

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

December 10, 2010

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, December 10, 2010 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Mr. Timothy Spies called the roll:

Present: Mr. Harvey Shulman
Mr. John Gauger left the meeting at 10:07 p.m.
Mr. David Mellen
Chairman Preston Littleton
Mr. Timothy Spies
Mr. Francis Markert, Jr.
Mr. Patrick Gossett
Mrs. Jan Konesey

Absent: Mr. Brian Patterson

Also Present: Mr. Glenn Mandalas, City Solicitor
Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

APPROVAL OF MINUTES

Minutes of the September 10, 2010, October 8, 2010, November 12, 2010 were not available for this meeting..

CORRESPONDENCE

There was no general correspondence.

OLD BUSINESS

Chairman Littleton called for a 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 discussion of Oak Grove Motor Court, Inc., 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 development and the Planning Commission may make a determination if it can or cannot proceed with this major subdivision application. If the Planning Commission determines that it can proceed with this major subdivision application, then the Commission will continue its review of the application and the latest changes to the associated legal documents, and receive an update on any outstanding engineering or design issues. The Planning Commission may take action on Major Subdivision Application No. 0708-05.

Chairman Littleton suggested that the Planning Commission collectively go through the documents. These documents were presented to the Planning Commission today. Because there were changes in ownership, the question is whether the Planning commission is able to proceed with the Applicatoin. If the Planning Commission is able to proceed, it will continue with its review.

- Exhibit 1. Cover letter dated November 28, 2010 and received November 29, 2010 with attachments from Ms. Jane Patchell, Esq. of the law firm Tunnell & Raysor, P.A. Package was received
 - Attachment 1. Red-line draft of the Conservation Easement with Exhibits 1, 2 & 3.
 - Attachment 2. Red-line draft of the Declaration of Covenants. Conditions and Reservations of Oak Grove at the Beach.
 - Attachment 3. Irrevocable Escrow Agreement.
 - Attachment 4. Copy of email correspondence from Mr. Stephen P. Ellis, Esq. to City Solicitor Glenn Mandalas, regarding the change of ownership of the property.
- Exhibit 2. Letter dated November 30, 2010 and received November 30, 2010 from Mr. Jim Elliott of Sussex Conservation District to Mr. Troy Dickerson of George, Miles & Buhr LLC (GMB)

- regarding the review of the sediment and stormwater management plans.
- Exhibit 3. Letter dated December 1, 2010 from Mr. Alan Kercher of Kercher Engineering Inc. (KEI) to City Manager Gregory Ferrese regarding his review of the plans and stormwater management report submitted by the Applicant.
 - Exhibit 4. Draft Resolution dated December 9, 2010 and prepared by City Solicitor Glenn Mandalas.
 - Exhibit 5. Red and turquoise-lined documents updated December 8, 2010 and received December 10, 2010 – Conservation Easement, Declaration of Covenants, Conditions and Reservations of Oak Grove at the Beach, and Irrevocable Escrow Agreement.

Ms. Jane Patchell, Esq. of the law firm Tunnell & Raysor, P.A. and Mr. Stephen Ellis, Esq. of the law firm Ellis & Szabo, L.L.P. represented the Applicants and were in attendance at the meeting. Ms. Judy Schwartz of George, Miles & Buhr (GMB) was also in attendance.

Chairman Littleton said that when the Planning Commission last met on October 8, 2010, it was only subsequent to that meeting that the Planning Commission learned there was a dissolution of the corporation and a transfer of ownership. The corporation owns the vast majority of the property, and the three Lovett siblings as tenants in common own the corner lot on Rehoboth Avenue and Canal Street. The principals of the corporation are the three Lovett siblings. On the advice of City Solicitor Mandalas, it raised a number of red flags relative to the Code and the Policies & Procedures of the Planning Commission. Since that time for gratuitous reasons, the corporation never was dissolved. The dissolution of the corporation was not recognized by the State. The current status is that the Lovett's have restored their application and the applicants to the status they were at the time of the October 8, 2010 meeting.

City Solicitor Glenn Mandalas said that a franchise tax has to be paid by a corporation in the State of Delaware. Because the franchise tax was not up-to-date and paid, the State would not dissolve the corporation. The corporation was never legally dissolved. Status quo at least with the corporation has been maintained, and the same shareholders that were in the corporation then remain the shareholders of the corporation now. Attorneys Patchell and Szabo confirmed this to be true.

Chairman Littleton noted that the Planning Commission has received confidential memorandums dated November 2, 2010 and December 9, 2010 from City Solicitor Mandalas. City Solicitor Mandalas has reviewed various cases; and in his view, this Application is currently situated in a way that the Planning Commission can move forward with it this evening, take action upon it if the Planning Commission chooses to, and would not need to do anything this evening with regard to what transpired with the endeavor to dissolve the corporation or the change in ownership, etc. The Planning Commission is in a position that the Application has not been violated, and it can move forward. Chairman Littleton said that if the Planning Commission should move at some point to conditionally approve this Application, it is conditionally approved to two Applicants, the corporation and the individuals. Those have to remain intact until a final approval can be reached. Once the final approval is received the Applicants can do whatever they want to do. City Solicitor Mandalas said that a series of things have to happen before a final approval is achieved. Timing is important in the Application because on December 13, 2010, Oak Grove Motor Court, Inc. is before the Board of Adjustment; and it will be requesting an extension to its variance that was granted for the rear lot lines. The Board of Adjustment can only grant a three month extension one time.

Mr. John Gauger made a motion, seconded by Mr. Francis Markert to move forward with the Application.

Mr. Harvey Shulman had raised questions at the last meeting regarding whether the dissolution could be rescinded *ab initio*, whether the transfer of the property could be rescinded *ab initio*, and the difference being *ab initio* from the initial stage so if something is undone it would be as if it never happened. Fortunately the corporation dissolution never went through so the Planning Commission did not have to worry about whether it could be rescinded *ab initio*. He still had an outstanding question of whether the transfer of land could be rescinded *ab initio*, as if it never happened. What happened here is that the land was re-conveyed back to the original owner. The Planning Commission's rules for filing an application are pretty specific on this point, and they say specifically in Part 5 what types of changes in information require the submission of a new application. "For example: The situation in which the owner of the land has changed will be considered a material change that requires a new application to be filed and go through both stages 1 and 2." What this motion is based on is that although the rules say that if there has been a change in ownership of the land a new application would need to be filed; but because that change in ownership was undone by re-conveying the land back, then the Planning Commission is not applying this section of the application rules. Section 236-8(A) of the Code has a specific definition of what the owner of the land means, and it says nothing about beneficial ownership. The definition is "[T]he owner of land

within the City is defined as a person or entity that is the named record owner of the land pursuant to the City tax records. The Code says the owner of the land is the named record owner on the City tax records, and the Application procedures say that if ownership changes during the process, then a new application has to be filed. If the transfer was rescinded in *ab initio*, then the law treats it as if it never happened; and therefore for purposes of the Planning Commission's rules and the Code, it never happened. Apparently what has happened is a re-transfer and not a rescinding as if it never happened. Mr. Shulman did not see how the Planning Commission can accept the notion of beneficial ownership because it is completely at odds with the Code's definition and the application. The solution is creating a gaping hole in the Planning Commission's application procedures.

Mr. Gauger said that the Planning Commission has a legal opinion from City Solicitor Mandalas, and it is not the Planning Commission's job to try this.

City Solicitor Mandalas said the Application is in a position that the Planning Commission can take action. If there is a concern about transfer of ownership, etc. outside of meeting times, then there is an opportunity to change the Application to close up the hole. The posture of the Application is as it was, the owners are the same, beneficial or otherwise. Since the Planning Commission has recognized on the record that the Lovett's have generally done everything to work in harmony and in good faith with the Planning Commission, the Application should proceed. If there is a concern about a gaping hole, then take this opportunity to correct in the Application going forward.

Mrs. Konesey said that City Solicitor Mandalas has made a ruling. If there is a hole, the Planning Commission needs to fix it. She requested that City Solicitor Mandalas provide the language to fix that at the next meeting. Mrs. Konesey agreed to move forward with the Application, but it needs to be fixed at the next meeting.

Mr. Shulman said that City Solicitor Mandalas' memo says the Planning Commission can interpret the Code a certain way. It does not say that the Planning Commission is obligated to do one thing or another. The Planning Commission has discretion.

(Shulman – no, with regret. Something did take place. The deeds were signed, and the property was conveyed from one entity to another; and that entity had title to the property for awhile. It was the legal owner. Some weeks later, it was re-conveyed back to the first owner. Gauger – aye. He agreed with Mr. Mellen. Mellen – aye. He was in total sympathy with Mr. Shulman's position. In this particular case, this is a situation where there is no harm, no foul; but he can see many situations where people could take advantage of this position if it remains as an example or precedent. There is a need to fix this, and the Planning Commission needs to advise applicants in the future exactly what it means by maintaining the status quo of the applications. Littleton – aye. He seconded the comments that have been made at the table of the Planning Commission's need to address that. In this case with all of the parties, it never exceeded the same group of people. The three siblings are the principals and only principals on the corporation. They are the fee simple owners of the land. This was not going to a third party. This has influence to him, and it makes him more comfortable in voting aye for this. He is respectful of the comments that Mr. Shulman raised and others that the Planning Commission needs to address this in terms of its policies, procedures and the application. Spies – aye. He is hopeful that the Planning Commission will address this issue soon and take care of any deficiencies. Markert – aye. It is his understanding that there was an event or legal transaction, and it does not appear from what he has read that anything actually did take place. There may have been an intent for something to take place, but it did not really happen; and that is the key that is essentially his justification for saying this. Gossett – aye. Konesey – aye.) Motion carried.

Chairman Littleton said that the Special Meeting which had been scheduled for October 22, 2010 and was to be devoted in its entirety to this Application was cancelled. At the November 12, 2010 meeting, the Planning Commission was ready to proceed with the same agenda of whether it could proceed with the Application. At that time, the Applicants through their attorney, asked the Planning Commission to table it to this meeting. The Planning Commission has solved Item 5(A)(1). The Applicants were given a deadline, and their attorney abided by the deadline and provided updates on the legal documents relative to this Application. Since that time, there has been an interchange between City Solicitor Mandalas and the Applicants' attorneys. Every recommendation that has come back and suggestions that have been offered by the City through December 9, 2010, have been accepted by the Applicants. The changes are suggested because the attorneys are trying to protect the Planning Commission and the City. The only reason why the Planning Commission is looking at the documents is because the Applicants have requested under another provision of the law to have less than a standard dead-end street, and it required justification. The justification is for the preservation of natural features

and how to preserve the trees. That in turn required all of these documents to reflect the agreements which have been reached between the Planning Commission and the Applicants relative to the protection of the trees. The only other aspect that the Planning Commission has, is the design that is being proposed. The Applicants are trying to do this in an environmentally, ecologically, advanced way. They are using non-standard materials relative to the City in terms of curbing, sidewalks, pervious surfaces and things that are not within the usual practices of the City. The maintenance of those items and the stormwater management which occurs on private property through an easement will be the responsibility of the Applicants and then at some point as lots are sold off, the owners through the homeowners' association. Those are the issues that need to be addressed and attended to by the Planning Commission. The only other issue that the City has to be assured of with the homeowners' association documents is that they are not in conflict with the City's codes. City Solicitor Mandalas in working with the Building Inspector has assured the Planning Commission that those documents are in conformity to that. The adequacy of these documents addressing all of the issues which have been discussed and there has been consensus, should be accurately reflected in these documents.

City Solicitor Mandalas said that the variance might be affected by whether the Applicants have final approval or not. He and Building Inspector Terri Sullivan have been discussing whether preliminary approval is enough for the variance not to expire after the extended three months. There has not been a final determination on that. He thought that preliminary approval would be enough for that. Mr. Mellen said that during the original hearings, the Planning Commission attempted to address that issue with the Board of Adjustment, pointing out that there would be a delay time between the actual preliminary approval and when things would be completed because of the nature of this project being a major subdivision. The Board of Adjustment did not want to address that issue, although it was told at that time that it would be difficult to comply with the six months. Chairman Littleton said that on behalf of the Planning Commission he had submitted written testimony to the Board of Adjustment and specifically addressed that issue. His understanding was that the Chairman of the Board of Adjustment was deferring to the Building Inspector on all of the things that could be signed off on.

Chairman Littleton read the letter dated December 1, 2010 from Mr. Alan Kercher of Kercher Engineering Inc. (KEI) to City Manager Gregory Ferresse. Based upon Mr. Kercher's review, he had the following comments: 1. KEI has reviewed the Site Improvement Plan Sheets G1.0 and C1.0 through C5.2 dated October 2010 and the Stormwater Management Report and Calculations dated November 12, 2010 from George, Miles and Buhr LLC (GMB). 2. A copy of the Final Record Plan shall be submitted for review and comment with the next submission. The plans do not address the existing power line along the property line for Lot Nos. 9, 11, 13 and 14. It needs to be specified how this line will be relocated or provide a utility easement. In regard to grading and drainage on Sheet C4.0, it is difficult to determine if surface runoff will follow the proposed grades without having additional information on the plan. The existing spot grades need to be shown with the next submission to better illustrate how surface runoff will be directed away from adjacent properties and in the direction of the closed drainage system on Sixth Street and to Canal Street. The site grading plan requires more information. Generic footprints and associated corner spot elevations of the proposed homes need to be provided. Trees that are expected to remain and corresponding surface elevations need to be identified. In regard to the Detail Sheet C5.1, the landscape basin typical section does not agree with the cross-section detail of Jones Lane shown on Sheet C3.1. The two foot width of the undisturbed lawn portion of the landscape basin in the Jones Lane road section on Sheet 3.1 needs to be labeled. A cross-section detail of the driveways taking access off of Jones Lane including the width, type of material, layer thickness, etc. needs to be provided. In regard to the Stormwater Management Report, the drainage areas for the closed drainage systems shown on EX-3 should be revised. The contributory drainage areas should be expanded to include the lot areas that are not being directed to the landscape basin as well as other offsite contributory areas since the spot grades show that surface runoff not being directed to the landscape basin will be directed toward either Sixth Street or Canal Street. The runoff coefficient utilized for the storm drain calculations should be revised since the majority of the surface cover within the contributory drainage areas for the closed drainage systems is impervious in nature. The .040 value used should be changed to something more representative of the existing conditions. A 0.70 minimum value is recommended unless calculations are provided to justify a lower "C" value. 3. KEI recommends that this application be revised to address the above comments to the satisfaction of the City as well as to meet the requirements of other reviewing agencies. Chairman Littleton said that there are two outstanding items dating back to the October 8, 2010 meeting. One is the parking area on Canal Street which abuts the Applicants' property. Since that time, Mr. Kercher and the City have agreed that the type of material similar to the parking areas on Jones Lane could be used. The other item is that there are no engineering issues which would prevent the Planning Commission to take action or require the Planning Commission to amend the Resolution. All engineering issues would be directed to

Mr. Kercher unless they involve design. Mr. Kercher has said that everything has been discussed with the Sussex County Soil Conservation District and/or by this memo. The engineering issues should have no impact for the Planning Commission to make a decision relative to this Application.

Building Inspector Terri Sullivan said that after preliminary approval, the permits would be issued for the road construction, etc., and the infrastructure would need to be completed before final approval. The Applicants would have to do the bonds in the next couple of months, and engineering would need to be finalized on the street including the sewer and water lines, etc. before the actual digging can take place. Ms. Schwartz and Mr. Kercher are working on how long the engineering issues will take. In regard to an expiration of the variance and a three month extension, the Board of Adjustment was informed that in Section 270-77 of the Code, it refers to a building permit or use change, and neither of those things will happen because infrastructure is being built not a house. The agreement between the attorneys and the Chairman of the Board of Adjustment was that preliminary approval would be enough to stop the time clock. The six month period for the variance expires at the end of December 2010, and the Applicants will be appearing before the Board of Adjustment on December 13, 2010 for an extension of the variance. The trigger was the Planning Commission's preliminary approval for the project. Mr. Shulman said that if the Applicants are getting a building permit to do something which is associated with the road, this would be inseparable with the variance they got to have the lots the way they are designed. Mr. Mellen said the Board of Adjustment understood that the start of infrastructure would comply with the intent of the Code.

Ms. Schwartz provided a brief engineering update. The plat plans dated September 28, 2010 that were reviewed by the Planning Commission at its October 2010 meeting are still valid, and no changes have been made to them. Since September 2010, a full set of engineering plans and drainage reports have been prepared, and they have been reviewed in detail by the Mr. Kercher and Sussex County Conservation District. Comments have been received, and she and the Applicants are working with Mr. Kercher and Sussex Conservation District work out the details. The details relate to storm drain hydraulics, water main connections and site grading. Supplemental exhibits and calculations have been prepared relating to the hydraulics and the storm drains. Confirmation was received at 12:54 p.m. today that those exhibits are acceptable. Resubmittal can now be made to Sussex County Conservation District. Mr. Kercher has indicated he is now in a position prepare the letter of no objection which the Conservation District requires before it can approve the plans. Final plans are expected to be distributed early next week to the Conservations District. Once the Conservation District is satisfied, those plans will return to Mr. Kercher for his final review and approval. Ms. Schwartz was hopeful that all of this can be done by the end of December 2010.

Mr. Mellen suggested that a flowchart or timeline should be forwarded to the City Engineer and Building Inspector of the various steps in the process that will need to take place starting with the bonding, etc. Ms. Schwartz acknowledged that a timeline has been developed, but it has not been submitted to Ms. Sullivan or City Engineer. She has been more focused on the Conservation District approval and satisfying the City Engineer. After that point, she would be in a position to prepare and submit the cost estimates and bonds. A timeline will be provided to the City Engineer and Building Inspector.

Attorney Patchell addressed the package that was delivered today regarding the color coding of the various changes to the documents. Chairman Littleton said that the Planning Commission has seen everything with the exception of a couple of minor things that have been changed.

Attorney Patchell's proposed changes to the Declaration:

1. No changes have been made to the Conservation Easement document today.
2. Page 17 of the Declaration. Because the Applicants are trying to keep this development green and use non-standard materials, the Planning Commission had desired that when the Applicants were taking responsibility for maintenance, repair and replacement the City would retain the right to require a higher standard of maintenance. In discussions with City Solicitor Mandalas and Attorney Mike Hoffman indicating from a legal standpoint in a homeowners' association declaration, there has to be an ascertainable standard to be enforceable for a violation in order to move forward in the courts to provide what the damages were. No discussion to date could be found of what a higher standard of maintenance would be. A standard of maintenance that is compliant with the current manufacturer or acceptable industry standards for the repair, maintenance and replacement thereof was inserted into the document. This refers to all of the items listed at the beginning of Section 7.1 which includes the Stormwater Management System, bio-retention area, walkway and parking areas (including concrete edge restraints)

adjacent to Jones Lane and the parking shoulder on Canal Street adjacent to the subdivision. By including in the standard both the manufacturer and an acceptable industry standard, it gives the flexibility in the Declaration which is a living document that will continue on, for the City to enforce the higher standard for maintenance, repair and replacement without having to amend this document or hold additional hearings to determine what a new standard would be if a manufacturer is no longer in business or if the specific material is no longer made.

Mr. Mellen said that it is possible the City could have a set of standards for some particular thing that would overrule any current practices. In the case where the City would have a defined set of standards or recommended procedures that would override current industry standards, it should have the right to apply those standards. Attorney Patchell said that those standards are reduced to an ordinance, and Section 14.8 of the Declaration which is an effect of law section covers that. It says that if there is a conflict between the Covenants and any applicable municipal, county, state or federal law, said law or laws shall take precedence over any conflicting portion of these restrictions.

Attorney Patchell said if the City feels particular items are that important that they need to be replaced and updated based on building code standards or any other standards which are in the Code itself, the effect of law section of the Declaration is clear that it trumps anything else and would give the City the right in that instance to require something so long as the City would have it included in one of its ordinances.

3. Section 7.1. Deletion of "...parking shoulder constructed on Canal Street..."
4. Section 7.1.1. Clarification that the association is responsible for any and all improvements in and to the right-of-way of Jones Lane, including any edging as specified on the Plot, but excepting there from the paved portion of Jones Lane. Pervious pavers will be used.

Mr. Shulman said that the HOA is responsible for everything on Jones Lane including the edging, except the paved portions which is the responsibility of the City. Attorney Patchell said that the parking areas on the street would consist of the pervious pavers which are included in any or all improvements that the HOA is responsible for maintaining.

5. Section 14.2.5. Page 31. No amendments to the Declaration may be adopted if it is inconsistent with the plot or Resolution. Section 7.1 was inserted to make sure that the City's higher standard of maintenance cannot be amended out by future associations.

Mr. Mellen referred to Section 5.1.8. He disagreed that the six (6) trees illustrated in the diagram located at Exhibit 2, shall be preserved during the site development process and for a period of three (3) years from the date the site preparation illustrated on the approved Subdivision Plot Plan is complete and the Street identified as Jones Lane accepted by the City of Rehoboth Beach. The six (6) trees illustrated in the diagram located at Exhibit 2, shall be preserved in perpetuity. During the construction period and for a period of three (3) years thereafter, the following remediation will take place. The intent of preserving the trees was a condition upon which there is a short dead-end street.

Attorney Patchell said that the language comes directly from the May 3, 2010 report of the Ad Hoc Committee of the Planning Commission. In the letter, No. 1 states specifically that is any tree identified as being preserved is illustrated in the diagram located at Exhibit 1, is damaged or dies within a period of three (3) years from the date the site improvement illustrated on the approved plot plan is complete and the street is accepted by the City, such dead or damaged tree shall be replaced or treated in accordance with Section 253-33(F) of the City Code. Based on the discussions of the Planning Commission, not only did it want the three (3) year time period inserted for damaged or dead trees that may be caused by site improvements, but the City also wanted to have the right to enforce that through legal actions either at law or at equity. That specific time period was for a three (3) year time period.

Chairman Littleton said that the goal statement is for those trees to remain forever. The remediation for damage after three (3) years is the enforcement area. He said that Mr. Mellen was concerned that the goal statement has been lost.

Attorney Patchell said that it is clear in the document that the trees are to be preserved forever.

Mr. Mellen said that the whole premise for a short dead-end street was the preservation of natural resources. And to not state it wherever it can be stated, he did not want people to have to look for it.

Attorney Patchell said that she would agree to put in the document that the trees shall be preserved according to the tree section of the Code rather than in perpetuity. Mrs. Konesey noted that the Code can be changed at anytime. The concessions that have been made by the City and the Planning Commission have been to preserve the look and feel of the property. There was a desire to preserve it. She agreed with Mr. Mellen.

Chairman Littleton suggested that Attorney Patchell and the Applicant would pick up some of the language to get back to a goal statement, but then gets into remediation. All that is being looked for is the intent is to maintain the trees forever.

Mr. Mellen said that there is a short dead-end street in the design, and the Code was changed in order to accommodate a short dead-end street. The rationale for accepting a short dead-end street was the preservation of natural resources. That is the only justification for a short dead-end street.

Chairman Littleton said that the issue with Section 5.1.8 is that one could misread that after three (3) years the trees could be chopped down. The intent was to preserve them forever, but recognizing that some damage could happen because of the street being put in is how this language came about.

Attorney Patchell said that under Preservation of Trees in the Architectural Standards, the Subdivision for Oak Grove at the Beach residential area was approved, in part, on the condition that natural features such as trees be preserved whenever possible.

City Solicitor Mandalas said that these trees will be protected under the City Code. Presumption under the City Code is that tree is taken down unless there is certain circumstances. The reason the Planning Commission has a conservation easement for certain trees and then there is a second set of trees, is because with the second set of trees there is a concern they would be damaged by the construction of Jones Lane. The Planner said that if those trees survive three (3) years, then Jones Lane will not have damaged those trees. He thought at the time that everyone was comfortable with it. At that point, there is a presumption that trees are protected under the Code, and that was enough protection for those particular trees. The second set of trees in the conservation easement, are protected even greater than what the Code would allow them. If the Planning Commission wants all the trees protected to the extent that the conservation easement protects certain trees, then there would only be a conservation easement with all of these trees in it.

Mr. Mellen said that the six (6) trees come into play because they are in the right-of-way, and they are the justification for the short dead-end street. The other ten (10) trees was a quid pro quo agreement volunteered by the Applicants. The Ad Hoc Committee worded it that way because it was right to comply with the City tree ordinance. The Committee was advised that it would be better to put the specific words in of what it wanted rather than rely upon the tree ordinance which was questionable whether it would survive.

Mr. Shulman said that some the Planning Commission members voted to approve the short dead-end street, not by just looking at the six (6) trees on the street, but looking at the layouts of the lots. The number and layout of the lots cannot be divorced from the size and shape of the street. Part of the price of allowing a short dead-end street was to preserve trees.

Mrs. Konesey said that she will not vote if this provisions stays in the document as it currently exists. Discussion ensued as to the proper language to be used in this provision.

Attorney Patchell suggested the language "[T]he six (6) trees illustrated in the diagram located at Exhibit 2, shall be preserved". Mr. Mellen suggested the language "[D]uring this period of time, the following remediation will take place. Thereafter the standard Code would take place".

Mr. Shulman did not understand why the conservation easement does not apply to the six (6) additional trees. He did not understand why there are different standards for the six (6) trees that are along Jones Lane.

Attorney Patchell believed that the Applicants have discussed this and are willing to take the higher standard for repair and replacement for the six (6) trees during the construction period and for three (3) years thereafter. This was discussed with the Planning Commission, and this is what the Applicants agreed to; and that is why the terminology is the way that it is here based on prior meetings and discussions of what was requested by the Planning Commission.

After a lengthy discussion, City Solicitor Mandalas recommended the following language. "[S]ix

(6) trees illustrated in the diagram located at Exhibit 2 shall be preserved. During the site development process and for a period of three (3) years from the date the site preparation illustrated on the approved Subdivision Plot Plan is complete and the Street identified as Jones Lane accepted by the City of Rehoboth Beach, any violation of this covenant resulting in death or damage to one or more of the trees shall require treatment in accordance with accepted ANSI Standards, or replacement with a tree or trees equal to the caliper value of the tree removed. However, any specimen tree, as those trees are defined in a Conservation Easement between the Declarant and the City of Rehoboth Beach dated _____, 2010 and recorded with the Sussex County Recorder of Deeds in Deed Book _____, page _____, which is damaged or dies as a result of the activities described above and in the time frame described above, shall be replaced with trees of a total caliper equal to two times the caliper value of the tree removed or damaged; except that, in the case of damage or death to a specimen tree, as specially defined in Section 7B(a)(i) and (ii) of the Conservation Easement, no replacement tree shall be less than six inches caliper. In addition to Owners and the Association, the Commissioners of the City of Rehoboth Beach and the Planning Commission, their successors and assigns, are granted the authority to enforce the covenant at law or in equity.

Mrs. Konesey noted that she wants these trees in the conservation easement. City Solicitor Mandalas said that this is not the agreement that has been worked out to this point. If there is a change to include the trees in the conservation easement, then that is a conversation the Planning Commission needs to have with the Applicants.

Chairman Littleton referred to Exhibit 2. The location of these trees are in the right-of-way or on property lines, and they are City trees. The City will require the Applicant to take special care of these trees during construction. The stormwater management system has been redesigned to better protect these trees because of concern that the original design might interrupt the tree root system. The Applicant and the homeowners' association document are inherently arguing for preservation of trees and natural resources. It is in writing and by requirements in terms of the architectural review standards. Mrs. Konesey said that the City does not always want to preserve its own trees.

Attorney Patchell said that what is being argued is that the Applicants are trying to accommodate the Planning Commission, and they want it maintained. The Applicants do not want, and they have not discussed or agreed to the higher standard of maintenance that could be caused by damage due to construction.

Mr. Shulman said that after three (3) years if some of those trees die from natural causes, lightning, accident, etc., some of the Planning Commission members view those trees in the same manner as the trees in the conservation easement or the impervious parking surface; and they do not want to say that the obligation only to comply with the Code is what remains in effect for a certain limit of time or afterwards. What is good for the parking surface, stormwater management, etc. is the same standard that should apply to these six (6) trees even though they are on public property. The Planning Commission as a group has not asked the Applicants to do that previously, and the Applicants have not agreed to do that. Many of the things the Planning Commission reached consensus on was before a public hearing was held and before it had actual copies of documents before it.

Mr. Mellen suggested that the other sections in the Architectural Standards should be referred to at the end of the paragraph in Section 5.1.8.

Mr. Gossett noted that the bylaws are mentioned in the documents, and he would like to know that the bylaws exist. Attorney Patchell said that the bylaws will exist when the association is incorporated. There are two documents that form a corporate entity. The first set of documents is the Certificate of Formation which brings the corporation to life. The second set of documents is called Bylaws which explains how the corporation will operate. The corporation cannot come into existence until the development is established because only members of the corporation can be owners of lots in the development. They happen simultaneously. The plot plan is put of record creating the lots; and thereafter the association is formed with the Certificate of Formation and Bylaws.

Mr. Shulman asked if there is anything in the Declaration and the Conservation Easement that specifically says that nothing in the bylaws can be inconsistent with the Declaration or Conservation Easement. Attorney Patchell said that she did not believe so because of the hierarchy of law. This language will be inserted in the Declaration and the Conservation Easement.

After a short break was taken at 8:49 p.m., the Planning Commission resumed the meeting at 9:00 p.m.

During the recess, Attorney Patchell had consulted with the Applicants regarding Section 5.1.8 and the six (6) trees that would be in the right-of-way of Jones Lane. The Applicants and their attorney have agreed to revise the language so that the six (6) trees will be preserved. In the event that any of those six (6) trees are damaged or die, the Applicants will plant a tree at a mutually selected location between the association and the City because at some point that will be City property so the Applicants cannot choose where the tree will go. Attorney Patchell will lift the language for the tree ordinance which says that when a tree is replaced it is one for one or adds up to the total of it, and insert that language into the Declaration so even if the ordinance is changed in the future, the language will be in the Declaration. The Declaration can be more restrictive than the ordinance.

Mr. Shulman requested that additional language be added to say that with a preference, if possible, the replacement trees be on or near the subdivision. Attorney Patchell agreed to the addition.

Mrs. Konesey asked if it could be indicated that the trees be replaced with native trees. The Applicants were in agreement with the request.

Attorney Patchell addressed the Conservation Easement and noted that there are only minor changes to the document.

1. Page 4. The Grantor shall reimburse all reasonable costs associated with this effort, including but not limited to attorney's fees.

Mrs. Konesey said that on Page 2, the conservation easement assures that the protected trees will be perpetually preserved until the protected trees die of natural causes. She asked if the protected trees will or will not be replaced after they die. Attorney Patchell said that a conservation easement protects the trees as long as they are living, and they do not have to be replaced after the trees die. The City Arborist determines if a tree dies of natural causes or not. Ms. Sullivan added that under the tree ordinance, a tree that dies of natural causes does not need to be replaced.

Attorney Patchell noted that on Page 5 – Termination, the language in this section makes it very clear that if any one or more of the protected trees die a natural death, the conservation easement terminates only to that tree or trees that died a natural death. The conservation easement remains for the remaining living trees.

Mr. Shulman said in Section 8.C, the trees are covered on private property. Actions by a third party such as a car driven into a tree would be considered an act beyond the grantor's control, and that tree would not have to be replaced. The Grantor is Oak Grove Motor Court, Inc., and Grantee is the City. The property is the entire parcel. Attorney Patchell said that this is binding on all successor owners. Even though the original grantee is Oak Grove Motor Court, Inc., it would be binding on any successor owners of the lots to be created where the trees are located. When Oak Grove sells the property, the new owner of the lots steps into the grantee's position in this conservation easement and would not be considered a third party.

Mr. Shulman said that Section 8.C refers to the actions against the grantor. Chairman Littleton referred to Section 7 which states what the grantee's rights are. The City and the Planning Commission have the right to require that in the event of a violation of this conservation easement resulting in death or damage to one or more the protected trees, the protected tree shall be treated by the grantor with a tree or trees equal to the caliper value of the protected tree removed. Attorney Patchell said that Oak Grove as the grantor conveys the right to the City to enforce any violation resulting in death or damage to any of the protected trees. The City will pursue the violator and not the homeowners' association if there is a violation to the conservation easement. The intent would be the violator. The association does not own the property. Therefore the City would not have the right to go after the association for damage to property that the association does not own based on the conservation easement. The easement has to run with the ownership of the land. Mr. Shulman asked if it has been made clear that the City does not have the right just to go after the successor to the owner of the whole property, but the City has the right to go after the successor to the owner of a portion of the property who bought the lot on which the violation occurred. Attorney Patchell said that there would have to be an insertion in Section 8.A - Remedies stating that the Grantee would have any remedy at law for a Grantor's violation. In addition to Grantor, its successors or assigns with violations of the protected tree on their individual lot. In Exhibit A, the individual lots are defined.

Chairman Littleton suggested that things are fixed up the Applicants' protection and the City's protection.

Attorney Patchell addressed the Irrevocable Escrow Agreement.

1. Page 2. The Applicants are willing to change No. 2 that the principal sum of twenty thousand dollars and no cents (\$20,000.00) shall be delivered by the owners to the escrow agent immediately upon the execution of this document.

Mrs. Konesey thought that the escrow was for a sidewalk along the Canal and not just a future beautification improvement project of the land area between Canal Street and the Canal. She thought the idea was to put a sidewalk on the western side of Canal Street because there was not a sidewalk on the other side of the street.

Attorney Hoffman noted a minor clarification was to reference the canal bank, not the canal.

Chairman Littleton said that language in regard to the canal park has been lifted from the Comprehensive Development Plan (CDP). City Solicitor Mandalas said that the Commissioners could apply the money to whatever improvement project it would like for that area. Chairman Littleton provided a brief history regarding what should be done on Canal Street. A study had been done by Mr. Kyle Gulbranson of URS Corporation, Ms. Sullivan and Mr. Kercher who reported that it would be better to not have something done regarding curbing and sidewalks abutting the property. There was no ability for the Planning Commission to require something to happen off of the Oak Grove property. The Applicants offered to do something in regard to the western side of Canal Street. The language in the Irrevocable Escrow Agreement could be rewritten to include a minimum of a pathway.

Attorney Patchell was agreeable that in regard to Page 3 of the Agreement, "[F]or explanatory purposes only, and not as a limitation, such improvements shall include a walking path and may further include benches, bike racks, informational signage, bank stabilization, landscaping and lighting".

Attorney Patchell said that the \$20,000.00 is due upon final approval of the Oak Grove at the Beach subdivision. She requested clarification on the timing of the demolition. The Applicants must demolish the structures prior to final approval or beginning construction. Attorney Patchell wanted to be sure the demolition of the building would not affect any information that the City relied upon for its conditional approval because the existing use plan would change prior to final approval. Chairman Littleton said the Planning Commission would need to condition that the buildings are to be removed.

Attorney Patchell said that the Applicants are ready to move forward with issuing of the bonds, etc. once a conditional preliminary approval is received. The Applicants are also looking for a timeframe because of the time stopping on the variance. The Applicants would like to move forward as soon as possible with supplying and meeting all of the conditions in order for a final approval to be made. Chairman Littleton said that final approval would be based on when the infrastructure is completed. Another hearing will take place when the conditional approval is removed, final approval is made and the plot plan is signed. Final approval would occur at the next available scheduled time.

Attorney Patchell said that the individual Applicants for estate purposes would like to transfer lots into their own names, but that cannot be done until the final approval from the Planning Commission. She asked if their bonds could be posted or if there is another type of leeway that the Planning Commission would need to have to permit them to move forward with that. Chairman Littleton said that this Application and the Applicants should stay totally intact until they have final approval from the Planning Commission. The Planning Commission will do nothing to delay final approval. Infrastructure will be completed before final approval. City Solicitor Mandalas concurred.

Chairman Littleton and the Planning Commission addressed the changes to be made to the Resolution.

1. Page 5. Section 1.1. This language to be changed regarding the six (6) trees to coincide with the proposed language in the Declaration.

2. Page 9. Section 1.12. This language to be changed regarding the \$20,000.00 and when it is executed to coincide with the proposed language in the Irrevocable Escrow Agreement.
3. Page 9. Section 1.12. This language to be changed regarding the walking path to coincide with the proposed language in the Irrevocable Escrow Agreement.
4. Page 9. Section 1.2. The language in the last paragraph to read: “[T]he Planning Commission’s approval of Major Subdivision Application 0708-05 is conditional upon the execution of the final form of the Escrow Agreement by the Applicant and presentation of this agreement to the Mayor and Commissioners of the City of Rehoboth Beach and their acceptance.”
5. Page 10. Sections 2 & 4. This language to be redone.

Mr. Shulman made a motion, seconded by Mrs. Konesey that the Planning Commission is in general agreement to approve the conditional approval of Major Subdivision No. 0708-05, but in light of several issues that are substantive and that both the Applicants and the Planning Commission are in agreement with, the Planning Commission is directing the City Solicitor to provide it with a final revised draft Resolution for approval by January 14, 2011.

There was consensus among the Planning Commission members that they were in agreement with the remainder of the Resolution and the changes that will be done by City Solicitor Mandalas, and they are ready to vote on it at the January 14, 2011 meeting.

A letter from the Chairman of the Planning Commission will be presented to the Board of Adjustment at its December 13, 2010 meeting in regard to the extension of the variance.

Motion carried unanimously.

A new partitioning application has been filed on for 807 King Charles Avenue.

Mrs. Konesey made a motion, seconded by Mr. Gauger, to adjourn the meeting at 10:08 p.m. and move the rest of the agenda to the next meeting.

The next Regular Meeting will be held on January 14, 2011 at 6:30 p.m.

RECORDED BY

(Ann M. Womack, Recording Secretary)

**MINUTES APPROVED ON
MARCH 14, 2011**

(Preston Littleton, Jr., Chairman)