

Open Work Session
DAF Storage Tanks Moratorium
October 6, 2020

Mr. Taylor said the purpose of this Work Session is to discuss the moratorium on DAF tanks that is currently in effect, and, if it is not extended, will expire roughly at the end of this year; to discuss whether Council wants to go forward with it; and, if they want to go forward with it, what they should do in addition to passing another Bill to extend it. He said there have been public comments about the existing tank and the problems it is causing, but that is not really the subject of this Work Session tonight. He clarified, if Council wants to explore that, they can certainly do so, but he would suggest they cover the moratorium first to get a rough idea of how Council wants to proceed because, if Council wants to extend it, it will take Legislative action. He explained, the moratorium has been passed twice by Council, each for a six-month period, and in each case it was vetoed by former Executive Culver, and was overridden by the Council; however, other than that, and other than a meeting Council had during the summer with a representative of the Delmarva Poultry Industry, there really has not been much in the way of any action to do anything in terms of addressing it and changing the zoning code. He explained, the purpose of the moratorium was to allow further study and action to change the zoning code, and he is not going to say they are at ground zero, but they have not progressed very far from that. He said there is a general risk in imposing any kind of a moratorium on land use that, to some extent, is a deprivation of someone's right to use their property. He said, for the purpose of his comments tonight, he is assuming, just as a hypothetical, that right now these tanks are permitted. He clarified, he is not saying that would be the ruling of a court, but in terms of addressing what the risk is, they would assume they are permitted because, if they are not permitted, in other words, if the litigation that is currently going on results in a ruling that they are not permitted, then obviously the moratorium is not needed and there is no deprivation of anybody's property rights. He said, for the purpose of discussion, he is approaching it from that basis. He said the concern is, if Council just continues the moratorium without doing anything it is, in effect, a defacto amendment of the zoning code to prohibit the particular use, in this case these storage tanks and the use of it to store this material.

Mr. Taylor said he provided a memorandum to Council yesterday that discusses the legal basis for this risk issue he just raised of the potential of taking someone's property due to a moratorium. He explained, the courts are fairly lenient as long as the Legislative Body is proceeding in a reasonable and serious way to address the underlying issue that caused the moratorium, but it cannot just go on endlessly forever. He said his suggestion is, and he put this in his memo, if Council is going to extend the moratorium, they need to become more actively involved in this and see if they can get it wrapped up in a reasonable time period. He suggested probably six months if they started today, or at the next meeting, and begin to move this.

Mr. Taylor said, if Council is going to change the zoning code, the process would be to suggest an amendment to the Planning Director; the Planning Director would then issue a report on the proposed amendment that would go to the Planning Commission who would make its recommendation, and then the proposed amendment would come back to Council. He clarified, it would not have to be approved by the Planning Commission, they could recommend one way or the other, and it would still come back for action by the Council. He said, even if they start moving forward very quickly, that process in itself is

probably going to take the better part of six months because the first thing Council will have to decide is what they want to propose as an amendment. He said, in broad overview, that is the situation with the moratorium and continuing it, if that is Council's decision. He clarified, obviously, they cannot make that final decision tonight, but they can certainly discuss it and reach a consensus tonight. He said, if there are any questions on it, he will answer them, but he thinks, to some extent, the ball is in Council's court.

Mr. McCain said, based on Mr. Taylor's comments and the obvious fact that they are far from resolving this, they need to extend the moratorium, and whatever path they take will easily take them six months to resolve it. He said their risk is kind of nonexistent as long as they are progressing toward addressing this issue from the Council's perspective, whether that is an amendment, or whatever path they take. He said given the fact they have no other pending applications or anything, he thinks they are fine extending it, but they obviously need to act on this and decide which direction they want to go.

Mr. Cannon asked Mr. Taylor if he said the current moratorium expires in December, to which Mr. Taylor responded, yes, roughly mid-December. Mr. Cannon said they certainly need to extend it, and he does not see any problem with that. He then suggested the public keep in mind that the Council has not really been stalling on this issue, but they have not really had an opportunity to fairly discuss this with Planning and Zoning since this whole process started. He said that is why they created the moratorium, to give Planning and Zoning time to give Council their opinion on what they thought might be Council's options, but Planning and Zoning over the last year has not been allowed to sit with Council to review this, but he thinks things may be different now where Council can work hand in hand with Planning and Zoning to find out what the solution might be. He said he is a very strong advocate of farming, and a very strong advocate of agriculture and poultry, but he has a concern over this DAF tank, and he thinks others do as well. He said he thinks Ms. Kenney's letter was probably the most concise explanation of the argument as to why this DAF tank and the storage of DAF material may not be what they want to see in Wicomico County, despite how things might be, and he assumes this is all valid information. He said, when they have MDE considering this an industrial material, and when they have Delaware and Virginia considering this to be industrial, they have to ask where Wicomico County is on this.

Mr. Cannon said he thinks another really great point that was made is that there is a real restriction on this, and this is something he missed entirely because he figured this is DAF material that is brought in and the purpose of it is to allow them to fertilize their properties. He explained, this product can only be used out of the DAF tank on the property of the individual farmer who is using it, so it is not like fertilizer where the product is used on all farms for all the farmers and the agricultural business as a whole. He clarified, it has to be isolated to one person on one piece of property, and, if it is not, it is an industrial use. He said that is one stipulation, it has to be used on that farmer's individual property, or else it is considered industrial. He said he does not even really know, but he suspects this is not even being used as a fertilizer, it is being used just as a process by which to put it in the ground to dispose of it. He said that in itself to him suggests they are not threatening the agricultural industry or the poultry industry, they are just simply in need of trying to take some type of measures more in line with what they are seeing Delaware and Virginia do, and he does not think it is radical. He said he certainly would like to hear from the poultry industry and the Farm Bureau, and whoever else to let Council know wholeheartedly how this is going to impact their industry.

Mr. Cannon said another point that was made that he thinks is a very strong point is the fact that in Delaware, Virginia, Dorchester County, and Talbot County the poultry industry and the agricultural industry did not disappear because they put restrictions on the DAF tanks. He clarified, they are very successful and thriving in all of these areas, so he thinks Wicomico County is going to need to try to look at taking some type of a position. He said he thinks the fact that Dorchester requires there be a hearing for a special exception maybe is the route Wicomico wants to take. He suggested that could be cut and dry and very simple, and it would be a first step because they have to begin somewhere. He said he thinks Planning and Zoning is now available to help Council, and they need some direction, so maybe they want to suggest Planning and Zoning develop a permitting process on this whereas it requires a special exception just for starters, and then they can go from there. He said the public has to recognize that they cannot do anything as a Council, as he understands it, with the current DAF tank that is there. He said that, he is afraid, is now in the litigation process, period, and he is not so certain there is anything the Council can do as a Legislative Body to address that DAF tank, but he thinks they can take measures to begin to address the concerns they heard tonight, and with the concerns that are legitimate within their County as to how they handle the DAF tanks in the future.

Mr. Dodd said it is his understanding there is litigation going on, so Council should probably limit their discussion about that specific tank, but they need to talk about moving forward with this moratorium. He said the first time Council did this they decided to do the moratorium for six months instead of a year hoping the Planning and Zoning staff would work with them and have a quicker timeline, but that did not work out, and then the next thing they knew a year was up, and here they are trying to extend it again. He said it sounds like everyone is on board with extending it, but they also need to talk about Legislation. He clarified, they probably will not get anywhere with that tonight, but he thinks that deserves another Work Session. He then asked if everyone is on board with extending the moratorium.

Mr. Hastings said Mr. Cannon's statement was well said, and he appreciates the folks who have spoken on this, and definitely agrees, but, to be clear, Council has tried to move on this issue. He said, if it were not for COVID, they would have had much better communication with the Department of Agriculture and others, but they have held off, so Council has been trying to navigate that. He said they want to avoid any kind of inverse condemnation or anything like that, but, above all else, he thinks they just need a process on this. He said he would like to have a better understanding, and maybe a talk with MACO, and then find out exactly what other Counties are doing, and maybe it could be a simple fix. He said it might take a process, and, as Mr. Taylor pointed out, it could be a six-month process for any kind of potential zoning changes, so he does not know if they want to consider a nine-month moratorium or something slightly beyond that. He said King Burnett actually also sent over a great memorandum that had really great points within it, just as Ms. Kenney's did. He said, speaking broadly, their County is also looking at extending water and sewer. He said, if they are going to grow and build new houses, a lot of that space is probably going to be just outside the City, and they cannot grow if they have a situation where folks are upset with the surroundings, so they need to find better balance there.

Mr. Cannon asked if Mr. Taylor could review the permitting process for Council because he would be really interested, and he thinks it would benefit Council if they had some idea as to creating a permitting process that required a hearing for a special exception. He said he knows that is in a lot of different parameters of Planning and Zoning, but maybe Mr. Taylor could give Council a breakdown on what that

would entail. He clarified, not now, but also what the pros and cons of that might be, what the impact may be on the industry, or the whole spectrum of what that would entail. Mr. Taylor responded, he can answer that in very general terms. He said, obviously, the impact would be on how many permits are issued, and they cannot really speculate on that. He said that would be up to the Board of Zoning Appeals, so it is kind of an open-ended question, and he cannot really answer that, and he does not think anybody else can very definitively. He said he thinks one thing that is worth pointing out, but he did not want to get totally into the weeds because he thinks they need to focus on the moratorium extension, but just so Council is aware, he has done some research on the State position which seems to be that spreading of the material is something they control. He clarified, if there would be any local Legislation to limit spreading, there would probably be a preemption issue by the State regulations; however, apparently they feel that the storage of it is a local matter that can be controlled locally. He said there is at least one other County he is aware of that someone brought to his attention, and he mentioned it in his memo, but Queen Anne's County has what is, essentially, a special exception mechanism for storage, so they have what he thinks Mr. Cannon is mentioning.

Mr. Cannon suggested Council see what Queen Anne's and Dorchester Counties have put together, and that might be a guideline on where they can begin. Mr. Taylor said he does not know what other Counties do, but he found out about Queen Anne's County, and they heard Talbot County mentioned tonight, but he has not seen those regulations. He said, from the discussion, it sounded like the Talbot County regulations had more to do with the processing of it rather than the storage of it. He clarified, he does not know, but that was his impression when he heard the lady speak.

Mr. McCain said they are not going to resolve all of this tonight, but Wicomico does not even have basic parameters around this. He said they have nothing that addresses the number of tanks, and right now there is nothing in their zoning code that limits the number or size of the tanks other than the amount of area they need to put the tank on. He said those are just basic zoning amendments they would have in any type of use, and that is not even addressed in their code at all. He said, whether it is addressed through special exception or addressed through amendment, those are the kinds of things they will have to talk about.

Mr. Holloway said, instead of tanks they need to really talk about the storage of the material because somebody could just build a tank. He said he thinks the tank that has been in use for the longest time in Wicomico County probably was not even built as a DAF tank, it was built as a tank to store something else. He said somebody could come in and say they were building a soilage tank, or building a tank for a hog farm or whatever, and it be used as a DAF tank in the future. He said, instead of just addressing the tank issue itself, it is the storage of the product, so that may be a route they need to address rather than just the tank part of it. Mr. Taylor said the Queen Anne's County regulation has to do with storage, and it does not make any difference whether it is a tank or a pit.

Mr. Dodd said he is not big on reinventing the wheel, so he agrees with Mr. Cannon that they need to look at the rest of the Counties, and even Sussex County and Delaware. He said every time somebody speaks, he learns something, or something sinks in. He said maybe he did not pay attention to it earlier, but every time somebody sends an email and he reads it, he learns something. He said he thinks Mr. Cannon was trying to say industrial waste, but he thinks he left out the waste part, but that is what he

heard several times tonight, so he is thinking it is whatever is on the ground, and whatever they clean. He said, if they are using cleaning products, is that part of the waste, and if that is part of the waste, is it bleach? He said in his other life that would have been a hazardous material and they would have been very sensitive on how they disposed of that, so that really concerns him. He said he guesses on that part he needs to learn to find out what that waste product is that is called an industrial waste, and what is in that waste, and whether it is being disposed of properly. He said he wonders if it is being disposed of, or are they using it as a fertilizer, which he does not think they are. He said, if they are at 3-million gallons right now, it sounds like they are going to need another tank soon.

Mr. Taylor said, according to the Maryland Department of Agriculture, the material generally has a very small nutrient value of nitrogen, phosphorus, and potassium, but is not real high on any of those soil nutrients. Mr. McCain said that is why they use the term "soil amendment", which is kind of a made-up term. Mr. Taylor clarified, it does, apparently, have some value in terms of nutrients, and he guesses that is why the State considers, as far as spreading it on land, that they control their regulations. He said there has been no litigation on that as far as he is aware, but he will make Council aware of the fact that about 30 years ago, more or less, these same kinds of issues came up with sewage sludge, and initially they allowed the County's past regulations to control it that were challenged in court and upheld, but the State changed the regulations to essentially preempt the Counties on sewage sludge, and that also was challenged and sustained, so there is a history in terms of sewage sludge, but not poultry sludge.

Mr. Taylor said he will point out, since Mr. Cannon mentioned, the County Council has had nothing to do with the issuance of the permit of the tank that has been mentioned tonight. He clarified, the Council cannot issue permits, and cannot cause them to be voided. He said the Council does not have that power now that they have changed to the County Executive system as that is an Executive Branch function. He said the Council can ask and make suggestions, certainly, as was one of the comments tonight, but, again, that is up to the Council.

Mr. Hastings said Mr. Taylor stole the words out of his mouth. He clarified, there were a couple of folks who seemed to infer that this Body had something to do with the current tank that is under question, and, obviously, that is not something this Council has the power or authority over at this point, or at least the current project, as folks in the Porter Mill area know. He said he also wants to emphasize that the six of them are definitely hardcore agricultural advocates, and he wants to make sure that is known. He said they have had a lot of folks from the agricultural community, a lot of farmers, and folks he grew up with who also have come out against this particular project that has been in question tonight. He clarified, he just wants to let folks know that Council is working on this, and they are going to continue to try to find some sort of common ground.

Mr. Dodd said Mr. Taylor mentioned earlier that Legislation could not be passed in six months, or it would be cutting it close. He said, with that said, Mr. Hastings mentioned nine months, so does Council want to go with six months, nine months, or a year for this moratorium. Mr. McCain said he thinks they could definitely do nine months, or even a year, and if they come to a resolution sooner, then so be it. Mr. Dodd said he has a feeling, if they are going to do six months, they will be back here doing the same thing. Mr. McCain said six months disappears pretty quick. Mr. Dodd asked if they should do this for nine months or a year, to which Mr. Cannon responded, they should do it for a year. He said, as Mr.

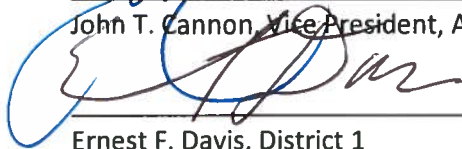
McCain said, they want to get this done sooner than that. Mr. Dodd asked Mrs. Hurley if they can get this ready, to which Mrs. Hurley responded, they can have it ready for introduction at the next meeting. Mr. Dodd said they will talk about the moratorium at the next meeting. There was no further discussion.



Larry W. Dodd, President, District 3



John T. Cannon, Vice President, At-Large



Ernest F. Davis, District 1

absent

Nicole Acle, District 2



Josh Hastings, District 4



Joe Holloway, District 5



William R. McCain, At-Large



Laura Hurley, Council Administrator