CITY OF NEWARK
DELAWARE

PLANNING COMMISSION
MEETING

June 2, 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 Frank McIntosh Robert Stozek
Staff Present:	Maureen Feeney Roser, Planning and Development Director Mike Fortner, Development Manager
City Officials Present:	Mark Morehead, Councilman, District 1 Robert Gifford, Councilman, District 3

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

1. THE MINUTES OF THE MAY 5, 2015 PLANNING COMMISSION MEETING.

   Mr. Alan Silverman: The minutes have been distributed to the Commissioners electronically and I believe on paper. They have also been posted on the internet also. Are there any additions or corrections?

   Mr. Bob Cronin: I do have one correction. On page 41, going down from the top in the first paragraph, the very first word on the left where it says improve, I believe, should be approve. I was the one quoted, so I think I can safely say that. With that change, I'm okay.

   Mr. Silverman: Since we have a change, I'm going to ask for a formal accepting of the minutes. The minutes stand approved as amended.

   One other administrative remark. We do have request forms available for those of you who are not used to using them. If you would like to speak, we would like to have you fill out a request form and bring it up to the front and that way we can assure that everyone has the opportunity to speak. They will be taken in the order that they were presented to the front table.

2. CONSIDERATION OF AMENDMENTS TO THE ZONING CODE REGARDING ACCESSORY USES AND THE DEFINITION OF NEIGHBORHOOD.

   Mr. Silverman: This is the third public session we've had on this particular topic. We have met two times previously in, I believe, March and April and this is a continuation of that discussion. In each meeting we have been whittling down ideas and recommendations, involving both public and staff. Michael, if you would proceed.

[Secretary's Note: Mr. Fortner, Commissioners and public referred to the PowerPoint presentation that Mr. Fortner brought for his presentation to the Planning Commission].

Mr. Michael Fortner: At the last meeting, we presented a lot of information and potential definitions but we focused on this definition at the April 7th meeting. With this definition, we created something we called a "no impact accessory use" and a "no impact accessory building" to go along with accessory use. We heard from the public. We discussed this option a lot. The key feature of the no impact is that it has no impact – no smoke, no dust, no noise. We heard from the public and members of the Planning Commission. We discussed surrounding area and discussed surrounding area in place of neighborhood for either 300 ft. or 1,000 ft. These two numbers were the numbers most discussed, but instead of neighborhood, we have something called "surrounding area" definition.

For accessory use, we had no noise, no smoke, and no dust. It was offered that we should have no pollution as part of that. So, we should add that because certain things have pollution but they don't cause any noise or dust or anything and we wanted to capture that.

Also, the word "excessive" was a very vague word and we should have something that was more definitive.

Character of the surrounding area was also a part of that. The word "character" was discussed as too vague and not specific enough, and also, "surrounding area," we had a lot of discussion about whether 300 ft. was far enough or 1,000 ft. First of all, 300 ft. is established in Zoning Code ordinances and we thought maybe there would be an unintended consequence if we extended 300 ft. because 300 ft. is such a commonly used measurement. The other angle was that 300 ft. or even 1,000 ft. wasn't enough. Something like the power plant affected a very broad range and some things may impact much further than 1,000 ft. So, we had arguments for and against on that.

Another recommendation was structural changes. First of all, we were doing too much defining in the definitions, too much regulation within the definitions. Maybe that would be better spaced out. These were kind of long convoluted definitions and also the structure wasn't logical. Maybe no impact is really a subsection of an accessory use. So, this is where we got to this definition. This first thing you will see is that there are six definitions rather than four, which we were a little reluctant to do, but we think that the result of it is that even though there are more definitions, it makes it more logical and more concise. To keep them all together we put accessory first so it stays in the definitions all together. If you add no impact accessory use, then it would go under N. So, this keeps them all together. We have accessory use no impact, accessory use with impact. We subdivide it. You have accessory uses which are standard definitions of what accessory use would be. And, then the creative part comes, accessory use – no impact, and accessory building with impact. Those are two subsections under accessory buildings or accessory use. Accessory use – no impact – creates no noise, no dust, no pollution, and if it does create something outside of the parcel, then it becomes something with impact and automatically goes for a special use permit. Also, we had in the original definition the words "at the property line." It is not always practical to get a measurement at the property line, so it is outside the property line. So, we changed that. We also added the word "pollution" to accessory building – no impact and accessory use – no impact.

And then, "shall not generate conditions detrimental . . ." Previously, we said it can't be detrimental to the character of the neighborhood or surrounding area. So, we took out the word character all together, and we just said, "It cannot generate conditions detrimental to areas outside of the property line." So, in that case we got rid of not only neighborhood, but we also don't need the definition for surrounding area. We don't have to worry about defining it as 300 ft. or 1,000 ft. If a no impact accessory use or building impacts outside of the property line then it's no longer a no impact accessory use. It is an accessory use with an impact and it needs to go to Council. It

is not that it is prohibited; it has to have a public review and go to Council. So, the proposed change is to take out the definition or delete the definitions of accessory use and accessory building as currently in the Zoning Code and replace it with these six definitions – "accessory building, accessory building – no impact, accessory building with impact, accessory use, accessory use – no impact, accessory use with impact." We would have those and they would be all together in Section 32-4 of the Zoning Code.

The next part is where accessory use is defined in Section A (permitted uses) of each of these zoning districts except UN. Where it is defined, we take out accessory use and replace with accessory use – no impact, accessory building – no impact, instead of just accessory use. In Section B of the codes, that is where it needs a special use permit. We would add accessory use with impact and accessory buildings with impact, and those would be conditional uses and they would have to go to Council for a special use permit. Accessory use with impact, the definition is that it doesn't meet the requirements of a no impact accessory use. So, it would go before Council and the public for a special use permit.

Under the proposed ordinance change, we would delete in its entirety Code Section 32-53. That is one of the sections that had a lot of discussion during the Board of Adjustment hearing on the data center because it had the words, "shall not impair the neighborhood." What is the definition of a neighborhood? So, we delete that section all together. We don't need that at all. It also improves the Code because we had in our definitions the definition of accessory use and accessory building in Section 4 and then we go to Section 3 where there is a little more information on what the requirements are for an accessory use. So, we were able to delete that. All the pertinent information is incorporated in the definitions and we don't need anything in here anymore. So, that streamlines the definitions and our Code as well.

We don't use the word neighborhood or surrounding areas in the definition for accessory use at all. In terms of accessory use, we don't need a definition of neighborhood and we don't need a definition of a surrounding area anymore because we have covered it and we have made it very concise. If it is outside the property line, if it has an impact then it is an accessory use with an impact. It keeps inside the property line, so we have defined it. So, we don't need neighborhood and we need surrounding area. But, there are some areas in the Code where we may want to change the word neighborhood to surrounding area.

This is a residential area – RS zoning – the little yellow spot there is a residential property zoned RS, a 9,000 sq. ft. minimum lot size. The first circle around it is a 300 ft. buffer from the property line. So, that is how much 300 ft. would be from the property line. And, then the second dot that looks greyish on this is 1,000 ft. from the property line. And, then finally, for fun, we put 2,000 ft. (the pinkish circle around that). That is where 2,000 ft. from the property line would spread.

This is a commercial district. This is downtown. The spot is Walgreen's. 300 ft. covers in total approximately a city block. When you get to 1,000 ft. you get pretty much the whole central business district on E. Main Street – the core part of it – and then when you get to 2,000 ft., you are extending to all parts of the town beyond the central business district.

This is an industrial site. This parcel happens to be Bloom. It is on the STAR Campus and it has a defined property line as opposed to the rest of the STAR Campus that really didn't have a defined property line yet. So, a hypothetical situation where they are doing something that would trigger a special use permit. There is the pink area that is 300 feet from the property line and then the greyish area is 1,000 feet and then 2,000 feet. Those are the three areas I looked at in context to the City.

What we are looking for is neighborhood. Again, this is independent of accessory use. The accessory use definition is defined without needing the word for neighborhood or surrounding areas, but there are some areas where we might want to change it. Specifically, we may want to change it when it comes to impacted areas.

So, as far as strategy, first of all, we keep the definition of neighborhood that comes from Webster's Unabridged Dictionary. So, we keep that for neighborhood. Neighborhood appears in the Zoning Code a lot but it is like neighborhood shopping area, things like that. We thought it only needed to be changed in places where we were talking about impacted area. So, we would add a definition of surrounding area and what staff is proposing is properties adjacent and extending 300 feet in any direction of a property in question for this area. There are three or four ordinances where we would change it. So, replace neighborhood with surrounding area in Section 32-11, the RM district. This is a case where someone is in RM, which is our garden apartment zoning, but there are also a lot of single family houses zoned RM. Someone wants to take a large single family house and turn it into more than one dwelling unit, which is permitted with a special use permit. It would go to Council. So, in that definition it says will not impair the character of the neighborhood. We recommend changing neighborhood to surrounding area. So, it would read as below. Again, it's already going to need a special use permit. It is in a residential area. 300 feet would be equivalent to three properties all the way around. 1,000 feet under residential area would be probably about ten properties all the way around.

The next area is MOR, which is office manufacturing and industrial zoning. This only pertains to landscaping and in Code Section D, where it speaks to area requirements and setbacks. It says, the area requirement in open areas should be landscaped to maintain the character of the surrounding neighborhood. So, we are recommending to delete the word neighborhood and put in surrounding area. So, a building or structure shall be located on a lot should be landscaped to maintain the character of the surrounding areas. What this is saying is that landscaping should look like the surrounding area, which we are recommending as 300 feet in all directions from the property line.

Next refers to nonconforming uses. If you have a use or a building that is nonconforming, you are allowed to increase it by a certain percentage without going back to the Board of Adjustment. In the criteria, it cannot affect the character of the neighborhood. So, we are recommending this be replaced with surrounding area, in that a use or building should not impair the value of the adjoining property or adversely affect the character of the surrounding area. Character is a vague word in the accessory use, but we feel it is appropriate to keep the word "character" because the intention is to keep the character of the area in this kind of case if you are changing a building.

The last thing is not so much changing the word, we are taking the word out all-together. This is a very common section, 32-78which details special use permit. It is related to accessory use in that anything accessory use with an impact would have to go to Council for a special use permit. Section 32-78 has neighborhood in it as well. So, what we propose instead of replacing it with surrounding area is striking it out all-together. In other words, if you strike "in the neighborhood," the special use permit section would indicate that anything that would adversely affect the health or safety of persons or be detrimental to the public welfare or injurious to the property or improvements would not be permitted. Again, we take out the last phase and just keep it a simple definitive statement.

That completes the recommendations from staff and we will open it up to any comments the Planning Commission might have.

Mr. Silverman: Let's start with the Commissioners. Do any of the Commissioners have any comments?

Mr. Willard Hurd: My only comment is that that was an excellent job. I think you have done a really good job of pulling together all the comments, even ones that seem to go in different directions. All the questions I had as I was reading it I found got answered by recommendations later. So, kudos to everybody on that one.

Mr. Bob Cronin: When I look at where we have been on these subject matters and where we might go, I guess the issues are a matter of degree in terms of accessory use

and/or neighborhood or surrounding area and distance and so forth. And you take the matter of degree and in the past we have looked at the wisdom of the process being the Commission hearings, the public input, the Commissioners recommending to Council, the wisdom of the Council members, and I don't really see where the past process has really done the City wrong in terms of the final results. So, I see impact, no impact, subdivisions whether it is residential or commercial and I think we tend to get down to minutia and it becomes more cumbersome, more restrictive for the people that are in these positions to try to do their very best for the community to have any flexibility or apply the collective wisdom of the bodies in the best interest of the City. So, it is kind of a long way of saying, if it's not broken, don't fix it. And, that is my leanings at the moment. I'm still open to more discussion and input from members of the public and other commissioners, but you asked for some comments and those are my early thoughts.

Mr. Hegedus: I'm a meeting behind everybody because I missed the first time you talked about all this. So, bear with me. I'm not sure, Mike if you are the best or Maureen to answer some of these.

Ms. Feeney Roser: We are a team.

Mr. Hegedus: We have two definitions - accessory use and accessory building, right? Why do we need the two separate definitions? Why isn't accessory use sort of encompass accessory building within it? Does that make sense? Like a building just sitting there doesn't really have an impact unless you are actually using the building for something and then it has an impact. Why are there two definitions?

Mr. Fortner: It is in the Code. Accessory building and accessory use are in our Code and I wrestled with it a little bit myself. Do you need an accessory building because it is usually the use of the building not so much the building that is accessory. But, accessory buildings are defined. There is a use. A detached shed, the shed is the accessory building but the use of it is for storage. I guess our Code finds it valuable to distinguish the two. Sometimes there may be things where you want to distinguish it. The same with a garage. The garage is the accessory building but the use of it is for storage and parking of your car.

Ms. Feeney Roser: Or a use may change.

Mr. Fortner: It is usually the use that is the problem rather than the actual building. So, we kept that structure for accessory use and accessory building to keep the congruency of them. They should kind of match. They are the same thing, but the difference is, one is the structure and one is the use, but they should have the same kind of logic to them.

Mr. Silverman: Andy, you can have multiple uses in a single structure in a single building. You can have a primary use and a secondary use within a building. That use can be changed. That use could have impact beyond the primary use. It also allows for that secondary use to be located exclusively in its own building. Are you with me on that? I can have a production operation that is highly controlled by automation and have my own computer center in a building. You could use it for anything but right now it is being used to control a production line. So, I have two uses. The production line that is automated is the primary use and the computing operation, which could be a fairly large percentage of square footage would be the accessory use. So, that is why use is in there. Those uses can change.

Mr. Hegedus: What you were saying, Mike, and I think where you got to was, to me it was the use that was really the thing of concern, not so much the structure because use can change. That is why I was a little confused because I thought if we regulate use through the definition of accessory use no impact, accessory use impact and we evaluate accessory use against the special permit, then that encompasses it. So, I am still a little unclear why we need the building piece in there, too.

Mr. Fortner: The building is part of the use. A lot of times the use doesn't happen without the building, they are usually going to be one in the same when they go to Council but to give it that kind of congruency of structure, you need a definition for accessory building. And, it is kind of anticipating unintended things we don't know.

Mr. Hegedus: I saw the parallel structures in here. It just seemed like everywhere you were putting accessory use no impact, you were putting accessory building no impact and they were going together and I didn't know why you could do it with just one and delete the building, because one of the beauties of what you have here is how simple it makes things. So, it just seemed like we could go one more step. It is one thing for consideration.

Mr. Fortner: I think we ought to keep it because it needs to be defined. I would like to have less definitions. Most places it is accessory use and accessory buildings so it keeps it together.

Mr. Silverman: Mr. Herron, as City solicitor, can you comment on this? Do you wish to?

Mr. Bruce Herron: I think both positions make sense. I know that when the Code was originally enacted there was a dichotomy here. So, I know there had to be a reason. I tend to agree with Mike. I don't see a reason not to keep it in here.

Mr. Silverman: Andy, may I piggyback on your comment. I want to confuse the issue even more by adding an additional word, building, use and "structure." Let's use a real world example. Awhile back we had an auto dealership come before us. They had a proposal to put up an antenna that they were going to use as a radio system to connect their various off-site locations. By definition, that structure, that tower is an accessory use, but is not a building. If I run a FEDEX type of operation, a small truck delivery and I have what the military would call a fuel farm on my property, that is an accessory use but it is not a building. It can be a structure. It can have pumps. It can have a cover over it, but it doesn't have any walls windows or doors. So, by putting structure in there, we add another dimension in defining our accessory uses.

Mr. Hegedus: So, that gets back to my point. As I was going through it logically, I didn't see a value in a building or now and a structure in here that wasn't already covered by the limitations around use. I don't want to beat the dead horse. I think that that is something, depending on how we vote and the conversation we have, we can go and ask that to be considered again in the final recommendation.

Mr. Silverman: But, there are also other circumstances where other agencies who have to make decisions about the use will need something physical. They will need a structure, whether it is a building, roof, walls, door, windows or an arrangement of structure material like a radio tower. So, that needs to be defined and actually placed on a plan.

Mr. Hegedus: I just don't know that it has to be placed onto the definition of an accessory building, it could just be used as part of the process to approve the overall site plan, structure, whatever. Let me just keep moving.

Some of these are just editorial notes, too. On page 4 where we talked about it, here is A-G of all the concerns that people put together. Mike you mentioned one, which was don't use the definitions to provide a criteria for acceptability.

Mr. Fortner: It is what is going on, what you are saying from reading the minutes. You thought they were getting too bogged down and putting the kind of regulations in the definition which were more appropriately placed in (inaudible). We do that a little bit if it is simple enough to keep it in the definitions. In this case, I think we can do it simply enough by keeping it in the definitions because it doesn't change in each zoning district. We are able to apply that same definition to all zoning districts. It

seemed appropriate just to keep it together. You read what a no impact accessory use is, that is throughout the Code.

Mr. Hegedus: You said it but you didn't write. It is not in here as a written consideration as you were going through how you restructured the definitions. So, that was just an editorial things.
Mr. Fortner: It is part of the recommendation of changing structure – I think.

Mr. Hegedus: Recommend to make it clearer and better structured. Proposed definitions, going with that comment about definitions not providing the criteria for acceptability, I'm wondering the value of the second sentence under accessory building. "All such accessory buildings shall not generate conditions detrimental to areas outside of the property line." To me the "generate conditions detrimental" that is evaluated by the special use permit. And, the no impact says, "no impact of pollution detectable outside the property line." So, it is already in that and then accessory building with impact says, if it's not that, then it is this. So, it seems like that second sentence is already covered and we can delete it.

Mr. Fortner: It is covered, but this is the most direct way to cover it. If someone wants to understand what accessory use is, they can go to the definitions and they get an idea of what the accessory use is. What you are saying is, well if they go into Section 32-78, Special Use Permit, they can't have anything detrimental, which is true, but it doesn't say anything about not being detrimental to the area, but if you go to the special use permit Section 32-78, there it says it can't be detrimental. It just sort of covers it.

Mr. Hegedus: But, it doesn't. That is the problem because generate conditions detrimental to areas outside of the property line. If I was a lawyer, and there is one next to me, but I might get into this Item C, which says, be in conflict with the purposes of the Comprehensive Development Plan of the City. I could see detrimental being adversely affecting the health or safety of people or be detrimental to the public welfare or injurious, right, but this third one, purposes of the Comprehensive Plan, I don't know that that really fits with will not generate conditions detrimental to areas outside of the property line. So, I think this wording is actually more confusing to have it in than just take it out and have the accessory building with impact get you over to the special use permit, which gives you the clear criteria by which you go. Something else to consider.

So, then we get to the definition of accessory use and now it doesn't just say accessory use but the definition says, "A use customarily incidental and subordinate to the principal use, or building and located on the same lot with such principal use or building. . ." I don't know why the "or building" is in there if we've got a definition of accessory building with the parallel things.

Ms. Feeney Roser: I think that had something to do with the size of the accessory building. Correct me if I'm wrong, Mike, because we have been through this so many times, but I think that what we were saying was you couldn't have a primary building that was much smaller than your accessory building so it says it without actually going into, it couldn't be taller, broader, wider, etc. It was just, is this building subordinate to the primary structure.

Mr. Hurd: That is covered in accessory building definition that it be detached and subordinate to the principal building.

Ms. Feeney Roser: Your suggestion would be to take out, "or building."

Mr. Hegedus: Yes, that was what I was thinking. If you believe you need the building piece as an accessory part, then I would just leave those definitions standing alone for accessory and make use separate without the building piece. And, then again, back to my comment on accessory building, that, "All such accessory uses shall not generate conditions detrimental to areas outside of the property line." That

same sentence there, I would strike from the definition for the same reasons I articulated about the criteria being in the special use piece.

Moving over to page 6, this is just a typo on page 6 that it doesn't say accessory buildings would impact, it just says accessory uses. So, you have it right in the summary, but you don't have it right on the first paragraph on the top of the page, I don't think.
Ms. Feeney Roser: I'm not sure I follow where you are, Andy.

Mr. Hegedus: Page 6, first paragraph.

Ms. Feeney Roser: The first full paragraph.

Mr. Hegedus: No, the one that says ". . .permitted. . . add Accessory uses, with impact to the conditional uses in each zoning district," It should say, ". . .add Accessory Uses, with Impact and Accessory Buildings with Impact. . .", if that is what you want to do and that is what you said in the summary in the back, it just wasn't there.

And, purely as an editorial piece, when I was reading in the flow and it got to saying in the paragraph below that it would be evaluated with special use, it would be nice to say and see the special use definitions changes later in this document just to let people know that there are things coming.

I really like the whole deletion of neighborhood and the idea of surrounding area and I like all the edits you put with surrounding areas in the right places. I was still unsure about the 300 ft. or the 1,000 ft. I was 50/50. I saw your maps. Thank you. Those are great, and based on the maps I would lean towards 1,000 ft., but I would be interested in the views of everybody else up here. The one that tipped me over was the Bloom plot. If you do 300 ft., it doesn't really hit much of anything.

Mr. Fortner: Keep in mind, it doesn't apply to accessory use. It only applies to landscaping.

Mr. Silverman: In industrial areas.

Mr. Fortner: In industrial areas it only applies to landscaping.

Mr. Hegedus: Okay, good point. And one last one, just to throw a little more fuel on the fire because I like that. You have offered two revisions to the special use permit. I agree to the revisions to both A and B on page 10. You are suggesting two revisions to the criteria that we would recommend against and City Council would approve against if there is anything with impact. Right? It is Section 32-78(a)(1) and there are three criteria that people use to determine if something is acceptable. A. Adversely affect the health and safety of persons. And, it used to have and surrounding . . .

Mr. Fortner: Neighborhood.

Mr. Hegedus: And you took all that out, which I think is great. Be detrimental to the public welfare and injurious to property improvements, etc., and you took that out. I think that is great. Here's the thing to look at, C. Be in conflict with the purposes of the Comprehensive Development Plan of the City. I'm not sure "the purposes" is the right word, meaning, I don't know anywhere in the Comprehensive Development Plan where we say, the purposes of this plan other than this plan provides overall what we are going to be doing. I think more this conflict with the goals of the Comprehensive Development Plan, meaning what the Plan is trying to actually achieve for our city rather than, the way this is written with the purposes of the Comprehensive Development Plan. That means why you have a Comprehensive Development Plan rather than the goals that are embodied within the Plan that the Plan is trying to get us to. I would recommend that the purposes be changed to the goals.

Mr. Silverman: Are there any other questions from any other Commissioners?

Mr. Johnson: On Page 7, we got rid of the term "excessive" because we all know what excessive is but we had difficulty defining it and we replaced it with "detectable air pollution." Now you have another word that I think is difficult to define – detectable. What is the definition of detectable?
Mr. Fortner: In the memo it does say air pollution but in the actual definition it just says pollution. If you can detect it with some sort of scientific, it could be a smell, but it could be, I guess, something like radiation that had no smell. You would have to be able to prove that there was something.

Mr. Johnson: So, if I had an instrument that could detect pollution in any form then that would preclude it from having no impact.

Mr. Fortner: Yes, if it is creating a pollution outside the property line.

Mr. Silverman: Who would determine that?

Mr. Fortner: It would be the Planning and Development Department. For most uses it would be obvious, but if there was something like the power plant.

Mr. Silverman: Let's forget the power plant. That is yesterday's battle. Somebody wants to open a restaurant upwind from of my neighborhood and I really don't like the smell of fried chicken 24 hours of day but the prevailing wind comes from that direction.

Mr. Fortner: That's not accessory use. It is a permitted use in a commercial district.

Mr. Silverman: Okay, let's make it an organization that has chicken barbeques every Saturday during the summer to raise funds and they just smell up the world. Who determines that?

Mr. Fortner: Those are events, not so much an accessory use but more of an event and sometimes there are permits if you are going to have a big event. It is not necessarily regulated through this. So, I don't think it would apply here if a church was going to have big cookout.

Mr. Hurd: It seems to me that part of the question is, and it has come up in other things, is it detectable? Let's say, above the background noise because we are doing a project and we got a radon test back and they said basically, this is your accounting which is basically below the level that you can really detect. We can't tell where it is actually coming from, the building or if it is just background noise. It is below the threshold that we can detect it.

Mr. Johnson: But, it says detectable. It doesn't say detectable above the threshold of whatever pollution.

Mr. Hurd: So, I think that detectable needs to be defined or understood better in the Code to say what we are looking for that use is going to create more, not that you can measure it. That's the problem. You have to reference the standard.

Mr. Silverman: Along with that, and I am talking generally, the court cases I have read dealing with land use and impact talk about impact of that particular site or use beyond the general impact that it has on the entire community and that is kind of the thing that Will is getting at. There is going to be something that is going to be background that is going to affect everyone, but the thing that we are looking for is that thing that stands out.

Mr. Fortner: We did explore a definition of excessive that Dr. Morgan provided but when we created this definition with what I think is more clear and crisp, if it generates no smoke, odor, pollution then it is a no impact accessory use.

Mr. Silverman: Is there is an exception for residential uses.

Mr. Fortner: There is an exception for a power generator and residential grills and fireplaces. The power generator is only for emergencies and maintenance and that is in the definition of no impact accessory use. Those are granted. I say, if we even suspect that it is going to create a noise or anything, they have to come in and prove it doesn't create a noise. If we even suspect it is going to create a smell, and if they put it up and it creates a smell, we make the decision that they can't put it up. It is just like a no impact home based business. Their right was to put in an accessory use that has no impact. If someone tells us this is going to have no impact and then they put it up and it does have an impact, then they have to go for a special use permit. It is the same as the no impact home based business.

Mr. Johnson: My concern simply is on the term "detectable" and I think if we have an understanding of what Will said, that there is a baseline for each of the pollutants and if it is detectable above that baseline, then it can't be no impact. But, I'm breathing carbon dioxide right now and if you put something in front of me, you could detect it, am I polluting?

Mr. Silverman: It's normal background.

Mr. Fortner: Yes, it is normal background.

Mr. Johnson: But, when you say it is detectable, I have just detected it. I have an instrument that detects it, therefore, I can't be no impact. So, I think we have to have an understanding that when you talk about detectable, you are talking about the pollutants above some level not above zero.

Mr. Hegedus: Mr. Chairman, I would like to wholehearted agree with Edgar that detectable means that you can discern a change from the background or what has been there before. Radiation naturally occurs – radon. It is naturally around. You pick up a Geiger counter and it is going to click. If you are going to put something up, you have to be able to say that it has more clicks outside the property line than just what you can detect if you picked it up and that thing wasn't there. So, I agree it has to be detectable above background from outside the property line. It seems like we are in violent agreement around that.

Mr. Fortner: I think the definition says that.

Mr. Hegedus: And that's what detectable means to me, is that you can find it above what is occurring today before this thing goes into use. And, worse case, if people aren't sure and we take the conservative approach then you go to do the special use permit and the first thing about the special use permit is that this thing is harmful to public health and safety and if it is just barely over this threshold of detectable, it is not going to be harmful any more than what is already there if you can barely detect the thing anyway, if I am making sense. So, it will get through the special use permit process even if people take a conservative step to go that way.

Mr. Hurd: It was occurring to me as I was thinking about this. I'm thinking about a garage, my garage for instance. When I run my car tools, I create dust and I create noise. If we follow this definition, no one can put up a garage because they are going to create noise and dust at some point. So, there needs to be an understanding of what is an acceptable minimum, and I shudder to say that because that starts meaning that now a no impact has a minimal impact. You see what I am saying? If I say, I'm going to put up a garage, your neighbor could say, hold on, you are going to fix your car in there. That is going to make noise. Boom, your impact, special use. So, I don't know if we need to have a definition that says it would be consistent vs. intermittent vs. normal. I hate to open that can of worms again.

Mr. Fortner: You are opening a can of worms that doesn't need to be opened. We will never get through this with something that is perfect. This is a lot better than we have had. The last one was wide open.

Mr. Hurd: I agree.

Mr. Fortner: You can't say you can't open a swimming pool. Kids are going to play in a swimming pool. The swimming pool has no impact, but the kids swimming in it are going to make noise. This is keeping sheds legal and if something comes up that we suspect could have an impact beyond the property line, you will need a special permit. We can't say, well, you started your car in your garage, so you need a special use permit. That's not going to work.

Mr. Hurd: The issue, I think, is with the word detectable all by itself means I detected it.

Mr. Silverman: Let me throw out an example and see how we all react to it. I have a manufacturing facility and I have air pollution bags that collect dust and they have to be cleaned in a certain manner at a regular interval specified by somebody's code. I have a cleaning facility onsite. I'm a big operation. The economy scale says it is cheaper for me to do it than to contract it. I use a solvent in that cleaning process. That solvent vents. It is an accessory use to my major use. It meets all our accessory criteria. How do we judge that solvent release or any gaseous material that may come off of it? Do we say, if it meets standards acceptable to whatever industry, whatever governmental unit regulates the release of that particular cleaning solvent that if it is below that threshold, it is a non-impact use?

Mr. Fortner: No, it is a non-impact use if it has any impact outside the property line. It doesn't matter what DNREC thinks, it's fine. None of that matters. Don't get too complicated with it. It is pretty simple.

Ms. Feeney Roser: When you go for the special use permit is when it is going to become important to be able to prove that it is not detrimental because it is within the guidelines. You would have to do that in front of Council, but if we can smell a solvent, I think that is pretty clear that it has some impact. I'm more concerned about the starting your car and that kind of thing. I realize we are getting into the weeds with it, but and I hate to say we need a definition of what detectable is or do we need to add some words after detectable, like beyond the norm that would help to address that.

Mr. Johnson: I think I said last time, we all know what excessive is. We know when there is excessive noise or excessive pollution and yet, we felt that wasn't a clear term. All we have to have is an agreement that detectable means above some base line. You don't have to write it in. It is just an agreement. You understand what the definition of detectable is, the minutes of this meeting will be so recorded. Council can then do the same thing and we all have an agreement it is above some baseline, but detectable. There are a lot of pollutants that we can detect that aren't harmful to anyone.

Mr. Stozek: I think there is a need for the changes we are making, and I don't want to go back to the power plant again, except for the fact that one of the reasons we are doing this is to clearly define what gets sent to Council to be approved. Where before, through whatever vagueness there was in the rules or the procedures of how we push things through, things have been approved and granted and Council, the elected officials, did not get to vote on the things that affected a large portion of the populace. I think that is the biggest benefit of this kind of document.

Getting to this whole measurement thing, I guess one of the things I was worried about, and I was trying to think of some situations and I have not come up with them again. If somebody wants to come here and build a business in the town, is this going to somehow be too restrictive to them? If they perceive it as, if anything detectable leaves my building, I can't do it. I think there are acceptable limits. There are noise levels that are 50 decibels, 70 decibels. I don't know if we have to define them here, but I think the City needs to have those somewhere on record. The same with air pollution. If you put in a business that has some sort of backup generator or just a

boiler to run the operation, what is going out the stack, as long as what is going out the stack doesn't exceed, maybe the limit is the clean air limits for various pollutants. That is how we control it. If it goes above that, it is either not going to be allowed or it has to have a special use permit. My only concern is are we going to limit people coming here trying to start a business, that we are only going to have hi-tech office type things. I haven't thought of one yet that you couldn't work with the system. Technology is advancing all the time. To get control of these things, you can put in engineering controls to get things down into limits. I think that is a reason for having this change in this document is, again, to get these approvals back before Council if there is something that we are worried about.

Mr. Silverman: We are very close with this document of saying virtually everything that isn't contained within the building goes before Council.

Ms. Feeney Roser: If it is an accessory use.

Mr. Fortner: In an industrial zone we have already designated what things are permitted and what is not. This doesn't affect that. This is accessory uses. We have gone through thinking of every kind of thing that we've ever heard of being proposed of an accessory use and 99% are sheds and garages and we want people to be able to proceed with those with a simple building permit. What we are trying to do are things that cause something that could be of concern, we want to have an extra layer of evaluation on that. I think that is what this does. Just getting back to the garage thing. A garage is a storage for a car. A parked car doesn't make noise. When you start the car it makes a noise. You can start the car in your driveway and it will make a noise and you can start the car in the street and it will make a noise. You may store your lawnmower in your shed, but a stored lawnmower doesn't make noise so a shed is no impact. Everything stored in there isn't making a noise. When you take it out and start it up to mow your lawn, which we actually require you to do, then you make a noise, but it doesn't affect what the accessory use is. Mowing your lawn isn't the accessory use. The storage of your lawnmower in a little building outside is accessory use. The storage of your car is the accessory use, not driving your car. Driving your car isn't an accessory use. That is a use. So, it doesn't matter that the car was started in the garage. Accessory use doesn't cause a noise.

Mr. Hurd: I will yield to Michael's thorough definition and remove my can of worms about garages.

Mr. Hegedus: And, I think that kicking it over to the special use permit process and then having those two things right there, "adversely affect the health and safety of persons be detrimental to public welfare," that is where the standards about releases and pollution come into play because if you meet State or Federal standards about how much you are releasing, you will meet those.

Mr. Silverman: As Maureen reminded us, we are talking about the accessory use not the primary use. Is there any more discussion at the table? I would like to open up the floor to speakers.

Ms. Ann Maring: District 1. I am really excited. I want to thank everyone for working so hard on this. I think it is an amazing improvement. Again, I agree that it is talking about use and the whole point of this is to get things in front of Council so that the vote comes back to the people for the Council members that are representing people in our community. It is very important for us to move forward and get a conclusion to this and have this in front of Council so that we can move forward. The community has been waiting for this for a long time, and I can't tell you how thankful I am for everything you have done. And, Mike, for what you have done, Thank you. So, I have the same question about surrounding area, the 300 ft. vs. the 1,000 ft. vs. the 2,000 ft. was shown. And, really, again, the industrial sites came up, and I had the same question as you did. To me, it really depends on how close the industrial site is to a neighborhood. So, in the case of Bloom Energy or the STAR Campus, 300 ft. and even 1,000 ft. wouldn't even cut it concerning something major coming in that the community would be concerned about. So, I think the surrounding area really has

to do with which zoning you are talking about. I agree with taking out the purposes. I would just take out "purposes" and have it read be in conflict with the Comprehensive Development Plan of the City because the Comprehensive Development Plan is a lot more than goals and it is a lot more than purposes. In its entirety, it is a legally binding document. So whatever comes up in front of us, it has to be in accordance with the entire thing, not just one section of it. And then, detectable, I agree that it should be left in. I agree that it is a good idea for it to be detectable because, again, we need to pick up big things that are going to be thrown to Council. So, I agree that detectable should be kept in. Thank you.

Mr. John Morgan: District 1. Again, I want to thank Maureen Feeney Roser and Mike Fortner for all the hard work they have done on this and also the members of the Planning Commission who have also made some very thoughtful comments.

I would like to begin by responding to the question that Mr. Cronin had about why we need to do anything. It is similar to the comment that Mr. Roy Lopata made at the first of these meetings a couple of months ago where he talked about 37 years and it has never been a big problem until the TDC situation. And, I think it is worth emphasizing that the legal situation changed profoundly in the summer of 2010. There were a pair of decisions by the Delaware Supreme Court which basically removed any discretion from the Planning Department or the Board of Adjustment or a City Council or a County Council. They said that the laws in the Zoning Code must be interpreted in such a way that any doubt is resolved in favor of the landowner. They said any doubt. They didn't say any reasonable doubt. They said any doubt. And, under well-established principles of legal interpretation, that stands. It doesn't even have to be an unreasonable doubt. That is why we need to have very precise language and that is why we have to talk about things like no impact, if an accessory use will be by-right, because when you use words like excessive, peoples' opinion of what that means can differ. If there is any doubt, it is the landowner's opinion that will govern under this ruling of a unanimous Delaware Supreme Court. And, we sure don't want to have to spend millions of dollars on legal fees trying to persuade the Delaware Supreme Court that every one of them made a mistake. So, that is why I think we absolutely must move forward with something very much like this document.

I think Mr. Silverman made a very good point when he observed that there are structures which are not buildings, for example a radio tower, and I would add maybe a water tower.

Mr. Silverman: Or bleachers.

Dr. Morgan: Once you start thinking about it, all of these other examples come to mind. And, I think there should be the phrase "and structures, or structures" should be added in appropriate places. On the issue about having a separate definitions of accessory building or structure, let me tell you why I think you need it. You can have an unused building. You need to have some restrictions on the size of an accessory building, even if it is not being used because someone could build it first and then say, oh, well, now I want to use it and since I already built it are you really going to prevent me from using it? So, I think that is the reason why most zoning codes, not just in the City of Newark but all over the country, have an accessory building section and an accessory use section. And, if you are going to have a section on accessory buildings and structures, I think you also want to have some limitations on height. You don't think so, okay, but there ought to be some limitation when you talk about how tall an accessory structure could be without having to go get permission from Council, right, if it is going to be by right. Otherwise, someone could put up a 200 ft. high tower right next to your house, right?

Mr. Silverman: Wouldn't the height limitations in the Zoning Code address that issue?
Dr. Morgan: For a structure, not a building.

Ms. Feeney Roser: There are restrictions on towers, absolutely, and then there are restrictions on antennas and things of that sort.

Mr. Hurd: To add the tower or antenna would have to be a by-right accessory use, which isn't generally true in residential areas that you can put up a radio tower.

Dr. Morgan: I have one or two other comments. One of them is that you just cannot rely on DNREC. It sounds good in theory but all you have to do is look at what happened with the Peninsula Compost Facility up in Wilmington where they were running for five years stinking up the surrounding area within a couple of miles, and DNREC only started to move on it after 18 members of the Delaware Legislature got on their case, and they still haven't succeeded in shutting it down because the facility is making all sorts of legal argument that they weren't given the proper notice and so on and so forth. So, I think we have to have in our City Code some regulations that we can enforce independently of DNREC. At this point, I just want to conclude by thanking everybody for all the time and effort they have put into this and listening attentively, and I very much hope that we will be ready to move forward on this document. I would say, hopefully, tonight and if not, then certainly in the next month or two. Thank you.

Mr. Fortner: Mr. Chairman, The definition for building. I think it is reasonable to add accessory building/structure, but a building is any enclosed or structure other than a boundary wall or fence occupying more than four sq. ft. within the permitted building area. Then it has definition of building and semi-detached and attached. It covers more than just the actual building, but it says building or open structure.

Mr. Silverman: Under the definition for building.

Mr. Fortner: Yes, it says, building - the definition for building is any enclosed or open structure.

Mr. Silverman: That is kind of backwards.

Mr. Fortner: I'm just working within the framework I've got.

Mr. Silverman: Maybe that is something to be looked at because a building is definitely a structure but a structure is not a building.

Mr. Fortner: That is why we use building. We don't say structure because a building would cover structure in this.

Mr. Hurd: Mr. Chairman, I just want to clarify one thing. If I have talked before about using DNREC, I speak only in the terms of defining standards, not in terms of enforcement and such. So, either DNREC or the Department of Energy or Natural Resources or whoever would govern or provide standards for noise and pollution or odors and such.

Mr. Silverman: So, any agency or group other than the City of Newark.

Mr. Hurd: If that seems to make sense because for almost everything out there there is a State or Federal regulation or such attached to it, I would believe.

Mr. Mark Morehead: District 1. I would like to also thank you all for the hard work, Michael included, Maureen. I know there is a lot of thought that has been put into this. A couple of comments. Listening to Alan, I like the building use or structure comment that he made originally before I understood the definition of building that we apparently already have. You made a comment about detectable at this property relative to, I think it was, the whole community.

Mr. Silverman: Yes.

Mr. Morehead: Okay, I like that.

Mr. Silverman: There is some legal precedent, I believe, when they talk about impact of a use, of a building, the structure, its impact beyond the general impact it would have, say, citywide.

Mr. Morehead: Because that puts the relative thing into perspective if it doesn't impact three miles away but it does impact 100 feet away. You have a difference there and I would like you all to consider something like that. Detectable. I like detectable because I am a science guy, but there needs to be a base level when we talk about detectable. I think Will was onto something with the garage, and the reason I say that is I have many power tools. I am a woodworker so I have band saws and table saws and my neighbors are patient, shall we say, but I tend to stop in the evenings. So, it is not just the car. I know folks that have air wrenches that they use on their cars. I have an air wrench, actually. So, it is not just storing things. It is also fixing things which can involve some other things.

The main thing I wanted to ask, I thought Mike was saying that we were having an overall definition for accessory building and then two subsets, one being accessory building – no impact, and the other being accessory building – impact. Is that kind of what you are getting at?

Ms. Feeney Roser: Yes.

Mr. Fortner: Yes.

Mr. Morehead: And, then the same format for accessory use with two subsets.

Mr. Fortner: Yes.

Mr. Morehead: The problem I'm having with this conceptually is in the overall definition. It defines it as a no impact definition and then you in the subsets have a no impact and an impact.

Ms. Feeney Roser: I think it is the same sentence that Andy was referring to in our definition. If we were to remove that, this is an accessory building or accessory use, but neither of them would be listed in the Code as permitted or conditional uses. It would only be no impact or with impact. So, I think you are right. I think we could remove that and it would still hold that no impact accessory uses are defined as we defined them. I think we were trying to make sure that we had covered all of our bases, but I would agree with that. I don't know how the rest of the Commission feels. Accessory use is the overarching one and then the only things that are allowable are those with no impact or with impact with a special use permit that you don't need to define it quite as stringently when you talk about what an accessory use or building is. I would agree with that, but I don't know how the Commission feels. Mike doesn't agree with me. Go Mike.

Mr. Fortner: It's not that I don't agree with you. Of course I agree with you, Maureen. I think if we move that, I think we would want to move that to that sentence starting "All such accessory buildings or uses. . ." should be moved with no impact because it is direction to Council, essentially, saying you can have an impact but it can't be detrimental to the community. Council communicates that to people looking at this.

Ms. Feeney Roser: But, are we looking at conditions that are beyond what we are saying they can't do like noise, smoke, dust, odor, pollution detectable outside the property line.

Mr. Fortner: If it is detectable, they have to get a special use permit. If they go to Council, they have to say, yes, we are creating noise or smoke but it is not going to be detrimental to the community because it is either an industrial area and nobody cares or because it is not that high. You can't hear it.

Mr. Hurd: But, I think that was Andy's point. The judgement to be detrimental is included in the special use permit process. So, as soon as you say it has impact, the special use permit process and Council determines if it is detrimental. It doesn't need a definition in here about being detrimental. It is going to be evaluated.

Ms. Feeney Roser: Mike wants it in the no impact one.

Mr. Fortner: I put it in the no impact. We'll say it still covers that, I guess. I still think it is reader friendly to actually include it with the definitions. We intend these things not to be detrimental even if it does have an impact.

Mr. Morehead: Mike, the problem I'm having is if both the impact and no impact are subsets of the higher definition then the higher definition can't contain one and not the other.

Ms. Feeney Roser: What we are saying is with impact it does generate these things but they are not necessarily detrimental. That is the point. Just because it emits a noise doesn't mean it is a detrimental noise.

Mr. Silverman: So, it is not an adverse impact.

Mr. Hegedus: So, the detrimental is determined by those two things right there plus one. Right?

Ms. Feeney Roser: Yes.

Mr. Hegedus: So, if there is any impact, that is what detrimental means plus the Comprehensive Plan. If you were to take that sentence and put it into the accessory building no impact then what you are essentially saying is noise, smoke, dust, odor or pollution isn't all encompassing enough and you need to include other conditions which would be detrimental outside the property line. And, I don't think we want to say that. I think the smoke, dust, odor, pollution detectable outside the property line is the bounds of the things that we are concerned about. Am I making sense?

Mr. Hurd: Yes.

Mr. Hegedus: So, I think we just strike that sentence and don't include it into the no impact.

Mr. Hurd: I would agree because if you move detrimental into the no impact, you now have to judge if there is something that comes out of that accessory use that is not noise, smoke, dust, odor or pollution. It is some sixth thing. Is that a detrimental thing and, therefore, when someone in Planning has to make a judgement call and they are going to court. I think it is easy to say that these things are generally agreed to affecting the neighborhood and we don't want them happening from an accessory use or building. I don't think there is much out there that is going to generate some unknown sixth thing and not one of these other things.

Ms. Feeney Roser: I would agree and I would think that if accessory building and accessory use are not listed in the permitted section and only those with no impact are then we are covered.

Mr. Frank McIntosh: I have been sitting quietly by and thinking I had all the answers in my head resolved, but now I am getting concerned and that is, if I have a garage and that garage is attached to my house, it is not a second building some place, while I don't ever do this, but if I want to work in that garage and I want to work on my car, I think I have some God given right to do that and I wouldn't want a planning commission or anyone else on God's green earth to tell me I couldn't. Now, if I were doing that every day or at 9 o'clock at night or 10 o'clock at night and creating noise or my kids were having a party at midnight or something like that, I think we have other rules that the City would regulate. So, what I am worried about or I'm hearing, I'm not sure it is true, and that is why I'm trying to get to this, does this affect any

building, any structure that exists that has existed? We have been in this house for 25 years. It doesn't? Is that what I see, everybody shaking their head saying no, so it is something new that is happening. So, if we are going to regulate the something new happening at a level that is different because I have lived here for five years I can do it, you can't. I'm not sure about that. It seems like we have two different standards. If you say, I'm going to retroactively say this applies to any property. All I could think of in this discussion was a compost pile. If my neighbor put a compost pile in his back yard, I would be unhappy with that and I would want that removed or disinfected or something. The point is what is good for the goose is good for the gander, right? I get what we are doing, I guess it is like tax assessments. If you bought your house 25 years ago and got a low assessment and you buy a new house today you get slammed. I just throw that out there. I don't really know what that means except, are we creating something that has an adverse effect on new people coming into our community, but no impact on those that are here?

Ms. Feeney Roser: It is true, Frank, because it is zoning you are going to have nonconforming existing uses in buildings. We create that every time we change a zoning law, but if your neighbor were to suddenly put down the compost next to you, that is a new thing. Of course, this wouldn't apply, because it is not a structure. Do you know what I mean, if your neighbor decided to build a building even though he has been there, this would apply to the new building.

Mr. McIntosh: This comes to mind because my neighbor is moving and I don't know who I am getting.

Mr. Hurd. This gets back to that question of detectable above normal limits because the City has a noise ordinance and you are allowed to make noise, like construction noise, between certain hours. As long as I am within those hours, I can go crazy but I have to stop.

Mr. Fortner: I think that is the key. There are things associated with residential use. People have hobbies. They work on their car. You could work on your car in your driveway. You could play your music with the window open and it creates noise. These are problems that neighbors have. This ordinance won't change that. It doesn't affect it. People will still be able to put up a garage. If they are a hobbyist that likes to work on a car, they are permitted to do that. If there are always people bringing their cars to him, all of a sudden they become a home based business and they are going to have to go to a special use permit. If the people build a structure and they are always in there making a loud noise, maybe you have to ask. But, beyond that your normal residential use is going to be fine and this ordinance is not going to affect that. You do what you do in your house. If you go out in the garage and you like to cut wood, you can do that, too. Or if you are in a basement, it doesn't matter. If you are making a lot of noise, your neighbors are going to complain and there are regulations that we are able to enforce.

Mr. Silverman: Mr. Gifford, do you have any comments? I'm offering you the floor.

Mr. Robert Gifford: District 3. I am trying to withhold most of my comments for the review by Council, but the one thing was, don't get confused, I think, between primary use and accessory use. You have a garage, you make noise, if your neighbor makes noise in their garage, that is still the primary use of the residential zoning. Just keeping it on accessory use, I think, is where the conversation should focus. Right, Maureen?

Ms. Feeney Roser: Yes.

Dr. Morgan: John Morgan, again, District 1. I was thinking a little more about the conversation regarding the sentence, "All such accessory buildings shall not generate conditions detrimental to areas outside the property line." And the similar sentence that appears in the general condition for an accessory use. And, it seems to me that you want to have those sentences where they are, and the reason is that if you take it out entirely and don't put it somewhere else, then you're not providing guidance to

Council on what criteria Council should use for determining whether or not to grant a special use permit. There is going to be some balancing. Will the applicant be generating noise that is detectable outside the property line? Okay, how much is it? Does it exceed the background by 5 decibels or 10 decibels? That might be acceptable. Does it exceed it by 40 decibels? That is almost certainly unacceptable. That is where the issue of detrimental comes in. That is going to be a judgement call, but you do need to give some qualitative guidance to Council of what they should be thinking about when they are looking at it. And, I think that it is better to leave it where it is because then that sentence applies to all accessory buildings and all accessory uses and there could be something that we just haven't thought of.

Mr. Silverman: You are referencing to what page, Sir?

Dr. Morgan: I think people have different size pages. Some have legal size and some don't, maybe. I'm on page 5, which is under revised recommendations and boldfaced and underlined, and then it says accessory use underlined.

Ms. Feeney Roser: While we are waiting, can I ask you a question, John? When you talk about guidance to Council on what might be detrimental, the conditions under which a special use permit can be granted, which deal with being detrimental to public welfare, injurious to property or improvements, or adversely affect health and safety, you don't feel that that is adequate to address whether the use is detrimental, because the only time something that has any impact beyond the property line is going to come to Council is to request a special use permit, and I'm wondering if that isn't enough guidance?

Dr. Morgan: Do these criteria then apply, although (inaudible) as neighborhood. Do these criteria apply to all special use permits?

Ms. Feeney Roser: The reason that it says neighborhood is because we haven't changed it to surrounding area yet, it says neighborhood now and there are three criterion for Council to consider when reviewing a special use permit and those I cited are the first two and the last one is: in conflict with the purposes of the Comprehensive Development Plan, which we are considering, it may say just Comprehensive Plan.

Dr. Morgan: I also think, though, it is not harmful to have similar consistent language in different sections of the Code so people don't have to jump back and forth to read one section or another section particularly if it's not extensively cross referenced. So, I think it is not harmful to do that. Now, on the issue of pollution. There was some discussion about what is pollution. Some people say carbon dioxide is a pollutant and I guess it could be at really high levels, right, but maybe you want to add the word harmful before pollution, which I think is a suggestion made before by Mr. Cronin, or something to that effect because if it's not really harmful to human beings, why are we worrying about it?

Ms. Feeney Roser: Do you think adding the word harmful before pollution would settle your concern about detectable?

Mr. Hurd: Isn't pollution by definition harmful? Because CO_2 is an admission. You emit CO_2 but nitrous oxide is a pollutant. It seems to me that pollution, unless you've got a different definition there is covering harmful.

Dr. Morgan: I don't know. I guess this would then fall back on what it says in Webster's Unabridged Dictionary.

Mr. Johnson: Can we think of any non-injurious pollution? The word pollutant, I think, is the negative context and it means harmful to me.

Dr. Morgan: If that is understood, that's okay.

Mr. Hegedus: I agree that pollution is potentially harmful. Whether it is or not depends on levels and that's where these criteria come in. So, I'm fine with pollution.

Mr. Silverman: I do have one definitional thing I would like to clear up and this may be just a holdover from earlier versions of the Code. When I was doing my background reading in preparation for this project, I found that there were three criteria generally used in the teaching text and in some of the court cases in defining an accessory use. The use was, 1. Customary, 2. Incidental and 3. Subordinate. There were three criteria that needed to be met. On page 10, and I don't remember whether it carries through in other areas of the document, talks about customarily incidental and subordinate. If I am looking at a residential use, a garage is an accessory use but it is customary in our community to have a garage whether it is attached or detached. It is also incidental to the structure in size, shape, utilization and it's clearly subordinate to the residential use. The residential use is an active use and the garage is a storage use. So, there are three criteria that should be met when we are reviewing an accessory use, one that is customary, it's incidental and it is subordinate and I don't know whether we are prepared to make that change or not, but I think it helps clarify some of the things we have been talking about and would give additional direction to Council when they are considering the accessory use if they are considering it for a permit.

Mr. Hegedus: I'm not sure I'm following. I'm reading the definition of accessory use on page 10, "a use customarily incidental and subordinate." And, what are you saying?

Mr. Silverman: I believe it should read, customary, incidental and subordinate.

Ms. Feeney Roser: That is not how the current Code reads – and it was discussed in detail in the prep work for the Board of Adjustment meeting. The City's attorney said it is customarily incidental, not customary, incidental. That's not saying that is what we want to keep, but that is the current language. I'm just trying to explain to you that it was interpreted legally. Bruce, am I right? Max was talking about customarily incidental and subordinate.

Mr. Hegedus: It's in use; it's not in building.

Mr. Fortner: That is the way it is in our definitions.

Mr. Silverman: I won't even go down that road. If we have a board that's ruled on it, if we have legal advice that has ruled on it, it will remain customarily for our purposes.

Ms. Feeney Roser: Customarily incidental.

Mr. Hurd: Are we talking about removing customary from building or from use? Because it's not in building. Building just says incidental and subordinate.

Mr. Silverman: This is accessory use.

Mr. Hurd: Right. I'm agreeing with you in use. I would rather see it say customary, incidental and subordinate. Those three criteria, but it has to pass through.

Mr. Hegedus: Maureen and Bruce, I understand that when you were in the hearings it was customarily incidental. Did you do research to see whether it's typically customary, incidental?

Ms. Feeney Roser: We interpreted what we had. That was the point of what we were doing, but we can certainly go back and look at it some more.

Mr. Silverman: Because we reference customary home occupations and that's where I though it kind of paralleled. The customary use would parallel a customary home occupation.

Mr. Hegedus: For me, I'm just playing in my head now TDC, building a big power plant to supply a data center. Would that be a customary use?

Mr. Silverman: If it is found nationally that it is a customary use, the answer would be yes. The data centers have either as primary power or secondary power enough power generated to take over the entire operation so there's no interruption. That may be customary.

Mr. Silverman: Is it worth going down that road? I believe it's cleaner.

Mr. Hegedus: Personally, I would like to have the investigation done. We have some edits to make to this, I think, based on the conversations this evening and some things for staff to consider and I am 1,000% confident that at the next meeting we will just approve it. I walked in thinking this was 95% there and really, really good work. It's much cleaner, simpler even with all the comments and discussions we have had. So, I'm echoing what everybody said about how far this has come. So, I'm sure next time it will go through.

Mr. Silverman: Maybe Mr. Herron had some thought as to whether it would clarify what has been issues in the past and it may help with future.

Mr. Herron: I would be happy to do that.

Mr. Silverman: Does anyone have any other comments. We want to make sure this thing is completely vetted.

Mr. Stozek: I have one question for clarification. Other than landscaping is the distance 300 ft. or 1,000 ft. mentioned anywhere?

Ms. Feeney Roser: In the Code?

Mr. Stozek: Related to this?

Ms. Feeney Roser: 300 feet is used for notification purposes for rezonings, subdivisions and annexations, and things of that sort. So, from the Planning and Development Department's point of view, that is what the Code considers the area of impact. That is why we had started with 300 feet. The 1,000 feet we are considering, in this case would not affect that (notifications), I don't think. Council could ask us to make it so that everybody got notified but that could be really cumbersome and expensive to do when you could put it on the web and do the regular notifications. When we talk about the distance now it is simply for neighborhood in the remaining definitions in the Code where we thought the term "neighborhood" meant impacted area. I think the concern about the word neighborhood was how it was used with accessory use. It may not really concern too many people now.

Mr. Stozek: It was brought up a couple of times tonight and I just wanted to make sure other than the landscaping issue it wasn't relative to the accessory use any more.

Mr. Fortner: Yes (inaudible).

Mr. Hegedus: If I could make two final comments. I said before that I was in favor of the 1,000 feet based on the map. I just want to be clear that based on the conversation that the 1,000 feet in industrial only applies to landscaping then I am fine with the Planning and Development Department's recommendation for 300 feet because I thought 300 feet was sufficient for residential and commercial based on the circles you drew. If someone wants 1,000 feet, okay, but 300 feet I thought, was sufficient. And then the last thing I want to comment on was back to this special use and the third criteria be in conflict with, and then the suggestion was to get rid of, the purposes to be in conflict with the Comprehensive Development Plan of the City. There are things that come to us and then to Council that are different than the Comprehensive Plan and the Comprehensive Plan says that this is modifiable over time and you could say that if someone's bringing something forward that is different

than what's in the Plan, it is in conflict with the Plan, so that is why I was saying that if it is in line with the goals of the Plan then that would give Council room to modify the Plan based on this new idea that's coming forward as long as we are still trying to improve our community and make it a better place as the goals specify.

Mr. Fortner: Do you think maybe, we could get a recommendation. We added accessory building or structure. We put structure on with building. We take out that last sentence on accessory building and accessory use because it is already covered in that. We've got the customarily thing, but customary and customarily, I think we are slicing hairs here. Customarily, the word is in there. Customarily incidental and subordinate. It is still applying. It is customarily incidental and subordinate. So, I think we've got it covered.

Mr. Hurd: They are very different because one is modifying incidental and one is by itself a definition. So, a customary accessory use is, I would say, very different than something that is customarily incidental. My machine shop is customarily incidental but it doesn't usually show up in this use so it's not customary. But, where it does show up, it is incidental. I do think it really needs the three pieces.

Mr. Fortner: Why don't we go with customary then? You don't think so, Maureen?

Ms. Feeney Roser: I might not be remembering it correctly, but I remember that Max Walton argued it was customarily incidental and then the folks who brought the Board of Adjustment appeal in their arguments were saying that it meant customary and I don't remember what that argument was but it has taken us so long to get here, so I would like to actually have a chance to look at it and bring it back.

Mr. Fortner: What if they made a recommendation for customary and then we researched it and we could provide Council with the follow-up information?

Mr. Morehead: District 1. Maureen, I thought I heard you say that both of them would be researched, customarily incidental and how that was legally different than customary and brought back to this group so that you would understand what you were voting on and then move it to Council, because I firmly believe they are different meanings and this is a critical difference that you all should understand before you vote on it. That would be my thought.

Dr. Morgan: In the interest of time, I hope the research can be done in a matter of a week so this could be brought back for your July meeting and not postponed to August, September or October.

Ms. Feeney Roser: No, it will be back in July. That will upset some other folks who are on the July agenda, but it will come back in July.

Mr. Silverman: Let's see if I can sum up where we are. On that 95%, Andy, we are now at 97, 98% and we will again ask the professional staff to take back the comments that are on the public record from both the Commissioners and the members of the public and come back with a tight ordinance style proposal.

Ms. Feeney Roser: We will be happy to do that but I would ask for more clarification on neighborhood before we do that because I don't want to get bogged down in it next time and delay any longer than we have to. And, I'm not sure I'm clear on what you thought about neighborhood and the distance and is it even necessary for us to start playing with that and changing it to surrounding area?

Mr. Hegedus: Maureen, the reason I didn't say anything is because I loved what you did.

Ms. Feeney Roser: Alright!

Mr. Hegedus: So, adding the definition of surrounding, the 300 feet that we talked about and then the three places where you replaced neighborhood with surrounding area, I thought was great.

Mr. Silverman: Do we have a consensus on that?

Mr. Hurd: The three places you changed it and the one place you removed it.

Mr. Fortner: So, if we put structure in there, we do research on customary or customarily and then take out that sentence and that is going to be your recommendation.

Mr. Silverman: And add Andy's recommendation on the Comprehensive Plan.

Mr. Fortner: That's it, right?

Mr. Hurd: To me adding detectable above normal levels instead of just detectable. I think we seem to be circling around that it has to be detectable not just detectable at all but detectable above the normal levels.

Mr. Fortner: Normal levels, a power plant has a normal level, but it is an accessory use.

Mr. Hurd: Normal levels of the area.

Mr. Fortner: No, it can't be detectable. If it is detectable, it goes to Council for a special use permit. I think we've covered it.

Mr. Johnson: In this wonderful world of technology, we can detect everything. So, everything would have to go before Council as impacted. I disagree with Will that you don't have to change the wording here. All we need is an understanding that the detectable means above normal levels as defined by the State or Federal agencies.

Mr. Hurd: My concern is that we are in this position partly because, if we have, say, we have an understanding about detectable that is a loose definition like excessive was, which can go to the court and the landowner can say that is not really detectable. I feel like it needs some sort of slight clarification about what kind of detectable we are talking about, but I am torn between just sort of saying, yes, it is detectable and they have to prove it's not. I don't know.

Mr. Fortner: You don't have to prove it's not. They have to convince Council that it is not going to be detrimental to the public health and safety.

Mr. Hegedus: I think staff should go consider it. In my old life it would be detectable above existing background, but whether you put that in or not I'm sort of with Edgar on it. Just maybe talk to Council and find out their thoughts on the legal ramifications one way or the other.

Mr. Fortner: Is that detectable beyond normal background?

Ms. Feeney Roser: I think that will work. We will look at it and we will come back with something that includes that qualifier.

Mr. Johnson: I want to be clear in my own mind when I leave here. You are going to come back with a new document that we are going to vote on?

Ms. Feeney Roser: Yes.

Mr. Johnson: And, hopefully, we will have minimal discussion. Correct?

Ms. Feeney Roser: Yes, hopefully. We will be back next meeting with that.

3. ELECTION OF TWO (2) PLANNING COMMISSIONERS TO SERVE ON THE RENTAL HOUSING NEEDS ASSESSMENT STUDY PHASE 2 STEERING COMMITTEE.

Ms. Feeney Roser: As you will recall, Council has approved moving forward with Phase II of the Rental Housing Needs Assessment Study, and at your last meeting I let you know that they had selected the Steering Committee, which is the Phase I Technical Advisory Committee and they would like to have two representatives of the Planning Commission to serve on that committee as well. So, I provided you with all the background information and asked you to think about it. Three Commissioners stepped forward and said they would be happy to serve, and that was Mr. Cronin, Mr. Hurd and Mr. Stozek. And, then, as I understand it, Mr. Stozek has deferred to Mr. Cronin.

Mr. Stozek: I talked to Bob about it and I will defer to him.

Mr. Feeney Roser: So, we have two representatives and the Commission should decide whether they would like to offer those two folks to Council as the Commission's representatives on Phase II.

MOTION BY HEGEDUS, SECONDED BY MCINTOSH, TO OFFER THE NAMES OF MR. BOB CRONIN AND MR. WILLARD HURD TO COUNCIL AS THE TWO PLANNING COMMISSION REPRESENTATIVES TO THE PHASE II RENTAL HOUSING NEEDS ASSESSMENT STUDY.

Mr. Silverman: It has been moved and seconded. Is there any discussion? Hearing none, by acclamation the appointments are approved.

There being no further business, the Planning Commission was adjourned at 8:55 p.m.

Respectfully Submitted,

Elizabeth Dowell
Planning Commission Secretary