CITY OF DOVER PLANNING COMMISSION
SPECIAL MEETING
June 3, 2014

The Special Meeting of the City of Dover Planning Commission was held on Tuesday, June 3 2014 at 12:00 noon with Chairman Colonel Welsh presiding. Members present were Mr. Holden, Mr. Cregar, Mr. Tolbert, Mr. Holt, Ms. Still and Colonel Welsh. Mr. Baldwin, Dr. Jones and Mr. Ambruso were absent. (Dr. Jones arrived at 12:15pm)

Staff members present were Mrs. Townshend, Mrs. Melson-Williams, Mr. Cook, Mrs. Harvey, Mrs. Mullaney and Mr. Pepper, Deputy City Solicitor.

APPROVAL OF AGENDA

Mr. Holt moved to approve the agenda as submitted, seconded by Ms. Still and the motion was unanimously carried 6-0 with Mr. Baldwin, Dr. Jones and Mr. Ambruso absent.

Mr. Tolbert moved to recess into Executive Session for purposes of a strategy session related to potential litigation, seconded by Mr. Holt and the motion was unanimously carried 6-0 with Mr. Baldwin, Dr. Jones and Mr. Ambruso absent.

Meeting adjourned for Executive Session at 12:12 PM.

Meeting resumed at 1:04PM.

Workshop Training: Making Motions and Building a Record

Mrs. Townshend stated that she had asked Mr. Pepper to talk to the Commission members about how they make motions and the issue of how they get the reasons for Commission actions on the record. The way that the process is done now is someone makes a motion, it gets a second and then they have a voice vote. In discussion with Mr. Pepper, they have decided that this process may not be the best way to continue in the future. They may want to make a motion, a second and then a roll call vote where members state their reasons for their decision.

Mr. Holden stated that the Kent County Planning Commission makes their motions this way.

Mr. Pepper questioned what the current practice was for making a motion and how specific the motion is? Responding to Mr. Pepper, Mrs. Townshend stated that the motion would typically be "to approve application S-14-01 Lands of Bob Welsh with the inclusion of all DAC comments and to approve the sidewalk waiver."

Mr. Holden stated that sometimes for Conditional Uses they offer the reasoning why it's in harmony but they could be better at that.

Mr. Pepper questioned how many people were on the Commission when they did the Water Street Office Building 2? It never got built. He asked if anyone remembered Mr. DiMondi's five (5) minute motions. The motions do not have to be that formal. He also likes the fact that the Commission members incorporate the DAC Report in the motion. He suggested that they mention that it complies with all the code requirements. Beyond that, he thinks it's safe to say "I move to approve application _____ because it complies with the Code and based on Staff's recommendation." If there is no public opposition, he thinks it's nice to add "and no public

opposition." After the second, he thinks the voice vote should change to a roll call vote. Then each Commissioner can state on the record, their reasons. It could be as simple as "for the reasons stated by the maker of the motion."

Mrs. Townshend stated that one of the things that the Board of Adjustment does is say "for the reasons specified in the Staff Report and given in public testimony today." If there is something that they clearly need to hone in on, they will add that fact.

Mr. Pepper stated if they are going to impose conditions, the Commissioners should have some specificity as to why they are imposing that condition, what makes this condition necessary and then tie that to something specific to the record, whether it's in the Staff Report or the public testimony.

Colonel Welsh stated that the conditions of approval would typically be presented in the motion. Responding to Colonel Welsh, Mr. Pepper stated yes, but as the Commissioners answer yes or no they may want to point out something specific.

Colonel Welsh stated that if that was not addressed in the motion then they have to go back and incorporate that specificity in the motion. Responding to Colonel Welsh, Mrs. Townshend stated no, not if it's a reason to support the motion. For instance, Dover High Comprehensive Sign Plan, if they did a roll call vote, Colonel Welsh would say "I vote yes in addition to the reasons stated this is the best sign plan package I have seen." It's not part of a motion.

Colonel Welsh stated by the same token if the Commissioner is voting no, they should specify their reasons for voting no. Responding to Colonel Welsh, Mr. Pepper stated that they can, that's not as credible. There is no action taken on no vote because the motion would fail and they would have to go with a motion that's the opposite of the main motion.

Dr. Jones questioned that if being the one dissenting vote, they don't have to state a reason? Responding to Dr. Jones, Mr. Pepper stated that they do not have to.

Dr. Jones further questioned if they would be asked to state a reason? Responding to Dr. Jones, Mrs. Townshend stated no.

Mrs. Townshend stated that the one thing that they do want to differentiate is on a Rezoning or a Zoning Text Amendment. The difference between a Subdivision and a Site Plan versus a Rezoning or a Zoning Text Amendment is that the Rezoning and Zoning Text Amendment are discretionary items. They are legislative actions; they have all the discretion in the world and the Commissioners are making a recommendation to City Council. If City Council doesn't follow the Planning Commission's recommendation, they need to be very clear on the record why. One of the things that's required in the City code and the State code is having the findings of fact to support the action. Typically, it's in the Staff Report. If it's consistent with the Comprehensive Plan and compatible with the surrounding land uses, Staff puts that in the Staff recommendation and no public opposition. However, in the case of the Ashburn application the Commissioners did not go with the Staff recommendation which obviously made sense. The motion would state "move to deny the application based on the public testimony with regard to traffic and the affect that all of the permitted uses in that zone could have on the neighboring uses and the existing traffic." During a roll call vote, the Commissioners would have findings and facts to support the

denial of the application.

Mr. Tolbert questioned if they were saying on a zoning recommendation made to City Council that they have to go through a roll call vote? Responding to Mr. Tolbert, Mrs. Townshend stated yes, they should. 9 times out of 10 City Council is going to take the body that the Commissioners give them as their basis for making a decision. For a Rezoning application that's cumulative, they try to have everything the Commissioners need in front of them minus the public testimony and then they build on that based on the public hearing and motion. Then City Council will have an even better body of information, along with their public hearing and then they are able to make the decision. By the time the application gets to City Council, it's been very well vetted. If they say no to something that the Planning Commission has supported, they need to be very clear for the record but they need the record to be clear when it comes to them as well.

Colonel Welsh stated that when he first came to the Planning Commission it was a roll call vote.

Mr. Cregar stated that he also remembers having a roll call vote.

Dr. Jones questioned if there had been no public comment and Commissioners were aware of some of the safety issues, is that enough to disapprove an application? Responding to Dr. Jones, Mrs. Townshend stated yes. If they drive that intersection every day and they think that it's going to be a disaster when built, they can state that for the record.

Colonel Welsh stated that jurors are told to disregard any personal knowledge that they have but part of the reason that Planning Commission exists is to get the knowledge of the community.

He questioned if from this point forward they would be doing roll call votes? Responding to Colonel Welsh, Mrs. Townshend stated yes.

Mr. Pepper stated that the more they tie it to the record that's been created and the reasons for their vote, the easier it is to defend the decision. Assuming that people aren't creating a record filled with stuff that's not relevant. For example, the East Lake Gardens application one of the reasons was that there was a petition naming 139 names opposing the application. That's not going to cut it.

Dr. Jones stated that as a new member, speaking of the office building located at 6 South State Street, what did the application come through the Planning Commission for? Responding to Dr. Jones, Mrs. Townshend stated that it came through as a Site Plan because of the parking lot improvements and the need for the parking waiver.

Dr. Jones further questioned if another application has to come through before construction starts at that building? Responding to Dr. Jones, Mrs. Townshend stated no, because it's just a change of use from one permitted use to another so that's administrative. If they weren't doing the site changes it would not have required the Planning Commission.

Colonel Welsh questioned if they could go back to the application that Mr. Pepper was referring to for East Lake Gardens? He was talking about a petition? Responding to Colonel Welsh, Mr. Pepper stated that it was not a rezoning petition that triggers a super majority requirement; this was a Site Plan application that the neighborhood didn't like even though the zoning was

appropriate for it.

Colonel Welsh further questioned if Mr. Pepper recalled the reason why the neighborhood didn't like it? Responding to Colonel Welsh, Mr. Pepper stated that development of the property that had been vacant would create more traffic. They were also concerned that it would lead to the loss of business for Tony's Bicycle Shop. The owner was having customers parking in the roadway which was part of the right-of-way and he didn't like that this development would probably mean that the right-of-way was going to become used for a roadway as opposed to being used for parking. There were a lot of points they brought up that Judge Terry said "these aren't in the Code. The Code gives six (6) objectives that the applicant is to assess as they design a Site Plan and these aren't there."

Colonel Welsh questioned that if there's public testimony and as part of the testimony they present a petition to show that a large number of the residents are concerned, the Commissioners are not to consider that? Responding to Colonel Welsh, Mr. Pepper stated that a petition can be considered if their objections are based on factors that the Planning Commission is allowed to consider.

Mr. Holden stated they are different from a Subdivision or a Conditional Use. Responding to Mr. Holden, Mr. Pepper stated yes, in a Site Plan approval there are six (6) objectives that the Commission is considering.

Colonel Welsh stated that one of the things that the Planning Commission is to consider is if it ties in architecturally with the surrounding community. If an applicant comes before the Commission with a building that is horrible and doesn't tie in with the existing buildings he has always thought that the Commission has had the right to deny the Site Plan. Responding to Colonel Welsh, Mr. Pepper stated that they do have the right to deny the application but it is being tied to a specific non-compliance with the Code.

Mr. Holden stated that there was the church on Wyoming Avenue. Responding to Mr. Holden, Mrs. Townshend stated that they could necessarily deny the Site Plan but they could say that the architecture of the building needed to be improved. The applicant then came back to the Commission and the architecture was improved.

Colonel Welsh stated that his concern is that the Planning Commissioners are afraid to make a motion or to ask a question because they think somebody might perceive the question to be stupid. He has sat out there and he understands that feeling. He is encouraging the Commissioners to be more vocal and to ask questions or feel free to make motions. What he doesn't want to do is enter into "be careful what you say" mode.

Mr. Tolbert stated that they are dealing with a very technical subject. When appointed to the Planning Commission, the Commissioners deal with all of these technicalities regarding buildings and construction and the ordinances. They have to learn all of that and they aren't given an orientation or training session; they learn as they go. This is why some Commissioners are afraid to open their mouths. Responding to Mr. Tolbert, Mr. Pepper stated that they have great resources up on the dais with the Planning Staff; they are the keepers of the Code.

Mr. Pepper stated that he couldn't remember how long it's been since he attended a Planning

Commission meeting. Responding to Mr. Pepper, Mrs. Townshend stated that they rarely have counsel at Planning Commission meetings.

Colonel Welsh questioned if Mr. Pepper would be at the Planning Commission meeting scheduled for Monday, June 16, 2014? Responding to Colonel Welsh, Mr. Pepper stated that he had not been asked to be at the meeting.

Mrs. Townshend stated that she didn't think Mr. Pepper would need to be there unless anybody believes that he is needed at the meeting. She thinks today was the opportunity for legal counsel.

Mr. Tolbert questioned if Mr. Pepper felt like he needed to attend the meeting? Responding to Mr. Tolbert, Mr. Pepper stated that he was already committed but could change his schedule if needed. He doesn't think that this case will be difficult.

Colonel Welsh stated that his only concern was that the attorney who came to the podium at last month's meeting was rather assertive. Responding to Colonel Welsh, Mrs. Townshend stated that they could specifically state Case Law in their motion. There's nothing confidential in these documents; Case Law is a matter of public record.

Dr. Jones stated that she didn't want to minimize the applicants coming back but now it seems rather cut and dry in terms of what responsibility they have to the law; what they can or cannot do. Responding to Dr. Jones, Mrs. Townshend stated that this was one of her concerns the night of the meeting and she can't give the Commissioner's legal advice.

Mr. Holden stated that the attorney had raised issues that this was an inappropriate Subdivision application and that it should have been a different type of application. In his mind, he didn't know conclusively that the attorney was wrong.

Dr. Jones questioned if they will be going through the same process during the meeting scheduled for Monday, June 16, 2014? Responding to Dr. Jones, Mrs. Townshend stated that there's no public hearing because there has already been one at the previous meeting.

Dr Jones stated that they don't have to appear exceptional eager but the Commission has no grounds to deny the application. Responding to Dr. Jones, Mr. Pepper stated that he sees nothing in the record that leads him to believe that the application is not Code compliant. Mrs. Townshend's memo for today said that the application complied with the Code.

Colonel Welsh questioned that since they would not be opening a public hearing does the applicant have the opportunity to present additional information? Responding to Colonel Welsh, Mrs. Townshend stated no because at this point the Commission deferred the application so that they could get legal counsel. If there was something that the Commission was requesting from the applicant then it would be fair to allow the applicant the opportunity to present additional information. Her thought is that the Commission closed the record; they needed to discuss the record with their attorney.

Colonel Welsh stated that the only thing that will be required of the Commission is to take a vote. Responding to Colonel Welsh, Mrs. Townshend stated yes.
Mr. Pepper stated that he agreed. The Commission will call the case; someone makes a motion

that gets seconded and then the discussion followed by a roll call vote.

Colonel Welsh questioned if the discussion would be just amongst the Commissioners? Responding to Colonel Welsh, Mr. Pepper stated yes.

Mr. Pepper stated that he doesn't know how free-wheeling these hearings are. He has some councils that have a give and take with the audience. He tries to prevent it but it's been going on since before he began attending the meetings. Responding to Mr. Pepper, Mrs. Townshend stated that they typically don't do that.

Mr. Tolbert questioned why council would do that? It seems like they would just be digging a pit for themselves. Responding to Mr. Tolbert, Mr. Pepper stated that its things like their room not being as formal as Council Chambers, there's not a clear delineation between Council and the audience which leads to some informality.

Mr. Holt questioned if it would be possible for the Planning staff to do a video shot of the property or something of that nature to present to the Commissioners? He doesn't always get to visit the site and sometimes a video shot would help clear up any questions. Responding to Mr. Holt, Mrs. Townshend stated that sometimes they do show an aerial photograph.

Colonel Welsh stated that they have done street level photos but that may have been before Mrs. Townshend's time. Each application had photos of the site.

Mr. Pepper stated that they should not all get in a van to go touring.

Mr. Holden stated that it would be considered holding a meeting. Responding to Mr. Holden, Mrs. Townshend stated yes and they would be violating FOIA.

Mr. Holden questioned going to the site as an individual? Responding to Mr. Holden, Mr. Pepper stated that was okay to do.

Mrs. Townshend stated that they should not talk to anybody at the site, for or against. She thinks that people assume the rule is to not talk to the property owner but it could be either for or against.

Meeting adjourned at 1:30 PM

Sincerely,

Kristen Mullaney
Secretary