

**PLANNING COMMISSION MEETING  
CITY OF REHOBOTH BEACH**

**July 12, 2013**

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 12, 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. Harvey Shulman  
                      Mr. John Gauger  
                      Mr. David Mellen  
                      Chairman Preston Littleton  
                      Mr. Francis Markert, Jr.  
                      Mrs. Jan Konesey (arrived at 6:35 p.m.)

Absent:            Ms. Lynn Wilson  
                      Mr. Michael Strange

Also Present:     Ms. Terri Sullivan, Chief Building Inspector  
                      Mr. Glenn Mandalas, City Solicitor (arrived at 6:41 p.m.)

A quorum was present.

**APPROVAL OF MINUTES**

Minutes of the April 12, 2013 and June 14, 2013 Planning Commission Regular Meetings were distributed prior to the meeting. Minutes of the May 10, 2013 Planning Commission Regular Meeting were not available for approval.

Mr. David Mellen made a motion, seconded by Mr. John Gauger, to approve the April 12, 2013 Planning Commission Regular Meeting minutes as written. (Patterson – aye, Shulman – aye, Gauger – aye, Mellen – aye, Littleton – aye, Markert – aye, Konesey – absent.) Motion carried.

Mr. Brian Patterson made a motion, seconded by Mr. Gauger, to approve the June 14, 2013 Planning Commission Regular Meeting minutes as written. (Patterson – aye, Shulman – abstain, Gauger – aye, Mellen – aye, Littleton – abstain, Markert – aye, Konesey – aye.) Motion carried.

**CORRESPONDENCE**

Correspondence will be read when the Public Hearing portion of the meeting is held for the property located at 111 Rodney Street.

**OLD BUSINESS**

There was none.

**OTHER BUSINESS**

Chairman Littleton called for Resolution Regarding the City's Trees passed by the Mayor and City 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.

1. Task reports from Planning Commission members.

Mr. Brian Patterson's tasks were to interview the City's Arborist and Chief Building Inspector. On July 5, 2013, he and Mr. Gauger interviewed the Arborist. A short report was done on this discussion. On July 12, 2013, he, Chairman Littleton and Mr. Markert interviewed the Chief Building Inspector. Mr. Patterson is currently working on a report from the discussion with the Chief Building Inspector.

Mr. Harvey Shulman's tasks were to interview the Mayor and City Manager. The interview with the

City Manager will be done at a future date. Mr. Shulman and Mrs. Konesey interviewed the Mayor on July 12, 2013. Mr. Shulman will be preparing a report from this discussion at a future date.

Mr. John Gauger's task was to interview Mr. Mel Craig, Director of Public Works Department. A note was provided that Mr. Craig has had no problems with the current tree ordinance. Mr. Craig declined an interview. Mr. Gauger had briefly talked with Mr. Jeff Meredith of Sussex Tree Inc. Mr. Meredith is willing to speak with the Planning Commission with regard to the tree ordinance.

Mr. David Mellen's task was to map out the trees on private land within the City and in City rights-of-way. To date, he has not been able to move this matter forward. The Planning Commission will need to discuss whether to use a survey of a portion of the City or to not attempt this project at all.

Mr. Francis Markert's task was to develop a questionnaire for the tree service companies. A questionnaire has been developed and will be coordinated with the interviewing of those companies. To date, Mr. Markert has been working on a general public survey to be placed on the City website. Mrs. Konesey volunteered to help in the development of the survey.

Mrs. Jan Konesey's task was to interview the Board of Adjustment members. Two members were interviewed approximately one month ago. A report was done and will be forwarded to Ms. Ann Womack, City Secretary in the near future.

Ms. Lynn Wilson's task was to interview the Parks & Shade Tree Commission members. Chairman Littleton noted that Ms. Wilson had interviewed them and has prepared a report which will be forwarded to Ms. Womack.

All reports will be kept in a file by Ms. Womack and will be distributed prior to the August 9, 2013 meeting.

## **NEW BUSINESS**

Chairman Littleton called for the Public Hearing of 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. Chairman Littleton provided the Public Hearing procedures and stated that the record of the Preliminary Review held on June 14, 2013 will be included as part of the record.

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 June 21, 2013. The notice was advertised in the Cape Gazette on June 28 and July 2, 2013, Coast Press on July 3, 2013 and Delaware State News on June 26 and 27, 2013. The mailings to property owners within 200 feet were sent out on June 27, 2013, and the sign was posted on the property on June 27, 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

Mr. Mellen recused himself from this Public Hearing. Although Mr. Mellen did not think he had a direct conflict of interest and would not be biased in the discussions, he owns property in very close proximity to the subject property on this street.

Chairman Littleton stated that the original plat layout for this block was 825 feet in length with twenty-five 25 foot wide lots and two 100 foot wide lots. All of the original deeds were described as shown on the original plat. At the Preliminary Review, it was stated that a difference greater than two inches was discussed.

City Solicitor Mandalas noted that original benchmarks were put in many years ago. Sometime later the City put in City markers. Historically, it is not known whether the markers were placed exactly right or if the

original benchmarks were placed correctly.

Mr. Eugene M. Lawson, Jr., of The Lawson Firm LLC represented Mr. Jeffrey and Trina Varone, owners of the property. The property consists of four 25 foot wide lots which were deeded separately into two 50 foot wide increments. The Applicants are requesting a partitioning in order for them to be two 50 foot wide lots for zoning purposes. The property consists of two proposed 50 foot wide lots that comprise a 100 foot wide property which the Applicants are requesting a partitioning for zoning purposes. According to the survey, each proposed lot would be 50 feet wide x 100+ feet deep. The proposed lots meet the City requirements by having 50 feet of frontage, and each would contain 5,000+ square feet. Attorney Lawson acknowledged that in terms of the original 25 foot wide lots which front on Rodney Street, there seem to be twenty-five of them. He did not know what the current makeup of the block is with 50 foot wide lots vs. 100 foot wide lots. Attorney Lawson had a list of the lots that were originally deeded out by the Rehoboth Heights Development Company, and those vary from 50 foot wide lots to 150 foot wide lots. Those lots have been since sold in such a manner that the combinations of lots are now different from what they were when they were originally deeded. The maximum used by surveyors, if there is a shortage in measurement, is to apply that shortage to the last lot sold. The first lots have first right, and they get everything they are expected to get which is the entire 25 feet width for each lot or 100 feet width. The last lot sold would be the one that would absorb whatever difference there is, whether it is more or less. Lot Nos. 62 through 66 were the last lots sold in July 1926. Currently, there are two surveys which were forwarded to the Planning Commission, one for each of the two lots. Two surveys were submitted because they have been partitioned for title purposes by a previous owner. With regard to the chain of title, a former governor deeded the property to the Andersons who previously owned the property before it was owned by Ms. Beebe-Mann. The survey in the deed from the Andersons was done by Mr. Fritchman who also did the zoning map of the City. Attorney Lawson did not know how many surveys were done between 1974 and the present. To Attorney Lawson's knowledge, the starting point for the surveys was done from King Charles Avenue. The survey which was recently given to him from the City's records indicates that everything to the east of the subject lots was also measured from King Charles Avenue. The survey of October 16, 2009 has a dimension on it that starts at King Charles Avenue. In response to Ms. Mildred Reed's comment that according to her survey there is overlap between what supposedly is shown on her survey as her land and what is shown on the Applicants' survey as their land, Attorney Lawson believed the Reed survey to be accurate in respect to what she owns which is 100 feet x 100 feet. The Applicants' survey is accurate to what they own which is 100 feet x 100 feet.

Mr. Shulman said that at least one owner and possibly more on Rodney Street have a shortfall. He asked Attorney Lawson how the Planning Commission would deal with other situations that come up where people would come in and say they have 100 feet, those lots are subdivided and in the end the Planning Commission knows that at least one person or maybe more does not have 100 feet.

Attorney Lawson said that with respect to the subject matter, he believed the property that suffers the loss of 2 1/8 inches is the last lot being Lot Nos. 62 through 66 which was conveyed together by the Rehoboth Development Company in July 1926. However, the City can resolve this problem which will be recurring by providing for a tolerance such as a measurement within 1%. Then an administrative variance could be done by the building official or some other person, and the owner would not have to deal with going through the process of deciding who gets the 2 1/8 inches. It would be much better if the City has an ordinance that allows for a variance.

Public Comment:

1. Mr. Jim Reed, co-owner of 115 Rodney Street, noted that his property is 100 feet x 100 feet. Starting from King Charles Avenue, Lot Nos. 40 & 41 has 100 feet of side yard on Rodney Street x 50 feet of frontage on King Charles Avenue. This property had been partitioned, but the owners own 100 feet x 100 feet. Lot Nos. 42 & 43 and Lot Nos. 44 & 45 each have 50 feet of frontage on Rodney Street. Lot Nos. 46, 47, 48 & 49 has 100 feet of frontage. Lot Nos. 50 & 51 has 50 feet of frontage. Lot Nos. 52, 53, 54 & 55 and Lot Nos. 56, 57, 58 & 59 each have 100 feet of frontage. Lot Nos. 60 & 61 has 50 feet of frontage. Lot Nos. 62, 63, 64, 65 & 66 has 125 feet of frontage. Lot Nos. 1 & 2 has 100 feet of side yard on Rodney Street x 50 feet of frontage on Bayard Avenue. The block as a whole may be short about two inches if measured from the markers that were apparently inaccurately placed by the City at the ends of the block, and if the Merestone survey of the distance between those markers is accurate. The shortage appears to be getting pushed away from the markers at the ends of the block and towards the middle. The Reed survey was done with a starting point of 275 feet from the marker at Bayard Avenue. The Applicants are trying to push the shortage off their lots onto the Reed property. Some of the considerations are: 1. South Rehoboth was laid out on paper mostly in 25 foot x 100 foot

lots. 2. In South Rehoboth, the minimum size required by the City for a building lot is 50 feet of street frontage with a minimum of 5,000 square feet of area which amounts to two of the originally plotted 25 foot x 100 foot lots. 3. Over the years, many pipes, rods, concrete markers and other monuments have been placed to locate the actual property corners on the ground. 4. Not one of these markers is accurate with zero margin for error. There is probably no accepted monument from which to begin measuring to more accurately locate any marker, regardless of the accuracy of modern survey equipment and techniques. If there was an accepted monument from which to re-plot the community, it would probably result in shifting every boundary line in South Rehoboth. 5. In partitioning cases, the City requirements as applied by the Planning Commission seems to make no allowance for reality of the unavoidable inaccuracies explained in No. 4. 6. The failure of the City to recognize the reality of unavoidable, minor survey variances causes much unnecessary stress, expense, hardship and injustice for partitioning applicants and has resulted in property owners paying enormous sums of money in disputes over whether they have a building lot. 7. Adoption by the City of a policy that accepts a reasonable margin of error, perhaps 0.5%, for the unavoidable deviation between lot dimensions as plotted on paper versus actual dimensions between property corners on the ground would eliminate all of that hardship and provide property owners with the intended rights and benefits of each 25 foot x 100 foot lot that they purchased. 8. In this case, the distance between the front corner markers at the two ends of the block is apparently about two inches less than the total frontage of plotted lots. 9. The question is what is incorrect because all three cannot be correct: A. The block length of 825 feet plotted on paper that was the basis for every lot sold on this block. B. The location of the marker apparently placed by the City at the west end of the block. C. The location of the marker that was apparently placed by the City at the east end of the block. Another question is whether there is any evidence that these markers were placed by a surveyor with the intent of marking the corners of the blocks and fully encompassing all of the lots in the block. Attorney Lawson had indicated that the markers were placed there when the City plotted the streets. For a 80 foot right-of-way for street, the surveyors did not need to be accurate; and they were probably using chains and ropes to measure at that time. 10. If the City adopts a policy as suggested in No. 7, then this partitioning can be approved without taking property from the Reeds or resolving No. 9 above. If the City does not adopt the suggested policy, then the Reeds oppose this proposed partitioning for the following reasons: A. The Applicants' lot is about two inches too narrow, and they are attempting to take their shortage out of the east side of the Reed lot. The Applicants' survey shows their west boundary line two inches onto the Reed lot along the entire boundary line. B. The Applicants have arbitrarily decided that every marker on the block is not correctly placed and arbitrarily assumed that the marker at the southeast corner of this block is the only correct marker. C. The Applicants' approach seems to be based on the assumption that the last property deeded out by Rehoboth Heights Development Company would be the one with the shortage in frontage, even though there is no reason to assume that there is a real shortage in the size of the block. That theory is an attempt to shift the boundaries of the three properties on the west side of the Applicants' property so that the shortage is shifted to the property with 125 feet of frontage. D. The Applicants' approach fails to take into account any of the other surveys done on the block or any of the markers for the other properties, many of which have marked the boundaries for decades. The Reeds are opposed to accepting and relying on this survey by Merestone as establishing the boundary line between their property and the Applicants', and allowing the Applicants to partition based on that survey.

Mr. Shulman commented that the Applicants said the only lot which is short is the end lot because that was the last one conveyed.

Mr. Jim Reed said that if the Planning Commission accepts that the King Charles Avenue marker is correct because if the measurement is taken from the other end of the block at Bayard Avenue and the shortage is taken out of 125 feet, then their markers would still be correct. If the measurement is taken from Bayard Avenue, the line would go where the Reeds have it at the moment. The beauty of this is that if the shortage comes out of the 125 foot lot, those owners can still get two 50 feet x 100 feet building lots.

Mr. Shulman said that currently there is no .5% rule and maybe there should be one. If there is no .5% margin of error and the City does not have a policy regarding this, then the Mr. Jim Reed's position is that they are against the partition.

Mr. Jim Reed said that one of the issues is that the Planning Commission does not determine boundaries, but previous decisions finding 99.97 feet or whatever have been based on boundary markers where the neighbor says their boundary is. The Reed's boundary is two inches east of where

the Applicant is putting the boundary line. If there is no .5% margin of error policy, then he would be opposed to this partitioning as is. Where the boundaries are marked, they are short. If this partitioning is approved and the boundary line is moved two inches west in order for the Reeds to keep their 100 feet x 100 feet, they would have to successfully move their boundary two inches to the west. The Reeds' neighbor would have to move their boundary two inches to the west into the 125 foot property. There is no basis to rely on the two markers at the end of the block.

Mr. Shulman noted that the Planning Commission does not determine boundaries, but it does have to determine whether, if the Applicant comes in with a survey that shows they have the distance, it is their burden to show they have the right size lot. If someone believes they do not have the right size, then that person has to come in with other evidence. The Planning Commission will not decide who is right, but it has to look at everything and decide if the Applicant has met their burden.

Chairman Littleton commented that Ms. Mildred Reed had submitted written testimony and a survey at the June 14, 2013 meeting. At that meeting, the Building Inspector said there was a more recent survey in the City files. This survey (Miller Lewis Inc. dated March 8, 2011) was distributed to the Planning Commission and the Applicants.

Mr. Jim Reed said that with regard to the Miller Lewis Inc. survey, the corner indicates that the surveyor found a pipe. The pipe is actually four inches from the corner. The Wingate & Eschenbach LLC survey dated May 19, 2004 refers to a drill hole the surveyor made in the sidewalk which the Reeds believe is a corner of the property. The Reeds have markers at the west end of the frontage and the middle, but there is no survey marker at the east end of the frontage. It is a pipe in the sidewalk. The Reeds met with representatives of Merestone Consultants Inc. today, and they confirmed that the property line on the Applicants' survey is west onto the Reed's property two inches inside the drill mark and two inches inside the survey marker at the back of the property.

Chairman Littleton noted that with regard to the Wingate & Eschenbach LLC survey dated May 19, 2004 and the Miller Lewis, Inc. survey dated March 8, 2011, there is nothing different in terms of the disputed two inches. Mr. Reed agreed that both surveys show the same dimensions.

Mr. Jim Reed said that their concern is the disputed two inches because there are only three lots left on the block that can be subdivided. Mr. Mellen and the Reeds both own properties that are 100 feet x 100 feet; and the third is the 125 foot wide property.

2. Mr. Joe Reed, co-owner of 115 Rodney Street, said that the property line in question where the two inch overlap occurs is because the Reed surveys originate from Bayard Avenue and the Applicants' survey originates from King Charles Avenue. There are survey markers on the property corners at the west end and between the two lots. The new survey was submitted because the house was demolished and a new house was built on the two lots. The house is 6'-2" from the eastern property line. If the line is shifted 2.16 inches, it could essentially have a setback violation. The Reeds are not opposed to the partitioning, but their issue is with the property line. Mr. Joe Reed read a letter dated July 12, 2013 from Ms. Mildred Reed with regard to the partitioning request of 111 Rodney Street. The Reeds have had a chance to review the boundary survey plans presented by Merestone Consultants. If they understand the plans correctly, the west property line of proposed 113 Rodney Street would be over the Reed's east property line by 2.16 inches which cannot be allowed to happen. The Reed family has owned Lot Nos. 58 & 59 since the late 1930's or early 1940's. Lot Nos. 56 & 57 were purchased in 1956, and the first house was built on the property in 1957. There has never been a boundary dispute with any of their neighbors. The house at 111 Rodney Street was bought and sold several times over the years and never was the Reed's property line in question until now. The City should officially recognize that all of the 33 lots of 25 feet x 100 feet in Block 25 of Rehoboth Heights are valid lots, and each 50 foot parcel is a potential building lot. Until this property line issue is settled and the Reed property is left intact, they must oppose the present partitioning request.

Mr. Brian Patterson commented that it is not the Planning Commission's role to determine the location of anyone's property line. Its role is to determine if there is evidence that the Applicants' property has 100 feet. The Applicants' survey suggests that someone's property to the west of them is two inches short, but it does not say who. The Reed survey says that it is not the Reed property that is two inches short. If the Reeds would want to partition based on their survey, it shows the property being 100 feet wide.

Mr. Joe Reed acknowledged that it would put him at ease knowing that the Planning

Commission's role is not to determine the location of anyone's property line. Its role is to determine if there is evidence that the Applicants' property has 100 feet. If a subsequent owner would partition, the line would have to be shifted two inches to the west to get 100 feet and as long as there is the same position and the owner of the 50 foot x 100 foot lot is not objecting to the possible partitioning request of the Reeds in the future. There is a property marker at the back east property line and the drill hole in the sidewalk. No property markers are set at the west end of the Applicants' property. If a marker would be set, it would be two inches over the property line. There has been conversation that part of the Reed fence is on the Applicants' property according to the Miller Lewis survey. In actually looking at the stake in the ground, the property line and the stake is on the east side of the Reed fence. Part of the fence was put up by the Andersons, a previous owner and is clearly on the Applicants' property.

Mr. Shulman noted that if the partitioning is approved, the Applicants will file their survey in Georgetown. That survey will say that the Planning Commission, when it approved the partitioning, these are the contours of the lot. The Planning Commission will approve, for filing, where the western boundary of the lot is.

Mr. Joe Reed said that they and the Applicants agree that where they say the western boundary of their lot is on their survey, is 2.16 inches into where the Reeds say their lot is. He acknowledged that according to the survey, the fence is on the Applicants' property.

3. Mr. Bob Reed, 36 Pine ridge, Henlopen Acres, co-owner of 115 Rodney, said that the Reeds do not want to lose two inches on the east side of their lot. That two inches should not prevent the Applicants from getting a partitioning. If the Applicants' survey would show each lot being 49.9 feet wide and the City would approve it, then this would be the way to go. He was happy to hear Mr. Shulman suggest that if the City adopted a reasonable margin for error, these inaccuracies would not prevent what should not be prevented.
4. Mr. Michael Early, PLS, owner of Merestone Consultants, Inc., performed and supervised the survey which had been presented to the Planning Commission. The distance between the monuments at the end of the block is 2 1/8 inches short from the 825 feet called for on the original plat. The original plat did not show or call for any original monuments. The monuments that were set by the City in approximately 1939 are close, but two inches is two inches. Merestone has found many deficiencies in the surveys it has performed throughout the City. The length of the block between King Charles Avenue and Bayard Avenue is two inches short. Generally in the north-south direction, the blocks are a little longer. There are a lot of inconsistencies in those measurements. Mr. Early does not want to upset property owners in the neighborhood. One marker that correlates the beginning distance from King Charles Avenue is located on Mr. Mellen's property. As Mr. Early came from the monument on King Charles Avenue, the marker is where it should be based on those distances. The location of the monuments was established through the entire block. The concept of senior rights is used which gets back to first in title, first in right. City Solicitor Mandalas has confirmed that this is the law in the State of Delaware. In this particular case, two inches is the difference as best determined by the monuments. The last parcel on the street that fronts on Rodney which consists of five lots should suffer the shortage and should be 124.82 feet. With respect to the amount of lot area that the aggrieved lot has, there is no question that the Applicants have a 100 foot wide lot. The question is where the 100 feet is located. If the measurement is taken from King Charles Avenue, the lot is located where Mr. Early thinks it should be. If the measurement is taken from Bayard Avenue, there is an overlap of 2 inches. Mr. Early believed that the City set its markers in 1939. There is nothing more recent showing that monuments have been set; however, safety improvements have been made at some intersections, and some of the monuments have been disturbed. Mr. Early has seen one monument that has been pulled out of the ground and laid off to the side while the improvements were being made.

Ms. Sullivan noted that the monuments were removed by the surveyor and replaced by the surveyor at the direction of the City Manager.

Mr. Early acknowledged that before Rehoboth Heights was laid out, it was open land. The surveyors laid out and described various blocks. This particular block was described as twenty-five 25 foot wide lots and two 100 foot wide lots equaling 825 feet in length. There was a note on the original subdivision plan that said each lot is 25 feet x 100 feet. In 1939, the City hired surveyors to establish the distances and set the monuments. There is no reason to believe that there was not an attempt to have the total lots equal 825 feet, as they were described for sale. Mr. Early acknowledged that with

regard to the subject property, there are two good surveys measured from different places. One of the things that is inherent when there are constraints and known shortages throughout the City is for the surveyor who prepares the plan for partitioning to survey the entire block and establish what the limits are. The next thing the surveyor needs to do is a title search to determine who has senior rights so that he knows who is supposed to suffer a deficiency or excess. The accuracy of surveys depends on the people doing the surveys. The potential is to generate measurements that equal 1/100,000<sup>th</sup> in terms of their relative accuracy. Mr. Early was unable to tell if the City markers are located in the right or wrong place. Markers in this particular block were located along with as many monuments and markers on each of the opposing corners. In 1939, the ability to measure and the willingness to measure were generally pretty good. As the property was being developed, the City was being demanded to put in infrastructure such as utilities. With the engineers and surveyors at that time, it was a big deal to monument and mark the streets because it locked down the streets. When the streets are locked down, the properties or lots are locked down within them. Stability was wanted in the property lines. This particular block from the northwest corner of King Charles Avenue and Rodney Street to the northeast corner of Bayard Avenue and Rodney Street is two inches short. As a surveyor, Mr. Early in order to justify the two inches must establish the block beyond a shadow of a doubt based on the evidence and the points defined in the ground. He has to pull all the deeds and determine who came first. He acknowledged that even though the Planning Commission would create new lots with particular boundaries, it does not necessarily bind the surveyor. The Planning Commission does not approve where the property lines are located. The Planning Commission approves the creation of two parcels. It does not care where the property lines are located other than the fact that the Planning Commission is approving that process to happen to split the property into two lots. The Planning Commission is not responsible for setting the monuments and markers on the ground, the surveyor is.

Chairman Littleton said that what the Planning Commission approves and what will be filed is a sealed survey as being accurate and complete; and that is what the Planning Commission bases its decision on. The Planning Commission does not set boundaries, but it officially agrees to the survey; and it specifies that the survey must be filed in Georgetown.

5. Mr. Joe Reed noted that the centerline of the subject property is 400 feet from King Charles Avenue and 425 feet from Bayard Avenue. He suggested that the measurement for the Applicants' survey be taken from Bayard Avenue since the most recent house constructed on the north side of Rodney Street is on the Reed property and that survey was based on coming from Bayard Avenue and is 6'-2" from the eastern property line.

Mr. Mike Early said that the deed for the Applicants' property is tied to a commencement point at the intersection of Rodney Street and King Charles Avenue. There is at least one point along the way that Mr. Early can confirm which hits within ¼ inch of where it should at Mr. Mellen's property, based on using the commencement point. An iron pipe in concrete with the RB39 disc set in the top of it was found at the northwest corner of the intersection at Rodney Street and King Charles Avenue. The iron pipe with disc does not look like it was damaged, destroyed or tampered with. The monument at the intersection of Rodney Street and Bayard Avenue did not have the RB39 disc in it, and it looked like it had been tampered with. One of his field notes was that the monument was broken or something to that effect. These are the reasons why survey was done from the intersection of Rodney Street and King Charles Avenue. With regard to the first rights doctrine, Mr. Early had checked and found the lots which had sold last.

6. Mr. Bob Reed said that Mr. Early started at King Charles Avenue because the deed description had that as the point of beginning. The block was plotted on paper as 825 feet. He did not understand why it was being assumed that the block is no longer 825 feet and why the distance between the two markers of 824.92 feet is correct.

Chairman Littleton closed the public portion of the hearing.

City Solicitor Mandalas addressed the idea that there is a first in title, last in title issue. Although it is the state of the law in Delaware, nothing the Planning Commission would do this evening would be a declaration that Lot Nos. 62 through 66 have two inches less. The Planning Commission does not determine boundaries. It could be that at a later date there is a court declaration that the City markers were improperly placed. That lot and all those lots have what was originally plotted. When the Rehoboth Heights Development Company deeded out these lots, there was a lot of land mass to deed exactly what it plotted in the original plot. To come to a determination that there are two inches missing on this block is part of the reason that the Planning Commission does not issue declaratory judgments as to boundary lines.

The Planning Commission does not have the power to make declaratory judgments as to property boundary disputes. To the extent that there is a dispute, nothing the Planning Commission does, should or could be used in a court of law deciding the property boundary dispute. With regard to administrative variances, the Planning Commission should be aware that the Board of Adjustment has discussed this on a number of occasions. The Planning Commission and the Board of Adjustment are on the same page about this issue. The Planning Commission has been asked to look at the Code and determine if the Code requirements have been met. There is nothing in the Code that says the Planning Commission needs to determine where the outer boundary lines are. The Planning Commission needs to determine whether there is a minimum lot size and if there is 50 feet of frontage.

Chairman Littleton said that the Planning Commission has no flexibility within the Code, and it cannot create an illegal action. The Planning Commission has to look at adverse impact on adjacent properties. Creating a variance or a setback would be an adverse action. Under D(5) of the partitioning application, it says, "when the proposed subdivision adversely affects the development of the remainder of the lot being subdivided or any property adjoining the existing lot of any new lot being created.

Mr. Shulman said that the Planning Commission has to determine if the survey is accurate. The survey tells the Planning Commission what the boundaries are.

Mrs. Konesey made a motion, seconded by Mr. John Gauger, to approve the partitioning of the property located at 111 Rodney Street, Lot Nos. 52, 53, 54 & 55, Block 25, into two lots with Lot Nos. 52 & 33 becoming one lot of 5,001 square feet and Lot Nos. 54 & 55 becoming one lot of 5,000.6 square feet. All the criteria has been met. The Planning Commission has received a stamped survey designating the square footage of each lot which meets the City requirements of 50 feet of frontage and 5,000 square feet.

Mr. Gauger said that both families have adequate lots. He thought that the Planning Commission can approve the partitioning, and it also can go to the Board of Commissioners about this problem. Mrs. Konesey agreed. She suggested that Chairman Littleton contact Mr. Tom Evans, Chairman of the Board of Adjustment, and there could be a joint request to the City Commissioners.

Mr. Patterson said that there are two credible surveys with two different lots each showing 100 feet wide. Clearly there is a discrepancy because the surveyors measured from two different points so it could be that one of those points is in the wrong location, both are in the wrong location or someone is missing two inches. There is no evidence that either of these two property owners (Reeds and Varones) are missing two inches. Even though testimony has been provided that there would be a setback violation, Mr. Patterson did not see it on the survey. The discrepancy is 2.18 inches, and there is not enough evidence for him to conclude that the Applicants must be denied a partitioning because the Reeds are concerned that they might have a setback violation if someone in the future was to determine that the property line is where the Applicants think it is. The Planning Commission is not here to determine whether the Applicants are right or the Reeds are right about the location of the property line. The Planning Commission needs to make a decision based on the information it actually has, not about speculation with things that could happen in the future. Mrs. Konesey and Mr. Markert agreed. Mrs. Konesey did not believe there is adverse impact, and the Reeds and Applicants have valid surveys. The Planning Commission's decision does not impact anything that happens in court.

Mr. Shulman thought that it was unfortunate for the people who bought their lot last because the undeniable logic of what is being said it is the people who have 125 feet who seemingly do not have 125 feet. This will cloud their title and the Reeds' title. The end result is that the properties will be subdivided. The adjacent neighbors who are property owners should be treated no differently when there are competing viable surveys. Chairman Littleton agreed. Both parties are innocent victims of a City mess up in 1939. The entire development started with wide open land, and there were no constraints. It was legally described and sold. Everyone has a title stating what lot(s) they own in 25 feet x 100 feet increments. A surveyor, after the fact, put in markers which are 2¼ inches off. The result is that there is a property dispute on this block. This dispute is no different than what is going on all over the City. The solution is no different than what the Board of Adjustment is trying to do. The City needs to take into account that these issues exist throughout the City, and it needs to allow some means for the Planning Commission provide leeway. For this reason, Chairman Littleton would not approve this application. His solution would be for the Planning Commission to go with the two parties to the City Commissioners to solve this matter.

Chairman Littleton did not think it would be fair for this to be resolved in costly and lengthy legal battles in a court. The City itself owes it to its citizens to address these issues so they are solved.



He voiced concern that there is adverse impact which can go both ways. Someone will suffer from this somewhere along the line.

Mr. Shulman made a motion, seconded by Chairman Littleton, to table the motion. (Patterson – no, Shulman – aye, Gauger – no, Mellen – recused, Littleton – aye, Markert – no, Konesey – no.) Motion failed.

City Solicitor Mandalas said that the signed and sealed survey from the Applicants has a presumption of validity. To not rely upon that survey, the Planning Commission would need to have evidence on the record that sufficiently undermines the credibility of that survey. It has to be an overwhelming analysis to not rely upon the survey.

(Patterson – aye. The Applicants have abundantly met their burden. They have a credible survey in front of him. He has another survey with an inconsistency, but he does not find it to be equally credible. He has testimony supporting the credibility of the Applicants' survey, justifying exactly why they took the measurements they did and from where they took them and calling into question the City's monument at Bayard Avenue which they did not measure from. The evidence overwhelmingly supports the presumption that this survey is credible and the Planning Commission should rely on it. Shulman – no. The Applicants are entitled at some point to partition the property, but the Planning Commission in order to achieve what ultimately is going to be the right result and a fair result, is really abusing its process. The Planning Commission is going down a road that will come back to haunt it. The next time it happens when it is four, six or eight inches, the Planning Commission will find that it has trapped itself into something that will create more litigation for private parties, more problems for the City and it is the wrong way to do it. Gauger – aye. He agreed with Mr. Markert. Mellen – recused. Littleton – no. The Applicants have the right to partition their property in some point in time. He cannot support the motion to approve on the basis that the Planning Commission is pushing off a City problem on private citizens. Both parties have presented very credible evidence. He does not question either of their surveys. They are both signed and sealed legal surveys. There is a discrepancy which definitely depending on how one goes, creates an adverse impact on either property. Either the Applicants will have an adverse impact or the Reeds will have an adverse impact. Chairman Littleton was not comfortable with a solution that says this has to be fought out in court when the line problem is a City problem. Markert – aye. He did not feel that this is unambiguous. The Planning Commission has clear evidence that the Applicants have proven they have a subdividable lot. There is no evidence to show otherwise. Whether the Planning Commission is creating a boundary dispute in this thing, it is central to this decision about the partitioning. Mr. Markert affirmed, lauded and supported any effort that the Planning Commission can make in order to try to get the City to make a correction to remedy this in the future. He did not feel that the Applicants should bear the brunt of that process. Konesey – aye.) Motion carried.

Mr. Early said that the surveyors, as a statewide group, would be willing to lend support in terms of additional input or credibility to the problem or input to the solution.

Mr. Shulman noted that an administrative variance would not apply to the Planning Commission.

Attorney Lawson would be happy to meet with the Planning Commission or the Commissioners to fix this problem because this will be a recurring problem.

Chairman Littleton called for a recess in the meeting at 9:00 p.m. The meeting resumed at 9:05 p.m.

## **OTHER BUSINESS**

Chairman Littleton called for the following agenda items: (2) discuss and adopt an action plan to seek input from tree service companies, builders, developers, foundation companies and surveyors doing business within the City, (3) identify further research needs and plans to obtain information, (4) plan for a special workshop meeting and (5) public comment/input relative to trees and the tree ordinance. Mr. Jeff Meredith of Sussex Tree and Mr. Bobby Hughes of Hughes Wood Service are willing to talk with the Planning Commission regarding trees. Chairman Littleton suggested that on August 9, 2013, the Planning Commission hold a special meeting in the afternoon and also meeting at its regular meeting in the evening. At the special meeting, the representatives from the tree service companies would come in from 3:00 p.m. to 4:00 p.m., and the builders, developers, surveyors and landscapers would come in at another time on that date. An invitation will be sent to all who are listed to come in. Chairman Littleton suggested that a questionnaire be developed to reach the public through the City's website and the email mailing list. There will be suggested topics for the public to respond to. The Planning Commission needs to move forward with the tree code. There will need to be discussion about construction techniques, issues with trees, etc. Discussion ensued.

Mr. Shulman would like to see the Planning Commission develop approximately six questions that really present very hard, specific examples and ask people how they feel about them such as someone putting in a pool in the backyard and there are three 70 foot oak trees that are two feet wide, and to put the pool in they want to take down the oak trees.

Mrs. Konesey said that the Planning Commission should start out with determining what the core values are as a community. If the core value is that it is a tree community and a person truly believes it, then a list would be provided of the things that happen when there are no trees. As larger houses are built and trees are cut down, the impervious surface increases causing stormwater issues which will cost the City a certain amount in drainage and taxes will increase. Part of keeping trees and pervious surfaces is that they absorb runoff, etc. The ordinance would be built into the core values. Part of the core values is whether the Planning Commission is concerned with private property rights or community rights. People need to be educated why the core values are important and why it makes a difference.

Mr. Shulman said that before the Planning Commission goes to drafting anything from conceptual agreements and buying into core values, it has to present real life situations.

Mrs. Konesey and Mr. Markert will work on a questionnaire which will be forwarded to the Planning Commission for its review.

Interviews will be scheduled for the special meeting in the afternoon on August 9, 2013.

Chairman Littleton called for discussion of Resolution Regarding Side Lot Setbacks for Properties with Frontages Greater Than 50 Feet and development of an implementation action plan.

Chairman Littleton has asked Ms. Sullivan to look at what it means in terms of FAR, natural area, what the impact is if the setback is changed, etc.

Ms. Sullivan provided sketches for the Planning Commission. On a 10,000 square foot lot (100 feet x 100 feet), there would be 5,100 feet of buildable area which would be 68 feet x 75 feet with the setbacks removed. The 40% natural area would be 4,000 square feet. The FAR would be at 60% or 6,000 square feet. The 50% lot coverage would be 5,000 square feet. Four thousand nine hundred square feet would be left in the setbacks. There would be no impact on lot coverage, FAR, natural area, etc. There would be no change to the 4,000 square foot rectangle. With regard to the irregular shaped lots, it is basically the same. Depending on the square footage within the lot, there would still be two side yard setbacks.

Mr. Mellen said that there are lots in the City which have setbacks that would preclude putting a building into the back of a lot because there would not be enough room if those setbacks are maintained. Mr. Shulman said that those lot owners would have to get a variance because they will not allow a lot to be unbuildable.

Chairman Littleton said that the purpose of this ordinance is to have light, air, scale, etc. If the setbacks are increased, trees would be saved. Mr. Shulman said that tree would be saved if people did not have the right to take down the trees they want to take down.

Mrs. Konesey said that to allow a 100 foot lot to have the same setbacks as a 50 foot lot, the scale, bulk and density is totally inappropriate. The City Commissioners need to pass an ordinance to bring the larger lots into compliance with the smaller lots. The bigger setbacks would allow for the scale and bulk to be appropriate for the neighborhood and for the rest of the lots in the City. All of the lots in the City need to be looked at if the Planning Commission wants to change things because of trees. That is a separate issue from this subject which has to do with side yard setbacks.

Chairman Littleton will prepare an action plan and forward it to the Planning Commission for its review.

Mr. Shulman's assignment is to look at the wording in Tier 1 use in the commercial district which is a residential use in the commercial district. Any residential use in a commercial district has to meet the setbacks.

#### Building Inspector Report

Ms. Sullivan, Chairman Littleton and Mr. Mellen met yesterday with regard to a property that does not meet the standard for coming before the Planning Commission for site plan review. All were in agreement that the property did not meet the Code requirements for coming forward. A memo was forwarded to the Planning Commission with regard to this property. Mr. Shulman requested that this be put on the August agenda because it was unclear how the Code was being read.

City Solicitor Report

There was none.

City Solicitor Mandalas has questioned whether a tree ordinance belongs in a zoning code vs. a separate code because it implicates private property rights. To that level, it is worth a discussion whether the tree ordinance should be within the zoning code.

No new subdivision applications have been submitted to date.

The next scheduled Regular meeting will be held on August 9, 2013 at 6:30 p.m. The Special Meeting will be held on August 9, 2013 from 2:30 p.m. to 5:00 p.m.

There being no further business, Mrs. Konesey made a motion, seconded by Mr. Gauger to adjourn the meeting at 10:10 p.m.

**RECORDED BY**

\_\_\_\_\_  
(Ann M. Womack, CMC, City Secretary)

**MINUTES APPROVED ON  
AUGUST 9, 2013**

\_\_\_\_\_  
(Francis Markert, Secretary)