

**PLANNING COMMISSION
AD HOC COMMITTEE MEETING
CITY OF REHOBOTH BEACH**

April 23, 2010

The Ad Hoc Committee Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 9:04 a.m. by Chairman David Mellen on Friday, April 23, 2010 in the Conference Room in the Building & Licensing Building, 306 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Mr. David Mellen
Mr. Timothy Spies
Mr. Patrick Gossett left at 11:49 a.m.

Also Present: Mr. Glenn Mandalas, Esq., City Solicitor arrived at 9:07 a.m.
Ms. Terri Sullivan, Building Inspector
Mr. Kyle Gulbranson, City Planning Consultant

A quorum was present.

CORRESPONDENCE

Cover letter dated April 20, 2010 and associated documentation from Oak Grove Motor Court to Ad Hoc Committee, conveying the Applicants' viewpoint as it relates to meeting the requirement that natural resources be preserved for purposes of defining Jones Lane as a short dead-end street. A compact disc was also submitted of the presentation.

Chairman Mellen noted that on the compact disc there are two additional slides which were not part of the original presentation. Those two slides may be used today because they show the dedicated trees which have been proposed for saving, etc.

Mrs. Ann Womack, City Secretary had forwarded this presentation to everyone prior to the meeting.

NEW BUSINESS

The Ad Hoc Committee will discuss matters related to satisfying the requirements for supporting the Short Dead-End Street Ordinance as it relates to the Oak Grove Major Subdivision proposal that is currently before the Planning Commission. The Ad Hoc Committee will report its recommendations back to the full Planning Commission prior to the continuation of the formal Public Hearing, scheduled for May 14, 2010.

Chairman Mellen said that this meeting should not deviate from the agenda. The engineering features of the street and other factors should not be debated at this time. The Ad Hoc Committee's task is to determine whether proposed Jones Lane adequately satisfies the Code requirements related to preserving natural features. A copy of the dead-end street ordinance was distributed prior to the meeting. In Section 236-21(M)(2)(c), a dead-end street may be considered a short dead-end street when an applicant demonstrates that natural features such as trees, brooks, hilltops and views will be preserved by lessening the dimensional requirements of this article. Chairman Mellen sensed that there was concern because this subsection does not say how many of those features need to be preserved and how they are preserved, etc. In general, the Planning Commission has been encouraged by the Applicants' desire to preserve the property, maintain visual impressions, maintain the trees and the concept of a canopy, etc. The question has always been what will happen when houses are built on the lots. Everyone knows that some trees will be removed, and a portion of the canopy will disappear. The issue is how to preserve not losing all of the canopy.

Mr. Kyle Gulbranson's sense was that the rest of the Planning Commission members need to be convinced that this project is going to preserve as much of those natural features as it can.

Mr. Patrick Gossett said that the Planning Commission was reticent to make a decision because of a comfort level. There is a demonstration wholly on the part of the Applicants to preserve natural features, but he wants to know that there is an instrument which demonstrates how that will be done and will codify the words of the Applicants in perpetuity. This is the area the Committee is looking to develop some type of instrument or methodology that can be interpreted by the Planning Commission but also in future properties. There has not been an instrument to codify the Planning Commission's words. Chairman Mellen said that there is language in

the Tree Ordinance that may address this idea. He asked if the Committee should rely on the language in the Tree Ordinance or if it should codify language in its recommendations to the Planning Commission and conditions that the Planning Commission might add on to move the project forward.

Mr. Gulbranson said that the Applicants have identified trees which will be preserved on-site. He asked, if the short dead-end street is meeting the requirements of the Code if those trees can truly be protected and there are other means to further that protection. Additional documentation needs to be done before the trees are removed.

Mr. Spies said that in the most recent presentation by the Applicants, nine trees were identified for saving which would be located in the buildable footprint, and the other issue is the short dead-end street and the trees located at Jones Lane. Chairman Mellen said that the Applicants have supplied additional material on the preservation of trees on the entire site and the addition of new trees.

City Solicitor Glenn Mandalas said that the question is if the positioning and use of the short-dead end street is protecting natural resources and natural features. What happens on the rest of the site is outside of the Committee's analysis today. The only natural features to protect are the trees. In the most recent proposal, the conservation easement is good legal mechanism to put in place to protect some of these trees. The easement can be a restrictive covenant between lot owners. In addition to that, a right of enforcement to the municipality can be put in the easement document. Mr. Gulbranson said that typically the conservation easement is granted to an environmental agency, or municipal government. Whoever holds the easement is the enforcer of it.

Chairman Mellen said that a concern has been with mitigation after the fact and for how long. Testimony has been heard from experts that the trees may be too close to the roadway to survive the building of the road, etc. He asked what should be the mitigation if damage occurs and what the responsibility is of the Applicants. There is language in the Code which deals with that during construction. Mr. Gulbranson distributed information from the University of Minnesota regarding construction measures and tree protection. Typically, a tree that has survived longer than three years after construction has a good chance of surviving long term.

Chairman Mellen referred to Subsection 253-32(F) of the Tree Ordinance - tree protection during construction, and he said that this language may need to be extracted into specific conditions related to this project rather than relying on somebody's interpretation of the Code at some point. The language such as this would help. The development of this property will occur over an extended period of time. There is a reasonable right as a City to expect that there is some period of time under which mitigating factors would take place. City Solicitor Mandalas said that Ms. Sullivan would have the enforcement. Some clarity should be put on what is damaged during construction. If there are concerns about tree damage which comes after the construction of the street, then other mitigating mechanisms can be looked at, which would involve other areas of the site or in the City. Ms. Sullivan recommended that the trees to be preserved should be called out as specimen trees. Mr. Gossett asked if it would be best to put in writing in a covenant or recommendation to refer to the actual site in the Code as opposed to extracting language. There have been many times where the language has been extracted and the original site has changed, and elsewhere in the Code it has not changed. Mr. Gulbranson said that mitigation standards and locations could be a condition of approval. The location of a mitigated tree could be recommended to the Parks & Shade Tree Commission to take into consideration when making its decision.

Chairman Mellen said that the current Code allows an enormous part of the land to be used for the house in the R-2 zone. Under the current building codes and by the time the house is constructed on the lot, there is no room to put substantive trees on the lot. Trees that are being proposed for maintaining close to a pavement can pose problems. Mr. Gulbranson said that Lot Nos. 3, 14 & 15 have the highest concentration of trees on the property in terms of tree density. The majority of those trees on the interior of the lots will be removed. A lot of mitigation will need to take place on those lots. The other issue in regard to the short dead-end street meeting the requirements of the Code is that when construction takes place, three trees may die within a couple of years at the dead-end of Jones Lane. There will be a six foot trench for the bio-retention area and utilities will need to be put in.

Ms. Sullivan said that the 10 foot easement is also the building restriction line. The Tree Ordinance calls out that one tree must be located in the front yard so trees will be planted in the easement which is not an option. The Zoning Code calls out that steps and chimneys can encroach two feet over the building restriction line which would be into the easement. The houses cannot be built to what everyone else in the City can do because of the easement at the building restriction line; and a tree cannot be located in the front yard. City Solicitor Mandalas said that the house may need to be stepped back or built differently because of the

requirement for a tree to be located in the front yard. He did not see that there is much else the Applicants can propose to save any more trees. Mr. Guilbranson said that the setback could be widened on those lots. Chairman Mellen said that the Applicants can dedicate a park in the midst of this property which would preserve the trees. Mr. Gulbranson said that if the road could be shortened so there is not as much impact on Lot Nos. 14 & 15, tree could be preserved.

Chairman Mellen said that on Page 4 of the April 20, 2010 submittal, the Applicants have identified seven trees to be preserved which relate directly to the road. Chairman Mellen would like to see some language relative to mitigation if these trees are damaged over some period of time and the proper survival time following construction. On Page 11, a group of other trees have been identified which are located in the buildable area on the lots to be preserved by the conservation easement. He would like to see the next level of trees identified to be preserved during construction in the setback areas on the lots along with the language for levels of mitigation.

Mr. Gossett did not know where there is additional space to put trees for mitigation. There should be a mechanism to guarantee the preservation of trees, and language should be formulated to do that. Mr. Gulbranson said that the decision needs to be made if this meets the intent of the ordinance; and if it does, what are the mitigation and preservation measures that follow.

Ms. Sullivan said that the current easement as designed does not meet the Code. More than likely those trees will not be saved if the Applicants are required to put in a 15 foot wide easement. City Solicitor Mandalas said that the Applicants have proposed a 10 foot wide easement. If the plat is recorded showing a 10 foot easement and the Planning Commission has not required them to do any easements, then there is wiggle room from the 15 foot requirement in the Code. Ms. Sullivan spoke with a representative from Delmarva Power about easements, and that individual said Delmarva Power normally requires 10 foot width, but a 15 foot width is preferred. City Solicitor Mandalas said that the Planning Commission has discretion to require or not require the easements.

Chairman Mellen said that Lot Nos. 8, 9, 10 & 11 are 105 feet. Those lots could be reduced to 100 feet, or at least less than 105 feet. The City could extend its right-of-way, and the easement could be partially on City land and partially on the owners land. The Applicants' engineer would need to look at this in terms of layout. There are issues relative to the easements, issues relative to planting trees in the easement area, issues relative to having a tree requirement in the front yard setback area; and these are all being constrained by the design of the street. Chairman Mellen said that the short dead-end street meets the best effort with this design. He would like to see an extra level of tree preservation and certain trees designated as being preserved. He would also like to work on the language in order to move forward.

Mr. John Gauger sat in as a member of the public. The easement could be dedicated to the 15 foot width, and the utilities could be dedicated to 10 feet. At a later time, the City could deem it necessary to take the tree out of the easement. The tree would not necessarily need to be removed now.

Mr. Gulbranson said that trees can be identified through construction standards. The next level would be a physical conservation easement to protect the tree which is a legal document. The discussion needs to occur about what all will encompass that. With a conservation easement, someone is the holder of the easement. It might make more sense that the City of Rehoboth would be the holder of those easements. It would be recorded with the deed and would be referenced in the homeowners' association documents.

Ms. Cindy Lovett asked if the tree protection law protects any tree that is in the setback. Chairman Mellen said that the Tree Ordinance does protect it.

City Solicitor Mandalas said that the Applicants are offering conservation easements for trees which could come down in connection with construction. They are offering a level of protection for those nine trees. There is protection in the Code based on the trees that are located within the setbacks. To require a conservation easement for trees that are located in the setbacks and are already protected by the Code is overkill. Chairman Mellen was concerned with having adequate documentation to show what the expectations are.

Mr. Lovett said the City requires that all utilities are put in underground, so now the easements need to be wider to accommodate the utilities. The Applicants are willing to mitigate the loss of specimen trees because of putting in the road. Present design satisfies the development.

All members of the Ad Hoc Committee agreed that the present design satisfies the requirements for preserving natural resources. Mr. Gossett said that the next step is to develop the instrument to indicate that to

the current Applicants and future owners of the lots. Mr. Spies was uncomfortable about the three trees identified by Mr. Gulbranson and the City Engineer that are unlikely to survive putting in the road, water and sewer. Those three trees and the other four on Jones Lane should be put under a conservation easement.

Mr. Gulbranson said that there is no best case scenario in terms of tree preservation on this site. If there are measures in place to protect the tree resources on-site through a conservation easement or through other language, the dead-end street is going to be obviously better than putting a 50 foot wide right-of-way and 37 foot wide paved street through the center of the property. This meets the intent of the Code if those mitigation measures are in place. Chairman Mellen felt the same.

Mr. Gulbranson referred to the construction standards and tree protection. Basically, it talks about the area which needs to be protected under a tree. The minimum area that should be protected during construction is the area directly under the dripline or the canopy of the tree. A diagram was presented that showed the good, better and best protection for mature tree protection. The minimum scenario is to protect the land under the dripline so as not to compact the ground. Certain trees will not be saved on the property. Mr. Gulbranson referred to the trees that have been identified as being protected or with conservation easements.

Chairman Mellen asked the Applicants if they have had any conversations with their engineer about how to physically build the road and protect the trees. Mr. Lovett has not talked to a contractor how they would preserve the trees because it seemed premature. Chairman Mellen suggested that the Applicants talk with a contractor about building the road and preserving trees. Mr. Lovett said that in 2008, a tree protection plan was submitted. He will have an answer from a contractor by the next meeting. Chairman Mellen said that he cannot see the Planning Commission approving something that ultimately cannot be built.

Ms. Lovett distributed pictures of trees that have survived recent construction near houses that were built since 2000.

City Solicitor Mandalas said that the City should have the right of enforcement for the easement. The Applicants can establish in the homeowners' association documents or the restrictive covenants that individual owners can enforce those restrictions between themselves as to certain trees. Mr. Gulbranson said that the City would be the best holder of the easement. The language should be added in the conservation document itself saying that if a tree dies by natural causes or is struck by lightning, etc., there would be some mechanism for mitigation after the fact. Mr. Walter Onizuk, City Arborist, would verify the health of the tree.

Mr. Lovett suggested language to be used that should any of those trees die within 5 years, mitigation measures according the City procedures need to be enforced. The Applicants were anticipating that the trees at the road would be in the conservation easement, and they would expect those trees to be preserved and mitigated should something happen to them. Mr. Gulbranson said that it would be difficult to put those trees located in the building area of the roadway in a conservation easement. The requirements for conservation easements have to provide a public purpose and protect the resource.

Mr. Gossett said that the standards should be set for the seven identified trees at the road. A mitigation statement is needed for the trees related to the road. A conservation easement could be layered on top for the nine specimen trees on the whole of the property.

City Solicitor Mandalas said that the recommendation of this proposal satisfies Section 236-21(M)(2) with the following condition: 1. If any tree identified as being preserved as illustrated in the diagram located in Exhibit 1, is damaged or dies within a period of three (3) years from the date the site preparation illustrated on the approved plot plan is complete and the street is accepted by the City, then such dead or damaged tree shall be replaced or treated in accordance with Section 253-32(F) of the City Code.

Mr. Spies said that if there is mitigation, it would be with the same type of tree. Chairman Mellen noted that there is language outlined in the Tree Ordinance regarding this. Guidance should be taken from a professional such as an arborist to determine the proper replacement tree.

City Solicitor Mandalas said the second condition of the recommendation would be: 2. The Applicant shall prepare conservation easements to be approved by the Planning Commission for the preservation of the nine (9) trees illustrated in the diagram located as Exhibit 2. Any violation of the conservation easement resulting in death or damage to one or more of the trees shall be replaced or treated in accordance with Section 253-32(F) of the City Code.

Mr. Gulbranson said that the conservation easement could work to the community's advantage.

City Solicitor Mandalas said that the third condition of the recommendation would be: 3. The Applicant shall include a covenant within the subdivision's restrictive covenants, to be approved by the Planning Commission, for the preservation of the nine (9) trees illustrated in the diagram located as Exhibit 2. Any violation of the restrictive covenant resulting in death or damage to one or more of the trees shall be replaced or treated in accordance with Section 253-32(F) of the City Code.

City Solicitor Mandalas said that the fourth condition of the recommendation would be: 4. Construction techniques for site preparation, to include utilities, roadway, stormwater and site grading, shall be reviewed and approved by the building official and city engineer to ensure best practices are observed for tree protection and preservation. This condition shall be included as a note on the recorded plot plan.

City Solicitor Mandalas will forward the recommendation and conditions to the Ad Hoc Committee. He also said that a preconstruction meeting should be held with the contractor, building official and city engineer.

Chairman Mellen will prepare a cover letter and forward it and the recommendation and conditions to the Planning Commission for its review. He asked Mr. Gossett to present the report to the Planning Commission at the May 14, 2010 Regular Meeting. A copy will also be forwarded to the Applicants.

Chairman Mellen said that some level of communication is needed from the Applicants that they have talked to the contractors to see if there some chance of doing this even under restrictive construction techniques.

Ms. Lovett asked if the members need to be unanimous on a topic before moving on, or if a straw vote is done to reach consensus on something and then move on. Chairman Mellen said that there are so many issues related to the total project. It is unfair to ask for an official vote of the Planning Commission at the next meeting. It is fair to ask for a non-binding straw vote. It is not essential that all the Planning Commission members approve of the project. The next issue to address is the rear lot line issue.

Chairman Mellen adjourned the meeting at 11:52 a.m.

RECORDED BY

(Ann M. Womack, Recording Secretary)

**MINUTES APPROVED ON
JUNE 11, 2010**

(David Mellen, Chairman)