

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

November 12, 2010

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:03 p.m. by Chairman Preston Littleton on Friday, November 12, 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 – arrived at 6:15 p.m.
 Mr. Harvey Shulman
 Mr. John Gauger
 Mr. David Mellen
 Chairman Preston Littleton
 Mr. Timothy Spies
 Mr. Francis Markert, Jr.
 Mr. Patrick Gossett
 Mrs. Jan Konesey

Also Present: Mr. Glenn Mandalas, City Solicitor arrived at 6:30 p.m.
 Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

WELCOME of newly re-appointed members of the Planning Commission.

Chairman Littleton acknowledged that the City Commissioners unanimously confirmed Mr. Francis Markert, Mr. John Gauger and Mr. David Mellen, each for three-year terms.

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 and October 8, 2010 Planning Commission Regular Meetings were not available for this meeting.

Mr. John Gauger made a motion, seconded by Mr. Francis Markert, to approve the Minutes of the July 9, 2010 Planning Commission Workshop Meeting. Motion carried unanimously.

CORRESPONDENCE

There was no general correspondence.

OLD BUSINESS

Chairman Littleton called for the status report and discussion of the ability of the Planning Commission to continue with its review of Major Subdivision Application No. 0708-05, the "Oak Grove at the Beach" application, based on an apparent transfer of ownership and the initiated dissolution of Oak Grove Motor Court, Inc., one of the applicants and the stated owner of the majority of the parcel under consideration. Discussion will be limited to the consideration of these recent developments and the Planning Commission may make a determination if it can or cannot proceed with this major subdivision application.

Correspondence:

1. Email dated October 22, 2010 from Chairman Littleton to the Planning Commission members providing a description of developments taking place in real time prior to the Special Meeting scheduled for October 22, 2010 and the reasons which led to the decision to cancel the Special Meeting.
2. Letter dated November 5, 2010 from Ms. Jane R. Patchell, Esq. of Tunnell & Raysor, P.A., requesting that the Major Subdivision Application No. 0708-05 be removed from the Agenda of the November 12, 2010 Planning Commission Meeting and placed on the Agenda for the December 10, 2010 meeting.

Chairman Littleton had explained to Attorney Patchell and the applicants that it is incumbent upon them to convince the Planning Commission from a legal standpoint to move forward with the application. He urged that they should submit all the legal documents in final form two weeks in advance of the December 10, 2010 meeting for review by the Planning Commission and City Solicitor Glenn Mandalas. If Mr. Alan Kercher, City Engineer, returns with a report that there are no design issues involved, this application will be placed on the Agenda for the December 10, 2010 Regular Meeting.

Mr. David Mellen said that for whatever reasons the legal changes were made in the ownership and even if they are reverted for purposes of the Planning Commission continuing on with discussion, it is obvious that the documents will ultimately change again. He hoped that the attorneys and the applicants would work on the documentation so it would be consistent with that change if it ever takes place.

Chairman Littleton called for the Planning Commission to review a report by the Building Inspector advising that all conditions set forth by the Commission in its August 13, 2010 conditional approval of Partitioning Application No. 0610-01 for the property located at 73 Park Avenue have been timely met. The Planning Commission may act to finalize this partitioning.

Chairman Littleton noted that the Planning Commission members had received correspondence from City Solicitor Mandalas testifying that the structures had been removed and a demolition permit has been closed out.

Mrs. Jan Konesey made a motion, seconded by Mr. Markert, to formally approve Partitioning Application No. 0610-01 for the property located at 73 Park Avenue. (Patterson – aye. Shulman – no, because he had previously abstained when this application was originally voted on for approval; and he had done so because the Planning Commission was given a deed to this property that was not consistent with an earlier deed for the same property and was not consistent with the original plat for the City of Rehoboth. Mr. Shulman was uncomfortable with proceeding to approve this partitioning because the Planning Commission had different documents showing the property line being in different places. It was his understanding that after the meeting, calculations had been done under the earlier deed and that there is a statement which appeared to meet the square footage requirement; but this was not part of the record. Mr. Shulman was voting against the approval because he was troubled that the Planning Commission got to this point without clearing up what was a definite inconsistency with two deeds for the same property and the earlier plat of the entire City. Gauger – aye. Littleton – aye. Spies – aye. Markert – aye. Gossett – aye. Konesey – aye.) Motion carried.

OTHER BUSINESS

Chairman Littleton called for the report of nominations by Commissioner Konesey and election of Planning Commission's 2010-11 officers.

Mrs. Konesey, Nominating Committee, had polled the members of the Planning Commission, and she submitted that the Planning Commission should continue with Dr. Preston Littleton as Chairman, Mr. David Mellen as Vice Chair and Mr. Timothy Spies as Secretary for 2010-11. When Mrs. Konesey polled the members, they also talked about the meeting start and end times and structuring of the meetings. Mrs. Konesey had also talked to Ms. Sullivan. After talking with everyone, Mrs. Konesey recommended that the start of the meetings be moved to 6:30 p.m.; the Planning Commission commits to finish the meetings by 9:30 p.m.; and the meetings should be structured.

Mr. Shulman made a motion, seconded by Mrs. Konesey, that the current officers remain the same for 2010-11. Motion carried unanimously.

Chairman Littleton noted that the Planning Commission has been operating in non-compliance with its bylaws. He agreed to the start of the meeting at 6:30 p.m. but opposed the end time at 9:30 p.m. because the Planning Commission's first responsibility is to take and be expedient in terms of dealing with matters before it. The Planning Commission owes it to the applicants who are citizens of the City to try to deal with finishing the agenda. Chairman Littleton said that he would not support the 9:30 p.m. cutoff time, but he did think 10:00 p.m. is appropriate. He urged the members to give serious consideration to doing the business of the City in an expeditious way and finish the agenda.

Mr. Shulman suggested that the next meeting and subsequent meetings should start at 6:30 p.m. and end at 9:30 p.m., and the bylaws should be officially amended at the next meeting.

Mr. Markert recommended that the bylaws should be amended, and it should be written in the bylaws to have flexibility with the meeting times so there would not be a concern with lack of compliance.

Mrs. Konesey noted that if the members want to send her recommendations, she will compile a list to be

brought back to the Planning Commission at the December 10, 2010 meeting.

The Planning Commission meeting will start at 6:30 p.m. on December 10, 2010, and this item will be placed on the agenda for discussion.

OLD BUSINESS

Chairman Littleton called for the Public Hearing of amended Partitioning Application No. 0710-02 requesting the partitioning of a property located at 2 St. Lawrence Street designated as Lot Nos. 22, 23, 24, 25, 26, 27 & 28, Block 33, as shown on a plot of lots of Rehoboth Heights, said plot being of record in the Office of Recorder of Deeds, in and for Sussex County, in Deed Book 264 at Page 410 and also any lands lying between the property known as Lot Nos. 25, 26, 27 & 28, Block 33, Rehoboth Heights and the Atlantic Ocean in which the applicant has an interest, into two (2) lots with 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 LLC on behalf of the owners of the property.

Chairman Littleton provided a brief history of what has occurred. At the October 8, 2010 meeting, a Preliminary Review was held. Both the applicants and the City acknowledge that it is evident there is a question about ownership of the oceanward portion of the property. Members of the Planning Commission have done a review of the titles from deed books in Georgetown, DE, and they were presented at the last meeting. The applicants were going to prepare their case regarding the ownership of that land for tonight's meeting. Another issue was that the affidavits which had been submitted with the application did not cite the oceanward land. The affidavits have been resubmitted. The third issue was that the application itself was missing information in terms of the dimensions of the lots, etc. and was not in compliance with what the applicants say they own. That portion of the application has been resubmitted with the known dimensions. Item E of the application has not been filled out to date.

Mr. Chase Brockstedt, Esq. represented Mr. Richard Harris, managing member of 2 St. Lawrence Street LLC. Mr. Harris was also in attendance at the meeting. Attorney Brockstedt confirmed that when the application was submitted, one issue that needed to be addressed was the concern with the land lying to the east and whether or not the Planning Commission could act on a partition application without making a determination to that land.

Chairman Littleton noted that from the Preliminary Review, the Planning Commission was in agreement that there is sufficient land to be partitioned. Building Inspector Terri Sullivan's report indicated that the house which exists on the ocean side of the lot is within the setbacks, etc. The applicants considered a tree preservation plan which is required. The interior lot to be created would not be encumbered with any setback issues.

Mr. Shulman said that if the Planning Commission believes the O-1 space is not part of the land to be partitioned, this could impact tree requirements, etc. because there are a certain number of trees needed to be preserved or planted depending on the size of the lot. Attorney Brockstedt said that for purposes of the density calculations, FAR, etc., the land lying to the east does not apply. He hoped that this would follow through with regard to trees, etc.

Attorney Brockstedt said that 2 St. Lawrence Street LLC is the record owner of this lot of lots and has some interest which is admittedly undefined in the land lying to the east. The interest that it has in this land is not interest that was created by 2 St. Lawrence Street LLC or the Harris family, but interest that was purchased by Mr. Harris and was inherited by his children and is now within the LLC. There is no argument that 2 St. Lawrence LLC owns the land lying to the east. What was conveyed to the LLC was some interest in this land which is undefined. In looking at this and going through the records provided by Mr. David Mellen and Mr. Timothy Spies of the Planning Commission and the chain of title, the only thing definitive coming from the City which references ownership of some of the land and not all of the land which is being talked about is a speed message, essentially a memorandum. In looking at the chain of title itself, then the waters are muddied, and without a court declaration or decision, the Planning Commission nor the applicant will be able to accurately define what interest and what right it has in this land. Attorney Brockstedt said that in his letter dated November 3, 2010, the applicant has made a proposal to maintain the status quo without jeopardizing the rights to the City or the applicant. Whatever interest this is at a minimum, it has been a recorded interest in the favor of the Harris family and then 2 St. Lawrence Street LLC since 1971. The fact that this land has existed in deeds which have been conveyed, reworded and recorded, etc. has not impacted the City, citizens, surrounding property owners or anyone's use and enjoyment of this property. By moving forward and preserving what is just language in a deed which cannot be acted upon given the zoning district as well as all DNREC and other

issues which exist and preserving whatever interest there may be, is the best way through. The applicant is looking to work with the Planning Commission. In the November 3, 2010 letter, the language was used so that nothing changes. The exact language that exists in the deed today, in 1971 and before, would be restated in new deeds with additional language which would say that there has been no determination whatsoever with regard to anything related to the disputed land to the east and the fact that there has been a partitioning of lands interior to that which are plotted lots that meet all the requirements, cannot be used for or against any party in the future. Attorney Brockstedt has not found any compelling legal authority which precludes the Planning Commission from including this as a condition of this application and granting a subdivision of what is clearly sub-dividable lands, which are the plotted lots. In regard to the survey, Mr. Adams included the land all the way to the low mean water line because that is what is conveyed in the deed itself. At no time has the applicant come forward and made the argument that the fee simple ownership of Lot Nos. 22 through 28 is the same or similar to some ownership of a right in the land lying to the east. There is an undefined right conveyed in the land; and leaving it undefined will not be detrimental to surrounding property owners or the general health, safety and welfare of the citizens of the City. In regard to the proposal, there would be an identifiable lot of approximately 5,000 square feet created on the western side; and there would be a separate parcel adjacent to the dunes and the Boardwalk separated from Lot Nos. 24 through 28, and included would be some right in the land lying to the east of the plotted lots extending to the Atlantic Ocean. What exists today is a large lot which is plotted with some right to the land extending to the ocean. The applicant is asking to create a smaller lot and a larger lot with the larger lot having the same right as they are today. Under no circumstances is this application seeking to put stakes in the ground at the low mean water line. Clearly within the corners of the plotted lots is fee simple ownership. The 50 x 100 foot lot to be created would have no interest in that land. Attorney Brockstedt did not think that the chain of title is not clear, but it is not clear that this land belongs to the City. What is clear in the chain of title is that there is some right in the land lying to the east.

Mr. David Mellen believed that the speed memo is an indicator but not an adequate legal document. The deeds would be considered more traceable legal documents. In regard to the purchase of the land by the Marshalls from the Rehoboth Heights Development Company, the deed is clear that Mr. Marshall bought two titled blocks which were plotted on the 1876 plat. There is no mention in the deed or subsequent deeds of any property to the east of those lots. The first time this occurred is in the 1971 deed. Attorney Brockstedt said that the straw transfer was to identify the newly plotted lots; and in today's terms, this would be seen as a corrective deed. Outside of the identifiable lots, the deed says that all the estate, right, title, interest, property, claim, demand and possibility whatsoever is in addition to the plotted lots in the deed. The Marshalls believed they were purchasing some estate, right, title, interest, property, claim, demand and possibility in the land in the front of their house. Attorney Brockstedt said that there is persuasive argument to be made that while it is an undefined right, there is evidence of a right that was conveyed in 1971 to the Harris family.

Mr. Mellen said that starting with the 1971 deed, there have been no title searches for the deed registered and a number of subsequent deeds. Mr. Harris said that he did not think his father had taken title insurance out on it.

Chairman Littleton felt discomfort in proceeding with this application because it would be a declaration by the Planning Commission that there is something out there and it would be precedent setting. He asked if the City and the applicant would be able to clear up this issue. Chairman Littleton could not imagine why the applicant would want to have rights to the ocean because it would be a potential liability in having those rights.

Mr. Shulman said that the benefit of a quiet title action is that the public is put on notice of someone claiming title to land. If there is another party somewhere who thinks the land is theirs, then the deal between the applicant and the City would not affect that party.

Attorney Brockstedt said in regard to whatever interest was covered by the 1926 deed, Deed No. 264 page 411 says that included in the identifiable land is "all the estate, right, title, interest, property, claim, demand and possibility whatsoever of it..." Mr. Shulman clarified that "it" refers back to the specific lots that are designated by lot numbers on the previous page.

Mr. Mellen said that it is not the obligation of the Planning Commission to solve the problem. The question before the Planning Commission is whether it has the right to act on a partition request in which there is a question of ownership. He said that the deed which is being discussed is the latest deed which claims the land to the ocean. The applicant and his representative have admitted that there is a potential question of ownership. Mrs. Konesey said that it is not the Planning Commission's responsibility to determine who owns the land.

Mr. Patrick Gossett said that with the submission of an application, the Code defines the owner of land

within the City as a person or entity that is the named record owner of the land pursuant to the City's tax records. The tax card describes the land as 175 feet x 100 feet, and the taxes have been paid on this footage. The tax card makes no mention of any other footage at all. Attorney Brockstedt said that this is the fee simple ownership. The applicant is not saying that there is fee simple ownership of the land lying to the east, but there is some interest in that land.

Chairman Littleton said that the Planning Commission will need advisement from City Solicitor Mandalas as to whether or not it can act on this application.

Mr. Harris said that no one can define what the value of the rights are. The end point his family would like to be at is that it remains the house, the dunes, the Boardwalk, and the beach. He voiced concern with what use the property would be put to if the City owns the property outright and is in the O-1 District of which the zoning does not apply to the City. The surplus land would be worth a fortune to the City.

Mr. John Gauger said that the applicant's property is for sale, and he asked if the applicant intends to convey interest in the other lot along with the lot that the house is located on. Mr. Harris said that Lot Nos. 22 & 23 are the westernmost lots which are proposed to be made into a 50 foot x 100 foot lot, and Lot Nos. 24 through 28 and whatever right is included with the property that goes out to the ocean, would be the center lot. The larger lot is the lot to be sold and will try to be conveyed to someone else. Mr. Harris' intent is to deed what is currently owned to the future owner.

Mrs. Konesey said that it is not the Planning Commission's job to come up with a solution to solve the problem. The applicant and his attorney need to meet with the City and City Solicitor Mandalas. The Planning Commission cannot determine who owns the land.

Mr. Shulman requested that the applicant give him some idea of what the applicant could possibly have as a right to that piece of land. He did not know if the Planning Commission or the applicant could bind future owners by anything other than a determination, not made by the Planning Commission, of who owns the open space. Mr. Harris used an example as to the rights of the enjoyment of the light and breezes from the ocean. He thought that there may be something in the old deed that mentioned something about a right of access to the ocean.

Attorney Brockstedt stated that he and the applicant would like to table this application and work with City Solicitor Mandalas to come up with some sort of a solution. He requested that City Solicitor Mandalas be made available to the applicant and himself to work on a solution.

City Solicitor Mandalas said that there has been some question about maintaining the status quo and how to reach a solution from where the status quo is maintained. There is no new property line, but there has been a request to change the status quo by adding a new property line. To the extent there is a partitioning, he did not think there is any scenario where the status quo is ultimately maintained because there are new lots rather than one lot as in this case. He recommended that the Planning Commission should not act on this application, and it would be appropriate for the applicant to table this application.

Mrs. Konesey made a motion, seconded by Mr. Shulman, to accept the applicant's request to table the application. Motion carried unanimously.

Mrs. Konesey and Mr. Shulman accepted the amendment to the motion made by Chairman Littleton to close the public hearing until a future date.

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.

There was nothing to report.

Chairman Littleton called for the report, discussion and possible action concerning those activities or

assignments taken at a Regular or Workshop Meeting of the Mayor and Commissioners that directly related to the Planning Commission.

Mr. Gossett noted that grants have been applied for and/or issued in regard to a biking plan and a walking plan for the City. In conjunction with the Comprehensive Development Plan which the Planning Commission is the author of, there should be some type of communication as to whether there is input needed from the Planning Commission for additional information.

Mr. Mellen reported that there are national authorities who will rank the City as a Biking City, etc., and he hoped that the Committee which is dealing with this will explore all those avenues.

Mr. Shulman said that a lot of issues have been raised about rental housing; and he would hate to see the resolution of the dispute between commercial property and adjacent residential property to lead to something that removes the core of dealing with noise in truly residential areas coming from other residential areas. He asked that with whatever is done to work for the solution on the issue which has come up to not weaken the noise ordinance in residential areas as it relates to noise from a residence to another.

Chairman Littleton called for the report of any new subdivision applications that may have been submitted in the prior 28 days and the status of pending applications or requests.

No new subdivision applications have been filed to date.

The next Regular Meeting will be held on December 10, 2010 at 6:30 p.m.

Mrs. Konesey made a motion, seconded by Mr. Gauger, to adjourn the meeting at 7:55 p.m.

RECORDED BY

(Ann M. Womack, Recording Secretary)

**MINUTES APPROVED ON
MARCH 14, 2011**

(Preston Littleton, Jr., Chairman)