

A New Castle City Board of Adjustment Hearing (Continuance) took place on September 29, 2008 at 7 p.m. in the City of New Castle's Town Hall.

Present: Mayor John F. Klingmeyer
Roger A. Akin, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7 p.m. He introduced City Solicitor Roger Akin and City Engineer David Athey.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Regina Marini for property located at 101 West Third Street, New Castle, Delaware, parcel number 21-018.00-007, seeking an appeal from the Historic Area Commission's denial dated 11/19/07 of her plan to construct a single-family residence on her lot at 101 West Third Street. The Board of Adjustment met to consider this appeal on July 10, 2008. After taking certain testimony and receiving additional materials in evidence, the hearing was recessed. For the purpose of considering this application, the Board of Adjustment will continue the public hearing held on this matter on Monday, September 29, 2008, at 7 p.m. in Old Town Hall, 2nd floor, located at 201 Delaware Street, New Castle, Delaware.

Mr. Akin provided a background of the proceedings to date.

(Everyone providing testimony this evening was sworn in by the Mayor.)

Mr. John Tracey, counsel (Young, Stargatt, Conaway and Taylor) for property owner Regina Marini, and Todd Breck, Project Engineer, presented to the Board. Mr. Tracey believes that most of the testimony from the applicant's perspective has been placed into evidence and provided to this Board. He followed with highlights from the last hearing. His clients are requesting a reversal of the Historic Area Commission's (HAC's) decision at their 9/07 meeting to deny the concept plan (mass and scale) allowing the applicant to move towards a building permit and an additional set of reviews for the HAC's review.

Mr. Akin suggested that since this is a continuation hearing, if any witnesses speaking tonight are either for or against this appeal, Mr. Tracey should be given an opportunity to address their testimony.

Mr. James Meek, resident of New Castle, said he can provide evidence of what the house looked like and what the footprint of the house was. He is countering prior testimony that there was no evidence of what the footprint was. On the City's website there is a link to the Community History and Archeology Program's website showing aerial photos of the 1930's and 1940's and an engineering drawing by the Sanborn Fire Insurance. He is offering as evidence a drawing dated 1901 giving detail of the property and its relationship to the properties across the street. *(He spoke of some of the details concerning the property.)*

Mr. Bayard Marin, counsel for Ms. Katherine Klyce and Mr. John Wheeler, stated that the purpose of this Board is to review the HAC proceedings and determine whether or not the HAC decision was arbitrary and capricious. The historic standards to be applied are not whether the building complies with Code, but whether it fits into the environment of the historic district. The New Castle area guidelines pertaining to historic districts state that new construction should be compatible with neighboring properties. *(Mr. Marin then detailed the rationale for his clients' objections to the appeal request.)*

Mr. Akin asked Mr. Tracey if he still feels that Mr. David Bird could not be an impartial member of the HAC in considering this application. Mr. Tracey feels that since Mr. Bird had previously expressed his opinions by endorsing Mr. Wheeler's statements after the original hearing, he should have recused himself from the decision-making process. *(Questions and answers followed.)*

Discussion followed amongst Board members concerning Mr. Bird's vote at the HAC proceedings. Mr. Akin stated that the applicant needs a majority of all votes of those sitting at the final HAC hearing when a decision was handed down in September 2007. Mr. Bird was one of three negative votes.

Ms. Katherine Klyce stated that she had expressed her concerns over this project at the last hearing and reviewed her concerns again.

Mr. Wheeler followed with his concerns about this project.

Mr. Athey questioned Mr. Wheeler's allegation that many trees will be destroyed in Battery Park if the home is built as designed. He stated that roots will be killed and branches will be trimmed to accommodate construction.

Mayor Klingmeyer clarified for the record that he has no relationship with Ms. Marini.

Gene Dempsey, (sworn in by the Mayor) owns several properties in the City and respects the City and Battery Park. He testified that Ms. Marini has a right to build on her own property.

Dorsey Fiske, 26 East Third Street, (sworn in by the Mayor) stated that the HAC has been put into place to protect standards of the historic areas of this town. It is good for the property values of this town. When you live in a town you are required to live by certain laws. HAC has done its best to keep historic values of the historic area and to adhere to federal guidelines.

James Meek provided a follow-up comment to his earlier statement about the measurements of the house. He approves of HAC trying to maintain a feeling for the town.

Jim Workman, 21 West Third Street, (sworn in by the Mayor) believes you should be able to do what you want with your land. They have tried to stay within HAC guidelines, but if someone doesn't like what you want to do to your property, the City should be prepared to pay the fair market value of the land rather than use force to change the owner's plan. If the town wants to prevent the use of a property, it should be prepared to pay.

Tom Wilson, Second Street, (sworn in by the Mayor) is concerned that the Board's decision tonight will set a precedent. He is hearing that in the future he can't buy a lot and build on it in the City because you have to build an old house in the historic district. If someone plants a tree and it grows onto my property I can't trim it back because it might kill the tree. If we establish footprints I can never put an addition on my house. The Board's decision tonight will affect everyone.

Judy Smith, 38 West Fourth Street, (sworn in by the Mayor) disagreed that the applicant is being told she can't build on the land. Rather, the building must fit in with the spirit and design of the historic area. Many communities have building restrictions and she values the HAC watching out for her property and its value.

Karen Heyman, 207 East Second Street, (sworn in by the Mayor) appreciates the work that the HAC does. She believes that we live in a federally-declared historic district and that imposes certain limitations on the property that is in our care. When you buy property here it comes with certain restrictions respecting the fact that we want to maintain the quality, architecture, spirit and ambience of one of the oldest towns in America.

Lula Etherton, 2 Plum Alley, (sworn in by the Mayor) said that all of the houses built around her were not built with sympathy of scale or style as mentioned earlier, but she has no problem with this. She referenced a notice left at her home alerting residents that there were matters of great importance concerning the park and historic New Castle. She sees this as a complaint by one homeowner. She feels the applicant should be able to build a home that serves the needs of her family.

Robert Smart, Fifth Street, (sworn in by the Mayor) said he was aware of the impact that HAC would have on improvements he wanted to do to his home. He feels that homeowners should be able to do what they want with the property they purchase. He described HAC proceedings and referenced the lengthy process the applicant has experienced. The process has been going on for two years and he feels that there is room for negotiation to come to a decision that is agreeable to both parties.

Mr. Tracey was given the opportunity to address new testimony this evening. He objected to the submission of information that Mr. Wheeler presented as

prepared by Mr. Dill as being inappropriate since Mr. Dill is not present to attest to how measurements were calculated in the document. Mr. Akin agreed with Mr. Tracey's objection that the document should be stricken from the record realizing that the Breckstone documentation that has been submitted has a good deal of information concerning measurements that is certified. Mr. Marin did not object to the City Solicitor's decision to strike Mr. Dill's information.

Mr. Akin made a motion that the objection to the exhibit be granted. Mr. Athey seconded the motion. The motion was approved by unanimous vote.

Mr. Tracey addressed several comments that were made during testimony.

Mr. Athey revisited the issue of Mr. Bird and his vote with the HAC. Mr. Akin said that since the issue has been raised before this Board we have an obligation to address it. Mr. Akin referred to page 16 of the 6/15/06 transcript containing the comments by Mr. Bird constituting evidence of bias on Mr. Bird's part in the proceedings. We must address whether Mr. Bird's comments render him unable to fairly participate in HAC proceedings after those comments. Mr. Akin does not feel the comments establish an irrevocable bias in Mr. Bird's mind, nor does it indicate that he formed an opinion on the application that early in the proceedings. A decision wasn't rendered until 15 months later when Mr. Bird voted 'no' as a member of HAC.

Mr. Athey disagreed with Mr. Akin's statement. Mr. Bird spoke of legal issues dealing with the property that need to be resolved, one of which was set-back requirements. If he was neutral or in favor of the project, he would not have raised the possibility of legal issues. Therefore, Mr. Athey does feel Mr. Bird was biased.

Mr. Athey made a motion to disallow Mr. Bird's vote at the 9/20/07 HAC meeting because he indicated in the 6/15/06 HAC meeting that he was biased toward the project and based on case law that Mr. Tracey presented at our prior meeting, he should have recused himself. Mayor Klingmeyer seconded the motion.

Mr. Akin voted against the motion citing as rationale that he is not convinced that statements made by Mr. Bird on page 16 on the 6/06 transcript do not demonstrate the kind of bias that would preclude him from serving as a fair-minded member of the HAC. He feels that Mr. Bird's statements do not show the level of bias that would cause his further involvement to have denied due process to the applicant.

Mr. Athey voted in favor of the motion. His interpretation is that Mr. Bird would not have spoken at that meeting if he were not opposed to the project and therefore carried bias with him when he was appointed to the HAC.

Mayor Klingmeyer voted against the motion stating Mr. Bird's statements were relatively innocuous. Since he is an attorney, he was raising questions relevant to the project.

The motion failed 1-2.

Mr. Athey asked what the process is for the applicant after HAC denies an applicant's request?

Mr. Akin said that State law provides that decisions of municipal Boards of Adjustment in Delaware may be appealed to the Superior Court on the record, not a new trial or hearing. The judge determines whether the Board of Adjustment acted within its discretion and that the records support their decision.

Mr. Athey stated that HAC was created in 1968 and Ms. Marini purchased this parcel in 1998. Ms. Marini knew or should have known of HAC's existence when she made the purchase of the land. Mr. Athey added that in the past this Board has held that it can overrule HAC on procedural issues, but this Board has elected not to overrule HAC on other matters. Mr. Athey feels that although HAC is not perfect, he believes that they tried to reach a compromise with Ms. Marini without success. Ms. Marini had an opportunity to return to HAC again, but chose not to do so. If Ms. Marini seeks further relief, she should approach City Council. Because Mr. Athey did not find any procedural missteps on behalf of HAC in this case, he will vote to support HAC's decision.

Mayor Klingmeyer commented that the creation of the HAC was motivated to protect the historic district. The purpose of the HAC was to preserve Colonial homes and it meant that people in other homes were not non-conforming. Every house in the City did not have to be preserved to its original structure; it only affected Colonial homes. City Council passed it unanimously and the citizens approved it. Over the years some members of the HAC have expanded the definition. The area in question is an open area. HAC tried to amend the law by removing the name 'Colonial' and replacing it with 'historical' meaning that almost every home would be bound by the HAC. It failed because the majority of citizens in the historic area opposed it. HAC has exceeded its authority over the years by going into areas where they have no authority. The City Charter does not take away the right to build. They are property rights. He will vote in favor of reversing HAC's judgment to deny the Marini application.

Mr. Akin said this Board has raised the issue of dismissing the case based on timeliness. The HAC ordinance (Section 230-52(c)) says that upon disapproval

of any application the HAC shall forward a written statement stating the reasons to the applicant. We have searched records associated with this case and have found none. Either a disapproval certificate/statement was never issued to the applicant or the minutes of the 9/20/07 HAC meeting serves this purpose. *(He read aloud the HAC voting on the issue from those minutes. Voting rationale was vague.)* This was insufficient notice to the applicant. He considered remanding this case back to the HAC so that the members of HAC could go on record articulating their votes. He has reconsidered this action citing that if a transcript of the hearing can be produced and it indicates why all the members voted why they voted it would be sufficient. Mr. Tracey's office had transcripts prepared for the hearing; therefore, it does not need to be returned to the HAC. The Board of Adjustment's function tonight is to determine whether the HAC acted properly when handing down its decision. Mr. Tracey and his client are aware for the reasons for disapproval by the HAC. After reviewing all of the opposing votes and supporting rationale from the HAC transcript, Mr. Akin feels the members of HAC stated with sufficient clarity to indicate they followed what they are mandated to do by way of the City ordinance. Based on the overall record in the case and how he believes the HAC members voting 'no' tried to convey their views of this evolving plan, in the end they determined that things such as mass, scale, streetscape and comparative view of the proposed house to neighboring properties was something that was unacceptable to the HAC. He will vote in favor of affirming the HAC's ruling to deny the applicant's concept plan.

Mayor Klingmeyer responded to Mr. Akin's statement by reciting Article 7, 230-52, Powers and Duties of the HAC. The last section addresses granting a historic review certificate is a result of being compatible with the Colonial period of New Castle. Based on the original intent of the law, the Mayor feels the HAC has exceeded its authority.

(Additional discussion followed about the intent of the law and the duties of the HAC.)

Mr. Athey made a motion that this Board deny the applicant's appeal from the HAC's denial dated 9/20/07. Mr. Akin seconded the motion.

A roll call vote was called.

Mr. Athey – voted in favor of the motion
Mr. Akin – voted in favor of the motion
Mayor Klingmeyer – opposed the motion

The motion passed by a vote of 2-1.

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The hearing was adjourned at 9:10 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits:

- 7) Package of approximately 100 sheets provided by the applicant since the July hearing constituting the various submittals to the HAC
- 8) 7-page legal memo summarizing historic guidelines supporting HAC's decision – prepared by Mr. Marin
- 9) Additions and New Construction Guidelines

Public Exhibits:

City Exhibit 1) – two (2) aerial photos of New Castle and a 1901 graphic of various City properties (submitted by Mr. Meek)