

Open Work Session
Proposed Zoning of Open Top Storage Tanks
August 17, 2021

Mr. Paul Wilber, County Attorney, and Mr. Andrew Illuminati, Esquire, came before Council. Mr. Wilber said, since the last Work Session they have made the modifications to the proposed zoning amendment, which will go to the Planning Commission if Council gives a consensus to go forward today.

Mr. Wilber said there is nothing new in the first paragraph, but in the second paragraph they have reduced the gallonage from 250,000 to 150,000 to make it even tighter, and they took out the village conservation zone but left in the A1 because, until the litigation is resolved, they should leave the parties in status quo. He said, as soon as all the litigation is over, if they want to take out A1, that is fine. Mr. McCain said he thinks that is the biggest issue of all, so they need to talk about that further.

Mr. McCain said, what they do as a Legislative Body is separate from the litigation, so, at the end of the day, they are two different animals, to which Mr. Wilber responded, there is an interconnection. He clarified, if they take it out of A1 and the litigation result is that the tank is not permitted, then it would be a nonconforming use as opposed to a permitted use. Mr. McCain asked, but that is just a Legislative choice the Council has made at the end of the day, to which Mr. Wilber responded, it is a Legislative choice, but he thinks they should leave it status quo until the litigation is over.

Mr. Hastings asked if anything that has been done would just be grandfathered in, and then have these regulations going from a certain date forward?

Mr. Cannon said, regardless of the litigation, it is grandfathered in, so it is not going to make any difference, to which Mr. Wilber responded, but it would be a nonconforming use. He clarified, that potentially puts Mr. Burns in a different category than he is in right now. Mr. Cannon clarified, the Council is not worried about the litigation right now as much as they are worried about what is right for the community today moving forward. He said the litigation could go on for years, though they do not know that, but he thinks it is important to get this Legislation through as soon as possible.

Mr. McCain said, from a legality standpoint, any litigation is based on what was in effect at the time the litigation started, so something done subsequently, such as the Council adopting new Legislation around this, is all post the dates of the litigation and what was in effect at that time. Mr. Wilber responded, depending on the result of the litigation, Mr. Burns' rights could be affected, and that is why he is saying he would leave it alone until that matter is concluded, and then if the Council wants to take it out of A1, that would be his recommendation.

Mr. Hastings said he still does not understand how it is that it is not forward looking. He said, if they make changes now, Mr. Wilber said it would be a nonconforming use, to which Mr. Wilber responded, it could potentially change Mr. Burns' use from a permitted use to a nonconforming use.

Mr. Cannon said they have that circumstance right now where they changed the poultry regulations a few years ago and they still have old poultry farms that are allowed to maintain their establishments because they were grandfathered in, even though they are 100 feet from the road, and this would be no different. He said, even if the Legislation has to state that they are grandfathering in existing tanks, he thinks the Council would be okay with that because he does not think they want to do anything that is

going to prohibit them from moving forward today. Mr. Wilber responded, with the poultry Legislation, they all became nonconforming uses, which makes it more difficult to keep that use. He said, for instance, if they do not keep the use active for a year, they lose it.

Mr. Cannon said he does not see where that compromises Mr. Burns because he has not suggested he will not be actively using it, he plans to use that thing for the next 20 to 30 years. He said he is more concerned with what this Council wants to do in regards to the citizens and the County as a whole, and get that Legislation out the door so they can prohibit this because they do not want to have a moratorium in perpetuity, they want to get something done.

Mr. Hastings suggested they could put in a date and say no building past that date going forward, to which Mr. Wilber responded, they do not know when this litigation will end.

Mr. Dodd asked if they can do Legislation around the litigation and how it would affect the Legislation they are currently working on, to which Mr. Wilber responded, his recommendation is they have I1, I2, and A1 in this Legislation, and then remove A1 after the litigation is concluded.

Mr. McCain said his only concern with that is what have they done because that is no different from what already exists except for a little bit of setback and making the tank a little smaller, but those are not the big issues. He said the fact that it is in the A1 district is what Council has expressed most of its concern about, so that is his only concern, and he does not want to adopt something leaving something in there that they have pretty much said they simply do not want in there.

Mrs. Hurley said her understanding is that it would be allowed only by special exception, and that is the difference between what is current, to which Mr. Wilber responded, that is the big change. Mr. Dodd asked if that is only for new tanks, to which Mr. Wilber responded, correct.

Mr. McCain said all they have to do for a special exception is meet what is stated in the zoning code, and they cannot be denied the special exception if they meet the criteria. Mr. Wilber said it is conditioned, to which Mr. McCain responded, right, but if they meet all the conditions, they cannot be denied, which, in essence, makes special exception a moot point. He said, in most cases, they are going to get their special exception because they cannot be denied if they meet the conditions, to which Mrs. Hurley responded, she thinks they can add certain conditions. Mr. Wilber clarified, they can add conditions, which is why the gallonage has been pulled so far down to 150,000, the setbacks at 300, and a five-acre minimum, which was in an effort to make it preconditioned. Mr. McCain said, as long as they meet those conditions, then they get the special exception.

Mr. McCain said people on the Council have made comments that they do not want this in the A1 zone, it should be in the industrial zone, so he is having a hard time getting past numbers two and three in this Legislation. He said he hates to cut it off right out of the gate like that, but he is having a hard time getting past numbers two and three.

Mr. Cannon said, whether it is 150,000 gallons, more or less, is rather insignificant if it is in the industrial zone.

Mrs. Acle said she remembers discussing another issue with any material that is not produced on one's farm being disposed of and that was in regards to the traffic and transporting this material. She then asked if that is discussed anywhere in this, to which Mr. Wilber responded, the traffic would be a law

enforcement issue. Mrs. Acle clarified, she means the material that is being disposed of, to which Mr. Wilber responded, that is a State issue. Mrs. Acle asked if there is some way the County can write into their code that it has to be something that is produced on that farm and then disposed of on that farm. Mr. Wilber responded, what is in the tank, in the County's view, is a Department of Agriculture issue, and they are talking about the structure. Mrs. Acle said she looked at Talbot's and Dorchester's codes, which read similar to that in that they can dispose of material that is produced on their farm, so there is no transporting.

Mr. Hastings said he thinks what Mrs. Acle is saying is that this should be more explicit to any farm operation that a structure containing manure, such as a manure shed, is used within that farm.

Mr. Cannon said he thinks an indirect way of resolving that is making sure that this is in an industrial zone only, to which Mrs. Acle responded, that way it would not touch on the Right to Farm. Mr. McCain clarified, this does not infringe on the Right to Farm, to which Mrs. Acle responded, she knows, but she is talking about that it should be on their own farm. Mr. McCain explained, what goes in DAF tanks is not produced on a farm, it is brought to the tank. Mrs. Acle then suggested they write into the County Code that it has to be produced on their own farm, to which Mr. McCain responded, he is not sure they need to put it in their code because it simply is not produced on a farm. Mr. Dodd said, so that it is not a vague concern, he can see writing something like that into the code.

Mr. Cannon said, if they choose to put it in the industrial zone instead of ag, it does not matter whose farm it comes from, it is going to be in the industrial zone, which he thinks is a much safer environment for it to be in than in the ag District. He said part of the stipulation could also be that there would have to be access to a collector road, which in most cases is the circumstance they find themselves in if it is in an industrial area. He said that would resolve the issue of the trucks going through the neighborhoods. He said, if they put it in the industrial zone and make sure it is accessed by a collector road, they would then have most of what he thinks the citizens of this County and the Council are looking for.

Mrs. Acle said, from the townhall she had, that is what she heard. She clarified, the concern of the majority of the citizens there was that they wanted it to stay on that farm. She said, if it was produced on that farm, it stayed on that farm.

Mr. Cannon said they are kind of talking about two different things here. He said, if they put it in the industrial zone, it does not matter where it is being produced because it is only going to be going to the industrial area, and the farms do not produce this.

Mr. Dodd asked, when Mr. Cannon says put it in the industrial zone, is he talking about future tanks or this current tank, to which Mr. Cannon responded, they cannot impact the current tank, so this would be from here forward.

Mrs. Acle said she is talking about other byproducts that would be produced down the line from a farm and keeping it on that farm so it is not being transferred, to which Mr. Cannon responded, he does not know what those byproducts would be. Mr. Dodd suggested, it could be chicken manure, to which Mr. Cannon responded, that is a whole different class entirely. He said this is DAF they are talking about, and he does not think they produce DAF on a farm.

Mr. Holloway explained, DAF is not coming from a farm to this tank, it is coming from a processing plant to this tank. He clarified, when he says processing, it is not coming from a processing plant, such as

Perdue or Mountaire, it is coming from a processing plant that processes DAF, so it is not coming from a farm. He said, by putting it in an industrial zone, the argument will then come along as to whether this is a farm material or an industrial material, and the problem is that nobody has tested it to say what it is.

Mr. Wilber said he sees another issue, which is that tanks on farms are used to hold product that come from off the farm, not just on the farm and used on the farm. Mr. Cannon asked what Mr. Wilber is suggesting farms are using that would come from off the farm, to which Mr. Wilber responded, corn and fertilizer. Mr. Cannon said even corn and fertilizer are a little bit different. He said he is assuming that the definition of what they are working with here are DAF tanks, to which Mr. Wilber responded, they are not making an effort to define DAF and they are not regulating DAF, they are just regulating the structure of the tank.

Mr. McCain said they define an open storage tank as an above-ground open-top structure designed and used for the storage of an agricultural byproduct, fertilizer, or soil amendment. Mr. Hastings said he thinks that is acceptable because no one is putting grain into an open tank, to which Mr. McCain responded, grain goes in a grain bin, so it would not be affected, and manure goes in a manure shed, so that would not be affected, but these are open-top structures, which pretty much is only DAF.

Mr. Dodd asked, if this tank is unused for a certain amount of time, can they place new Legislation on it, sort of like a building code? He said, if a building is vacant for over a year, he believes it has to conform to a newer standard. Mr. Wilber responded, on this tank, if it is not used for a year, it would be a nonconforming use, end of story. Mr. Dodd asked who would keep track of that and how that can be enforced, to which Mr. Wilber responded, the Planning and Zoning Department would keep track of that. Mr. Dodd said he has a feeling the citizens would be keeping an eye on it, to which Mr. Wilber responded, probably. Mr. Dodd said he just wanted to ask that question, and he thinks Mr. Wilber answered it.

Mr. Cannon said the Council appreciates the legal advice, but he thinks it is incumbent upon the Council as a Body to respond to the citizens, and their request is that DAF tanks in the future be put in an industrial zone where there is a collector road for proper access, and he thinks that is what the Council would like to see as the Legislation.

Mr. Dodd said that is the impression he has. He then asked if Mr. Wilber has any concerns with that, to which Mr. Wilber responded, only that in the future, depending on how the litigation comes out, he thinks Mr. Burns may be put in a legal position which he is not in today, and they will see how he reacts to that.

Mr. Cannon suggested that maybe there could be amendments to this Legislative Bill in the future if they feel there is a real issue that develops from that particular concern.

Mr. Hastings suggested addressing that by being explicit with the grandfathering in or from a build date on forward, or something like that.

Mr. Wilber said, if Council is okay with everything else, this can go to the Planning Commission, and it sounds like the Council wants it to be just I1 and I2.

Mr. Cannon asked if the distinction of it being 150,000 gallons is necessary if they decide this is something that will be in an industrial zone, to which Mr. Wilber responded, the object was to make it

more restrictive than they had when it was first presented. Mr. Cannon said, if they look at the concept of the industrial zone, would it be necessary to have it included in there about the five-acre minimum, to which Mr. McCain responded, he thinks so. He said it is in there now with I1 and I2. Mr. Wilber said, when they think about the I1 and I2 areas, if they look at the zoning map, some of those areas are probably more surrounded by residential and commercial than where this tank is in the Ag zone, so he thinks they want a low bar for special exception review.

Mrs. Hurley asked if Mr. Wilber can give them some examples of some businesses that are in I1 and I2 so they have an idea of what this tank could be built next to, to which Mr. Wilber responded, any type of manufacturing business. He said there are different permitted uses in I1 and I2, to which Mr. McCain added, I2 is heavy industrial. He said Brick Kiln Road where the landfill is is I2. Mr. Wilber added, chemical processing would be in I2.

Mr. Dodd asked if the County has zoning maps for that, to which Mr. Wilber responded, yes. Mr. Dodd said they can just use those maps, to which Mr. Wilber responded, when this comes back to Council, they can have the zoning map so they can see where all the I1 and I2 are, but generally they run up and down Route 13 on one side or the other and are generally closer to Salisbury, Delmar and Fruitland.

Ms. Lori Carter, Director of Planning and Zoning, then handed out zoning maps to the Council. Mr. Cannon asked if they could also have it in PDF format, to which Ms. Carter responded, yes.

Mr. Hastings, referring to the map, said the striking difference he can see is the difference with A1, and they can see that much of the County is in an A1 District.

Mr. Cannon said the question is whether or not the light industrial might even be an area where putting DAF tanks might compromise some of the neighboring properties. He said he does not know, but he thinks they have to be more familiar with the areas.

Mrs. Hurley asked, what about retail establishments? She said she knows that is commercial, but are any of those near I1, to which Mr. McCain responded, they should not be. He said, from a zoning perspective, consistency and compatibility are the two components of zoning, so normally they transition out of I1 and I2 into a light business, or something of that nature, before getting into general commercial. He said he does not know if they have cases where general commercial borders I1 or I2, and they would have to look at a map, but that is probably unlikely.

Mr. Holloway asked what the driving factor was behind using five acres, to which Mr. Wilber responded, just separation. Mr. Holloway said apparently there are two of these tanks in the County, and one of them is on a 300-acre farm. He said he has never seen that one, but it does not seem to bother anybody. He said the other one is on a small parcel that is close to houses, so he is just wondering, if they wanted to keep it in the ag district, it would have to be more acreage and further setbacks. He then asked if there is a problem with doing something like that, to which Mr. Wilber responded, no, that could be done.

Mr. Dodd said the setback was something that several of the citizens discussed. Mr. Holloway said it seems as though the problem with the latest tank that was built and is causing problems is the distance it is from homes and the roads.

Mr. Hastings said, from listening to the citizens, it would have to be in terms of miles, not feet. He said they have talked to folks who have said there is a mosquito issue, and then there are the flies that were potentially breeding in there, and then one group said there were thousands of flies.

Mr. Dodd asked if the mosquitos were breeding because of the liquid, to which Mr. Hastings responded, that is what individuals have said. He said there is also the smell that comes along with that, so the challenge would be that, before it crusts over, the smell or the other potential liquid matter can carry for some distance, but he does not know if they can adequately address that in any kind of real way.

Mr. Holloway said the other problem with that is finding an area in the County that is that detached from anywhere else because they are getting built out.

Mr. Cannon said it seems to be somewhat of a moot point if it is going to be in the industrial zone, to which Mr. Holloway responded, that is what he was saying. He clarified, it could be in the Ag zone if it had further setbacks and larger acreage. He said it is also hard to find a piece of land that is that large.

Mr. McCain said it is also not just the property line setbacks, they also would not want to be getting into wetland areas, ditches, and streams, so that is another reason to come back to the industrial area.

Mr. Dodd asked, if it is in the industrial area, can they require the distance and a buffer, to which Mr. Wilber responded, if the Council so wishes. He clarified, that is what is in this Bill. Mr. Cannon said it may not need to be as extreme because it is in an industrial area, to which Mr. Dodd responded, but it would be nice to know that there is a buffer going up.

Mr. Cannon said he guesses this will come back to Council again, to which Mr. Wilber responded, it needs to go to the Planning Commission for comments and recommendations, and then it comes back to the Council. Mr. Cannon asked if it will go to the Planning Commission with the changes the Council has asked for, to which Mr. Wilber responded, if that is Council's consensus, that is the way it will be presented.

Mr. Dodd asked, if this is the Council's consensus, will it then go to the Planning Commission for approval, to which Mr. Wilber responded, it will be for the Planning Commission's own independent recommendations, and then it comes back to the Council.

Mr. Dodd asked if everybody is okay with that, to which there was a consensus. Mr. Wilber clarified, they will go with I1 and I2.

Mr. Mitchell asked if Mr. Wilber is going to put something in the Bill saying that the changes are only forward-looking on the A1, to which Mr. Wilber responded, yes, it will be grandfathering. Mr. Mitchell said he is not sure he would call it grandfathering as much as he would say this change affects only those tanks which will be applied for from this day forward.

Mr. Cannon asked if Mr. Wilber will also put something in about a collector road, to which Mr. Wilber responded, yes.

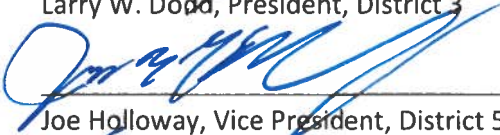
There was no further discussion.

Signatures on next page

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Larry W. Dodd, President, District 3



Joe Holloway, Vice President, District 5



John T. Cannon, At-Large



William R. McCain, At-Large



Ernest F. Davis, District 1



Nicole Acle, District 2



Josh Hastings, District 4



Laura Hurley, Council Administrator