

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

July 8, 2011

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:33 p.m. by Chairman Preston Littleton on Friday, July 8, 2011 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Vice Chair David Mellen called the roll:

Present: Mr. Harvey Shulman
 Mr. John Gauger
 Mr. David Mellen
 Chairman Preston Littleton
 Mr. Francis Markert, Jr.
 Mr. Patrick Gossett

Absent: Mr. Brian Patterson
 Mr. Timothy Spies

Also Present: Mr. Glenn Mandalas, City Solicitor
 Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

APPROVAL OF MINUTES

No minutes were available for approval at this meeting.

CORRESPONDENCE

There was no general correspondence.

NEW BUSINESS

Chairman Littleton called for the Public Hearing of Partitioning Application No. 0511-03 requesting the partitioning for the property located at 36 Columbia Avenue, Lots X & W, into two (2) lots with each lot becoming one (1) lot of 5,000 square feet. The property is owned by Beryl Lee Deck, individually, as Co-Executor of the Estate of H.A. Deck and as Successor Co-Trustee of the Luella F. Deck Spouse's Testamentary Trust, and Linda Frances LeMessurier, individually, as Co-Executor of the Estate of H.A. Deck and as Successor Co-Trustee of the Luella F. Deck Spouse's Testamentary Trust. The Partitioning has been requested by R. Brandon Jones, Esq. of the law firm Hudson, Jones, Jaywork & Fisher LLC on behalf of the owners of the property. Chairman Littleton noted the Preliminary Review procedures.

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

- Exhibit A – Application packet which includes:
- (1) Planning Commission Affidavits.
 - (2) Tree Preservation Plan.
 - (3) Adjacent House Location Survey showing propose houses.
 - (4) Documentation of ownership.
 - (6) Photographs of adjacent properties.

Ms. Sullivan acknowledged that the 23 inch pine tree is located in the setback area on proposed Lot W. As an option to the removal of the 23 inch pine tree, the house could be flipped and the proposed driveway could be moving to the opposite side of the proposed lot since the 36 inch oak tree is slated to be removed because of the proposed porch.

Mr. Harvey Shulman said that in terms of the tree plan and adverse impact, the fact is that if the Planning Commission would approve the partitioning at a Public Hearing, it would be clear that the Planning Commission would not approving the removal of the pine tree, but because of the tree ordinance, the Building Inspector may say that the house would need to be flipped.

Mr. R. Brandon Jones, Esq. of the law firm Hudson, Jones, Jaywork & Fisher LLC represented the owners of the property, and he provided a brief history. The Applicants' parents bought the house in 1956. One lot had been left to the son and the other lot to the daughter. The family's plan was that the existing house and improvements would be demolished. Each of the children would build a house on each of the proposed lots. This plan is the same as the parents' plan for the property. In regard to the tree plan, the Applicants understand that when the house plans are finalized, they will need to talk to the City to make sure they comply with the tree requirements. The house plans have been submitted as conceptual plans, but have not been finalized to date. Assuming that the Public Hearing is held in August 2011 and the partitioning is approved and conditioned upon the demolition of the house, the house will be demolished in September 2011. There are no deed restrictions so on Page 2 in Section F(12) of the Application the private deed restrictions are not applicable. There is no legal agreement related to the site easement at the corner of proposed Lot X. The City has requirements with site setbacks, and the preliminary location of everything to do with the site is something the Applicants need to have. The plans need to be approved to get a building permit, and that is when the final decision is made on how exactly the house is set up. The preliminary plans meet the concept of the site easement at the corner of proposed Lot X. For it to comply with the Will, separate Deeds cannot be done until such time as the partitioning is approved. The parents of the Applicants did an estate plan, and they conveyed their interest into separate trusts. Their trusts provided that the children are the successor trustees. Ultimately the trusts will end, and the properties will be deeded into their own names. The Applicants (children) are in attendance at this meeting as co-successor trustees of the two trusts and as co-executors of the estate. Until the transfer of deeds is done, the legal title will remain in the trusts. Attorney Jones acknowledged that the double lot is legally owned by the two trusts. Even though the will afforded to give one half of the lot to the son and one half to the daughter, currently there is no legal affect of that will, and legal direction must be followed. Legal direction cannot be followed until the partitioning is approved. Both trusts are co-owners of the undivided lot.

Mr. Mellen thought that there is a mistake in the proposed deeds. Currently both the brother and sister have half ownership of the entire lot. In order for each one to eventually end up owning a proposed lot, they have to deed half their interest on the split lot to the other person and vice versa. In the proposed deeds on Page 104, it is indicated that each proposed lot will have 25 feet of frontage. Technically, each proposed lot will be 50 feet wide, and the same is true in the second deed. Mr. Mellen suggested deferring the removal of the questionable trees until there is a finalized plan.

There was no public comment.

Chairman Littleton closed the Preliminary Review and called for discussion among the members of the Planning Commission.

Mr. Shulman made a motion, seconded by Mr. John Gauger, to move the Application to Public Hearing. Motion carried unanimously.

OLD BUSINESS

Chairman Littleton called for the Public Hearing of Partitioning Application No. 0511-02 requesting the partitioning for the property located at 2 Oak Avenue, Lot Nos. 2 & 4, into two (2) lots with Lot No. 2 becoming one (1) lot of 5,056 square feet and Lot No. 4 becoming one (1) lot of 5,052 square feet. The property is owned by Thomas H.B. Dunning. The Partitioning has been requested by Gregory M. Hook, PLS of Simpler Surveying & Associates, Inc. on behalf of the owner of the property. The Planning Commission has since received additional information that Mr. James Fuqua, Esq. has been asked to represent the Applicant. Chairman Littleton noted the Public Hearing procedures. The audio recording of the Preliminary Review from June 10, 2011 was made part of the record.

Ms. Ann Womack, City Secretary acknowledged that this application had been duly noticed and properly posted.

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

Exhibit A – Application packet which includes:

- (1) Application with supplemental received on May 4, 2011.
- (2) Proposed Partitioning Plat dated April 27, 2011 and received May 4, 2011.
- (3) Photographs of adjacent properties.
- (4) Recorded Deed prepared July 30, 2010 and received May 4, 2011.
- (5) Tax Summary from Treasury Division of Sussex County dated April 27, 2011.
- (6) Planning Commission Affidavit signed by Thomas H.B. Dunning and received

May 4, 2011.

- Exhibit B – Survey dated October 18, 2005 and prepared by Miller-Lewis, Inc. which is located in the City Street File.
- Exhibit C – Property & Location Survey dated Jun 23, 2004 and prepared by Wingate & Eschenbach, LLC., and received June 9, 2011.
- Exhibit D – Recorded Placement Survey dated May 30, 1978 and revised November 1, 1978, and prepared by Wingate & Eschenbach, Registered Surveyors and received June 9, 2011.

Surveys provided by Mr. Robert Worth, owner of the property located at 42 Surf Avenue.

- Exhibit E – Placement Survey for Lot Nos. 2, 4, 6, 8, 10, & 12 and easterly one-half of Lot No. 14 Oak Avenue, dated May 30, 1978 and revised November 1, 1978, and received June 9, 2011.
- Exhibit F – Property & Location Survey prepared for Bryce M. Lingo for Lot Nos. 2 & 4 Oak Avenue (Realigned), dated June 23, 2004 and prepared by Wingate & Eschenbach LLC, and received June 9, 2011.

Correspondence:

1. Letter dated Jun 27, 2011 and received June 29, 2011 from Robert R. and Blaikie Worth, owners of 42 Surf Avenue, to Chairman Littleton, stated that concern for the Simpler survey's objectivity was immediately aroused by its finding that both Lot Nos. 2 & 4 measure exactly 50 feet along Oak Avenue while all the other lots on the block are just short of 50 feet. It raised the question whether the surveyor may have adapted his measurements to the owner's wishes. It was Mr. Worth's understanding that Mr. Doug Wingate of Wingate & Eschenbach believes Mr. Worth's marker at the western edge of his property along Oak Avenue was moved. As a next-door neighbor, Mr. Worth would prefer to have only one house on the subject property; and he has no sympathy for the owner of that property, who since abandoning it seems to have taken no responsibility for it, allowing it to become a dilapidated eyesore. He asked on the other hand, if it makes sense to deny the owner the right to split a lot in two over a matter of, at most, a disputed 3½ inches especially when it is known that all the original lots along Oak Avenue were intended to be 50 feet. Mr. Worth hoped that this matter can be resolved swiftly.

Mr. James Fuqua, Esq. represented the owner of the property. Mr. Thomas H.B. Dunning, owner of the property was in attendance at the meeting. Mr. Gregory Hook, PLS of Simpler Surveying & Associates, Inc. was also in attendance. The Application is for the partitioning of 2 Oak Avenue into two lots.

Applicant Exhibits A-1 – Plot of Rehoboth Beach dated February 1928 by Thomas B. Pepper, surveyor.

B-1 – Plot of Rehoboth Beach Camp Meeting Association, Deed Book No. 84, Page Nos. 603 & 604.

C-1 – Plot of Oak Avenue dated November 1, 1978 by Wingate & Eschenbach LLC, Plot Book No. 16, Page Nos. 149 & 150.

D-1 – Survey of Lot No. 6 Oak Avenue dated December 27, 1994 by Wingate & Eschenbach LLC.

E-1 – Survey of Lot Nos. 2 & 4 Oak Avenue dated June 23, 2004 by Wingate & Eschenbach LLC.

F-1 – Survey of Lot Nos. 2 & 4 Oak Avenue dated October 18, 2005 by Miller-Lewis Inc.

G-1 – Survey of Lot Nos. 2 & 4 Oak Avenue dated October 14, 2010 by Simpler Surveying recorded in the Office of Recorder of Deeds, Plot Book No. 151, Page No. 38.

H-1 – Survey of Lot Nos. 2 & 4 Oak Avenue dated April 27, 2011 by Simpler Surveying, Proposed Partitioning Plat.

I-1 – Sussex County Tax Map.

J-1 – Deeds of Record at Sussex County Recorder of Deeds Office in Deed Book Nos. 815 Page No. 221, 1264 Page No. 302 and 3813 Page No. 240.

K-1 – Letters dated June 7, 1978, July 19, 1978, September 22, 1978 and March 29, 1979 from Tunnell & Raysor, and letter dated September 26, 1978 from Richard Goulet.

Attorney Fuqua noted that 2 Oak Avenue is comprised of Lot Nos. 2 & 4 Oak Avenue as shown on the original plot of Rehoboth Beach by Thomas B. Pepper, surveyor and the plot of Rehoboth Beach Camp Meeting Association. The original lots measured 50 feet x 100 feet which was a typical residential lot in the City. The property is improved by an existing older house which is currently in a rundown condition and is certainly in need of major renovations or demolition. The property was at one time two separate lots. When the house was built on the property, it was built across the dividing line between Lot Nos. 2 & 4. This basically results in the two lots for zoning purposes becoming merged into one (1) 100 feet x 100 feet lot. Mr. Dunning has owned the property since 1987. He inherited it by will from Mr. Richard Goulet. Mr. Goulet and another gentleman purchased the property in 1976. The other gentleman conveyed his interest to Mr. Goulet in 1984. Mr. Goulet passed away in 1987 willing the property to Mr. Dunning. The intent is to partition the parcel into two lots subject to the condition that the existing house would be removed. The two lots proposed to be created by this partitioning would be in character with the existing lots fronting on Oak Avenue between Surf Avenue and First Street. Currently according to the County Tax Map, there are 22 smaller lots and 5 larger combined lots including Mr. Dunning's property.

Attorney Fuqua had a short and long version of his presentation. Because of the unique aspects of this case, he presented both versions. In regard to the short version, the old Rehoboth plots confirm that this property was originally two lots. In the deed to Mr. Goulet, Mr. Dunning's predecessor in title, the legal description conveyed two lots. Mr. Gregory Hook, PLS of Simpler Surveying Associates Inc. prepared a survey of the property. That survey has been recorded in the Sussex County Office of Recorder of Deeds in Plot Book No. 151, Page No. 38, and it shows the property as having a total frontage of 100 feet. In determining the 100 feet width, Mr. Hook measured from two found lines. He did not place monuments, but found pre-existing monuments which had already been set. The pipe had been set, and the chisel mark on the wall had been set. The proposed partitioning plat prepared by Simpler Surveying shows two proposed lots with each lot having 50 feet of frontage. Lot No. 2 has an area plotted at 5,056 square feet, and Lot No. 4 has an area plotted at 5,052 square feet; and it has already been determined that each of the lots can contain a 4,000 square foot rectangle as is required by the Code. Based on the above information, the proposed partitioning complies with a partitioning and the Zoning Ordinance requirements, and subject to the condition that the partitioning will not be effective until the existing house is removed. The Ordinance says that partitioning applications which meet those requirements are entitled to be approved by the Planning Commission.

Chairman Littleton said that Mr. Hook found a chisel mark and an iron pipe, with the chisel mark being to the east and on top of a wall. Two sections of the wall are not in line. Chairman Littleton asked if the survey is based on the iron pipe or the chisel mark in the wall. Attorney Fuqua said that in general, there is a certain priority of references to go by such as physical possession, ancient monuments, word of mouth, etc.; and they have different priorities. It is a combination of all those things to arrive at the answer, but known set monuments are near the top of the priorities. Mr. Hook said that when he does a retracement survey, he retraces the original steps of the original survey. His job is to do the best he can to retrace what the original surveyor did. The "x" mark is shown on four different surveys with one of them being done by the original surveyor who did the re-alignment survey. When a chisel mark or an "x" mark which has age to it, a surveyor measures from or to it in different ways such as measuring from City monuments, a known point, etc. The chisel mark in the wall showed very good precision in reference to the original re-alignment survey. It also showed precision and accuracy to the Wingate survey for 2 Oak Avenue. Pipes can move just as easy as a chisel mark. In regard to the height of the chisel mark on the wall, the wall could have shifted. Mr. Hook has a preponderance of evidence that proves this lot has 100 feet of frontage. The chisel mark was measured at the same location by each surveyor. Once the chisel mark was found, it was re-measured. Mr. Hook was confident that the chisel mark in the wall has not moved, and it was an agreed upon boundary line. A small portion of the wall is located on the adjoining property at 42 Survey Avenue. Attorney Fuqua said that the wall has been there a long time; and if there was a dispute about the wall, the owner of the corner property which fronts on Surf Avenue could establish that he has adverse possession.

Mr. Shulman said that to go by the chisel mark in the wall does not resolve an exact double lot. Mr. Hook's survey shows that the frontage on the street is 100 feet, but the rear lot line is 100.50 feet. This could mean that the side lot lines are not perpendicular to Oak Avenue and may or not be parallel to each other. The side lot line to the east is 100.89 feet, and the side lot line to the west is 100.76 feet. Mr. Shulman asked why the result would not be a perfect square if the survey was done according to the monuments. Mr. Hook said that possession plays a huge part in boundary law. The owner of the

lot will not have 100 feet x 100 feet because there is possession by the adjoining property owners on each one of the monuments. There are no double monuments in the corners so there is dispute in lines. Mr. Hook acknowledged that the official City monuments are located on the corner of Surf and Oak Avenues, the corner of First Street and Oak Avenue. He found multiple monuments such as iron pins along Oak Avenue which reflect the corners of other properties. The chisel mark is the only corner monument at 2 Oak Avenue, and it has been the corner of the property since 1978. Mr. Hook did not know if the length of the block from the official City monument at the corner of Surf and Oak Avenues to the official City monument at the corner of First Street and Oak Avenue was a constant distance or if that distance changed from one survey to another.

Mr. Mellen said that he added up the distances based on what is on the four surveys. The distance is the same because the markers are presumably there. The interpretation of the distribution of the distances for each of the lots comes out slightly different. In regard to the 2004 survey by Wingate & Eschenbach, the total distance between the two City monuments is 901.93 feet. The total distance on the 2005 survey by Miller-Lewis is 901.39 feet. With regard to the Miller-Lewis survey, if the frontage from the deed of one of the lots is added in instead of the measurement from the survey, the total distance is 901.54 feet. In regard to the Simpler survey, the total distance is 901.77 feet. With regard to the re-alignment survey of 1978, if the average taken from the other surveys of Lot 42 Surf Avenue is added in, the total distance is 897.25 feet. The error occurs in Lot Nos. 12 & 14 which all the other surveys show it nominally at 80 feet. The re-alignment survey shows it at 75 feet. Mr. Mellen found it amazing that Lot Nos. 2 & 4 comes out at 100 feet on the Simpler survey when on the other surveys, the lots come out with fractional distances to known monuments.

Mr. Shulman said that on the Simpler survey, Lot No. 42 Surf Avenue was shown from the official City monument to the chisel mark as 92.15 feet. He asked what the distance is between Surf Avenue and where the rear lot line intersects the side property line of Lot Nos. 2 & 4 Oak Avenue. Mr. Shulman said that from the survey, the chisel mark seems coincident with almost the west end of the property line at Lot No. 42 Surf Avenue. On Oak Avenue, the wall clearly is not on the property line at the rear lot line. Mr. Hook said that this distance was not shown on the survey because it is irrelevant. He surveyed all the adjoining monumentation of the properties adjacent to the subject property. There was no survey done of Lot No. 42 Surf Avenue. Mr. Hook proved all the corners of Lot Nos. 2 & 4 Oak Avenue and the adjoining properties. The conventional surveying method is used which is called a total station. Known monuments are surveyed, and the location of the known monuments is calculated through angle distances. The common standard practice for surveying in the State of Delaware is using existing monuments. He uses due north as the azimuth, and 1/15,000 seconds is the standard accuracy of the rule of survey.

Attorney Fuqua gave his long presentation. He said it is obvious everyone is aware that there are inconsistencies regarding some of the dimensions on Oak Avenue. All of the known documentation has been organized in the exhibit book provided to the Planning Commission. On the old plats of Rehoboth, the property was two lots of 50 feet x 100 feet each. With regard to the June 7, 1978 letter from Mr. John Messick, Esq. of the law firm of Tunnell & Raysor to Mr. Richard Goulet, predecessor in title, Attorney Messick said that there were encroachments on Lot Nos. 4, 6, 8 & 10 Oak Avenue, and there was a solution to correcting this problem. Lot No. 10 encroached on Lot No. 8, Lot No. 8 encroached on Lot No. 6, Lot No. 6 encroached on Lot No. 4. There was fence on Lot No. 4 which belonged to Lot No. 6. The improvements on Lot Nos. 2 & 4 did not encroach on any other properties. With regard to the September 22, 1978 letter from Mr. John Messick, Esq. of Tunnell & Raysor to Mr. N. Keith Dozier and Mr. Richard Goulet, Attorney Messick referenced that the purpose is to move the eastern boundary lines of the involved lots five feet easterly. The encroachments would become part of the proper lot. It was Attorney Messick's understanding that Mr. Goulet was agreeable to this solution provided that he had two lots upon which improvements could be built. Attorney Messick had met informally with the Chairman of the Planning Commission and also with the Mayor and Council; and it was his impression that the matter of the two building lots could be resolved. Attorney Messick's proposal was to draft a contract between Mr. Goulet and his adjoining property owners for five feet. Attorney Fuqua was not aware of there ever being a meeting with the Planning Commission, the Board of Commissioners or the Board of Adjustment. There would have been documentation of a meeting or meetings if that occurred. Clearly, there was the intent, at least in regard to Mr. Goulet's parcel, that both side boundary lines were to move five feet. Rather than five feet, these boundaries were moved almost five feet. The 1978 re-alignment survey was stamped by the County, but there was no stamp on it from the City of Rehoboth Beach. If that survey had gone to the City, there would have been an approval by the City on that document. In 1978, lots had to be 50 feet wide, and

they had to contain 5,000 square feet. If the 1978 re-alignment survey had come to the City, it would not have been approved. Even though Attorney Messick was the City Solicitor at one time, it was not known if he was the City Solicitor at this particular time. In regard to the 1978 re-alignment survey, the original lot lines were shown as 50 feet x 100 feet. Also shown on the survey where Lot No. 4 borders Lot No. 6, was the agreed upon boundary which was purported to be where the lot line was moved to. In looking at the distance, it appears to be 4.67 feet, not five feet that was given to Lot No. 6 from Lot No. 4. Lot No. 6 gave Lot No. 8, 4.61 feet. Different distances were picked up in going further down the block. In going south on Lot Nos. 2 & 4, the distance between the old lot line and the new lot line is 4.76 feet. Mr. Goulet did the re-alignment to accommodate his neighbors. This was a re-alignment of the lots on Oak Avenue, not the creation of new lots.

Chairman Littleton noted that 4.76 feet was given to Lot No. 2 Oak Avenue from Lot 42 Surf Avenue. The argument that the attorneys will research is that Lot No. 6 went to the Board of Adjustment because it had inadequate dimensions, so the City at some time had to agree what Lot No. 6 had. The Board of Adjustment established the easternmost boundary of Lot No. 6 and the westernmost boundary of Lot No. 4.

Mr. Shulman said what happened was the creation of new lots. If the re-alignment never went to the Planning Commission or the Board of Adjustment, he did not know that the lot the Applicant wants to divide is actually in the City eyes an existing legal lot. The Board of Adjustment cannot create new lots. Mrs. Konesey said that in 1996, the Board of Adjustment gave the property owner a variance to the legal requirement of the lot. Mr. Shulman said that the Planning Commission needs to know whether Lot Nos. 2 & 4 is, in the eyes of the City, a lot with the side lot line where the individual owners agreed to place the side lot lines. Attorney Fuqua said that was a different standard in 1978, and things were not done the way they are today. This agreement affected all the lots in this block on Oak Avenue.

Chairman Littleton said that if the Planning Commission approves this partitioning, it may be the first official action by the City recognizing a revised property line. Many of the Planning Commission members looked at the 50 feet and read it as being the newly created footage. Attorney Fuqua clarified that this was not newly created because every other survey since then has shown less than increments of 25 feet or 50 feet.

Mr. Francis Markert assumed that the concrete wall is the reason for the western five foot difference. It seemed that there was some issue with another fence somewhere other than the one that was shifted down. He surmised that if it was moved the distance wherever it was to where the actual wall is which would be less than five feet, then that equal amount would satisfy the fence issue, and then it would be shifted by that increment.

Mrs. Konesey said that this matter should go to the Board of Adjustment for a variance. The Planning Commission could inform the Board of Adjustment that it has five surveys, and there was also the case with Lot No. 6 which already was heard before the Board of Adjustment. Attorney Fuqua said that the survey shows the property as having 100 feet, so the Applicant cannot go to the Board of Adjustment for a variance because a variance is not needed. The Board of Adjustment only has specific authority to do certain things. It can grant variances, rules on special exceptions and hear challenges to the building official's determination. Mr. Shulman said that the Planning Commission does not determine ownership, but the Applicant has the burden of persuading the Planning Commission that he owns the amount of land and the frontage of land. It could be that the Planning Commission, in looking at all the different surveys, does not think the Applicant has met the burden of showing that he owns 100 feet of frontage. Mrs. Konesey said that in the past, the Planning Commission could send something to the Board of Adjustment saying that it believes this is a hardship because there are disputed surveys. The Planning Commission could send the Applicant to the Board of Adjustment for a determination and have the Applicant sent back to the Planning Commission for approval of the partitioning.

Attorney Fuqua said that with the re-alignment survey, it appears that the boundary between Lot No. 4 and Lot No. 6 was moved 4.67 feet. It appears in the front of the eastern boundary of Lot No. 2 to have been moved 4.33 feet, and further back it is 4.76 feet. The 4.76 feet appears to be the distance to the new boundary. The predominant City monument that came into play was the one at First Street and Oak Avenue. Most of the surveys reference that monument, and the dimensions were run from that monument. On the re-alignment survey, the total of all the frontages to the corner of Lot Nos. 4 & 6 is 704.67 feet from

the City monument to the new corner. On the 1994 survey of Lot No. 6, it shows Lot No. 6 having a frontage of 49.47 feet. The new corner marker showing the new line between Lot Nos. 4 & 6 is 704.37 feet from the monument at First Street and Oak Avenue. This was arrived at by adding the 49.47 feet to the 654.9 feet. Attorney Fuqua did not know if the 1994 survey was based on the re-alignment survey or the actual measurements. In looking at Lot No. 6 on the re-alignment survey, it showed that Lot No. 4 gave 4.67 feet to Lot No. 6; and on the 1994 survey, Lot No. 6 had gained 4.37 feet. There was obviously an inconsistency of .3 feet. In looking at the 2004 survey, Lot Nos. 2 & 4 are shown as having 99.71 feet. Adjacent to Lot No. 4, Lot No. 6 shows a frontage of 50.06 feet which is inconsistent with the 1994 survey. In looking at the lots from the corner monument at First Street and Oak Avenue to the corner monument between Lot No. 4 and Lot No. 6, the survey shows 704.96 feet. In looking at the 2005 survey, the Lot Nos. 2 & 4 frontage is shown as 99.83 feet with an area of .37 feet acquired by quitclaim. In looking at the lots from the corner monument at First Street and Oak Avenue to the corner monument between Lot No. 4 and Lot No. 6, the distance is 704.22 feet. In looking at the 2011 Simpler survey, the Lot Nos. 2 & 4 frontage is 100 feet. In looking at the lots from the corner monument at First Street and Oak Avenue to corner monument between Lot No. 4 and Lot No. 6, the distance is 704.61 feet.

Mr. Shulman said that three surveys had been done specific to the Lot Nos. 2 & 4 property. The 2004 and 2005 surveys showed the frontage as being less than 100 feet. The 2011 Simpler survey shows the frontage at exactly 100 feet. Attorney Fuqua said that in looking at the 2004 survey, the frontage is shown as 99.71 feet, but it also shows Lot No. 6 as being 50.06 feet. It is known from the other survey that Lot No. 6 was purported to be 49.47 feet. Mr. Shulman said that in regard to the 2011 survey, the distance from the City monument on the corner of Surf and Oak Avenues to the chisel mark in the wall is 97.15 feet. In the 2004 survey, the distance is shown to be 97.26 feet. The 2004 survey shows that 1/10 of a foot from the monument belongs to Lot No. 42 Surf Avenue rather than Lot Nos. 2 & 4. The 2005 survey shows the distance from the monument on the corner of Surf and Oak Avenues to the chisel in the wall to be 97.34 feet. The 2004 and 2005 surveys show the lot on Surf Avenue to go deeper into Lot No. 2 than the 2011 survey.

Attorney Fuqua said that five surveys show five different distances from the corner monument at First Street and Oak Avenue. Mr. Hook's calculation of 704.61 feet on the 2011 survey is the closest to the 704.67 feet on the original re-alignment survey. What Attorney Fuqua concluded from that beyond a reasonable doubt is that all of the surveys taken together will prove nothing beyond a reasonable doubt other than confusion. All of that information establishes the problem. Mr. Goulet owned Lot Nos. 2 & 4. His improvements did not encroach on anybody else. Mr. Goulet was requested, because his neighbors had encroachments, to participate in this agreement to move the property lines of the involved lots five feet to the east to cover the encroachment. Mr. Goulet's only concern was that he did not want to lose two lots. To be a good neighbor, he joined in the re-alignment and helped solve the problems the other neighbors had. Mr. Goulet did not receive any benefit from the re-alignment because he did not have an encroachment. And now the problem has been handed down to Mr. Dunning. The different surveys established that there are minor inconsistencies and a small margin of error which is clearly shown by the five different distances from the City monument at the corner of First Street and Oak Avenue. Under the worst case scenario, Lot Nos. 2 & 4 would basically have the same width as Lot Nos. 6, 8 & 10. All of those dimensions were created when the re-alignment was done. Based on everything that was presented, the Applicant has 100 feet of frontage on Lot Nos. 2 & 4. Mr. Hook is a registered land surveyor and is licensed in the State of Delaware. He undertook this work and was well aware that there were inconsistencies. Mr. Hook performed his work in an appropriate, professional manner and re-checked his calculations numerous times. His determination is that the lot frontage of Lot Nos. 2 & 4 is 100 feet. The 2011 survey was certified by Mr. Hook that it is true and correct, the accuracy required by accepting engineering and surveying standards and practices; and it complies with applicable laws and regulations as required by the State of Delaware. Attorney Fuqua said that the Application complies with the City of Rehoboth Beach requirements. The house would need to be removed. The two proposed lots would be similar in character with the ocean block of Oak Avenue. In the future, the two proposed lots would the location of two new beach houses which will enhance the appearance and property values of all properties on Oak Avenue.

Chairman Littleton said that everything is based on the 1978 survey which shows the re-alignment of the lots. At this time, the Planning Commission has no evidence, other than the neighbors getting together and agreed to something, that the agreement ever occurred. If the Planning Commission was to agree with Mr. Hook's survey, it is based on the 1978 survey. Chairman Littleton had concern with the legality of the 1978 survey because it may be that the first time the Planning Commission would be

certifying that 1978 re-alignment survey, if the Planning Commission, should approve the partitioning. Before the Planning Commission can go any further, it will need to have guidance from the City Solicitor. City Solicitor Glenn Mandalas said that based upon all the evidence presented, if the Planning Commission wants that level of assurance it will take some sort of quiet title action or a court of law issuing an order. There is merit to some of the arguments which have been made about what happened 30 years ago. Things were done differently at that time, and no one has challenged what has been recorded. At some point, a court might say there is a period of time that lapsed; and it cannot be argued about what has been recorded and relied upon for the past 30 years, and expect to undo what was done 30 years ago. Things that were done wrong, nevertheless, become the law of the land. City Solicitor Mandalas did not know what ultimately the answer is.

Chairman Littleton said that Planning Commission needs to know is if it can legally move to make a decision to approve the partitioning. Some of the members think the lot can be subdivided. The fundamental issue which has been based on the 1978 re-alignment and Attorney Messick talking about going to the Planning Commission and the Board of Adjustment and talking to the City, is that unless the Planning Commission has evidence that the City can recognize that, it will fall on City Solicitor Mandalas' shoulders to give advice to the Planning Commission.

Mrs. Konesey said that in 1994 when the Gorman's property came up, it appears that the 1978 re-alignment was not relied upon. The Gorman's were required to go to the Board of Adjustment and get a variance. The Wingate survey of 1994 is different from the 1978 survey.

Mr. Shulman said that other cases should be looked into, and to expect an answer tonight seems unreasonable. City Solicitor Mandalas said that he has not researched the cases to date.

Public Comment:

1. Mr. Thomas H.B. Dunning, owner of the subject property, said that Mr. Richard Goulet had one stipulation when he signed the agreement that the property had to be 100 feet. All of the lot lines moving had to do with Lot No. 6. The chimney of the house on Lot No. 6 encroached onto the Lot Nos. 2 & 4 property. That was the reason for moving the lot lines. Mrs. Blanfield's lot was only 75 to 80 feet wide and could never be subdivided into two lots. From Mrs. Blanfield's lot eastward, the property lines shifted five feet so the chimney on the house on Lot No. 6 did not encroach onto Lots Nos. 2 & 4. There is more than 100 feet of frontage measuring from the eastern boundary of Lot No. 6 to the post. On the 1978 survey, Mr. Wingate put on the survey that the lots were 50 feet x 100 feet. That was a generic term referring to lots in Rehoboth. Mr. Wingate surveyed various people's lots, and some of them measured less than 50 feet of frontage. Mr. Dunning said that at one time he had a survey which showed his property as being more than 100 feet. Mrs. Worth did not care about losing footage on her property at the corner of Surf and Oak Avenues.

Chairman Littleton closed the Public Hearing and called for discussion among the members of the Planning Commission.

Chairman Littleton said that historically the intent was to have 50 foot wide lots. The 2011 survey is a creditable survey. If that survey is accepted, it is still based on the 1978 re-alignment survey. Chairman Littleton said that he cannot act on this partitioning until he knows the legalities of that. He suggested that the Planning Commission table this Application to let both attorneys go back and try to make the case of why the Planning Commission would be able to rely on the fundamental underlying of the 1978 re-alignment.

Mr. Shulman said that the City Solicitor should give the Planning Commission an analysis of whether the Planning Commission can or cannot rely on the 1978 re-alignment survey, whether the Planning Commission has discretion and whether the law tends one way or another, etc.

Mr. Dunning said that he had filed a Freedom of Information Act (FOIA) request with the City to have the minutes reviewed as to whether there was a Planning Commission and/or Board of Adjustment meeting in regard to the 1978 re-alignment. He was told by the City that there was no action taken.

Mr. Shulman said that the best answer for whoever now owns these seven lots is to jointly say that they want the Planning Commission to approve the lot lines. For the lots that are less than 50 feet wide, a variance will be needed. The true legal outcome would be that the sub-sized lot owners can get a variance and as a group the lot owners could come to the Planning Commission to clean up everything.

Mrs. Konesey made a motion, seconded by Mr. Shulman to table the Application as advised to allow the attorneys for the City and the Applicant to separately come back to the Planning Commission with the requested information. (Shulman – aye, Gauger – abstain, Mellen – aye, Littleton – aye, Markert – aye, Gossett – aye, Konesey – aye.) Motion carried.

City Solicitor Mandalas and Ms. Sullivan will research prior minutes in regard to the 1978 re-alignment.

Mr. Shulman requested that the Planning Commission gets any Applicant submission on this issue whether it is legal, factual, etc., 15 days before the August 12, 2011 Planning Commission meeting. Chairman Littleton agreed.

OTHER BUSINESS

Chairman Littleton called for the discussion of and possible action of whether the Planning Commission should re-activate the currently “tabled” Public Hearing related to the 2 St. Lawrence Street partitioning application.

Correspondence:

1. Letter dated June 20, 2011 and received June 20, 2011 from Chase T. Brockstedt, Esq. of the law firm Bifferato Gentilotti LLC to Chairman Littleton regarding 2 St. Lawrence Street with 12 copies of the revised Existing Conditions Plan, revised Tree Removal Protection Plan and the revised Division Survey Plan. The letter read that Attorney Brockstedt looked forward to presenting these documents at the July 8, 2011 Public Hearing before the Planning Commission.
2. Letter dated July 7, 2011 and received July 7, 2011 from Chase T. Brockstedt, Esq. of the law firm Bifferato Gentilotti LLC to Chairman Littleton regarding 2 St. Lawrence Street and requesting that the Application be placed on the agenda for the Public Hearing to be held on August 12, 2011.

Chairman Littleton noted that he did not place this matter on the agenda for tonight’s meeting because the agenda was already full, and it was too late for publishing in the newspapers. Attorney Brockstedt had been informed of this. The Applicant has every right to be heard by the Planning Commission and get some action regarding this Application.

Mr. Shulman said that the Planning Commission tabled this Application specifically because there were things going on, and it wanted to be told whether they reached an agreement with the City. The whole idea of tabling the Application was to see if there was an agreement and then when the Public Hearing is held, the Planning Commission would have new information.

Chairman Littleton said that when the Planning Commission tabled the Application, the Applicant received material at that meeting which he had not seen before. It was actually to give the Applicant time to look at the material presented by the Planning Commission which was new information to him. It also was under the understanding that the Applicant was going to go back and try to negotiate with the City. That has started, but it has not been resolved. The Applicant has a right if he is asking for it to come back on the agenda. The Planning Commission was trying to help the Applicant get a favorable opinion by giving him time to work out a negotiation and review material. If the Applicant wants to come back and be heard, he bears the risk of whatever the decision is from the Planning Commission.

City Solicitor Mandalas said that initially the Planning Commission said to take some time and try to work something out with the City. He was hopeful that the documents are worked out before the Planning Commission’s next meeting. The Applicant is at the point where he is saying he wants a hearing, and he needs movement on this Application. The Applicant and the City are hopeful the documents will get worked out prior to the next Planning Commission meeting.

Mr. Shulman said that in the past when new information or evidence has come up either by the Planning Commission, Applicant or the public, the Planning Commission has not tabled things. The Planning Commission continues the hearing to the next meeting so people have time to digest that information, comment on it, analyze it, etc. The Planning Commission tabled this Application not because new information was to be brought forward, but because the Planning Commission was expecting some type of development to occur that would have an important impact on its deliberations.

Chairman Littleton said that the Applicant is requesting that a determination be made on this Application.

Mr. Shulman said that if there are going to be any type of developments happening, he does not want

to receive that information at the last minute. There has to be stipulations that the Planning Commission receives information well in advance of the next meeting.

Mr. Gauger made a motion, seconded by Mr. Markert to take the Application off the table with the stipulation that all materials are submitted and filed by the close of business on July 28, 2011. (Shulman – abstain, Gauger – aye, Mellen – aye, Littleton – aye, Markert – aye, Gossett – aye, Konesey – aye.) Motion carried.

City Solicitor Mandalas provided a status update in regard to the 2 St. Lawrence Street negotiations. The Mayor and Commissioners met in executive session to discuss some documents which had been put together. They came out of executive session, and basically reached an agreement that the Mayor could make minor modifications to the documents in working with the Applicant, and sign those documents. City Solicitor Mandalas had a telephone conversation with Attorney Brockstedt and Mr. Harris in which there were a number of items which had been discussed. Attorney Brockstedt agreed to make the modifications to the documents. City Solicitor Mandalas discussed those modifications with the Mayor, and he saw them as more significant changes than what he had been authorized to sign. City Solicitor Mandalas drafted a new set of amendments to the documents which the Mayor is now reviewing. Once the Mayor is done with his review, they will go back to Attorney Brockstedt. The exchange with the record documents is active, but Attorney Brockstedt's client has gotten to the point where he just wants a decision, whether the documents work out or not.

Attorney Chase Brockstedt did not have a problem with submitting materials by July 28, 2011 for the next Planning Commission meeting. The submission received on July 7, 2011 was his response to the new information that the Applicant was confronted with by Mr. Mellen. That submission was provided along with a request to be heard at the August 12, 2011 Planning Commission meeting. To the extent that the City and the Applicant ultimately have an agreement in place by July 28, 2011, that would be great. If it looks like they are close to an agreement but are not in agreement by July 28, 2011, it would make sense to continue the process and push the hearing out to September. Chairman Littleton advised that Attorney Brockstedt should make absolutely sure the Application is accurate and it reflects what is trying to be done.

Chairman Littleton called for continued discussion and possible formulation of plans to address items and/or issues that have been deferred to date related to possible Code changes or Planning Commission procedures. Specific items are as follows: 1. Need to update the major subdivision section of the City Code with particular emphasis on ensuring the City is properly protected. 2. Mixed-use development and possible overlay districts. 3. Explore means to increase efficiency and reduce costs to both the City and the applicant relative to partitioning, and minor or major subdivision review. 4. Concept of proportional changes in side lot setbacks for legal non-conforming lots of less than 50 feet front footage or for lots with more than 50 feet front footage.

Chairman Littleton said that an effort is being promoted by Ms. Connie Holland of the Office of State Planning and is being implemented by the University of Delaware's Sea Grant Program and by the extension service to try to come up with Cape Sub-Region Planning model which might convince Sussex County to look at the different needs of the ocean communities of Lewes, Rehoboth, Dewey and surrounding areas. He was invited to a smaller group to come up with four scenarios on how the cape sub-region could be developed. 1. Develop like the Sussex County Comprehensive Development Plan (CDP). 2. Create a new town and concentrate the development in that town. 3. Nodal development where there are individual nodes that have connectivity among them with a cultural education research center that would bring a different type of industry. 4. Special places. Identify all of the critical land, wellheads and environmental sensitive areas, and how to develop without touching those areas. A small portion of the draft was presented to the bigger group which was attended by Mr. Markert. By Fall 2011, they will have the beginning of the discussion document available.

Chairman Littleton called for the Building Inspector's report.

There was nothing to report.

Chairman Littleton called for the City Solicitor's report.

There was nothing to report.

Chairman Littleton called for the report, discussion and possible action concerning those activities or assignments taken at Regular or Workshop Meeting of the Mayor and Commissioners that directly relate to the Planning Commission.

There was nothing to report.

Chairman Littleton called for the report of any new subdivision applications that may have been submitted in

the prior 28 days and status of currently tabled applications.

No new applications have been submitted to date.

There being no further business, Mrs. Konesey made a motion, seconded by Mr. Gauger, to adjourn the meeting at 9:35 p.m.

RECORDED BY

(Ann M. Womack, City Secretary)

**MINUTES APPROVED ON
SEPTEMBER 9, 2011**

(Preston Littleton, Jr., Chairman)