

**Planning and Zoning Commission Meeting
June 9, 2014 @ 7:00pm**

In attendance were Chairman Bob Linett, Commissioners Susan Brewer, Paul DuCott, and Holly Wingate, Town Solicitor Seth Thompson, URS representative Kyle Gulbranson, Town Manager Debbie Botchie, Town Code & Building Administrator Eric Evans, and Executive Assistant Matt Amerling. Commissioner Jim Koozer was absent.

- 1. CALL TO ORDER:** Chairman Linett called the meeting to order at 7:00 p.m.
- 2. PLEDGE OF ALLEGIANCE**
- 3. ADOPTION OF MEETING MINUTES – May 12, 2014:** Commissioner Susan Brewer motioned to accept the adoption of the minutes from the May 12, 2014, Planning & Zoning (P&Z) Meeting. Chairman Bob Linett seconded the motion. Motion was carried 4-0.
- 4. NEW BUSINESS:**
 - A.** To consider a revised final site plan application for possible recommendation to the Town Council, submitted by Millville Seaside Properties II, LLC; in Millville by the Sea (MBTS) / Sand Dollar Village Phase II. The applicant is requesting an addition of 6.5-foot wide use easements to the following lots: 40-45 and 48-53. Synopsis: On February 12, 2013, the Town Council approved the final site plan for Sand Dollar Village Phase II and the Developer had the plans recorded as approved. On April 23, 2014, Scott and Shuman, PA, recorded a Deed of Use Easement for the Developer in the Sussex County Recorder of Deeds, encompassing the majority of lots in said phase. In order to comply with Town Code, including Sections 125-36 and 37, the Developer's plans are now before you for your consideration and recommendation to the Town Council.

Commissioner Paul DuCott recused himself from the meeting. Mr. Doug Smith, of Millville Seaside Properties II (MSP2), introduced himself and the rest of his representation – Debbie Rosenstein and Craig Hovenner. Mr. Hovenner stated the cottage concept had been developed two years ago, and is not included in the designed lots in Sand Dollar Village Phase II. Mr. Hovenner further stated the side is 10 feet and recommended as 5 feet, so the property line had to be set back 6 ½ feet. Mr. Hovenner stated realizing there was no backyard for the cottages, MSP2 created a side porch for the property. Mr. Hovenner stated MSP2 realized it would be nice for a property owner to use all of the side land as opposed to breaking it up into two (2) strips, so they explored easement use which has been used frequently throughout the country in other jurisdictions and it's something fairly commonly applied to smaller lots like this. Mr. Hovenner stated MSP2 thought it would be a good solution to allow these homebuyers who have more space on one side and give up – not in terms of title, but in terms of use – the strip of land that would typically not be used other than to mow or attend to the

mulch a few times a year. Mr. Hovenner stated when the homes were originally designed, there were 2-foot square windows located higher on the wall for both an element of privacy and a maximum allowance of natural light, so there are windows all the way around the home. Mr. Hovenner stated MSP2 had taken into account the privacy aspect as well as living in a smaller home, on a smaller lot. Chairman Bob Linett asked if the Roxana model in Sand Dollar Village I is the same house. Mr. Hovenner stated yes. Mr. Linett asked if there was no deed use restriction there. Mr. Hovenner stated there was none. Mr. Linett asked how much larger is the lot. Mr. Hovenner stated the lots over there are about six (6) feet wider. Mr. Hovenner stated those lots were already there and planned before this product was envisioned. Mr. Hovenner stated the lot is 38 feet wide and the house is 24 feet. Mr. Linett asked if MSP2 were going to fit in new lot construction. Mr. Hovenner stated yes. Mr. Linett asked if MSP2 made a decision that they wanted a smaller lot and now they have to put the house to it. Ms. Debbie Rosenstein stated she does not think MSP2 tried to fit the house after setting the lots, but, rather, the houses were built in Phase I to test the market, so MSP2 knew the home sites were going to be smaller because a cottage would have a smaller lot size. Mr. Linett asked if MSP2 knew when they built the Roxanas in Phase I that they would be using these use restrictions in Phase II. Mr. Hovenner stated no, in conversations about the product and the market, MSP2 never initially intended to do this. Mr. Linett asked if MSP2, in the beginning of Phase II, decided to use the use restrictions. Mr. Doug Smith stated, as the developer and home builder were working together, a side yard use easement is something that is done in other parts of the country in order to deal with some of the narrow lot lines so, as the product evolved, MSP2 thought the side yard use easement would be a good addition. Mr. Linett asked around what time frame did MSP2 decide it would be a good idea to consider this. Mr. Smith stated about 2013 – this time a year ago. Mr. Linett asked how is this different – from a practical matter and a legal matter – from a zero lot line. Mr. Hovenner stated a zero lot line is where the edge of the house is the lot line, but with this, the lot line does not change so the lot line runs halfway between the houses. Mr. Linett stated that is a legal matter but as a practical matter, is there any difference. Mr. Kyle Gulbranson, of URS, stated the homes you see here in the photo are physically centered on the lot, but not physically built on the property line, and a typical zero lot line structure is physically built on a property line. Mr. Linett stated yes, but the property in the traditional zero lot line on the corner would represent “my property” and then “my neighbor’s” property would start a sixteenth of an inch from my wall; but, in this case, Mr. Linett would also be a sixteenth of an inch from his own wall. Mr. Hovenner stated yes. Mr. Linett asked if there is no practical difference in terms of use. Mr. Smith stated he believes there are restrictions within the recorded easement which restricts what can go in there, such as a barbecue grill cannot go directly against the neighbor’s house. Mr. Smith stated what MSP2 tried to do by doing this is having it in the title in the ground so whenever anyone buys or sells that house, the easement will be discoverable because it runs with the ground.

Mr. Linett asked if, with this easement, he wanted to take the 6 ½ feet, get rid of all the grass, fill it with sand and use it as a horseshoe pit, can he do that. Mr. Smith stated yes. Mr. Linett stated he finds item four (4) interesting which prohibits barbecue grills or any potentially hazardous items in the easement premises, but rather use the area as a general recreational picnic and social area. Mr. Linett stated the part he thinks becomes a little open for

interpretation is when it is mentioned that “to unreasonably disturb the owner of the burdened cottage lot.” Mr. Linett asked if he were to place a multiple amount of statues in the easement yard and the neighbor did not like one – or many – of the statues for religious, political, or social reasons, but the statues posed no safety hazard, would Mr. Linett’s statues still be considerable of disturbing the neighbor, because that kind of scenario is the “gray area” not covered in the restriction. Town Solicitor Seth Thompson stated he could put some legal framework around it, so obviously the Town would not have to deal with enforcing restrictive covenants and the homeowner’s association (HOA) or individuals would have to deal with that; but it sounds like the Town is concerned with people approaching the Town if they come across a neighbor they do not like. Mr. Thompson asked if MSP2 has had that situation in any other developments with this easement, and what has MSP2 been doing to make people (potential buyers) aware of this arrangement. Mr. Smith stated education to the buyer would be MSP2’s main goal. Ms. Rosenstein stated in designing the homes and looking at the easements, MSP2 did look at a number of different things and when MSP2 started marketing these homes, MSP2 did it, in actuality, to educate the buyers. Ms. Rosenstein stated if the potential buyers were interested, MSP2 would take them around to the cottages in Phase I (because that was all there was available at the time), and then MSP2 would bring them back to show them pictures of how the easement would work and explain very succinctly what a use easement is and tell them it enhances the ability to have open space. Ms. Rosenstein stated MSP2 would walk the potential buyers to the side porch and show how the houses would interact with each other. Ms. Rosenstein stated it is in the deed when the buyer settled to notify them of the use easement, but the buyer was also made to sign an agreement before that deed signing. Commissioner Holly Wingate asked if the HOA would be held responsible for any complaints so property owners are not coming into Town Hall and making complaints. Ms. Rosenstein stated in any situation, there could be neighbors who they disagree with and the HOA will address that. Mr. Rosenstein further stated she thinks the HOA is the entity that would enforce any disputes or breaking of rules. A public audience member (Ms. Penny McCormick) shouted out that is not true. Ms. Rosenstein distributed two email letters from individuals in MBTS who have settled on the properties in question and support the use easement. Ms. Botchie stated what she is looking for is – when potential buyers come in and see the Roxana model – the paper information provided to them. Ms. Rosenstein stated before the recorded deed of use easement, the buyer will be told about it. Ms. Botchie asked if when the buyer signed the contract of sale if the deed of use easement was on record. Ms. Rosenstein stated no, it was not. Ms. Botchie stated MSP2 is selling a product that does not have the deed of use easement but what was given the buyer to explain it. Mr. Smith stated the deed of use easement is in the sales contract. Ms. Botchie asked if it explains what the use easement is. Mr. Smith stated yes. Ms. Rosenstein stated MSP2 does show the potential buyer visually what the use easement entails. Mr. Linett asked if MSP2 has printed literature to inform the potential buyer of what they can and cannot do with a use easement. Ms. Rosenstein stated she does not have that literature with her. Mr. Linett asked if there is such a piece of literature. Ms. Rosenstein stated it is in the sales contract. Mr. Linett asked if it is shown and/or told before the sales contract process and the buyer “falls in love with the home.” Mr. Hovenner stated the buyer is given the easement language and document itself as part of the sales process. Mr. Linett asked if on the rack – or in the literature – is the language of the use restriction. Mr. Hovenner stated it is a

part of the sales contract. Mr. Linett stated he wanted to know if it is part of the beginning process when the potential buyer is told of the amenities, etc. Mr. Hovenner stated there is a homeowner with such easement attending the meeting tonight and Mr. Linett can ask her. Mr. Linett stated he was asking MSP2. Mr. Hovenner stated MSP2 does give the potential buyer a copy of the use easement for them to read and ask questions prior to them executing a contract. Ms. Wingate asked if there are any other nearby communities which have the same concepts. Mr. Smith stated this is unique to Millville but it is not a unique concept at all as far as a side use easement. Mr. Smith further stated in addition to being the developer of MBTS, MSP2 is a home builder in Washington, D.C., and throughout their 15 years, they have used this side use easement many times in a manner which was earlier discussed, including part of the sales contract, so any future buyer knows what the use easement is. Mr. Smith stated he currently has two different communities in Washington, D.C., that have this easement and MSP2 has done this before, and they have not had any issues because it is explained to potential buyers. Mr. Smith further stated having the extra use easement does not change the property line, but, rather, when someone walks out onto their side porch, they have the use all the way up to the side of their neighbor's house. Mr. Smith stated the homeowner who has the use of the entire yard is responsible for maintaining that entire space. Mr. Linett asked if this use easement been used in Delaware or Sussex County. Mr. Smith stated, to his knowledge, he is not aware of it being used in Sussex County in this respect, but it his firm has used use easement in a product in the County. Ms. Botchie asked if he said it was in Lewes, DE. Mr. Smith stated no, it was in Long Neck, DE. Ms. Botchie asked if that was County jurisdiction. Mr. Smith stated yes. Ms. Botchie stated she searched "use of deed easements" in most of the Town websites, and she could not find anything in anyone's general code, but she is sure the easements have been used on an individual lot but not in a development. Mr. Smith stated the draw to use this was to have variety but certainly individual homeowners could use this easement at any point. Mr. Linett stated to Ms. Botchie and Town Code & Building Administrator Eric Evans that tonight the P&Z Commission has learned that approximately a year ago, this concept was in MSP2's heads; and asked when did Ms. Botchie and Mr. Evans both learn of this concept being implied to MBTS. Ms. Botchie stated the first or second week of May 2014 when Sussex County Mapping called the Town and told us they had not seen a deed of use easement and that was what triggered her to contact the Town. Ms. Botchie stated the County faxed a copy of the easement to the Town and Ms. Botchie faxed it to Mr. Thompson, who started reading it and realized it was not approved on the final site plan. Mr. Thompson stated that helps to demonstrate the difference between individuals doing this and it being done on a plan because the recorder of deeds thinks it needs to be approved through a municipality. Ms. Botchie stated that was what "raised the red flag" (for County) because these plans were not stamped for approval by the Town.

Commissioner Susan Brewer asked why the plans were not stamped and why the easement was recorded before getting approval from the Town. Mr. Smith stated MSP2 did not know they had to come back in front of the Town in order to do that. Mr. Thompson stated, from a legal perspective, the Town Code sets up the subdivider, the person dividing up the land, that is who submits their preliminary subdivision plans and their final plans, and that goes through the process. Mr. Thompson further stated once the subdivider submits the plan, the Town

Code does not really require something of those purchasers. Mr. Linett asked who is the subdivider. Mr. Thompson stated that would have been Millville Town Center LLC, and that who is initially came and wanted to divide the large plot of land into various different parcels. Mr. Linett asked if when the Town approves a plan, it is approving the developer, which is Millville Town Center LLC. Mr. Thompson stated yes. Mr. Linett asked who Millville Town Center LLC sold to. Mr. Thompson stated he thinks they sell the land through phases. Mr. Linett asked who bought this particular phase discussed tonight. Mr. Thompson stated it was sold to MSP2. Mr. Linett asked if that is Christopher Companies. Mr. Smith stated that is managed by Christopher Companies. Ms. Botchie asked who manages Millville Town Center LLC. Mr. Chuck Ellison, of Miller & Smith, stated Miller & Smith manages it. Ms. Botchie stated the developers' engineers – CEA (Civil Engineer Associates) – who always do MSP2's preliminary and final plans, also did this plan showing the easements. Ms. Botchie stated CEA is very aware of the Town's Code and easements and asked if CEA not bring this to MSP2's attention, that easements had to be approved by the Town. Mr. Smith stated CEA did not bring it to MSP2's attention, and if a mistake was made, MSP2 is trying to rectify it tonight. Mr. Gulbranson stated Mr. Thompson had indicated that two individual property owners can grant an easement effecting both properties without issue, but the issue with this is it involves multiple easements along almost every property in that phase of the community, which should have gone through the subdivision process and the final plan approval process. Mr. Thompson stated we would not be here today if easements had been on the plans that were approved, but we are here now so he believes the applicant is coming forward and trying to correct it and the application for use easement is not with all of the lots, but just the block of lots where there haven't yet been any sales. Mr. Thompson stated the Town is dealing with the applicant coming forward and trying to correct the procedural issue in terms of not having these easements on their subdivision site plans when they went through the process. Mr. Gulbranson stated one thing he thinks is kind of important to say is that part of the reason why you approve a master planned community (MPC) is to approve multiple housing types for everybody, and the beauty of an MPC is there is something for everyone. Mr. Gulbranson stated it is a possibility that these products – with their use easement – may not sell well and they will never be seen again. Ms. Botchie asked what would happen if this product is sold and people are not happy with it and they resale, which then gets rented out; the Town has seen communities that have really gone downhill with renters so if there is someone who is renting one of the houses and does not care about maintaining the property, what might happen then. Ms. Botchie further asked what is behind the windows facing the other person's property. Mr. Hovenner stated some are the kitchen and some are the living room. Ms. Botchie stated people could be having a party in the yard and be standing directly next to the neighbor's window, able to look in the neighbor's home. Mr. Hovenner stated yes, but that could happen even without the easement. Ms. Botchie stated yes, but someone could still stand directly against the neighbor's home and look inside. Mr. Hovenner stated yes.

Ms. Botchie asked if the two neighboring property owners can rescind the use easement. Mr. Smith stated yes, but they both have to agree to abandon the easement. Ms. Botchie stated part of the discussion was to get this action planned and in place, and asked where is MSP2 in the process of having existing easements removed. Mr. William Scott, of Scott & Shuman,

stated they drafted a "vacation of easement" but Mr. Thompson and he did not talk about the terms of that and what Mr. Scott thinks what they needed to be given the entities until last Friday afternoon, and he was away all weekend, but that can be done within days. Ms. Botchie asked what the timeline is because all of Council thought this was the best plan of action to go forward with, but she still has Council asking "is this done?" and "how long will it take?" Mr. Scott stated "It is not done" and "It should not take very long." Mr. Scott further stated there was an action plan which was based on a meeting that was had and it would not affect the lots which have already been sold but would remove it as to these lots here and then the builder and developer have agreed to come back, which is why we are here tonight, to seek recommendation from P&Z to Town Council about reestablishing them on the two rows of lots discussed tonight. Mr. Scott stated if P&Z's question is "are we going to live up to our commitment to vacate them, as to those two rows?", the answer is yes and "the ball is in my court."

Mr. Evans stated regarding MSP2's terms of within the perks of the use easement premises, item #4, it states the property owner can put in paver patios, construction, trellises, etc. within the easement area, and the Town does not allow anyone to build outside the property line. Mr. Evans stated there are some really nice paver patios out there and the Town does not issue a permit for them because they can be removed if/when the builder moves; however, the County does require a building permit for paver patios – especially if they are elaborate – because it could increase the property owner's taxes and the County does not care whether it is a use easement; they will still increase the property tax. Mr. Evans stated if one property owner builds a paver patio and they cross over the building line, then both property owners – including the neighbor who has no use of the paver patio – will have their property tax increased based on the one property owner's decision. Mr. Evans stated he does not know if MSP2 thought this all the way through. Ms. Botchie stated that is an aspect which potential buyers should be aware of. Mr. Thompson stated most of this is based on the need for notice and the Town does not want to be a part of some neighborly grudge match. Mr. Thompson asked if there are hours set for noise. Mr. Scott stated he thinks so and his firm did not draft those but he has seen them and he thinks there is the ability to make rules and regulations regarding such things and he thinks this goes more to reducing those neighborly squabbles. Mr. Scott stated in a resale situation, there is an extensive disclosure that has to be done and they would include these types of easements so the potential buyer will know what they are entitled to maintain. Mr. Linett asked if this group of homes would be part of a separate HOA or part of the larger HOA. Mr. Scott stated this group would be a part of the larger HOA. Mr. Scott further stated if a complaint does come to the Town, he is not sure the Town has the authority or ability to actually deal with the complaint. Mr. Thompson stated that is right.

Ms. Wingate asked how much open space is already in this phase. Mr. Hovenner showed P&Z on a map the foliage space that is part of the phase. Mr. Gulbranson stated he knows there is concern about how close the structures are but MSP2 is meeting Town Code as drafted. Mr. Gulbranson stated if you were to draw a line down the middle of the side yard shown, between the two properties, there is basically a side yard which is unusable by both property owners because it would be too small for recreation or maintenance. Mr. Gulbranson stated

this may not work for everybody but part of the draw of an MPC is to have a various amount of home types for buyers to choose from. Mr. Thompson stated he really wants to know when notification was being put in place because he thinks it is important from a legal perspective and letting perspective buyers know what they could be getting into. Mr. Linett stated he was giving the public a chance to make comments or ask questions.

Ms. Frances Deering, of MBTS, stated she likes the idea of a side yard and that her dog can be noisy and have adequate space. Ms. Deering stated the space may look small but it is big enough for her in that she does not have a lot of yard to mow, and, as far as privacy, if she were not so tall, she would not be able to look in her neighbor's house and blinds can remedy that. Ms. Deering stated she will be very upset if this easement does not get approved because she specifically bought the house because of the side yard easement. Ms. Botchie stated Ms. Deering's side yard use easement would not be affected because it has already been established, and P&Z is merely discussing future – from this point on – use easement with future homes in phase II.

Ms. Pat Moulder, of Tybee Street, stated she has been living in MBTS for five (5) years and as far as the HOA dealing with complaints about other people and neighbors, suppose there is a basketball hoop right against the neighbor's house and there is a noise complaint at 11 p.m., who will the neighbor call. Ms. Moulder stated the HOA issued a booklet about complaints, but when someone goes to the Wilgus people (HOA) to make a complaint, they "get blown off" by Wilgus. Ms. Moulder further stated she disagrees with the statement made by MSP2 that the HOA will take care of complaints or violations because they don't currently do it in phase one of Sand Dollar Village.

Chairman Linett stated he is not in favor of recommending approval of this to Town Council. Ms. Wingate stated she is in favor of it because she feels the Town needs to try and work together with MSP2, but she thinks this is very unfortunate we're here right now, and it is a major breakdown in communication but P&Z needs to assure that complaints will not come back to Town Hall administration. Ms. Brewer stated she agreed with Ms. Wingate as long as residents do not come to Town Hall with their complaints too much. Mr. Linett stated he might be able to get on board with that if people know what they are getting into before buying the property when it comes to the easement.

Mr. Linett recommended to Ms. Wingate he could agree to motion to recommend to the Council to approve the application as long as the potential buyers are notified to the rules and restrictions of the property's use easement. Mr. Linett motioned to recommend to Town Council to accept the revised application for a deed use easement for lots 40-45 and 48-53, subject to the fact that Millville Seaside Property II LLC provides upfront notification in sales literature as to the "dos and don'ts" associated with the use easements. Ms. Brewer seconded the motion. Motion carried 3-0.

Chairman Linett stated he wanted to mention the fact that the P&Z Commission approved plans which were associated with Millville Town Center and that it didn't "catch or have effect

on” a second person in the development process bothers Mr. Linett. Mr. Linett stated he believes P&Z should recommend to Town Council that it modify its ordinance so it is absolutely clear that the site plan process would apply to some specific sequence. Mr. Linett asked Mr. Thompson if he had to make a motion or was it simply fine mentioning it on record. Mr. Thompson stated simply mentioning it should suffice.

Mr. Linett stated he is disappointed that the present representation of MSP2 and Miller & Smith thought about this a year ago and, in all of the discussions they had with the Town, there has not been any mention of it until simply by happenstance a month ago that Ms. Botchie and Mr. Evans heard about it. Mr. Linett stated he had hoped the communication was better than what had transpired.

5. PROPERTY OWNER/AUDIENCE COMMENTS:

Mr. Chuck Slagle, of Tudor Place, stated he wanted to comment on what Ms. Botchie brought up and that is the comment about what is going to happen if renters come into the area, and how in the past, things have not gone well if renters move in. Mr. Slagle stated he moved to MBTS to retire and he loves it, but what is happening now is there is “a lot of cram and jam going on” and if someone cannot have a grill in their backyard, and certainly a fence down their property line to separate themselves, and if there is a dog involved, he feels badly for those living next door to each other if one has a dog and the other opens their window and tries to get some rest while the dog is barking. Mr. Slagle stated he is only mentioning it to the Commission so they may take that into consideration because the homeowners in MBTS want to live happily and enjoy the area, which was Mr. Slagle’s main goal in moving here.

6. ADJOURNMENT:

Chairman Linett stated the next P&Z Meeting would be on July 14, 2014. Mr. DuCott rejoined the vote. Ms. Wingate motioned to adjourn the meeting at 8:05 p.m. Ms. Brewer seconded the motion. Motion passed 4-0.

Respectfully submitted and transcribed
by Matt Amerling, Executive Assistant