

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY
CIVIL TRIAL DIVISION**

ALEXANDER PARENTI, et al.:
932 Blythe Avenue
Drexel Hill, PA 19026

Appellants

v.

UPPER DARBY TOWNSHIP COUNCIL
100 Garrett Road #107
Upper Darby, PA 19082,
&
UPPER DARBY TOWNSHIP
100 Garrett Road #107
Upper Darby, PA 19082,

Appellees

NO. CV-2020-003024

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of Appellants' Motion for Additional Evidence and any responses thereto, it is hereby **ORDERED** and **DECREED** that Appellants' Motion is **DENIED**.

BY THE COURT:

J.

I. FACTUAL BACKGROUND

1. Admitted in part, denied in part. It is admitted that Upper Darby School District (the “District”) filed an application with Upper Darby Township (the “Township”) for preliminary/final land development plan approval (the “Land Development Application”). It is denied that the Land Development Application was filed on March 1, 2020. The District’s Land Development Application was filed on or about August 29, 2019.

2. Admitted.

3. Admitted in part, denied in part. It is admitted that Township Council held a committee meeting followed by a special meeting on April 1, 2020, which were held via GoToMeeting due to the COVID-19 pandemic. The District's Application and request for waivers were included as part of the Township’s business for both meetings. *Appellee’s Exhibits A & B.*

4. Admitted in part, denied in part. It is admitted that Township Council held the April 1, 2020 Special Meeting after a public meeting. It is specifically denied that the public meeting was a “regularly scheduled Township Council meeting.” The April 1, 2020 Special Meeting was held after the Township’s Committee Meeting.

5. Admitted in part, denied in part. It is admitted that the special meeting began at approximately 10:00 PM. It is specifically denied that the scheduling of the special meeting “minimized the participation and input from the Appellants.” On the contrary, more than nineteen (19) public comments were submitted and considered during the public comment portion of the April 1, 2020 special meeting. By way of further Answer, Township Council President Laura Wentz observed that the Township received and entertained more comments than if there had been an in-person meeting.

6. Denied. Township Council's written agenda is a writing that speaks for itself, and any characterization thereof is accordingly denied. By way of further Answer, it is specifically denied that Township Council's written agenda was vague.

7. Denied. Denied as stated. The stormwater management plans submitted as part of the District's Application were formally reviewed by the Township's stormwater engineer, Catania Engineering Associates, Inc. ("Catania"), pursuant to review letters issued on September 24, 2019, December 4, 2019, January 23, 2020, and March 25, 2020. The final review letter issued on March 25, 2020, confirmed that the stormwater plans were acceptable and recommended approval contingent on resolving the comments contained therein.

8. Denied. By way of further answer, School Board's architect and engineer attended the meeting and answered questions and provided commentary.

9. Admitted.

10. Denied. It is specifically denied that Township Council "granted" Resolution 18-20. By way of further Answer, Township Council adopted Resolution 18-20. The remaining averments are denied as conclusions of law to which no response is required and the exhibits to Appellants' Notice of Appeal speak for themselves.

11. Admitted.

12. Denied. Denied as a conclusion of law to which no Answer is required. By way of further Answer, Section 508 of the Pennsylvania Municipalities Planning Code ("MPC") governs approval of land development applications and does not require a municipal governing body to hold a public hearing before approving or denying a land development application. Section 1103 of the SALDO contains nearly identical language to Section 508 of the MPC. Neither the MPC nor the SALDO require Township Council to hold a public hearing on the Land Development

Application. By way of further Answer, Appellants were afforded an opportunity to present public comment in opposition to the Land Development Application.

13. Denied. By way of further answer, a public hearing is not required by the MPC or the SALDO for land development applications, and a public hearing was not held in this case. Appellants had an opportunity to provide comment regarding the Land Development Application.

14. Denied. Appellees are without knowledge or information sufficient to form a belief as to the truth of this averment. Therefore, strict proof thereof is demanded at trial herein By way of further Answer, see Appellees' Answer to paragraph 7, above, as evidence of the availability of the stormwater management review letters.

15. Admitted. By way of further Answer, there is no legal requirement that land development applications with exhibits and plans be posted on the Township's website prior to action being taken by the Township Council.

16. Denied. Counsel for the Township and Township Council has received no email request for the Land Development application from Counsel for Appellants.

17. Denied as stated. Counsel for the Township and Township Council cannot respond to an email that was never received.

18. Admitted in part, denied in part. The Township did receive a request pursuant to the Pennsylvania Right-to-Know Law ("RTKL") from Appellants. By way of further Answer, the RTKL does not require a "confirmatory email" to be sent acknowledging the receipt of a request. The RTKL requires a response within five (5) business days of receipt. If a response is not received within five business days, it is a deemed denial. This denial is appealable to the Office of Open Records, not this Court. The Township has received no notification of an appeal.

II. LEGAL ARGUMENT

19. The Appellees incorporate all of the foregoing responses as though fully set forth herein.

20. Denied. The averments contained in Paragraph 20 of the Appellants' Motion are conclusions of law to which no response is required.

21. Denied. The averments contained in Paragraph 21 of the Appellants' Motion are conclusions of law to which no response is required.

22. Admitted in part, denied in part. It is admitted that the School District, its counsel, and the School District's expert witnesses participated in the Township Council meeting via GoToMeeting. It is specifically denied that Township Council's meeting was "styled as a 'special meeting,'" rather, the meeting was, in fact, a Special Meeting as provided for in Section 311 (c)(1) of Upper Darby's Home Rule Charter and Pennsylvania's Sunshine Act.

23. Admitted in part, denied in part. It is admitted that the Appellants' or Upper Darby residents did not have access to the GoToMeeting log-in information. It is specifically denied that the Appellants or Upper Darby residents were not "afforded an opportunity" to comment regarding the Land Development Application.

24. Admitted in part, denied in part. It is admitted that the Special Meeting did not begin until approximately 10:00 PM and ended at approximately 1:00 AM. It is denied that the Appellants' right to public comment and participation in the open meeting was compromised as a result of the hour. Appellants and other residents of Upper Darby had an opportunity to comment on the plan during public comment.

25. Denied. Specifically denied that Appellants were denied the opportunity to enter facts, evidence, and/or testimony on the record. By way of further Answer, there was no "record" because there was no "public hearing" (as defined by the MPC) held (or required by law to be

held) to consider the Land Development Application. By way of further Answer, Appellants were afforded the right to submit public comment on the Land Development Application just as the general public was.

26. Denied. After reasonable investigation, Appellees are without knowledge or information sufficient to form a belief as to the truth of this averment. Therefore, strict proof thereof is demanded at trial herein. By way of further Answer, Appellants were afforded the right to submit public comment on the Land Development Application just as the general public was.

27. Denied. Denied as a conclusion of law to which no Answer is required. By way of further Answer, Township Council provided the required notice of the special meeting pursuant to the Pennsylvania Sunshine Act by advertising the April 1, 2020 special meeting on its website and in a newspaper of general circulation beginning on March 27, 2020.

28. Denied. The averments contained in Paragraph 28 of the Appellants' Motion are conclusions of law to which no response is required.

29. Denied. The averments contained in Paragraph 29 of the Appellants' Motion are conclusions of law to which no response is required. By way of further Answer, the Township did not disregard the Sunshine Act, but rather complied with it.

30. Denied. It is specifically denied that the Stormwater Memo was not available for public review. See Appellees' Answer to Paragraph 7, above. The remaining averments are conclusions of law to which no response is required.

31. Admitted in part, denied in part. It is admitted that the Land Development Application and plans were not available on the Township's website for public inspection during the special meeting. The remaining averments are conclusions of law to which no response is required.

32. Denied. The averments contained in Paragraph 32 of the Appellants' Motion are conclusions of law to which no response is required.

III. CONCLUSION

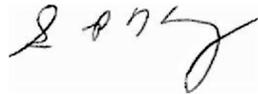
33. The Appellee incorporates all of the foregoing responses as though fully set forth herein.

34. Denied. The averments contained in Paragraph 34 of the Appellants' Motion are conclusions of law to which no response is required.

WHEREFORE, Appellees respectfully request this Honorable Court deny Appellants' Motion for Additional Evidence.

Date: 6/24/2020

Respectfully submitted,
KILKENNY LAW, LLC



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Attorneys for Appellees

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**APPELLEES' BRIEF IN OPPOSITION TO APPELLANTS'
MOTION FOR ADDITIONAL EVIDENCE**

AND NOW, Appellee Upper Darby Township Council and Appellee Upper Darby Township (collectively “Appellees”), by and through its counsel, Kilkenny Law, hereby file this Brief in opposition to the Appellants’ Motion for Additional Evidence as follows:

I. Relevant Facts

The underlying Land Use Appeal in this case arises out of Township Council’s adoption of Resolution 18-20 granting preliminary and final land development approval to the Upper Darby School District for renovations to and an expansion of Aronimink Elementary School, which action was taken at Council’s April 1, 2020 special meeting. Plan approval followed seven months of communication between Upper Darby Township (the “Township”), the Delaware County Planning Commission (“DCPC”), and the Upper Darby School District (the “District”).

On August 29, 2019, the District submitted an application to the Township for preliminary and final land development approval (the “Land Development Application”) for the renovation and expansion of Aronimink Elementary School. The District sought approval of its plans under the Delaware County Subdivision and Land Development Ordinance (“SALDO”). The Land Development Application included land development plans showing the design and specifications for the project, a traffic impact study, and a post-construction stormwater management plan and narrative.

As required by the SALDO, the Township forwarded the District’s Application to the DCPC for review. The Township’s Civil Engineer, M.G. Engineering Associates, LLC; Stormwater Engineer, Catania Engineering Associates, Inc.; and Traffic Engineer, Traffic Planning and Design, also reviewed the application and provided multiple reviews containing recommended plan revisions that were communicated to the District over a six-month period.

By letter dated March 27, 2020, the M.G. Engineering Associates, LLC, identified three (3) SALDO waivers (collectively, the “Waivers”) he believed were necessary. First, a waiver from Section 300.I of the SALDO to allow the Land Development Application to be reviewed and approved simultaneously as both preliminary and final plans. Second, a waiver from Section 805.C.2 of the SALDO to allow three non-residential driveways along the Bond Avenue property frontage where only two are permitted. Third, a waiver from Section 805.C.3 of the SALDO to allow the driveway associated with the new faculty parking lot to be less than 150 feet from Alexander Avenue. On April 1, 2020, the District's legal counsel requested the Waivers as suggested by M.G. Engineering Associates, LLC, and provided justification for the Waivers as required by Section 512.1 of the MPC and Section 1105(D)(1) of the SALDO.

On March 25, 2020, prompted by the COVID-19 pandemic, the Township moved to virtual meetings in accordance with the Governor's March 6, 2020 Emergency Order and subsequent stay-at-home Order for Delaware County issued on March 23, 2020. The District participated in Council’s March 25, 2020 and April 1, 2020 virtual meetings to give presentations about the Land Development Application and respond to numerous questions and comments from the Township and the public.

At Council’s March 25, 2020 virtual meeting, the District made a presentation to Council on the Land Development Application. On Friday, March 27, 2020, the Township advertised its upcoming April 1, 2020 special meeting in the Delaware County Times and posted notice of the April 1, 2020 special meeting on its website. On April 1, 2020, Council held two virtual meetings: a committee meeting and a special meeting pursuant to Section 311 of the Upper Darby Home Rule Charter. Resolution No. 18-20 was one of six action items on the April 1, 2020 special meeting agenda.

During the March 25, 2020 Council Meeting, Township Council asked questions of the District and received public comment. During the April 1, 2020 special meeting, public comment was received following the District's final presentation and prior to Township Council's vote on Resolution 18-20.

Township Council received no less than 19 public comments on the Land Development Application, some of which came from individual Appellants. Township Council President Laura Wentz observed that the Township received more comments than if there had been an in-person meeting. After the District's presentation and public comment, Council adopted Resolution 18-20.

On April 30, 2020, Appellants filed a Notice of Appeal from Township Council's grant of preliminary and final land development approval for the Aronimink Elementary School project. On or about May 29, 2020, Appellants filed a Motion for Additional Evidence.

II. Legal Argument

A. Motion for Additional Evidence.

Section 11005-A of the Pennsylvania Municipalities Planning Code ("MPC") provides, in relevant part, "[if, upon motion, it is shown that proper consideration of the Land Use Appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence . . .]" 53 P.S. § 11005-A.

The question of whether the presentation of additional evidence is to be permitted under Section 1005-A of the MPC is a matter within the discretion of this court. *E. Consolidation & Distrib. Servs., Inc. v. Bd. of Comm'rs of Hampden Twp.*, 701 A.2d 621, 624 (Pa. Commw. 1997).

Where a Board's decision is sound and based on substantial evidence, the taking of additional evidence is unnecessary. *Ernsberger v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 531 A.2d 98, 102 (Pa. 1987), *petition for allowance of appeal denied*, 538 A.2d 878 (Pa. 1988).

It took over seven months for Township Council to approve the District's Land Development Application. The Application was received on August 29, 2019. Over the seven-month period, the Township, its engineers, the Delaware County Planning Commission ("DCPC"), and the District engaged in numerous correspondence and conversations regarding revisions and updates to the plan. Before adopting Resolution 18-20, Township Council received presentations from the School District in two separate meetings and also took public comment.

This level of both professional consultant review and public input is a clear indication that Township Council's decision to approve the Land Development Application was based on sound and substantial evidence, and taking additional evidence is unnecessary.

B. Appellants' argument fails because there is no legal requirement that a "public hearing", as defined in the MPC, be held prior to a governing body acting on a land development application.

While the MPC requires that a governing body receive and act upon all preliminary and final applications for land development, **the MPC does not require a governing body to hold a public hearing.** *See* 53 P.S. § 10508(5) ("*(5) Before acting on any subdivision plat, the governing body or the planning agency, as the case may be, may hold a public hearing thereon after public notice.*" Emphasis added). A municipality acting on a land development plan has the option of whether to hold a public hearing. Unlike proceedings before a zoning hearing board, a conditional use or curative amendment hearing before a governing body, or the consideration of a zoning ordinance or SALDO amendment, all of which *require* a public hearing pursuant to public notice under the

express provisions of the MPC, consideration of and official action on land development plans does not require that a public hearing be held.

Any official action taken by a governing body must be taken in an open and public meeting under the Pennsylvania Sunshine Act. *See* 65 Pa. C.S. §§ 701-716. For a meeting to be “open and public,” the municipality must provide public notice prior to holding a public meeting, and public comment must be taken before any official action is taken by the governing body. *Id.* “Public Notice” is defined in the Sunshine Act as, “publication of notice of the place, date and time of a meeting in a newspaper of general circulation which is published and circulated in the political subdivision where the meeting will be held.” 65 P.S. § 703. The Sunshine Act also requires that the public have the opportunity “to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action” at each “advertised special meeting.” 53 P.S. § 710.1(a). Public comment may be taken “at the beginning of the meeting.” *Id.*

In accordance with the Sunshine Act and the Upper Darby Home Rule Charter, the April 1, 2020 special meeting was advertised on Friday, March 27, 2020 in the Delaware County Times, a newspaper of general circulation in the Township. Township Council received public comment at the April 1, 2020 special meeting prior to voting on the six action items on the agenda, including the Land Development Application.

The Appellants make two incorrect assumptions in their Motion and Brief. First, the Appellants contend that by engaging in a question and answer period, receiving professional opinions, and allowing the applicant to participate through counsel at its public meeting, Township Council somehow transformed its public meeting into a public hearing. This is simply untrue.

Governing bodies routinely engage in these practices to make informed decisions. Both an applicant and the public have the ability to comment at a public meeting.

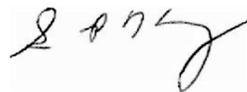
The second assumption is that Appellants are entitled to an unfettered right to interject or participate in a governing body's meeting at any time. Appellants contend that they were entitled to enter facts, evidence, and/or testimony during the public meeting, outside of public comment. This is impermissible. Under the Sunshine Act, the public, which includes the Appellants and other Upper Darby residents, is only entitled to public comment before official action is taken, an opportunity that the Appellants received here. Additionally, even though the special meeting did not begin until approximately 10:00 PM, the Appellants were not precluded from being heard because comments were not only received during the April 1, 2020 special meeting but for several days prior, and 19 public comments were made at the special meeting.

III. CONCLUSION

Because there is no requirement for Township Council to hold a public hearing to consider a land development application, and because the April 1, 2020 special meeting complied with the requirements of the Pennsylvania Sunshine Act, Appellants' Motion for Additional Evidence should be denied.

Date: 6/24/2020

Respectfully submitted,
KILKENNY LAW, LLC



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EXHIBIT “A”

COMMITTEE MEETING AGENDA FOR APRIL 1st, 2020

ATTENDANCE OF COUNCIL

COUNCIL PRESIDENT, LAURA WENTZ

MAYOR BARBARANN KEFFER

COMMITTEE REPORTS

MUNICIPAL SERVICES, LICENSING AND PUBLIC WORKS COMMITTEE

Brian K. Burke, Chairman

Members: Sheikh M. Siddique, Thomas P. Wagner, Hafiz Tunis Jr.

Ordinance No. 3070, requiring sewer lateral inspections in connection with the transfer or change in use of a property; repealing all Ordinances or parts thereof inconsistent herewith; providing a severability clause; and providing an effective date

FINANCE AND APPROPRIATIONS COMMITTEE:

Robert S. Gwin Jr., Chairman

Members: Michelle Billups, Brian K. Burke

Resolution No. 13-20, a Resolution of Upper Darby Township, Delaware County, Pennsylvania to provide a fee schedule for the abatement of property; repealing all Resolutions and parts of Resolutions inconsistent herewith; providing a severability clause; and providing an effective date

Ordinance No. 3071, an Ordinance of the Township of Upper Darby, Delaware County, Pennsylvania, amending Ordinance No. 2786, Ordinance No. 2787 and Ordinance No. 482 to provide that all parking violations shall be punishable by a fine established by Resolution of Township Council; repealing all inconsistent Ordinances or parts thereof; providing a severability clause; and providing an effective date

Resolution No. 14-20, a Resolution of Upper Darby Township, Delaware County, Pennsylvania establishing fines for parking violations in Upper Darby Township; repealing all inconsistent Resolutions or parts thereof; providing a severability clause; and providing an effective date

Resolution No. 15-20, a Resolution of Upper Darby Township, Delaware County, Pennsylvania establishing fees for Licenses and inspections for the operation of food and drink facilities; repealing all inconsistent Resolutions or parts thereof; providing a severability clause; and providing an effective date

Resolution No. 16-20, a Resolution of Upper Darby Township, Delaware County, Pennsylvania, establishing fees for the fire safety inspections in Upper Darby Township; repealing all inconsistent Resolutions or parts thereof; providing a severability clause; and providing an effective date

Resolution No. 17-20, a Resolution of Upper Darby Township, Delaware County, Pennsylvania establishing fines for property maintenance violations in Upper Darby Township; repealing all inconsistent Resolutions or parts thereof; providing a severability clause; and providing an effective date

PLANNING, ZONING AND BUILDING CODE COMMITTEE:

Robert S. Gwin Jr., Chairman

Members: Michelle Billups, Donald P. Bonnett

Ordinance No. 3072, an Ordinance of the Township of Upper Darby, Delaware County, Pennsylvania, establishing a Property Maintenance Code for all residential and non-residential structures and properties in

Upper Darby Township; establishing minimum requirements and standards for premises, structures, equipment and facilities for light, ventilation, space, heating, sanitation, protection from the elements, a reasonable level of safety from fire and other hazards, and for a reasonable level of sanitary maintenance; providing for the responsibility of owners and owners' authorized agents, operators, and occupants; and providing for the occupancy of existing structures and premises, and for administration, enforcement and penalties; repealing all inconsistent Ordinances or parts thereof; providing a severability clause; and providing an effective date

Resolution No. 18-20, for Land Development of Aronimink Elementary School

The UDSD will be available to answer questions.

LAW AND GOVERNMENT & RULES AND PROCEDURES COMMITTEE:

Michelle Billups, Chairwoman

Members: Danyelle Blackwell, Matt Silva

PUBLIC HEALTH AND ENVIRONMENTAL AFFAIRS COMMITTEE:

Matt Silva, Chairman

Members: Michelle Billups, Sheikh M. Siddique, Hafiz Tunis Jr.

COVID-19 Update

Police Update

LEISURE SERVICES COMMITTEE:

Lisa Faraglia, Chairwoman

Members: Matt Silva, Danyelle Blackwell, Hafiz Tunis Jr.

PUBLIC SAFETY COMMITTEE:

Brian K. Burke, Chairman

Members: Danyelle Blackwell, Matt Silva

EVENT PLANNING COMMITTEE:

Michelle Billups, Chairwoman

Members: Hafiz Tunis Jr., Danyelle Blackwell, Matt Silva

OLD BUSINESS

Census

NEW BUSINESS

ADJOURNMENT

EXHIBIT “B”

**Upper Darby Township Council Special Meeting
Agenda
April 1st at 7:45pm**

- 1.0 Pledge of Allegiance to the flag of the United States of America
Opening of Special Meeting
- 2.0 Roll Call
- 3.0 **Presentation by the UDSD for the Aronimink Elementary School Land Development.
Resolution No. 18-20 will follow under the Planning, Zoning & Building Code Committee**
- 4.0 **Rules for Meeting Decorum**

Rule out of order scandalous, impertinent, and redundant comment or any comment the discernible purpose of which is to disrupt or prevent the conduct of the business of the meeting, including the questioning of, or polling of, or debating with, individual members of the Board.

5.0 **Public Comment**

Public Comment should be limited to Special Meeting Agenda items only, not to be repetitive, and be no more than 3 minutes. Total Public Comment will be limited to **30** minutes.

6.0 **Committee Reports**

6.1 **MUNICIPAL SERVICES, LICENSING AND PUBLIC WORKS COMMITTEE**

Brian K. Burke, Chairman

Members: Sheikh M. Siddique, Thomas P. Wagner, Hafiz Tunis Jr.

- (a) **Introduction of Ordinance No. 3070**, requiring sewer lateral inspections in connection with the transfer or change in use of a property; repealing all Ordinances or parts thereof inconsistent herewith; providing a severability clause; and providing an effective date

6.2 **FINANCE AND APPROPRIATIONS COMMITTEE:**

Robert S. Gwin Jr., Chairman

Members: Michelle Billups, Brian K. Burke

- (a) **Introduction of Ordinance No. 3071**, an Ordinance of the Township of Upper Darby, Delaware County, Pennsylvania, amending Ordinance No. 2786, Ordinance No. 2787 and Ordinance No. 482 to provide that all parking violations shall be punishable by a fine established by Resolution of Township Council; repealing all inconsistent Ordinances or parts thereof; providing a severability clause; and providing an effective date

6.3 **PLANNING, ZONING AND BUILDING CODE COMMITTEE:**

Robert S. Gwin Jr., Chairman

Members: Michelle Billups, Donald P. Bonnett

- (a) **Introduction of Ordinance No. 3072**, an Ordinance of the Township of Upper Darby, Delaware County, Pennsylvania, establishing a Property Maintenance Code for all residential and non-residential structures and properties in Upper Darby Township; establishing minimum requirements and standards for premises, structures, equipment and facilities for light, ventilation, space, heating, sanitation, protection from the elements, a reasonable level of safety from fire and other hazards, and for a reasonable level of sanitary maintenance; providing for the responsibility of owners and owners' authorized agents, operators, and occupants; and providing for the occupancy of existing structures and premises, and for administration, enforcement and penalties; repealing all inconsistent Ordinances or parts thereof; providing a severability clause; and providing an effective date

- (b) **Resolution 18-20**, a Resolution for the Aronimink Land Development

6.4 **PUBLIC HEALTH AND ENVIRONMENTAL AFFAIRS COMMITTEE**

Matt Silva, Chairman

Members: Michelle Billups, Sheikh M. Siddique, Hafiz Tunis Jr.

- (a) **Introduction of Ordinance No. 3073**, an Ordinance of the Township of Upper Darby, Delaware County, Pennsylvania, repealing Ordinance No. 1912 in its entirety; repealing Section 1 of Ordinance No. 2673 in its entirety; and enacting new standards for the operation of food and drink establishments; repealing all inconsistent Ordinances or parts thereof; providing a severability clause; and providing an effective date

7.0 Mayor Barbarann Keffer

8.0 Adjournment