

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

June 14, 2013

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:31 p.m. by Acting Chair David Mellen on Friday, June 14, 2013 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Mr. Francis Markert called the roll:

Present: Mr. Brian Patterson
 Mr. John Gauger
 Acting Chair David Mellen
 Mr. Francis Markert, Jr.
 Mrs. Jan Konesey
 Ms. Lynn Wilson
 Mr. Michael Strange

Absent: Mr. Harvey Shulman
 Chairman Preston Littleton

Also Present: Ms. Terri Sullivan, Chief Building Inspector
 Mr. Mike Hoffman, Esq. of the law firm Baird Mandalas LLC on behalf of Mr. Glenn Mandalas, City Solicitor

A quorum was present.

APPROVAL OF MINUTES

No Minutes were available for approval.

CORRESPONDENCE

Correspondence will be read when the Preliminary Review of the property located at 111 Rodney Street and Other Business portions of the meeting are held.

OLD BUSINESS

There was none.

NEW BUSINESS

Acting Chair Mellen called for the Preliminary Review Application No. 0513-02 for the property located at 111 Rodney Street, Lot Nos. 52, 53, 54 & 55, Block 25, into two (2) lots with Lot Nos. 52 & 53 becoming one (1) lot of 5,001 square feet and Lot Nos. 54 & 55 becoming one (1) lot of 5,000.6 square feet. The Partitioning has been requested by Eugene M. Lawson, Jr., Esq. of The Lawson Firm LLC on behalf of Jeffrey & Trina Varone, owners of the property. Acting Chair Mellen provided the Preliminary Review procedures.

Ms. Ann Womack, City Secretary, verified that the public notice for the Public Hearing was posted at City Hall, the Building & Licensing Department and on the City website on May 22, 2013. The notice was advertised in the Cape Gazette on May 28 and 31, 2013, Coast Press on May 29, 2013 and Delaware State News on May 29 and 30, 2013. The mailings to property owners within 200 feet were sent out on May 24, 2013, and the sign was posted on the property on May 29, 2013.

Chief Building Inspector Terri Sullivan read her report with exhibits. (Copy attached.)

- Exhibit A – Application packet which includes:
- (1) Application
 - (2) Planning Commission Affidavit
 - (3) Deeds
 - (4) Tree Survey/Protection/Planting Plan
 - (5) Proposed Partition Plan
 - (6) Photographs

- (7) Previous owner's rental license
- (8) Notice of Demolition

Ms. Sullivan acknowledged that based on the surveys submitted, both proposed lots can fully contain a 4,000 square foot triangle. Both proposed lots have a lot size of at least 5,000 square feet and have 50 feet of frontage on a street.

Mr. Eugene M. Lawson, Jr., of The Lawson Firm LLC represented Mr. Jeffrey and Ms. Trina Varone, owners of the property. He noted that the previous owner had a house on the property which was rented. A demolition permit was issued in August 2011 to demolish the house in October 2011. The tree protection fencing located on the property is to keep people from wandering across the lot.

Acting Chair Mellen noted that in H(5) of the Partitioning Application, the box should have been checked yes instead of no in response to whether changes will be made to existing off-street parking and/or curb-cut(s) or whether such additional parking and/or curb-cuts will be required. There was only one curb-cut to the original lot. Ms. Sullivan said that another curb-cut would not be required until a house is built on the proposed lot.

Correspondence:

1. Letter dated June 14, 2013 from Mildred Reed, 115 Rodney Street, stating concerns that several years ago, 111 Rodney Street was supposedly several feet short of the required 100 feet. Two years ago there were numerous surveys done, and it was shown to have 100 feet. Her property has three iron pipes measuring each 50 foot lot. Ms. Reed's deed states that she owns Lots 56, 57, 58 & 59 according to the plot made by Morgan T. Gum, Surveyor, in 1924 and of record in the Office of Recorder of Deeds at Georgetown, DE. Ms. Reed had also submitted a sealed survey of her property dated may 19, 2004 that was prepared by Wingate & Eschenbach. She asked where the corner markers or survey stakes are where one can measure from. She also asked if her eastern boundary marker coincides with what the Applicants determine to be their western boundary.

Public Comment:

1. Ms. Carol Warner, 113 St. Lawrence Street – in support of the partition.

Acting Chair Mellen closed the public portion of the Preliminary Review and called for discussion among the members of the Planning Commission.

Mr. Michael Strange asked how to discern which survey is the correct survey.

Mrs. Jan Konesey noted that Ms. Reed's survey does not show the adjacent properties, and she could not tell how that survey relates to the Applicants' survey.

Attorney Lawson said that the Rehoboth Heights subdivision plat was recorded in the County and has nominally 50 feet x 100 feet lots. The streets are nominally at right angles which are not necessarily accurate. With regard to the lots associated with this partitioning, the deeds were used from the original developer for the entire block. The surveyor surveyed the entire block and found out that there are discrepancies in the pipes with regard to Ms. Reed's property. The pipes are not very accurate anymore because the pipe itself can be an inch off one way or another. It is certain, based on looking at the entire block, that the surveys are accurate and were done with the most modern GPS equipment. Over the years people have put pipes in different places. It has been discovered that some of the lots are not at 90° angles anymore. That is why the entire block was surveyed. Attorney Lawson was confident that the surveys provided are the most accurate. The entire length of the block measuring from King Charles Avenue to Bayard Avenue is two inches short. He looked at the deeds from the Rehoboth Heights Development Company to find out what the last lot was. The surveyor has taken the position that the last lot which is sold loses the two inches. There may be someone along that block who will lose two inches at some point. The lots between Norfolk and Rodney Streets are actually deeper than 200 feet because the angle is not at a right angle.

Acting Chair Mellen noted that the starting point for the measurement on the survey appears to be at the marker at King Charles Avenue. It appeared that a marker was set in between the Applicants' proposed two lots because there was no existing pipe. This marker was used as a reference to go 50 feet to either side of the marker that was set to generate a 100 foot lot. Some of the adjacent lots may be losing property.

Attorney Lawson acknowledged that the discrepancy with the length of the block is on the western side

of the block from Bayard Avenue. This would not indicate that Ms. Reed may lose property. It would mean that someone between Lot No. 53 and Bayard Avenue has a deficiency in lot size. Initially, the measurement was taken from the monument set on King Charles Avenue for the Rehoboth Heights subdivision. At the western end of the 113 Rodney Street survey, the pipe was always there. This pipe is adjacent to Ms. Reed's marker.

Acting Chair Mellen said that he had actually looked this evening at what is labeled as the point of beginning, and he could not see any pipe or bar at that point. The way the survey reads is that from the location on King Charles Avenue, the surveyor measured 350 feet which would be the start. The survey does not show a marker found at that point which would be the boundary between the lots in question and the lots to the east. The drawing shows that the surveyor went another 50 feet and put in a bar and essentially divided 50 feet either way.

Attorney Lawson said that the bar which is indicated on the border between Ms. Reed's property and the subject property may not be above the sidewalk, it may be underground. The Applicants' survey shows that the surveyor did not set the bar between the subject property and Ms. Reed's property. It must have already been there.

Acting Chair Mellen noted that Ms. Reed's survey starts from the marker on Bayard Avenue. A ¾" pipe was found on the western side of her property. The surveyor measured 100 feet eastward and set a drill hole in the sidewalk on the eastern side of her property. When Ms. Reed's property was surveyed, the surveyor found the ¾" pipe on the western side of the property, next to the street. It was there from a previous survey. On the eastern side of the property, a drill hole was set in the sidewalk. No adjacent markers were found, and it is not stated on the survey whether Ms. Reed's adjacent marker was found. The Applicants' surveyor went to the King Charles Avenue end of the block and used the city marker, measured the 400 feet to the center of the property, set a marker and then put 50 feet on each side. There is no reference to any other existing markers.

Mr. Strange commented that from an engineering standpoint, in surveying, three inches over 375 feet is quite an error. One survey was done in 2004. The technology that is currently being used in surveying has been in use for 20+ years. The obligation from the Planning Commission's standpoint is that there must be a 50 feet x 100 feet lot. The question has been raised as to whether the lot is 50 feet x 100 feet, even if it is nominal. Depending on what reference point is being used, if the Planning Commission accepts the new survey, either a property owner to the right or a property owner to the left will lose something. He asked when there is a conflict between surveys what the appropriate step from the City's standpoint is in addressing this issue for all property owners.

Attorney Mike Hoffman said the situation before the Planning Commission is that it has Ms. Reed's survey which was taken from Bayard Avenue, then measured eastward and engaged the points. The Planning Commission also has the Applicants' survey which was taken from King Charles Avenue, then measured westward. Each took a reference point and went to the center of the block. He asked if there is an existing pipe to resolve this issue.

Attorney Lawson said that in looking at the December 2011 survey which is referred to in the deed, it shows the entire block from Bayard Avenue to King Charles Avenue as being 824.83 feet, not 825 feet. The depth of the lots from Norfolk Street to Rodney Street is 207.07 feet, not 200 feet.

Mr. Strange voiced concern that the building code is unforgiving and if this partitioning would be approved on face, then adjoining property owners, at some time in the future when their land is surveyed, will need to apply for a variance to get a building permit if they so desire because their lot is no longer conforming. Mr. Brian Patterson said that the next property owner has their own survey done. This particular survey does not constrain them. The issue is whether the Wingate survey calls into question the accuracy of the latest survey or vice versa. Each surveyor makes his/her own professional assessment. Mr. Strange said that in using those markers, it is an accumulative effect of error or new markers are set.

Attorney Hoffman said that a property line can be challenged in a court of law.

Attorney Lawson commented that there is no reason to believe the surveys are incompatible. Ms. Sullivan noted that the compass directions are off as well as the fence line in relation to the property line shown on both surveys. Every deed was pulled from the Rehoboth Development Company. Every line was lined up. Part of the fence encroaches into Lot No. 55.

Ms. Sullivan noted that a current survey should be on file since Ms. Reed's house was built. She was

unable to answer whether or not it is the same as what is shown on the survey that was submitted by Ms. Reed.

Mr. Patterson said that the two surveys at most add up to a discrepancy of 2 inches. Given that the neighbors have the opportunity to challenge the latest survey and the Planning Commission meeting is not the place to do that, the question is whether or not this Application is complete and accurate.

Mr. Strange said that the discrepancy is a statistical error due to whatever reasons over time that cannot be reconciled. The point of reference is important because it will determine where the shortage or overage occurs which then creates the conflict of the property owner on the right, the property owner on the left or the property owner behind the subject property. He had no way of determining either survey to be the accurate survey. Mr. Strange did not have the information to move this Application to Public Hearing. There is no way to adjudicate which survey is right or wrong in the absence of further investigation or having surveyors come to agreement on what is there, or there may be a missing, absolute certain amount of inches based on the way things were originally done and there was an error.

Mr. Patterson asked why the Planning Commission would credit that Wingate was right to drill the hole in the sidewalk where he did rather than the other surveyor even if the surveys are not referencing the same hole drilled in the sidewalk.

Attorney Hoffman noted that Ms. Reed had submitted a different survey which conflicts with the Applicants' survey. She has not presented evidence that would discredit the Applicants' survey.

Acting Chair Mellen said the difference between the two surveys is an overlap of the subject property of 2.16 inches which is approximately 16 square feet and is the correct amount to get it to the 5,000 square feet. Since Ms. Reed is not challenging this in court as a property line dispute, the position the Planning Commission has taken prior to this is that if it has a sealed survey, the Planning Commission must accept it.

Mrs. Konesey made a motion, seconded by Mr. Markert, that the package is substantially complete and the Planning Commission moves it to Public Hearing.

Acting Chair Mellen recommended that Ms. Sullivan provide additional information on the survey when the house was built for the Public Hearing.

(Patterson – aye, Gauger – nay, Mellen – aye, Markert – aye, Konesey – aye, Wilson – aye, Strange – aye.)
Motion carried.

OTHER BUSINESS

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 relate to the Planning Commission.

Acting Chair Mellen noted that a memorandum had been received from Chairman Preston Littleton on June 13, 2013, reporting on the action taken by the Commissioners at their meeting on Monday. The Planning Commission has suggested to the Commissioners last month that they should consider examining a change in the side yard setbacks.

City Commissioner Patrick Gossett said that by unanimous consensus of the Commissioners they will ask the Planning Commission to bring forward suggested changes or suggestions on ways to manage side yard setbacks to lots of 50 feet or greater in residential areas.

Mrs. Konesey thought that the City Commissioners are sending this to the Planning Commission when they could very easily do this themselves.

Mr. John Gauger was charged with looking into the idea of giving notice to property owners when there is construction. Ms. Womack had surveyed her contacts throughout the state, and all who responded basically said that they do not give notice to property owners when there is construction. However, when there is a demolition, everyone on a particular street is informed. Mr. Gauger asked if the City should be notifying people when there is construction on their street.

Acting Chair Mellen called for a status report on the interview process relative the Resolution Regarding the City's Trees passed by the Mayor and Commissioners on December 21, 2012 tasking the Planning Commission to research and propose amendments, as necessary, to the City's ordinances, regulations or procedures which are

designed to protect and augment the City's urban forest in order to ensure the environmental health, beauty and enjoyment of Rehoboth Beach's trees:

Ms. Lynn Wilson interviewed four of the five members of the Parks & Shade Tree Commission. At a future date, the remaining member will be interviewed. Her notes were sent back to the Parks & Shade Tree Commission members for confirmation of the interviews. Ms. Wilson will provide a more detailed report for the Planning Commission.

Mrs. Jan Konesey sent an email to the Board of Adjustment members. Three of the five board members were interviewed. Her notes were sent back to the board members for confirmation of the interviews.

Mr. Harvey Shulman was not able to interview the City Manager and Mayor to date. Mrs. Konesey and Mr. Shulman will

Mr. John Gauger was not able to interview the Public Works Department, etc. to date. Mr. Strange and Mr. Markert will be working with Mr. Gauger in regard to interviewing Mr. Mel Craig, Public Works Director. Mr. Gauger has talked with Mr. Jeff Meredith of Sussex Tree, and he has a brief summary of comments and concerns.

Mr. Mike Strange was not able to interview the Building Inspector to date. He will know in approximately five days if he will be able to do the interview.

Mr. Brian Patterson was not able to interview the City Arborist to date. An interview will be scheduled before the next meeting. Mr. Gauger will also be attending the interview.

Mr. Markert has been developing a generic questionnaire or survey to propose to various tree service companies. He has been receiving assistance with its development.

With regard to documenting the canopy and assessing technical ways of doing that, Acting Chair Mellen has had an initial discussion with Mr. Kyle Hoyd from the State. Mr. Hoyd has sent Acting Chair Mellen pictures of the City which he was unable to open due to formatting issues. Mr. Hoyd has not been in contact with Acting Chair Mellen since that time. Mr. Max Hamby, IT Director, has not yet put up the City's GIS software. Some representative areas of the City's canopy will be done by Acting Chair Mellen to provide data to the Planning Commission that will help it to decide whether the goal of 40% coverage which was set in the original tree survey is feasible, etc.

All documentation shall be forwarded to Ms. Womack by August 1, 2013. This information will be forwarded to the Planning Commission members for discussion at the August 9, 2013 meeting.

Correspondence:

1. Letter received May 20, 2013 from Peter Fox and Mona Murphy, 109 Park Avenue, encouraged the Planning Commission to take stronger measures to protect the trees in the Pines and all Rehoboth neighborhoods. They see a very big gap in the current tree ordinance. The current ordinance provides no protection for abutting owners affected by tree removal, grubbing out of trees and roots and land clearing on a given site. In their case, the next-door construction site had large old pines, hollies and hardwood that were removed for construction. Mr. Fox and Ms. Murphy do not believe developers or builders should be able to trespass and encroach on abutting lots causing significant damage in the process. They wanted to maintain a natural buffer on the side of the lot. Mr. Fox and Ms. Murphy also had a rear hedge. In June or early July 2012, land clearing, grubbing and tree removal took place on the Columbia Avenue lot. In the course of that work, the developer destroyed their entire abutting side yard and a significant part of the rear hedge. The developer grubbed out all of the trees and understory growth, left ragged roots protruding well into their property, disturbed the grade by leaving holes from removed roots, left exposed roots to the 100 year old boxwoods, dumped construction fill on their lot and ran heavy equipment repeatedly over the rear hedge and some 30 to 40 feet into their property. As the Planning Commission considers changes to the tree ordinance and building codes, Mr. Fox and Ms. Murphy suggest that the following provisions be added: 1. Abutting owners must be given notice of at least 60-90 days before any clearing takes place on the lot in question. This will give abutting owners time to document existing growth on their own lots, do a survey of the lot line, request a tree survey and take other appropriate steps to protect and monitor their property. 2. Developer/builders must cut all roots vertically at the property line and not cause disturbance to the abutting lot by tree removal, land clearing, grubbing or otherwise without express permission from the abutting owner. 3. Developer/builder must install and maintain four foot construction fences on all

abutting lot lines throughout the building project. 4. Developer/builder may not access building site from private property or otherwise use such private property for purposes of tree removal, land clearing, grubbing, etc., without express permission from owner. 5. Violations should result in meaningful fines, stop work orders, restoration and/or restitution orders. 6. The tree ordinance should be amended to take into account the need to protect smaller trees and understory growth, particularly on abutting lots.

Ms. Sullivan noted that the house was completely built when the neighbors contacting the Building & Licensing office. There was a silt fence installed on the property, and it did not appear that there was any tree removal, etc. on the abutting property. She had pictures from when the property was partitioned.

Acting Chair Mellen commented that an issue which is not addressed in the tree ordinance is when construction takes place correctly on a lot and someone excavates and cuts roots that are from a tree on an adjacent lot, and the tree dies. Yet there is no way to show any concern about it. This is an issue the Planning Commission needs to address. It has an impact relative to side yard setbacks and where trees are located.

Mrs. Konesey said that there is a sense of urgency to pass something to address the setback issue right now. The Planning Commission has an overview from sitting in the meeting and seeing impacted neighbors and what it does to a street to have something that is so out of proportion to the rest of the street. The City Commissioners have a responsibility to address this issue themselves and to do it quickly.

This item will be placed on the agenda for the next meeting.

Mrs. Konesey has an ordinance drafted and will forward it to the Planning Commission and the City Solicitor.

Building Inspector's Report.

There was nothing to report.

City Solicitor's Report

There was nothing to report.

No new subdivision applications have been submitted to date.

There being no further business, Mrs. Konesey made a motion, seconded by Mr. Strange to adjourn the meeting at 8:28 p.m.

RECORDED BY

(Ann M. Womack, CMC, City Secretary)

**MINUTES APPROVED ON
JULY 12, 2013**

(Francis Markert, Secretary)