

**New Castle City Board of Adjustment Hearing**  
**September 25, 2013 -- 6:30 p.m.**  
**City of New Castle's Town Hall**  
**2<sup>nd</sup> and Delaware Streets**

Present: William J. Barthel, City Council President\*  
Daniel R. Losco, City Solicitor  
David J. Athey, City Engineer

City Personnel: Jeff Bergstrom, City Code Official

\*Mr. Barthel chaired the meeting in the absence of Mayor Donald A. Reese.

Mr. Barthel called the meeting to order at 6:30 p.m. Roll call was taken.

Mr. Barthel read the Notice of Public Hearing that states, "An application has been filed by Brian C. Allen (Douglas R. Allen, Trustee), 30 Casimir Court, New Castle, DE 19720 for a property located at 30 Casimir Court, New Castle, Delaware, parcel number 21-007.00-087, seeking to appeal the determination of the building department regarding a proposed use. Applicant is requesting verification that the proposed use of the property as a practitioner of oriental medicine including acupuncture is permitted as a matter of right as an accessory use under Section 230-16 of the City Code.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Wednesday, September 25 2013, at 6:30 p.m. in Old Town Hall, 2<sup>nd</sup> Floor, located at 2<sup>nd</sup> and Delaware Streets, New Castle, Delaware."

An affidavit of publication was published in the News Journal and the New Castle Weekly. Mr. Bergstrom testified the property was properly posted on 9/6/13.

*(Mr. Allen was sworn in.)*

Brian Glancy, counsel for the applicant, presented. They are seeking verification for the proposed use of the property as a matter of right as a physician's office. The application was denied by the City Building Inspector who questioned whether practice of Oriental medicine and the licensed practice of acupuncturist in Delaware qualify as a 'physician' under the Code. There is no definition of 'physician' in the Code.

Mr. Allen currently resides at 17 West 9<sup>th</sup> Street, New Castle and is in the process of purchasing 30 Casimir Court from his grandfather's estate. He plans to live and practice Oriental medicine at 30 Casimir Court.

A letter written by Mr. Allen to Mr. Bergstrom seeking approval of the use for the property was entered as an exhibit. Mr. Allen's undergraduate work was a major in philosophy with minors in East Asian studies, Chinese language and religious studies. He received his Master's of Science and Traditional Oriental Medicine from Pacific College of Oriental Medicine in San Diego, California. The degree is a full-time four-year, post-graduate degree and he took an additional year of course work. Mr. Allen is a licensed acupuncturist, licensed under the Board of Medicine in the State of Delaware to practice. Mr. Allen described the process to become a licensed acupuncturist. Graduate from an ACOM medical college, passed the national board exam for acupuncture and Oriental medicine. Delaware has higher standards than most states. A background check is required.

The license is new in Delaware. The Board of Medicine is unclear whether acupuncture is considered an act of medicine. Several practitioners in the state worked for several years to develop legislation to be authorized to be licensed to practice. Mr. Allen estimated his license has been in existence in Delaware about three years.

He currently practices in an office in Wilmington. The purpose of his move to New Castle is to have his practice in his home to afford more time with family. He has no employees and handles all aspects of his business by himself.

Mr. Allen summarized what he does in his practice from initial contact to treatment. He does receive referrals from other physicians and physical therapists. The same standards apply for his medical license as for all physicians in the State of Delaware. There are two Codes of Ethics (National Certification Commission for Acupuncture and Oriental Medicine Certifying [NCCOM] Board and State of Delaware) that he described to the Board. Mr. Allen testified he is not licensed to prescribe controlled substances; however, he is nationally Board certified with Oriental herbology. He has not applied for hospital privileges and is not familiar with requirements for same.

Exhibit B-1 is a State of Delaware website printout showing Mr. Allen's license number and that he is current and active. According to the Department of Professional Regulations [DPR] and the Board of Medicine, his profession is a medical practice. A document from the DPR, entered as Exhibit B-2, shows that physicians, specifically M.D.'s, are categorized under medical practice.

Mr. Losco questioned Mr. Glancy's statement that the State is equating physicians with a M.D. Mr. Glancy noted that 'physician, acupuncture and practitioner' appear on the website printout and argued that the category of license as a physician/M.D. qualifies. Mr. Allen informed the name of the license type for an M.D. is referred to as a physician/M.D, and believes it is a blanket description. His specialty is referred to as a medical practice.

The DCR identifies what Mr. Allen practices as a medical practice while other medical practitioners such as physical therapists and other health care practitioners are not described as practicing medicine. (Exhibit B-3)

The DPR lists chiropractors are not included under the medical practice category. They are in the category of chiropractic. (Exhibit B-4)

The term 'physician' is not shown on Mr. Allen's professional license. The NCCOM certification letter shows his certification number, how long he has been Board certified and when his certification expires. The NCCOM is the main certifying Board for Oriental medicine in the United States.

In Tab 2, Mr. Glancy reviewed some of the definitions of 'physician' as it appears in the Code. The definition of a 'physician' in its general use is ambiguous.

Mr. Glancy used several reference books to give definitions for 'physician'. It is his belief that the definition has evolved over time to include doctor, podiatrist, chiropractor, thus making the stand-alone word of 'physician' ambiguous in the Code.

Mr. Losco said that when the Code provision was adopted by City Council there is little question what they considered to be a physician. Mr. Glancy argued that because of that uncertainty, the law requires the Board to err in favor of the applicant allowing Mr. Allen to use the property freely. He agrees there needs to be some threshold or definition in the Code.

It is Mr. Losco's opinion that people do not typically think of an acupuncturist as a 'physician.'

Mr. Losco asked Mr. Allen if he uses the formal title of 'Doctor.' He said his patients call him by his first name. Mr. Allen added that titles are political, referring to the parties involved when legislation is prepared.

Letters of neighboring residents indicating support of the application were entered into the record. Mr. Allen said two residents who live two and three houses diagonally from his property refused to sign a letter of support. The only concern mentioned dealt with traffic. A resident about ten houses away was leery of any changes and would not sign the support letter.

Mr. Allen testified he would be utilizing more than 50% of his basement for his practice and possibly a small build-out. He sees one patient per hour so traffic is not a concern. There is a two-vehicle driveway and enough space on the street in front of his home for five more vehicles. Any signage would be Code-complaint.

Mr. Glancy stated there are no deed restrictions as it relates to any business activity. He highlighted three legal cases supporting the applicant: *Dewey Beach Enterprise vs. Board of Adjustment*, *Norino Properties LLC v. Mayor and Town Council of the town of Ocean View*, and *Stingray Rock, LLC v. Board of Adjustment of the City of Rehoboth Beach*.

Mr. Glancy stated that if the court and the Board is unsure of how to define 'physician' then the ruling should be in favor of the landowner. The statute is ambiguous if it is reasonably susceptible of different conclusions or interpretations. He suggested City Council revisit the Code and provide clarity.

Mr. Glancy informed that the applicant has filed for a special exception on his application as it related to 'institutes.' 'Institutes' is clearly defined in the Code. He established through Mr. Bergstrom that there is no need for the Planning Commission to endorse the application. The primary argument in support of this applicant is that the broadest definition of 'physician' be granted. City Council should address if they are concerned with clarifying the definition of 'physician.'

Mr. Glancy cited the Town of Middletown's definition of 'physician' in its Code that "includes every individual qualified to practice medicine." Physician's office as defined in the City of Newark's Code is "a structure designed or converted for medical practitioners limited to outpatient care only and excluding the practice of veterinary medicine."

The presentation portion of the hearing was adjourned and deliberations began.

Mr. Losco summarized the presentation. If it is felt the language of the Code for 'physician' refers to medical doctors and not other types of medical practitioners, then the application

can be denied. If it is felt there is ambiguity as to the definition of ‘physician’ then the ruling could favor the applicant. He cited the case of *Stingray Rock, LLC*, ‘if the statute is found ambiguous it is reasonably susceptible to different interpretations, the court must then construe the statute in a way that it promotes its apparent purpose and harmonize it to other statutes within the statutory scheme.’ The question returns to what Council’s purpose was when they adopted this language.

It is Mr. Athey’s opinion that the applicant has delivered compelling arguments showing acupuncture is a medical practice (State website). The applicant possesses the qualifications shown under ‘definition’ and he has made the case that Oriental medicine is a medical practice.

Mr. Barthel believes when the language was adopted the City Council was clear what a medical practice was, but it is unclear and ambiguous today. He agreed that City Council should revisit the language as it currently reads.

Mr. Losco believes a physician in a traditional sense is an innocuous use, that he/she is a person held to a high character and standard and abides by a code of ethics. It is also a convenience for the neighborhood to have a doctor present. Only certain clientele will seek out Oriental medicine.

Mr. Losco does not believe an acupuncturist is a physician and does not believe it was Council’s intent that any medical practitioner of any sort as long as they possess a state license can operate their practice within a residential district. He concluded that the Board must make its ruling using the law as it exists today, meaning if City Council later addresses the language to exclude medical practices such as Oriental medicine, the applicant is grand- fathered based on the ruling of this Board.

**Mr. Athey made a motion to overturn the administrative official’s prior order and allow the applicant’s use at 30 Casimir Court on grounds of ambiguity of the statute. Mr. Barthel seconded. Motion was approved by a 2-1 vote, Mr. Losco voting against the motion.**

A motion was made, seconded and approved to adjourn the meeting.

Respectfully submitted,

Debbie Turner  
Stenographer

Exhibits:

Allen Letter to J. Bergstrom, City Code Official

B-1 – State of Delaware website printout showing Mr. Allen’s license number and status.

B-2 – DPR document describing physicians, specifically M.D.’s, categorized under medical practice.

B-3 -- DPR identifies what Mr. Allen practices as a medical practice while other medical practitioners are not described as practicing medicine.

B-4 – DPR document that does not include chiropractors under the medical practice category. They are in the category of chiropractic.