PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH

August 12, 2011

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:30 p.m. by Chairman Preston Littleton on Friday, August 12, 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. Brian Patterson Mr. Harvey Shulman Mr. David Mellen Chairman Preston Littleton Mr. Francis Markert, Jr. Mr. Patrick Gossett Mrs. Jan Konesey
Absent:	Mr. John Gauger Mr. Timothy Spies
Also Present:	Mr. Mike Hoffman, Esq. of the law firm Baird Mandalas LLC on behalf of Mr. Glenn Mandalas, City Solicitor Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

APPROVAL OF MINUTES

Minutes of the June 10, 2011 and July 8, 2011 Planning Commission Regular Meetings were not available for approval.

CORRESPONDENCE

There was no general correspondence.

OLD 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 Public Hearing procedures. The audio recording of the Preliminary Review from July 8, 2011 was made part of the record.

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 dated May 2, 2011 and received May 10, 2011.
(3) Adjacent House Location dated May 2, 2011 and received May 10, 2011.
(4) Survey dated May 2, 2011 from Coast Survey, Inc.
(5) Documentation of ownership.
(6) Photographs of adjacent properties.

Mr. R. Brandon Jones, Esq. of the law firm Hudson, Jones, Jaywork & Fisher LLC represented the owners of the property. Mr. Beryl Lee Deck and Ms. Linda Frances LeMessurier were in attendance at the meeting. It is planned that the house would be demolished, and one lot would be owned by Mr. Beryl Deck and the other lot by Ms. Linda LeMessurier. The application for demolition has not been filed to date. The plans for

construction of the two proposed houses are nearing completion, and the Applicants are anticipating the approval of the partitioning in order to obtain the building permits and commence with construction. Half interest was originally deeded to Mr. H.A. Deck, and half interest was originally deeded to Mrs. Luella F. Deck in the 1990's. After the passing of Mrs. Luella Deck, her interest was placed in a trust until the passing of Mr. H.A. Deck. When Mr. Deck passed away, his interest was willed to Mr. Beryl Deck and Ms. Linda LeMessurier. Mr. H.A. Deck had exercised a Power of Appointment that half of the ownership of both lots through Mrs. Luella Deck's trust and half through his will would go to Mr. Beryl Deck and Ms. Linda LeMessurier; but all of the one lot has gone to Mr. Beryl Deck and all of the other lot has gone to Ms. Linda LeMessurier. Cross-deeds will be done so there is no question about ownership in the future.

There was no correspondence and no public comment.

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

Mrs. Jan Konesey made a motion, seconded by Mr. Harvey Shulman, to approve the partitioning for 36 Columbia Avenue based on meeting all the legal requirements for a partitioning in the City of Rehoboth Beach and subject to the removal of the house and shed.

Mr. Shulman said that the Applicants have made every effort to comply with every aspect of the Code. He encouraged the Applicants to have some flexibility with regard to the trees when they are building their homes.

Motion carried unanimously.

Chairman Littleton called for the continuation of 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. and James A. Fuqua, Esq. on behalf of the owner of the property. Chairman Littleton noted the Public Hearing procedures. The audio recording of the continuation of the Public Hearing from July 8, 2011 was made part of the record.

Mr. James A. Fuqua, Esq. represented the owner of the property. Mr. Thomas H.B. Dunning was in attendance at the meeting. At the last meeting, Attorney Fuqua presented all the facts that he could obtain and gave his conclusions from the facts. The final determination was that it is not known exactly what has happened with the moving of the property lines. The recorded plot shows that the property lines moved, and one of the deeds clarified that. In the letters which were submitted, there was some informal indication that Mr. Messick had talked to Council, the Planning Commission or some members of those bodies in regard to the property lines. Attorney Fuqua's main emphasis was on the plat surveyed by Mr. Gregory Hook, PLS, which shows the existing property as 100 feet x 100 feet, thus resulting in two (2) 50 feet x 100 feet lots. The plat was recorded in the Office of Recorder of Deeds, Georgetown, DE. The square footage of the two lots exceeds what is required. There was indication from the City that the 4,000 square foot rectangle requirement has been met. It is an opportunity to take away a deteriorated building and create two new lots with two new homes and two new tax bases. The 1978 movement of the property lines was to benefit one or two properties which had an encroachment. This property did not have encroachments. The owner went along with it to accommodate the neighbors. The only condition the former owner had was to make sure he had two lots. If the City would decide to come forward and say that this is illegal because approval was not gotten back in 1978, then there would be a real problem in terms of an equity argument. The City indirectly has been aware of this matter because it is exists. No one is suffering any impact or negative consequences from the movement of the property lines. Something happened that should not have happened with regard to the encroachments.

Mr. David Mellen noted that the owner of the two lots on Surf Avenue has lost property and does not have a double lot. That lot went from approximately 102 feet to approximately 97 feet.

Chairman Littleton commented that the children who inherited the Surf Avenue property, when they testified before the Planning Commission during the Preliminary Review, could not understand why their mother signed off on relinquishing a portion of the property. Attorney Fuqua said in that situation, it comes down from the person who signed the deed. It was not that somebody had taken the property from the mother, she actually deeded or agreed to the new boundary line. The children will be bound by what their predecessor had done, and they would have an issue and a legitimate claim to come before the Board of Adjustment for a variance from the lot width requirement if they would request a partitioning from the Planning Commission.

Mr. Mike Hoffman, Esq. said that as a threshold matter, it is important not to lose the forest from the trees with any sort of an application that is before the Planning Commission. The Code with a request for partitioning of land requires the Planning Commission to look at the application, weigh the evidence and make a determination whether the Applicant has met the requirements in Chapters 236 and 270. The credibility and reliability of the survey goes to whether the Applicant meets the street frontage requirements, etc. During the Preliminary Review, the Applicant's surveyor went through the history of how he came up with his survey. At the first Public Hearing, there was further discussion into the history of the property and why the Applicant's survey says what it says. The question then becomes with the Planning Commission and based on the evidence, whether the Applicant's survey is reliable and credible. In regard to the 1978 survey, there are some questions with what happened; but the question is if there is enough evidence that the Applicant's survey is credible and reliable. City Solicitor Glenn Mandalas had sent a memo to the Planning Commission addressing the history and the 1978 survey. Attorney Hoffman paraphrased the memo. The 1978 survey was a survey that was agreed upon by the neighbors and was recorded. In that survey, permanent markers were set which was based upon the surveyors and the understanding of the original intent of what the lots were supposed to be. From those permanent markers, the subsequent surveys have been created. It is all based upon the reliability of the markers; and whether those markers capture the intent and whether the evidence shows that those markers capture what these lots were supposed to be. If the Planning Commission concludes that the evidence shows that the 1978 survey and the permanent markers capture the intent and are credible and reliable, then the question is whether the survey presented is based on those permanent markers and is also credible and reliable. If the evidence says that it is, then that is a survey which the Planning Commission can rely upon in conducting its review and analysis of whether the Applicant meets the Code requirements.

Mr. Mellen said that there are two issues: 1. Reliability of the survey and whether the Planning Commission believes the survey relative to the markers and irrespective of the fact that there have been other surveys which show slightly different answers. 2. 1978/79 action that was taken circumvented the partitioning process. It created new lots that are different from the original platted lots. Mr. Mellen asked if any of this can come undone by the Planning Commission's actions. Attorney Hoffman said that it ultimately comes down to the Planning Commission weighing the evidence and making a determination as to whether the Applicant meets the Code requirements.

Chairman Littleton said that the Applicant's survey is based on a piece of land being in some location. That piece of land is known not to be in that location prior to 1978. In 1978, neighbors got together and mutually agreed to shift property lines. There is no evidence which has been presented by Attorney Hoffman, the City or Attorney Fuqua that the City ever recognized that partitioning. What exists today in terms of property lines is what should be. The question is whether it is legal how they got there; or if there is any easy way to make sure it is legal so that this does not come undone at any time.

Mr. Patrick Gossett noted that one of the responsibilities of the Planning Commission is to not create a non-conforming lot. If the Planning Commission was to take action in a positive manner on this partitioning, it would be creating non-conforming lots with the Surf Avenue Lot Nos. 41 & 42 by shortening those lots by 3.6 feet.

Mrs. Jan Konesey said that said that the City has already dealt with Lot No. 6. The property was purchased, and the owners thought it was a 50 feet x 100 feet lot. The survey showed the lot to be 50 feet wide but only 98 feet deep. The owners went to the Board of Adjustment and received a variance. This occurred after 1978. The survey which the Applicant is asking the Planning Commission to validate shows the property at 49.85 feet wide x 100 feet deep. Today, Mrs. Konesey reconfirmed with the people involved that the property is 2 feet short lengthwise. The City and the Board of Adjustment used a different survey for that property than the 1978 survey.

There was no public comment.

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

Mr. Shulman said that this property can and is able to be partitioned. Whether it is by a variance, whether it is by an action taken by the Planning Commission or whether it results in a court case, it is clear that it would be grossly unfair for this to not end up as a partitioning. His concern was with the process. This should have gone through a subdivision process in 1978/79. The legal memo the Planning Commission received focused a lot on determining where an unknown boundary really is. The Planning Commission has been counseled along the lines about what can happen in a situation not where a boundary line is shifted or changed, but where it is a corrective measure and a corrective document filed because of the drift of the line due to some

of these non-standardized surveys. In this particular case, this is a shifting or changing of the boundary line. In Exhibit G & H, the original boundary lines are shown. On July 19, 1979, Mr. John A. Sergovic, Jr., Esq. of Tunnell & Raysor wrote to Mr. N. Keith Dozier and Mr. Richard R. Goulet saying that the encroachment problem can be solved through appropriate conveyancing instruments where the boundary lines established by fences would become the property lines of the respective lots. On September 22, 1978, Mr. John E. Messick, Esq. of Tunnell & Raysor wrote to the same owners saying that one of the suggestions has been to move the Eastern boundary lines of the involved lots five feet easterly. Attorney Messick had met with the Chairman of the Planning Commission and discussed requirements of the Subdivision Ordinance. It was his distinct impression that there would be no difficulty involved in this type of solution in moving the lines pursuant to the Ordinance. Based upon those conversations, his proposal is to a contract between Mr. Dozier, Mr. Goulet and the adjoining property owners for five feet. There are subsequent letters in Exhibit K regarding moving the lines. In the layout in Exhibit B, the corner lot on Surf and Oak Avenues is shown as 102 feet deep. It is clear that the intent was for the corner lot on Surf and Oak Avenues to be 102 feet deep and the lots behind it to be 50 feet wide. The one thing that can be said with certainty because it is on all the surveys is that the lots on Surf Avenue are not 102 feet. There is an approximate five foot difference. Normally, if there is a one inch, half inch or two inch difference, that would be considered a correction. Changing a property line by four to five feet particularly when the result of that is to take what clearly was a double lot on Surf Avenue capable of being subdivided and no longer can be a double lot, a new lot was created. It was created among the parties by the 1978/79 deed. To take what were two separate lots on Surf Avenue and make them what can only be one lot if the agreement among the neighbors is honored, is a significant change. Nothing that has been cited to the Planning Commission by its own counsel or by the City provides a single court case saying that when individual neighbors have an agreement among themselves to do something and a survey is filed, that when enough time passes it is alright to say it happened. It would be difficult for any of the individual lot owners to not respect the survey. What individuals did among themselves and filed is something that should be accepted by the City, and the City has no choice to accept it. Mr. Shulman cited two cases that dealt with this almost identical issue, one from Rhode Island and the other from New York. Even assuming there is 50 feet of frontage, it is a different 50 feet of frontage post 1979 than before 1979. It may be material and significant particularly with the property on Surf Avenue, in the sense that currently their garage and wall come right up to the property line. Where the new property line was moved to by the parties, is now right up against the garage. What used to be an approximate five foot setback between the garage and what is known to be as the boundary line of that property is something which has created a situation now where it is not just that dimensions have been changed; but without any Planning Commission approval, a new line has been drawn which worsens a setback violation. Mr. Shulman thought that there are enough reasons for the Board of Adjustment to approve the undersized lots because they are undersized by a very small amount. He would like to see that done; and then in this case, the owners should come to the Planning Commission and ask it to subdivide the property the way it was agreed upon among themselves and with the Board of Adjustment variance from the different lot sizes and the setback violations. It would be reasonable for the Planning Commission to approve the proposal which was made in 1978/79 and then approve the subdivision of this lot. Mr. Shulman voiced concern with proceeding with this for the reasons that have been indicated; and he cannot start off by accepting what was done as a mere correction but really was a transfer and conveyance of land and shifting of property lines which was not done in compliance with the Code. In dealing with this problem, the only other lot that would come into play might be the lot immediately west of Lot 4. His thought was that this should be cleaned up in its entirety for everyone who is affected by the 1979 transfer be benefitted by it so no one has to deal with this again. It may be possible to only deal with the three properties, and it may be simpler that way.

Attorney Hoffman clarified that a whole record has been presented to determine what the lots are. These lots have not been re-partitioned or re-subdivided. It was the decision of the property owners in 1978 to move the boundaries. There are questions as to whether the property owners should have been able to do that. The question is whether the Applicant's property as presented to the Planning Commission, meets the Code requirements for a partitioning. Mr. Shulman said that the Planning Commission would be accepting, if approved as is, that the easternmost boundary of Lot 2 is approximately five feet further east than everything that existed in the City records until the property owners in 1978/79 tried to solve a problem. The question is not only if the lot is the right size and shape, it is where the boundary lines are for these lots. Since the Planning Commission and the City never took any affirmative action to move the eastern boundary line five feet further east, this would be the first time the Planning Commission would be doing that; and it would be done on a lot on Surf Avenue where the owners are not a party to this proceeding. This would be the first time the City is putting its stamp of approval on a boundary line that is five feet further east than where the City originally set the boundary line to be up until 1978 at least and possibly after 1978.

Mr. Brian Patterson said that the 1978 documents are only important to whether the Planning Commission believes and accepts the Simpler survey. The Planning Commission does not have a reason to challenge what happened in 1978. No one is disputing the lot lines as presented in the 1978 survey. The owner of the Surf Avenue lot which was harmed by what happened in 1978, signed the survey; and the current owner has attended a Public Hearing and submitted written comments in support of this partitioning. There is no one in interest who is disputing what happened in 1978. If the Planning Commission now disagrees that there should have been a Public Hearing on the subdivision, and they at that time failed to do that, it does not invalidate what happened in 1978. Mr. Patterson did not see any basis to say that Tunnell & Raysor had committed malpractice by failing to follow through with the things they said in the letter of September 1978 and the agreement was finally done six months later. There is no point in trying to recreate that. The only issue is whether the 1978 survey and documents support the Applicant's survey.

Mr. Mellen said that another solution would be to ask the Attorney General's office for an opinion on whether the impact of what was done in 1978/79 should affect what is done today. Attorney Hoffman did not know if that is an option, and he did not know what the procedure would be. Attorney Fuqua noted that the Attorney General represents the State, and the City has its own attorneys to help the citizens.

Chairman Littleton said that the Applicant's property should ultimately be subdivided. He did not think that there would be anyone who would want to undo what the property line has been laid out with. Chairman Littleton said that he has to be concerned about the legality and procedures of the Planning Commission; and he was looking at how this could be done, even to the standpoint of the Planning Commission going to the City Commissioners or to the Board of Adjustment and presenting this matter. Mr. Shulman said that if the Planning Commission denies the partitioning, then it can be taken to the Board of Commissioners who has the right to interpret the Code. He was extremely uncomfortable with the Planning Commission doing something in regard to this matter.

Mrs. Konesey said that this is a perfect case for the Board of Adjustment. There is doubt about the validity of the survey.

Attorney Hoffman said Section 236-9(E) reads that partitioning applications which are bound to meet all of the requirements of Chapters 236 and 270 shall be approved by the Planning Commission. The question is whether the evidence supports a conclusion that all the requirements of Chapters 236 and 270 are met or not. There has been no dispute brought forth by the neighbors, but there has been a question of what happened in 1978.

Mr. Patterson thought that by having the 1978 deed which all the property owners signed, the Applicant owns what he says he owns even if all the property owners did not get the Planning Commission's blessing on it. Attorney Hoffman said that boundary lines would be set by a court. If a neighbor would want to challenge the boundary line, the neighbor would go to court to challenge the line.

Mr. Shulman made a motion, seconded by Mr. Francis Markert, that the Planning Commission should disapprove the Application on the grounds that it appears to be a re-subdivision of land which the parties privately subdivided or attempted to subdivide in 1978/79 without the Planning Commission's approval; and therefore the eastern and western boundary lines of Lot Nos. 2 & 4 as presented by the Applicant, represents movement of those boundary lines which occurred without compliance of the subdivision ordinance.

Mr. Shulman said that there is a review process in the Subdivision Ordinance for the Board of Commissioners to review the Planning Commission's decision. It reads that if there is an appeal, the Commissioners shall review the record using arbitrary and capricious standards to determine if the final action of the Planning Commission was reasonable, and the result of an orderly and logical review of the evidence and involved a proper interpretation and application of the applicable provisions of the Code of the City of Rehoboth Beach.

Chairman Littleton said that if the motion would pass, it would be important for the Planning Commission to signal to the Applicant what it thought about the current survey; and on the basis, this might be appealed, to signal the Board of Commissioners that the Planning Commission thinks that what occurred in 19977 on, should not come undone.

Mr. Shulman amended his motion, seconded by Mr. Markert, that the Planning Commission, on denial, was done reluctantly because of the understanding that 32 years have passed, and the Planning Commission does not see any reason other than the Subdivision Ordinance to question the private deal of the parties.

Mr. Gossett asked what resolution there would be other than codifying a 1978 action if an appeal was

taken to the Board of Commissioners. Mr. Shulman thought that the Board of Commissioners has to act in accordance with the Subdivision Ordinance.

Mr. Mellen concluded that the Planning Commission wants the existing lot lines to stay where they are and that the partitioning be approved. He was uncomfortable with denying the partitioning and putting the process to the Board of Commissioners.

Mr. Francis Markert voiced concern that if the Planning Commission's decision is appealed to the Board of Commissioners, it adds another layer of uncertainty as to how the Commissioners will feel about it. This is something the Planning Commission is capable of approving if it chooses to. The Application meets the requirements.

(Patterson – no, because he was not convinced, based on the record, that there was an error in 1978/79 and that this was not formally approved by the Planning Commission. Assuming, because the Planning Commission has not seen the proof and no one can find that there was not an approval, the area is immaterial to what the Planning Commission is asked to do as far as a partitioning because the record is clear that formal approval would have given. Shulman – aye, for the reasons he expressed in the discussion. Mellen – no, for the same reasons that Mr. Patterson has cited, although he is uncomfortable with a potential for setting a precedent based on what happened in 1978/79 which he truly believed was not correct. In the end, the Planning Commission's responsibility is to vote on the basis of what a presented survey is and the assumed known property lines based on current needs. Littleton – no, for the reasons stated. Markert – no. He sided with his colleagues, Mr. Patterson and Mr. Mellen. Gossett – no, because the Applicant has met the standards of this particular Application. He felt that there are other circumstances which should be further investigated in the fact that recording the deed has to be approved by the City prior to Georgetown registration, and that they may also supplement this so that this should not or could not occur again if the Planning Commission would take action on it. Konesey – abstained. She found that there are too many surveys. The survey done in 1996 does not look like current survey; it goes along with the 1978 survey. Maybe they were recorded by the property owners, but they were not recorded anywhere else; and not all surveyors are looking at the same thing.) Motion failed.

Mr. Mellen made a motion, seconded by Mr. Patterson, to approve the partitioning request based on the fact that it meets the standards required, that it has the incorporated square footage area, lot dimensions and other lot requirements, and it is based on the recorded deeds; and with the condition that the structures be removed.

Chairman Littleton commented that at the Public Hearing and the Preliminary Review, a neighbor had attended and talked about the front of this property and the condition of this property to the neighbors in the neighborhood. A letter was received from the Surf Avenue owners who were supporting that the partitioning be approved, and some of it was based on the structure being torn down. Chairman Littleton did not know why the City has not essentially moved in itself and taken over this property to clean it up. Building Inspector Terri Sullivan acknowledged that there is a procedure. A second letter has been sent by the City to the owner notifying him that he has five days to become compliant. Chairman Littleton said that he is leery of the owner who has allowed this property to get in this condition. He would like to see the motion be amended or just be told, if the partitioning is approved, how the property will be left if the house is removed. The neighbors cannot suffer as they have suffered if this is approved. Chairman Littleton said that the purpose of Section 236-2 is to provide rules, regulations, standards, etc. in order to promote the public health, safety, the convenience and the general welfare of the City. This piece property has not been doing this. He cannot be more strongly offended by that piece of property, and the owner should have been tending to it all along.

Ms. Sullivan said that the City sends letters on a regular basis; and by the time it is ready for the City to move in, the property is taken care of. Then it starts again. The actions stated in the letters are that the City will take care of it which is to clean up the brush and the front walkway, cut the grass, etc. and then put a lien on the property. Attorney Hoffman noted that there are certain notice requirements and certain steps that the City has to take in terms of providing notice before it can go in and take care of it. Ms. Sullivan acknowledged that the action must be taken within five days of the letter being sent. By August 16, 2011 the property owner should have taken action to clean up the property; and if not, the City will hire someone to take care of it.

(Patterson - aye, for the reasons stated by Mr. Markert. Shulman - no, for the reasons he had explained; and also because he believed that the boundary lines of this property as presented to the Planning Commission, have deflected an improper prior subdivision. Once again the Planning Commission in its effort to do the right thing is taking an end justifies the means approach. It has gotten the Planning Commission in trouble before where it accepted surveys, and people have come back in later cases to tell the Planning Commission that it was not done

in another case. This is going to bite the Planning Commission. Mellen - aye. He felt that it meets the standards. While he has concerns about multiple surveys showing slightly different dimensions, there are margins of error in the way those measurements are taken; but it is a sealed survey and the Planning Commission has a certain responsibility to respect the ethics of a sealed survey. Littleton - aye, for the reasons stated. Markert - aye. He had confidence that the current survey was professionally prepared. He also took into consideration the testimony of the neighbors and the adjacent property owner, and the explanation from what was surmised as to the rationale of why the lot lines were shifted. Gossett - aye. He felt that the Application is current and is presented in its fullness, and it is accurate. Konesey – no. She had a lot of concern about the number of surveys. It looks like in the 1994 survey for the Gormans, they did not use anything from the 1978 survey. She was very uncomfortable with it.) Motion carried.

Mr. Mellen said that because of the multiple surveys he had a problem when a surveyor is asked to be proactive in presenting a case. The surveyor's information should be independent of the decision of what is proactive or not. He thought it is bad practice that when an independent witness who seals a survey and has an ethical responsibility by law to do certain things, proactively presents a case.

Chairman Littleton called for the continuation of Public Hearing of amended Partitioning Application No. 0710-02 requesting the partitioning of a property located at 2 St. Lawrence Street designated as Lot Nos. 22, 23, 24, 25, 26, 27 & 28, Block 33, as shown on a plot of lots of Rehoboth Heights, said plot being of record in the Office of Recorder of Deeds, in and for Sussex County, in Deed Book No. 264 at Page No. 410 and also any lands lying between the property known as Lot Nos. 25, 26, 27 & 28, Block 33, Rehoboth Heights and the Atlantic Ocean in which the Applicant has an interest, into two (2) lots with Lot Nos. 22 & 23 becoming one (1) lot of 5,020 square feet and a remaining lot of unknown size. The property is owned by 2 St. Lawrence Street LLC. The Partitioning has been requested by Chase T. Brockstedt, Esq. of the law firm Bifferato Gentilotti LLC on behalf of the owner of the property.

Chairman Littleton said that this was a tabled application pending a hopeful action or agreement between the City and the Applicant. At the Planning Commission's last meeting, the Planning Commission took action to un-table this Application.

Attorney Hoffman thought that it is important, especially given the length and complexity, to go back through a timeline of the Application from the beginning. Included in this timeline will be what has happened since the Planning Commission last met. On July 2, 2010, Mr. Chase Brockstedt, Esq. on behalf of the Applicant, submitted an Application for the partitioning of land concerning the property located at 2 St. Lawrence Street. In the July 2, 2010 Application, the Applicant sought to partition the property identified as Lot Nos. 22, 23, 24, 25, 26, 27 & 28, Block 33, as shown on the plot of lots of Rehoboth Heights Deed Book 375 Page No. 313. A Preliminary Review of the Applicant's partitioning request was held on August 13, 2010. During this Preliminary Review, the Planning Commission identified various areas of concern including confusion over ownership of certain land east of the plotted lots; and this was specifically in the context of why the proper notice was provided. Despite these concerns, the Planning Commission concluded that the Application was substantially complete and accurate, and voted to move the matter to Public Hearing. A subsequent review of the ownership concerns, raised during the August 13, 2010 Preliminary Review prompted the need for an amended Application. On or about August 24, 2010, the City Solicitor informed Attorney Brockstedt that several items on the Applicant's written Application were either incorrect or unclear. Specifically City Solicitor Glenn Mandalas opined that the Applicant was required to clearly identify on the Application his ownership interest in the land including lands east of the Boardwalk. On or about August 25, 2010, Attorney Brockstedt challenged the need for an amended Application. Attorney Brockstedt opined that the land east of the plotted lots was irrelevant to the Applicant's partitioning request. On September 10, 2010, the Planning Commission considered whether the above-mentioned ownership issue warranted an amended Application and new Preliminary Review hearing. The Planning Commission was informed that the Applicant's property due to prior confusion has subsequently increased significantly from what was originally reported to the Planning Commission as part of the Building Inspector's August 6, 2010 report. During the August 13, 2010 meeting, the Applicant represented that the land to be partitioned was 175 feet x 100 feet. After that meeting however, the Applicant signaled the land owned was actually 620 feet x 100 feet. Based upon this confusion, the Planning Commission concluded that a new Preliminary Review was appropriate. On October 8, 2010, the Planning Commission conducted a second Preliminary Review of the Applicant's partitioning request. During this review and according to the official minutes, Attorney Brockstedt explained why the Application did not reference the land east of the plotted lots. "The reason why ownership east of the plotted lots was not made clear in the original application is because there is disputed ownership. It was Attorney Brockstedt's understanding that there is disputed ownership of the lands lying to the east of the plotted lots in South Rehoboth. He did not want the Planning Commission to think that the Applicant is

requesting this body to make some type of determination with regard to the ownership of lands which is the dune, Boardwalk and beach going to the mean water line which changes in dimension every day. Whatever right exists to that land today would only be held by the owners of the newly created lots." The Planning Commission agreed to schedule the matter for a Public Hearing, but identified three areas of concern that the Applicant needed to address: 1. The Affidavits were inconsistent with the deed and would need to be amended. 2. The ownership of a portion of the land described in the Application was at issue and would need to be resolved. 3. The Application tabled would need to be amended to include the square footage of the entire parcel to which the Applicant claimed ownership. The Applicant subsequently amended his Application to make clear that he sought to partition the property that included the land east of the plotted lots. On November 12, 2010, the Planning Commission conducted a Public Hearing; and at the Applicant's request, agreed to table the Application to allow the Applicant to work with the City Solicitor to address the still unresolved ownership issue. On or about February 10, 2011, the Applicant requested that the Planning Commission remove the Application from the table and continue the Public Hearing on March 11, 2011. On March 11, 2011, the Planning Commission continued the Public Hearing for the Applicant's partitioning request. The Planning Commission however re-tabled the Application after a lengthy discussion of the ongoing questions over proper ownership and the continuing efforts of the Applicant and the City Solicitor to resolve the related issues. From March 11, 2011 until July 2011, the Applicant and the City Solicitor had continued to work towards an amicable resolution of the ownership issue. On or about June 29, 2011, Attorney Brockstedt communicated a strong desire to be placed on the Planning Commission's August agenda for a Public Hearing regardless of whether the City and the Applicant were able to resolve the ownership issue. On July 5, 2011, Attorney Brockstedt, through written correspondence, conveyed his disappointment in the latest developments relative to the ownership issue. On or about July 7, 2011, the Applicant supplemented his partitioning request. This supplement included materials that the Applicant maintained which supports his contention that he owns the land extending 150 feet east from the easternmost boundary of the plotted lots. The record reflects that Attorney Brockstedt and the City Solicitor dispute the impetus behind the parties' inability to resolve the ownership issue and the related developments regarding the present partitioning request. Regardless, the fact is that the parties were unable to agree on a resolution to the ownership issue, and the Applicant as requested that the Planning Commission continue its review of the Applicant's partitioning request as amended on or about June 20, 2011 and supplemented on July 7, 2011. The ownership issue is the present Application dates back to August 2010 2010. As noted above, the issue was first raised during the August 13, 2010 Preliminary Review in the context of providing proper notice. On October 8, 2010, Attorney Brockstedt acknowledged that the Applicant's request did not accurately identify all of the related land because ownership was disputed, and he did not want to make the Planning Commission think that the Applicant is requesting this body to make some type of determination with regard to ownership. The legal question at that time therefore became whether the Planning Commission could partition a request for ownership over a portion of the property in question was at issue. Sections 236 –8(A), 236-8(B) and 236-9(G) of the City Code at the very least imply that the Planning Commission may require evidence of ownership over the entire land to be subdivided prior to taking an action on a subdivision application. The Subdivision Application Instruction Sheet further puts applicants on notice that "the Planning Commission may request further proof of ownership such as by title search, copies of all deeds or the like; and failure to provide such proof will result in the rejection of or no action on the application". The Applicant notably conceded on October 8, 2010 that he did not know whether he owned the land east of the plotted lots that had been identified on his partitioning request. This prompted concern among the Planning Commission whether the Applicant would be able to meet his burden of providing sufficient evidence to indicate compliance with the Code's ownership requirements. It is important to note that after much research and discussion the Applicant has amended his position; and as of June 20, 2011, he now maintains that he owns the land extending 150 feet east from the easternmost boundary of the plotted lots. That is the Applicant has amended his Application to include a specific land that is to be partitioned. This amendment is important because unlike before, the Applicant has now taken a position as to the land he claims he owns. The question relative to the ownership issue is therefore simply whether the Applicant has met his burden of presenting sufficient evidence to show that he owns what he claims to own. To be clear, the Planning Commission is not tasked with making a conclusive legal determination of ownership. To the contrary, the Planning Commission similar to any other application must review the evidence and make a determination as to whether the Applicant has presented sufficient evidence such that his request meets all the statutory requirements for partitioning of land. Consistent with Delaware law, the Planning Commission must avoid relying on an arbitrary basis to arrive at a particular conclusion.

Mr. Shulman asked what the Tax Map of the City shows with regard to how far the land goes. Chairman Littleton said it was his recollection that the Tax Map shows only the R-1 zoned area, but this would need to be verified. The Tax Card has already been entered into the record.

Mr. Chase Brockstedt, Esq. of the law firm Bifferato Gentilotti LLC represented the owner, 2 St. Lawrence Street LLC. Mr. Richard Harris, the managing member of 2 St. Lawrence Street LLC, was in attendance at the meeting. Attorney Brockstedt disagreed with most of the chronology which was stated with the exception of the legal standard. On July 2, 2010, an initial Application was filed which included an Addendum, Affidavits, Deeds, LLC Operating Agreement, Lot and Boundary Survey, Tree Protection Plan, Proposed Subdivision Plan and Photographs. On September 2, 2010, the Application was supplemented with revised Affidavits, a statement from the members of the LLC, Easement for a Storm Drainage Reduction Project, Photographs of an exterior shower and trash storage area, completed Section E and correspondence from Mr. Harris. On February 15, 2011, the Application was supplemented with a document summarizing the Chain of Title, correspondence and memoranda, most of which came from the City which references the ownership of the land at issue and ownership of land in South Rehoboth on the Boardwalk. The supplement included a booklet of maps and a Will and certification of Thomas Clarence Marshall. On June 20, 2011, the Application was supplemented with a revised survey, Tree Plan and Proposed Subdivision Plan. On July 7, 2011, the Application was supplemented with a copy of the Deed for 1 Stockley Street, a Stipulation and Final Judgment in a State of Delaware court matter known as Ridgely, documents from the Planning Commission's file related to the partitioning of 1 Stockley Street which included the Public Notice, Building & Licensing memorandum, Board of Adjustment Decision, Planning Commission Minutes and survey and signed approval from the Board of Adjustment. That submission also included maps of Blocks 59 & 55 in South Rehoboth as plotted on the 1876 map. The final submission was on July 27, 2011 which included completed Section E which conforms to the revised drawings submitted on June 20, 2011. In addition to all of the submissions, the Applicant respectfully requests that all correspondence between Attorney Brockstedt's law firm, the Applicant and both the Planning Commission and City Solicitor to date as it relates to this Application including electronic correspondence, and all oral representations and testimony provided by Attorney Brockstedt and Mr. Harris including the statements and testimony provided tonight, be included in the record of this Application. Additionally, the Applicant requests a copy of the power-point presentation from Mr. Mellen which was provided in March 2011 and for it to be included in the record.

Mr. Shulman said that he did not even know that the Planning Commission has seen all the correspondence between Attorney Brockstedt's law firm and the City Solicitor. Attorney Brockstedt assumed that that information was forwarded to the Planning Commission. Chairman Littleton said that other than asking for status reports, the Planning Commission does not know what is being discussed. The Planning Commission receives status reports and it has been noted on the agenda. The Planning Commission has no idea what those points are with what has been worked on. Attorney Hoffman understood that much of the communication was with City Solicitor Mandalas as the City and the Applicant had been working through a possible resolution. Attorney Brockstedt clarified that there has been correspondence between his law firm and City Solicitor Mandalas as it relates to a potential agreement being discussed with the City Commissioners, specifically the Mayor. That was not the correspondence he was talking about. The correspondence Attorney Brockstedt was referring to was just related to the matter before the Planning Commission. The correspondence was from Attorney Brockstedt to either the Planning Commission or the City Solicitor, and correspondence from the City Solicitor to Attorney Brockstedt's law firm. Attorney Brockstedt requested that this correspondence be part of the record. Mr. Shulman said that the only problem he has with that normally the Planning Commission makes things part of the record by identifying them. Attorney Brockstedt was under the assumption that when there are written communications back and forth with the City Solicitor that are discussing the merits of a pending application, that the City Solicitor would make the substance of that correspondence known to the Planning Commission. Attorney Brockstedt withdrew the request. Attorney Hoffman said that City Solicitor Mandalas has provided status updates. City Solicitor Mandalas has made those representations, but Attorney Hoffman was not aware of all the communications with what has been conveyed.

Attorney Brockstedt said with regard to the original Application that was filed, the boundary of the property identified on the survey extended to the mean low water line. The reason why it extended to the mean low water line is because the surveyor, Mr. Chuck Adams, who prepared and provided that document read the language in the deed and there existed an undefined right, title and interest to the land lying to the east of the residentially zoned lots extending to the Atlantic Ocean. The Planning Commission raised an issue with the Applicant regarding the ownership of that land. The Applicant represented multiple times that he possessed an undefined right to that land; and the Planning Commission would not approve the Application without the Applicant defining what that right was. An alternative was provided which is to reach an agreement with the City to define that right.

Mr. Richard Harris said that the original Application did not have the footage because it went out to the water line, but it had the survey which identified land going to the east. Mr. Harris said that the deed and the

survey both show it.

Mr. Shulman thought that at the original meeting, the Planning Commission asked who owns the property. At that time, the answer was that Attorney Brockstedt could take a guess. The Planning Commission did not get the response the first time that the Applicant was claiming to the water.

Chairman Littleton commented that the Applicant's attorney had said he did not know, and it was only clarified later.

Attorney Brockstedt said that since November 12, 2010 when the Application was tabled, all of the efforts have been to define that right, title and interest in that land. Attorney Brockstedt and the Applicant did their best to work toward a resolution for the City. Based on all of the submissions, testimony and the evidence in the record, the Applicant's right in the land seaward of the residential lots is fee simple ownership extending 150 feet east x 100 feet wide.

Mr. Harris said that as he and Attorney Brockstedt endeavored to find out what the language in the quitclaim deed meant, they found more and more evidence and the first draft of a survey was presented to the Planning Commission in March 2011 to illustrate the 100 feet x 100 feet parcel which was an effort to define the original language of the quitclaim deed to whatever right, title and interest he had. They defined that and presented it to the Planning Commission. Prior to the first presentation to the Planning Commission in March 2011, they had presented it to the Mayor in February 2011.

Chairman Littleton said that the first time the Planning Commission received an amendment to the Application was date stamped July 27, 2011.

Attorney Brockstedt said that multiple title searches were done on properties on St. Lawrence Street, Stockley Street and other properties in Rehoboth specifically to figure out with regard to King Charles Avenue and the presentation heard from Mr. Mellen. Documents were obtained from the Sussex County Recorder of Deeds, State of Delaware courts and maps in the possession of Sussex County and the State. Multiple Freedom of Information Act (FOIA) requests were submitted to the City, and they were shocked by the lack of information provided in response. Attorney Brockstedt and the Applicant had two meetings with the Mayor and City Solicitor. Based on all of this research as well as other research, all of the evidence reports this 150 feet fee simple ownership that is depicted on the revised drawing submitted to supplement the Application on June 20, 2011. Significantly, no evidence has been presented by the City or anyone else that there is another owner of this land. The City has produced no documents evidencing ownership. Despite repeated requests, the City has refused to formally or informally claim ownership, and the City has also refused to dispute the Applicant's ownership of this land. The question is who has claimed ownership of this land, what the nature of the claim is and what evidence exists to support such a claim. The answer is there is none. The Applicant has conclusively defined his right, title and interest in the land lying east of the residentially zoned lots. The substantial evidence in the record is that the record owner of the land is 2 St. Lawrence Street LLC. The Application meets the requirements under Section 270-22 of the Code. The Applicant is, under Delaware law, presumptively entitled to approval because he has met the legislative requirements. When the Application meets the objective standards established in the Code, then the burden shifts to the Planning Commission to articulate a non-arbitrary basis for denial; and that basis must be supported by substantial evidence in the record. In a recent case, the magistrate judge stated that landowners have a clearly established right under the substantive prong of the due process clause to a rational decision that is not based on arbitrary or irrational considerations. It is with this backdrop that Attorney Brockstedt and the Applicant are requesting the Planning Commission to approve this Application. In the March 2011 hearing, Mr. Mellen had raised a question whether the Applicant is on something more than 74 or 75 feet. AThis was based on a theory that King Charles Avenue had moved. The documents provided as part of the July 7, 2011 letter from Attorney Brockstedt to Chairman Littleton were the Deed from Cullen to Ridgely, Stipulation of Settlement Order and Final Judgment in Ridgely vs. The Commissioners of Rehoboth and some things from the Stockley Street partition application which took place in 2001 as well as overlays of the 1876 map with Blocks 55 and 59. That body of documents confirms that King Charles Avenue has not moved; and it is based on several references which measured the length of the block both from the Surf Avenue and the Boardwalk side as well as from the King Charles Avenue side. King Charles Avenue never shifted to the east. The Applicant is satisfied with the record that was created at the March 11, 2011 hearing. One thing that the Applicant was unable to address at this time was the theory that King Charles Avenue had moved because he was hearing it for the first time at that hearing.

Mr. Harris said that to a small extent the issue of whether King Charles Avenue had moved was addressed in the March 2011 meeting because a survey was introduced into the record from the current owner of 1 Stockley Street. That survey shows a 150 foot segment going out beyond the Boardwalk, and that property is

identified as being part of Block 59 which is a reference to the 1876 map. The deed from Cullen to Ridgely was based on the 1876 map. The property was measured 400 feet from Surf Avenue which was the easternmost line of Block 59 on the 1876 map, and it came westward 400 feet towards King Charles Avenue. The Cullen to Ridgely deeded 200 feet x 400 feet with the width of the lot going for hundred feet in. The Cullen to Ridgely deed (Horsey predecessor) conveyed land bounded on the north by Newcastle Avenue, on the east by Surf Avenue, on the south by Stockley Avenue and on the West by a line running parallel with Surf Avenue from a point in the southern line on Newcastle Avenue which point is 400 feet distant from the western line of Surf Avenue to a point in the northern line of Stockley Avenue which said point is 400 feet distant from the western line of Surf Avenue aforesaid, be the contents thereof whatever they assay. In the case of Ridgely vs. The Commissioners of Rehoboth in July 1967, the relevant portion is that the defendant (The Commissioners of Rehoboth) agreed to recognize the plaintiff's (Ridgely) exclusive right, title and interest and not to assert any right, title or interest therein in and to all that portion of plaintiff's property comprising Block 59 as shown on the aforesaid survey. The general metes and bounds of the plaintiff's property being as follows: bounded on the east by a line approximately parallel to the east line of King Charles Avenue and being 750 feet distant to the east thereof; bounded on the west by a line approximately parallel to the east line of King Charles Avenue and being 350 feet distant to the east thereof. The 150 foot parcel of land that runs seaward from the current residentially zoned lots is a throwback to the 1876 map. Mr. Harris referred to the July 7, 2011 letter from Attorney Brockstedt to Chairman Littleton. The deed from Cullen to Ridgely conveys the eastern 400 feet of Block 59 as depicted on the 1876 map. Today, that 400 foot area is comprised of the eastern 250 feet of the residentially zoned land on the current Block 37 and an additional 150 feet seaward of the residentially zoned land. In Ridgely vs. The Commissioners of Rehoboth, it was acknowledged by the City that the land extending 150 feet seaward was indeed owned by the plaintiffs. The land is depicted in Exhibit D showing the 1876 Block 59 with an overlay of the currently zoned residential land. The property description from the Cullen deed is referenced on the Block 59 overlay. It is important to note that the property in the Cullen deed was measured from Surf Avenue westward. The comparison with the current residentially zoned land shows that King Charles Avenue was the same position then as it is today. For reference in this case, the Block 55 overlay in Exhibit E depict the same land configuration, the 600 foot residentially zoned portion of the current Block 33 and the extension 150 feet seaward of Block 55 from the 1876 map. A portion of the land conveyed in the Cullen deed was the subject of an application before the Planning Commission in 2001. Although the notice of the application did not reference the land seaward of the residentially zoned land, its existence was acknowledged and discussed throughout the proceedings. In the memorandum to the Board of Adjustment from Building & Licensing, the 150 foot portion of the land extending seaward is noted as being part of the property, but not to be included in any determination of setbacks, lot coverage and other zoning issues. Section 3 of the Findings of Fact states that a single family dwelling is permissible in all districts except O-1, and the setback, lot coverage and other zoning issues are determined upon the lots in the R-1 district only. Also included in the Planning Commission's file for the Stockley Street partitioning is a survey of the subject property with notes and approval by the Board of Adjustment. The survey shows the position of land extending seaward 150 feet from the residentially zoned lots. Reference is made to the 1876 map regarding that portion of land. The survey clearly indicates the distance to King Charles Avenue as being 750 feet from Surf Avenue, the same place it was in 1876 map and where it remains today. The partition application was approved. Mr. Harris said that when looking at the two properties, they are basically a parallel situation. He and Attorney Brockstedt have addressed the chain of title. They have established what the 1876 map was which was a real plotted map of the City where streets were dedicated, etc. They have proved that Mr. Harris conclusively owns the land. When Mr. Harris and Attorney Brockstedt met with the Mayor and the City Solicitor, Mr. Harris went into the meeting with the idea of finding out what claim the City had upon the property and move ahead and have an agreement with the City, if it was appropriate. Throughout this proceeding there has been an underlying premise that the City owns this land. Mr. Harris presumed that is why the Mayor and City Solicitor kept negotiating with them. They wanted Mr. Harris to give this land to the City. An attempt to reach an agreement fell apart.

Mrs. Konesey said that none of the Planning Commission members were present at the meeting, and she felt uncomfortable with only hearing one side of what happened in the meeting.

Attorney Hoffman clarified that the Application was tabled to afford the Applicant and the City an opportunity to get together and try to work something out. An agreement could not be reached, and the Applicant is currently back before the Planning Commission, so as far as what is before the Planning Commission is what the Applicant is submitting, the evidence the Applicant is submitting and asking the Planning Commission to make a determination. What happened in the negotiations is a separate issue.

Attorney Brockstedt said that there has been no attempt to try to have anything from those meetings admitted into the record. The point is that they have come to the table both to the Planning Commission as well

as in meeting with the Mayor and City Solicitor with all of the objective evidence that they could find regarding ownership of the land in an attempt to define the right which was identified by the deed. The only evidence has been that 2 St. Lawrence Street LLC owns that land. There has been no evidence submitted in the record or provided to the Applicant at any time that suggests the City has ownership of the land or has made a claim of ownership of this land.

Mr. Shulman said that it is alright for the Applicant to say he does not believe there is anything in the record that shows the City has any right to ownership; but the problem is that what is in the record is also a number of statements of what happened at the meeting with the Mayor. The Mayor in particular did not dispute ownership; and when looking the dictionary, dispute does not necessarily mean he is claiming ownership, it means call into question. The statements in the letters the Planning Commission received are that in the meetings with the Mayor, the Mayor did not dispute ownership. One of the reasons the Applicant is saying that is as backup for the claim that there is no basis for contesting ownership. So if what the Applicant is saying now is that when the Planning Commission considers this it should not consider any statements as to what happened in the meeting with the Mayor, that is fine; but if the Applicant is trying to say that in meetings with the Mayor certain things were said and not said, that is not fine.

Mr. Harris said that there is evidence which they submitted as to ownership.

Chairman Littleton said that the Planning Commission is looking at a clean, modified Application showing the Applicant's best research that he has ownership 150 feet eastward.

Attorney Brockstedt agreed with the caveat that as part of the record are requests to find out whether or not the City would make a claim of ownership of this land. There has been no claim of ownership of the land.

Mr. Shulman said that if Attorney Brockstedt wants to say the record does not reflect any claim of ownership, that is alright; but to ask the Planning Commission to accept that the City has not made a claim of ownership, he did not think the Planning Commission can say that because it does not know what happened at the meeting. Mr. Patterson read from the March Planning Commission meeting where City Solicitor Mandalas acknowledged that the City has not made an affirmative representation that it disputes ownership or is seeking to obtain ownership. City Solicitor Mandalas had read his emails to Attorney Brockstedt that the City has not formally claimed ownership of the land at issue. Mr. Shulman said the Planning Commission received an email from City Solicitor Mandalas that actually says the City does dispute ownership.

Chairman Littleton said that none of the members of the Planning Commission has had a problem with the R-1 area for partitioning, it solely related to what extends beyond the R-1 lots. The Applicant has a piece of property which is known as the O-1 area which extends more than 60 feet beyond the Boardwalk. Chairman Littleton noted that he takes credence to the presentation before the Planning Commission, but other members may not.

There was no public comment.

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

Mr. Shulman said that Attorney Brockstedt is not arguing that anything in the court decision involving Ridgely or anything else that the Planning Commission has regarding the prior partitioning specifically dealt with the land on St. Lawrence Street; but what he understood him to say is that an analogous issue was dealt with on Stockley Street with respect to the Horsey property, and that Attorney Brockstedt thinks that reasoning which applied to the Horsey property also applies here. Attorney Brockstedt said that part of it may apply, but the Stockley Street issue is in response to Mr. Mellen's question regarding historic location of King Charles Avenue. Mr. Shulman said that the Ridgely decision and the Stockley Street property dealt with the length of the block between Surf Avenue and King Charles Avenue. He asked if anything was said in the decision specifically about the length of the block or anything about St. Lawrence Street, or if Attorney Brockstedt's argument that the same principles and factors considered about Stockley Street apply to St. Lawrence Street. Mr. Harris said that there is no specific mention of Block 55. It came up in the context of the King Charles Avenue move. When looking at what occurred with Block 59, Stockley Street, the Ridgely case, the Planning Commission and the Board of Adjustment, it is inescapable to not understand the parallels that took place regarding what is before the current Planning Commission in this Application. Attorney Brockstedt said that the documents which were just referenced go back to the 1876 map which has the block on Stockley Street plotted as 750 feet which is known to be the exact same dimensions of Block 55 on St. Lawrence Street. Mr. Harris said that it gives credence to the entirety of the 1876 map in relationship to the current residential lots. There has never been any litigation or Planning Commission decision regarding Block 55. The reason this

has dragged on so long is because there has been so much confusion about these properties south of Hickman Street to the City line. Mr. Harris said that he and Mr. Mellen were under the assumption that those blocks were the same as the current blocks, but they were not. Mr. Shulman said that if Mr. Harris' argument is that what happened at Stockley Street is really by analogy a precedent for resolving this, he was not sure whether it is any different for anyone else between Stockley Street and the end of the Boardwalk. In this case, Mr. Harris is claiming the property which is under the Boardwalk. Mr. Shulman asked if the City is trespassing on his property. Mr. Harris said that he did not know the nature of the Boardwalk.

Chairman Littleton said that if the Planning Commission is comfortable with the evidence brought before it, the Planning Commission could approve the Application and then reference back to Section 236-2 which deals with public health, welfare, safety, etc. That language is picked up relative to the Ridgely case where it lays out what can be done. Conditions could be set about the Boardwalk, access, a permanent easement, that the beach can only be used for beach purposes, etc. In some sense, the City can be protected under the provisions of Section 236-2 with conditions that will assure that it has access to the Boardwalk and the beach can only be used for bathing purposes, beach replenishment, dune building, etc., all of which is laid out in the settlement that was reached between the City and Horsey. If the Planning Commission agrees with the evidence presented that the Applicant has ownership 150 feet eastward, then there is no basis for the Planning Commission to deny this Application.

Mr. Shulman said that in the concept of adverse possession, easement by use, etc., it is known to happen between private parties. He asked what the situation is in Delaware regarding private property and a government entity, and if the City has an easement by adverse possession, ownership or anything like that. Attorney Hoffman addressed the first as to the specific point of whether the players are a government or not, he would want to look into it. Attorney Hoffman did not know the answer to that specific condition, but he knows the procedure and process. The Planning Commission is not setting the legal boundaries. If there is a claim to be made, it can be researched and debated; but the question here is whether the Application as presented and the evidence allows them to meet the standards in the Code. Mr. Shulman said that he asked his question in part because Section 236-8(A) reads that the owner of land within the City defined as the person or entity that is the named record owner of the land pursuant to the City's tax records may file an application to subdivide it. This does not mean that the conclusion automatically is that the Applicant does not have the land, but clearly the Code talks about the owner of land pursuant to the tax records. The tax records for many years indicates land that is 175 feet. The City built the Boardwalk and has been doing other things. It raises a question about the ownership of the land. Mr. Shulman understood that the Applicant is saying that he has a survey, and the survey based on the chain of title shows that the land goes to a certain point; but the survey also shows and the evidence has shown that the City has appropriated part of that land for the Boardwalk and to do other things. Since the ordinance talks about the owner pursuant to the tax records, it clouds the issue that even if the Planning Commission accepts the Applicant's statement that this is what his chain of title shows on paper, Mr. Shulman did not know whether that is the ownership today based on all the other evidence in the record. Attorney Brockstedt asked what other evidence in the record there is other than the tax record and a 1978 speed message which suggests City ownership. Mr. Shulman said there has been discussion about the fact the Boardwalk is there, and it has been part of the beach.

Attorney Brockstedt asked what other evidence is in the record that contradicts the Applicant's ownership of land extending 150 feet, other than the tax record, a 1978 speed message and the fact that a beach and boardwalk are there. Mr. Harris said that no paperwork was found in any of his records regarding the reconstruction of the Boardwalk. There was extensive paperwork as to the DNREC beach replenishment which was provided to him, and all of it suggested that the Applicant owns the property.

Mr. Mellen said there are practical issues to be concerned about since by history the property is used as a beach. He asked if the Applicant might put up a fence in the future to say that there is no trespassing, or if there are liability issues if the property is continued to be used as a beach. Mr. Harris said that when there is private land and continued public use of that land, then there might arise an easement. Mr. Harris and Attorney Brockstedt had asked the City for any ownership interest it would have in that land extending seaward from the residential lots, and they also asked for any theory of ownership. Nothing was received from the City in return. If the situation would be that he has fee simple ownership, there might have been a public easement created for use of the Boardwalk and beach area beyond the Boardwalk. That probably has been restricted somewhat now because there are dunes beyond the Boardwalk, and there is a fence. Maybe they need to define what the City can do there as part of the agreement. The problem is there is one definition in the Ridgely case which Mr. Harris would be happy to use that language in his agreement. That language had been proposed in the meetings with the Mayor and City Solicitor. Instead of on a case-by-case basis from Hickman Street south where there

would be a patchwork of easements, there should be a comprehensive approach from Hickman Street south.

Chairman Littleton said that if the Planning Commission was willing to approve the partitioning, the next concern would be with the conditions for the Boardwalk and the public beach, not the O-1 area to the Boardwalk. The Ridgely case would be a starting point for the Planning Commission.

Attorney Brockstedt said that he and the Applicant have walked the Planning Commission through the chain of title back to the 1876 map. They have conclusively identified the original sizes of those Blocks and have conclusively determined that historic location of King Charles Avenue as it relates to those Blocks. They have provided approximately 60 pages of correspondence and memorandums mostly coming from the City which indicates that the Applicant owns the land lying seaward or to the east of the residentially zoned lots. The evidence is the tax map, 1876 map, deeds, and the will and certification of Thomas Clarence Marshall. This is substantial and conclusive evidence of fee simple ownership. The evidence to the contrary is the tax record and what exists. When the Application was amended, there was no further claim to ownership to the Atlantic Ocean. As a condition of the partitioning, the deeds will need to be redone. As part of the potential approval, the Applicant has a proposed subdivision plan that has the boundary at the line which has been discussed; and that will be part of what is ultimately recorded with the County along with two new deeds that have specific descriptions consistent with the new subdivision.

Chairman Littleton said it is very important that the Planning Commission protects the public rights, etc. in terms of conditions. The Applicant has presented enough evidence that he would be willing to vote an approval of this partitioning subject to a number of conditions.

Mrs. Konesey said that if the land is truly owned by private people, then how did all of this happen and nobody has done anything since whenever the Boardwalk was built.

Mr. Patterson said that the Planning Commission is not tasked with researching the history of the construction of the Boardwalk in the 1930's. The fact of the matter is that the City has not come forward to present a claim of ownership to this land; and in fact, the City Solicitor has said the City does not claim ownership of the land. This is a partitioning of land, and the only issue is ownership. Easements, etc. would be nice conditions to put in there; but up to now, the Planning Commission has been kept in the dark about what the City would like to have. If the only reason the Planning Commission has been kept in the dark is because the City does not want to prejudice the Planning Commission's judgment about the ownership issue, the Planning Commission can probably get past that by saying that it accepts the Applicant's current statement of his ownership, and now the Planning Commission is wanting to know what the Applicant and the City have discussed as far as conditions so the Planning Commission can decide which of those or others it would like to invoke on the partitioning.

Mr. Shulman said that if the Planning Commission would get advice from the City Solicitor in that the concept of adverse possession is by a public entity and private owner, and if the evidence would turn out that the land between the end of the numbered lots to the Boardwalk the City never really did anything with, but from the Boardwalk on because the City built the Boardwalk, put trash cans on the beach, etc., it could be that what a resolution would address is that really the Applicant owns up to the Boardwalk and through adverse possession the City owns everything beyond the Boardwalk.

Mr. Harris said that the City has not claimed an easement on this property, but he thought that there is one but it has not been put in writing. Mr. Harris thought that this partitioning should be approved possibly with recommendations to the City that it addresses this issue all along the Boardwalk so there would be a comprehensive plan rather than having 23 separate agreements with the properties south of Hickman Street.

Chairman Littleton thought the Planning Commission has reached consensus that this property can be subdivided. The Planning Commission and the City has an obligation to move on this matter.

Mr. Shulman did not think the planning commission can send a letter to the board of commissioners in regard to this matter because the board may end up reviewing this. He suggested that a letter be sent to the Building Inspector and to the City Manager asking them what they believe would be appropriate conditions to protect any public interest, City interest, etc. in the land beyond the numbered lots if the Planning Commission determines that the Applicant owns that land. Mr. Patterson suggested asking the City Solicitor to draft proposed conditions. Chairman Littleton said it was his understanding that the City Commissioners gave the Mayor permission to enter into and finalize the negotiations with the Applicant. Mr. Shulman said that he wanted to hear from the people who are enforcing codes, picking up trash, etc. He did not want an attorney drafting a set of conditions.

Mr. Harris thought that in reality there is an easement for the Boardwalk and the area beyond the Boardwalk, but not for the portion between the residential lots and the Boardwalk. In reality, there is an easement for the use by the public and the City of that land. In practicality, based on that easement, the rules as to the use of that land have already been established. They have been codified and posted on the Boardwalk. On the City website, there are rules as to the use of the Boardwalk and the beach. He thought that there would be an easement which has not been written down for public use of the Boardwalk and land east of the Boardwalk. As a condition of the partitioning, Mr. Harris would agree that there is an easement but it is undefined.

Mr. Shulman said that he would like to hear back from the City Solicitor on (1) the concept of adverse possession and (2) an understanding of how Section 236-8(A) would affect the Planning Commission's decision. Depending on the answers, he is willing to look at an approval with conditions. If the City has an excellent case not only to an easement, but to adverse possession from the Boardwalk on, he did not want to rule out that the Applicant only owns the land up to the Boardwalk and everything beyond that an easement is not needed because by adverse possession the City owns it.

Chairman Littleton noted that the Public Hearing will be continued at the next meeting to be held on September 9, 2011.

No new subdivision applications have been submitted in the prior 28 days.

Due to the lateness of the meeting, no other agenda items were discussed.

There being no further business, Mrs. Konesey made a motion, seconded by Mr. Shulman, to adjourn the meeting at 10:21 p.m.

RECORDED BY

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(Ann M. Womack, City Secretary)

MINUTES APPROVED ON
SEPTEMBER 9, 2011

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(Preston Littleton, Jr., Chairman)