

CITY OF NEWARK  
DELAWARE

COUNCIL MEETING MINUTES

June 1, 2020

Those present at 7:00 p.m.:

Presiding: Mayor Jerry Clifton  
District 1, James Horning  
District 4, Chris Hamilton  
District 5, Jason Lawhorn  
Deputy Mayor Stu Markham, District 6

Absent: District 2, Sharon Hughes  
District 3, Jen Wallace

Staff Members: City Manager Tom Coleman  
City Secretary Renee Bensley  
City Solicitor Paul Bilodeau  
Assistant to the Manager Jeff Martindale  
Chief Communications Officer Jayme Gravell  
Finance Director David Del Grande  
Planning and Development Director Mary Ellen Gray  
Code Enforcement Officer Tim Poole  
Parking Manager Marvin Howard  
Planner II Michael Fortner

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1. Mr. Clifton called the meeting to order at 7:00 p.m.

2. **SILENT MEDITATION & PLEDGE OF ALLEGIANCE**

Mr. Clifton asked for a moment of silence and the Pledge of Allegiance.

Mr. Clifton explained the procedures for the GoToMeeting Platform. He stated that at the beginning of each item, he would call on the related staff member to present and, once the presentation was complete, he would call on each Councilmember in order of district number to offer their comments. If a Councilmember had additional comments to add later, they should signal Ms. Bensley through the GoToMeeting chat function. Members of the public wishing to comment should also signal Ms. Bensley through the chat function with their name, district or address, and the agenda item on which they would like to comment. He noted that for participants logged in by phone, names would only appear as Caller One, Caller Two, et cetera, so it was imperative that the participants inform Council of their identities. He stated that all lines would be muted until individuals were called to speak. All speakers were required to identify themselves prior to speaking and, in compliance with the executive order on teleconference meetings by Governor Carney, votes would be taken by roll call. He continued that it may be necessary to adjust the guidelines if any issues arose during the meeting. He reminded that all lines should be muted until called upon to speak.

Mr. Clifton asked for a motion to amend the agenda to add item 3-A-2, Emergency Ordinance No. 20-03 – An Emergency Ordinance Concerning COVID-19 Precautionary Measures Relating to Food and Drink Establishments Within the City of Newark.

MOTION BY MR. LAWHORN, SECONDED BY MR. HORNING: THAT COUNCIL ADD ITEM 3A2 TO THE AGENDA.

MOTION PASSED. VOTE 4 TO 0.

Aye – Clifton, Hamilton, Horning, Lawhorn.

Nay – 0.

Absent – Markham, Hughes, Wallace.

3. 1. **FINANCIAL STATEMENT:** (*Ending February 29, 2020 and Ending March 31, 2020*) (30 minutes)

4:17

Mr. Del Grande stated that the February Monthly Financial Updates did not include the estimated impact of Coronavirus and the State of Emergency (SOE). He explained the estimates provided in the March report only began to reflect the impact of the Coronavirus pandemic, as the impact from the SOE occurred after March 13, 2020. Per Council direction, both the February and March financial reports were abridged to focus on the April Financial Update which would be presented to Council at the June 29 Council meeting.

Mr. Del Grande explained that the March report included information from February. He reported that estimated expenditures based on three months of activity reflected a positive variance of \$1.2 million with \$950,000 coming from savings in electric and sewer utility purchases. As the year progressed, staff anticipated utility purchases to be below budget due to the low demand for electric and sewer service.

Mr. Del Grande stated the comparison of 2020 expenses to 2019 through March reflected an expenditure increase of \$925,000. Most of the differential was due to the DFIT Workers Compensation Program as it was not part of the initial 2019 operating budget. He explained that other expenses making up the variance were personnel costs.

Mr. Del Grande continued that the overall revenue reflected a \$938,000 negative variance when compared to the budget. He explained the shift from February was due to lost utility sales from the SOE and said that water and sewer sales were down over 18% for the month when compared to budget, while electric sales were down 14.5%. Staff reviewed early DEMEC reports of April's electric purchases and estimated an 18% budget shortage which indicated no dramatic improvements in utility sales until businesses and UD began to reopen.

Mr. Del Grande reported the net current operating surplus, the combination of revenue versus expense, was positive. He continued that although unlikely, if the City reached all budget estimates for the remainder of the year, the amount of reserves required to balance the budget would be reduced by \$267,000, with the revenue reductions offset by the expenditure savings.

Mr. Del Grande reported the end of March cash balance was \$37.9 million, which included \$23.8 million in the City's long-term cash account and \$14.1 million in operating cash. The electric regulatory liability carried a credit balance of \$249,000 that would be managed through the 2021 rate stabilization adjustment (RSA) as pursuant to code.

The Mayor opened the table to discussion from Council.

Mr. Horning thanked Mr. Del Grande for the report and requested that staff continue act responsibly with City finances.

Mr. Hamilton was interested to see the impact of reopening the UD campus.

Mr. Lawhorn was eager to see the April report. He believed more significant losses would show in April and May and asked if staff anticipated seeing improvement by August. Mr. Del Grande confirmed.

Mr. Markham read that July 15<sup>th</sup> was UD's target date to open and Mr. Coleman understood that researchers and support staff would begin to return on July 15<sup>th</sup>. He admitted it was a longer phased-in opening than anticipated. Mr. Markham also read that UD would allow remote working for some employees which made forecasting more difficult. He asked Mr. Coleman if there would be a formula to depict the gradual increase of utility strength or if Council would have to wait for the April report. Mr. Del Grande replied that staff initially created four scenarios and added the fourth scenario three weeks ago with updated numbers. He said he would create a fifth scenario once he compiled the April numbers and reported an estimated \$15 million loss and said that parking revenue would provide some relief. Mr. Markham requested that the financial reports not be sugarcoated and acknowledged the next few rounds of updates would be difficult unless the Federal Government assisted, which he did not anticipate. Mr. Markham thanked Mr. Del Grande for his efforts.

Mr. Clifton thanked Mr. Del Grande. He shared that he walked on Main Street and was hopeful that the number of opened businesses indicated an economic upturn. He was concerned about UD's decision because 25% of the revenue loss was a result of the University's shutdown.

There was no public comment.

4. 2. **SPECIAL DEPARTMENTAL REPORTS:**

A. General Assembly Update and Associated Requests for Council Direction – Lobbyist (25 minutes)

14:46

Mr. Armitage reported that the House met virtually on Tuesday and passed a resolution to allow the House and committees to continue to meet virtually and said the Senate opted for the same on Wednesday. He continued that the Legislature would reconvene virtually as a whole in June with the intent to focus on the Operations and Capital Budgets, Corporation Law, necessary Anti-COVID-19 Legislation, and time-sensitive legislation. He understood that they would continue to work on consent agendas and did not expect anything controversial would move forward because any member of the Legislature could object to a consent agenda bill and it would be removed. He did not believe the Legislature would dedicate time to determine the objection.

Mr. Armitage explained that Mr. DeChene sent Council a report about the DEFAC meeting which indicated that numbers improved over April because of the shutdown reversion from the school districts and other non-filled employee positions. He noted that DEFAC was working with uncertainty because real revenue information would not be available until July when corporations and residents began paying taxes.

Mr. Armitage stated the Joint Finance Committee was set to begin meeting physically on June 2<sup>nd</sup> and hoped to craft the entire budget in three days. He said he would inform Council immediately of any exciting changes.

Mr. Armitage explained that HB175 would have allowed vote by mail for State elections but would not move forward as it was controversial. He noted the City election would be in late July.

Mr. Armitage continued that the reassessment issue was still within the 45-day period for staff to propose to the judge on how the case would proceed. He believed it would be early August before there would be any indication of what may happen.

Mr. Armitage referred to Mr. Markham's direction for the lobbyists to monitor the Renewable Portfolio Standards. He explained that Senator McDowell had a bill that would have done community solar and Mr. Markham hoped there was an opportunity to create a revolving loan fund. Mr. Armitage revealed the bill would progress and did not anticipate that a loan fund would be created given the current fiscal situation and budget uncertainty. He shared that Mr. Coleman and Mr. Del Grande would join a discussion on Thursday with every utility provider, the Governor, and staff to determine reopening billing and the issues surrounding utility shut offs. He shared that Senator Coons believed it would take a minimum of three weeks for the Federal Government to craft anything that would move forward regarding municipal aid for smaller towns and cities.

Mr. Clifton opened the table to comments from Council.

Mr. Horning asked Mr. Armitage if he needed any direction from Council, which he did not.

Mr. Lawhorn asked if he or Senator Coons could gauge support for municipal aid. Mr. Armitage thought it was very probably that the Federal Government would eventually act. He explained that the bill the House passed had moved to the Senate and was mired in DC's political discord. He did think there would be a resolution but interpreted Senator Coons' comments as there would be three weeks of argument before there would be some movement. He continued that if the Senate bill differed from the House bill, there would be discussions on compromising. Mr. Lawhorn asked if there was hope and Mr. Armitage believed Senator Coons was optimistic but noted it would be not as timely as hoped.

Mr. Markham was pleased to learn about the interpretation regarding Federal aid and hoped that it would pass. He asked Mr. Armitage about \$400,000 in PILOT-lite funds and Mr. Armitage could not yet answer the question. Mr. Markham noted no one specifically slashed it and Mr. Armitage replied that there was talk about a grant-in-aid bill, but the number was not available. He explained it depended on what was spent in the operations budget and there were too many variables to estimate an outcome. He spoke to Senator Sokola who promised to be helpful and explained that it also depended on the next DEFAC number. Mr. Markham noted that Council was only allowed to have virtual meetings because of the Governor's order and felt that it should be explored as a future option because it made it easier for residents with different schedules to participate. He understood there would be conditions but believed it helped the City run efficiently during the pandemic.

Mr. Clifton believed Mr. Armitage's assessment about actions in DC was correct.

There was no public comment and the Mayor returned the discussion to the table.

Mr. Armitage recollected that virtual meetings were discussed by the Governor on the Mayor's call and many jurisdictions found them to be successful. He indicated many town halls were not conducive to social distancing and offered to request continuing flexibility. Mr. Clifton agreed that it would be difficult to appropriately social distance within Council Chambers and estimated that six or eight people would be able to attend. He wanted to address it in his next meeting with the Governor.

**5. 2-B. AGRICULTURAL USE DISCUSSION AND DIRECTION TO STAFF – PLANNING AND DEVELOPMENT (60 MINUTES)**

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**28:54**

Ms. Gray presented the proposed framework and approach for a Farming, Agricultural, and Resource zoning district and would share staff's thoughts and concerns in order to get Council's input and direction before being formally introduced as an ordinance to Council.

Ms. Gray explained that Max Walton was interested in annexing his small farm into the City. She explained the property was adjacent to the City and, as with any application or interest in land development, staff conducted a review of parcels currently within and outside the municipal boundary that were eligible for future annexation. Staff determined there was a benefit to current and future residents to create a new use for agriculture, horticulture, and forest land for large parcels in a residentially zoned district. She then displayed a slide depicting eligible properties within and adjacent to the City of ten or more acres.

Ms. Gray said the benefits of an allowed agricultural use included maintenance or continuation of farm uses, preservation of natural environment and open space, and would allow property owners to take advantage of State and County tax exemptions, including a rollback tax if a property were to be developed.

Ms. Gray summarized the history of the proposed legislation. On January 27<sup>th</sup>, staff presented three proposed ordinances related to agricultural and farm uses. The first was an ordinance to amend Chapter 32 to allow agricultural and related uses in the RH/RS/RT zoning district for parcels of ten or more acres. The bill was originally proposed to the Planning Commission on November 5, 2019 where it was unanimously decided to move the bill to Section B in the Code section with the stipulation that a special use permit was required through Council. The motion failed before Council on January 27<sup>th</sup> and it was recommended for staff to consider a separate agricultural zoning district rather than permitting the use through special use permits.

Ms. Gray continued that the second proposed bill on January 27<sup>th</sup> was a companion legislation to allow additional animals under farm use and was tabled. The third proposed bill was the ordinance to allow partial tax exemption if farm use was an operating farm and was consistent with what was currently allowed at the State and County level.

Ms. Gray explained that staff developed the framework for an agricultural district-based discussion and direction from Council. The proposed draft added new definitions which were taken from State and/or City Code with some modifications. The new district outlined the permitted uses and placed potentially obnoxious uses in a special category. She noted that Council did not provide direction on specific density, so staff drafted three potential buckets: RH zoning with ½ acre minimum, RD zoning with more density, and a mix of residential types with overall density limitations. Each bucket would be by-right and required 120 days' notice to be given to the City prior to filing applications. Properties of ten acres or more would be encouraged to provide a master plan for the site.

Ms. Gray stated that the new district would be called the Farming, Agricultural, and Resource district (FAR). The basic allowed uses were raising farm animals, agriculture, horticulture, forest land, viticulture with one-family dwellings limited to 1.3 acres, and one-family semi-detached dwellings under site plan approval. She listed the potentially obnoxious uses as aquaculture, aquaponics, garden center, nursery, petting zoo, and retail sales and explained they could have an impact on neighboring properties and would require a special use permit to allow Council to create conditions. She informed the third area of the zoning ordinance was regulations which would consider setbacks and allowed density.

Ms. Gray added that Council requested a waiting-period to deter quick development proposals. The proposed ordinance proposed that landowners granted a FAR zoning must wait two years before applying for a subdivision. She explained that under the site plan approval process, the applicant was allowed the ability to develop, and staff proposed to allow up to eight dwelling units per acre under site plan approval with 40% of the total site under review for open space.

Ms. Gray commented that per the January 27<sup>th</sup> meeting, Council requested a zoning district and wanted the ability to control uses. She explained that to control a zoning district, certain permitted uses must be allowed and suggested they be controlled with special use permits. She continued that an agricultural zoning district must allow residential development because zoning had to have an allowed underlying use. She noted that there was no farm use listed in the Comprehensive Plan and it needed to be added as a housekeeping measure. She asked Council to provide input on density.

Mr. Clifton opened the table to questions from Council.

Mr. Horning thanked Ms. Gray for the presentation. He noted that the only property of ten acres or more in District 1 was Downes Elementary School and he wanted to defer to Councilmembers who had constituents who would be more impacted by future use. He asked Mr. Bilodeau for the appeal procedure if a special use permit was denied by Council. Mr. Bilodeau replied that if Council denied a special use permit, the appeal would be heard before the Superior Court, but he did not know if it would be a direct or certiorari appeal. He believed that the main portion of the appeal would be that the three-pronged test for a special use permit was not properly articulated by Council's vote. He explained that Council needed to make sure that the three-prong aspect was satisfied during the vote. Mr. Horning appreciated the commentary in the memo that detailed agricultural uses. He stated he would hold further questions until the rest of Council spoke.

Mr. Hamilton admitted he was challenged by the whole concept because there were not many properties that would qualify as farms currently within City limits. He was concerned that focus was on bringing outside areas into the City as potentially agricultural land under the guise of preservation with a two-year limitation. He did not think it was unreasonable that a developer would be willing to wait two years. He referred to the discussion about potential tax breaks and assumed the City would receive the tax break back, but he felt the process was a backdoor way to get farmland into the City only to develop within two years. He noted it was easier to develop in the City versus the County and was shocked that the land could be developed after two years. He wanted to know how the City's density compared to the County's after the land was developed. He noted that Council was not required to pass annexations and stressed that any annexations should provide benefits to residents and City. He did not see the proposal as beneficial in its configuration to preserve land. He asked Mr. Coleman how much time staff spent on the proposal and confessed he was not comfortable that Council made the right decision.

Mr. Clifton asked Ms. Gray if she was able to answer Mr. Hamilton's questions. Ms. Gray replied that the language in the proposal draft was a starting point. She asked for other suggestions for the timeframe. She asked Mr. Hamilton to clarify his question regarding City versus County density. Mr. Hamilton rephrased his statement to explain how a developer could consider abusing annexation to purchase land, designate it as farm use, and build at a higher density after two years than would be allowable by the County. He noted that the proposal claimed the land could be preserved but thought the language allowed for a quick flip by developers.

Mr. Lawhorn agreed that allowing a farm use was beneficial to the City and felt there were areas where farms could exist. He was also concerned about allowable density. He referred to Ms. Gray's presentation and asked if the three buckets were options that required feedback from Council. Ms. Gray confirmed that staff was receptive to all feedback and comments. Mr. Lawhorn agreed with Mr. Hamilton's concerns about density and pointed that large homes in neighborhoods were inefficient and presented a net-loss for the City. He expected that the City would authorize a mix of uses with some high and lower density development in order to be more cost-effective to the City and provided flexibility to match the area. He wanted to avoid developing garden apartments next to larger homes. He agreed with Mr. Hamilton's concerns about the two-year waiting period and backdoor development plans. He asked Ms. Gray how staff determined the timeframe and asked how the concern would be addressed. Ms. Gray replied that two years was a placeholder to address the concerns of flipping the property. She believed that developers would propose developments on the initial application because it would still require an approval. She said it was possible to require a longer waiting period. Mr. Lawhorn wanted to consider both sides and believed five years was more appropriate.

Mr. Lawhorn asked what the by-right options were and noted that staff encouraged site plan approval so plans could be brought before Council. Ms. Gray replied that the property could be subdivided to get no more than two interior lots for two one-family dwellings that lacked street frontage so long as one of the lots remained ten acres to be reserved for agriculture. She continued that for subdivisions that did not subdivide and opted for site plan approval or created two lots, the property could be developed under the RH zoning district with a by-right total site density limited to less than 1.3 dwelling units per acre. She pointed that another option for subdivisions for the semi-detached could be done under RD district for not less than 2.5 units per acre. Mr. Lawhorn asked if all three would be an option and Ms.

Gray explained that all three would be available to the developer because they were listed as possible uses. Mr. Lawhorn asked how the 40% open space related to the options. Ms. Gray replied that under site plan approval, the developer would be allowed up to eight dwelling units per acre with a required preservation of 40% of the site for parkland or open space. She explained the provision encouraged a cluster-type development. Mr. Lawhorn stated it fell into the third mixed option and Ms. Gray confirmed. Mr. Lawhorn supported the third option and believed it preserved open space. He pointed that the land could not be forever zoned as farming because it was not a legal option. He asked Ms. Gray if her intent was to protect the space with the option and Ms. Gray confirmed. He agreed with the definitions and special use permits.

Mr. Markham asked if the proposal was residential zoning with a special use when it first came to Council and Ms. Gray confirmed. He recalled that Council did not want to allow a straight by-right residential zoning for a farm to deter quick development. He informed Ms. Gray that he was hoping for the strongest zoning code to help a farm remain a farm and he assumed the underlying zoning could not be parkland because parkland did not offer development rights. Ms. Gray confirmed that there needed to be an underlying use and she did not think it was possible to develop parkland. Mr. Bilodeau confirmed that development had to be an option. Mr. Markham asked Mr. Bilodeau to forward him the Code. Mr. Markham assumed that the County also had underlying zones for farms and asked Ms. Gray what they were. Ms. Gray replied residential. Mr. Markham asked for the City equivalent and asked how many residents were allowed per acre. Mr. Fortner replied the County had varied zoning districts and informed that suburban reserve allowed one unit per acre. Mr. Markham asked what was typical for a farm and Mr. Fortner repeated his comments for suburban reserve and explained it was a complicated answer. Mr. Markham asked if there was a path forward for development within in the County because the underlying use residential and Mr. Fortner confirmed. Mr. Markham pointed that it was not blocked in the County and Ms. Gray confirmed it was not. Mr. Markham noted there was a farm in the City but was zoned UN and asked what UD's underlying farm zoning was. Mr. Fortner revealed that the UD farm did not have an underlying zoning and Mr. Markham understood all UNs were required to have one but Mr. Fortner informed him that not all were required. Mr. Markham wanted to address the UN farming zone incase it was decided to sell the farm. Mr. Markham believed to in order to encourage farm use, the waiting period should be increased prior to development because the County offered the same basic rights with tax breaks and underlying residential zoning. He asked if the City could choose a similar underlying zoning to the County and Ms. Gray confirmed but admitted she struggled with Mr. Markham's question of underlying density. Mr. Markham explained that the County's suburban preserve provided certain parameters around residential development and Ms. Gray confirmed. He asked what City density zone was comparable to the County's suburban zoning. Ms. Gray replied the closest was RH at half an acre or two units per acre. Mr. Markham believed it was important that if the City chose a similar underlying zone to the County so there would be incentive to not convert to a farm. He wanted a longer waiting period and an underlying zone that encouraged a remaining farm use. Ms. Gray stated that tax exemptions would encourage continual farm use because it was crafted to tax the structures instead of the land and suggested staff could create other incentives but wanted to do more research. Mr. Markham thought it was best to brainstorm during the meeting because a vote was not required that evening.

Mr. Clifton acknowledged Ms. Bensley who said she reviewed Ordinance 78-30, which granted much of UD's underlying zoning, and explained that the farm had underlying zoning of either MI or RS. She said she would have to research a map to share which pieces were which but noted that the Experimental Farm, Agricultural Hall, three Experimental Farm single-family homes, and agricultural land were UN/MI while East Farm Barn & Stables and East Farm single-family home were UN/RS.

Mr. Clifton thanked Ms. Bensley for the clarification. He stated that many of his concerns were already discussed and he agreed with many points made by Council. He said he had made his feelings known over the last year about the issues of underlying zoning. He understood that the underlying zone for the country club mirrored that of the surrounding development when it was constructed but viewed it as a ticking time bomb. He thought RH was the least dense of the zoning codes and thought that the longer FAR properties had to wait for development, the better, and suggested ten years. He asked why the underlying zoning had to be for housing development and shared that residents were concerned about overdevelopment. He wanted farm zoning to mean the property was a farm and asked why an underlying zoning was necessary. He asked what other underlying issues Council should be made aware of before annexing properties. He appreciated the notion of site plan approval and asked Mr. Bilodeau if requiring a ten-year waiting period could be viewed as arbitrary and capricious. Mr. Clifton felt that ten-years protected the neighbors and ensured the City the property would remain a farm. He did not want to take away development rights but wanted to pattern the rights to protect future properties. He asked if only farmland had to have underlying zonings and, if so, why. Mr. Bilodeau said he would have to research the ten-year waiting period issue and underlying zoning but said that farm owners had to be provided options for their properties. Mr. Clifton believed that future Councils considering annexations

should be able to partake in true decision making instead of being limited in action as stewards of the City. He wanted to understand the legal basis for the issue.

Mr. Markham interjected that when a property was purchased, the zoning was clear to the owner and if they desired a change, they were required to appear before Council. He did not understand why the process was not enough.

The Mayor opened the floor to public comment and Ms. Bensley stated that Max Walton had requested to speak.

Mr. Walton, 19 The Horseshoe, wanted to address his mother's farm, located at 751 Papermill Road. He clarified that underlying zonings were required because not providing one would be considered a taking under the Constitution (*Penn Central Transportation Company*, and *Lucas v South Carolina Coastal*). He explained it was a common law doctrine that says, "if the government takes all or substantially all economically viable use of the land, then that is a taking." He continued it was a balancing test to determine the ultimate outcome. He repeated the zoning had to have an underlying use. He informed Council and staff that if a strict agricultural use zone was possible, then the State would not need the Delaware Agricultural Land Preservation Fund. He noted there was a wide interpretation of lot sizes.

Mr. Walton explained that his mother's farm was zoned suburban with sewer with an underlying density of 1.3 units per acre. He stressed that he wanted to construct a home on the property and neither he nor his mother were concerned with the underlying density. He stated the largest lot size in the City was half an acre and his family would be fine with one-acre lot sizes which would be less density than they were entitled under the County. He noted that the proposal called for a two-year period and pointed out that there was an additional period of 120 days' notice for a potential change in the zoning or by-right development proposal. He indicated the density could range from one-acre lots with mansions to 2.5 units per acre if it was a higher density zoning. He added that there was also a 120-day clock to protect the City so that if a proposal came before Council, there was time for Council to pass an ordinance or start a process with a pending ordinance to alter the proposal. He continued that it was designed to encourage site plan approval to allow Council to have more input. He explained that by comparing the densities allowed under by-right uses to densities allowed under site-plan approval, it was clear that a site plan approval was more desirable than the by-right plan.

Mr. Walton revealed that he and his family never researched the issue of the five to ten year waiting period because they wanted to keep the farm as such because it had been under their ownership since the 1930s. He reiterated the waiting period was not a huge issue but thought that Planning and Development proposal provided Council a few benefits. He noted that the proposal allowed a by-right use with a special notice provision to give Council the ability to act. The proposal created an inducement for site-plan approval which allowed the City a lot of input.

Mr. Walton addressed Mr. Hamilton's comment and explained the advantage of having a farmland, especially when the City was granted so much control, allowed for better planning. He also pointed that there were not many parcels that would qualify but the proposal still allowed for annexation and master planning and reiterated the City's control over the properties. He continued that the proposal allowed for the potential of future development, and stressed he was not interested in developing the proposed property in his lifetime but added that the tax base services would be in place. He interpreted that the ordinance was designed to provide Council more flexibility than the landowner.

Mr. Walton expressed his support of the ordinance and shared that his mother was also in support. They were not concerned about the waiting period timeframe because they had no intentions of selling the farm. He reiterated there had to be allowable use and felt the Planning Department was thorough in providing ample notice to Council for discussion without violating the 5<sup>th</sup> amendment takings rights.

Mr. Walton noted that Council typically wanted to develop with more density because of revenue and stressed that his family did not care what density Council proposed, they just wanted to be part of the City. He asked for clarification on public comment and Mr. Clifton explained that Council reserved the right to question the speaker.

There were no additional public comments and the Mayor returned the discussion to the table. He added that he wanted to hear from Director Gray after Council comments.

Mr. Horning reiterated Mr. Markham's comments about County uses and potential parcel development. He believed Mr. Walton made a strong argument for the annexation and asked Mr. Bilodeau his opinion on the 120 days' notice required before a developer could file an application. He asked if Council's review of the by-right's parameters would pass legal muster. Mr. Bilodeau confirmed that Council would have 120 days to act which could include introducing a pending ordinance to change the requirements prior to the application. The ordinance would have to be addressed before the property owners could move forward. Mr. Horning was comforted and thought it was favorable to the issues surrounding the Dickinson dorms. Mr. Bilodeau added that owners would consider the 120 days and provide Council with more reasonable proposals.

Mr. Hamilton did not think Council could use the 120 days to change the law and asked for clarification.

Mr. Markham interjected and stated there were a few Councilmembers unaware of the pending ordinance doctrine. He explained that during a pending ordinance, there would be no action on certain development projects and asked Mr. Bilodeau for clarification. Mr. Clifton appreciated Mr. Markham's comments because Council understood that once a plan was submitted, it had to be voted based on current law.

Mr. Bilodeau explained the pending ordinance doctrine was in-play with the Kappa Alpha litigation because the applicants filed the litigation against the City challenging the zoning. He continued that the City had an ordinance in the works to change the zoning of the property and to amend the Comprehensive Plan. The pending ordinance immediately halted the Superior Court litigation to allow the City to address the amendments at the local level. He repeated the pending ordinance doctrine halted litigations until the City passed new legislation.

Mr. Hamilton thought the discussion would be more appropriate offline because he did not want to argue legalities. He assumed Council would initiate a freeze so developers could not submit a project and not that project would be submitted first and then Council amended second.

Mr. Horning explained the 120 days' notice was to alert Council that a developer intended to submit an application so Council could revisit the legal structure and propose ordinance changes prior to receipt of the application versus changing ordinances after a proposal was submitted.

Mr. Lawhorn asked if it was legal for future Council to propose ordinances to change zoning within the 120 days. Ms. Gray understood the pending ordinance doctrine was an articulation that Council intended to change an ordinance. Mr. Lawhorn asked Mr. Bilodeau if it was necessary to provide more clarification on Ms. Gray's comments. Mr. Bilodeau thought clarification would be helpful and confirmed that Council would be allowed to change the zoning code during the 120 days and stressed the actions would take place prior to the official submission of the application. Mr. Lawhorn changed his support of option 3 for underlying zoning to increase the number of years to the maximum allowed with the least amount of density. He believed the 120 days allowed Council to change the zoning and noted that encouraging site-plan approval added another layer of protection.

Mr. Markham supported whatever option maintained the most similarity to the County and suggested RH density because he did not think the location made sense for high density projects. He agreed with the 120 days' notice and encouraging developers to use site-plan approval. He was pleased with the amount of controls added to allow future Councils more control. He asked Ms. Gray if staff required more direction and added he preferred five or ten years. Ms. Gray asked Mr. Markham about comments regarding provisions to encourage the property remain a farm. Mr. Markham said it was more of an overall comment and supported staff's strongest argument to keep the property a farm.

Mr. Clifton shared Mr. Lawhorn's and Mr. Markham's viewpoints. He offered Mr. Walton the floor for additional comments.

Mr. Walton referred to the case of *Kappa Alpha Educational Foundation v City of Newark* and explained the Supreme Court held that there was no vested right to any zoning classification. He offered to forward all pertinent citations on the legality of zoning. He informed that the City would not have to change zoning or complete the process with the 120 day period, rather, the City would have to introduce an ordinance or pass a resolution to introduce an ordinance, as in the case of *Covington v City of Rehoboth Beach*, in order to stop the application from advancing while it was pending. He believed that the Planning and Development department provided Council tools to have a say in the property development and provided incentive for developers to utilize site-plan approval.

The Mayor returned the discussion to the table.

Mr. Clifton asked Ms. Gray if she was satisfied with the direction from the discussion. Ms. Gray confirmed.

**6. 3. ITEMS SUBMITTED FOR PUBLISHED AGENDA:**

**A. Council Members:**

- 1. Potential Items for Future Meeting Discussion – Council Members (15 minutes)**

**2:02:25**

Mr. Clifton stressed the need for additional revenue streams and thought it was time to have initial discussions about moving forward with impact fees to recover legitimate costs. Ms. Gray shared that upon direction from Council, staff had internal meetings regarding impact fees. She said she would create a memo for Council to discuss at a future meeting.

Mr. Markham asked that the City Secretary to pull the conversation from the budget meetings and wanted to revisit the notes.

There was no public comment and the Mayor returned the discussion to the table.

**7. 3-A-2. EMERGENCY ORDINANCE NO. 20-03 – AN EMERGENCY ORDINANCE CONCERNING COVID-19 PRECAUTIONARY MEASURES RELATING TO FOOD AND DRINK ESTABLISHMENTS WITHIN THE CITY OF NEWARK – CITY MANAGER**

**2:06:37**

Ms. Bensley read the ordinance into the record by title.

Mr. Coleman informed the Governor provided a method for restaurants to extend premises, including the serving of alcohol, outside of their current footprints to allow for the creation of outdoor seating areas which would help restaurants be more profitable while total seating capacity was restricted due to the pandemic. He pointed that with the Main Street construction project, COVID-19, and UD closure, downtown businesses and restaurants needed assistance.

Staff reviewed how to implement the Governor’s plan for restaurants and identified several existing hurdles in Code that greatly restricted the ability to quickly process applications because patio expansions required Council approval. He noted the City had an open container regulation that prohibited alcohol sales in the right of way and in public spaces. He explained the regulation could be problematic if restaurants expanded into the right of way or cross sidewalks to serve tables on the far side of a sidewalk, away from the restaurants.

Mr. Coleman continued that the proposed emergency ordinance provided a way for Council to approve quality, temporary applications via a quick administrative process to speed up the application process for Newark’s restaurants. He informed that the Governor’s order was set to expire on July 31<sup>st</sup> unless extended, so the emergency ordinance would last until the end of that order. If staff received information from the Governor that the order would be extended, Council could consider a full ordinance with sunset, like the gathering ordinance.

Mr. Coleman shared that after staff posted the emergency ordinance, they identified two more amendments and two minor adjustments to add to the existing amendments. He believed the amendments gave the City more flexibility to assist restaurants and more control over the process by adding the ability to revoke permits if applicants failed to follow the approved guidelines:

Mr. Coleman suggested that Council:

- Modify Amendment 1 to add “or revoke” after “deny” which would give the City Manager the authority to revoke permits if an applicant fails to follow the guidelines and approved plans associated with the permit. He found the current language ambiguous as to the revocation of issued permits.
- Renumber Amendment 4 to Amendment 6 to make room for two new amendments.
- Add Amendment 4:  
“AMENDMENT 4: Effective immediately, all code provisions restricting expansions of patios into alleys and onto neighboring properties to expand outdoor seating for serving food and

drink are amended to allow the City Manager to consider, grant, deny, or revoke such applications”

- Add Amendment 5:  
“AMENDMENT 5: Effective immediately, all code provisions restricting open containers in public spaces are amended to allow the City Manager to consider, grant, deny, or revoke applications to exempt expansions of outdoor seating for serving food and drink for employees of the applicant, their contractors, and patrons of the applicant.”

The Mayor opened the table to discussion from Council.

Mr. Horning was pleased to see the City was working quickly to help restaurants and thanked staff for the work. He asked what residents should expect from the temporary special noise waivers in Amendment 2. Mr. Coleman informed that he had the ability to set the requirements and revoke for the waivers as necessary and would work with applicants, on-site, on a case-by-case basis to determine a reasonable noise meter reading for a dinner environment. He stressed that the intent was not for DJs to move outside but rather to have dinner music.

Mr. Hamilton followed-up on Mr. Horning’s comment. He cautioned Mr. Coleman to be judicious with the approvals and wanted to make sure residents were protected from loud music after 9 p.m. He wanted to help businesses but not at the expense of residents. He wondered how many code officers would be working to willingly enforce the ordinance. Mr. Bilodeau interjected that Mr. Coleman would have the ability to place conditions on the hours of the sound within his approval rights and could immediately revoke the waiver. Mr. Hamilton wondered if Code or Police would enforce the ordinance. Mr. Coleman replied that the Police enforced the existing noise ordinance by whether it could be heard across property lines and reiterated he had the authority to immediately revoke permits. He stressed that he would only allow music for the lunch and dinner windows. Ms. Gray explained the ordinance only pertained to restaurants who were granted permits for additional outdoor seating under the Governor’s emergency order.

Mr. Lawhorn wanted staff to have conversations with applicants throughout the application process to explain the guidelines.

Mr. Markham asked if the ordinance applied to all zoning districts because he did not want it to apply in residential districts. Ms. Gray informed the Governor’s order was not zoning district specific and was only specific for restaurant use. Mr. Markham asked how the access ways would be maintained. He requested Council be informed of which restaurants were granted applications. He agreed with Mr. Lawhorn that applicants be provided clear language on guidelines. Mr. Markham asked if restaurants would get points or revocations. Mr. Coleman believed that points would be given for alcohol violations and Mr. Bilodeau confirmed restaurants could lose points for alcohol violations and could lose special use permits for 30 or 60 days. Mr. Markham wanted staff to relay that the point system was in play. Mr. Markham wanted an after-hours contact list for any issues.

Mr. Clifton appreciated that Mr. Markham wanted a contact list but explained that only Mr. Coleman had the authority to immediately revoke the permits. Mr. Clifton shared that he visited downtown establishments and was enthusiastic to see how the ordinance would play out as a lower key Newark Night and hoped it had a future.

The Mayor opened the floor to public comment. Ms. Bensley read a comment from Jamie Kelso, General Manager for Klondike Kate’s:

“Thank you for taking the time to listen to our concerns and feedback regarding the use of expanded outdoor seating at our location during this pandemic. As you know, the restaurant industry has been hit the hardest during this time and combine that with the Main Street construction it has been the perfect recipe for crippling our businesses up and down Main Street in the past year.

When Governor Carney announced the idea of expanding outdoor seating for restaurants, we were ecstatic to hear that this was a temporary possibility to help all of the businesses on Main Street. In numerous small towns and cities, different restaurants have been given the opportunity to build temporary decks and close down streets in some areas to allow for this brief modification to normal rules and regulations that are in place.

As you know, the spring semester was lost and is usually the most lucrative time of the year for all of us to build a cushion to use for the slow summer months. With the uncertainty of when school will be back in session, the loss of the spring semester and UD Graduation, and the capacity restrictions that we still have with no end in sight, we were hoping that the City of Newark would have some leniency in this decision to help our local small businesses. This closure and ambiguity of when we are able to again schedule or book any type of function like graduations, birthdays, rehearsal dinners, showers and school mtgs is severely hampering another avenue we depend on to survive under normal circumstances during this time.

We were discouraged to read that the city of Newark is imposing and enforcing a number of code guidelines to be able to conform to this brief time. We felt our request would be ok because we were only asking to add an additional 4 tables on the sidewalk adjacent to our property We are pleading with the City of Newark to work with us during this time of need. As long time good business partners to the City we and a number of businesses are all suffering. If the City feels that adding those tables to the sidewalk is an issue, would they be more inclined to allow us to add them to the parking spots on the side of our building on Choate Street? If that doesn't work either, we are more than open to any suggestion you may have at this time that would help us.

When making your decision please keep in mind this is a temporary ask and hopefully only for the summer months. We are pleading with the City to please give us and the other businesses on Main Street a fighter's chance during these tough times we are all facing in some capacity."

The Mayor recognized Douglass Smith for public comment. There were technical difficulties and Ms. Bensley read the comments Mr. Smith submitted in chat:

- How soon would outside seating be approved;
- Noted with 30% occupancy, restaurants could not be open long;
- Was with Mad Macs; and
- Wanted an outdoor seating permit approval update.

Mr. Clifton thought the discussion covered the update. Ms. Bensley thought Mr. Smith was concerned with the timeframe for an application to get approved if the ordinance passed. Mr. Coleman shared that Mad Macs' application was submitted and ready to be approved at the City level pending ordinance approval. If the ordinance passed, the application required approval from the State alcohol division. Mr. Coleman did not know how long it would take the State to approve but expected it to be processed quickly. Mr. Clifton knew that some restaurants had spoken to State Alcohol Commissioner Jack Cordrey and thought the process would go more smoothly than other processes through ABC. Mr. Clifton again offered Mr. Smith the floor and Ms. Bensley said he still had technical issues.

Ryan German, Caffè Gelato, believed having outdoor seating would be safer for diners.

There was no further public comment and the Mayor returned the discussion to the table.

Mr. Horning asked Mr. Coleman if the amendments addressed Mr. Kelso's requests. Mr. Coleman said he spoke to Mr. Kelso before the meeting. He revealed the seating along the sidewalk in front of the building was an ADA issue and he would work with staff to address concerns. Mr. Coleman explained that seating in the alleyway was a staff recommendation and believed staff could address the concerns of the restaurant.

Mr. Clifton asked Mr. Coleman to read the proposed amendments into the record and asked if they could be approved as one or had to be done individually. Ms. Bensley replied that one motion was enough. Mr. Markham shared that he had the information necessary.

MOTION BY MR. MARKHAM, SECONDED BY MR. HAMILTON: TO MODIFY AMENDMENT 1 TO ADD "OR REVOKE" AFTER "DENY" TO GIVE THE CITY MANAGER THE AUTHORITY TO REVOKE PERMITS, RENUMBER AMENDMENT 4 TO AMENDMENT 6, ADD AMENDMENT 4 WHICH STATES, "AMENDMENT 4: EFFECTIVE IMMEDIATELY, ALL CODE PROVISIONS RESTRICTING EXPANSIONS OF PATIOS INTO ALLEYS AND ONTO NEIGHBORING PROPERTIES TO EXPAND OUTDOOR SEATING FOR SERVING FOOD AND DRINK ARE AMENDED TO ALLOW THE CITY MANAGER TO CONSIDER, GRANT, DENY, OR REVOKE SUCH APPLICATIONS", ADD AMENDMENT 5 WHICH STATES, "AMENDMENT 5: EFFECTIVE IMMEDIATELY, ALL CODE PROVISIONS RESTRICTING OPEN CONTAINERS IN PUBLIC SPACES ARE AMENDED TO ALLOW THE CITY MANAGER TO CONSIDER, GRANT, DENY, OR REVOKE APPLICATIONS TO EXEMPT EXPANSIONS OF OUTDOOR SEATING FOR SERVING FOOD AND DRINK FOR EMPLOYEES OF THE APPLICANT, THEIR CONTRACTORS, AND PATRONS OF THE APPLICANT."

MOTION PASSED. VOTE: 5 to 0.

Aye – Clifton, Hamilton, Horning, Lawhorn, Markham.

Nay – 0.

Absent – Hughes, Wallace.

MOTION BY MR. MARKHAM, SECONDED BY MR. HORNING: TO APPROVE EMERGENCY ORDINANCE 20-03 AS AMENDED.

MOTION PASSED. VOTE: 5 to 0.

Aye – Clifton, Hamilton, Horning, Lawhorn, Markham.

Nay – 0.

Absent – Hughes, Wallace.

8. 3-B. **OTHERS:** None
9. **Meeting adjourned at 9:40 p.m.**

Renee K. Bensley, CMC  
Director of Legislative Services  
City Secretary

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