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January 23, 2020

VIA ELECTRONIC DELIVERY AND FIRST-CLASS MAIL

Glenn Mandalas, Esquire
City Solicitor to the City of Lewes
Baird Mandalas & Brockstedt LLC
6 South State Street
Dover, DE 19901

Re: Fishers Cove Minor Subdivision Application

Dear Mr. Mandalas:

As you know, I represent the applicant, and I attended the January 15, 2020 City of Lewes Planning Commission meeting on the Minor Application. Although there was a motion to send the application to Council with a condition, the discussion devolved into several questions until more information was ultimately requested from the applicant.¹ My client and I were available at the meeting to address the Commission; in fact, you pointed us out for that purpose, but the Chair did not called upon us to answer any questions or to participate whatsoever. So I write, now.

At the outset, the Planning Commission also dismissed a letter from my co-counsel, Shawn Tucker, dated December 9, 2019, and did not appear to give any consideration whatsoever to the letter's mention of a petition for writ of mandamus. Surely the Planning Commission can appreciate why, after waiting nearly a full year for a recommendation on the Minor Application, my client would reasonably expect that the Planning Commission have made some final recommendation by now. In fact, at least one Planning Commission member commented that it appeared the Planning Commission was holding the Minor Application "hostage." In fact, required governmental action being held "hostage" is exactly what a writ of mandamus is intended to cure. Certainly,

¹ See Tom Wes Email to Tim Tice (attached).

our client would expect the Planning Commission to take such matters seriously, at the very least consider the legal elements of such a writ and explain why they do not apply.

As you may recall, the Planning Commission initially deferred its decision on the minor application until the Mayor and City Council had rendered a decision on my client's major subdivision application, asserting that the minor application was inherently connected to the major application. However, that original justification to delay a recommendation is illogical. If the two applications were connected, as the Planning Commission originally claimed to justify delaying the Minor Application, both applications should have been forwarded to the Mayor and City Council contemporaneously.

The legal elements required to approve, or in this case make a recommendation, have been met. If the Commission wants to entertain conditions they certainly may, but Council necessarily by code and the applicant is entitled to that referral, now. There is no legal justification for the extensive delay my client has endured on the Minor Application. Put simply, it is long past time for the "hostage" to be released.

Nevertheless, at the January 15, 2020 hearing on the Minor Application, the Planning Commission discussed proposing a condition that the easement noted on the Minor Application be expanded to encompass a possible road. As has been established multiple times, the only legal access to the Fishers Cove property is through Rodney Street, which is a record public right-of-way. Further, the Fisher House property is a separate parcel, not part of the proposed Fishers Cove subdivision. The applicant volunteered a twenty (20) foot easement on the Fisher House property to connect Pilottown Road to the Fishers Cove community. The easement would be pervious rather than paved, to save existing trees on the properties, and offered for the limited purpose of pedestrian and emergency access, as well as utilities. Again, this easement was volunteered by my client, and is not required by the City Code, nor can it otherwise be mandated by your client. Indeed, as the Planning Commission was recently advised by its ethics consultant, Professor Max Walton, it can "add conditions," or recommendations, but it cannot "impose conditions [that] administratively enlarge the power to deny a conforming application outright." The Minor Application complies in all respects with City Code. Thus, the Planning Commission's delay is at direct odds with the legal advice they were given by Professor Walton just a few months prior.

Put another way, just because the applicant previously offered pedestrian and emergency access on the Fisher House property that is not required by the City Code, does not grant the Planning Commission the liberty to continue to delay its recommendation in an effort to extract additional right-of-way on that same property from my client. In fact, if the Mayor and City Council required right-of-way access across the Fisher House property beyond what my client volunteered, it would constitute

a taking under the Fifth Amendment of the United States Constitution. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 831–32 (1987) (holding that the California Coastal Commission’s imposition of a condition requiring a landowner to provide an access easement across their beachfront constituted a taking; “To say that the appropriation of a public easement across a landowner’s premises does not constitute the taking of a property interest, but rather . . . ‘a mere restriction on its use,’ is to use words in a manner that deprives them of all their ordinary meaning.”). This is well-settled law.

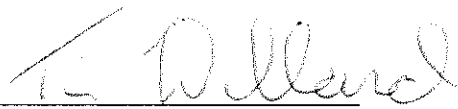
If given the opportunity on the 15th, I could have expressed these positions. I write today to avoid any possible misunderstandings moving forward, and to confirm that my client seeks the Planning Commission’s recommendation on the Minor Application, as presented to the Planning Commission, and neither offers nor is required by law to offer any additional right-of-way access. The Planning Commission can recommend whatever they deem appropriate; regardless, this minor subdivision should be before Mayor Council now.

In sum, the applicant cannot proceed with its plans to preserve the historic Fisher House until the Minor Application is forwarded to the Mayor and City Council along with your client’s recommendation. Please let me hear back from you regarding whether or not your client will schedule the Minor Application for a vote in February, or if it intends to further delay my client’s application.

Although the survey information that was requested about establishing a roadway on the historic Fisher House property should be irrelevant, my clients have agreed to offer that information. So, two surveys are attached with these measurements for a 50 or 40 foot easement. Again, the applicant is not offering this option. Furthermore, a 50 foot right-of-way, in accordance with §170-27 does not meet the requirements of §197 Attachment 2, nor does a 40 foot right-of-way, according to our engineers.

Very Truly Yours,

FUQUA, WILLARD, STEVENS & SCHAB, PA

BY 
Timothy G. Willard

Enclosures

Pc: Tom West, Director

Ann Marie Townsend, Town Manager

From: Thomas West <TWest@ci.lewes.de.us>

Sent: Friday, January 17, 2020 12:22 PM

To: Tim Tice <tim@echeloncustomhomes.com>; Ann Marie Townshend <ATownshend@ci.lewes.de.us>

Subject: RE: 1/15 PC meeting request - 624 Pilottown Minor Subdivision

Good afternoon Tim,

The requested site survey updates were tied to the Commissioners discussions and eventual motion on a recommendation for the minor subdivision application. The full set of minutes has yet to be created and I am out of Town so I do not have access to the audio transcription. I have tried to convey the salient points in response to your question from my notes. I cannot guarantee my notations are 100% accurate, until I can review the transcript, but hope the information can provide enough information for you to consider next steps.

The Planning Commission deliberations included a discussion on voting to provide a recommendation to City Council based on conditions, primarily that the area currently defined on the minor subdivision as a 20' easement be expanded to accommodate a roadway should that eventually be considered. The Commission discussed the feasibility and requirements (code) for a road. In terms of code it was indicated that it would be important to see if a road ROW could be accommodated and if the resulting lot (containing the existing structure) could still meet code requirements for dimensions such as lot frontage. I indicated the current survey shows a lot dimension at the street edge but that lot frontage is determined at the front yard setback and that the width at the point (30' back from the road edge) would need to be known to verify zoning compliance. There was also discussion on the need for ROW and the necessary width. **City code calls for a 50' ROW for a local street but the City Engineer indicated that a request to reduce a**

standard roadway (from 32 to 24') can be considered by the City under certain conditions (with Planning Commission recommendation) and that the resulting ROW could be 40' (24' for the roadway plus 16' clearance for ROW), assuming the reduction requests are granted. After further deliberation the Commission voted to defer the decision on the minor subdivision and to provide opportunity to include the dimensions in the survey and allow time for your Team to provide feedback on the possibility of incorporating the additional area for a potential road as part of the subdivision.

The exact motion needs to be verified after reviewing the transcripts but the draft motion that we are reviewing was as follows:

Initial motion to approve minor Subdivision, with conditions, proposed by Mark Harris, seconded by Joe Hoechner. After much discussion and amendment to perfect the motion, Motion withdrawn.

Motion to

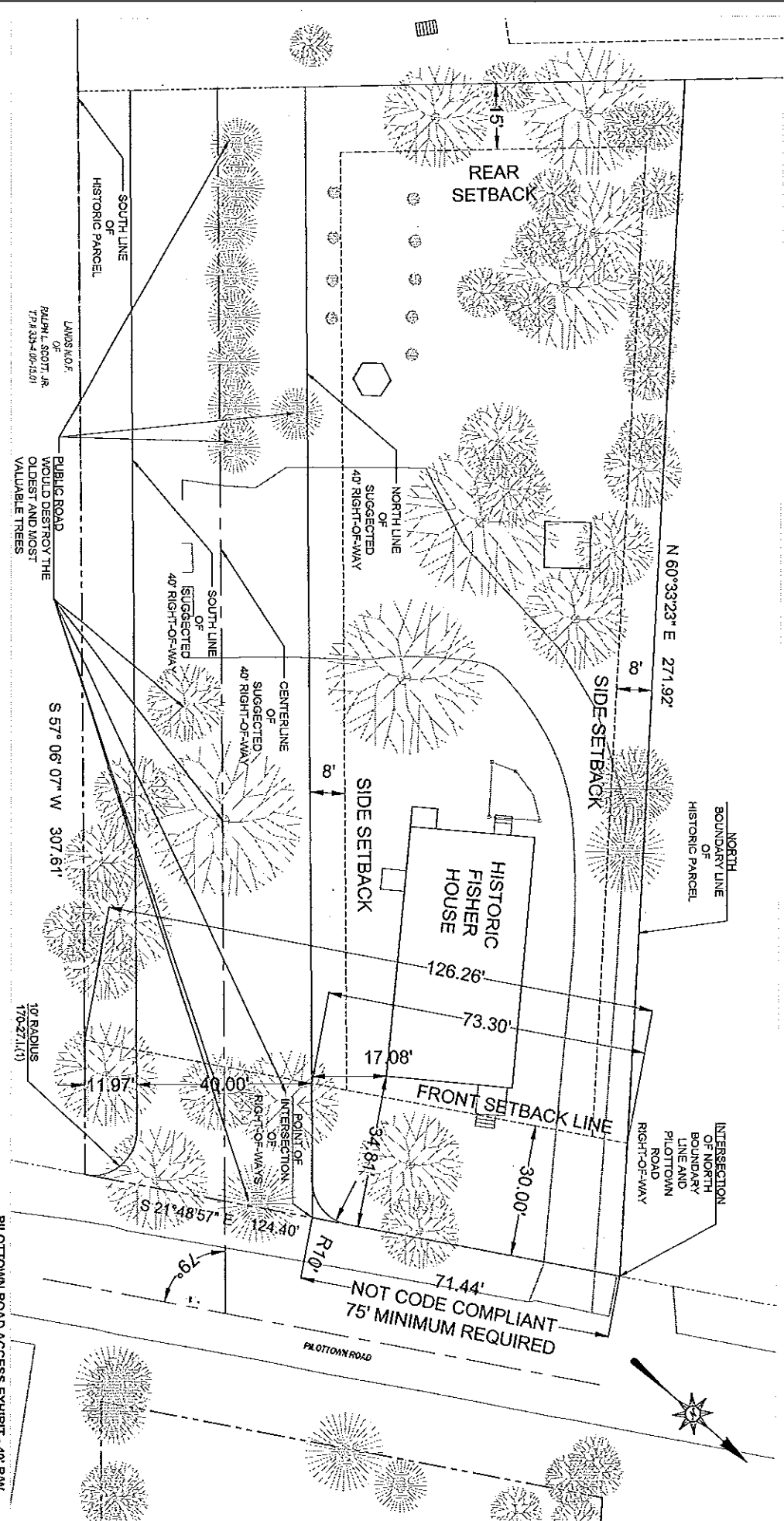
- 1 Defer application
- 2 Request a survey for 40 or 50 ft right of way
- 3 Further report from applicant as to what they would like to see done in regards this application and right of way.

Proposed by Tom Panetta, second by Melanie Moser.

In summary, my understanding is the Planning Commission would be looking for a report and updated survey from your Team to consider at a future public meeting to review the minor subdivision proposal. Although the draft motion does not include adding the lot frontage at the front yard setback I believe it was appended afterward but again I do not have access to the transcript to verify that until sometime next week.

I hope this helps clarify the points regarding the survey, let us know if we can help with any additional questions.

Thanks,
Tom West



LANDS K.O.F.
 OF
 RALPH L. SCOTT, JR.
 T7P133-00-10-01

PUBLIC ROAD
 WOULD DESTROY THE
 OLDEST AND MOST
 VALUABLE TREES

PLOTOWN ROAD ACCESS EXHIBIT - 40' RW

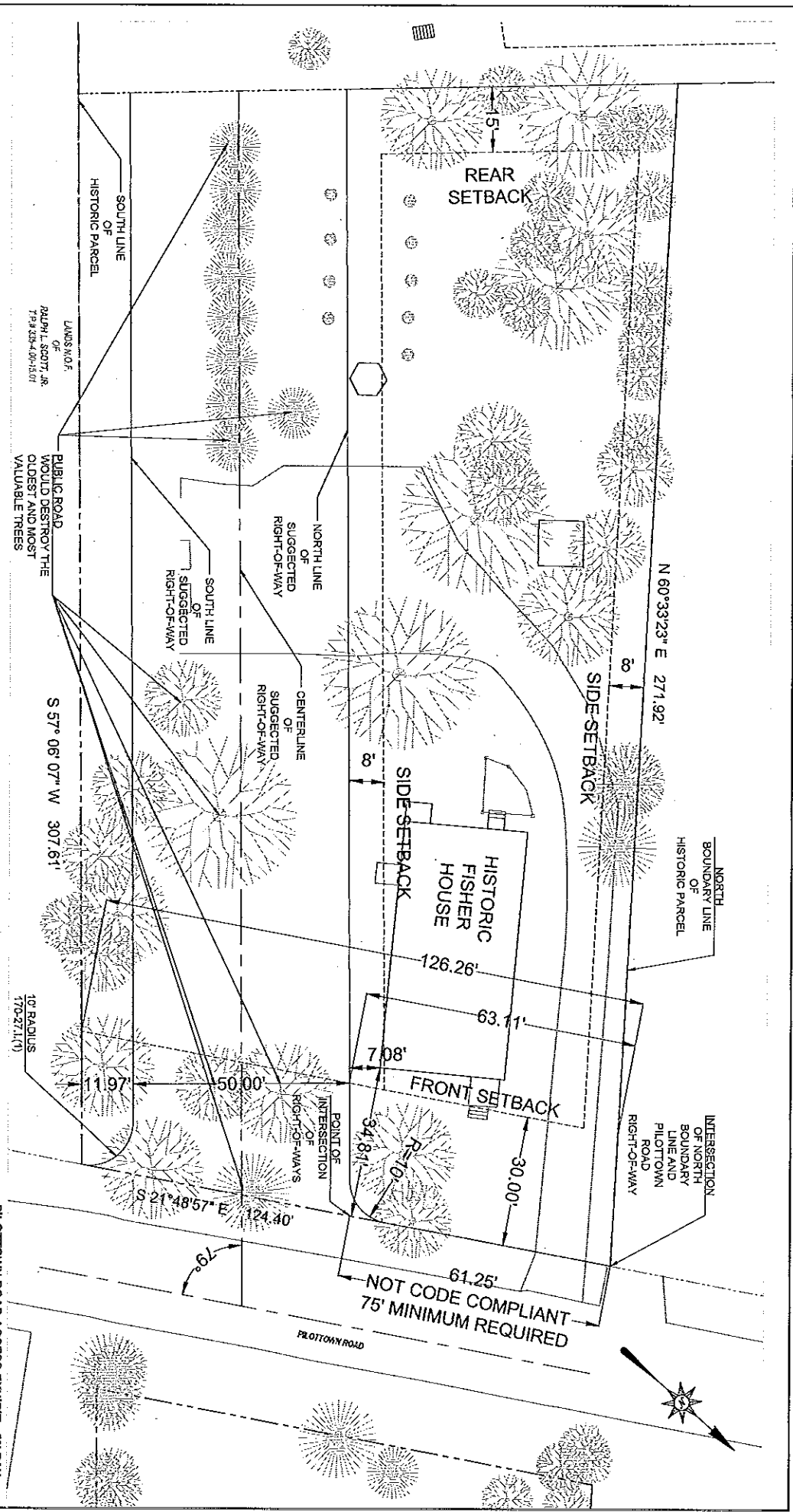
FISHERS COVE

FOR

Yairine and Associates
 1000 W. 10th Street, Suite 100
 Oklahoma City, Oklahoma 73106
 Phone: (405) 555-1234
 Fax: (405) 555-5678
 Website: www.yairine.com

DATE: 11-18-2023
 DRAWN BY: J. Smith
 CHECKED BY: M. Jones

SCALE: 1" = 30'
 SHEET: 1 OF 1



NO.	DATE	REVISIONS

PROJECT TITLE:	PILOTOWN ROAD ACCESS EXHIBIT - 50' RW FOR FISHERS COVE
OWNER:	RALPH L. SCOTT JR. T/P # 208-409-1107
DESIGNED BY:	KARNE AND ASSOCIATES
DATE:	
CHECKED BY:	
SCALE:	1" = 10'
DRAWN BY:	
DATE:	
SHEET:	1 OF 1
DRAWING NO.:	

KARNE and Associates
 RESIDENTIAL SUBDIVISION
 10000 W. BROADWAY, SUITE 100
 DENVER, CO 80231
 PHONE: 303.751.1100
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 WWW.KARNE.COM

PUBLIC ROAD WOULD DESTROY THE OLDEST AND MOST VALUABLE TREES
 SOUTH LINE OF HISTORIC PARCEL
 LANDS A.O.F.
 RALPH L. SCOTT JR.
 T/P # 208-409-1107
 NORTH LINE OF SUGGESTED RIGHT-OF-WAY
 SOUTH LINE OF SUGGESTED RIGHT-OF-WAY
 CENTERLINE OF SUGGESTED RIGHT-OF-WAY
 NORTH BOUNDARY LINE OF HISTORIC PARCEL
 INTERSECTION OF NORTH BOUNDARY LINE AND PILOTOWN ROAD RIGHT-OF-WAY
 HISTORIC FISHER HOUSE
 FRONT SETBACK
 SIDE SETBACK
 REAR SETBACK
 PILOTOWN ROAD ACCESS EXHIBIT - 50' RW FOR FISHERS COVE
 NOT CODE COMPLIANT - 75' MINIMUM REQUIRED
 R=10
 10' RADIUS (70:27:10)