

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

December 13, 2013

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:31 p.m. by Chairman Preston Littleton on Friday, December 13, 2013 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Mr. Francis Markert called the roll:

Present: Mr. Harvey Shulman
 Mr. Paull Hubbard
 Mr. David Mellen
 Chairman Preston Littleton
 Mr. Francis Markert, Jr.
 Mrs. Jan Konesey (left the meeting at 9:18 p.m.)
 Ms. Lynn Wilson
 Mr. Michael Strange

Absent: Mr. Brian Patterson

Also Present: Mr. Glenn Mandalas, City Solicitor (left the meeting at 8:42 p.m.)
 Ms. Terri Sullivan, Chief Building Inspector

A quorum was present.

VERIFICATION

Ms. Ann Womack, City Secretary, verified that she had met the requirements for the meeting notice to be posted, advertised, mailed and signage.

APPROVAL OF MINUTES

Minutes of the August 9, 2013 Planning Commission Special Meeting were distributed prior to the meeting. Minutes of the August 9, 2013, October 11, 2013 and November 8, 2013 Planning Commission Regular Meetings were not available for approval.

Mr. Francis Markert made a motion, seconded by Mr. David Mellen, to approve the August 9, 2013 Planning Commission Special Meeting minutes as written. (Shulman – aye, Hubbard – aye, Mellen – aye, Littleton – aye, Markert – aye, Konesey – aye, Wilson – aye, Strange - aye.) Motion carried unanimously.

CORRESPONDENCE

There was none.

NEW BUSINESS

Chairman Littleton called for the Preliminary Review of Partitioning Application No. 1113-04 for the property located at 49 Park Avenue, Lots G & H, into two (2) lots with Lot G becoming one (1) lot of 5,000 square feet and Lot H becoming one (1) lot of 5,000 square feet. The Partitioning has been requested by Timothy G. Willard, Esq. of the law firm Fuqua, Yori and Willard P.A. on behalf of Meredith Ann Thomas, Elaine Marie Lewis Nolan, Campbell Collier Lewis & Melanie Scot Lewis, Trustees of the Coeur Jolie Irrevocable Trust, owners of the property. Chairman Littleton provided the Preliminary Review procedures.

Chief Building Inspector Terri Sullivan read her report with exhibits. (Copy attached.)

- Exhibit A – Application packet which includes:
- (1) Application
 - (2) Planning Commission Affidavits
 - (3) Deed
 - (4) Boundary Survey Plan & Proposed Partitioning
 - (5) Photographs

The owners wish to subdivide Lot G & H, Block Park, into two lots with Lot G becoming one lot known as 47 Park Avenue and consisting of 5,000 square feet and Lot H becoming one lot known as 49 Park Avenue and consisting of 5,000 square feet. The existing structures will remain but the garage apartment will be renovated and a portion removed to meet the City Code. The stone patio and spa will be removed. No trees are proposed to be removed. Based on the survey submitted, both proposed lots can fully contain a 4,000 square foot rectangle, will have a lot size of at least 5,000 square feet and will have 50 feet of frontage on a street.

Mr. Timothy Willard, Esq. of the law firm Fuqua, Yori and Willard, represented the owners of the property. This is a Partitioning Application to divide one (1) lot which is addressed as 49 Park Avenue into two (2) 5,000 square foot lots. With the Application, a deed was filed in addition to the filing fee, Affidavits, seven (7) photographs of adjacent properties and survey. In looking at the Application, Attorney Willard acknowledged that there were omissions:

1. B(2) – Photograph of the lots immediately adjoining the side lot lines of the existing lot to be subdivided and any new lot being created as taken from across the street from those adjacent lots (and showing those adjoining lots' total street frontage and structures on those adjoining lots). The photographs were attached.
2. F(2) – The field work (including all measurements) was done within the last 6 months. The box should have been checked yes, not no.
3. F(5) – Shows the entire street frontage of the existing lot and all new lots to be created. The box should have been checked yes.
4. G(4) – Will any existing trees on the existing lot or any lot(s) being created be affected and, if so, explain. The box should have been checked no, not yes. There is no intention to remove any trees that should be protected.
5. G(9) – Are there any structures on any of the lots immediately adjoining all property lines (front, back and sides) of the existing lot or any new lot(s) being created and, if so, include on a survey attached to this page (or include as part of the survey) the locations the sides of all such structures closest to the property lines and their heights. The heights of the adjacent structures were not provided but would be by the January 10, 2014 Planning Commission Meeting.

The photographs were referred to as follows:

1. A-6 – Existing lot – 49 Park Avenue.
2. A-7 – New lot being created. Two story garage at the rear of the lot.
3. A-8 – New lot being created. Front of house and house to left.
4. A-9 – Side adjacent lot to east.
5. A-10 – Lot adjoining side lot line to west.
6. A-11 – Rear adjacent lot to west.
7. A-12 – Rear adjacent lot to east.

With regard to the survey dated October 30, 2013, the house is located within the existing setback lines and would be located 10 feet off of the new lot line. The intent is for the garage to possibly be brought into compliance for the purposes of setback and dwelling requirements or be demolished. The garage is approximately 19 feet long. Approximately eight feet at the rear of the garage would be removed, if possible. The intent at this point is for the parking to remain. Each lot would be within the statutory size of 5,000 square feet.

Mr. Campbell Lewis noted that the house had been previously moved two years ago from the center of lot to one side in anticipation of a partitioning.

Ms. Sullivan noted that there cannot be an accessory structure without a primary structure on a lot. The primary structure has to be residential. In order for the garage to be a legal dwelling, it would have to be moved forward. The applicants would need to apply for a building permit before getting final approval from the Planning Commission. It may be that the Planning Commission would need to extend the partitioning recordation requirement a little longer than what would normally happen. As long as the applicants would apply for the permit and have the work done, the final for Building & Licensing would be that it is a residential structure. All the Planning Commission would need to know is that the applicants received a Certificate of Occupancy for the dwelling unit.

Mr. Harvey Shulman said that not only would part of the building be removed, work would also need to be done in it so it would become a residential structure that complies with the Code. A condition of

approval for the partitioning would be for the building inspector to report about what has been done with the building and how it has been converted it into a residential which complies with the Code. If the lot is partitioned, the building inspector will need to make sure that the second lot with the small building on it does not become a joint use with the other lot.

Mr. Willard noted that the stone path is to be separated so it does not connect. He had done a title search of the property to make sure there are no restrictions on it. He noted that Mr. Lewis is asking for nine months with regard to a conditional approval in order to get the work done.

Chairman Littleton noted that the Planning Commission could only do a six month conditional approval. Before the end of the six month approval, the Applicant would need to come before the Planning Commission for good cause to ask for a three month extension.

There was no correspondence or public comment.

Chairman Littleton closed the public portion of the hearing.

Mr. Shulman made a motion, seconded by Mrs. Jan Konesey, to move the Application to Public Hearing.

City Solicitor Mandalas read the Resolution. The Planning Commission find that Partitioning Application 1113-04 is substantially complete and accurate, such that the Applicants may proceed forward to a public hearing on the Application and action by the Planning Commission pursuant to Section 246-8.1, so long as the Applicants provide the following additional information and clarify the following legal or factual issues before such public hearing is scheduled. The Applicant shall correct the Application errors and omissions identified on the audio recording of the Preliminary Review by December 27, 2013.

Mr. Shulman was comfortable with making the motion because what is missing from the Application is so small, and it rises to the level of going to a public hearing.

In addition to the deficiencies in the Application previously noted above, Ms. Sullivan also provided a list:

6. H(1) – Does the existing lot or any new lot(s) being created involve any non-conforming structure or use (including as otherwise permitted by law). (If yes, explain on a separate paper attached to this page.) The box was checked yes, but there was no explanation.
7. H(2) – Does the existing lot or any new lot(s) being created involve any accessory building or use. (If yes, explain on a separate paper attached to this application.) The box was checked yes, but there was no explanation.
8. H(5) – For the existing lot or any new lot(s) being created, will changes be made to existing off-street parking and/or curb-cut(s) or will such additional parking and/or curb-cuts be required. (If yes, on a separate copy of survey show all existing off-street parking and curb-cut(s) and how such requirements will be met after subdivision, including changes to locations of all off-street parking and curb-cuts.) The box was checked yes. The curb-cuts are shown, but it is not known if they are existing or proposed.

Attorney Willard noted that with regard to H(5), the box should be checked no. Two parking spaces would be required per dwelling on the lot.

Mr. Shulman amended the motion, that the Applicant shall correct the Application errors and omissions identified on the audio recording by December 27, 2013. Motion carried unanimously.

Mr. Mellen suggested that a letter should be issued to various surveyors reminding them that the Planning Commission requires heights of buildings on adjacent properties and if there are any problems, the reason why it cannot be done should be noted on the surveys. Mr. Shulman agreed that a public notice, announcement or reminder should be issued. City Solicitor Mandalas thought that it should also be sent to the attorneys.

Chairman Littleton said that the Planning Commission should refer this issue to the Building Inspector and City Solicitor.

OLD BUSINESS

There was none.

OTHER BUSINESS

Chairman Littleton called for the Building Inspector's Report.

Chairman Littleton noted that Mr. Mike Hoffman, Esq. of Baird Mandalas Brockstedt LLC, Mr. Shulman, Ms. Wilson and Mr. Markert are working on a site plan review application.

Mr. Mike Strange will contact a representative of DelDOT to find out whether or not there will be an entrance to the new townhouses being built on Rehoboth Avenue Extended. Design requirements would need to be met. It would be impossible for traffic to turn left into the townhouses. This may create problems with traffic at the circle on Rehoboth Avenue.

Chairman Littleton called for the City Solicitor Report.

City Solicitor Mandalas mentioned that the Board of Adjustment heard an appeal of the Building Inspector for a property located at 89 Columbia Avenue. The Appellants decided to go before the Board of Adjustment on appeal instead of coming before the Planning Commission for a partitioning. The Board of Adjustment determined that there were two lots and granted the appeal. The lots are viewed as subdivided. Another similar case will be heard by the Board of Adjustment on December 16, 2013 for a property located on Rehoboth Avenue with regard to an appeal of the Building Inspector. The Board of Adjustment does not look at any kind of intrusion on the new setbacks which it is creating with a new lot line.

Ms. Sullivan said that at 89 Columbia Avenue, the house will be demolished so there will be no intrusion. The Appellants had applied for a demolition prior to the hearing.

Chairman Littleton noted that City Solicitor Mandalas had drafted a Code amendment which would clarify the issue of merger/unmerger. The Planning Commission had forwarded it to the Commissioners on two occasions citing that this is an ongoing problem. There has been no action by the Board of Commissioners to date.

Mr. Shulman said that merger has relevance for both zoning purposes and subdivision purposes. City Solicitor Mandalas noted that the City has taken the position that merger has relevance for zoning purposes. There are still two existing parcels that can be separately deeded. When someone builds a structure across two properties, zoning setbacks will be needed for the new merged property. When the Planning Commission does a partitioning or subdivision, it subdivides for title and zoning purposes.

Mr. Shulman said that the point is lots can be unmerged for zoning purposes, but there is still a subdivision process. As a matter of common sense, to say that when demolishing structures people do not have to go through the partitioning process, there would be no partitionings if everyone did that. If the subdivision ordinance is to have meaning, Mr. Shulman thought people should not be allowed to get around it. The notion of being concerned about adverse impact on the neighbors would be irrelevant.

City Solicitor Mandalas thought that the Planning Commission has done everything it can do to raise the issue with the level of individuals who can make change. The Commissioners had discussed the issue, but have not done anything about it. He would much prefer that clarity would be brought to this issue.

Mr. Shulman suggested that "Discussion of potential response to Board of Adjustment actions on unmerger of lots" be placed on the next Planning Commission agenda. He suggested sending a more direct and respectful letter to the Board of Commissioners. The Planning Commission should ask the Board of Adjustment to have a joint meeting with it to discuss these issues. Chairman Littleton said that he will need the members to come to the meeting with their ideas of what needs to be explained better to the Board of Commissioners. He also urged that each member talk to the individual Commissioners with regard to this issue.

City Solicitor Mandalas reported that with regard to the minor subdivision application which was tabled, he and Ms. Sullivan had met with Ms. Veronica Faust, Esq. of the law firm Morris James LLP and her two clients. They discussed the various issues regarding the application and the survey infractions. Attorney Faust had said that an agreement to transfer would not be considered a violation. There has been no exchange of money so there is no sale that is occurring. It is simply an agreement to transfer. Mr. Shulman said that there is an exchange of consideration. Sales do not always require an exchange of money. Sales require mutual consideration. These people have made mutual promises to each other about what each will receive. City Solicitor Mandalas said the current status is that he has drafted a memorandum which he has shared with Chairman Littleton. A final memorandum will be issued at some point, but to date the Applicants are not ready to come back before the Planning Commission.

Chairman Littleton called for the continuation of discussion regarding possible changes and amendments to the

City Tree Ordinance based on public input, interview and recommendations received by the Planning Commission and research conducted by the Commission with respect to the Resolution regarding the City's trees which was passed by the Mayor and City Commissioners. Chairman Littleton also called for discussion of a planned transmittal report to the Board of Commissioners, identifying any additional data needs and plan to attain same and public comment.

Chairman Littleton referred to Chapter 253 of the Code with regard to trees. Mr. Brian Patterson of the Planning Commission had provided an annotated copy and a clean copy of his version of the existing tree ordinance. These copies had been forwarded to the Planning Commission prior to the meeting. At the last meeting, the Planning Commission had not reached consensus that this chapter of the Code would be moved into the Zoning Code and it would be the Board of Adjustment's responsibility. With regard to the existing Code, Mr. Patterson was trying to reduce its volume and add simplicity to it. Chairman Littleton noted that clarification is needed on how to define protected trees. In Mr. Patterson's annotated copy, he referred to a specimen tree as a tree that has at least 24 inches caliper. A shade tree has three inches caliper or more and is located in the front of the property, or has five inches caliper or more and is located anywhere on the property. Shade trees are the large trees. In the existing Code, it is required that three specimen trees of three inches caliper or more would need to be located on a property which is necessary to meet the density requirement; an existing tree of six inches caliper or more; or can be argued or an existing tree of three inches caliper or more in the area between the front property line and the front of an existing structure. The Planning Commission would like that every large tree of 24 or more inches caliper should be included in the definition of a protected tree. Three trees should be located on the property. If a lot is newly created, there should be three shade trees on the property. A shade tree in the front yard that has three inches caliper should be a protected tree. If the requirements would need to be met, it should be a protected tree. The discussion in the existing Code is correct, but it is oversimplified.

Mr. Shulman said that the notion of a historic tree would be eliminated as per Mr. Patterson's definitions. A protected tree incorporates a specimen tree, but the definition of specimen tree would be changed. Mr. Patterson's definition of specimen tree was different from the current definition. Discussion ensued as to whether or not loblolly pines would be considered as shade trees.

Mr. Michael Strange said that over the years, the amount of setback on the street has been increased, there is virtually no land available for a substantial shade tree. It creates a host of problems with overlying wires on the street, adjoining houses, etc. The trees that are not protected are the one that will have the greatest probability of survival because they do not have a wide canopy. They are green all year long, absorb more greenhouse gases, and are more survivable in a salt environment. A failure is being set up for 40 to 50 years from now. With large canopy trees, if a person has an adjoining lot and they build on it, the adjoining lot can be clear cut to the property line where the tree would extend over onto the other lot. With cedars, there is a lower probability of this because of the smaller setbacks. It grows tall and provides shade. As presented in Mr. Patterson's proposal, future problems would be created and there would be de-treeing, not treeing.

Chairman Littleton noted that at the August Special Meeting, the representatives of the tree companies said that the City would be much better served by having three shade trees on a property with no understory trees.

Mr. Mellen said that when talking about canopy, there is an assumption of being able to stand under a tree and there is canopy above. From a standpoint of absorbing gases and producing shade, holly trees produce a lot of shade; and they should not be eliminated. The concept of a canopy is wrong.

Chairman Littleton said he is looking at this issue more from a property rights standpoint than a community rights standpoint. Mr. Shulman referred to his interview with Mayor Cooper. Structures that are too big and cover too much of a lot are allowed for trying to get the protection that is wanted. The true answer is to allow smaller structures and less coverage. Chairman Littleton thought that with relativity to trees, it would be a good idea if the biggest a house could be built would be 2,500 square feet, the setbacks would be increased and more natural area would be needed.

Mr. Markert noted that at the last Regular Meeting of the Mayor and Commissioners, he had presented the report from the Planning Commission. He had mentioned that Mr. Patterson has been working on a draft ordinance. The Commissioners were disinclined with that idea; they were more interested in getting a report from the Planning Commission. Mr. Markert thought that the Planning Commission should come up with the best recommendations. The preamble that Chairman Littleton had written, spelled out the inherent problems with the situation aside from the trees themselves. What should be spelled out is that there is diminished area as a result of the FAR and lot coverage; and then the considerations to be made should be stated.

Chairman Littleton thought that the Planning Commission needs to lay out all of the big issues and provide an amendment to the Code. Everyone has said that the tree ordinance is confusing, they do not understand it, and it is causing wrong decisions to be made and preventing right things to be done. He thought that nuisance trees on an existing property are an issue. Everyone that had been interviewed has said the tree ordinance is confusing and it is not understandable. The public does not understand the ordinance, and the people who are trying to enforce are saying that it is forcing them to make decisions they do not think are right, and it is not allowing them to do things they think should be done.

Mr. Shulman did not have a problem with coming up with recommendations for trees on public property. There are inadequacies in the Code and in the City practices. The Planning Commission could suggest things about trees on public property. There should be a list of the correct species of trees. Being less intrusive of personal property rights would be to tell someone that they can build the house they want to build but the building inspector would have the right to tell that person what would need to be done to protect the trees. Mr. Shulman thought that there would be less protection to existing trees in the proposed draft than what is in the current ordinance.

Mrs. Konesey said that Chairman Evans of the Board of Adjustment thought that the City was cutting down too many trees, and that is why the appeals need to go to the Board of Adjustment instead of the Parks and Shade Tree Commission. He thought that the City has gone too far in the direction of property rights and not enough in the direction of community rights. Chairman Evans does not want to see any more trees being cut down. Mrs. Konesey thought that tree protection during construction, maintenance, etc. is not addressed appropriately.

Ms. Sullivan said that it is not possible to protect a 40 foot wide shade tree on a 50 foot x 100 foot lot. This was verified by Mr. Jeff Meredith of Sussex Tree.

Chairman Littleton thought that an attempt to increase the tree canopy would be to replace a cut down tree with a shade tree.

Mr. Shulman was concerned with trees being cut down that are located in the setback areas. Mr. Markert said that once a house is built, there has to be some protection for the setback areas such as a tree planting zone or have it that the setbacks would be an undisrupted area in the future.

Mr. Shulman said that the Code can be simplified without significantly reducing protections for the trees that are now protected. There also needs to be an educational campaign.

Mr. Strange said that with regard to balancing property rights, in the preface it should be stated there are bigger issues which cause deforestation of the City and examples should be provided. However, with that context, there should be a minimum recommendation that is sensitive to property rights and the community. There is a minimum where the Planning Commission can get to so it will not inflame everyone, but it will pass the test of reason and have a positive impact. It would clarify the gray area and make it easier to execute.

Ms. Sullivan suggested changing the definition of caliper. The practice for arborists is to measure caliper is the diameter at breast height not 12 inches from the ground.

Mr. Markert noted that the minimum for trees to be planted on a bare lot should be three shade trees. Those trees should grow to a specific height. Mr. Shulman had less concern about the type of tree planted as opposed to a tree being cut down and under what conditions it can be taken down.

Chairman Littleton thought that the Planning Commission was not going to differentiate between evergreens and deciduous trees. Ms. Wilson suggested that there be two large trees and one intermediate tree with regard to the bare minimum.

Chairman Littleton found the flow very difficult of what Mr. Patterson had done with a draft. The flow of the existing ordinance was more logical. The existing ordinance can be simplified without losing its core. Chairman Littleton said that the Code states that a tree removal permit requires a tree plan. There is a fee for both of those. No fee is charged for the permit if the tree is dead or diseased. The Building and Licensing Department is not following the letter of the law with regard to the fees. Mr. Shulman suggested that this be cleaned up. Chairman Littleton said that there should be a non-discretionary mitigation fee that the reviewing body would not be able to alter. With regard to moving the tree ordinance into the Zoning Code, there is vulnerability of losing the ordinance. Chairman Littleton mentioned that Ms. Sullivan had suggested that part of the Planning Commission's recommendation should be that if the tree ordinance stays with the Parks and Shade Tree Commission, then the Commission deserves education, resources and to be helped with what its

task is. Chairman Littleton also noted that the Code could be more specific. He thought it would be better to not move this to the Zoning Code.

Mr. Paull Hubbard acknowledged that his wife is a member of the Parks and Shade Tree Commission. In many cases, it amounts to the wrong tree in the wrong place. The problem seems to be that the City Arborist does not have flexibility to make a judgment as to what the right tree in the right place is. The new draft done by Mr. Patterson, does not give the City Arborist any more flexibility. Chairman noted that in the preamble he had drafted, it said that ideally not only will setbacks be changed, but it would allow the City Arborist more discretion.

Mrs. Konesey suggested that the City Arborist would be able to bring issues, not only appeals, to the Parks and Shade Tree Commission for discussion. Mr. Shulman said that he would support this idea if the City Arborist is trained and skilled, etc.; and secondly, if the homeowner would not like what the City Arborist would propose, then the homeowner would have to show the Parks and Shade Tree Commission that the Arborist's decision was arbitrary and capricious. They would have to show that there is something wrong with the City Arborist's decision. If the Planning Commission is going to build in discretion with the tree ordinance and give discretion to the Arborist, it should not let the Parks and Shade Tree Commission second guess the Arborist's expertise. There would have to be standards to be followed. The law would be rewritten that in certain situations, the Arborist would have discretion.

Ms. Sullivan had a problem with giving the City Arborist discretion to that degree. Rewriting the ordinance with the possibility of the understory trees and trees less than five inches caliper, etc. to be cut down and creating spaces for the growth of the remaining trees are a good idea. When a property owner appeals the City Arborist's decision to the Parks and Shade Tree Commission, the Arborist does not provide an opinion as to how he feels about the case unless he is asked an opinion; and Ms. Sullivan likes that. She has no issue when it goes to an appeal, but to give the Arborist the ability to provide an opinion, she does not want any part of that. Mr. Shulman said that even if the ordinance would not allow it, there could be reasons in the ordinance which the Arborist could cite to for allowing flexibility.

Ms. Wilson said that Section 253-30(A) of the existing Code gives a lot of discretion to the City Arborist and to the Parks and Shade Tree Commission. Mr. Hubbard said that there is a total disconnect between the Arborist and the Parks and Shade Tree Commission.

Mr. Mellen said that the Planning Commission is not doing enough to protect what is already there and be creative about how to grow something new. He noted that Mr. Patterson's draft removed historical tree, but there are other ways of designating a tree as an historical tree. It can be done by the State. This should be recognized.

Chairman Littleton volunteered that he would try to red-line the existing Code and pick up some of the things that Mr. Patterson had suggested. Mr. Shulman said that with whatever draft the Planning Commission looks at, it should have also have the existing ordinance with it highlighted as to what will remain, what will be deleted from it and what will be added.

No new subdivision applications have been filed to date.

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

Mr. Markert announced that at the January 17, 2014 Mayor and Commissioners Regular Meeting, a public hearing will be held on the setback issue.

The next scheduled Regular Meeting will be held on January 10, 2014 at 6:30 p.m.

There being no further business, Mr. Shulman made a motion, seconded by Mr. Strange, to adjourn the meeting at 9:38 p.m.

RECORDED BY

(Ann M. Womack, CMC, City Secretary)

**MINUTES APPROVED ON
JANUARY 10, 2014**

(Francis Markert, Secretary)