

**PLANNING COMMISSION MEETING  
CITY OF REHOBOTH BEACH**

**May 14, 2010**

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:05 p.m. by Acting Chair David Mellen on Friday, May 14, 2010 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

**ROLL CALL**

Mr. Timothy Spies called the roll:

Present:           Mr. Brian Patterson arrived at 6:35 p.m.  
                      Mr. Harvey Shulman  
                      Mr. John Gauger  
                      Mr. David Mellen  
                      Mr. Timothy Spies  
                      Mr. Francis Markert, Jr.  
                      Mr. Patrick Gossett  
                      Mrs. Jan Konesey

Absent:            Chairman Preston Littleton

Also Present:     Mr. Glenn Mandalas, Esq., City Solicitor  
                      Ms. Terri Sullivan, Building Inspector  
                      Mr. Kyle Gulbranson, City Planning Consultant

Also Absent:     Mr. Alan Kercher, City Engineer

A quorum was present.

**APPROVAL OF MINUTES**

Minutes of the March 12, 2010 and April 9, 2010 Planning Commission Regular Meeting were distributed prior to the meeting. Minutes of the April 23, 2010 Ad Hoc Committee Meeting were not available for the meeting.

Mr. Spies made a motion, seconded by Mr. Francis Markert, to approve the March 12, 2010 Planning Commission Regular Meeting minutes. (Patterson – absent, Shulman – aye, Gauger – aye, Mellen – aye, Spies – aye, Markert – aye, Gossett – aye, Konesey – aye.) Motion carried.

Minutes of the April 9, 2010 Planning Commission Regular Meeting were deferred to the June 11, 2010 meeting.

**CORRESPONDENCE**

There was none.

**NEW BUSINESS**

There was none.

**OTHER BUSINESS**

Acting Chair Mellen called for the report of the April 30, 2010 Public Hearing conducted by the Board of Commissioners on the final draft of the Comprehensive Development Plan (CDP) that was approved by the Planning Commission at its September 22, 2009 Regular Meeting and any action by the Board of Commissioners.

Acting Chair Mellen reported that the Board of Commissioners approved the Comprehensive Development Plan (CDP) on April 30, 2010, and it has been forwarded to the State. He also noted that Mr. Bryan Hall of the Office of State Planning and Coordination had commented that the PLUS process has started. Mr. Hall had also commented that with the approval at the April 30, 2010 meeting, the new CDP is law even though it has not yet been approved by the State. A meeting will be held on May 26, 2010 at 1:00 p.m. in the Armory in Dover, DE regarding the CDP and the PLUS process. Mayor Samuel Cooper and Mr. Spies will be in attendance. Acting Chair Mellen and Mrs. Jan Konesey will possibly be in attendance.

Acting Chair Mellen called for the Building Inspector's Report.

There was nothing to report.

Acting Chair Mellen called for the report of any new subdivision applications that may have been submitted in the prior 28 days and the status of pending applications or requests.

No new subdivision applications have been filed to date.

Acting Chair Mellen called for the City Solicitor's Report.

City Solicitor Glenn Mandalas reported that the school rezoning negotiations are near completion. The office of the attorney for the Cape Henlopen School Board is drafting the language for the easement which will be connected to the drawing. Once the language has been drafted, the Mayor and Commissioners can place the rezoning on the agenda and move forward. City Solicitor Mandalas will distribute a current copy of the ordinance to the Planning Commission this week for its review.

Acting Chair Mellen called for the report, discussion and possible action concerning those activities or assignments taken at Regular or Workshop Meetings of the Mayor and Commissioners that directly related to the Planning Commission.

Mr. Harvey Shulman requested that in regard to the Mayor and Commissioners possibly making significant changes to the Tree Ordinance, the Planning Commission should have the opportunity to review the ordinance and make its recommendations before changes are made. No members objected. City Solicitor Mandalas will forward this request on to the Board of Commissioners.

## **OLD BUSINESS**

Acting Chair Mellen called for the continuation of the Public Hearing on Major Subdivision Application No. 0708-05 requesting the major subdivision of the property located at 43 Canal Street, comprised of the following lots on Canal Street: Lots 43, 44, 45, 46, 47 & 48, the following lots on Sixth Street: Lots 26, 27, 28, 29 & 30, and the property located at 512 Rehoboth Avenue comprised of Lot 42A, into fifteen (15) lots as follows: Lot 1 to be 6,112 square feet, Lot 2 to be 5,015 square feet, Lot 3 to be 6,362 square feet, Lot 4 to be 6,112 square feet, Lot 5 to be 6,328 square feet, Lot 6 to be 6,076 square feet, Lot 7 to be 5,421 square feet, Lot 8 to be 5,260 square feet, Lot 9 to be 5,260 square feet, Lot 10 to be 5,260 square feet, Lot 11 to be 5,259 square feet, Lot 12 to be 5,584 square feet, Lot 13 to be 5,174 square feet, Lot 14 to be 7,381 square feet and Lot 15 to be 5,012 square feet. The properties are owned by Oak Grove Motor Court, Inc. The Major Subdivision has been requested by the owners of the property. City Solicitor Mandalas presented the Public Hearing procedures.

City Solicitor Mandalas had forwarded a confidential memorandum to the Planning Commission regarding the rear lot line ordinance and its applicability to this particular application, and presumably the Planning Commission has read it. This privileged communication is not for inspection by the public.

Acting Chair Mellen referred to Section 236-12(F) of the City Code, and noted that the Planning Commission shall act within reasonable time, etc. The Planning Commission has a responsibility not only to the City to protect it in terms of this application and looking at it judiciously, but the Planning Commission has a responsibility to the Applicants to move along on the Application as best as it can. The issues are complicated, and some are critical. Regarding Section 236-12(F)(1), in all cases, the recommendations of those attending a public hearing shall be given careful consideration in the final decision of the Planning Commission. This is to remind the Planning Commission of anything heard from the public and any comments previously mentioned.

**Exhibit 14** – 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.

Acting Chair Mellen noted that the Ad Hoc Committee met on April 23, 2010 in the Building & Licensing Office. Members of the Committee were: Mr. Patrick Gossett, Vice Chair Mellen, Mr. Spies and Mr. Kyle Gulbranson of URS Corporation. Building Inspector Terri Sullivan and City Solicitor Mandalas were in attendance. Mr. John Gauger of the Planning Commission, Mr. Paul Lovett and Mrs. Cindy Lovett were also in attendance as members of the public.

Acting Chair Mellen posed two questions to the Planning Commission: 1. Does the Planning Commission have enough information to make a decision on the relevance of whether Jones Lane as proposed meets the requirements, not in terms of design of the street, but in terms of mitigation of natural resources, etc. If the

answer to that is yes, then the Planning Commission can proceed and discuss it. If not, then more information will be needed. 2. After the Planning Commission discusses the recommendations of the Ad Hoc Committee and comments are taken from the public, Acting Chair Mellen will call for a non-binding straw poll vote as to whether the Planning Commission is inclined, at this point in time with what is known, to support the concept of a short dead-end street that is preserving natural resources as it has been proposed, not necessarily the design of the street. Acting Chair Mellen fully expects that this decision may not be unanimous, and he did not think that this should be an official vote. At some point in time, there will be a motion before the Planning Commission to accept, in some form, the major subdivision proposal that has been proposed by the Applicants, and there may be conditions associated with it. All the members of the Planning Commission will have to state their reasons for supporting or not supporting the motion. The proposal the Planning Commission has before it is the Applicants' best and final proposal. The Applicants have received a copy of the Ad Hoc Committee Report.

Mr. Shulman clarified that if for some reason the layout, of where the street is located, was to change, then that would affect the lots and the trees. For that discussion, the Planning Commission will be accepting the location of the street but not deciding on whether it thinks the street has the right drainage, etc.

Mr. Patrick Gossett presented the Ad Hoc Committee Report. The charge of the Committee was to determine the acceptance of the short dead-end street proposal with a specific look at the preservation of natural features. Discussions were focused on: 1. If the proposed Jones Lane adequately meets the short dead-end street requirements. 2. Determining mitigation requirements should Jones Lane's trees, designated to be preserved, be damaged or lost as a result of construction of the proposed short dead-end street. 3. Preservation of other trees throughout the proposed subdivision designated to be preserved, and mitigation requirements related to those trees. 4. Issues related to subsequent street and lot construction techniques which would help to ensure that the natural resources intended for preservation would have a higher likelihood of surviving. Based on extensive discussion, the Committee came up with four (4) recommendations: 1. If any tree identified as being preserved as illustrated in the diagram located as 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, such dead or damaged tree shall be replaced or treated in accordance with Section 253-32(F) of the Code. 2. The Applicants 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. 3. The Applicants 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. 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. After the recommendations were made by the Committee, the Applicants submitted materials that addressed Condition Nos. 1, 2 and 3. With the return of this information and review of the documentation which was submitted, the Ad Hoc Committee concluded that the proposed Jones Lane does adequately satisfy the intent of the short dead-end street ordinance based on the preservation of natural features that have been shown.

**Exhibit 15** – Ad Hoc Committee Report dated May 3, 2010 with Exhibits 1 and 2.

Mrs. Jan Konesey and Mr. Brian Patterson verified that they had listened to the tapes of the April 9, 2010 Regular Meeting, prior to this meeting.

Acting Chair Mellen noted that the Ad Hoc Committee had asked the Applicants whether they had discussed with any of the potential contractors how they would build the road should it be approved. The Committee had concern that it is one thing to approve the road and say that it is going to be built, but it is another thing to have a contractor agree that the road can be built. The Applicants have talked to the contractor, and he had recommended some changes to the bio-retention area in order to not bring construction closer to the trees, etc. Acting Chair Mellen noted that the Applicants issued a letter along with proposed conservation easements. The Applicants had said that they would prepare the easements and have prepared proposed language which will be forwarded to City Solicitor Mandalas at some point in time for review.

Correspondence and associated documentation was received from the Applicants on April 30, 2010 in response to the discussions at the April 23, 2010 Ad Hoc Committee meeting regarding utility easements, the

impact on trees by roadway construction, bio-retention modification, and a schedule for proceeding with the stormwater management analysis. Correspondence and associated documentation was also received from the Applicants on May 5, 2010 in response to the May 3, 2010 Report and Recommendations of the Ad Hoc Committee concerning acceptance of the short dead-end street proposal from Acting Chair Mellen. Both sets of correspondence will be deferred to the June 11, 2010 Planning Commission meeting to be placed into the record due to some members of the Planning Commission saying that they had not received either set of correspondence.

Mr. Gossett said that the charge to the Ad Hoc Committee was to determine whether the short dead-end street could be approved and that the Committee agreed the preservation of natural features exists. He felt that the recommendation from the Ad Hoc Committee had been met. The Applicants have presented information that meets the requirements suggested by the Ad Hoc Committee. Mr. Shulman agreed that the conditions have been met. He rejected the notion that merely having the narrower street with less turn-around and paving less space, meets preserving natural conditions. The significance is that because of the short dead-end street the Applicants were able to configure the lots in a way that allowed them to put a reasonable number of trees in the setback areas where they will be preserved and allowed them to have other trees very close to the setback areas where they are voluntarily agreeing to protect those trees which are not protected by the ordinance, but are protected through a conservation easement. In looking at the whole picture, it is not the size of the street per se, it is how the Applicants have been able to configure the lots and allows them to increase the trees in the setbacks and saves the other large trees. This satisfies the condition that there is more than a miniscule amount of preservation of natural resources which justifies moving forward with the short dead-end street.

Acting Chair Mellen, at this point, asked each member of the Planning Commission (straw poll vote) if they would accept the Ad Hoc recommendation and conditions that the requirement for the short dead-end street had been met. Each member said yes. The Planning Commission then proceeded to discuss the rear lot line issue. Acting Chair Mellen read the Code section relating to rear lot lines and stated that the Code is very specific.

Mr. Paul Lovett, co-owner of Oak Grove, commented that it was incumbent upon him as the Applicant to send everything through Ms. Ann Womack and to use that system to get communications to people. He cannot have that system break down. Acting Chair Mellen reassured Mr. Lovett that the system had not broken down.

Mr. Shulman said that the notion of continuous rear lot lines was not something limited to partitionings. The concept applies to major subdivisions, partitioning and minor subdivisions. When looking at the proposed lots in this Application, the side lot line of Lot 1 becomes the rear lot line of Lot 12 and the side lot line of Lot 2, and the side lot line of Lot 12 becomes the rear lot line of Lot 2 which creates a zig-zag effect. On certain pieces of property where the lots are odd-shaped, natural features are trying to be preserved, and where the lots are not all a minimum of 5,000 square feet, there might be a legitimate basis for doing this in terms of it being a unique situation that probably would not repeat itself with other situations. The notion that this is a good layout has a lot of truth to it; but if the ordinance about jagged lines prohibits this, then that is not an ordinance the Planning Commission can waive if this design is inconsistent with the ordinance.

Acting Chair Mellen said that not only was it the offset of the rear lot lines, but it was also the impact that building a house would have on an odd-shaped piece of property so that the adjacent neighbors have a reasonable expectation of finding like kinds of houses in setbacks when they look out of their rear porch area, etc. One of the issues is that someone could potentially build a house that would block air, sunlight and the general view. This is a unique piece of property, and this design is what the Applicants have proposed to the Planning Commission. Acting Chair Mellen read Section 270-74 of the City Code, which relates to the powers of the Board of Adjustment. It is in the domain of the Board of Adjustment to make modifications when the obvious intent as it is applied in the Code is not so stated.

Mr. Brian Patterson said that this is worth exploring for the benefit of the Applicants. It is not at all clear to him that this is an unnecessary hardship or a practical difficulty in the sense of what a Board of Adjustment would be looking for. This is an economic decision the Applicants are making in terms of how they decided to configure the major subdivision. Mr. Patterson agreed with Mr. Shulman and Acting Chair Mellen. Mr. Patterson said that the statute is clear, and there is not any room for the Planning Commission to interpret around it because the side lots line of Lots 1, 2, 3, 12 & 15 are not exactly the same length where those five (5) lots meet each other. Ultimately the Applicants may need to reconfigure those lots because there is no guarantee the Board of Adjustment will agree that this is unnecessary hardship. Mr. Patterson did not think this is necessarily the ideal layout as a planning matter, but he was not sure anyone would think this is a hardship to have to lay out the lines differently in order to achieve continuous rear lot lines.

Mr. Gossett said that the Applicants have been forthcoming in all of their intent of what they wanted to represent in this subdivision. The Planning Commission has known from the beginning that it could have taken a different shape following the strict lines of the Code and going with condominiums, and have a greater density, lose trees and a larger street, etc. The Applicant has taken the path of not offering that. Mr. Gossett did not know whether there is hardship that needs to be stated or exists to go to the Board of Adjustment. There could be hardship against the community in going with another plan of design. Mr. Gossett disagreed with an earlier statement that the adjustment or amendment to the Code about the rear lot lines was an overview of the City in future planning. It was spot zoning and was another case of bandaiding the Code to meet specific challenges that was being faced. The aspect of rear lot lines meeting side lot lines exists all over the City. What is being attempted to be done with this subdivision may not be to the letter of the specific Code, but the intent is being met.

Mr. Shulman said that this is not a situation where anything was built here, where the person who came in for a partitioning wants to change someone that everybody else relied on. Whoever buys the lots will know the way they are laid out. He agreed with the statement about undue hardship. The view has usually been something that is self-imposed, and economic benefit is not undue hardship. What is different here is that there would be an undue hardship to preserving trees if the Applicants would have to design the lots the way they would normally be designed. The road would be different and would require taking down trees. If there was not a road, the lots would be configured in another direction that would create other issues. A requirement in the major subdivision section of the Code is that in designing a major subdivision, natural features such as trees, etc. shall be preserved to the fullest and practical or whatever is possible. This tells the Applicants that they have a legal obligation to preserve trees. The Applicants have proposed a smaller street that will save even more trees. Mr. Shulman asked how the Applicants can satisfy that legal obligation with a traditional design of lots. The undue hardship is created by the City imposing an obligation to the practical extent to preserve natural features. In trying to preserve natural features, the Applicants have come up with a design that has lot lines which do not exactly comply with the Code. If the small part of the proposed development is being done to comply with the ordinance obligation to preserve natural features, then the City has partially contributed to the undue hardship that the Applicants are facing.

Acting Chair Mellen read Section 270-71 of the Zoning Code which relates to appeals to the Board of Adjustment. The Planning Commission could go before the Board of Adjustment.

Mr. Shulman said that the State Code sets forth the powers of the Board of Adjustment, and the Rehoboth Beach City ordinance does not say exactly what the State Code says. The State Code allows appeals, not just from a building inspector, but by any decision of an administrative officer. City Solicitor Mandalas was not aware of any case that says it has to be a decision from the building official or City body before a person can go to the Board of Adjustment. If the Applicants are aggrieved or they do not think that the rear lot lines meet the Code, then they could go to the Board of Adjustment and request a variance without an adverse ruling from the building official or the Planning Commission. If the Applicants would want to appeal, then they would need an adverse ruling from a City body, and it would most commonly come from the building official.

Acting Chair Mellen asked if the Planning Commission is likely to accept the Applicants' design, assuming that a variance could be granted. If the Planning Commission accepts the design with minor movement of the width of the street, etc., the literal interpretation of any zoning ordinance, code or regulation which will result in unnecessary hardship or exceptional practical difficulties is the logic and basis to go for the variance. The Planning Commission does not have the flexibility to change the Code. Mr. Spies agreed.

Mr. John Gauger commented about the idea of having a green strip at the back of the homes is a great idea, but people put fences up; and then there is no open strip there anyway. It is not known how the houses will be configured on the lots. The house on Lot 15 could be built sideways on the lot. The Planning Commission is dealing with land division, and it not doing anything with the layout of the homes on the lots.

City Solicitor Mandalas noted that there seems to be general consensus that the rear lot line ordinance is applicable to this subdivision application, and that this subdivision application does not comply with it. The Planning Commission has discussed different avenues that the Applicants might take. The Board of Adjustment can take a strict approach in granting a variance for the proposed plan only. The Board of Adjustment has some leeway to say that it will grant a variance with limited discretion of the Planning Commission to accept minor alterations if Jones Lane changes as long as there are no major changes to the lot configurations, just minor ones caused by minor consequential things.

Mr. Patterson said that the Applicants will be the owners of the property, but not the owners of Lots 1, 2, 3, 12 & 15. They would be coming in for a variance that pertains to side lot lines of Lots 1, 2, 3, 12 & 15 although

those lot lines will not exist. Mr. Patterson was concerned that the Board of Adjustment may not grant a variance on side lot lines for lots that do not exist. Mr. Shulman said that is different because what is not there is the actual lot line, but in concept this is no different than a lot of things that do not exist. When coming in for a variance, the applicant wants to be able to create it and allow it to exist within the bounds of the Code.

Acting Chair Mellen said that Chairman Preston Littleton's feeling on this matter is that if the rear lot line issue could be solved, the division or use of the property as currently laid out is reasonable planning considering the number of lots the Applicants want to create to allow preservation of trees and the roadway. The Planning Commission should be able to communicate with the Board of Adjustment or go with the Applicants to the Board of Adjustment to convey their desire to continue through with this design and solve the lot line issue.

Mr. Shulman said that the notion of a passageway could still have some effect on this design. It is conceivable that the lot design could be affected, depending on what the Planning Commission decides about whether there is a passageway. In all fairness, the Planning Commission should express tentative views on the notion of a passageway.

Ms. Donna Bengel, co-owner of Oak Grove, asked if the Planning Commission could say no to the rear lot line issue even after the Applicants would receive a variance. City Solicitor Mandalas said that the Board of Adjustment would basically change the Code for the Applicants only. Mr. Shulman said that after a variance would be received, the Planning Commission cannot deny the application because it does not meet the rear lot line requirement in the Zoning Code, but someone could say that there may be another issue because of the way the lot lines are proposed.

Mr. Paul Lovett as one of the Applicants, has a presentation which had been previously given to the Planning Commission, arguing that the Planning Commission should not make the Applicants conform to going to the Board of Adjustment. It does not look like it makes sense for the Applicants to reintroduce that presentation. The Planning Commission appears destined to send the Applicants to the Board of Adjustment to get a variance from the Code; but in general, the Commission does not believe it should apply. Mr. Lovett did not think that some members involved with the Code change believed it was meant to apply to the Oak Grove situation. This process is exhausting, and he would like for the Planning Commission to establish what the ground rules are for going to the Board of Adjustment. Mr. Lovett would like the Planning Commission to share the podium with them at the Board of Adjustment meeting. He would like to take comments from Mr. Shulman and others, and put them together into a presentation to be made to the Board of Adjustment. Mr. Lovett asked the Planning Commission to look at the outline of the lot, and he asked the Commission to conceptualize something that it believes conforms to the Code.

Mr. Patterson said that in setting aside the square footage requirement for lot and setting aside the issue of whether a pointy corner of a back yard is desirable enough, it would be possible to satisfy this aspect of the Code by connecting where Lot Nos. 10 & 1 intersect with where Lot Nos. 15, 3 & 2 intersect. This aspect of the Code requires the rear lot lines from all of those lots be continuous and the side lot lines would be the same length for each abutting lot. There would be no question that this would have a lot of undesirable results. It may mean that Lot No. 2 would be too small and would have a pointy back yard. The line between Lot Nos. 3 & 15 is satisfied in the Code, but the line between Lot Nos. 12 & 15 that does not.

City Solicitor Mandalas said that side lot lines of Lots No. 8 & 10 do not abut the side lot lines of the current existing lot. Rear lot lines can terminate at a side lot line of an existing lot. The side lot lines of Lot Nos. 15 & 12 do not exactly coincide. Discussion ensued as to the configuration of the lots.

Mr. Patterson said that in general the Planning Commission is agreeable with the design, except that it has a defect which will need to be heard by the Board of Adjustment.

Acting Chair Mellen noted that the Planning Commission has a specific Code that needs to be applied, and the Planning Commission cannot set a precedent by violating the Code. The Applicants have not changed their design in a sense that they have wanted fifteen lots, and economically that has some meaning to them. Acting Chair Mellen asked if the Applicants would be willing to lessen the lots to thirteen. Mr. Lovett said that the Applicants would go to the Board of Adjustment first, since the Planning Commission has decided that this has to apply. If the Board of Adjustment would deny the variance, the Applicants will have no choice but to go back and reconfigure the design with fewer lots. Acting Chair Mellen suggested that, as an example, if Jones Lane was not a dead-end street which has created some consternation and it was a through street, two lots may be lost and there may be a gain of an area of parking spaces inside the confines. Mr. Lovett did not think it would make sense for the Applicants to do that. More than two lots would be lost.

Ms. Bengé asked if the lots have to be buildable lots to comply with the Code or if Lot No. 2 could be reconfigured to an open space lot and still comply with the Code. The building would not face the rear lot line facing the side lot line. City Solicitor Mandalas would have to give that question some consideration.

Mr. Shulman said that the open space lot to be created would need to be conveyed to the City. The Zoning Code does not apply to the City. A lot could not be created that is a private lot and not buildable. If a substandard lot is created and will be a public lot, it would not violate the Zoning Code because there is no requirement for a certain size lot that the City would own as its own property. The lot could not be private open space.

Ms. Cindy Lovett said that approximately more than one and a half years ago Mr. Lovett had asked to talk about the rear lot line issue. The Applicants kept being put on hold. Three different Commissioners are on record saying that they do not think what happened at Hickman and Laurel Streets affect this property. She asked if a new plat can be brought to the Planning Commission if the Board of Adjustment approves the variance. Ms. Spies said that a new best and final plat could be submitted. Ms. Lovett asked if the Planning Commission has the ability to say that this is not what was intended by the Code that the rear lot line ordinance does not apply in this situation. City Solicitor Mandalas said unfortunately not. There are some Codes that give the Planning Commission the authority to waive certain requirements which are typically in the Subdivision Code. This issue is in the Zoning Code, and the Planning Commission does not have discretion or authority to waive or adjust zoning requirements.

Acting Chair Mellen, asked the Planning Commission if there is a general consensus to proceed with the design if the rear lot line would not be an issue,

Mrs. Konesey was fine with not having a path through the property. It is not appropriate and is not fair to do because there are no pathways through back-to-back streets anywhere else in the City. The Code was changed for the short dead-end streets in order to preserve as much open space on this property and keep the leafy tree look there. In listening to the tapes of the previous meeting, it appeared that there were neighbors who had issues with the layout of the lots that they are not like the other streets in the City. Mrs. Konesey did not have a problem with the layout of the lots.

Mr. Gossett did not have a problem with the way the proposed lots are currently laid out.

Mr. Markert looked at this project primarily in terms of what he perceives as cost, cost risk and effect which is who benefits or does not benefit, what detriment is created or not created, and with regard to the layout, the rear lot lines, path, etc. He does not perceive that the City is harmed by the proposed rear lot lines not being in conformance. Mr. Markert did not see what benefit is created by trying to conform to the ordinance. The Applicants have made a concerted effort to try to maintain what is here. The short street is a reasonable solution to try to do that. The path is superfluous, and he did not see what benefit is created by inserting a path into the subdivision. Mr. Markert was supportive of the way the layout has been created.

Mr. Spies was fine with the layout. He agreed with Mr. Markert and Mrs. Konesey in regard to the path.

Mr. Patterson supported the proposed layout. He has a concern about the way Lot Nos. 1 & 2 require the houses be oriented at a diagonal to the street whereas all the other buildings on Canal Street would encourage the Applicants to design those two lots so the sides of the houses would be perpendicular to the street. At the April meeting, a person was concerned about the orientation of Lot Nos. 8, 9, 10 & 11 and wondered why the lots could not face the street. This would be fine with Mr. Patterson to reconfigure those lots to face Sixth Street. In regard to connectivity with a path, he did not think it is necessary because Jones Lane enters the middle of the block.

Mr. Shulman said that in difference to people who previously thought the path might be a good idea, he did not say anything one way or another. Mr. Shulman was not in favor of the path because it currently does not exist, and nobody has the right to walk through the property. Nothing is being taken away. The lot is small and to have people walking through the private property at all hours of the night may raise other safety issues. In regard to the lots facing Sixth Street, he understands the person's concerns. There are things that can be done architecturally to preserve the integrity of the streetscape. Mr. Shulman did not see how the layout could satisfy the side and rear lot line provision of the Code. He did not have a problem with the design. There is only one reason legitimately that supports the notion that this is not a bad design, and that is the preserving of natural resources. Hopefully the Board of Adjustment will see that the hardship was created by the Subdivision Ordinance and not by the Applicants' desires. One issue that has not been talked about is a pedestrian passage on Canal Street, whether it is a sidewalk, a path across the street, etc. There needs to be some kind of passageway that pedestrians can have a place to walk along Canal Street, particularly since there would be more

lots and vehicles.

Acting Chair Mellen noted that items to be discussed are the actual street design, width of the street, construction of the street, and the bio-retention area and how and who maintains it. Building Inspector Terri Sullivan said that there are things which need to be clarified such as the utility easements, grading, bio-retention, etc.

Mr. Patterson said that at some point, the Planning Commission needs to talk about parking. The Applicants prefer that the parking is only on one side of Jones Lane. He was not sure how many cars that design could accommodate and whether the lots on that side of Jones Lane would have to be restricted to one curb-cut. If the Planning Commission would require parking on both sides of Jones Lane or would restrict curb-cuts, etc., none of that relates to Lot Nos. 1, 2, 3, 12 & 15. The Applicants could get a variance with respect to those three lot lines which were previously identified that are defective under the Code, and the Planning Commission could still modify the width and layout details of Jones Lane.

Acting Chair Mellen said the Planning Commission feels that this is a workable design.

City Solicitor Mandalas said that the Planning Commission as a board can consider other issues concurrently with the Board of Adjustment considering the lot line issue.

The consensus of the Planning Commission was to continue with the other issues pertaining to this project at the June 11, 2010 Regular Meeting.

Mr. Lovett had created a summary of the public comment. A copy of Mr. Lovett's presentation will be provided to the Planning Commission and for the record. The total public comment on this project has been from eight people from the last time the meeting was publicly announced plus this meeting. Comments included were the effect of this subdivision on the City, connectivity with a path, approval of the project, observations on density, orientation of lots to face Sixth Street, street design to include a through street, parking concerns on Sixth and Canal Streets, and trees and enforcement of the Code. Mr. Lovett noted that the general conclusion from the public is that they do not have a problem with this project. He has been receiving private communications from the public. Acting Chair Mellen said that from the standpoint of a public hearing, the Planning Commission has received comments, some of which have been summarized, and have been entered into the exhibits. The Planning Commission is aware of those comments, and it is the responsibility of the Planning Commission to review those comments.

Mr. Gauger asked if people who live on Sixth Street currently walk through the property to get to the Canal. Mr. Lovett said that sometimes they do. Mr. Gauger asked if the people who stay in the cottages in the summer, park along Canal Street. Mr. Lovett said that it is very seldom they park along Canal Street. Mr. Lovett provided a picture taken in mid-summer of the cars parked on the property. He noted how much open parking space there is on and around the property. Currently, on-street parking at Oak Grove is 19 spaces. On-street parking after the development of the property is 23 spaces. The minimum off-street parking per lot will be two spaces. There will be more than 50 spaces in total combined parking after the property is fully developed.

Mr. Lovett said that what is being proposed in regard to easements, the plot plan will be revised. The street construction note will be added to the plan which was required by the Ad Hoc Committee. A fire hydrant will be removed from the pedestrian parkway. Delmarva Power has informed Mr. Lovett that private utility easements are typically negotiated after subdivision approval. There needs to be no easement for private utilities to appear on the plat. The Applicants are proposing to remove those easements from the plat because there is no real requirement for the subdivision process for the Applicants to show them. The easements will go completely around each lot. Primary conduits will be placed at the rear of the edge of the roadway to minimize the impact on tree root systems. The utility conduit easements will be located in the same excavation as the road. The underground conduits will minimize disturbing the private property. The primary conduits must be located in a separate trench from the water and sewer, but may be as close as two feet away. The conduits for cable and telephone can be located in the same trench as the trench for the electric. Another issue which has been raised is lighting on Jones Lane. Lighting has been noted on the plat. The issue with parking on one side of Jones Lane will need to be addressed. As a condition of approval for a short dead-end street, the Planning Commission may require restrictive public parking for a final subdivision approval. Mr. Lovett asked if this clause should apply to this project because the Planning Commission is not requiring the restriction of public parking on one side of Jones Lane or if it is the intent that the Applicants desire restrictive public parking on one side of Jones Lane. He also asked if the rationale should be reassessed if it is felt that the Code should be adjusted from what it actually says, and if the Planning Commission should have the authority to decide since



the Planning Commission oversees everything else in a subdivision. Ms. Sullivan said that the Mayor and Commissioners required the condition of approval to be placed in the Code because they wanted parking on both sides. If the Planning Commission felt that it was agreeable to have parking on one side, the Applicants will need to go back to the Board of Commissioners and get its approval. The Planning Commission cannot approve parking on one side.

Mr. Shulman said that the Planning Commission cannot approve the street with parking on both sides because the street as designed is too narrow. The only way the street will be approved is with parking on one side. If the Planning Commission approves the street with parking on one side, this will trigger the fact that this issue will need to go through the Board of Commissioners. In another section of the Code which specifically deals with parking, it says that when parking is restricted on the street, the City Commissioners have to make that decision. Only after approval has been granted by the Board of Commissioners and all other conditions have been met, can the Planning Commission grant final approval of the subdivision.

Mr. Lovett said that the Applicants have scheduled a meeting on May 18, 2010 with Sussex Conservation District because they want to get feedback about the bio-retention area.

Acting Chair Mellen said that normally when a street is dedicated, the City assumes responsibility for the public utilities that are in the street. In regard to this project, the Applicants are requesting to put in a bio-retention area instead of storm sewer. This will be located in the street right-of-way. There is a legitimate questions as to the maintenance of that application over a long period of time. Mr. Lovett said that the homeowners' association would assume the responsibility of the maintenance. Also included would be simple overall maintenance so that all of the lots would be maintained consistently.

Mr. Lovett asked if the Planning Commission is agreeable to the 18 foot width of Jones Lane and the K-turn, and how it would serve small vehicles.

Mr. Spies was not prepared to agree with the 18 foot width of the street tonight. The Applicants have indicated that there is an issue with the easements to be incorporated into the lots.

Acting Chair Mellen said that the easements as originally proposed were to be private utility easements; and under advice from the City Engineer, he has continually requested a larger easement of 15 feet. The easements, as currently proposed by the Applicants, would also be the setback area. If the easements are to be viewed as utility easements, then there would be limitations as to where trees can be planted. Mr. Lovett said that Delmarva is saying that this would not be an issue.

Ms. Sullivan said that another issue with the easement is that at 10 feet, steps, etc. can project two feet into the setback area. If there is an easement set at 10 feet from the property line, the steps would project two feet into the easement. This is something which is allowed by the Code, but would not be allowed by the easement. Ms. Lovett asked if this issue of private utilities could be incorporated in the architectural guidelines. Acting Chair Mellen said that because the Planning Commission would have no control over the homeowners' association guidelines or covenants, it runs the risk that the Applicants could change things that would be detrimental to the City. The Planning Commission is not prepared to discuss those issues tonight.

Mr. Shulman was not prepared to agree with the 18 foot width of the street tonight. He asked if feedback has been provided from Ms. Sullivan, Mr. Gulbranson, Mr. Kercher, Police Chief Keith Banks, and the Fire Department. Ms. Sullivan said that she has not spoken to Police Chief Banks regarding this issue. She said that Mr. Kercher and Mr. Gulbranson have made some comments. The Fire and Public Works Departments have determined that the City vehicles cannot make the turn on Jones Lane. Comments were made at the site meeting held on October 2, 2009. Mr. Shulman said that the Planning Commission will need to hear from the Applicants about why they think this street is fine. The Planning Commission will need information from the Police Chief, Fire Chief, Public Works, Building Inspector, Mr. Gulbranson, Mr. Kercher, etc. For the Planning Commission to make an informed decision on this issue, it has to hear what people are thinking. Acting Chair Mellen said that the Planning Commission will review the record of the site meeting held on October 2, 2009. If further information is needed to make the decision regarding Jones Lane, the Planning Commission will take whatever action is required to give it the answers needed to make the final decision of the design of the street.

Mr. Jim Lovett, co-owner of Oak Grove, asked if prohibiting parking on Jones Lane would be a possibility. Acting Chair Mellen said that this would also need to go to the Board of Commissioners.

Mr. Patterson asked if the Planning Commission is satisfied with the presentation of how many parking spaces in general there will be around this property and these lots if this is developed as proposed, or if the Planning Commission wants to have on-street parking on both sides of Jones Lane. He was satisfied with the

the number of parking spaces. Acting Chair Mellen had some concerns because he cannot project who will buy the lots and how they will be used. Mrs. Konesey also had concerns.

The Public Hearing was closed.

The next Regular Meeting will be held on June 11, 2010 at 6:00 p.m.

Mr. Gauger made a motion, seconded by Mrs. Konesey, to adjourn the meeting at 9:35 p.m.

**RECORDED BY**

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**(Ann M. Womack, Recording Secretary)**

**MINUTES APPROVED ON  
JUNE 11, 2010**

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**(David Mellen, Acting Chair)**

The Planning Commission Meeting was taped by Terri Sullivan in the absence of Ann M. Womack, City Secretary. The Planning Commission Meeting Minutes were prepared by Ann M. Womack.