

**PLANNING COMMISSION MEETING  
CITY OF REHOBOTH BEACH**

**October 11, 2013**

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:32 p.m. by Chairman Preston Littleton on Friday, October 11, 2013 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

**ROLL CALL**

Mr. Francis Markert called the roll:

Present:        Mr. Brian Patterson  
                     Mr. Harvey Shulman  
                     Mr. John Gauger  
                     Chairman Preston Littleton  
                     Mr. Francis Markert, Jr.  
                     Ms. Lynn Wilson

Absent:         Mr. David Mellen  
                     Mrs. Jan Konesey  
                     Mr. Michael Strange

Also Present:   Mr. Glenn Mandalas, City Solicitor (left meeting at 8:15 p.m.)  
                     Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

**VERIFICATION**

Ms. Ann Womack, City Secretary, verified that the Agenda was posted at City Hall, Building and Licensing Department and the City website on October 1, 2013. The Agenda was faxed to Cape Gazette, Coast Press and Delaware State News on October 1, 2013. An E-News blast was also sent out on October 1, 2013.

**APPROVAL OF MINUTES**

No Minutes were available for approval.

**CORRESPONDENCE**

1. Letter dated October 1, 2013 from Stan Mills regarding the Planning Commission's charge by the Commissioners to review the tree ordinance and policies.
2. Letter dated October 1, 2013 from Amantha S. Allen regarding concern about the current Rehoboth Beach City tree trimming code.

**OLD BUSINESS**

There was none.

**NEW BUSINESS**

There was none.

**OTHER BUSINESS**

Chairman Littleton called for the presentation and discussion by Mr. Patterson regarding possible changes and amendments to the City Tree Ordinance based on public input, interviews and recommendations received by the Planning Commission and research conducted by the Commission with regard to Resolution Regarding the City's Trees passed by the Mayor and City Commissioners asking the Planning Commission "...to research and propose amendments, as necessary, to the City's ordinances, regulations or procedures which are designed to protect and augment the City's urban forest in order to ensure the environmental health, beauty and enjoyment of Rehoboth Beach's trees". Chairman Littleton also called for discussion of planned transmittal report to the Board of Commissioners and to identify any additional data needs and plan to attain the same.

Mr. Brian Patterson reviewed what the Planning Commission has been asked to do by the Board of Commissioners, what has been learned in its review since last winter or early spring and go through key ideas to

possibly amend the ordinance. The changes from the City Commissioners were to: 1. Make proposals to better fulfill the purposes of the tree ordinance. 2. Make the tree ordinance easier to understand. 3. Make the tree ordinance more equitable in its interpretation and application. 4. Incorporate elements from other jurisdictions. 5. Propose measures for effective notice to neighbors and other interested parties. 6. Use the State of Delaware's list of approved or suggested trees. 7. Develop a plan to create a Community Forest Plan for the City. 8. Recommend other measures to eliminate inconsistencies and inefficiencies. 9. Recommend effective implementing powers of City commissions and other regulatory bodies. 10. Estimate the resources required for effective enforcement. 11. Propose a plan and resources for effective communication and education. 12. Propose further steps to be taken in concert with DNREC and other agencies. The benefits of an urban forest (1) improves air quality, (2) reduces noise pollution, (3) improves water quality, (4) reduces energy costs, (5) reduces stormwater, (6) lowers sidewalk and street temperature, (7) shaded asphalt last longer, (8) people linger and shop along tree-line streets, (9) lower crime rates, (10) higher property values, (11) lower obesity rates and (12) mental health benefits. A lot of research has been done to quantify the benefits and costs. The top three are higher property values, reduced energy costs and reduced stormwater costs. The US Forest Service has estimated that well placed trees can reduce cooling costs on a building by 15-35%, reduce heating costs by 10-15%, reduce sidewalk temperature by 10 degrees in the summer and increase residential values 3-7%. The US Forest Service provides free software that municipalities can use to plug in the kind of data from the Davey Resource Group study and quantify the values for the City of the street trees and park trees. The US Forest Service has studied approximately 20 municipalities over the last ten years using the research it built the software with and developed some costs. Berkeley, CA, Charlotte, NC and Charleston, SC were used as examples. The average benefit of public trees in those cities was \$47.00-\$67.00 in added value every year. Maintenance per tree average from \$21.00-\$65.00 per tree. The return on investment averaged \$2.00-\$45.00 annually. The average benefits per street and park tree annually was property value/aesthetic - \$32.00, stormwater reduction - \$24.00 per 2,461 gallons, electricity and natural gas savings - \$11.00 and net CO<sub>2</sub> reduction - \$2.00. Mr. Patterson provided the average benefits by species, energy savings, stormwater, aesthetic and average canopy by species in Charlotte, NC, for Willow Oak, Red Maple, Loblolly Pine, Crepe myrtle and American Holly. The average benefits per species range from \$8.00-\$166.00; energy savings ranges from \$2.00-\$24.00; stormwater ranges from \$2.00-\$74.00; aesthetic ranges from \$2.00-\$73.00 and average canopy by species ranges from 124 square feet - 1,473 square feet. It sends a clear message that it is not about the quantity of trees as much as the quality of trees and the quality they provide to the City. The ordinance should be refocused around the kind of trees that provide benefits such as canopy, etc. The City really has two separate ordinances, one for public trees and the other is for trees on private property. With regard to public trees, the City needs to adopt a plan for planting and maintaining more street trees. This would require will and money, and tweaks would need to be made in the ordinance on public trees. What the ordinance does well for trees on private property is protecting existing trees and tree replacement. There are opportunities for improvement such as: 1. The right tree in the right location which would better fulfill the purposes of the ordinance and would increase canopy. 2. Equity in interpretation and application, in appeals, and notices and communication. 3. Simplicity of the ordinance so it is easier to understand; and eliminate inconsistencies and inefficiencies. A common understanding is needed of the architecture of the ordinance. There are three fundamental building blocks: 1. Density requirement. 2. Protection/permit for removal. 3. Mitigation after removal. The main motivations for changing the architecture are the right tree in the right place, simplify and equity. With regard to the density requirement, the City Commissioners have adopted a 40% canopy goal, which is a 1/4 increase in canopy from the mid-32% current canopy. The basic density requirement is three trees on a 5,000 square foot lot or 26 trees per acre. To increase the canopy, Mr. Patterson did not see how the density requirement could be reduced. Since 2006, the City has focused on the number of trees on private property with regard to density. The idea would be to choose the right tree for the right location, simplify and eliminate nonessential distinctions such as deciduous vs. evergreen, front yard vs. other locations and choosing from the DNREC list of species plus others approved by the Arborist, and equity. He suggested changing the focus to the species that provide medium to large trees. With regard to equity, partial credit could be allowed for line tree and street trees where the property owner takes care of the maintenance. The second major element of the ordinance is tree protection and removal permit. With regard to the right tree in the right location, this would allow removal of a tree when it interferes with the development of another healthy protected tree. Currently, the City protects juvenile trees that will never provide shade benefits it is seeking. With regard to simplicity, protection could be eliminated for trees smaller than 5-6 inch caliper, and protection could be eliminated for non-approved species unless they are specimen, historic or a tree stand. With regard to equity, a prior notice of tree removal would be required by the applicant to adjacent property owners. There could be a non-discretionary fee in lieu of mitigation, and appeals would be made to the Board of Adjustment vs. Parks and Shade Tree Commission. The last building block would be mitigation. With regard to the right tree in the right location, a specified fee could be paid in lieu of mitigation for street trees, and it could be allowed by planting adjacent street trees where the property owner is

taking care of maintenance of the tree. An idea to consider for simplifying mitigation would be to replace tree-for tree instead of inch-for-inch. With regard to equity, the City Arborist or Board of Adjustment would have to determine that on-site mitigation is an undue hardship. The key questions for the Planning Commission to consider are: 1. Does it agree to focus the ordinance on shade trees where small tree species would be disregarded and the density requirement would be made more rigorous (medium-large trees)? 2. Does it agree that a focus on shade trees calls for flexibility in how density and mitigation are met by apply a credit for privately-planted street trees and a specified fee in lieu of mitigation? 3. Does it agree that a focus on shade trees calls for relaxing the tree protection requirements by not protecting juvenile trees, and not protecting non-approved species unless they are specimen, etc.? The next steps would be for the Planning Commission to discuss key issues which will be discussed at tonight's meeting; Mr. Patterson will draft revised ordinances for review and discussion and Chairman Littleton will draft the Planning Commission report for review and discussion. An open item would to estimate costs and quantify benefits using the i-Tree software.

Chairman Littleton said that the objective is to get consensus on how to move forward. The proposals that Mr. Patterson laid out are good.

Mr. Patterson said that if there are trees located in the footprint of a house, currently the City would approve a tree removal permit. He was not proposing to change this. The only issue would be what the mitigation implications are of that such as meeting the density requirements on the property after the removal of the tree, the types of trees to replace it with and how to mitigate offsite if mitigation cannot be done onsite. Currently, the first preference is to mitigate that onsite. The question is how much is needed to mitigate. Currently, if mitigation cannot be done onsite, a property owner can ask to mitigate in some other way such as offsite or with a fee. Mr. Patterson proposed to change that the fee would be specified; and the owner would still have the option of planting a tree offsite or paying the specified fee. His preference would be to first look to see if they would have a location to plant street trees abutting their property. The next step would be that if the tree cannot be planted on the property, then it would be able to be planted in the street tree area. If mitigation would not be satisfied that way, then the owner would pay a specified fee which would go into a fund that the City can use.

Chairman Littleton thought that there should be no mitigation required for removing a tree that would be located in the footprint of the house. It would still have to meet the density requirements.

Mr. Patterson noted that Commissioner Mills' comment that a property owner should be allowed to remove trees reasonably without penalty to construct a new house or new addition is inconsistent with considering offering incentives to encourage building around trees. Chairman Littleton disagreed.

Mr. Shulman said that if someone removes trees in the center of a lot and there is no consequence to that, it will be difficult as a community with individual obligations to sustain 40% canopy. Chairman Littleton said in the Planning Commission's calculations, there is no way the City can meet 40% canopy on private property. Mr. Shulman said that the biggest legal arguments have to do with people taking down trees in setbacks areas in the front and side yards or really close to the house.

Mr. Patterson acknowledged that by eliminating the focus on small trees, it would change the messaging of the ordinance and make it more about shade trees and canopy. Chairman Littleton and Mr. Gauger agreed.

Ms. Wilson thought that the right tree is the larger canopy tree. Great trees can be planted in a smaller setback is they are planted after the house is built. Canopy can be increased if there is concentration on the big canopy trees from now on. Mr. Markert agreed. He would like an ordinance that through it workings can basically give large trees a chance in the future and some way perpetuate that. The goal is to ensure shade trees and the character of the City. Another critical point is what the strength of the 40% goal is and how it is adhered to, etc. There has to be some underpinning of the ordinance with that overarching goal.

Mr. Shulman said that three inch caliper only comes into play in two places in the ordinance. 1. A protected tree is an existing tree of three inches in caliper or more which is necessary to meet the density requirements. 2. An existing tree of three inches in caliper or more that is in the area between the front lot line and the front of the residential structure. Most of the dispute is where people want to take down trees in the setback areas. The hard issues are not with the trees in the center of a lot where a house will be built.

Chairman Littleton noted that there are three triggers – building permit, subdivision and demolition. Ms. Wilson said that she would like to add property transfer as a fourth trigger. Ms. Sullivan said that Building & Licensing does not get any of that documentation so she would not know how that would be enforced.

Mr. Patterson said that under his proposal, a person could cut down an oak tree that is less than five inches in caliper without a permit. Small species and juvenile trees could also be cut down without a permit. The density requirement only needs to be met at certain point in time. The permit requirement is different. A person has to get a permit if they are going to remove a three inch caliper tree from the front yard. He is proposing to raise the three inches to five inches in caliper and lower the other number from six to five. It would be a more simplified requirement.

Mr. Markert suggested that there should be small caveats or exceptions for certain trees in different areas of the City.

Chairman Littleton thought that there should be no penalty for people removing trees as long as they would have the required minimum of those trees.

Chairman Littleton noted that the status of the Board of Commissioners action on the recommendation submitted by the Planning Commission on August 16, 2013 relative to the Resolution Regarding Side Lot Setbacks For Properties With Frontages Greater Than 50 Feet is that it was being worked at the Workshop Meeting and will be brought to the next Mayor and Commissioners Regular Meeting.

City Solicitor Mandalas acknowledged that the Commissioners want to something about this issue.

Chairman Littleton noted that as an updated and possible further action regarding the recommended ordinance submitted to the Board of Commissioners on June 4, 2012 – “An Ordinance to amend Chapter 270 of the Municipal Code of the City of Rehoboth Beach, Delaware, 2001 by amending Sections 270-4 and 270-46.1, relating to lot merger for zoning purposes”, the City needs to resolve the issue of merger/unmerger.

City Solicitor Mandalas was not aware of any activity at the Board of Commissioners level. There are two applications before the Board of Adjustment that relate to the issue of merger/unmerger and whether a person needs to go to the Planning Commission for a partitioning or go to the Board of Adjustment with an appeal of the decision of the building inspector.

Chairman Littleton thought that the Planning Commission should resubmit the resolution to the Board of Commissioners. The City needs clear direction on this issue about unmerger. He suggested that the resolution should be attached to his report to the Board of Commissioners for its next Regular Meeting on October 18, 2013. There is evidence that this issue is becoming a more pressing problem, and action needs to be taken. There was consensus for Chairman Littleton to resubmit the resolution.

Chairman Littleton referred back to the agenda item on trees.

Mr. Patterson noted that the reason why he had proposed the change to the size of caliper is because it serves the purpose of simplifying some of the charges and it serves making the ordinance more equitable. If people have a tree in their backyard that is less than five inches in caliper, they are cutting it down with a handsaw; and nobody will ever know. If people have to partition a lot or get a building permit, they get caught in the ordinance over the small trees, and then they have to get a permit and justify it. In lots of case, they cannot justify it under the reasons given in the Code. Other ways to approach this would be to add more reasons why trees can be taken down, but then that would apply to not only the small trees, it applies to big trees; and that could be a worse outcome. It would require them to mitigate which some people say is unequitable. An obvious solution is to sacrifice the little trees.

Ms. Sullivan said that her only issue with that is when a house is built, Building & Licensing requires the owner to plant three trees with three inches caliper. Owners are only required to maintain those trees for one year. So if two years later those trees are still below the five inches caliper, she did not know what trigger would be if the owners cut down those trees. She would agree to it if it could be written that trees can be removed below five inches in caliper as long as the density requirement is met, if the density was required to be met at some point.

Mr. Patterson said that what he has proposed would apply to all existing trees.

Chairman Littleton said that an objective would be to allow people to remove trees that are smaller than three inches caliper however there must be three of the right kind of trees remaining on the property. It would be a requirement to put the right tree in the right place.

Mr. Patterson said that one of the requirements of being a protected tree would be that it is necessary to meet the density requirement, and it is three inches caliper or more. The bar has been raised to only apply to the shade tree species. An existing tree in the wrong place is not currently a reason to get a permit. The City Arborist could be given discretion to give a permit to remove any tree if it will be replaced by the right tree in the right location. If this would be written into the Code, there would be no way to overturn that exercise of judgment. Mr. Shulman said that there has to be balance to the discretion so there would have to be standards. Mr. Patterson said that his solution, apart from additional discretion to the Arborist, to allow an existing healthy tree to thrive, the Arborist could issue a permit to remove other trees in that location. To plant a new tree in a better location and give a permit to remove other trees in that location would be a whole other order of magnitude of discretion. Mr. Patterson thought there was consensus that when counting for density or for planting new trees for mitigation to come up to density, the species would be limited to the medium and large shade tree species. A list of trees that would qualify in the medium and large shade tree species would need to be written. Discussion ensued.

Ms. Sullivan said she would not have a problem that a tree under six inches caliper is not protected.

Mr. Markert thought that there should be exceptions for people who have properties with tremendous tree density. A baseline needs to be established. It is reasonable that the Arborist would have certain discretion, and guidelines could be created for that person.

Mr. Shulman said that the best answer would be that the Planning Commission trusts the fact that the City has invested money in a learned person who has no proprietary interest in what is going on, knows the overall goals of the City and can make a decision for a lot. With regard to the Arborist having discretion, the only way it would work is if what would be built into the process that once the Arborist would make a decision, the only way that decision could be overturned by the Board of Adjustment is if it would be a total abuse of discretion without any basis in the record.

There was consensus that there should be grounds for a removal permit to remove existing trees to allow another existing healthy qualified tree to thrive. Mr. Shulman did not agree with it being started that broadly, but he agreed with the concept. There was consensus to remove existing trees in order to plant another qualified tree assuming there is a high bar for a good tree in a good location.

Mr. Shulman said he did not have a problem with the idea of removing a three inch or four inch caliper tree replacing it with another three inch or four inch caliper tree that provides the same or better canopy within a reasonable time. It would be hard to come up with a general rule that applies throughout the City when getting to a certain size tree. If the Planning Commission is looking to eliminate the worst extreme problems, at some point there is a cutoff where people should not have to replace more caliper. A lot of things could be done with caps or minimums with keeping the same requirements. The situations Mr. Shulman is most troubled about are setback area trees or the fringe area trees.

Mr. Markert thought that it would be reasonable to replace a tree on the lot or near the lot line with a tree that would mature to be like the tree being replaced. Ms. Wilson and Ms. Sullivan liked that when removing a tree up to a certain amount of caliper, then it would be replaced with one tree. Beyond that caliper, the tree would be replaced with two trees; and beyond a certain threshold, the tree would be replaced with three trees. Mr. Patterson thought that it would be a bad trade for the canopy of the City to replace one tree for one tree. Mr. Markert thought that the Planning Commission should get direction from an arborist.

There was consensus that a tree should not be replaced inch for inch. The Annapolis model should be used. For purposes of density and/or mitigation and/or protection, the Planning Commission will focus only on medium to large tree species. In the case of protection, there has been no agreement on that. All trees that are currently protected probably should continue to be protected; but there should be more flexibility on the situation where a person can get a permit to remove it. If the tree is not injuring the overall canopy coverage or some other criteria, then the Planning Commission is less concerned about it such as with understory trees or nuisance trees which are interfering with a healthier tree, etc. The fact that the tree would be a crepe myrtle, dogwood or holly should not disqualify it from being protected.

Mr. Markert said that there should be some kind of justification that the remove of this tree will not hinder and potentially improve the shade trees. Ultimately, the Planning Commission is looking to give the City Arborist discretion now, but guidelines will need to be provided to him. There was consensus that the list for replacement trees would not be used for determining if a tree is protected or not. If a tree is not in the front yard and it is not needed for density, then the tree is not protected if it is less than six inches caliper. Mr. Shulman suggested that the discussion of whether to allow a person to count a street tree in front of their house towards the density requirement if they are going to sign a contract with the City to maintain that tree should be postponed until the City Solicitor is present. The ordinance would have to make clear that the obligation would run with the land. An amount should be defined and should bear some relationship to whatever the mitigation requirement would be if it would be one for one, two for one, three for one, etc. The fee should bear a relationship to whatever the mitigation requirement would be so that the person can make a rational decision.

Mr. Patterson will work on amending the tree ordinance.

Chairman Littleton had sent a draft of the transmittal report to the Board of Commissioners on October 10, 2013 to the members for their review.

Chairman Littleton noted that with regard to site plan review, City Solicitor Mandalas and his staff will be taking the lead in trying to get the application and supporting documents drafted. Mr. Markert had volunteered to be the interface, and Mr. Shulman and Ms. Wilson had volunteered to be technical advisors.

Chairman Littleton called for a review and discussion of existing City requirement regarding silt screening and gravel/stone access to building site and possible recommendation to the Mayor and Commissioners regarding implementation of the Planning Commission's Lakes Report recommendation to prevent runoff from construction sites.

Ms. Sullivan said the State Sediment Control Code requires that any time there is a disturbance of more than 5,000 square feet a silt fence is required to be put up. Any time it is less than that, it is discretionary. The biggest issue is that when the silt fence is put in, it confines the lot even more. The problem is the runoff on neighboring properties. Requirements are to put in a gravel driveway, and space is limited for use of the lot itself. Once the house is built, it is easier to get equipment in. A lot of contractors are questioning their ability to work with this requirement. A City Code amendment would be in the Building Construction section.

Chairman Littleton's argument of why the Planning Commission should to try to give the building inspector some authority on this is that there have been complaints about contractors invading adjacent properties. With silt fencing at the side lots and rear lot, a boundary is set of where it can or cannot go. He was less concerned with silt fencing at the front of the property and more concerned with tracking, etc. off of the construction site. Chairman Littleton thought that a Code change would give her more discretionary authority to require silt fencing on the lots with less than 5,000 square feet of disturbance. This would be for the purpose of runoff, dirt, etc. from entering into adjacent properties and/or streets.

The consensus of the Planning Commission was for City Solicitor Mandalas to draft a code amendment.

A minor subdivision has been submitted for a property located at 114 St. Lawrence Street. The Preliminary Review will be held on November 8, 2013.

The next scheduled Regular Meeting will be held on November 8, 2013 at 6:30 p.m.

There being no further business, the meeting was adjourned at 10:04 p.m.

**RECORDED BY**

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(Ann M. Womack, CMC, City Secretary)

**MINUTES APPROVED ON  
MARCH 14, 2014**

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(Francis Markert, Secretary)