience to the Commission. His background is chem/engineering, but he spent most of his life on the engineering side in facilities management at the corporate non-profit and educational level. His last job was with Facilities Management at the University of Delaware. Probably the best example of his work that you may have walked through and walked around are some of the restored gardens at Longwood and some of the new buildings at Longwood Gardens. They were Bob's projects, so he brings quite a bit of experience particularly on the technical side, and living here in Newark he brings community interest to our commission.

1. THE MINUTES OF THE MARCH 3, 2015 PLANNING COMMISSION MEETING.

The Minutes of the March 3, 2015 Planning Commission meeting were approved as posted.

2. REVIEW AND CONSIDERATION OF AN AMENDMENT TO THE ZONING CODE ON DEFINITIONS OF "ACCESSORY USE" AND "NEIGHBORHOOD."

Mr. Silverman: Tonight's meeting will consider the work product of the March Planning Commission meeting. The March meeting used a workshop type format to provide a forum for the exchange of ideas dealing with definitions of accessory uses and neighborhoods. At the conclusion of the March meeting, the Commission charged the land use department to develop a single recommendation for refining the definition of "accessory uses" and defining "neighborhood" based on the public

testimony and the Commissioners' discussion. Tonight we will only focus on the two recommendations provided by the land use department: one is for accessory uses and the other is for dealing with the definition of neighborhoods. Tonight's consideration is the result of the evaluation of 13 alternatives prepared by the land use department at the request of City Council and were discussed during the concluded March Planning Commission meeting. The City Attorney has reviewed the two recommended proposals that are subject at tonight's hearing and has no legal concerns nor problems requiring clarification. With respect to referring to distances, which came up in the last meeting, the City Attorney indicated that they are a matter of policy rather than law.

On the topic of "accessory uses" it was pointed out by members of the public as well as discussion among the Planning Commissioners present that the recent data center application process triggered requests from City Council for review and guidance in dealing with the adequacy of the current definition of accessory uses, as well as the need for a definition of "neighborhood." The City Code specifies that when the Land Use Code, the Building Code and some of the other City codes are silent, that Code requires that the City use the Merriam-Webster dictionary to determine meaning. There was no indication from City Council that the Land Use Code itself was defective. In any event, the Delaware Courts and SCOTUS (Supreme Court of the United States) regularly grant deference to agencies' interpretations of their own regulations, and this was found in a case in Cheswold a number of years ago.

The professional planning staff reviewed the work of more than 60 jurisdictions and produced six alternatives dealing with defining a neighborhood as well as seven alternatives dealing with accessory uses. The 60 jurisdictions they looked at ranged from small towns to townships to counties, small counties, larger counties, big cities. They tried to pick a broad spectrum of kinds of interpretations and uses when they were working on that particular project.

With respect to what was stimulated by the data center, the Commissioners recommended against making Code changes to the current definition of accessory uses if the true concern was really fossil fuel power generation within the City. Therefore the prohibition of fossil fuel generation is not part of the charge. It will not be considered tonight as part of the issue. Speaking as a member of the public, the past Planning Director Roy Lopata stated, ". . . Why not just say exactly what we mean. We don't want fossil fuel burning, at least that's what I think people feel, plants that would sell energy to outside uses." The generation question of fossil fuel, again, is not a topic of discussion this evening.

Testimony at the March meeting also revealed that the only time that the definition of accessory use was an issue was almost 40 years ago and involved a non-residential land use proposal. At the time, the issue dealt with trying to accommodate a relatively new business model dealing with drive-up customer service and commercial properties. Citing one of our commissioners, ". . . to change the definition of something that has worked for so long and has not been challenged hardly at all in that time makes no sense to me." Land use staff Planner Michael Fortner stated in his oral staff presentation, "When we talk about accessory uses, 99% of the time we are dealing with a shed in the backyard, a fence, a patio or a swimming pool. You want to be careful how you change it. . ." (referring to accessory uses) "so that you don't create unintended consequences."

On the topic of defining a neighborhood, as with accessory uses the data center and companion fossil fuel power generating facility application raised the question of defining a neighborhood with respect to impact and public notification, as well as in the subsequent judicial proceeding. The consensus among the public and the commissioners present was that a neighborhood was extremely, extremely difficult to define. Neighborhoods need to be defined within context as well as how it's impacted by the proposed land use. It should be pointed out that of the 60 political entities reviewed by the land use planning staff, only one attempted to define "neighborhood." Whereas, from what I understand all 60 had definitions dealing with

“accessory uses.” Discussion also included using a measured distance for property owner notification. A discussion ensued about where measured distance should begin and end. Another debate, property lines from the use up-wind, down-wind along traffic corridors. A current Code requirement – and, help me, Maureen, if I am wrong on this – with respect to land use development activity uses a 300 ft. distance from the subject parcel property line to develop a mailing list for notification of impacted adjacent property owners. Now, I believe that is part of the subdivision/land development process.

That kind of summaries an overview of a rather extensive discussion. I tried to distill it down as much as I could.

Dr. Morgan from the University, Professor Morgan, worked very closely with the Land Use staff with respect to the concerns, and particularly his concerns, dealing with the issues of “accessory uses” and defining “the neighborhood.” And, he worked closely on the proposals that were reviewed in the March meeting and I am going to assume he read what was available on the postings in the internet for tonight’s meeting. Unfortunately, due to a traumatic injury he was unable to attend the March meeting and actively participate. His views and comments were conveyed to the commissioners by staff land use Planner Mike Fortner and are referenced in the transcript. What I would like to do when we get into discussion is extend the floor to Dr. Morgan early on. I will ask him not to plow too much the ground from the last meeting moving forward rather than backwards and offer the floor to him so he can make his comments early.

What I would like to do now is to move into the topic of tonight’s discussion and that is the definitions of “accessory use” and “neighborhood.”

[Secretary’s note: Ms. Feeney Roser brought a PowerPoint slide show to the Planning Commission for her presentation of the information].

Ms. Feeney Roser: Thank you Chairman Silverman. Good evening everyone. Because the Chairman’s remarks were so thorough and comprehensive and in the interest of time with such complex subject matter, I think rather than going through the Planning and Development Department Report in any kind of detail like I would normally do, I will just go right into the definitions and our recommendations. I will point out that the report itself is on the web. It is copied and available at the door here and it will be included in the minutes of tonight’s meeting. But, for our purposes I think it would be a better use of time if we moved forward and reviewed the recommendations in detail.

There are two recommendations -- one for accessory use and another neighborhood.

For accessory use ... the Department’s recommendation is to move forward with Option #4 in the report, which is to create a definition of a *No Impact Accessory Use and/or Building*, which could be a permitted use in any zoning district; and to delete the current definition of Accessory Use and create a new definition of *Accessory Use*, which is a use that may in fact have an impact on the surrounding area, but would be considered as a conditional use and require a Council granted Special Use Permit. .And we will also have to define the term surrounding area.

So for a No Impact Accessory Building – we propose the following definition: “A *detached or subordinate building, the use of which is incidental and subordinate to that of the main building on the same lot. A no impact accessory building shall not be used for commercial purposes, but may be used for a professional office. No noise, smoke, dust, or odor detectable at the property line nor other conditions detrimental to the character of the surrounding area shall be permitted in a no impact accessory building.*”

Now the sentence in yellow is highlighted for a reason which we will get to discuss in a minute ... but I don’t want to stop now and get bogged down in it because it will also come up later as you will see ...

And for a definition of No Impact Accessory Use - *“A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except for parking spaces as required in Article XIV of this chapter. The term “no impact accessory use” shall not include commercial uses but may include professional offices. With the exception of a residential grill, fireplace or back up power generator used during emergency or maintenance conditions, any such no impact accessory uses shall not generate noise, smoke, dust, or odor detectable at the property line nor shall a no impact accessory use generate other conditions detrimental to the character of the surrounding area.”*

Again we will have to discuss the sentence in italics, but essentially you have a definition that should insure that a no impact accessory use or building will have no impact beyond the property line.

And then for those buildings or uses which may have an impact beyond their properties, we have another set of definitions.

For Accessory Building - *“A detached or subordinate building, the use of which is incidental and subordinate to that of the main building on the same lot, which does not meet the definition of a no impact accessory building, but from which no excessive noise, smoke, dust, or odor is generated. Such use shall not generate other conditions detrimental to the character of the surrounding area.”*

And then for Accessory Use - *“A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except for parking spaces as required in Article XIV of this chapter, which does not fit the definition of a no impact accessory use, but which will not generate excessive noise, smoke, dust, or odor. Such use shall not generate other conditions detrimental to the character of the surrounding area.”*

And finally, a definition for surrounding area.

“Properties immediately adjacent thereto, and extending 300’ (or 1000’) in any direction from the property in question.”

This approach will provide a definite boundary for impacted area. Originally, the department suggested 300’ because that is already the distance used in the Code for notifications for rezonings, annexations and Special Use Permits so it seems reasonable to assume that 300’ measured in any direction from a property line may be considered the impacted area. However as we found in our conversations with interested persons and at the last Planning Commission meeting, 300’ may not be enough for the community to be comfortable, so the Department is open to extending the distance for these purposes should the Commission deem it appropriate to do so.

Now once we’ve settled on definitions, we would propose that we

Replace existing definitions of Accessory Use and Accessory Building in Code with revised Accessory Use and Accessory Building definitions; and add definitions for No Impact Accessory Use, No Impact Accessory Building and Surrounding Area.

Replace instances of Accessory Uses and Accessory Buildings in permitted uses section of every zoning district in the Code with references to No Impacted Accessory Uses and No Impact Accessory Buildings, with additional specific verbiage as required (which we will also get into); and

Add references to Accessory Uses and Accessory Buildings in the conditional uses section of every zoning district in the Code, so that they require a Special Use Permit to be permitted.

So that is the general plan, but before we get into specifics of how we would implement it, let’s go back to the highlighted sentence in no impact accessory use and no impact accessory building, which does not allow commercial uses, but allows professional offices.

Now the prohibition of commercial uses was originally included because we found it in our research, and thought that it would prevent something like the Data Center from selling redundant electricity ... and then at the last Planning Commission meeting when we talked about a definition for a residential accessory use and an industrial accessory use, it made sense to use the prohibition on commercial activities for the residential zones, provided we allowed professional offices ... but in this approach, and this just came to us as we were preparing this power point dealing with the specifics of how we can amend the Code sections, that this approach does not make sense since we are trying to create a definition that we can use across all zoning districts and to say that commercial uses are not allowed in commercial districts – that just doesn't make any sense – and in industrial zones commercial activities are already regulated, so what we would suggest that our own recommendation be modified by the Planning Commission to either delete the sentence entirely from the definition – so for the definitions of No Impact Accessory Buildings and Uses would read as on the right pane in this slide as opposed to what was originally proposed. We think that even without that sentence, the definition is solid in insuring that the use does not impact the surrounding area.

Or we would suggest rephrasing the sentence to eliminate the concern. So we will have to talk about that.

So let's get into the specifics on how we would amend the Code, should this approach be acceptable. Because each zoning district is different as to how it permits accessory uses and buildings, we had to look at each district individually, and assume that if there are restrictions on accessory uses and buildings in that section, they are there for a reason. You will see what I mean ... so assuming that we can agree on definitions ... we would

In Zoning Districts RH, RT, RS and BN – we would delete from the permitted uses *“Accessory Uses and Accessory Buildings, excluding semitrailers and similar vehicles for the storage of property”* and

In RD, RM, RA, RR, AC, BL and BLR – we would delete from the permitted uses “Accessory Uses and Accessory Buildings, customarily incidental to the uses permitted in this section and located on the same lot, including a private garage as defined and limited in Article II and subject to the special regulations of Article XV of this chapter, excluding semitrailers and similar vehicles for the storage of property”

And in its place we would insert in all those districts no impact accessory use and buildings in the permitted uses section and insert accessory uses and buildings in the list of uses which require Special Use Permits, with the restrictions, assuming if they were important to restrict in RD, RM, RA, RR, AC, BL and BLR, they should also be restricted in RH, RT, RS and BN.

For zoning districts BB, ML, MOR and STC we would delete accessory uses and accessory buildings from the list of permitted uses and insert no impact accessory use and no impact accessory buildings in permitted uses -- and accessory uses and buildings in the conditional use section.

For BC, which is our most intense commercial zone, we suggest deleting the current permitted accessory uses and buildings with its restrictions on semi-trailers and vehicles for storage, and instead insert no impact accessory uses and no impact Accessory buildings with the same restrictions, and then add accessory use and accessory buildings with the same restrictions to the list of conditional uses.

Likewise for MI, our most intensive industrial zone, we would delete accessory uses and buildings with restrictions that repair, installation and servicing be done indoors and the prohibition of items in a state of disrepair from being outside -- and replace it with no impact accessory uses and no impact accessory buildings with the same restrictions in permitted uses; and accessory use and accessory buildings. Again with restrictions in the conditional uses section.

So that is the approach for accessory use we would recommend. As for neighborhood ...

During the discussion at the last Planning Commission Meeting, we discussed the many variations and contexts of defining the word “neighborhood.” And the general conclusion was that “neighborhood” is a difficult word to define because its meaning may alter based on individual associations and/or contexts. And, as noted when we discussed definitions of “accessory use,” eliminating the word “neighborhood” from the definition of

“accessory use” and associated Code sections, may make the creation of a definition of “neighborhood” less necessary.
Be that as it may, we know

That the term neighborhood is used 26 times in the Municipal Code – and that in most cases it is used to refer to what we usually consider a neighborhood to be – for example neighborhood block party, neighborhood parks, neighborhood streets, students and residents sharing the neighborhood – and for those references, there really aren’t any issues with using the dictionary definition ... but where it is problematic is in both the Code and the Comp Plan when we refer to neighborhood as an impacted area of something else – and in those instances we need to be specific.

Therefore we recommend that we replace the term “neighborhood” with the term “surrounding area” which we are currently trying to define and having a working definition of

“Properties immediately adjacent thereto, and extending 300’ (or 1000’) in any direction from the property in question,” recognizing, of course, that the exact distance still needs to be determined.

And replacing neighborhood, not only as it relates to accessory uses (which is in Chapter 32 Sections 53), but also in all Code Chapters where it is clearly used to describe a particular impacted area.

So specifically, in Chapter 16 which is Garbage, Reuse and Weeds; and in Chapter 32, which is Zoning, we would replace the reference to neighborhood with the more definitive term surrounding area.

In addition, any references to neighborhood in the Comp Plan currently under review where the term is clearly used to refer to an impacted area, we use the term surrounding area.

I know that the Commission will have questions and some discussion, but I appreciate you tolerating me going through that rather lengthy visual summary.

[Secretary’s Note: As previously noted, the Planning and Development Department Report is included in the official record].

Planning and Development Department Report:

Definitions of “Accessory Use” & “Neighborhood”

“Council requested a review of the City’s Zoning Code for consideration of changing the definition for the term “accessory use” and creating a definition for the term “neighborhood.” At its regularly scheduled meeting on March 3, 2015, the Planning Commission reviewed a series of alternative definitions for both “accessory use” and “neighborhood” based on the Planning and Development Department’s June 13, 2014 Memorandum and March 3, 2015 Planning Commission reports, which detailed research of the Zoning Codes of more than 60 political bodies across the country. Many of the communities reviewed were university communities, in addition to some Delaware municipalities and counties, and other political bodies found through internet searches or known to staff as progressive planning communities. In addition, the Planning and Development Department reviewed the ICC Codes definitions and had extensive conversations with interested members of the public who provided additional alternatives, which were contained in the reports (see attached).

This memorandum is intended as a follow up to the Planning and Development Reports on “Accessory Use” and “Neighborhood” based on the Planning Commission’s direction to staff and on comments provided by the public at the March 3, 2015 Commission meeting.

Background

Newark's current Zoning Code definition of "Accessory Use" is as follows:

"Accessory Use": *A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.*

The term is further refined in Code Section 32-53 which reads:

"Accessory uses shall be permitted only on the same lot with the building to which they are accessory, except for the parking space as required in Article XIV of this chapter. All accessory uses shall be such as do not alter the character of the premises on which they are located or impair the neighborhood."

Similarly, an Accessory Building is defined as:

"Accessory Building: *A detached or subordinate building, the use of which is incidental and subordinate to that of the main building on the same lot."*

Currently, the Zoning Code does not provide a definition of "neighborhood." Instead, Section 32-4(b): Definitions states: *"Words not defined above shall have the meaning given in Webster's Unabridged Dictionary"*.

The Merriam-Webster's Unabridged Dictionary provides the following definition:

"Neighborhood

1. *Friendly association with another that is a neighbor: the agreeable easy relations usual among congenial neighbors. <If there are remoter nations that wish us not good but ill, they know that we are strong; they know that we can and will defend our neighborhood – F. D. Roosevelt>*
2. *The quality or state of being immediately adjacent or relatively near to something: proximity. <the neighborhood of the earth to the sun>*
3.
 - A. *The approximate area or point of the location or position of something. <Traveled to a region somewhere in the neighborhood of that city>*
 - B. *The approximate amount or extent or degree – usually used with in and a qualifying phrase. <In the neighborhood of \$10,000,000> or <a highway in the neighborhood of 100 miles long>*
4.
 - A. *A number of people forming a loosely cohesive community within a larger unit (a city, town) and living close or fairly close together in more or less familiar association with each other within a relatively small section or district of usually somewhat indefinite boundaries and usually having some common or fairly common identifying feature (as approximate equality of economic condition, similar social status, similar national origins or religion, similar interests) and usually some degree of self-sufficiency as a group (as through local schools, churches, libraries, business establishments, cultural and recreational facilities). <thought the whole neighborhood would hear about it>*
 - B. *The particular section or district that is lived in by these people and that is marked by individual features (as type of homes and public establishments) that together establish a distinctive appearance and atmosphere <now lives in a beautiful neighborhood>*
 - C. *An area or region of usually vague limits that is usually marked by some fairly distinctive feature of the inhabitants or terrain."*

The Planning and Development Department Reports dated March 3, 2015 (see attached) provided seven (7) alternative definitions for “accessory use” and six (6) alternative definitions for “neighborhood,” which were discussed at length at the Commission meeting. From the discussion, the following options were determined appropriate for further review:

Accessory Use

Option 1:

“Accessory Use: A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building.”

The proposed definition may be further refined in Code Section 32-53 to read:

*“Accessory uses shall be permitted only on the same lot with the building to which they are accessory, except for parking spaces as required in Article XIV of this chapter. All accessory uses shall be such as do not alter the character of the premises on which they are located or impair the **surrounding area**.”*

And the following definition:

*“**Surrounding Area**: “Properties immediately adjacent thereto, and extending 300’ (or 1000’) in any direction from the property in question.”*

Discussion:

This option maintains the current definition of “accessory use” and does not require a definition for “neighborhood.” Instead, it replaces the word “neighborhood” in Code Section 32-53 with “surrounding area” and provides a definition of immediately adjacent properties and the area extending a distance from the property. By removing the term “neighborhood” from Section 32-53, the determination of impact would no longer be limited to the neighborhood where the accessory use is located, rather the entire “surrounding area” however it is defined. This option would eliminate the need for changing the definition of “neighborhood” as it relates to accessory use from the current Merriam-Webster’s Unabridged Dictionary definition.

Originally, the Department suggested that the surrounding area definition be defined as a 300’ distance measured in any direction from the property in question because 300’ is the threshold used in the Code for notification of rezonings, annexations and special use permits so it seemed logical to infer that 300’ is already considered the impacted area for a land use. Having said that, however, several concerns were raised that the 300’ distance is not adequate for accessory uses, and a 1000’ distance was suggested. The Commission may wish to discuss this distance requirement at the meeting.

Option 2:

***Accessory Use:** “A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except for parking spaces as required in Article XIV of this chapter. The term “accessory use” shall not include commercial uses but may include professional offices. Such accessory uses shall not generate **excessive** noise, smoke, dust, or odor detectable at the property line nor shall a use generate other conditions detrimental to the character of the surrounding area.”*

Discussion:

The definition excludes commercial uses from being an “accessory use” which would prohibit a power plant or generator from selling excess power as an accessory use.

It also adds a prohibition against “excessive” conditions detrimental to the surrounding area; however, there has been some concern about the term “excessive” being too vague. To make the definition more definitive and restrictive, the Planning Commission could choose to recommend this definition without the use of the word “excessive” after “generate”. If the word “excessive” is deleted from the definition, the Planning Commission may want to include special exceptions for backup power generators (with conditions), and residential grills and fireplaces. An ordinance could then be drafted to require that anything else would need a special use permit. Finally, this definition also uses the term “surrounding area” rather than neighborhood; therefore, the creation of a definition for neighborhood may not be necessary with this option.

Option 3:

Option 3 would be to leave the definition of accessory use alone, and instead change the permitted uses sections of the industrial zoning districts to allow fossil fuel burning accessory power generation only to provide power to the primary use or building on the same lot. This option would require amendments to all industrial zones. Specifically, Section 32-20 Uses permitted in the ML districts (limited manufacturing) (a) (6); and 32-23 Uses permitted in the MOR districts (manufacturing office research) (a) (10); section 32-23.1 Uses permitted in the STC district (science and technology campus) (a) (13), which read:

“Accessory building uses and accessory buildings,” would be amended by adding

“Except that any accessory power generation facility that converts fossil fuels into electrical energy or steam through a combustion process shall provide such electrical energy or steam solely and exclusively to the principal use or building to which the power generation facility is accessory.”

Amend section 32-21 Use permitted in the MI districts (general industrial) (a) (8), which reads:

“Accessory uses and accessory buildings, including the repair, installation, and servicing of any commodity distributed, manufactured, processed, produced, or warehoused in this district. Such repair, installation, and servicing must be provided totally within enclosed buildings; outdoor parking and storage of vehicles, products, or other related items in a state of disrepair shall not be permitted.” by adding:

“In addition, any accessory power generation facility that converts fossil fuels into electrical energy or steam through a combustion process shall provide such electrical energy or steam solely and exclusively to the principal use or building to which the power generation facility is accessory.”

Discussion:

This option would alter individual zoning districts permitted use sections as they relate to accessory uses instead of the overall definition. Experience shows that, until recently, there has been little or no concern regarding accessory uses in the City. Rather, the concern has been limited to one zoning district and one particular project. Therefore, changing the permitted accessory uses in industrial zones would address the immediate concern for a power plant, but would not single out the STC zone in particular. The approach, of course, encourage the University of Delaware to invoke its exemption from zoning entirely, which, is something that we could discuss with them, should the Commission, and ultimately, Council wish to proceed with this approach. Also, if this option is explored, the City will need to determine whether there are vested rights that are impacted by the changed limitations. The Planning Commission would also need to explore whether the revised limitations have only prospective (as opposed to retroactive) application. Further, it appears that the biggest objection has been for power generation facilities which convert fossil fuels into energy, and not all types of power generation (batteries, solar panels, etc.) so the Option 3 approach will address that concern. There is also the objection that the TDC plan was to sell redundant power as part of their business

plan, which some would argue drove the size of the facility. Therefore, changing the permitted accessory use sections of industrial zoning categories could get to the heart of the current concern for on-site power generation and its sale.

Finally, this option could be considered in conjunction with Option 1. Considered together, the approach may eliminate the need for creating a definition of “neighborhood,” and instead use “surrounding area” and its definition in its place. Of course, this option assumes that accessory power generation through conversion of fossil fuels in industrial zones will be the only type of accessory use for which concerns will be raised.

Option 4:

Option 4, while not specifically discussed at the meeting, stems from the March 3, 2015 Planning Commission conversation regarding a desire for City Council to review some but not all accessory uses, and the possibility of creating a “residential” accessory use definition, and an “industrial” accessory use definition. Instead, the Department believes that, regardless of the type of zoning (residential vs. industrial), the community would be better served by a definition concentrating on the accessory use itself, rather than its’ zoning district. As a result, Option 4 creates two new definitions of accessory use/building similar to our recent amendments to the Zoning Code for home based businesses. Under this scenario, we create a definition of a *No Impact Accessory Use/Building*, which could be a permitted use in any zoning district and we also create a new definition of *Accessory Use*, which may in fact have an impact on the surrounding area, and would be considered as conditional use and require a Special Use Permit.

The proposed definitions follow:

No Impact Accessory Building: *“A detached or subordinate building, the use of which is incidental and subordinate to that of the main building on the same lot. A no impact accessory building shall not be used for commercial purposes, but may be used for a professional office. No noise, smoke, dust, or odor detectable at the property line nor other conditions detrimental to the character of the surrounding area shall be permitted in a no impact accessory building.”*

No Impact Accessory Use: *“A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except for parking spaces as required in Article XIV of this chapter. The term “no impact accessory use” shall not include commercial uses but may include professional offices. With the exception of a residential grill, fireplace or back up power generator used during emergency or maintenance conditions, any such no impact accessory uses shall not generate noise, smoke, dust, or odor detectable at the property line nor shall a no impact accessory use generate other conditions detrimental to the character of the surrounding area.”*

Accessory Building: *“A detached or subordinate building, the use of which is incidental and subordinate to that of the main building on the same lot, which does not meet the definition of a no impact accessory building, but from which no **excessive** noise, smoke, dust, or odor is generated. Such use shall not generate other conditions detrimental to the character of the surrounding area.”*

Accessory Use: *“A use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building, except for parking spaces as required in Article XIV of this chapter, which does not fit the definition of a no impact accessory use, but which will not generate **excessive** noise, smoke, dust, or odor. Such use shall not generate other conditions detrimental to the character of the surrounding area.”*

And then add a definition to 32-4 of Surrounding Area, as previously suggested, as follows:

Surrounding Area: *“Properties immediately adjacent to thereto, and extending 300’ (or 1000’) in any direction from the property in question.”*

The approach would also require Code Section 32-53 to read:

“No Impact Accessory Uses and Buildings and Accessory Uses and Buildings shall be permitted only on the same lot with the building to which they are accessory, except for parking spaces as required in Article XIV of this chapter. All accessory uses shall be such as do not alter the character of the premises on which they are located or impair the surrounding area.”

Under this approach, *No Impact Accessory Use* would replace references to Accessory Uses in the list of permitted uses in all residential, commercial and industrial zoning districts now permitted (RH, RT, RS, RD, RM, RA, RR, AC, BL, BLR, BN, BB, BC, ML, MI, MOR, STC); and add Accessory Uses to the Conditional Uses in each zoning district, thereby requiring anything that might have an impact on the community to obtain a Special Use Permit.

Discussion

This approach specifically allows accessory uses and buildings which have no impact on the surrounding area, while requiring those accessory uses and buildings which may have an impact to be reviewed by Council as a conditional use. As previously noted, this option developed from discussion at the Planning Commission meeting based on creating a residential accessory use and building definition, and a separate industrial accessory use and building definition, and follows a similar approach used with our recent amendments to the Zoning Code for *“No Impact Home Based Business.”* This approach gets to the issue of community review of uses that may impact the area, and yet permits accessory uses which have no impact on the surrounding area to proceed.

This option would also eliminate the need for changing the definition of “neighborhood” as it relates to accessory use from the current Merriam-Webster’s Unabridged Dictionary definition. Having said that, as this approach is somewhat new to our conversations, the Department has forwarded it to the City Solicitor for comments, which we hope will be available for the April 7, 2015 Planning Commission consideration.

Recommendation

The Planning & Development Department believes that Option 4 is the best of the four options reviewed, because it specifically addresses the issue of Council review of use with community impact, without causing an undue burden for straightforward accessory uses and buildings which do not have an impact beyond the property line.

Neighborhood

During the discussion at the Planning Commission Meeting on March 3, 2015, Planning Commissioners and the public discussed the many variations and contexts of defining the word “neighborhood.” The general conclusion was that “neighborhood” is a difficult word to define because its meaning may alter based on individual associations and/or contexts. And, as noted in discussing the four (4) *Options* for definitions of “accessory use” provided above, eliminating the word “neighborhood” from the definition of “accessory use” and associated Code sections, may make the creation of a definition of “neighborhood” unnecessary.

Background

To assist in determining the impact of not having a definition of neighborhood, we have reviewed the Municipal Code and found that the term is used on 26 occasions in 6 separate Chapters. Specifically it is used:

- Once in Chapter 2 – Administration in the creation of the Town & Gown Committee and clearly refers to the residential arrangement (“...students and non-student residents sharing local *neighborhoods*”);
- Once in Chapter 16 – Garbage, Refuse and Weeds and appears to refer to residential use (“...violations which may create a nuisance or be dangerous to the public health, safety, welfare, or effect the quality of life in a *neighborhood*”);
- Once in Chapter 17 Housing and Property Maintenance in the establishment of the Promoting Owner-Occupancy of Homes (POOH) Program, which is clearly referring to residential developments (... in existing residential *neighborhoods*);
- Three times in Chapter 23 – Parades and Public Assemblies in the definition of a Block Party – again residential in nature referring to (“... gathering of *neighborhood* residents,” and “... *neighborhood* street fairs, *neighborhood* street picnics”);
- Three times in Chapter 27 – One time in Definitions regarding Collector Roads defined in part as “ ... means of transportation between *neighborhoods*”) and twice in Appendix VI – Parks, Playgrounds and Area Requirements regarding the money in lieu of land option in which the city can use the money for (“... improvement of a *neighborhood* park” to benefit “...the general *neighborhood*”);and
- Seventeen times in Chapter 32 – Zoning – Once in the Definition Section, in which it defines “*Neighborhood* shopping center: A group of more than one retail store and/or personal service establishments and/or offices, located from the central business district, to serve the local shopping needs of the residential area in which it is located; Once in 32-5 which is the Classification of Districts section in that the BN zone is *Neighborhood* Shopping; Once in 32-11 RM Districts (Multi-family dwellings – garden apartments) where it allows for the conversion of one-family dwelling into dwelling units for two or more families that such conversion will “ ... not impair the character of the *neighborhood*”); Four times in 32-17 BN – once in the title and three times the in area requirements for *neighborhood* shopping centers; Once in 32-23 MOR – Manufacturing Office Research – in area requirements in that open areas should be landscaped to “ ... maintain the character of the surrounding *neighborhood*.”; Once in 32-51 – Nonconforming Uses, structures and buildings in that the extension of a nonconforming use or building may not “ ... adversely affect the character of the *neighborhood*”; Once in 32-53 Accessory Uses as noted above in that they may not “...impair the *neighborhood*.”; twice in 32-78 Special Use Permit in that the use may not adversely affect “ ... persons residing or working in the *neighborhood*” or be “... injurious to property or improvements in the *neighborhood*”; and finally, five times in Article XXVII Site Plan Approval in that excellence of site arrangements may include its “... relationship to *neighborhood* and community” and that Planning Commission may offer conditions for, among other things, the “...best development of the *neighborhood*” and “...to reduce injury to the value of property in the *neighborhood*” as may City Council.

The term is also referred to numerous times in the Comprehensive Development Plan.

Therefore, the Planning Commission may wish to consider creating a *legal* definition for the word “neighborhood” to provide more specific meaning for its intended use. Of the six (6) alternatives discussed at the March 3, 2015 Planning Commission meeting, the following options merit further consideration.

Option 1:

Replace the word “neighborhood” with the term “surrounding area” defined as: “*Properties immediately adjacent to thereto, and extending 300’ (or 1000’) in any direction from the property in question,*” not only as it relates to accessory uses (32-53), but also in Code Chapters noted above where it is clearly used to describe a particular

impacted area. Specifically, Option 1 would replace “neighborhood” with “surrounding area” in Code Chapter 16 as it relates to quality of life; in Zoning Code Section 32-11 RM Districts (Multi-family dwellings – garden apartments) where it allows for the conversion of one-family dwelling into dwellings units for two or more families that such conversion will “... not impair the character of the *neighborhood*”; in Zoning Code Section 32-23 MOR – Manufacturing Office Research in area requirements in that open areas should be landscaped to “... maintain the character of the surrounding *neighborhood*.”; and in Zoning Code 32-78 Special Use Permit in that the use may not adversely affect “... persons residing or working in the *neighborhood*” or be “... injurious to property or improvements in the *neighborhood*”; and finally, in Zoning Code Article XXVII Site Plan Approval in that excellence of site arrangements may include its “... relationship to *neighborhood* and community” and that Planning Commission may offer conditions for, among other things the “...best development of the *neighborhood*” and “...to reduce injury to the value of property in the *neighborhood*” as may City Council.

Discussion:

This approach will give a definite boundary for impacted area, while allowing the term neighborhood to be used for residential area reference. To proceed with this option, the distance/boundary will need to be determined. As noted earlier in this report, 300 feet is a commonly used threshold in the Code for notification and/or restrictions. However, there may be concern that the 300 feet distance is not enough and should be increased. For example, the 300 feet threshold would not reach the Devon neighborhood from the STAR Campus. Therefore, the Planning Commission may want to consider extending the threshold to beyond 300’ to 1000’ or some measurement in between. This approach eliminates the need to define “neighborhood”, and the current Comp Plan, under review, should be revised to use the term “surrounding area” in place of “neighborhood” when used to define the area.

Option 2:

Neighborhood: *“An area that forms a community and includes the surrounding area extending 1000 feet of any particular place, person, or object.”*

-Combined Google and surrounding areas

Discussion

This definition, based Google’s definition, provides a basic description of “neighborhood” consistent with the way many people describe it. However, this definition would also extend the boundaries to 1000 feet from the use/building in question (not the property line) to ensure the impact on the surrounding properties is considered and the same are not omitted from having standing in a Board of Adjustment complaint. The definition excludes the phrase “within the city,” which had been in previous versions of the definition and may unfairly exclude residences nearby but outside of Newark. If this option is selected, the “term” neighborhood could continue to be used in all of the 26 instances it is used in the Code and in all locations in the Comp Plan.

Option 3:

Neighborhood: *“The neighborhood of a given property includes all other properties within 1000 feet of the given property.”*

-John Morgan revised alternative

Discussion

The definition seems reflective of the way people consider a “neighborhood” and boundaries are more closely defined. In addition, extending 1000 feet from a given property line provides a greater range of effected properties. As with Option 2 above, this definition excludes the phrase “within the city” that may unfairly exclude residences nearby but outside of Newark, and excludes “forms a community” that may exclude commercial or industrial properties nearby.

Recommendation:

The Department suggests, because the term neighborhood is difficult to define and because its meaning may vary based on individual associations and/or context, that the Commission recommend Option 1, replacing the word “neighborhood” with the term “surrounding area” in the Code, where the term is clearly referencing an impacted area and eliminating the need to define “neighborhood.”

Mr. Silverman: Do any of the Commissioners have any comments at the moment?

Mr. Robert Stozek: When you first talked about the definition, you were using 300 feet or 1,000 feet in any direction from the property. That is what is written in italics, but when you described it verbally, you said from the property line. Which is the intent here?

Ms. Feeney Roser: The intent is the line, the boundary of the property so that would be the starting point for the 300 ft. measurement (or 1,000 ft. depending on what the Commission wants to do). At one point, we had talked about using whatever the use was or the building but I think it is more appropriate to use the property line.

Mr. Andy Hegedus: The recommendation would have City Council use the special use permit criteria when needed. Right?

Ms. Feeney Roser: Yes.

Mr. Hegedus: I didn’t hear any changes to the criteria around special use permits and what is looked at when Council decides whether or not to approve them.

Ms. Feeney Roser: Correct, no changes to what is looked at, but the term “neighborhood” is used in that so we would change “neighborhood” to surrounding area.

Mr. Hegedus: If I remember right, there are three criteria for what constitutes approval of special use.

Ms. Feeney Roser: Yes.

Mr. Hegedus: One is, in keeping with the goals of the City. If you could read those, it would be better than just my bad memory.

Ms. Feeney Roser: It says, an applicant has to demonstrate that a conditional use will not:

- A. Affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use;
- B. Be detrimental to the public welfare or injurious to property or improvements in the neighborhood; and
- C. Be in conflict with the purposes of the comprehensive development plan of the city."

Mr. Hegedus: Those first two would be places where you would change “neighborhood” to “surrounding area?”

Ms. Feeney Roser: Yes.

Mr. Silverman: Is there anyone else that would like to speak from the Commission? Being none, I would like to add what I hope will be some additional light rather than creating more smoke and fog. We heard some terms used. They are descriptive terms. They are terms that are recognized in law. They are terms that are common in planning and in codes and ordinances. In dealing with a common definition of accessory use and what is subordinate and what is incidental and what is customary, I am going to use a single family house as a principal use, a vehicle garage is considered incidental to the residential use. It is also customarily found on residential properties. Otherwise, a garage for housing automobiles would actually be a commercial or a light industrial use. But, since it is customarily in our community associated with a residential property, it is

automatically permitted as an accessory use, and some jurisdictions get into part of lifestyle. A garage, an automobile is part of our lifestyle today so it also supports that. So, that is the relationship between those terms.

I have one other set of ideas to take you through. I did some research on this and the Beginners Guide to Land Use Law produced by Pace University Law School based on an evaluation of more than 200 court cases – it was done in 1985 and it still holds today. This is not necessarily Delaware Law. It identifies five criteria used for accessory uses. They must be related to the principal use, and that is not usually explicitly said in most zoning ordinances, but it is implied. There has to be a relationship and an example I've used before was a clothing manufacture. Someone who takes in bulk cloth and converts it to clothing. They have an outlet store in their manufacturing plant. That is considered an accessory use. It is related, unless it is prohibited. Retail outlets are not permitted in industrial areas. They must be subordinate and clearly incidental to the principal use. They must be customarily incidental. In other words, that is not the primary purpose of the use. They must be located on the same lot and some jurisdictions say under the same ownership. Now, Newark goes down that path except for remote parking, I believe, there is an exception. So, you can have, like, I believe, the Foard Funeral Home where they have the funeral home on one side of the street and they have their parking on the other. They must not alter the character of the area or be detrimental to the area. It is occasionally stated, but it is usually implied in the zoning ordinance. Finally, because of the zoning's protective nature many ordinances ignore the issue of accessory uses inside commercial structures unless the activity of the structure or some aspect of the accessory use overshadows the principal use. Those are the kinds of things that are often looked at when determining what is a primary use and what is a secondary use.

Accessory uses can exist in one or two circumstances. The accessory use can be integral to the primary use. I have a food production manufacturing facility. It has a lot of machines that require constant maintenance. In order to do that, I have a machine shop on my premises, clearly different than a food processing facility, but the food processing facility cannot continue to run without this continuous maintenance repair and making new parts. I have a circumstance like I just described where I have a fabric plant, a clothes manufacturing plant, and I have a retail outlet. This retail outlet could disappear tomorrow and this clothing manufacturing plant would continue. So, there are two variations on accessory uses. One is linked. One, the primary use cannot exist without the secondary use and the other is, the primary use and the secondary use, even though they are related, can exist separately. That kind of sets the stage. That is the kind of thing we talked about this entire discussion.

Mr. Hegedus: Maureen, one more thing came to mind. In the definitions of accessory building and accessory use there is the term excessive. So, how is excessive to be judged or what process is used to judge whether something is excessive or not?

Ms. Feeney Roser: That is a term that the City Solicitor was very interested in having us include in there. He didn't have a problem with us saying no smoke at all for the no impact buildings because that would have no impact. But, if you were to say it for other things there may be some smoke that doesn't really bother people or there may be something that would be emitted that wouldn't be a problem and he thought that we should hedge on the word excessive so that it was clear that we weren't trying to prohibit everything but could limit it. The term excessive is an accepted word in legal circles, and you're going to have to have some room for interpretation. Alan, you look like you want to respond.

Mr. Silverman: Maureen, wouldn't this force the applicant to prove that it is not, that the burden would be on the applicant and would also force the applicant to provide material that either staff or Council could make yes or no type decisions on?

Ms. Feeney Roser: Yes.

Mr. Hegedus: I'm just not sure where that standard of excessive or not excessive is, even if they have submitted documentation. It seems to me that excessive might be either

judged by the next sentence which says, “Such use shall not generate other conditions detrimental to the character of the surrounding area,” because if something was excessive then that might be conditions detrimental or the other option I was thinking of is back to the three criteria you read for special use because anything that is an accessory building or accessory use has to be approved by a special use permit. So, if anything was excessive that would mean that it was not in compliance with the goals of the Comprehensive Plan or have impacts on the surrounding area. Right? So, that is why I was a little hung up on the process that would be used or the standard that would be set around excessive.

Mr. Silverman: And the goals of the Comprehensive Plan would link back to such things as State mandated air quality, for example.

Mr. Hegedus: That and goals about being bicycle friendly and those sort of things.

Mr. Silverman: Meeting LEED requirements.

Mr. Hegedus: The things that are in the plan around where we want our community to be and go in the future.

Ms. Feeney Roser: Because a conditional use would require a review for a special use permit you don’t need to restate those things that are used as criteria for a special use permit in the definition. Right?

Mr. Hegedus: Right.

Ms. Feeney Roser: So, this is the definition. If they can meet that then they have to come and prove their case that they are not going to be detrimental to the neighborhood, but it doesn’t prohibit an accessory use from any emissions whatsoever or any noise. Then you have to come to Council and make your case. The other one does. It says no noise, no smoke, no nothing. That’s a permitted use. If they can’t meet that criteria and if we find something to be excessive, then we wouldn’t even consider it for a special use permit. Is that making sense to you?

Mr. Hegedus: I think I understand what you are saying but I am still having a logical disconnect around it. Let’s hear from others and then we will talk through it.

Mr. Silverman: Miranda Wilson submitted a request for public comment. Ms. Wilson may I extend the floor to Dr. Morgan first.

Ms. Miranda Wilson: Absolutely.

Dr. John Morgan: District 1. On the assumption that my two-page statement can be incorporated into the minutes and has already been read by, hopefully, all the members of the Planning Commission, in the interest of time, I will just summarize a few key points. Is that okay?

Mr. Silverman: We will include your written statement as part of the minutes and feel free to summarize your key points.

[Secretary’s Note: Dr. Morgan’s two-page statement will be added to the end of the official Planning Commission minutes].

Dr. Morgan: First of all, I want to really thank the members of the Planning Commission, Maureen Feeney Roser and Mike Fortner for all the time they have invested in this important issue. I’d like to say that I almost never came to Council meetings until about a year and a half ago after I learned about the problems posed by the power plant and I was very disturbed to be told by a reporter that the only reason it was possible was that there were some gaps in our Zoning Code. I think Mike Fortner did a really good job of describing the various alternatives and, therefore, I don’t need to rehash what he said and instead, I would like to focus on the two decisions by the Delaware Supreme Court in 2010 which have profoundly altered how zoning laws can be administered and enforced

by municipalities in our state and which necessitate removing in the very near future any ambiguity or other vagueness from the definitions of accessory use and neighborhood. So, these two Supreme Court decisions played a crucial role in Max Walton's memo of September 9, 2013 on the power plant and in his written and oral submissions to the Board of Adjustment in March 2014 concerning accessory use and neighborhood. The first of those decisions involved a case of Chase Alexa LLC vs. the Kent County Levy Court. It was a dispute over zoning. I have given you the link to that decision where you can read it in full and it includes an important sentence "If there are two reasonable interpretations of the statute, the interpretation of that favors the landowner controls." The second such decision a few months later in 2010 involved the case of Dewey Beach Enterprises Inc., a private company, vs. the Board of Adjustment of the town of Dewey Beach. Again, you can click on the link to read that in full. In overturning a Superior Court ruling which had affirmed a decision by the Dewey Beach's Board of Adjustment, the Delaware Supreme Court made an even stronger concluding statement on the last page of its unanimous ruling, which I quote. "Finally, to the extent that there is any doubt as to the correct interpretation, that doubt must be resolved in favor of the landowner."

The phrase "any doubt" is far-reaching. Not just any reasonable doubt, any doubt. According to well established principles of legal interpretation, if the Delaware Supreme Court had meant any reasonable doubt, they would have used this more specific phrase, not just any doubt. This emphasizes the need for absolutely clear definitions and other language in our City Zoning Code to avoid having to spend millions of dollars of taxpayers' money on a future legal case which would require asking the Delaware Supreme Court to modify its recent unanimous decision.

And, I would like to say that at one of the few points I would disagree with something Mike Fortner said in his presentation at the last meeting is where he said that under Delaware law if there is a tie, it goes to the land owner. If I can use a baseball metaphor, if your team has outscored the other team 10-1, you still lose because there can't be any doubt. It's not just a tie. It doesn't matter what it is. It doesn't matter whether the doubt is reasonable. You still lose. The land owner wins.

I've given an example of why you shouldn't use the phrase "adjacent property" because something across the street may not be considered adjacent because there is public property separating it as could happen with the Park 'n' Shop Shopping Center where there was the Wawa controversy two years ago.

As I was listening here, it occurred to me that the issue of 300 ft. vs. 1,000 ft. maybe should be resolved by looking at the area, the zoning. I think 300 ft. is appropriate for residential districts, but I think if you are to have a commercial or industrial application, which typically generates a lot more noise, a lot more emissions, you might want to look at 1,000 ft.

Since Maureen has already stated that we are really only going to look at Option 4, I think I will just move ahead to that and say that I very much endorse Maureen and Mike for coming up with it. I have only two suggestions for improving Option 4, and the first is to change the phrase, "at the property line" to the phrase "outside the property line" since it might be difficult to make measurements of noise or odor or dust exactly at the property line. For example, if you look at the parcel where TDC was going to build its power plant, if you wanted to get to the property line on the north side of STAR Campus, you have to somehow get into the Norfolk Southern Railroad yard and then climb up an embankment, which I think would actually be illegal because the access to railroad tracks is governed by Federal law. So, I think this single change of a word would be helpful. And the other suggestion I would make is that "detectable air pollution" should be included in the list of things that no impact accessory use cannot generate and be detectable outside the given property. With these two small but significant modifications, I wholeheartedly endorse the belief of the Planning and Development that Option 4 is the best way to proceed. I also endorse Option 1 for the definition of surrounding area which will avoid the need to have a precise definition of "neighborhood."

I think I will conclude by saying I think that the Planning and Development Department has come up with some really good proposals. If there are potential accessory uses which might generate some noise that is detectable there is a straightforward procedure. The applicant can submit a request for a special use permit and be evaluated by the Planning and Development Department. That evaluation will then be forwarded to City Council and I think ultimately we have to rely on the good judgement of our City Council which will have to hold a public hearing and where the public can contribute and, ultimately, they should make the right decisions. Thank you.

Mr. Silverman: Thank you very much. Ms. Wilson.

(Inaudible from the audience – not at the mic).

Mr. Silverman: Our practice is to take people in order.

Ms. Miranda Wilson: 329 Orchard Road and I am from District 4. I want to start by saying how happy I am that the Planning Commission is addressing these important issues of “accessory use” and trying to work towards a good and workable definition of “neighborhood.” This is such an important conversation to have and, again, I am so happy that you have brought the public in to talk about these things with you. I want to start off by really endorsing the comments of my fellow Newarkian, John Morgan, and I want to say right off the bat that I very, very much hope you take his recommendation to consider the 1,000 ft. from the property line as part of the definition of surrounding area. I also hope that you consider adding the detectable air pollution that he just mentioned.

I also think that one of the things brought up by Planning Commissioner Hegedus something that has been playing on my mind, too – the importance of language. And, I really, really hope that we do not go through this process with the feeling of hast because I think that has gotten us into a lot of trouble in the past. If I may, I don’t know what the rules of time are for this, but I would, if possible like to read a short excerpt from the Board of Adjustment’s transcript that is online just as sense of history just to show how important, I think, it is that we get the language right here. So, if I may?

Mr. Silverman: Very short, brief.

Ms. Wilson: This is something from our very own Max Walton, and this was in terms of the impact on neighborhood, and he was specifically talking about noise. He says, “So, the next is noise. How about noise? The applicant’s contention is that the ambient noise standards might be, might be too high. So, you could be able to hear noise beyond the property line and it will be audible. How do we know that this is the point? How can the City know that because it’s got to be audible beyond the Amtrak lines, the Norfolk Southern lines and here is the other point? There are features, sound deadening features that will be put in during the construction phase which we haven’t even gotten to yet because we do not know right now if there will be sound outside the building. And, if you look at their experts to say look, it is 52 decibels, you can hear it outside, it is 52 decibels at the property line, and you should be able to hear it down the road. We don’t know if it is going to be 52 decibels at the property line. We can’t tell, and that should be a basis, a potential that noise laws would be violated. The potential for that to happen isn’t a basis to overturn the zoning verifications.” And, this is a point he came back to again and again. We can’t know. So, I do worry when I hear language like excessive noise, excessive air pollution. I worry because I feel like that is vague and it opens the door to arguments such as those used by Max Walton at the Board of Adjustment meeting. I think we have to be really, really careful, and very, very specific about what we mean by excessive. We can’t just leave it open to interpretation. That is the way it has been in the past and it has really, really created problems. I will just leave it at that. I really hope that you think about how things are being defined because other people are already thinking about how we define things. We have just gone through a very difficult time in the last year and a half. I hope we do not ever have to deal with something like that again, but if we don’t do this thing right now, of course we will. People are going to be watching for other loopholes. Please close the loopholes. Get language that is unassailable so that we can live with a sense of security again. Thank you.

Mr. Alan Brangman: I am the Vice President for Facilities, Real Estate and Auxiliary Services at the University of Delaware. Thank you for allowing me to come and speak before you this evening. I actually came in one state of mind and after listening to the conversation here on the dais have shifted a little bit but still want to comment on a few things that I think are very important that you keep in your minds as you taking consideration of the actions that you are about to proceed on. One is, as was mentioned by staff, and congratulations to staff on doing what I consider really to be an excellent job of reviewing the issues, analyzing the issues, and providing you with some rather, I think, direct and, I'll say, correct interpretations of how you might look at changing your Code. I also want to thank you and I also want to apologize because you have obviously had a couple of meetings that we – the University – were not present. I really would have liked to be part of those discussions because, I think I may have been able to help in terms of being able to get to where you are now but that is in the past and won't deal with that now. But, the key thing to me is unintended consequences and that is the one thing that I started looking at when I got this document at 9:30 this morning. So, bear with me a little bit because I have been trying to cram to make sure that I was able to at least get some of the comments out before you this evening. And, again, I commend staff because you have already picked up on a couple of things as I started looking at it and saying, wait a minute, if you are going to make that decision relative to changing your ordinances this way it is perhaps going to affect other things that you weren't considering as you were looking at this earlier on, and I think you certainly have caught some of those. I would still caution that there may be others out there so I would encourage you to spend a little more time as you review this to make sure that you have kind of captured everything, as some of the speakers have said, as you move forward with this.

I spent some time on a planning Commission and didn't have the benefit of spending time on a zoning commission. I spent some time on a council. So, I understand the issues that you are having to deal with. I understand the pressures associated with being able to put ordinances in place that are going to control your community for a long period of time. So, you want to try and get it right and for as best you can. And, there are a couple of things I think as well that we need to pay attention to as we look forward to because not everything that was done previously was necessarily done wrong, it just may mean that we need to look at things again. And, I would challenge my colleague [John Morgan] to the right of me here on the issue, particularly, of surrounding area. I like the definition of surrounding area as you proposed it vs. neighborhoods. I understand the difficulty of trying to figure out what a neighborhood is. So, I think that is the direction you have taken with respect to surrounding area is the right way to go. And, I do think that that does happen at the property line in terms of 360° around what is happening with that property, but I think you have to look very closely at to what that distance is because I'm assuming, if your ordinance was like the ordinance that I was dealing with in Falls Church, that 300 ft. didn't come out of nowhere. It was an important dimension that dealt with the impact upon that property and the neighbors or surrounding properties that were in the vicinity of that property. As you extend further and further out, that dimension becomes much more impactful on the rest of your community. And I think you have to look at that and try and determine – and you could actually put a pin on a map – and try and determine how it is going to impact each one of the properties. What you are trying to put in place are parameters that are going to be able to at least set a direction for the future of how you should develop in your community and you don't want to make decisions at this point in time that are going to impact your ability to be successful with respect to economic development and future development. So, again, I really think what you have done thus far is great. I didn't see it in here but I suspect that there is a timeline and maybe at your next Planning meeting you are going to make a decision and then that would go to Council. If you could just clarify what the timeline is from here going forward because I want to make sure that I am at least involved in the next conversations as they occur.

Ms. Feeney Roser: May I answer that for you, Mr. Brangman. The Planning Commission is advisory to Council so depending on the discussion tonight and what Commission plans to do, if we were to come back at the next meeting or the meeting there after, because the Commission's next meeting is already jam-packed, just to let you know, we will then advertise it to go to Council and there will be two readings of Council

because it is an ordinance change. So, we will make sure that we have notified you whenever we are going to talk about it again either here or at the Council meeting.

Mr. Silverman: Just a comment on impact on the community. There are court cases to back this up, but generally the reading says that it is an impact that is greater than the impact on the general community. So, if there is a use and people are going to drive to it, they drive through the general community to get to that specific site. So, we are talking about when jurisdictions and lawyers argue and the rest of it, they argue about the impact that is greater than the general impact on the community.

Ms. Sherry Hoffman: My comment is really brief and I would like to start by speaking to part of the treatise that the Chair read in his presentation and the quote I want to make from that treatise was with respect to accessory use the language was detrimental to the area. And you will notice when we incorporated this into these provisions it says detrimental to the character of the surrounding area. I think saying detrimental to the character instead of detrimental to the area significantly limits the word detrimental. So, the only thing you have to broaden it is the preceding sentence that speaks to noise, smoke, dust or odor and that is extremely limiting. For example, that doesn't include emissions like carbon monoxide that may be harmful to your health but don't smell or have an odor. So, it seems to me with a short laundry list of noise, smoke, dust or odor, it is not prudent to say detrimental to the character of the neighborhood rather than detrimental to the surrounding area. I didn't mean to say neighborhood. It just slipped out.

Ms. Feeney Roser: That's a good point.

Ms. Marina Dobronovskaya: 149 Dallam Road. I wanted to say that I didn't do a lot of research, but what I found during 45 minutes that neighborhood usually is defined differently but, some census tract, maybe police district, it may be a parish, it may be an area surrounding an institution, it may some kind of election district so, it is something different from your proposed about surrounding area. Surrounding area is just a territory while neighborhood, at least what I saw on internet, is kind of more towards a community definition and I think that when you say about this accessory use in saying that surrounding area you discussed 300 ft. or 1,000 ft. I would prefer 1,000 ft. but I kind of agree with this, but I would simply add this term instead of neighborhood because I think neighborhood is different. When you say move mailbox from one corner to another then surrounding area is fine but when you are saying about a power plant next to my house, it can be 300 ft., right? I think you should keep neighborhood and add surrounding area. Also, I have a question. The question is, in the flyer when I read about this meeting, it read that the data center kind of accelerated this question, but the data center and the power plant deal was about a year ago. Why did it come up now, the question about neighborhood? The reason I am asking is if something bigger similar to the power plant is in your agenda and this is why you are trying to change the definition from neighborhood to surrounding area.

Ms. Feeney Roser: There are a couple of things. We have been working on this since last spring, since the Board of Adjustment meeting, because it was an issue that was brought to our Council as a problem to be resolved. And, there is a lot of research that went into it and there were a lot of other projects that got in the way and finally, we were waiting for a Council time and they have been bogged down with workshops to discuss it, but there didn't seem to be a date for one, so we eventually decided to just start with a Planning Commission public conversation about the definitions. The impetus of this is the data center. I know of no other data center or big project in the pipeline that would be impacted by this. That's not to say there will not be sometime in the future, but that is why we are trying to work on the definition of it now. Also, when we talk about neighborhood, we were talking about leaving the references in the Code which obviously meant community and changing it to surrounding area when it was pretty clear that what we were talking is the area that going to be impacted. Finally, I would just say that the reason we are doing this is really who had the right to bring the case to the Board of Adjustment. There was some conversation about who is in the neighborhood. Only those in the neighborhood would have standing to bring something before the Board of Adjustment. This does not mean that you would not be able to come to Council as a

citizen and speak about any issue that was before them. It really was to get to the point that a legal argument was that there was no one in the neighborhood who had the standing to bring the case to the Board of Adjustment. That is why we are trying to define surrounding area and make sure that it is wide enough to include people who will be directly impacted while, at the same time, recognizing that if something comes before Council that everyone in the community has an opportunity to be heard.

Ms. Helga Huntley: I live in District 1. I am very happy that this issue is finally getting discussed because when I was listening to the arguments at the Board of Adjustment hearing a year ago, I thought there must be a better way to regulate these things. I think, unfortunately, I was not able to come to the meeting last month, I think you made some good progress in getting down to a workable solution here. I do want to address a couple of comments that came up last month. I was listening to the audio to catch up on where the discussion stood and one of the issues that was raised last time is that we don't really need to make any changes because in all the decades that these laws have been on the books there has only been this one instance where there was a problem. My answer to that is that now that we know there is a problem, even if it has only occurred once, we should fix it before it does recur and it is likely to recur sooner rather than later now that this flaw has been charted out so publicly. The other comment that I will briefly address was the suggestion to focus solely on prohibiting fossil fuel burning power plants. Chairman Silverman mentioned this in the beginning in summary comments and that approach does not seem wise to me, as it is limited to addressing the very specific instance of what happened last year and does not forward looking to solve a broader problem with (inaudible) variations that might occur next time.

Having said that, I move on to the two proposals in front of us. The first one I will address because it (inaudible) the neighborhood definition and I agree completely with the conclusions that defining a neighborhood is really difficult, it is rarely done because it is usually has slightly different meanings and slightly different contexts. The only context where it really matters for us is in the protections clauses in the Zoning chapter. So, I agree with the suggested Option 1 to only deal with the definition of neighborhood in that context. I hesitate, however, to endorse making a definition of "surrounding area" as something that has a particular radius because in normal usage of those words it does not imply a particular distance. So, instead of defining surrounding area as being a specific area with a radius, I would include the whole phrase surrounding area up to a 1,000 ft. from the property line in all those instances where it was suggested to just put surrounding area. That way the meaning is immediately obvious to someone reading the Code and it is not buried in the definition section. I mentioned here a 1,000 ft. That is my preferred distance. Obviously, that is a matter up for discussion. I don't think as one of the previous people from the public commented that it will significantly somehow impact our community's ability to attract businesses, whether 300 ft. or 1,000 ft. because more than likely, if something is impacted within 1,000 ft. it is also impacted within 300 ft. But, be that as it may, I would prefer going with a longer distance.

One final comment on the neighborhood definition, it was suggested to make the replacements for the word neighborhood in the zoning chapter as well as in Chapter 16, and I think, actually, the meaning of neighborhood in Chapter 16 – that is the chapter about the garbage and saying conditions are not supposed to impact the quality of life in a neighborhood – I think, actually, in that case neighborhood does in my opinion refer to the community and not so much to just be adjacent areas. It also says that it can affect the quality of life of the neighborhood where this problem exists, but a neighborhood, which, to me, means any neighborhood. So, I would leave the word neighborhood in that case.

Moving on to accessory use regulation. Of the four options that were put forth, my preference is clearly for Option #4, which attempts to separate those accessory uses with no impact on anybody else from those with an impact. The main problem that I see with the currently proposed language is the following. No impact is a qualifier of accessory use so, no impact accessory uses should be a subset of accessory uses. Anything else defies standard usage of English. So, I propose that the general category of accessory uses is defined first and then broken into two categories that of no impact accessory uses and that of accessory uses with impact. As proposed by the Planning

Department, no impact accessory uses should replace all references to accessory uses and accessory uses with impact should require a special use permit from City Council. While we are busy fixing the definitions, there are a handful of other smaller issues that I suggest should be addressed.

The first one is that I would propose that the language be consistent between accessory buildings and accessory uses and that both need to be customarily incidental. The word customary only appears in one of those. Secondly, I would also propose to be precise about what we mean by subordinate like some of the other municipalities that were researched by the Planning Department. My suggestion would be to ask that buildings should be subordinate in area and that uses should be subordinate in area and purpose. And, thirdly, I recommend that the prohibited conditions are those detrimental to the surrounding area. This is what Ms. Hoffman was referring to rather than detrimental to the character of the surrounding area. In that context as well, I would like to see pollution included more generally, not just smoke, dust and odor.

The limitations clause in Section 32-53 specifies that accessory uses may not impair the neighborhood, which is proposed to be replaced by, they are not allowed to impair the surrounding area. I would like to argue that anything that causes impairment to any part of the City of Newark should not be permitted as an accessory use. That alleviates the problem of having to determine the appropriate radius to use.

I did put all of these suggestions together into revised wording for the definitions and regulations and I will pass this around to you so that you will have a written version of it in front of you and I will read it into the record.

Mr. Silverman: Are you providing individual copies to all the commissioners and the director?

Ms. Huntley: Yes. I have eight copies up there so there should be one extra in case I miscounted. I also have extra copies for anyone in the public who wants one.

So, I suggest that the definition for accessory building should be, “a building that is detached and subordinate in area to the main building on the same lot the use of which is customarily incidental and subordinate to that of the main building on the same lot. Such use shall not generate conditions detrimental to the surrounding area up to 1,000 ft. from the property such as excessive noise, smoke, dust, odor or other pollutions.” I think what rephrasing these conditions at the end does is that it’s clear what we mean by excessive noise in that it is cited as an example of what it means to generate conditions that are detrimental to the surrounding area. I am not going to read the rest of it because you all have it in front of you. I will just highlight some of the other changes that I propose. The definition as it was written for accessory building and accessory use said it’s the use that does not meet the conditions for a no impact accessory use or no impact accessory building, and I propose to take that out so that we have a more general definition for accessory building and accessory use and make the no impact accessory use definition as follows:

“An accessory use that generates no noise, smoke, dust, odor or other pollution detectable beyond the property line. In addition, a residential grill, fireplace or backup power generator used only during emergency or maintenance conditions shall be considered no impact accessory uses.

And then the definition for an accessory building with impact or accessory use with impact is very simple by just saying that it is an accessory building or an accessory use that does not meet the conditions for a no impact accessory use.

Finally, for the limitation clause in Section 32-53 where I suggested changing the ending of that by saying that all accessory uses shall be such as to not alter the character of the premises on which they are located or impair the City of Newark, any part thereof or any area within a 1,000 ft. of the property line.” Thank you.

Ms. Amy Roe: District 4. Just as a matter of record, the issue of neighborhood has come up before City Council several times in proposals for special use permits where the Planning and Development Department recommendations have said does not impair the neighborhood most recently being for a child based daycare facility. That would have been up near the reservoir. So, (inaudible) that haven't come before here, I think, is distinct from other uses of that language.

I have a question that I would like clarification on, which is how the proposed changes to the language on neighborhood or surrounding area would change who has standing in a Board of Adjustment appeal. It seems to me from comments made earlier by the Planning and Development Director that there could be changes to standing so if I could have some clarification on what that means, I would appreciate it.

Ms. Feeney Roser: What I was referring to, Ms. Roe, was that in the City's presentation to the Board of Adjustment one of the things that was said, or perhaps it was leading up to it, was that the law refers to "neighborhood," therefore, if there is no one who lives in the neighborhood, there is no one who has standing to bring the Board of Adjustment case. Now, I may be paraphrasing and perhaps I have misinterpreted that, but that was my understanding of why the term "neighborhood" was one of the important issues. So, what we were trying to do is to find a boundary, something we could actually use and measure that would say these are the people who live in the impacted area and, therefore, would have standing to bring case in any Board of Adjustment or other hearing. When we used the 300 foot measurement and Dr. Morgan pointed out to us that if you use 300 feet the Devon neighborhood would not be considered part of that neighborhood, and that is when we thought that, perhaps, then we do need to expand that distance, but we thought it would be important to have a defined area rather than using the nebulous term neighborhood that could be argued.

Mr. Silverman: Is there anyone else who would wish to speak?

Mr. David Shearer: 149 Dallam Road. I would like to reinforce at least two recommendations from members of the Commission to retain the language of neighborhood in various clauses. I think defining surrounding areas is an extremely good idea and I think that should be included and I think that is an extremely good recommendation. But, I would also like to add neighborhood into that as a more flexible and broader kind of community indication because, of course, things like the power plant, other things affect certainly more than 300 ft. and even more than 1,000 ft. So, the language neighborhood, I think, should be retained and it should be made flexible which means that it can allow anyone from the community of Newark to have a say on what may or may not be built and what it is used for. So, it seems to me that both languages should be included – the language of surrounding area and also the language of community and neighborhood. I also agree that the definition of surrounding area should be at least 1,000 ft. 300 ft. is almost nothing. If you consider the impact of the power plant, 300 ft. was almost nothing.

The second point I want to make, I guess, might come under not so much a specific category, it's more of a political statement and that is the remark about the comments from my colleague from the University of Delaware were very eloquent but I also think they are very vague and I would be very concerned. If I were on the committee, it seems to me that those comments are designed more to allow the maximum flexibility of the University to do what it wishes to do in this community rather than being really responsible to the community and, so, I will say that I work at the University of Delaware and it is a wonderful place to work, but as a resident of the community, I do not trust the corporation of the University to do what is in the best interest of the community. Thank you.

Mr. Silverman: Now that we have heard from the individuals who petitioned to speak, I will open up the floor to comments, and please direct your comments forward rather than to one another.

Dr. Morgan: I would like to make two comments to follow up things that were said already. I think as my colleague Alan Brangman said the figure of 300 ft. has a long

history and I think that that history is based in what happens in residential communities. Typically, 300 ft. away from any given house in a residential neighborhood will involve at least a dozen other people. If none of them have any objections, it is highly likely that nobody else further away should. But, we get into a different situation when we are looking at industrial uses or commercial uses. For example, the Norfolk Southern Railroad Line is approximately 350 ft. to 500 ft. wide. So, if one were to use a definition of 300 ft. for surrounding area, it would mean that nobody who is living in any of those houses on the north side of the tracks would have any standing to contest what is happening in the STC zoning district. And, I certainly hope that that was not an intended consequence of my colleague's remarks. I would also have to say that I think that the University administration has learned a lot of lessons in the last three years and I don't want to go into a lot of details, but I would say that within 15 months or less we will have a new administration and with likely major changes in high level administrative positions as happened eight years ago. And, some of these people may not remember some of the lessons that were learned the hard way in the past couple of years and that is why I do think we need to a Zoning Code amendment, such as the one that the Planning and Development Department has proposed in which there is one class of no impact accessory uses which are by right and another class of accessory uses which allow the applicant to come to the Planning and Development Department and then go to Council. That process should not take more than two months. It should not hinder responsible development. So, I very much endorse that approach. Thank you.

Mr. Silverman: Is there anyone else? Please come forward.

Ms. Leslie Purcell: Old Oak Road, District 1. I would like to follow on what Andy Hegedus said about the wide latitude between no impact on the one hand and excessive use on the other. That just seems like there is an awful lot of leeway in there and, again, it is going to lead to a question of interpretation that could be very difficult in the future. So, I would just like to reiterate that and I think that the alternative wording for Option #4 that Helga presented us with looks very interesting. It takes a little while to really read through it so I hope you would all seriously consider that. Thank you.

Mr. Silverman: Is there anyone else? What I would like to do now is bring our discussion back to the Commissioners. You have heard the public testimony, are there any comments you have on the testimony with respect to how it reflects on the proposal from the land use department? And, then I am going to ask the second question, where as a group do we want to go from here? I will reserve my comments for last.

Mr. Stozek: I have one question. Several times tonight the addition of air pollution in some manner was suggested be incorporated in this beyond just dust and dirt or whatever. Are we going to include that in the next rewrite?

Ms. Feeney Roser: Actually, Dr. Morgan and I had a conversation about adding it and the report was already written so we thought we would have this conversation at the table. It will be difficult, I think, for the Planning and Development Department to determine whether air pollution is, in fact, going to be emitted from an accessory use or building. It would depend on what that use might be, but that is not to say that someone couldn't in an accessory garage mix paints or have some kind of fire or odor that would be an air pollutant. I think Ms. Huntley referred just to the term pollution which seems easier for us to deal with. I don't know. I don't really think that the Planning and Development Department has the expertise, but perhaps Public Works or Water Resources does. The State is really the entity that regulates that. So, we would have to consider it certainly. I'm not opposed to thinking about it, but I don't know that we are ready at this point to say that we could simply add it and be able to do that kind of quick turnaround of yes, this is a no impact or not.

Mr. Stozek: Where would that determination be then, and how would it come to be resolved if people had concerns about pollution? Would it then come before Council?

Ms. Feeney Roser: In the case of a conditional use, it could come up at Council because Council would be reviewing that. It wouldn't be a permitted use. We could determine whether there was potential for pollution and then the onus would be on the applicant to

prove that it wasn't emitting it, but, and someone else here may want to speak to it, I don't know that I would be able to tell if something came in that there was no possible way that they would admit any air pollutant from that. I guess we could then go back and shut them down if they did.

Mr. Stozek: What if they were going to build another power plant, even a small one, an emergency backup generator. Would that come through your department.

Ms. Feeney Roser: Yes.

Mr. Stozek: So, that's where a judgement would be made as to whether they meet some sort of standard?

Ms. Feeney Roser: The standard would be, will there be absolutely no noise, no smoke, no odor and if you wanted to add pollution to that, detectible, I think Dr. Morgan's idea of, beyond the property line makes sense because it is true that we are not going to measure on the Norfolk Southern Line. But, that kind of determination would be relatively easy for us to make, I think, and then if there were anything that would have odor or smoke or pollution then they would have to come to Council. They would be considered an accessory use not a no impact accessory use.

Mr. Silverman: And, I believe other codes would come into play. For example, with a relatively large generator that may power an apartment building for life safety and elevators or refrigeration units. The Building Codes often specify exactly what kind of muffler system has to be on it and noise radiuses. So, there are kind of other backups or redundancies.

Ms. Feeney Roser: I guess what I am kind of leading to is if you start determining this 300 foot or 1,000 foot and where the impact is, I think you are going to have problems where there is technology out there, there are ways of mitigating it. I'm sure there are other federal regulations. I just think it needs to be somewhere where it's reviewed in the process, not necessarily within what we are writing here today, but within the Planning and Development Department or somewhere that has to be a check-off point that it meets certain standards.

Mr. Silverman: Are there any other commissioners that want to comment?

Mr. Cronin: One of the thoughts I have is this issue of detectable noise, odor, dust, so forth. I would like to see some reference to detectable whether it is healthy or not. You can detect odor, dust and noise, but an odor might not be unhealthy and the same thing with dust or pollution. You can detect things in the smallest amount and say, oh, it is detectable, but it's not really common sense, and I think we need to have some clarification or expectation that it may be tied into healthy or unhealthy conditions maybe at the property line, for example, as opposed to even further away.

Ms. Feeney Roser: I guess our thought process was that if it was detectable then they would have to come before Council for a special use permit and prove that it was healthy or not unhealthy. That's the point, right? If a normal person with normal smell, seeing, hearing can hear it or detect it at the property line then it is not a no impact. So, therefore, you have to go through a process and meet the criteria that it doesn't adversely affect the community. So, I'm thinking if they could say that their emission was healthful, that it was a healthy thing, they could make that claim to Council.

Mr. Cronin: It's not whether it's healthy or not, it's whether it is unhealthy, whatever it might be.

Ms. Feeney Roser: The onus would be on the applicant to come and prove to us that it was not an unhealthy odor or emission.

Mr. Hegedus: A couple of thoughts and then I'm going to loop back around because I think I am a little clearer about the problem I was having earlier. I would like a little more consideration around pollution or air pollution, particularly in the definition of the

no impact piece. So, personally, I'm not ready to approve something tonight. I'm not going to make a motion to do that because I think there are more things for us to think about. So, that would be one. The 300 feet vs. the 1,000 feet on the surface, I like the idea of differentiating the numbers between residential and commercial and industrial use. That seems to make sense but, I'm sure, that when people get out of the heat of tonight and think through that a little bit more, that will be interesting. I also like the recommendation about deleting, to the character, from the definition. With those couple of comments, back to where I was having trouble before. What is bothering me, I think is, in definitions we have criteria for whether something is acceptable or not. To me, that is not the purpose of the definition. The purpose of the definition is to define something and then somewhere else in the Code is the criteria with which we approve or Council approves or doesn't approve. So, we can say, here's a no impact accessory building or no impact accessory use because it meets these things; no noise, no smoke, no pollution, no whatever, and then anything that doesn't meet that is accessory use or accessory use with impact, or something, and then somewhere else in the Code it says now here is the standard by which we judge whether this accessory use is going to be allowed or not. So, in 32-53, potentially, there could be criteria added that says within a 1,000 feet such and such happens or the special use permit approval that we talked about before those criteria are used to make a judgement but the part about excessive noise, maybe that is written into 32-53. The problem with all of this is that we will never, ever get to a point where it's so cut and dry that interpretation is not required. The definitions of special use and how to approve special use are not required judgement. The word excessive requires judgement and so there will have to be criteria established and public input and then reasonable people making reasonable judgements, expressing why they are making those reasonable judgements and then allowing that to happen. We will never get to the point where we have covered all the bases. Anyway, that is where I am coming from with my thinking. I think we might want to go back and take a look at either the alternative wordings or the definitions themselves, maybe pull the acceptance criteria out of definitions and stick that somewhere else in the Code. That's just a thought. So, that explains why I was getting hung up before.

Mr. Hurd: I was going to second Andy's comment. I do feel, both, I think, from the comments here and from myself that 300 feet makes sense in a residential area and I'm not completely convinced that 1,000 feet is a logical number. It is a round number, but I am not sure if it has a basis in a reality that reflects the City. We need to find a number that sort of says, around this industrial zone there is a sufficient boundary to incorporate essentially neighboring residential areas because they are the ones that are going to mostly be affected by those impacts. So, I don't know what that scale would be for our city. What is an appropriate distance? But, I do feel that you can separate them out. If I am trying to put an impact use in my residence, it really is the 300 feet around me that is going to be affected. Excessive does bother me, but I think if there were something in the definitions or some reference to established standards like DNREC or local things or just to say it has to comply with all local, state and federal regulations. The thing that I have a concern about being part of the building trades and such, people can say, I'm going to do this work, I'm going to muffle it, and the engineers say it is not going to generate more than this many decibels, and then they get it up and running and it is more. What is our recourse for that? I think I would like to see something in there where we could say it is conditional upon operation for a certain period of time or that we have a way to come back and say you've still got to work to get it down to the level we agreed to. That is a little more Council's problem.

Mr. Hegedus: I would like to commend the public for their thoughtful comments and input. I was not at the last meeting but in reading everything that was here and my colleagues, I was very impressed with the level of discussion that went on and I was also very impressed with the Planning and Development Department in their thoughtful approach to laying it all out. So, I just wanted to publicly commend everybody for all the hard work and thought that has gone into this.

Mr. Silverman: Particularly the objectivity looking at this as a present and future issue and how do we not revisit the problems we have had in the past. Along with my colleagues, I am not ready to vote on these proposals tonight.

Ms. Miranda Wilson: District 4, 329 Orchard Road. I am just curious whether as a Commission have discussed creating some sort of data set for us. I think one of the things that came out really clearly during the TDC and power plant conversations is that as a community we don't necessarily know where we are in terms of air pollution or noise or any number of things. And, I am just curious whether that has ever come up with you all. Has there been any interest in figuring out where our baseline is because it does seem as if one of the things that I hear you struggling with is trying to figure out how we know if something is excessive. At what point does something become excessive? But, if we don't know what noise levels are generated now in various parts of the City or if we don't know what the air quality is like in this section or this district then it becomes really, really hard to decide what is excessive and what isn't. The reason I am thinking about this is my hometown in Minnesota just installed for the city and the county air monitoring devices that run 24/7 all year long because there was this issue with increased air pollution being generated by local industry and it has made a world of difference just in terms of how people understand what is a problem and what isn't a problem. I'm just wondering if it has ever come up. It really is just a question. Has it?

Mr. Nick Wasilewski: I live in District 3 and I have just celebrated my 30th anniversary of living in the same house in Newark. I live in Binns development. I know that you have a really difficult job and we appreciate your thoughtful attention and it is very complicated. There have been issues of pollution, of distances, of definitions. And with that in mind, I would like to tell you a story. When things were really heating up with the power plant a year ago December, I was at a dinner party and by chance I sat across the table from an environmental engineer and he doesn't live around here. We were talking about the power plant issue and he said what you need to do is you need to have an air dispersion modeling study done. I said that sounds pretty cool, how much is that? He said \$10 or \$20,000. Concurrent with that, my son just graduated from the University of Delaware last May with a degree in environmental engineering and one of his senior projects was to do an air dispersion modeling study of the power plant. All the data they gathered came from the air quality permit which was filed with DNREC. Now, these are seniors in college but, obviously, they have a professor and mentor who is showing them what to do with this air dispersions study. My house is 1,500 ft. from the property line of the area of the STAR Campus where the power plant was being built, approximately 2,000 ft. from where the stack would be. When they did the air dispersion modeling at the University, he came to me and he said Dad, you are at ground zero. The different pollutants that are emitted like nitrogen oxide and ammonia, pollution 2.5 micron, 10 micron. They all disperse differently depending upon their weight, depending upon the direction the wind blows and how fast the wind blows, but under certain conditions like low wind conditions where I live there was more pollutants than people closer to the power plant. So, the issue of 1,000 feet, which is an arbitrary number, may not be a valid number. The surrounding area could be more than a 1,000 feet. So, thank you for your attention. I hope that the story would help you in making decisions.

Ms. Feeney Roser: Do you want me to respond? My response is, I do not believe that we've done any air monitoring. I know that we have been talking about doing a noise study, but I would imagine the two Council members here can speak to that more succinctly than I could, but I don't think we have done any baseline or air dispersion modeling. Heather may know.

Ms. Heather Dunigan: 422 Orchard Road. There are a number of air quality monitoring stations that DNREC has installed throughout New Castle County. There are none in Newark. When the data center was before us, a citizen put in a request to get one installed in Newark. That hasn't happened but I think it might be helpful to have an official request from the City of Newark to DNREC to install one within municipal Newark.

Mr. Silverman: We opened with Dr. Morgan and we will close out with Dr. Morgan.

Dr. Morgan: Since DNREC has been mentioned a couple of times, I just want to say that you can't rely on DNREC to enforce anything, even if they want to. All you have to do is look at what happened with the Peninsula Composting Facility on the outskirts of Wilmington and it took 18 legislators to pressure DNREC to finally start moving on

shutting down that facility which was stinking up the area for a couple of miles in each direction. DNREC sets minimal standards, but I think the City of Newark needs to set higher standards, particularly in residential areas. Thank you.

Mr. Silverman: Back to the Commissioners. Where would we like to go from here? As I started to comment earlier, I am not ready to make a decision on the two proposals tonight. A lot of good information came out. I have developed some of my own questions. Some are very practical like on this notification, who pays for it? Who goes out and finds a 1,000, 2,000, 3,000 mailing addresses and mails them out at 50 cents apiece. Is that the applicant or is that the City who verifies the address? Just some of the nuts and bolts. Sometimes I get into the weeds. Then, also, we talked about odors. I've seen the term noxious odors used. I was out this afternoon and somebody was barbequing in my neighborhood. That whetted my appetite for dinner. But, when something happens in the sulfur unit at the refinery along the Delaware and the wind is blowing just right, I don't like my eyes watering and my throat burning here in Newark, speaking of distance from fallout. So, some of this is very difficult to work with and as was said here at the table, what looks good on paper and what gets built doesn't necessarily produce the kind of product we would like to see in the end, and I don't know how we address those issues.

Ms. Feeney Roser: May I just say that I don't think there was anything that we were proposing tonight that was going to change the notification process. These requirements are in different sections of the Code. This was really just to define "surrounding area" and as impacted area. Council may, if we determine a distance that the notification procedures are done to that distance, but at this point we weren't proposing changing that. It was still 300 feet for those sections of the Code.

Mr. Silverman: I understand that.

Mr. Jim McKelvey: Winslow Road. It just occurred as you were saying that, Maureen, about the notification going out and this number has a use in that way. You notify 300 feet or you notify 1,000 feet, but if I understand it rightly, it is also being used when it comes to the Board of Adjustment or judicial type venues that it defines standing. I would not like to be the man who's at ground zero and find myself not having standing. Can we solve that?

Mr. Silverman: That is one of the questions I had and that needs to go back to the legal people.

Mr. McKelvey: I hope you will.

Mr. Silverman: Someone whose children suffer from asthma and they are the next street over outside whatever the number is.

Mr. McKelvey: Standing would be my issue. I would like to have standing regardless of whether I got notified.

Mr. Silverman: That is going to be a question for the lawyers.

Ms. Dobronovskaya: Surrounding area is just a territory and just keeping it as a territory makes sense, but keeping a neighborhood is necessary in these definitions because it defines people, community and even closer than just community or citizens of Newark so I think we need both. Thank you.

Mr. Mark Morehead: Mark Morehead, District 1. I would like to echo Jim McKelvey's comment. I think the distance is possibly inappropriate. If you are affected, you should have standing and we need to figure that piece out because, like Nick, he is 2,000 feet away. Like we talked about at the previous meeting, depending on how high the stack is if you are determining where that fallout is for the particular components that are dropping. So, to say 300 feet or 1,000 feet doesn't take into account whether or not you deserve standing based on the affect and whether or not you are actually affected and

whether you are impacted. So, I would ask you to consider that very, very carefully without making any recommendations at all. It is a request.

Mr. Silverman: I am trying not to let myself be influenced by a several hundred foot smokestack. I don't think we are going to see a lot of those coming before the Board in the near future, but we are going to see more fast food places and other kinds of uses that affect beyond the property lines, particularly with their cooking.

Mr. Morehead: I had to chuckle when you were talking about the barbeque because I have friends that are vegetarian that don't want anything to do with that smell.

Mr. Silverman: This issue of standing, the Delaware law school could probably keep us here for a long time describing how the courts look at standing.

Ms. Feeney Roser: I don't want to call you out Sherry, but I know that that was an issue that was brought up to the complaint that you brought before the Board of Adjustment. Right? Can you help clarify what we mean by standing as opposed to being affected and being able to go to a Council meeting and say I oppose the power plant, for example?

Ms. Sherry Hoffman: As I am sitting there, I am trying to remember. My memory isn't that great because I'm old, but my sense of standing is that if it is somebody that is affected by something different from the entire community. If what is affecting you is the same as affects everybody else then you don't generally have standing, but if you are affected negatively more than somebody else then I think you may have standing, but in certain cases and I'm not even sure I can remember the argument I made about standing and I am certainly no expert on zoning, but I do remember reading a section that spoke to the issue of in a zoning decision who has standing to require a super majority in appealing a zoning decision? And, that super majority would have been somebody who was within a certain number of feet. It was a very confusing ordinance. I don't remember where it was but it spoke to a distance between, I think, the middle of a road. I was having a lot of trouble trying to figure out where to start counting the number of feet to determine who has the standing to require a super majority. But, I think that is something different than standing to just bring an action because you are affected differently than someone else. Having said that, talk to your attorney about that because I am sure he has looked at it in great detail. If I am wrong, it won't be the first time.

Ms. Feeney Roser: I appreciate the attempt.

Mr. Edgar Johnson: I am concerned a little bit about the number of people who have talked about the term excessive and wanting to clarify it. Andy has said that a lot of things are going to require judgement and I don't want to tie our hands by defining excessive. I think about Judge Blackman on the Supreme Court when asked to define obscene he said, I don't know what the definition of obscene is but I know it when I see it. I think everybody in this room would know what excessive pollution is or excessive odor or excessive noise. Just as Will said, don't we have rules and limits on noise and so forth already established at the property line? So, I don't want to get so narrow that we define excessive that ten years from now that definition is thrown back in our face because we defined it so narrowly. So, I would just like to say I'm not in favor of trying to bore down and define what excessive is. I think we all know it when we see it.

Mr. Hegedus: We are in this space of ideas keep coming to us, right? There was a comment made 20 minutes ago about pollution and isn't that the State looking at pollution rather than here in the Planning Department, so that tied in with my thinking about moving acceptance criteria out of the definitions into another section. It could be in that other section, one of the acceptance criteria that makes sure that something isn't excessive is that it passes other regulatory hurdles that are there and so if the pollution passes DNREC, then that would say it is not excessive. Conceptually, if there are other regulations that other departments or organizations have set that could be a standard that is used to determine whether something is excessive or not and then provide that to City Council for their approval or in terms of giving us teeth to our Code that could say, if it doesn't pass that definition then, therefore it is excessive and we can revoke our approval,

or something like that. Just a random thought that came in for further consideration between now and the next time this comes back.

Mr. Hurd: I have one thing to add. I'm realizing sitting here that a lot of the conversation around the definition of surrounding area is being tied to our idea about standing for the Board of Adjustment. And, I think we are recognizing that a 1,000 feet is not big enough, but the City of Newark maybe is a bigger size. It feels that we should find a way to take the definition for who has standing to bring something to the Board of Adjustment out of the wording of surrounding area because once we said it cannot generate smoke, noise, dust beyond the property line. Once we've set that criteria, that minimum, it goes to Council whether it is past the property line. It doesn't matter that it is 1,000 feet, it's gone past the property line, it has triggered that minimum definition, Council has it. It is just that separate case of if someone wants to take a case to the Board of Adjustment of have legal standing, can we look at a way to pull that definition out or find another way to codify that now that we recognize that the definition of neighborhood isn't adequate for the legal basis. I think we can just not even touch distances and surrounding area and just say, if your accessory use emits beyond your property line – boom – you have triggered it and we are done. There is no distance attached to that any more.

Mr. Silverman: That's for standing, how about notification?

Mr. Hurd: I think notification stays 300 feet or 1,000 feet.

Mr. Silverman: I'm going to try to bring this to a conclusion. I get the feeling that the Commissioners are not prepared to vote on the two ordinances as presented to us even with some modest modifications. What I would like to do is do as we did in the last meeting, ask the Land Use Department and professional staff to digest our discussion, the points that were raised by the public and present us with another iteration of the proposed ordinances for "accessory use" and "neighborhood." Is that a general consensus?

Ms. Feeney Roser: May I just say that we are happy to do that and I think we were provided with some good information tonight. I'm just not sure that we are going to be able to be prepared for your next meeting with this because there are other projects coming. There are at least four that you will be looking at next month. But, if we can, we certainly will.

Mr. Silverman: If we can hold this as almost an exclusive discussion so we can invest our time and the public's time in a full discussion. After dealing with several properties, it is very hard to concentrate on some of the abstracts we are talking about.

Ms. Feeney Roser: We definitely will work on it and then at the next meeting if we are not ready to talk about it, I can at least give you an update on when you can expect it.

Mr. Silverman: Again, to my fellow Commissioners, would we like to have legal counsel here from the City to give us some more informed information on some of these issues? Does it make a difference at this point?

Mr. Hegedus: I actually do like that idea, not for the four projects but for when this comes back up again because if we can get one or two questions resolved in discussion at the table with counsel and then that satisfies us enough to approve the recommendation going forward then it doesn't delay it for another month. So, the cost to the City to have the Solicitor here for one meeting, I don't think is that large. Personally, I like the idea but I defer to the judgement of the group.

Mr. Silverman: Consensus on that or shall we put it in the form of a motion?

MOTION BY HEGEDUS, SECONDED BY HURD THAT AT THE NEXT MEETING WHERE WE TALK ABOUT ACCESSORY USE AND NEIGHBORHOOD THAT WE HAVE THE SOLICITOR JOIN US.

Mr. Silverman: It has been moved and seconded that we request that the City Solicitor be present at the next session where we consider accessory uses and neighborhood. Is there any discussion? All those in favor signify by raise of hand, Aye. All those signify by raise of hand, NAY. Motion passes. Are there any other comments from the table?

VOTE: 5-1

AYE: HEGEDUS, HURD, JOHNSON, SILVERMAN, STOZEK

NAY: CRONIN

ABSENT: MCINTOSH

MOTION PASSED.

There being no further business, the Planning Commission adjourned.

Respectfully Submitted,

Elizabeth Dowell
Secretary, Planning Commission

**REMARKS TO THE PLANNING COMMISSION ON DEFINITIONS OF
“ACCESSORY USE” AND “NEIGHBORHOOD” John Morgan (District 1) April
7, 2015**

I'd like to begin by expressing my appreciation to Maureen Feeney Roser and Mike Fortner for investing many dozens of hours in considering various definitions of “accessory use” and “neighborhood”, and also to the members of the Planning Commission for taking up these complex issues again tonight after their last meeting on March 3. I regret that I was unable to attend your last meeting because I was then suffering from not only a recently broken ankle but also a very bad cold, and the weather was very bad, which also resulted in a very low turnout by members of the general public.

I have listened to the audio and read the draft minutes of your meeting on March 3. Mike Fortner did a very good job of describing several possible definitions of “accessory use” and “neighborhood” and their advantages and disadvantages, so I don't need to rehash what he already said at that meeting. Instead, I would now like to focus on the two decisions by the Delaware Supreme Court in 2010 which have profoundly altered how zoning laws can be administered and enforced by municipalities in our state, and which necessitate removing in the very near future any ambiguity or other vagueness from the definitions of “accessory use” and “neighborhood” in our city's zoning code. These two Delaware Supreme Court decisions played a crucial role in Max Walton's memo of September 9, 2013, and in his written and oral submissions to the Board of Adjustment in March 2014 concerning “accessory use” and “neighborhood”.

The first of these decisions by the Delaware Supreme Court involved the case of Chase Alexa LLC vs. the Kent County Levy Court, which concerned a dispute over zoning. You can read it in full by clicking on the following link: <http://caselaw.findlaw.com/de-supreme-court/1523234.html>

I draw your attention to the following statement by the Delaware Supreme Court: “If there are two reasonable interpretations of the statute, the interpretation that favors the landowner controls.”

The second of these decisions involved the case of Dewey Beach Enterprises Inc. vs. the Board of Adjustment of the Town of Dewey Beach, which concerned another dispute over zoning. You can read it by clicking on the following link:

<http://courts.delaware.gov/OPINIONS/download.aspx?ID=141450>

In overturning a Superior Court ruling which had affirmed a decision by Dewey Beach's Board of Adjustment, the Delaware Supreme Court made an even stronger concluding statement on the last page of its unanimous ruling:

“Finally, to the extent that there is any doubt as to the correct interpretation, that doubt must be resolved in favor of the landowner.”

The phrase “any doubt” is far-reaching. Not just “any reasonable doubt”; “any doubt”. According to well-established principles of legal interpretation, if the Delaware Supreme Court had meant “any reasonable doubt”, they would have used this more specific phrase, not just “any doubt”. This emphasizes the need for absolutely clear definitions and other language in our city's zoning code, to avoid having to spend millions of dollars of taxpayers' money on a future legal case which would require asking the Delaware Supreme Court to modify its recent unanimous decision.

For example, consider the phrase “adjacent property”, which might occur in a definition of “neighborhood”. The Park & Shop Shopping Center, where it was proposed two years ago to build a Wawa with several gasoline pumps, is separated from the houses directly across Apple Road by a public street about 50 feet wide. Is this shopping center “adjacent” to these residential properties? Arguably not, since it is separated from them by public property. Are these houses in the same neighborhood as this shopping center? Arguably not, since they are in different zoning districts, as Max Walton argued for the City at the Board of Adjustment meeting last year. And if there is any doubt at all, “that doubt must be resolved in favor of the landowner”, according to this unanimous recent decision by the Delaware Supreme Court.

That's why we need a definition of “neighborhood” or “surrounding area” which includes all other properties within a distance of N feet, where N is a specific number, such as 300 feet, or even better, 1000 feet. Of course, such a distance is arbitrary, but it has the crucial advantage of being absolutely unambiguous. Phrases such as “forms a community”, or “constructed in a similar style”, or “sharing a common street grid”, or

“delineated by streets or other physical features”, which occur in the zoning codes of many other towns in many other states, are very vague, and under Delaware law must now be interpreted in a manner most favorable to the landowner, who may not even be a resident of Newark in the case of commercial or industrial properties which might have adverse impacts on our city’s long-time residents.

With these points in mind, I’d now like to turn to the document before you this evening with 4 options for redefining “accessory use” and 3 options for adding definitions of “neighborhood” and “surrounding area”.

Option 1 for “accessory use” is unsatisfactory because it includes the vague phrase “customarily incidental and subordinate”, which occasioned much unresolved debate last year at the Board of Adjustment meeting, and also because the verb “impair” is vague and hence open to various interpretations.

Option 2 is also unsatisfactory because it includes the adjective “excessive”, which, like beauty, is in the eye of the beholder, or in the case of noise, in the ear of the listener. You may think your son’s music is excessively loud, but he doesn’t. In a zoning case, under current Delaware law, the landowner’s interpretation of “excessive noise” shall prevail.

Option 3, which focuses on placing restrictions on fossil-fuel burning power plants, might prevent a repetition of the experience we had last year, but it would do nothing to prevent other accessory uses which could generate offensive levels of noise or dust or odors up to 24 hours a day. For example, large wind turbines generate low-frequency noise which is audible up to a mile away. So would a helicopter pad on the STAR Campus, which is a customary accessory use for a medical center. At the previous meeting of the Planning Commission, one member opined that if Gov. Markell can land there in a helicopter, so should anybody else. I tend to agree, but only if the landings occur during the day rather than at night, when the noise from helicopters would disturb the sleep of at least 10,000 residents north and south of the STAR Campus. If restrictions on times are to be imposed, the use cannot be an unlimited “by right” accessory use, but will have to be a “conditional accessory use” which will require a special use permit approved by Council.

Option 4, which creates the new category of “no impact accessory uses”, similar to the recently created category of “no impact home occupations” in residential districts, is by far the best choice. I commend Maureen and Mike for formulating this definition, which allows accessory uses causing impacts outside their own property to be considered for a special use permit by Council. For improving Option 4 I have only two suggestions. The first is to change “at the property line” to “outside the property line”, since it might be difficult to make measurements of noise or odor or dust exactly at the property line. The other is to include detectible air pollution in the list of things a “no impact accessory use” cannot generate outside the given property. With these two small but significant modifications, I wholeheartedly endorse the belief of the Planning and Development Department that Option 4 is the best way to proceed.

Moving now to the definitions of “neighborhood” and “surrounding area”, I concur with the contention of the Planning and Development Department that the best way forward is Option 1, which involves replacing most occurrences of “neighborhood” in our city’s zoning code with “surrounding area”, with the latter defined to include all other properties within 1000 feet. Anything else would be much more complicated and probably ineffective.

In closing, I’d like to emphasize how dangerous it is to continue to have in our city’s zoning code a vague definition of “accessory use”. Principal uses, which are permitted by right, are listed explicitly in our city’s code, and hence have been pondered beforehand, so there should be no surprises. Accessory uses, which also are permitted by right, are not listed explicitly, so there is great potential for sudden surprises, as happened in 2013. The best way to avoid future surprises is to require an accessory use which generates detectible adverse impacts outside the given property to be brought before Council for a special use permit. That should not be unduly burdensome for any commercial or industrial project.