

**PLANNING COMMISSION MEETING  
CITY OF REHOBOTH BEACH**

**October 8, 2010**

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:07 p.m. by Chairman Preston Littleton on Friday, October 8, 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. John Gauger  
                      Mr. David Mellen  
                      Chairman Preston Littleton  
                      Mr. Timothy Spies  
                      Mr. Francis Markert, Jr.  
                      Mr. Patrick Gossett  
                      Mrs. Jan Konesey

Absent:            Mr. Harvey Shulman

Also Present:     Mr. Glenn Mandalas, City Solicitor  
                      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 July 9, 2010 Planning Commission Workshop Meeting were distributed prior to the meeting. Minutes of the September 10, 2010 Planning Commission Regular Meeting were not available for this meeting.

Minutes of the July 9, 2010 Planning Commission Workshop Meeting were deferred to the next Regular Meeting.

**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.

Chairman Littleton noted that Mr. Jim Lovett and Ms. Donna Bengé were in attendance at the meeting. Mr. Paul Lovett was in attendance at the meeting via speakerphone. Ms. Judy Schwartz of George Miles & Buhr (GMB) was also in attendance. Mr. Paul Lovett will be able to listen to the discussions, but he will not be able a participant in the meeting in any way. The Planning Commission have the ability to direct specific questions to him or other family members.

Correspondence:

1. Letter received September 13, 2010 from Mr. Don Walker and Mrs. Janet Walker, 10 Sixth Street, requested that the plan submitted have the following condition: The two curb-cuts currently on Sixth Street must be curbed.
2. Letter with attachments received October 8, 2010 from Mr. Paul Lovett, Mr. Jim Lovett and Ms. Donna Benge of Oak Grove Motor Court, Inc., who are hopeful that the Resolution of Approval, Conservation Easements, Covenants and Architectural Guidelines are sufficiently final for the Planning Commission to find them acceptable with whatever minor adjustments might be agreed to at the meeting. The attachments were suggested changes to the parking surface on the easterly side of Canal Street and the hard surface on Jones Lane.

Mr. Jim Lovett and Ms. Donna Benge acknowledged that it is the desire of the Applicants to ask for a modification of the Application relative to above-mentioned request in the letter received October 8, 2010. Mr. Paul Lovett also affirmed that desire.

Chairman Littleton said that his position, subject to the consensus of the Planning Commission, is that this would be a revision of the Application; and the Applicants should go back and revise the Application, and submit a new Application in 28 days prior to the meeting which would have time for the City Engineer, Land-Use Consultant and Building Inspector to look at it. This modification impacts all of the legal documents as well because some of the legal documents are based on pathways, parking areas, maintenance and construction. The Applicants are looking for a redesign of parking and things that the Planning Commission had specified and worked out. The Planning Commission has no idea of the impact of changing from pervious to non-pervious surfaces and how it will affect stormwater management, Sussex County Conservation District requirements, etc. The Applicants are looking for reductions of space that the Planning Commission has allowed for pathways, etc. The Applicants should have every opportunity to express what they want, but the Planning Commission should not be sitting here dealing with it piece by piece. Mr. Spies said that there are significant new requests, and the Planning Commission has not had a chance to think about those requests. Chairman Littleton noted that a request regarding \$20,000.00 has nothing to do with the street. It has to do with the sidewalks and being relieved of the sidewalks as a requirement on the eastern side of Canal Street. The Applicants volunteered to something on the western side of Canal Street. Unless the Planning Commission sees something in writing, it cannot proceed.

Mr. Patrick Gossett asked the City Engineer how much of an impact these types of changes have on the project. There are multi-level changes being proposed: one change will then result in others. Mr. Alan Kercher, City Engineer, said that the shoulder parking on Canal Street is an engineering issue. He has been told that the City wants a permanent surface; and what this is can be worked out between now and final approval. The walkway issue and change in parking on Jones Lane is for the Planning Commission to make that decision. With regard to the impact on stormwater management, the runoff would be reduced a minimal amount by reducing the parking spaces. The grass pavers portion would be eliminated for the entire road, and it depends what the Applicants would replace the pavers with. Ms. Judy Schwartz of GMB said that in regard to stormwater management, there has been discussion with Sussex County Conservation District about the idea of possibly substituting porous pavement in lieu of the grass pavers. The Conservation District has prescribed a criteria that would need to be followed. It would increase runoff. A preliminary redesign has been done on that basis. Minor adjustments would be needed, but there is still adequate room to put it in. Eliminating the pathway would not have a big impact on the stormwater. The right-of-way and location would remain the same. Ms. Schwartz agreed with Mr. Kercher that the shoulder on Canal Street is an engineering issue; and she felt confident that this issue could be worked out between now and the final approval. The walkway and elimination of parking spaces are Planning Commission issues.

Mr. Spies said it appears to him that the Planning Commission has a different Application. Mr. Mellen agreed. What is bothersome is that significant effort has gone into what the Planning Commission believed at the last meeting that this was the final design. A significant legal effort by the City Solicitor and his associates has gone into crafting the documents which basically would have to be re-crafted and reread.

City Solicitor Glenn Mandalas said that the documents will be impacted. Emails have been sent by Mr. Lovett requesting additional changes to the documents. There is question about whether certain things could be called the homeowners' association property vs. homeowners' association assets because the homeowners' association will not hold any real property. It will have assets such as the stormwater management area, etc. Most changes to the documents would be non-substantive.

The consensus of the Planning Commission members was that this would be a change, and the Application should be revised and resubmitted with a new plat. The Planning Commission afforded the Applicants a five

minute private discussion via telephone to decide if the Application would move forward or be withdrawn. After discussion, the Applicants withdrew the letter in its entirety that was received today.

Mr. Kercher noted that at this point, plans and calculations have been received this week to support what the Applicants have proposed and what was discussed at the last meeting. Mr. Kercher has not had the opportunity to review those plans and calculations. From an engineering standpoint, the Application can move forward. Chairman Littleton noted the issues: 1. Demarcation of a pathway from the rest of the property. 2. Parking situation on Canal Street. 3. Extending the walkway and connectivity of the street.

Ms. Schwartz said that in regard to proposed plat PP-1, the walkway has been extended onto Jones Lane at the end of the parking. A statement has been added to the plat referencing the conditions of preliminary approval, and the wording was crafted with City Solicitor Mandalas. On PP-2, the road section was modified to allow room on the back side of the bio-retention area for access which was requested by Mr. Kercher at the last meeting. A modification has been made to the note on the grass pavers to read "...net paved 50 grass pavers or equal" to allow the developer to choose from a number of different permeable grass pavers for the walkway and parking areas. The issue regarding Canal Street has been addressed on the submittal to Sussex County Conservation District as grass pavers or equivalent.

Mr. Kercher commented that the bio-retention area goes to the property line; and if maintenance work has to be done, there is a possibility of disturbance back onto the private property. Ms. Schwartz said that this detail could be worked out on the engineering drawings. The proposed rain garden is located in the easement area on private property. There has been no indication from Sussex County Conservation District of an inadequacy with the proposed rain garden. Two existing curb-cuts are identified by Note No. 12 on the proposed plat to remain. One curb-cut is located on Lot No. 9 and the other is located on Lot No. 8. In order to maintain parking access and the rain garden, access to Lot Nos. 8 & 9 will be off of Sixth Street.

Mr. Kercher said that a shoulder will be required on Canal Street. In regard to the trees in the City right-of-way, it is possible to have required parking on Canal Street that is not totally linear. Chairman Littleton said that the Applicants will try to maintain some of the trees, but two trees have been identified that might be in jeopardy.

Chairman Littleton said that in regard to the two curb-cuts, Lot Nos. 8 & 9 were reoriented in order to maximize parking and the rainwater discharge on Jones Lane. The four curb-cuts would be reduced to the two necessary curb-cuts on Sixth Street to access the lots, one on each side of Jones Lane. In the legal documents, the Sixth Street facades would need to give a streetscape appearance.

Mr. Kyle Gulbranson said that the issues discussed at the last meeting have been addressed.

Mr. Mike Hoffman, Esq. of Baird Mandalas LLC addressed substantive changes that Mr. Paul Lovett proposed regarding the Covenants. A red-line version and clean copy were provided to the Planning Commission.

Chairman Littleton noted that the only reason the Planning Commission is looking at any of the Covenants is because it is related to the agreements made relative to trees and maintaining a natural area. The City also has a responsibility to make sure there is nothing specified in the documents that is contrary to City Code and requirements. City Solicitor Mandalas said that the Homeowners' Association (HOA) documents are the internal governance of the Homeowners' Association, and the Planning Commission can address things that run contrary to the Code.

Attorney Hoffman said that what is being proposed by Mr. Paul Lovett is because there is no association property or property owned by the association. Anything within the Declaration of Covenants that refers to association property becomes obsolete. Mr. Lovett has requested that this be changed to read "Association assets". As a result of that change, there would be multiple portions of the Declaration of Covenants that would need to be stricken because it would be rendered obsolete. Areas of concern are:

1. Article 4. Section 4.1. A large portion of this section would be stricken. It would then read: "Association Assets. The Association shall be responsible for the management of the Association assets."  
A section would need to be added that would indicate
2. Article 4. Section 4.2 would be stricken in its entirety.
3. Article 4. Section 4.2.1 would be stricken in its entirety.

Chairman Littleton said that the pathway and hard-surfaced, pervious parking area on both sides of Jones Lane would be on City property. The Applicants have agreed that they would maintain those

because they are being given an exception to the Planning Commission's normal requirement which would be a paved area. In deference to the Applicants' desire to have a pervious surface and meet the stormwater desires, the Planning Commission agreed to the design but the City would not maintain it. Attorney Hoffman agreed that this is a valid point. In his revision as well is a portion in another section that is to be stricken where there is a similar issue which pertains to an easement over Jones Lane. If Jones Lane is dedicated to the City, there is no easement over Jones Lane. In Section 4.1, there would need to also be a section which would indicate that in addition to the landscaping of the property, the Association will maintain it. Section 7.1 pertains to maintenance.

Chairman Littleton said that Section 7.1 erroneously states that the City of Rehoboth Beach shall be responsible for maintenance of Jones Lane. The Applicants have defined "Jones Lane" in Section 1.20 that it shall mean the paved surface and the right-of-way associated, defined hereinafter as Street. With the exception of the paved street, the right-of-way contains everything that the Applicants will be responsible for. Attorney Hoffman agreed that this would need to be changed to clarify that point.

Chairman Littleton said that the Planning Commission does not care about the Applicants' desire to fix up their documents regarding Association property vs. assets. The Planning Commission is interested in how it can make sure, after the Applicants modify their documents, that the Planning Commission's needs are addressed in terms of the requirements for who is responsible for what. He was concerned that the City is spending a lot of legal time fixing up an association's documents that have nothing to do with the Planning Commission. Mrs. Konesey agreed.

City Solicitor Mandalas said that at this point, a substantial amount of legal reviewing has been done. It is no longer his firm's and the Planning Commission's responsibility to be editing, changing, etc. The Applicants need to make the changes which will then require another legal review by City Solicitor Mandalas and Attorney Hoffman. Mr. Mellen said Mr. Paul Lovett has stated repeatedly over a number of meetings recently that their covenants have not changed from the beginning; and yet, the legal aspects of what they are trying to put forth in the Covenants have changed substantially.

4. There is no Section 8.
5. There is a reference to by-laws in the document, but there were no by-laws as part of the document.
6. Craft language in the Covenants that refers to the other three documents such as the Planning Commission's Resolution of Approval so the homeowners' association can look at all the reasons for approval.

Attorney Hoffman said that this was not included in the Declaration of Covenants because in the Resolution, there were covenants required to be included in the Declaration of Covenants. Those particular covenants were included in the Declaration.

Mr. Patterson noted that there is a general reference to the Resolution in Sections 15.2.5. Mr. Mellen noted Section 15.4 as well.

City Solicitor Mandalas suggested that an additional whereas clause could be included in the Resolution. He acknowledged that the Resolution could be made an attachment, appendix or a part of the Covenants. Mr. Gossett said that making all the documents as one would be better than having stand-alone documents. Chairman Littleton said that having one document was a request of the Planning Commission at the last meeting.

7. Put a requirement in the Covenants that they be specifically referred to in every deed for the lots.

City Solicitor Mandalas said the deed will say that a property will be subject to any restrictions, covenants of record, etc., and that would show up in a title search. A new owner would be put on notice that these are the covenants they have to live under. At least for the first time the property is sold, the developer will be required to give a copy of the Declarations to the new owner. There will be some reference in the deed to declarations of record and they need to be recorded with the Recorder of Deeds.

8. Change the heading from Exhibit 1 to Exhibit 2 and from Exhibit 2 to Exhibit 1.

Attorney Hoffman noted that in regard to Exhibit A in the Conservation Easement, this refers to the final plat. City Solicitor Mandalas said that there needs to be a legible site plan describing the easement. It may be something more limited than the plat so the easement can be demonstrated.

Chairman Littleton noted that the architectural board needs to be clarified as to whose architectural review

board it is in regard to the Architectural Standards because the City is dealing in architectural review.

Mr. Spies asked if the Planning Commission's Resolution and the plat should be referred to in the description associated with Dwelling Size. City Solicitor Mandalas suggested that the language could read "...with all building requirements of the City of Rehoboth Beach's code for residential construction, and with the Planning Commission's Resolution of Approval and the plat..."

Chairman Littleton referred the Resolution. Comments and suggested changes were:

1. Correct the spelling to read 512 "Rehoboth" Avenue.
2. Page 4. Line 187. There is question whose architectural review board it is.
3. Page 6. No. 3. "This condition shall be recorded as a note on the recorded plat plan" should be added as the last sentence.

City Solicitor Mandalas noted that in working with the Applicants, it had been suggested that this should be referenced as a document on the plat and give the book and page recorded with Sussex County. It would be referenced like this, and all the conditions would be included in the approval. As a condition, all of them could be eliminated, and a new condition could be added that says this document shall be referenced as a document recorded with Sussex County; and note that there will be one note on the plat to reference this document. This document is incorporated by reference and the approval.

7. Page 7. No. 8. The HOA would also be responsible for the parking and pathway on Jones Lane.

Chairman Littleton added that if there will be a non-standard parking area on Canal Street, the City should not be responsible to take care of it.

Mr. Mellen said that in regards to the responsibility of Oak Grove to maintain some of the areas, there is still the question of who has the authority to say when they should be maintained and how they should be maintained as to what level they should be maintained or remediated. The City should have the authority to say when it should be maintained for its property and similarly the same for the rain garden. City Solicitor Mandalas said that this concern will be addressed.

8. Page 8. Change (c.) to Pathways.
9. Page 8. Change (d) to Edge restraints.
10. Page 8. Add (l.) – Mitigation of protected trees. This sub-section would deal with the big trees at the end of Jones Lane.

Attorney Hoffman provided suggestions made by Mr. Paul Lovett about the Resolution.,

1. Page 7. No. 6. Remove "...in writing, by illustration, or both..."

Attorney Hoffman said that Mr. Paul Lovett thought the added clause is an unnecessary administrative burden for the Applicants and the City. The consensus of the Planning Commission was that it disagreed with the removal of the clause.

2. Pages 5. Line 199. Change damaged to dead.

Attorney Hoffman said that the language should be kept as "damaged". The Planning Commission agreed.

3. Page 9. Line 362. Change Planning Commission to City Solicitor.

City Solicitor Mandalas said that he would at least want the Planning Commission to have the framework of what the escrow agreement would look like and know the key points. City Solicitor Mandalas would be fine with that change, but he would not want discretion over the escrow agreement. The requirement for preparation of the escrow agreement is that the Applicants would go to a third party escrow agent, and then City Solicitor Mandalas would review it and make recommendations to the Planning Commission. He would need to know the dollar amount, triggering event for the funds to be released to the City to do the work or released back to the Applicants because the City may not do the project, and what the time period is for the work to be done. Final approval would not be granted until the Planning Commission has heard from City Solicitor Mandalas that this condition has been met. Mr. Mellen said that the Planning Commission has put forth the desire to have this done. The consensus of the Planning Commission was to leave the language as is.

4. Page 8. Line 359. Remove "...by engaging a consultant..."

Mr. Patterson said that this goes hand-in-hand with the change made in the previous sentence. The previous sentence used to read that the consultant must be engaged within the five year period commencing on the date the funds are deposited in the escrow agent's escrow account. The trigger is engaging a consultant. City Solicitor Mandalas agreed. The Applicants had asked that it would be not just to get a consultant. They want to see something actually happen. It was changed up top and was not changed at the bottom of this section. Chairman Littleton said that a lot of the members concurred with the Lovett's request at that meeting.

Mr. Mellen had a problem with that such as when they are ready to go forward with the project and State approval cannot be gotten or a time cycle of when they cannot do something. Consequently, starting the project means when the project actually starts. There may be reasons to have a protracted starting date. The essence of the plans would have to be in going forward, but he would not necessarily tie it to consultant. Mr. Gossett agreed. If "by engaging a consultant" is removed, it creates a more vague sense. It could be defined that the project is started by hiring a consultant, putting a shovel in the ground, cutting the ribbon to open the park, etc.

City Solicitor Mandalas said that the two sections should coincide. Mr. Lovett has suggested that if the Planning Commission is in agreement with "[T]he condition precedent to the release of the escrowed funds to the City shall be the actual site development as part of a project to enhance the Lewes-Rehoboth Canal bank with improvements beneficial to the public", then it should be carried down to the lower section to say "[I]f the City fails to complete actual site development as part of the project to enhance..."

Mr. Spies said that the proposal is in lieu of the sidewalk on the western side of Canal Street.

Mr. Patterson thought that it was left last time when construction is started. He was not sure that this is implying when the site development is done.

Mr. Kercher's concern was that if the City would have to go to Army Corps of Engineers the project could hang there for quite awhile. It could possibly say that the project has been designed and the plans have been submitted for permits by that date.

Mr. Jim Lovett said that he could not see the Lovett's withdrawing from it if the plan is initiated. Chairman Littleton said that there is a desire on the Applicants' part to see an improvement for the owners to look at, and it is the desire of the Planning Commission to get something done.

Mr. Kercher and City Solicitor Mandalas will work together to craft the language.

Chairman Littleton said that the Planning Commission has come to consensus on engineering. What the Planning Commission has gone through with the various documents with one exception has been editorial items. The exception is the desire on the Applicants' part to do something that may ricochet through the documents. Absent that, the Planning Commission is in a position tonight to take action on this Application. The Planning Commission needs to make sure that the protection of the City is not lost. The City Solicitor should not be doing legal work for the Applicants. Chairman Littleton stated that the Planning Commission's draft resolution should not be forwarded to the Applicants. City Solicitor Mandalas said that he will forward all the suggestions the Planning Commission has given to the Applicants. Attorney Hoffman could get the revised documents back to City Solicitor Mandalas by October 13, 2010 to be forwarded on to the Planning Commission by October 22, 2010. Chairman Littleton will tentatively schedule a meeting for October 22, 2010 regarding the review of the documents and a possible preliminary approval of the project.

Mr. Paul Lovett said that the easy way would be to leave the Declaration the way it is without striking the clauses because there is no association property. The Applicants were trying to simplify the document. The original reference to association property was not clear as to whether the street would be dedicated. Once it was made clear that the street would be dedicated to the City, then there became no association property that would be City property. The language can be left the way it is without all the strikeouts. Maintenance of the walkway and the parking on Jones Lane was specifically mentioned that it would be owned by the City and was made a reference in the revision of Section 7.1. The problem will be solved if the wording is left in the document. Mr. Lovett said that the sentence "[T]he City of Rehoboth Beach will be responsible for maintenance of Jones Lane" should be deleted.

City Solicitor Mandalas said that it is in the City's best interest to clarify property vs. assets. The

association does not own real property. The question is whether the Planning Commission can go forward with this document, and between now and final approval make the clarification of this issue another condition of preliminary approval. With regard to the change from property to assets, Mr. Paul Lovett has already done that with the red-line copy. Mr. Paul Lovett said that no other changes are being made to the Declaration of Covenants other than the changes which have been provided tonight in red-line form.

Mr. Paul Lovett, Mr. Jim Lovett and Ms. Donna Bengé have no objections to the corrections to be made. City Solicitor Mandalas said that he can work with the Lovett's on the change to make sure that there is agreement with the changes from property to assets and editorials. The documents will be forwarded back to the Planning Commission next week.

Chairman Littleton thought the Planning Commission would be better served by making a decision at the October 22, 2010 meeting. Mr. Gauger did not agree. There is no reason why the Planning Commission needs to consider the changes in order to vote on preliminary approval.

Mr. Mellen was concerned that the concept from the standpoint of protecting the City is now captured someplace else. He has not seen those words captured. It should be a neat package. Mr. Spies agreed.

Mr. Markert has not changed his opinion but if other people want to see a package so be it.

Mr. Gossett said that he would like to see the corrections made tonight. The Planning Commission had discussed a comprehensive overview charge to instruct the property owners of the idea that comprehensiveness of these documents together is one unit. That does not exist in these documents. The Planning Commission needs to convey what the documents mean to the final end user.

Mrs. Konesey said that she would like to see everything before voting on it. Her concern was with the City Solicitor putting together documents for an applicant. Since her tenure on the Planning Commission, there has never been a time where legal work has been done to the extent that this has for an applicant. This has been very expensive for the City. If an applicant wants to come in without an attorney in the future, the Planning Commission and the City do not need to do their legal work for them. Mr. Markert interjected and said that the proper finality of this shows that the process benefits everyone. Whatever cost is borne is a benefit for the citizens in addition to the Lovett's.

Mr. Patterson agreed with Mr. Gauger. Some significant changes have been made to the Resolution, and he would want to go through them again. Mr. Patterson felt that he could approve the project preliminarily because there will be a significant amount of time between now and final approval when these documents continue to change. As long as the Resolution is clear, the Applicants know what their documents should say. Mr. Mellen said that final approval can occur in two years. The four documents that the Planning Commission agrees to will be frozen. At some point when the Planning Commission agrees to the Resolution, it will be giving approval to the wording in the other documents that impacts the City.

A Special Meeting will be held on October 22, 2010 at 6:00 p.m.

Mr. Richard Kerchhoff requested that the Resolution of Approval be made available to public after adoption.

After a short break was taken at 8:20 p.m., the Planning Commission resumed the meeting at 8:27 p.m.

Chairman Littleton called for the Preliminary Review of amended Partitioning Application No. 0710-02 requesting the partitioning of a property located at 2 St. Lawrence Street on Block 33, Lot Nos. 22, 23, 24, 25, 26, 27 & 28, into two (2) lots with Lots 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 on behalf of the owners of the property.

Building Inspector Sullivan gave her report with exhibits. (See report.)

- Exhibit A. Application packet.
- Exhibit B. Existing Conditions Plan – Lot Location and Topo Survey Plan dated July 6, 2010.
- Exhibit C. Division Survey dated July 6, 2010.
- Exhibit D. Correspondence packet from Chase T. Brockstedt, Esq. dated August 19, 2010 and received August 20, 2010.
- Exhibit E. Response from City Solicitor Glenn Mandalas to Chase T. Brockstedt, Esq. dated August 24, 2010 and received August 25, 2010.
- Exhibit F. Packet submitted by Chase T. Brockstedt, Esq. dated September 2, 2010.

Exhibit G. "Speed Message" to Sussex County Assessment Office Court House from City of Rehoboth Beach dated November 22, 1978.

City Solicitor Mandalas added that it has been the Building Inspector's practice that she bases her report on the survey which is submitted by the Applicant, so the dimensions, square footage, etc. she gave are all based on the Applicant's survey. He would not want her report to be presumed as acquiescence by the City that the survey submitted by the Applicants is indeed the property that is owned by the Applicant. City Solicitor Mandalas wanted to make sure that her report is not used sometime in the future as evidence to say the City is acquiesced to the ownership.

Chairman Littleton did not find where the Applicant has given those figures which were noted in the Building Inspector's report. The Application does not provide those figures. The amended Application talks about three lots. Ms. Sullivan said that the figures were based on the survey which was submitted. She also has an email dated September 20, 2010 that says the land lying between Lot Nos. 22, 23, 24, 25, 26, 27 & 28 and the Atlantic Ocean is owned by the Applicant and will be conveyed with the newly created lots comprising Lot Nos. 22, 23, 24, 25, 26, 27 & 28. Ms. Sullivan confirmed that the dimension in the report with the 573 foot lot line are Lot Nos. 22, 23, 24, 25, 26, 27 & 28 plus the area between those lots and the Atlantic Ocean.

Mr. Chase T. Brockstedt, Esq. represented the Applicant, 2 St. Lawrence Street LLC. Correspondence has gone back and forth; and hopefully he has been able to clarify some of the confusion.

Chairman Littleton said that Attorney Brockstedt has stated the Applicant's ownership of the land going to the ocean. The amended Application itself gives different dimensions, and it will be a requirement that the Application itself specifies what the size is.

Attorney Brockstedt said that the Application has not been amended. The Application that was originally submitted is the same Application being brought forward tonight. The Application has been supplemented with additional information, but the Application has not been amended.

Chairman Littleton said that when the Planning Commission asked about the ownership of the land to the ocean, the Applicant through his attorney said that they did not know. Attorney Brockstedt concurred. He has made that clear in his correspondence that it is a question he is unprepared to answer. However, the answer was in the Application itself which is that it is clearly identified in the deeds and on the only survey that has been provided with the Application.

Chairman Littleton said that the Application itself does not include that land. Attorney Brockstedt said that the Application which was submitted said to see the attached survey.

Attorney Brockstedt provided a chronology to help in a path forward. His efforts and the Applicant's effort have been made in good faith. On July 2, 2010, the Application package was submitted along with a check and all of the copies required. Ms. Sullivan had made a followup call to his office saying that she needed the larger drawings for the tree plan which was later provided. On July 21, 2010, a public notice was issued that identified the property which is being partitioned by address, block, Lot Nos. 22, 23, 24, 25, 26, 27 & 28; and it identified that the Applicant is seeking to divide Lot Nos. 22, 23, 24, 25, 26, 27 & 28 into one lot, Lots 22 & 23 and a second lot which is Lots Nos. 24, 25, 26, 27 & 28. Attorney Brockstedt did not agree that this was a defective advertisement. On August 6, 2010, the Building Inspector's report in its purpose, location, project description and discussion sections identified that the Applicant is seeking to divide Lot Nos. 22, 23, 24, 25, 26, 27 & 28 into two lots, Lots 22 & 23 and Lots 24, 25, 26, 27 & 28. At the August 13, 2010 Preliminary Review, it was requested that the Applicant provide Affidavits signed by all of the members of 2 St. Lawrence Street LLC, which was provided on September 2, 2010. There was a question about the protection of trees as identified on the tree planting/protection plan. It had come to light that members of the Planning Commission had not received the larger drawing, and they had only received the smaller drawing. The protection is identified on the drawing which has been provided to the Planning Commission in larger form. There was also a question regarding the ownership of the land to the east of Lot Nos. 25, 26, 27 & 28. Attorney Brockstedt admitted that he was not prepared to answer that question. However, that question was answered literally in the days following the meeting. On August 13, 2010, there was a vote to move this Application forward to Public Hearing. In Section 236-8.1(C) of the Code, it states that a substantially complete application shall be placed on the agenda for a public hearing. On August 16, 2010, Attorney Brockstedt received an email from the City Solicitor in which he attached a snapshot of the parcel from the County Tax Map. That email he received on August 16, 2010, the first business day after the Preliminary Review, and it states in part "[T]ake a look at the County Map concerning the land east of 2 St. Lawrence Street. The County Map suggests your client may own more than your survey showed. The City is not conceding nor disputing ownership at this time had you



previously seen this.” Attorney Brockstedt’s response to the City Solicitor a couple of days later was “[G]lenn attached to this email is the lot and location survey plan that accompanied the Application for the referenced matter. I spoke with Chuck Adams who is the Applicant’s surveyor about the issue that was raised. He indicated to me that the land owned by the Applicant extends east to the mean low water line. He further indicated that the property line is the heavy outside perimeter line. This seems consistent with the County Map snapshot which you sent to me on Monday. This should resolve the ownership and notice issue.” The notice issue was raised at the Preliminary Review. After Attorney Brockstedt left the Preliminary Review, he went home to take a look at the Application and found what he thought to be the answer to the question that he was asked and was unprepared to answer. Attorney Brockstedt confirmed that answer with Chuck Adams before he responded to City Solicitor Mandalas’ email just to make sure that he was seeing things the same way that Chuck Adams was. Much to Attorney Brockstedt’s confusion, a couple of hours after he responded to the City Solicitor’s email, he received an email that said that there was a significant change to the partitioning application based on a new survey. A flurry of emails went back and forth later that day and the following day in which Attorney Brockstedt attempted to reiterate repeatedly that there has never been a second survey. There has only been one survey which is the survey that was submitted as part of the plan. On August 18, 2010 based on the significant change of the Partitioning Application which was a result of the belief that there was a new survey, it was determined by some decision that the Application needed to be amended and that it had to go through Preliminary Review again. This was followed by correspondence back and forth in which he attempted to explain that the survey was not new. They are the same lands that were identified in the Application to be subdivided, and they are the same lands today. There was followup correspondence from City Solicitor Mandalas to Attorney Brockstedt in which there were different reasons provided regarding the need for another Preliminary Review, and it changed from significant change because of a new survey to the ownership information provided both during and following the Preliminary Review and confusion. The reason the Application did not go to a Preliminary Review, from the Applicant’s perspective in accordance with Section 236, was not because there was a new survey but because there was some confusion regarding the Application. Attorney Brockstedt has done his best to state in correspondence to the City and most recently, a week ago yesterday, that all along the land lying to the east of Lot Nos. 25, 26, 27 & 28 is land which is going to convey to the extent that it is every going to convey along with the newly created eastern lot. The reason why that this 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 lands lying to the east of 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 the lands which is the dune, boardwalk and beach going to the mean low water line which changes in dimension every day. It changes in dimension with the season, tides, etc. Whatever right title or interest there was to that land in its pre-partitioning state, the only change would be that in its post-partitioning state the newly created Lot Nos. 22 & 23 would have no right to that land. Whatever right exists to that land today would only be held by the owners of the newly created Lot Nos. 24, 25, 26, 27 & 28, the beachfront lots. By including that land and identifying that there is this part of the newly created lot which is designated differently from the zoning classification standpoint which is designated differently from a use standpoint which changes in size every day which has disputed ownership, it was not part of the lot that was going to be created. There may be some right, title and interest in that land that may convey, but for purposes of an application, the Applicant was not seeking to subdivide that land. The Applicant was not seeking any action with regard to that land whatsoever. It is not a third lot. That is a right to something which is clearly disputed, and the Applicant does not dispute that fact. The originally submitted Application submitted accurately depicts, from the Applicant’s perspective, the property that it owns which accurately depicts the land which it seeks to be subdivided which undisputedly meets the three requirements under the Code – 50 feet of road frontage for each new lot, each new lot being 5,000 square feet or greater, and each new lot being able to have a 4,000 square foot rectangle with 48 feet at its shortest side. There has been no opposition submitted to this Application, and there has been no evidence that has been put in the record at all that this will negatively impact the health, safety and welfare of the citizens of Rehoboth Beach. Attorney Brockstedt referred to case law. The Applicant is presumptively entitled to have this Application approved. The only caveat to that is if the Planning Commission can articulate a non-arbitrary basis for denial. All of the evidence in the record has been the same from the beginning. The only additions to the record have been supplementations that the Applicant has been asked to provide. Regardless of any correspondence that has been submitted, the documents speak for themselves; and they are unchanging and will not be changed. The requirements under the Code have been met.

City Solicitor Mandalas said that every drawing submitted with the Application shows a dashed line between Lots Nos. 25, 26, 27 & 28 and the land going to the ocean except for one. The one that changes it is in the division survey plan which shows where the land is being divided; and that becomes a solid line. That is the plan the Planning Commission was looking at that evening. The solid line creates two lots. It says in the

notations that it is land running to the Atlantic Ocean. That is one of the reasons this has caused confusion with what is actually being subdivided. All of the discussion at the last meeting was about two lots being created from Lot Nos. 22, 23, 24, 25, 26, 27 & 28. The understanding that everyone was laboring under was that there might have been a notice problem because no one knows whether the land going to the ocean is probably the City's land and it needs to be double-checked to be sure. Chairman Littleton said that the public notice gave no ownership to that land.

Attorney Brockstedt said the public notice is to just identify the square footage of the lot, and it was silent to the land to the east.

City Solicitor Mandalas said agreed that the Planning Commission should have looked more carefully at some of the drawings because it is clearly marked there. It is unfair to say that everything was plain and obvious when all of the surveys show the dashed line except for the division survey that shows a solid line. It looks like it is creating the lot at that line. In addition to that, the surveyor set an iron bar at that point to draw that line.

Chairman Littleton said that when the Applicant through his attorney was asked about ownership, an answer was not given. He asked if the Applicant cannot tell the Planning Commission who owns the land, then why is it a presumption of the Planning Commission that on its own it is going to discover something that the Applicant cannot answer. He resented the implication that the Planning Commission should do the research. Mr. Richard Harris said that the deed was part of the Application. He said that it was brought up in the context of the notice, and he thought the issue was resolved. At that meeting, the Planning Commission voted to move forward with the public meeting. The deed refers to the numbered lots and the land between those lots and the ocean. In looking at the surveys, the text describes that land as being owned by the Applicant, and the pictures depict ownership.

Chairman Littleton said that there are two options: 1. Debate having the Preliminary Review tonight. It can be pulled off the table and can be appealed to the Board of Commissioners. 2. Proceed with the Preliminary Review. The reason for proceeding with the Preliminary Review is because the public was not duly informed of what this Application was. Attorney Brockstedt said that he and the Applicant would like to move forward with the Preliminary Review tonight, and that the Applicant did not provide false information which led to the public being misinformed. The deed and the survey were provided to the Planning Commission. Chairman Littleton disagreed. In going back to Application and the dimensions of the original submission, the information has not been provided.

Chairman Littleton said that the Planning Commission has no problem with holding the Preliminary Review this evening. The majority of the Planning Commission members have significant problems with the Application. An amendment to the Application was submitted on September 20, 2010. The starting size of the property has not been submitted. The Building Inspector constructed dimensions based on the survey. The Applicant needs to tell the Planning Commission what the size of the existing lot is.

Attorney Brockstedt said that the deed identifies plotted Lot Nos. 22, 23, 24, 25, 26, 27 & 28 and land lying to the east of the plotted lots extending to the Atlantic Ocean. Ownership is being claimed to the right to the land lying to the east of the plotted lots.

City Solicitor Mandalas said that the Planning Commission is asking for the dimensions of the land currently owned in its entirety including the land running to the ocean and the plotted lots; and given those dimensions, what the dimensions are of the lots to be created. Attorney Brockstedt said that Lot Nos. 22 & 23 would consist of 5,020 square feet, and Lot Nos. 24, 25, 26, 27 & 28 including any right in the lands lying to the east of the plotted lots extending to the Atlantic Ocean would consist of the 125 feet x 100 feet lot. The way he has stated it is the legal description in the deed.

Chairman Littleton said that the Affidavits do not include that language of the right in the lands lying to the east of the plotted lots extending to the Atlantic Ocean. Mr. Harris said that he had filled out that part of the Affidavits. He was not sure if the land between the numbered lots and the ocean was a lot. Attorney Brockstedt said that if the Planning Commission would like the Affidavits amended to identify the lots as they are depicted and restate the language in the deed with the land lying to the east, the Applicant will do that. The Affidavit specifically calls for the lots that are being divided. The lots that are being divided are Lot Nos. 22, 23, 24, 25, 26, 27 & 28. Chairman Littleton said that there would be three lots, and this would be considered a minor subdivision.

Chairman Littleton said that from the Planning Commission's standpoint, it needs to begin with a given

starting dimension then ending up with what the resulting dimensions would be. If there are going to be two parcels out of one parcel, then that fits in with a partitioning. If there are going to be three parcels, then that would be a minor subdivision.

Attorney Brockstedt said that what he does not want to have happen is identifying the lot that is the entire parcel and then creating from that an eastern lot which would consist of Lot Nos. 24, 25, 26, 27 & 28 plus whatever right is out there. He understands that it is disputed land, and the Applicant does not want to get into a quiet title action or where the dispute is ownership of gotten land impacts this. Whatever the right and interest in that land is, the Applicant wants it to stay status quo.

Chairman Littleton said that if the Planning Commission would approve the partitioning, it would be the first time the City through an official body did some statement relative to that land. Attorney Brockstedt disagreed.

Attorney Brockstedt asked if it is possible to allow this partitioning to proceed without the Applicant or the City taking a position on that land. Chairman Littleton said that if the Applicant can prove he owns the land, it would solve everything. It is incumbent upon the Applicant to show the City that he actually owns the land. The Planning Commission cannot take any legal action, and it cannot partition something that the Applicant does not own. There is challenge to the Applicant's ownership of that land. Attorney Brockstedt said that the Applicant does not dispute that. It is some right in that land.

City Solicitor Mandalas said that on the table, it shows two new created lot, one 50 feet x 100 feet and one 125 feet by 100 feet with a total square footage given to both of those. Then there is additional land that is 44,268 square feet. The question the Planning Commission has to deal with is the issue of some right. After the two lots are created, the Planning Commission will have approved through a partitioning process, a three lot minor subdivision if it is ever concluded there is a right; and the Planning Commission cannot do that. The position can be taken of putting the 44,268 square feet into the proposed new No. 2 and move forward under those two newly created lots. Leaving it out there as some right becomes ambiguous for the Planning Commission, and it will not know ultimately what it is approving.

Mr. Mellen said that if it is ever challenged as to what can be done in the O-1 zoning area and if it is assumed that someone owned that land, then that could impact the building restrictions, FAR, etc. It is necessary to understand ownership because things could change such as taxes, liability relative to people, maintenance of the land, etc.

Mr. Richard Harris said that in looking at the survey, there is a space between the numbered lots and the Boardwalk. In the area between the numbered lots and the Boardwalk, there is a sand fence. In the 1980's and 1990's, the City made his father do the maintenance on the sand fence. Since his father is no longer alive, the City is telling Mr. Harris that he has to do the maintenance, and the Planning Commission is telling him that the land may not be his. That is recognition by the City that 2 St. Lawrence Street LLC does have some rights to that land. The County has the land shown on the Tax Map, and the State of Delaware through DNREC asked for an easement to that land. Square footage cannot be put on the land to the east. Over time, the square footage cannot be pinned down. The land can be defined as Lot Nos. 24, 25, 26, 27 & 28 and it would be the nature of a quitclaim deed to whoever owns it. If the east lot can be defined, then the Application can move forward.

Mr. Patterson did not think that the Planning Commission should prejudice the City's claim, and he wondered if there is some way to move forward without prejudice to the City's claim to that property and not put the Applicant to the burden of proving anything more than what they have a deed to that land. Chairman Littleton said that there is no evidence of purchasing or transferring the land. The City is on record that the Applicant does not own the land.

Mr. Harris said that the Speed Messago refers to Lot No. 93 or Lot No. 93.1. The City is conceding ownership of Lot 92 which is east of the numbered lots. To settle the issue, a quiet title class action suit would take all the oceanfront properties and bring them all together to resolve this dispute once and for all. It should not be the burden of the Planning Commission.

City Solicitor Mandalas said that in regard to the maintenance of a fence, the City asks owners all the time to maintain sidewalks and repair sidewalks, etc. With regard to whether the Planning Commission can approve a partitioning when there is a question of ownership, everyone agrees that there is enough land clearly owned by the Applicant to create two lots. Neither City Solicitor Mandalas nor Attorney Brockstedt has been able to find any case law that is analogous to this circumstance.

Mr. Mellen said that the moment the Planning Commission acquiesces to potential ownership of that land and goes on record and lets the next deed be recorded, there is an implication that the Planning Commission has endorsed that ownership because it will be declared in the deed. Attorney Brockstedt said that he would be willing to figure out with the Planning Commission or the City Solicitor any way to make it so that nothing changes in regard to that land. Whatever disputed rights the Applicant has in the land today, those will not change in favor of the City or in favor of the Applicant afterward. This is a way where the land is clearly subdividable and can be partitioned. The eastern lot of 5,020 square feet is undeveloped land and can be separated from the larger parcel. The way through is to make it a condition that nothing changes in regard to the separately identified land lying to the east.

Mr. Harris said that this is not an isolated incident. There are at possibly 12 other beachfront parcels that show land beyond the current subdivision with the numbered lots. Mr. Harris said that his father purchased the property in 1970. In that deed there is a recitation concerning this property beyond the number of lots going out to the ocean. Prior to that, the Marshall deed in 1926 and recorded in 1927 refers back to the 1876 map. In that deed there is a recitation of certain lots. There is an extensive recitation after that which the language can be interpreted that there might be other property which goes with the other rights. It does not look like the footprint of the 1876 map corresponds exactly with the footprint of the current map that the City is using. If those maps are not entirely concurrent, the arguably the 1876 map would show a footprint going out further than that. All of the 12 properties give an indication. To answer the question, every deed has to be studied to try to understand where the rights came from. There should be a way to describe the land out there in a manner that will not have the Planning Commission put a stamp of approval on the Applicant's ownership. Quitclaim deed language explains itself and is the vehicle probably needed to employ so everybody has an understanding of ownership and the way to transfer that land. The Applicant needs to have that language in the deed if the land is sold. Mr. Mellen said that in the first Marshall purchase in 1926, it is clear what was bought. Mr. Marshall did not buy any land running east towards the ocean. In looking at the 1876 plat, it is very clear what those lots are relative to the new plat where the lots remain on Bock 33. Mr. Patterson said that a deed is not definitive evidence.

City Solicitor Mandalas said that the Application can go to Public Hearing. The Planning Commission needs him to give it some legal research on the question of whether the Planning Commission can subdivide the property when there is a question of ownership. Some of the burden is on the Applicant as well as the City. The Planning Commission will ultimately want to hear from City Solicitor Mandalas on that legal issue. What the Planning Commission does in this case could have implications for other properties; and that make this Application significant. One of the reasons the Planning Commission is wondering about ownership and what the Applicant should be willing to do with ownership is that there is a difference here and a private conveyance of land that has similar language in the deed. The difference is that the Applicant is coming to the City and asking the City to take action. And at this point the City is saying that it needs clarity if it should take action on the land. City Solicitor Mandalas thought the research could be done before going to Public Hearing at the next meeting. If the Planning Commission wants a pristine application, it would be better that the Applicant amends the Affidavits.

Attorney Brockstedt, Mr. Harris and City Solicitor Mandalas will work to figure out a way regarding the issue of ownership. Mr. Harris said that hopefully they can find language where neither side has to concede the point and where neither side is committing or supporting the point.

Mr. Patterson was uncomfortable not having someone who has authority to speak for the City and City's claims of property ownership and putting the dispute on the table if it appears the ownership issue needs to be clarified. City Solicitor Mandalas said that the City disputes this claimed ownership.

Attorney Brockstedt requested that all correspondence including emails be made part of the record. With regard to the documents obtained by Mr. Mellen and Mr. Spies and the memo from Mr. Spies and Mr. Mellen as well as the chronology chart with comments, these will be made part of the record.

Mr. Harris provided a photo of the outdoor shower area on the property.

Attorney Brockstedt's purpose for submitting the easement was because the Application specifically calls for identifying accessibility.

Mrs. Konesey made a motion, seconded by Mr. Markert to move the 2 St. Lawrence Street Application to Public Hearing at the next Regular Meeting with the conditions that have been discussed. Motion carried unanimously.

**NEW BUSINESS**

There was none.

**OTHER BUSINESS**

Chairman Littleton called for the Building Inspector's Report.

There was nothing to report.

Chairman Littleton called for the City Solicitor's Report.

City Solicitor Mandalas reported that Cape Henlopen School Board has signed the conservation easement, and it will be recorded next week.

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

Chairman Littleton announced that Mayor Cooper is placing the reappointments to the Planning Commission on the agenda for the October 15, 2010 Regular Meeting. He has asked Mrs. Konesey to Chair and be the sole member of the Nominating Committee for the officers of the Planning Commission. Mrs. Konesey will be contacting the other Planning Commission members for potential nominees.

Chairman Littleton reported that the Mayor and Commissioners have before them the issue of noise, patios and restaurants. Patio and noise ordinances are being proposed.

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

Mrs. Konesey made a motion, seconded by Mr. Spies, to adjourn the meeting at 9:58 pm.

**RECORDED BY**

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(Ann M. Womack, Recording Secretary)

**MINUTES APPROVED ON  
MARCH 11, 2011**

\_\_\_\_\_  
(Preston Littleton, Jr., Chairman)