

**PLANNING COMMISSION MEETING  
CITY OF REHOBOTH BEACH**

**September 10, 2010**

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:01 p.m. by Chairman Preston Littleton on Friday, September 10 13, 2010 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

**ROLL CALL**

Mr. Timothy Spies called the roll:

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

Absent:            Mrs. Jan Konesey

Also Present:     Mr. Glenn Mandalas, City Solicitor arrived at 6:29 p.m.  
                      Ms. Terri Sullivan, Chief Building Inspector  
                      Mr. Kyle Gulbranson, City Planning Consultant  
                      Mr. Alan Kercher, City Engineer

A quorum was present.

**APPROVAL OF MINUTES**

Minutes of the August 13, 2010 Planning Commission Regular Meeting and the August 13, 2010 Planning Commission Executive Session were distributed prior to the meeting. Minutes of the July 9, 2010 Planning Commission Workshop Meeting were not available for this meeting.

Mr. David Mellen made a motion, seconded by Mr. John Gauger, to approve the August 13, 2010 Planning Commission Regular Meeting minutes as written. Motion carried unanimously.

Mr. Mellen made a motion, seconded by Mr. Spies, to approve the August 13, 2010 Planning Commission Executive Session minutes as written. Motion carried unanimously.

**CORRESPONDENCE**

Correspondence will be read when the request for Major Subdivision portion of the meeting is held.

**OLD BUSINESS**

Chairman Littleton called for the Major Subdivision Application No. 0708-05 requesting the major subdivision of the property located at 43 Canal Street, comprised of the following lots on Canal Street: Lots 43, 44, 45, 46, 47 & 48, the following lots on Sixth Street: Lots 26, 27, 28, 29 & 30, and the property located at 512 Rehoboth Avenue comprised of Lot 42A, into fifteen (15) lots as follows: Lot 1 to be 5,608 square feet, Lot 2 to be 5,015 square feet, Lot 3 to be 6,362 square feet, Lot 4 to be 6,112 square feet, Lot 5 to be 6,328 square feet, Lot 6 to be 6,076 square feet, Lot 7 to be 5,421 square feet, Lot 8 to be 5,260 square feet, Lot 9 to be 5,260 square feet, Lot 10 to be 5,260 square feet, Lot 11 to be 5,259 square feet, Lot 12 to be 5,584 square feet, Lot 13 to be 5,174 square feet, Lot 14 to be 7,381 square feet and Lot 15 to be 5,012 square feet. The properties are owned by Oak Grove Motor Court. The Major Subdivision has been requested by the owners of the property. The Planning Commission will review the applicants' latest proposed changes, continue its review and discussion of Major Subdivision Application No. 0708-05 and possibly take action on the application.

Correspondence:

1. Email received September 9, 2010 from Richard Kirchoff, 34 Sixth Street, noted that the 53 trees which should be protected will be vulnerable during the development phases of the project (road construction, underground utilities, house construction, etc.). He had voiced concern that stronger

measures need to be taken to protect more trees on the property than the 10 stipulated in the conservation easement and hoped that the Planning Commission would impose a bond requirement and/or condition to ensure protection of the other trees which have been indicated to be saved.

2. Letter received September 10, 2010 from Don & Janet Walker, Sixth Street, requested that the plan have the condition that two curb-cuts, now on Sixth Street, must be curbed.
3. Letter received August 18, 2010 from Jim Prettyman and Robert Bonham, 20 Sixth Street, opposed the request to divide the property into 15 lots and requested that the residents in the area be considered.

Chairman Littleton noted that at the last meeting the Planning Commission had laid out parking on both sides of the street which entails engineering and design changes, and it deferred to Mr. Alan Kercher, Mr. Kyle Gulbranson and Ms. Terri Sullivan to see what the Applicants and their engineer are proposing and return to the Planning Commission. What the Planning Commission laid out was that once Mr. Kercher, Mr. Gulbranson and Ms. Sullivan are satisfied with the design, the engineering can move forward.

**Exhibit 31** – Oak Grove at the Beach Subdivision Plat Proposal as of September 10, 2010

Mr. Alan Kercher presented the list of items that shall be provided for review and final approval by the City:

1. Overall site grading and drainage plan including existing and proposed topography with sufficient proposed spot elevations necessary to ensure that water will drain away from all structures and will not pond on the site. The edge of the boundary of the lot has to blend in with the rest of the design. The biggest thing is to make sure that the finished floor elevation of the house is higher than the elevation of the finished roadway.

Mr. Harvey Shulman asked how the people who will be building the houses would know that there is a specific grading plan they need to comply with. Mr. Gulbranson said that typically what happens when getting to this stage in a plan and getting to a point where the Planning Commission is comfortable with the concept and is in agreement with house design and general design content, preliminary approval would lock that into place, heavy engineering would begin and the grading plan would take place, and the Conservation District would make its comments. When all of that is put together and the applicants have all agency approvals, that plan would come back to the City and would be approved as a final plan. All the information would be contained in that final plan. When lots would be sold, Ms. Sullivan would have that plan, and whoever would be building a home on a lot would have that plan. When the person building a home would submit a plot for construction for a permit, Ms. Sullivan would have to review it to make sure it is consistent with the overall plan. City Solicitor Mandalas said the conditions would be listed as notations on the recorded plot that the Planning Commission would impose as part of the approval. Mr. Shulman said that one of the covenants would have to be that when every lot is sold, an applicant is given a copy of the approved plan. City Solicitor Mandalas did not think that a sophisticated builder would prepare a set of plans without consulting the public record to find out what constraints there would be, but he did not think it would be a bad idea to give a copy of the plans to the buyer of the lot. Mr. Shulman said that a requirement should be some place as an attachment. Chairman Littleton said that a way to transmit the approved plat is as an addendum to the homeowners' association document. Mr. Shulman said it could be that one of the conditions to conveying these lots would be that the deed would have to say "and subject to conditions in the recorded plat which should be reviewed prior to any construction". City Solicitor Mandalas added that it could say "and subject to all restrictions and conditions recorded in the Office of Recorder of Deeds.

2. Stormwater management plan and supporting calculations. The Sussex County Conservation District is requesting a copy.
3. Erosion and sedimentation control plan. The Sussex County Conservation District is requesting a copy.
4. On-site and off-site piping plans/profiles and supporting calculations for the storm drainage piping system.
5. All necessary construction details and supporting calculations, if necessary. Make sure enough details are on the plans for (1) construction and (2) from the City's standpoint, for inspection.
6. Due to utility cuts in the pavement, both Canal Street and Sixth Street will be repaved with a minimum of 1½ inch thick hot mix asphalt. The limits of paving on Canal Street will extend a minimum of 10 feet beyond the utility cut on Lot 1 to 10 feet beyond the utility cut on Lot 6. The limits of paving on Sixth Street will extend a minimum of 10 feet beyond the utility cuts for the stormwater and the water

line piping systems.

7. Permanent shoulder for parking on the easterly side of Canal Street. Permanent shoulder on Canal Street and curb-cuts were previously shown on several shared driveways. There is nothing shown on the plan at this point. There are long-term maintenance issues. From a grading standpoint, it must be seen exactly how the paving and shoulder will lay out. Roll curbing may not be needed to achieve the shoulder. With the parking spaces which have been requested, approximately three trees will need to be removed.

Mr. Paul Lovett said that there is nine feet between the edge of the pavement and the closest tree. Mr. Kercher said that there would be a tree root issue. Several people in the City who hold official positions want to see a permanent shoulder on Canal Street for parking.

8. Parking surface on Jones Lane is the same as the walking surface on Jones Lane so there might not be enough of a visual difference. A concrete border may be considered. There could be problems with people parking on the walkway. This is something that could be worked out during the construction plan approval process. When putting the concrete border in, it should be made a pseudo-roll curb so there will be a lip which will cause a little bit of an elevation difference but not enough to be a major grading problem. This will give a visual as to what is elevated and is not considered a parking area. This can be discussed during the review of the construction plans.

Mr. Mellen asked what the construction of Jones Lane will be. Mr. Kercher noted that Jones Lane will consist of hot mix asphalt over a stone base and on top of compacted soil. Various options had been discussed of impervious pavement or putting some type of infiltration devices underneath, but this will not be done. He acknowledged that grass pavers will be used in the parking areas, and there will be demarcation and reinforcement as previously discussed. Mr. Kercher also acknowledged that the reinforcement is between the paving region and the pavement. A roll-over curb might be created to demarcate between the walkway and grass parking which will create an elevation break in the visual cue. This will be worked out during final construction. Mr. Kercher acknowledged that Jones Lane will eventually be dedicated to the City, but it will contain some non-standard parking.

Chairman Littleton noted that in regard to Mr. Mellen's questions of who will maintain Jones Lane and who will be responsible for maintenance, the Applicants have agreed that they, the homeowners' association and their assignees are to be responsible for maintaining the bio-retention area as well as the grass pavers and walkway. The City will be responsible for the dedicated paved street. One major issue that needs to be cleaned up in all the documents is identifying the responsible parties. Mr. Shulman noted that there is one applicant which is Oak Grove Motor Court, not the three individuals. The applicant is different for the homeowners' association, and then there are individual lot owners. There may be assignees of any of those lots which have nothing to do with the assignees of the other. Oak Grove, theoretically if it sold everything, would have an assignee who would not be the assignee of the lot owner or the homeowners' association.

9. Utility easement for bio-retention area. The bio-retention area terminates at the utility easement line which means if there is any sluffing of the edge there is a possibility that part of the private lawn could collapse or sluff down into the maintenance easement or into the bio-retention area. There should be a minimal two to three feet wide easement called a maintenance easement possibly so that if maintenance is to be done an easement would not be needed from each individual homeowner. Asking for a minimal maintenance easement is worthy at this point. The maintenance easement would run parallel with the bio-retention area. The bio-retention area has been moved into the utility easement. A utility easement has been created on the rear lot lines of Lots 8, 10 & 12. The maintenance easement is specifically for the bio-retention area because of the soft media such as mulch and other soft materials.

Chairman Littleton asked if there is a reason why the utility easement for Lots 8, 10 & 12 is not included on Lot 2. Mr. Kercher noted that Lot 2 can take the utilities from Canal Street. Ms. Schwartz noted that utility access for Lot 15 would be provided off of Jones Lane. Ms. Sullivan said that no easement would be required for Lots 2 and 3 because the utilities would be provided along the turn-around.

Mr. Kyle Gulbranson added to Mr. Kercher's list of items.

1. Pathway. The pathway does not have a terminus on Sixth Street. It blends into the curb. More detail is needed for this area. The pathway ends abruptly on the western side and should reconnect with

Jones Lane and the parking. Mr. Kercher said the terminus at Sixth Street could mean putting in an ADA ramp which is a construction detail and is absolutely needed. Mr. Lovett said that the pathway abruptly stops because of a huge oak tree. If the pathway is to be extended, he would prefer that the mitigation of that tree is taken off because the pathway would take out the tree roots if it is extended. Chairman Littleton said that the Planning Commission wants the pathway to tie in back to the street at some point. The engineer and consultant will determine the termination. Mr. Gulbranson's recommendation would be to curve the pathway back to Jones Lane prior to getting close to the tree. Mr. Lovett said that this would be fine.

Building Inspector Terri Sullivan added to Mr. Kercher's list of items.

1. Addressing of the lots is incorrect. One, three and five Canal Street are incorrect. Those lots would be evenly numbered on Canal Street. Jones Lane addresses will be in the 500 block.

Chairman Littleton referred to the most recent version of the draft resolution and other documents which include the homeowners' association document, conservation easement, trees, covenants and architectural standards. These documents had been distributed to the Planning Commission prior to the meeting. No substantive changes have been made to the resolution, but there have been editorial type changes. He noted that the decision was made to not refer to the Code section relative to mitigation of trees, but to repeat the current language in the Code.

Mr. Shulman said that in regard to Section 1-1 of the draft resolution, the language distinguishes between "damages" and "dies". The tree ordinance defines "damage" as severe decline, disfiguration, discoloration defoliation, removal or death of a tree. In the draft resolution, it noted that "...such dead or damaged tree shall be treated in accordance with ANSI Standards..." Mr. Shulman did not know how a "dead" tree could be treated, and what could be done with a "dead" tree. The words of the tree ordinance are a recipe for litigation between lot buyers and the Lovetts, between the City and the Lovetts, between the City and the homeowners' association, between the homeowners' association and the lot owners, etc. The Planning commission has an obligation to be as clear and specific as possible.

Mr. Gossett asked if the language is being confused between the tree ordinance and what has been drafted in the resolution. There are two different standards that would need to be met.

Mr. Mellen noted that at the Ad Hoc Committee Meeting on April 23, 2010, the thinking in regard to this issue referred to any damage or death occurring over a period of time to the trees which are being considered. It was arbitrarily decided by the Committee and under consultation that three years was a reasonable time. Mr. Gulbranson had at that time said if damage occurred as a result of construction, it would show up within three years after completion of construction. The Committee had concentrated on what kind of mitigation there should be. It was debated whether the language of the tree ordinance should be used or if language should be crafted. Guidance was provided by City Solicitor Mandalas that the language which is already written should be used rather than recreating new language. The Committee cited the mitigation aspects of the tree ordinance because it was felt they were reasonable. Subsequent to that when there was discussion with the Board of Commissioners when it was debating about what to do with the tree ordinance, it was suggested that the Planning Commission should copy the language of the tree ordinance and not refer to the tree ordinance because it might be changed.

Mr. Patterson said that the important part in this subsection is the protection of the six trees during the construction of the road. Mitigation of trees when damaged and they die is not as important. The Planning Commission is not suggesting to incorporate all of the tree protection provisions of the Code into this resolution. If the Planning Commission is going to parse the language of the mitigation portion of the Code as repeated in the resolution, then the tree protection provision should be incorporated in the resolution.

Mr. Mellen noted that it was pointed out in the Ad Hoc Committee Meeting that for some of the trees especially along Jones Lane, there would be construction closer to the trees. As a compromise, there would be a requirement to review with the Building Inspector and City Arborist or consultants of how to do particular construction which could possibly require hand construction as opposed to power construction. In that sense, steps have been taken to go beyond the tree ordinance in terms of overseeing the techniques of construction.

Mr. Shulman asked for clarification as to "...any specimen or historic tree, as those trees are defined below, damaged as described above shall be replaced with trees of a total caliper equal to two times the caliper value of the tree removed or damaged..." Any historic or specimen tree that is damaged shall be replaced by a certain size tree of the caliper of the tree removed or damaged.

Mr. Mellen said that if a tree is damaged which is 24 inches in diameter, that 24 inch diameter tree cannot be replaced conveniently. The tree would be replaced there with two times the 24 inches or in other places. This opportunity would be used to create more potential canopy. Mr. Shulman said that when the Code uses the word "damaged", it is defined to include not only specific types of damage, but death. In the resolution, "damaged" is different from "dies". So the resolution says that when a specimen or historic tree is damaged, it shall be replaced by certain trees of the caliper values of the tree removed or damaged.

Mr. Patterson said it is important to bear in mind that this is what needs to be done when there is mitigation. After a permit request for tree removal is filed, the City has to make a determination to allow the tree to be removed. It is only then when the caliper is decided for replacement.

Mr. Shulman said that any historic or specimen tree which is damaged as a result of site preparation shall be replaced with trees of the total caliper equal to two times the caliper value of the tree removed or damaged. Mr. Patterson said that he did not see why a builder operating under a construction permit to build a road and damages a tree, would not need to apply for a tree removal permit to remove the tree he had damaged. Mr. Shulman asked how many of the six trees are specimen or historic trees. Mr. Spies said that no tree in the City has been designated as a historic tree. The six trees are specimen trees. Mr. Paul Lovett said that four of the six trees are specimen trees as noted in the original tree protection plan which was submitted with the application.

City Solicitor Mandalas noted that there are two issues: 1. The idea of what it means to damage a tree which is easily solved by inserting the definition of "damaged" from the Code into the resolution. 2. The issue of whether the tree ordinance applies anyway which it does. This resolution is a second layer of protection above and beyond the tree ordinance that applies in any event. As to the six trees that are to be protected, the resolution provides that the applicants are responsible for three years. It is a specific condition which tries to deal with damage or death of a tree which would occur as a result of construction. After the date the site preparation illustrated on the plot plan is completed and the street is accepted is when the three year timeframe begins.

Chairman Littleton said that in Section 1-2 of the draft resolution, the conservation easement will be recorded with the Sussex County Recorder of Deeds and referenced on deeds of conveyance for the individual lots, enforceable either by the Board of Commissioners or by the Planning Commission and to be approved by the Planning Commission for the preservation of ten (10) trees illustrated in Exhibit 2.

Mr. Shulman did not understand what the obligation is if one of the trees is damaged but not killed. Mr. Mellen said that a decision is made through someone who is knowledgeable, as to whether or not a damaged tree will survive. Mr. Shulman said the City makes that decision, and there are provisions in the City Code which gives the Arborist certain discretion. This covenant says that if a specimen tree is damaged, it will be replaced.

City Solicitor Mandalas read the definition of "damaged" which is severe decline, disfigurement, discoloration, defoliation, removal or death of any tree which is intentionally caused as a result of recklessness or negligence. In the resolution, any specimen or historic tree which is damaged shall be replaced.

Mr. Patterson said that this language in the resolution does not authorize anyone to remove a tree. To get authority to remove a tree, a tree removal permit is required. Property owners do not ordinarily have an obligation under the tree ordinance to be fertilizing and trimming trees according to ANSI standards. He asked if the Planning Commission is willing to impose an affirmative obligation to treat trees outside of construction.

Mr. Francis Markert voiced concerned that a loophole may be further inferred because of this, and something is needed to clarify the inevitable demise of the tree.

Mr. Shulman said that he is unwilling in the end to vote for something that he does not think does something on tree preservation that is clear and goes beyond the Code.

Mr. Patterson said that the sentence can be modified beginning with however so that it incorporates the City's determination in accordance with Section 253-30(A)(6) to read that the City having made a determination that a specimen tree is dead, significantly diseased, severely injured or in danger of falling.

Chairman Littleton said that he would like to give City Solicitor Mandalas some guidance, and then have City Solicitor Mandalas return to the Planning Commission with an outlook in moving forward on this matter.

Mr. Mellen said that in regard to the language of the easement, it was meant to get the Planning Commission through the construction period and was meant to save certain trees which exist on the property that a developer under other circumstances might just come in and clear-cut. The recognition still is that trees will die, and they will be handled by the existing tree ordinance in the Code as long as it continues to exist. This is a second layer of protectiveness above and beyond the Code during the construction period. The Planning Commission should lift the appropriate Code.

Mr. Shulman said that there are two pieces to this. Part of it is focused on the construction period, and the other part is focused on however long the people own the lot. The piece which is being discussed now specifically deals with the extra trees and not the construction.

City Solicitor Mandalas said that No. 3 in the Resolution requires that No. 2 be incorporated in the covenants. Mr. Mellen requested that “[T]his condition shall be recorded as a note on the recorded plot plan” should be repeated in No. 3.

Mr. Patterson said that more than 10 trees are being protected, but it is not known what additional burdens will be imposed on the property owners in No. 2 and No. 3.

City Solicitor Mandalas said that the draft covenants impose conditions above and beyond what is in the Code. The covenants do not contain the trees that are mitigated around Jones Lane. It includes reference to the trees in the conservation easement. With regard to the other trees that are in the setbacks, there is nothing beyond those that are conservation easement protected. Based upon the lot configuration, the Applicants tried to put as many trees in the setbacks as possible.

Chairman Littleton said that in Section 1-4, this refers to what will be done for the façade of the home to be built on Lot Nos. 8 & 9.

Ms. Sullivan noted that the language “...including but not limited to some setback of the first story and any higher story” should be removed because the Mayor and Commissioners recently changed the Code that this would only be in effect in the commercial areas.

Mr. Mellen had a problem with imposing the actual design of a house as opposed to quantifying the design. The house should be in order to blend with the streetscape of the rest of the community, and the architectural review process should be allowed to control that. Flexibility should be given to the architect and the architectural review process to create something that is acceptable. Chairman Littleton said that the HOA will have its own architectural standards.

Chairman Littleton suggested that “[T]he side façade of the home shall be designed to appear as a front façade” should be added to the language in No. 4.

City Solicitor Mandalas said that if there are going to be HOA documents and architectural standards, and if the standards for a front façade are satisfactory than this language is appropriate.

Chairman Littleton said that in regard to Section 1-5, the language “...providing that driveways shall be shared by lots 2, 3, 4 and 5, lots 10 and 12, and lots 11 and 13...” should be changed to read “...providing that driveways shall be shared by lots 10 and 12, and lots 11 and 13...” based on the plat.

Chairman Littleton noted that Section 1-6 pertains to City engineering. Best practices observed for tree protection and preservation will be recorded on the plot plan. Section 1-7 has been previously discussed.

Mr. Paul Lovett commented that in regard to Section 1-7(G), there is potential for making the situation worse on Canal Street. If the Planning Commission requires a permanent shoulder for parking on the eastern side of Canal Street, the Applicants will adhere to it. Engineered pavers could be put in, but it will change the image of Canal Street considerably in a way that takes away the lane and tree feel. Perhaps it is inconsistent with the preservation of trees, but it will not be that close to those trees. One tree in front of lot 3 is on city property, is virtually dead and should probably be removed.

Chairman Littleton said that in regard to Section 1-8, the Applicant shall include a provision in the by-laws of the homeowners’ association (HOA) making the HOA responsible for the maintenance of the bio-retention area, including the portions of the bio-retention area on private property, and those portion of the bio-retention area, if any, extending onto public property. The Applicant should also be responsible for the parking and the sidewalk or pathway.

Chairman Littleton said that in regard to Section 1-9, the Applicant shall furnish performance guaranties in

accordance with Section 236-15 of the City Code.

Mr. Kercher said that the Planning Commission should possibly require a bond or escrow to at least cover the potential costs of removing and/or replacing damaged trees in case the Applicant is not financially able to. City Solicitor Mandalas said that this would require an additional performance bond for this item based upon the Planning Commission's interest in preserving the trees on Jones Lane. It would be unreasonable to require a bond that would cover the mitigation of all the trees, but a percentage could be used. The consensus of the Planning Commission was that this is a good idea. Mr. Gulbranson and Mr. Kercher also thought it was a good idea.

Mr. Paul Lovett requested that the sidewalks be changed to walkways and the curbs be changed edging. Mr. Kercher identified those elements as edge restraints instead of curbs and pathways instead of sidewalks. The consensus of the Planning Commission was to change in language.

Chairman Littleton said that Section 1-11 pertains to the City Engineer with regard to the review and final approval, and the itemized estimate of the cost for improvements; and Section 1-12 also pertains to the City Engineer with regard the Applicants providing copies of the approval letter or certificate of approval of feder, stat, county or local bodies which have an official interest in this development. Section 1-13 pertains to the Applicants engaging an escrow agent for the purpose of deposition a certain amount of money in the escrow account to be release to the City.

Chairman Littleton said that when this subject was last discussed, the Applicants want to see some construction begin within five years, not that the design is started in five years. The Planning Commission is interested in improving the canal front and Canal Street. The Applicants would like to expand the improvements, not only to include the pathways but also to include the possibility of improving the canal bank at water level.

Mr. Shulman thought the consensus at the last meeting was the improvement should be at street level. He did not agree with improving the canal bank at water level.

Chairman Littleton said that the improvements would be made in lieu of a sidewalk on the eastern side of Canal Street. No sidewalk was to be put in on the western side. The concept is to fix up the land to the west of Canal Street.

Mr. Mellen said that the Applicant has offered to participate in the development process for the canal park. The Applicants have endorsed trying to improve the land to the west of Canal Street.

Mr. Lovett said that the Applicants have volunteered their leadership in lieu of funding to pursue a larger project. The Planning Commission had decided it preferred funding. The canal bank does not need a lot of upgrade, but it needs to be connected to the bridge. Chairman Littleton said that this would voluntarily relieve the Applicants of putting curbs and sidewalks on one side of Canal Street. In concert with the CDP, the Applicants escrowing out money will put pressure on the City to improve that area.

Mr. Patterson thought that the primary consensus of the Planning Commission had been that there would be an ADA compliant walkway as a minimum.

Chairman Littleton said that the Planning Commission should accept the Applicants' offer of a certain monetary amount to be put in escrow for the City to use toward improving the area to the west of Canal Street with construction starting within a five year period.

City Solicitor Mandalas said that the Planning Commission is allowed to impose conditions on an Applicant that are related to a health, welfare, and safety concern which are associated with the Oak Grove development. He asked if the Planning Commission is addressing that by doing something on the western area of the canal. Chairman Littleton said that Mr. Kercher's recommendations were that it did not make sense to put in a sidewalk on the eastern side of Canal Street, and there was not enough room on the western side to put in traditional sidewalk and curbing. A pathway would be more appropriate on the western side of Canal Street. City Solicitor Mandalas said he wanted to be sure that if the Planning Commission is setting the monetary amount, that monetary amount needs to be tied to a health, safety and welfare concern and how that amount is going to be put to work to address that concern.

Mr. Paul Lovett said that the Applicants are offering the monetary amount of \$20,000.00, but he would want "...by engaging a consultant..." to be removed from the language in this section.

Chairman Littleton also noted that the walking path should be ADA compliant. That language will

also be inserted into this section.

Mr. Shulman said that the offer was in part tied to the lower end of the estimate to do sidewalks. It has no relationship to whatever it might cost to do something across the street. He would like the Applicants to present an amount that has some reasonable relationship with what it will cost. After a lengthy discussion, there was consensus to accept the Applicants' offer of \$20,000.00.

Chairman Littleton read Section 1-14 regarding the documents and submittal deadline of no later than sixty (60) days before any Planning Commission meeting at which the Planning Commission will consider final approval.

Mr. Paul Lovett estimated that it would be six to eight weeks to get an agreement with Mr. Kercher on what needs to be done. The Applicants will not get approval for this major subdivision until another several months. He was hoping construction could be started in three to four weeks.

Chairman Littleton said that there are three substantive issues which need to be reflected in the documents. Some people within the Committee do not feel that the documents address the fundamental issues adequately. After a lengthy discussion, it was determined that the document submittal deadline will be addressed and set at the next meeting.

Mr. Mellen felt uncomfortable with waiting until the final voting day to see the plats. The Planning Commission needs to start seeing the documents and plats early.

Chairman Littleton noted that the conditions which the Planning Commission has required need to be stated on the face of the plat before it signs the plat for conditional approval. This would require a new plat bearing a different date.

Ms. Schwartz reiterated that the conditions need to be put on the plat and the addresses need to change. She will inform City Solicitor Mandalas of the actual date on the plat.

Chairman Littleton noted that in Section 3, Jones Lane meets the City Code requirement for a short dead-end street. In Section 4, the Planning Commission shall consider final approval of Major Subdivision Application 0708-05 upon completion of all of the conditions provided in Section 1 and at the Applicant's request. In Section 6, this Resolution shall take effect immediately upon its adoption by a positive vote of the majority of the members of the Planning Commission. City Solicitor Mandalas will work on cleaning up the language in the Resolution.

After a short break was taken at 9:12 p.m., the Planning Commission resumed the meeting at 9:20 p.m.

Mr. Mellen noted that a number of the members of the Planning Commission have submitted comments to City Solicitor Mandalas regarding the Covenants and Homeowners' Association and Architectural Review documents. He summarized the major issues which are legal concerns and are critical. The critical areas are: 1. In regard to the Covenants, the question at all times is who is responsible for doing what. At certain phases of the development of the property, Oak Grove developers have certain responsibilities. As lots are begun to be sold, the Homeowners' Association has certain responsibilities, and then the lot owners have certain responsibilities. The responsibilities pertain to mitigation of trees, etc. If the design proceeds as the Planning Commission perceives it to be, there will be shared responsibilities. The Applicants will be dedicating a street, but normally a street is dedicated and the City has responsibility for the street. In this case, there is parking on that street which consists of pavers. Someone, other than the City, is going to be responsible for that. 2. Questions need to be clarified in the documents of who has the responsibility and ability to declare when something needs to be repaired or taken care of and under what manner will it be taken care of and who is responsible for it. 3. The transfers of responsibility need to be clarified in the documents. Currently, the Oak Grove Association is assuming responsibility for all the negotiations and agreements; but as the lots are sold, members of the Homeowners' Association may challenge the covenants and what was agreed to originally. The Planning Commission cannot let this happen. The Homeowners' Association and Architectural Review documents need to be consistent with the need to protect the City as well as the Applicants. Between City Solicitor Mandalas and the Applicants reviewing the documents and the comments, they could be incorporated in order to move forward.

Chairman Littleton said that there is a responsibility to make sure that what is being required does not violate the City Code and the Zoning Code. Chairman Littleton said that the Planning Commission agrees what the critical issues are: 1. Protection of the City. 2. Assignment of making sure the responsibilities are clearly laid out. 3. Clean up of language. 4. Change because the rain garden is on private property.



City Solicitor Mandalas was comfortable with the feedback received. There are varying degrees of interest with members of the Planning Commission in regard to the documents. The Resolution is the most important governing document because that is where it sets what things have to be incorporated into the other documents. The Planning Commission's overriding concerns are the tree preservation and making the covenants and conservation easement are properly documented and recorded. Everything that needs to be incorporated in the HOA documents flows from the Resolution. It is this development's homeowners' association so it is an agreement among those owners as to what they want their subdivision to look like. There is only a level of detail that the Planning Commission should go to before it has gone too far. It is appropriate to look at their restrictions to see if they are consistent with what is in the Code. As a developer, the Applicants are trying to create a community which is going to be attractive for them and saleable. City Solicitor Mandalas will be looking at the broad issues to give protection to the City. City Solicitor Mandalas acknowledged that he would take the working comments which have been passed to him and review the documents, and work with the Applicants to make sure the City is protected.

Mr. Mellen said that the issues which have been identified are ones of responsibility and ones of how assured the Planning Commission is that they will run with all the deeds and be accepted by all the subsequent landowners, and the protection against the owners making changes to what was originally agreed to. The City has a right to be protected.

Mr. Patterson said that one of the big issues is successors challenging the covenants. The subdividers and successors have the power to amend the covenants. He did not think they can amend the covenants to take out the specific things which the Planning Commission's Resolution required them to put in the covenants such as HOA responsibilities for the bio-retention.

Mr. Shulman added Section 15.2.5 to the Declaration of Covenants. "Notwithstanding anything in this Declaration that may suggest or state to the contrary, no amendment to this Declaration may be adopted if it is inconsistent in any way with the conditions imposed by the Plat or Resolution approving the subdivision."

Chairman Littleton said that he was not in favor of taking action on the Resolution tonight. All members of the Planning Commission should forward their comments to City Solicitor Mandalas for him to do a synthesis to incorporate items and highlight those areas where consensus is needed. Chairman Littleton suggested that City Solicitor Mandalas have this ready for the next meeting on October 8, 2010 with the idea that the Planning Commission does not take action at that meeting. A special meeting would then be scheduled for October 22, 2010 with the only agenda item being this matter.

Mr. Shulman suggested that City Solicitor Mandalas should talk to the people who have put in particular viewpoints as well as talk with the Applicants and Chairman Littleton. City Solicitor Mandalas noted that he would like some discretion to work with Mr. Shulman on these documents.

Mr. Shulman noted that in order to continue the meeting past 10:00 p.m., the majority of the members of the Planning Commission must agree to take up a new agenda item after 10:00p.m. according to the bylaws. Mr. Patterson, Mr. Shulman, Chairman Littleton , Mr. Spies, and Mr. Gossett agreed to continue the meeting past 10:00 p.m.

## **NEW BUSINESS**

There was none.

## **OTHER BUSINESS**

Chairman Littleton called to discuss and possibly recommend changes regarding the Chairman's decision to place amended Application No. 0710-02 requesting the partitioning of a property located at 2 St. Lawrence Street LLC into two lots, provided all amendments to the application are timely submitted, on the Planning Commission's October 8, 2010 Regular Meeting agenda for Preliminary Review.

Chairman Littleton noted that at the last meeting, the Planning Commission members moved this application to a Public Hearing for reasons that are totally legitimate. At the Chairman's discretion, he made the decision to place amended Application No. 0710-02 on the October 8, 2010 Regular Meeting agenda for Preliminary Review. He asked the Planning Commission members if they endorse the decision he made to move 2 St. Lawrence Street from Public Hearing at an upcoming meeting. His decision was based on the advice of City Solicitor Mandalas, the Building Inspector and himself.

Chairman Littleton deferred the Chair to Mr. Mellen.

Mr. Gossett, Mr. Spies and Mr. Shulman did not support Dr. Littleton's decision. Mr. Markert, Mr. Gauger, Mr. Patterson and Chairman Mellen supported Dr. Littleton's decision.

Dr. Littleton summarized the rationale for the basis of his decision to not move forward to Public Hearing. The Building Inspector had been informed that the dimensions of the property had increased significantly from what was announced and included in the August 6, 2010 Building Inspector' Report and was discussed with the Planning Commission at its August meeting. In August 2010, the Applicant indicated that under consideration was the property of 17,520 square feet measuring approximately 175 feet x 100 feet. The owner/applicant/attorney subsequent to the Planning Commission's September meeting indicated that the property under consideration was actually approximately 620 feet x 100 feet or approximately 62,000 square feet. This discussion among City Solicitor Mandalas, Building Inspector Sullivan, Ms. Womack, City Secretary and Dr. Littleton took place within 30 minutes of the newspaper's print deadline based on the prior information that Ms. Womack had submitted to the newspapers. Not only was there a significant change to the application, there was no time available to correct the submission to make the newspapers' legal notification. Dr. Littleton's decision was to stop the publication of the erroneous notification and return the amended application to the Planning Commission for Preliminary Review at the next meeting to be announced i.e. the October meeting. Since at its August meeting, the majority of the Planning Commission voted to bring the application to Public Hearing in October, Dr. Littleton not only made the decision to not put it on the September agenda but also next bring it before the Planning Commission as a Preliminary Review. The issue is that the Planning Commission had indicated in August that the application was ready to go to Public Hearing, and he made the decision to vote to return it to a Preliminary Review at the October meeting subject to the applicant's timely submission with an updated corrected application. The applicant's attorney addressed communication to Dr. Littleton, and he requested the City Solicitor to handle all communications with the applicant's attorney.

City Solicitor Mandalas confirmed what Dr. Littleton said is accurate. City Solicitor Mandalas supported Dr. Littleton's decision.

Mr. Shulman said that there is some substance behind why this was a problem.

Mr. Patterson said that the Planning Commission members had other things to do than spend time on an application which is materially false and listen to answers that were false. He did not know whether it is appropriate to penalize the applicant in any way by delaying another preliminary hearing. He would search for ways to penalize them because of the Planning Commission's time being wasted and the time of the other important pending application which is still not complete.

Mr. Spies made a motion, seconded by Mr. Shulman, to postpone the Preliminary Review to November 12, 2010.

City Solicitor Mandalas said he would understand it if the Planning Commission's agenda is too heavy to handle this application during the October meeting, but he warned the members that penalties would be entirely inappropriate.

Mr. Shulman did not believe this would be a penalty because the Planning Commission has a complicated agenda for the October meeting. He did not want to feel under pressure for the next meeting to stiff Oak Grove by feeling that the Planning Commission needs to deal with 2 St. Lawrence Street and Oak Grove at the same meeting.

Dr. Littleton said that authority to set the agenda rests with him.

Mr. Markert said that under the circumstances and given the fact that this took place at a time when the Planning Commission could have gotten further along with the Oak Grove property, it would be appropriate to close the Oak Grove property and focus attention on that at the next meeting in October.

Mr. Gossett suggested that when the November agenda is established, Chairman Littleton should keep in mind that a second special meeting has been scheduled to handle the Oak Grove material. The October meeting has a heavy agenda already since a second meeting has been scheduled to deal with that.

Chairman Mellen said that it is the Chairman's responsibility to set the agendas. Mr. Patterson agreed.

Dr. Littleton suggested to keep the October meeting open for the Oak Grove application and move the 2 St. Lawrence Street application to November 2010.

Mr. Shulman withdrew his second.

Mr. Spies made a motion, seconded by Mr. Shulman to amend the motion to request the Chairman to schedule the 2 St. Lawrence Street application at the November meeting, for the reasons stated of what appears to be a busy agenda and not wanting to cut short either applicant and to give both applicants fair consideration. (Patterson – nay, Shulman – aye, Gauger – nay, Mellen – nay, Littleton – abstain, Spies – aye, Markert – abstain, Gossett – abstain.) Motion failed.

Chairman Littleton will take the 2 St. Lawrence Street application under consideration for placing it on the October or November agenda.

Due to the lateness of the meeting, the remainder of the agenda was not completed.

The next Regular Meeting will be held on October 8, 2010 at 6:00 p.m.

Mr. Gauger made a motion, seconded by Mr. Gossett, to adjourn the meeting at 10:15 p.m.

**RECORDED BY**

\_\_\_\_\_  
(Ann M. Womack, Recording Secretary)

**MINUTES APPROVED ON  
MARCH 14, 2011**

\_\_\_\_\_  
(David Mellen, Acting Chairman)