

**PLANNING COMMISSION MEETING
CITY OF REHOBOTH BEACH**

January 9, 2015

The Regular Meeting of the Planning Commission of the City of Rehoboth Beach was called to order at 6:30 p.m. by Chairman David Mellen on Friday, January 9, 2015 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Mr. Francis Markert called the roll:

Present: Mr. Brian Patterson
 Mr. Harvey Shulman
 Mr. Paull Hubbard
 Ms. Joyce Lussier
 Chairman David Mellen
 Mr. Francis Markert, Jr.
 Mrs. Jan Konesey
 Ms. Lynn Wilson
 Mr. Michael Strange

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

A quorum was present.

VERIFICATION OF MEETING NOTICE

Ms. Ann Womack, City Secretary, had forwarded the verifications to Chairman Mellen prior to the meeting. Ms. Womack has verified that the Agenda was posted at City Hall, Building and Licensing Department and City website on December 29, 2014. The Agenda was faxed to Cape Gazette, Coast Press and Delaware State News on December 29, 2014. The Public Notice for the Public Hearing of the Partitioning Application No. 1114-03 was posted at City Hall and Building and Licensing Department on December 18, 2014. The Public Notice was advertised in the Cape Gazette on December 23, 2014 and December 26, 2014, Coast Press on December 31, 2014 and Delaware State News on December 23, 2014 and December 24, 2014. A mailing of the Public Notice to property owners was sent out, and signage was posted on the property.

APPROVAL OF MINUTES

Minutes of the June 13, 2014 and December 12, 2014 Planning Commission Regular Meetings were distributed prior to the meeting. Minutes of the August 8, 2014, September 12, 2014 and October 31, 2014 Planning Commission Regular Meetings were not available for approval.

Mr. Francis Markert made a motion, seconded by Mr. Paull Hubbard, to approve the June 13, 2014 Planning Commission Regular Meeting minutes as written. (Patterson – aye, Shulman – aye, Hubbard – aye, Lussier – aye, Mellen – aye, Markert – aye, Konesey – aye, Wilson – abstained, Strange – aye.) Motion carried.

Mr. Markert made a motion, seconded by Mr. Hubbard, to approve the December 12, 2014 Planning Commission Regular Meeting minutes as written. (Patterson – abstained, Shulman – abstained, Hubbard – aye, Lussier – aye, Mellen – aye, Markert – aye, Konesey – aye, Wilson – abstained, Strange – aye.) Motion carried.

CORRESPONDENCE

Letter dated December 31, 2014 from Wayne Neale, AIA, President, has observed several regulations in the City ordinances which have resulted in unintended and adverse consequences; and with minor adjustments, these adversities could be eliminated. Mr. Neale offered observations and comments for consideration by the Planning Commission for future revisions to the Code with regard to: 1. Zoning – restrictions vs. incentives. 2. Turrets, bays and oriel windows. 3. Porches. 4. Other incentives sought to achieve urban design objectives. 5. Floor Area Ratio (FAR) – basements vs. above grade living space. 6. Setbacks. 7. Setbacks and garages. 8. Lots do not merge or should they be required to merge.

PRESENTATION by and discussion with Ms. Dorothy Morris, Delaware Office of State Planning Coordination (Sussex County “Circuit Rider”) concerning State requirement and possible assistance in the five year review and

update of the City's Comprehensive Development Plan (CDP) that was certified by the State on July 23, 2010.

This item had been discussed at the December 12, 2014 Planning Commission Meeting.

OLD BUSINESS

Chairman Mellen called for the Public Hearing of Partitioning Application 1114-03 for the property located at Lot Nos. 36 & 38 Surf Avenue, Block Surf, into two (2) lots with Lot No. 38, the northerly portion of Lot No. 37 and the northeasterly portion of Lot No. 2 becoming one (1) lot of 8,505 square feet, and the southerly portion of Lot No. 37, the easterly portion of Lot No. 36 and the southeasterly portion of Lot No.2 becoming one (1) lot of 6,000 square feet. The Partitioning has been requested by Caren Euster Nelan, owner of the property. Chairman Mellen provided the Public Hearing procedures.

Building Inspector Terri Sullivan read her report with exhibits.

Exhibit A – Application packet which includes:

1. Application
2. Partitioning Plan dated June 2, 2014.
3. Deed dated October 31, 2014
4. Recordation Receipt
5. Email dated November 12, 2014
6. Deed dated August 13, 2014
7. Letter from Susan L. Kirby
8. Estate of Laura Winslow Qualified Disclaimer of Catherine Winslow Priest
9. Deed dated April 6, 1996
10. Letter from FEMA dated September 9, 2014
11. Title Insurance
12. Tax Information from Sussex County
13. (4) Photographs dated November 12, 2014
14. (4) Additional Photographs dated November 24, 2014
15. (1) Additional Photograph dated December 1, 2014
16. Existing Property Lines Survey dated November 25, 2014
17. Partitioning Plan dated November 25, 2014
18. Cover Letter received December 16, 2015
19. Amended first and second page of Application
20. FEMA Letter of Map Amendment Determination Document (Removal) dated September 9, 2014
21. FEMA Letter of Map Amendment Determination Document (Removal) Attachment 1 (Additional Considerations) dated September 9, 2014
22. Letter dated September 9, 2014 from Luis Rodriguez, P.E. of FEMA to Dr. Caren Euster Nelan
23. Letter dated August 24, 2014 from Luis Rodriguez, P.E. of FEMA to Dr. Caren Euster Nelan
24. Letter dated July 15, 2014 from Robin H. Danforth, Project Engineer of FEMA to Mayor Samuel Cooper
25. Letter dated June 19, 2014 from Robin Danforth, Project Engineer of FEMA to Mayor Samuel Cooper
26. Partial Topographic Survey for 4 Pennsylvania Avenue dated June 2, 2014 and prepared by Miller Lewis Land Surveying Inc.
27. Letter dated June 5, 2014 from Caren Euster to Don Miller of Miller Lewis Inc.
28. Letter dated June 5, 2014 from Caren Euster to Terri Sullivan, Chief Building Inspector
29. Partial Plat Map
30. Sussex County, DE Flood Information Report
31. Partial Flood Map prepared by Virgil Brown, Appraiser
32. How to Request a Letter of Map Amendment (LOMA) or Letter of Map Revision Based on Fill (LOMR-F)

The owner wishes to subdivide the easterly portion of Lot No. 36, Lots Nos. 37 & 38 Surf Avenue and the easterly portion of Lot No. 2 Pennsylvania Avenue into two lots with the easterly portion of Lot No. 36, the southerly portion of Lot No. 37 and the southeasterly portion of Lot No. 2 becoming one lot known as 36 Surf Avenue and consisting of 6,000 square feet, and the northerly portion of Lot No. 37, Lot No. 38 and the

northeasterly portion of Lot No. 2 becoming one lot known as 38 Surf Avenue and consisting of 8,505 square feet. Currently, there are 13 trees located on the property, and no trees are being proposed to be removed. Six trees will be on 36 Surf Avenue, and seven trees will be on 38 Surf Avenue. Based on the survey submitted, both proposed lots can fully contain a 4,000 square foot rectangle. Both proposed lots have a lot size of at least 5,000 square feet and have at least 50 feet of frontage on a street.

Dr. Caren Euster Nelan, owner of Lot Nos. 36 & 38 Surf Avenue, noted that she and her sister had inherited the 4 Pennsylvania Avenue and Lot Nos. 36 & 38 Surf Avenue properties as joint tenants with rights. An agreement was made between Dr. Nelan and her sister in October 2014 for her sister to be deeded the house and property at 4 Pennsylvania Avenue. Dr. Nelan was deeded Lot Nos. 36 & 38 Surf Avenue. The existing building on the corner lot was originally the kitchen to the old house that was built in 1900. In 1962, there was a nor'easter that destroyed the old house, and what was left was the kitchen. The kitchen had plumbing and electricity up until approximately 15 years ago when they were removed. Currently, the building is being used as a storage shed.

Ms. Sullivan noted that the water and sewer service for the shed was disconnected at the street. There are no pipes inside the structure. She was not sure if the pipes between the structure and the streets had been removed. There is no electrical meter located on the structure.

Mrs. Jan Konesey was concerned about the proposed driveway on Surf Avenue because it is a heavily traveled street. She voiced concern about making two new lots with a structure that is an accessory building when there is no main building. The steps from the structure go to the property line which is not allowed in the City. When making two new lots out of one, the new lots and the structures on them should be conforming.

City Solicitor Glenn Mandalas noted that these are currently legal nonconformities. The history of the Planning Commission has been that where a new lot line does not increase or create a new nonconformity, those existing nonconformities can continue to exist. By moving the lot line does not increase or create any new nonconformities. Historically, this Commission has taken the position that in this case, the nonconformity does not need to be rectified.

Mr. Shulman said that in the past if a house was on a double lot, and it was only four feet from the property line on one side but not close to the new property line in the middle, the Planning Commission has said it would allow another lot to be created. That was a nonconforming structure. He did not think the Commission has ever dealt with the issue of a nonconforming use. An example would be if someone was grandfathered in what is now a residential street but they have a commercial business and they had it before it was made residential, so it is a commercial use on a double lot. If they decide to subdivide the lot, the business would be run from a lot that is half the size as it was previously. The Commission has never made a decision that it would allow an existing nonconforming use to continue to exist on a lot that is half the size. Currently, the Commission is dealing with a structure and a use. The structure in this application is an accessory structure because it is subordinate to a main structure which, in this case, burned down. The Planning Commission should not penalize someone for having what used to be an accessory structure, but is essentially now the primary structure because it is the only structure on the lot. Structurally, it is too far into the setback area. Mr. Shulman voiced concern that this is also a building with an accessory use. This is the first that the Planning Commission is being asked to subdivide a lot where a use, which is a nonconforming use because there is no primary building that the use is accessory to, is allowed to continue to exist on a smaller lot.

Mr. Brian Patterson said that an accessory use is defined as a use on the same lot with and customarily incidental to any permitted uses. The definition of accessory use does not say on the same lot with and used incidental to the main building. The building in this application is nonconforming with an accessory building because it is too tall. It is legal nonconforming because the structure is already there. With regard to the use, the ability to use the accessory structure would not be lost just because the main building was lost or removed.

Ms. Sullivan acknowledged that she would not issue a building permit for an accessory structure within four feet of the property line on an empty lot. The structure would not be an accessory to another building on the lot without merging the properties.

Mr. Shulman noted that City Solicitor Mandalas has not rendered any opinion that a pre-existing nonconforming use can continue to exist on a smaller subdivided lot. He said if there is a pre-existing nonconforming structure, which is in the setback area, etc. and that does not change, the Planning

Commission's practice has been that it does not allow the subdivision of a lot.

Dr. Nelan said that the shed is not being used. All that remains in the shed is what was left from when everything was cleaned out of it.

Chairman Mellen said it would be unfair to be punitive to take down a structure because, at this point in time, there is no decision as to what will be on the lot. Once it is decided what will be on the lot, Dr. Nelan will have to deal with the correcting of any nonconformities that relate to zoning, building, etc.

Dr. Nelan noted that there had been a driveway on Surf Avenue. Dr. Nelan acknowledged that she would agree to the Planning Commission imposing a condition that the driveway access to the corner lot should be on Pennsylvania Avenue and cannot be on Surf Avenue. The lot facing Surf Avenue would need to have a driveway on Surf Avenue.

Correspondence:

1. Letter received on January 5, 2015 from Kenneth K. Lingo, Jr., 35 Surf Avenue – in opposition to.

Public Comment:

1. Mr. Walter Brittingham, 123 Henlopen Avenue, asked if the property numbers will stay the same or change.

Ms. Sullivan noted that the addresses will be 36 Surf Avenue & 37 Surf Avenue.

Chairman Mellen closed the public portion of the hearing.

City Solicitor Mandalas read the Resolution. Partitioning Application 1114-03 shall be conditionally granted with the following conditions of final approval. The Applicant's property at 38 Surf Avenue shall have vehicular access by way of Pennsylvania Avenue solely. Adoption of the Resolution shall constitute conditional approval and shall not constitute final approval. Consistent with Section 236-7(B) of the Code, conditional approval shall expire six months from the effective date of this Resolution, unless the Applicant has fulfilled all of the conditions as a contingency of final approval. The Planning Commission may grant one extension of this time period for up to three months based on good cause. Final approval shall be granted upon (1) confirmation by the Chief Building Inspector that the conditions of final approval have been satisfied and (2) an affirmative vote during a public meeting of the Planning Commission granting final approval. Subdivision of the property shall be in accordance with the final plat plan prepared by Miller Lewis Inc., dated November 25, 2014, with no revisions noted, Drawing No. 3-34-14.10-6 and with notes and other revisions required by the Resolution. A final plat shall not be filed by the Applicant with the office of the Recorder of Deeds in and for Sussex County until the Planning Commission grants final approval. In accordance with Section 236-9(G), a copy of the final plat containing such conditions as may be required by the Planning Commission shall be filed by the Applicant with the office of the Recorder of Deeds within 90 days from the date of final approval. A copy of the recorded final plat shall be provided to the Planning Commission, the Board of Assessment, the Building Inspector and the City Manager. If the final plat is not filed within this period, the approval shall expire, except that if the Planning Commission for good cause shown may extend the time for final plat filing for a period not to exceed 90 days.

Mr. Francis Markert made a motion, seconded by Mrs. Konesey to accept the Resolution subject to any discussion for conditions.

Chairman Mellen noted that a condition should be that the existing driveway for 38 Surf Avenue shall vehicular access by way of Pennsylvania Avenue, solely.

Ms. Lynn Wilson suggested, as a condition, that the driveway on 36 Surf Avenue shall be accessed to the northerly part of the lot rather than the southerly part of the lot by way of Surf Avenue. Mr. Markert did not agree that this should be a condition. City Solicitor Mandalas noted that the Building Inspector is given the authority under the Code to select driveway locations.

Mrs. Konesey suggested, as a condition, that if the structure is a true accessory structure and be referred to as a shed/storage area, that it forever remain a shed/storage area, not a pool house, overflow, etc. Mr. Patterson did not sympathize with the concern. This is not a commercial building and is not a nonconforming use in his view. This is a building in a residential zone that is used completely consistent with residential uses. It is utterly an accessory incidental to a residential use. The statute does not make a link between an accessory structure and an accessory use.

Mr. Markert, maker of the motion and Mrs. Konesey, seconder of the motion, accepted that there is only one condition that the existing driveway for 38 Surf Avenue shall have vehicular access by way of Pennsylvania Avenue, solely.

(Patterson – aye. He supported the motion because he did not believe the Planning Commission is approving a nonconforming use in this situation. Shulman – no. He complimented the Applicant on a very comprehensive application and doing the right thing for the community and the neighborhood. He disagreed with Mr. Patterson and others in terms of accessory use. In reading the Code, an accessory use has to be incidental to a primary use which is framed in terms of looking at the use regulations in the Code for R-1 Districts. The uses are in regard to other buildings on the lot. There are no other buildings on the lot. This was at one time an accessory use, but it is no longer an accessory use. He thought it is a nonconforming use. In the 13 years, he has been on the Planning Commission, it has never subdivided a lot that had a nonconforming use on it to allow that use to exist on a prior lot. On the other hand, what the Planning Commission is going to do is a very, very narrow decision that, in this case, (1) there is a structure that actually existed before there was a zoning code. (2) The lot on which the structure exists has always existed as a separate legal lot. There has been no evidence presented that there was merged use. If there was evidence presented that there was merged use, it would be a different story. The Planning Commission has been told, and no one has contradicted it, that this has been used only by the people who own the second lot. (3) The fact that there has not been a merger of these lots has been confirmed by the fact that there was a separate building permit issued for this lot to the owner of this lot, and it was not at all connected with the lot next door. (4) Whatever accessory use has been made of this structure in recent history, and he did think there has been an accessory use made in terms of storage, it has not involved any habitation, any dwelling, any business operation, or any human being. The evidence is that stuff is in there, and that is where it has been ever since the time it was cleaned out. Whatever this decision stands for in terms of allowing pre-existing nonconforming uses to continue to exist on a smaller lot, this is about the most narrow unusual use that one could ever make of a structure like this. The Planning Commission has been told it has no plumbing, no electricity, etc. When this gets approved, in his view, it almost stands as no precedent for anything else except for somebody who has the same situation. Since his vote does not really matter because he thought this is the wrong process, he voted against it and believed that the better approach would have been to get a variance. The structure enhances the property. It is all beautiful. It should continue. The Planning Commission should not require it to come down. Hubbard – aye. Lussier – aye. Strange – aye. It amplifies and does a very good job of supporting the Comprehensive Development Plan as opposed to other options that were legally possible. Mellen – aye. While he had some of the same concerns that Mrs. Konesey raised about accessory buildings under advice from counsel, he believed this fits the requirements related to partitioning. He was sympathetic to Mr. Shulman’s point, in terms of views, but this is a very narrow restriction in terms of this unique property. Markert – aye. He said that Mr. Patterson best clarified the issue regarding the use and the Commission’s concerns about that. I tend to support things that I think are for the community benefit. Her decision to basically do the subdivision in such a way certainly supports that. Konesey – abstained. Wilson – aye.) Motion carried.

Chairman Mellen called for final approval of 104 Rodney Street based on obtaining final inspection by Building & Licensing of conditions set at the Public Hearing held on October 31, 2014 of Partitioning Application No. 0814-02 for the property located at 104 Rodney Street, Lot Nos. 27, 28, 29, 30 & 31, Block 24, into two (2) lots with Lot Nos. 27, 28 and the westerly portion of Lot No. 29 becoming one (1) lot of 7,253 square feet and the easterly portion of Lot No. 29 and Lot Nos. 30 & 31 becoming one (1) lot of 5,250 square feet. The Partitioning has been requested by Lee S. Waples on behalf of Yvonne S. Waples Trust and John F. Waples Trust, owners of the property.

Building Inspector Terri Sullivan reported that the conditions set forth by the Planning Commission at the Public Hearing have been completed. The garage has been moved; the curb-cut has been replaced with curbing and the new driveway has been installed. The new addresses for these properties are Lot Nos. 27, 28 and part of 29 becoming one lot known as 104 Rodney Street; and Lot Nos. 30, 31 and part of 29 becoming one lot known as 102 Rodney Street.

Mr. Shulman made a motion, seconded by Mrs. Konesey, that the Planning Commission does final approval. Motion carried unanimously.

NEW BUSINESS

There was none.

OTHER BUSINESS

Chairman Mellen called to continue to discuss plans and timeline for review and documentation of the required

5-year update of the Comprehensive Development Plan (CDP).

Chairman Mellen noted that Ms. Dorothy Morris, circuit rider, was in attendance at the last meeting. She informed the Planning Commission where it is in the current CDP and what options it has. The State considers that the current CDP has no problems, and there are no issues which would cause the Planning Commission to change it. There are three options: 1. Modify the existing CDP which will cause it to go through the PLUS review process with the State agencies and a recertification. 2. Summarize the status where the Planning Commission is with the existing CDP and make an attachment to it. 3. Write a letter to the State saying that there will be no changes to the CDP. Chairman Mellen suggested that the Planning Commission should go with Option 2. The Planning Commission will need to figure out the process, figures out how to upgrade or make comments, what public notifications are needed, etc. The update needs to be completed by mid-July 2015. Chairman Mellen's inclination was to go through the CDP, bring it up-to-date and then prioritize it in order to give guidance to the Board of Commissioners. There has been an indication that the Mayor has suggested some joint meetings with the Planning Commission regarding some of the current issues at hand. Chairman Mellen had reviewed the CDP and developed a spreadsheet with the goals and action items. The spreadsheet will allow the items to be sorted, prioritized and accessed by all the members of the Planning Commission. Chairman Mellen requested that the members fill in the current status and prioritize each of the action items on the spreadsheet. The consensus of the members was to follow the process of using the spreadsheet. Each member will volunteer to work on certain items and provide the status for each.

Mr. Markert noted that the Planning Commission will need to engage the public in the process.

Chairman Mellen called for the Building Inspector's Report.

Ms. Sullivan reported that a work group is working on a noise ordinance, pool ordinance, etc. Sixteen pool applications had been received; and in that grouping, there were five that were approved. A lawsuit has been filed regarding one of the pools.

Chairman Mellen called for the City Solicitor's Report.

City Solicitor Mandalas has been working with Commissioner Mills on a merger ordinance.

Chairman Mellen called to discuss possible agenda items for the March 13, 2015 Regular Meeting, and confirm that there will be no Regular Meeting in February because of quorum concerns.

Chairman Mellen noted the Planning Commission will not be meeting in February 2015.

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

There was none.

No new applications have been timely submitted.

The next scheduled Regular Meeting will be held on March 13, 2015 at 6:30 p.m.

There being no further business, Mrs. Konesey made a motion, seconded by Ms. Lynn, to adjourn the meeting at 9:38 p.m.

RECORDED BY

(Ann M. Womack, City Secretary)

**MINUTES APPROVED ON
SEPTEMBER 11, 2015**

(Michael Strange, Acting Secretary)