

A New Castle City Board of Adjustment Hearing took place on April 30, 2008 at 7 p.m. in the City of New Castle's Town Hall.

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

Mayor Klingmeyer called the meeting to order at 7:05 p.m.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Richard Keller/Buck-Kennett III LLC, P.O. Box 4095, Greenville, DE 19807 for variances from the zoning code to permit the construction of a new building (1) reducing the front setback to 12.5 feet from the required 32.5 feet, (2) reducing the rear setback to 16 feet from the required 32.5 feet, and (3) increasing the maximum building height to 67.5 feet from the required 65 feet, on property located at 0 West Ninth Street, New Castle, Delaware (Deemer's Landing II) known as tax parcel number 2101400500.

For the purpose of considering this application, the Board of Adjustment will hold a public hearing on April 30, 2008 at 7 p.m. in Old Town Hall, 2<sup>nd</sup> Floor, located at 201 Delaware Street, New Castle, Delaware."

An affidavit of publication from the News Journal was published on April 9, 2008.

City Building Inspector Mr. Bergstrom confirmed the property has been properly posted.

*(All parties providing testimony this evening were sworn in.)*

Mr. Athey asked a clarification question concerning reduction of the rear setback to 16' from the required 32.5'; the plan reads that 16 feet is the width of the back drive and the setback is actually 27.5 feet. Counsel advised it is a housekeeping matter that will be addressed.

Mr. Sean Tucker, counsel for the applicant, informed there are some housekeeping matters concerning the advertisement. The advertisement states an incorrect distance (16.5 feet) for the rear yard variance; in the formally-filed application we requested 12.5 feet.

Variances being sought for the rear yard setback required by code is 32.5 feet and we are seeking a reduction to 27 feet. There is also a variance that is not in the advertisement concerning parking. The application requests parking reduction from the required 156 spaces to 140 spaces. We would like to waive the non-advertisement issue tonight. In the event an appeal would be filed we would come back to another hearing to address this matter; if none were filed it would become a non-issue. Mr. Akin informed that the fact that a variance was incorrectly published and the parking variance was not published may prejudice the rights of members of the public who may have liked to speak on those subjects but have not received notice that they are before this Board tonight. Counsel informed that they would pay for advertisement of the decision, if favorable, so people could be put on notice of an appeal period. If an objection is filed we would be willing to hold another hearing.

*(Discussion followed.)* The Board agreed that the applicant's position as stated by their counsel provides the protection the court would require.

Mr. Tucker used an aerial photograph from McBride and Ziegler (project engineer) to provide an overview of the proposed project. They are seeking to mirror the Deemer's Landing I project on the south side of Ninth Street and are seeking a variance in the rear yard from the required 32.5 feet by Code to a reduction of 27.5 feet. This parcel has unique characteristics and this setback does not serve any purpose here. They are contiguous to railroad property (150 feet from the railroad tracks) and they have a buffer of the railroad line. He utilized three (3) additional photographs to further demonstrate to the Board what the applicant's plans are for the property. The setback requirements in the Code do not fit this property. They have a significant buffer and the reduction will not have any impact on neighboring properties.

Mr. Tucker described the variance request for Deemer's Landing I. In 2002 there was an application to the Board of Adjustment to allow a 12 foot setback that established the existing character with the Deemer's Landing I. The planner at that time recommended the Colonial look and wanted to create a landscape along Ninth Street. *(Mr. Tucker then displayed the photographs to audience members.)* The City's Comprehensive Development Plan uses Deemer's Landing I as an example of how to do development on Brownfields. *(A Brownfield site is defined as a designated parcel that had some level of contamination on the site. Many sites today are being recycled, treated and cleaned up to meet EPA and DNREC standards.)* Approval from DNREC has been received before presenting this proposal.

The floor was opened to the audience for questions/comments. No questions/comments were raised.

Mr. Parley Hess, professional engineer at McBride and Ziegler and project engineer, said that 78 apartment units are being proposed and 140 parking spaces. The Code requires 156 spaces (2 parking spots per unit). He referred to the photograph to show the Board where the building footprint and parking area will be located. All development will be on the western side of the site. The 78 units will be located in a single building and they are proposing six (6) stories. The applicant is seeking a variance to increase the maximum building height 2 feet, 11 inches from the 65 feet allowed per the City Code. Mr. Hess confirmed that McBride and Ziegler determined the front yard setback, the rear yard setback and the parking calculation. They visited the site four (4) different occasions to view the existing parking in Deemer's Landing I and how it is being utilized. There are 269 spaces, which is more than what was required by Code at the time. Mr. Hess reported on his findings. There are currently four (4) units vacant out of 144 units. If no variances were sought the same number of units, height and parking could be built on this site. To do so would have necessitated crossing of a drainage ditch to provided additional parking. That would involve installation of a pedestrian path as well. The unit sizes would have to be smaller (10%) to reduce the footprint of the building and they would not have the

extra 2 feet, 11 inches of height. Mr. Keller described reducing the size of the units as dramatic. He wants to improve on Deemer's Landing I and to get the marketing and clientele he is looking for he needs the extra size for amenities and rents. He is also proposing two (2) elevators for the building making it more ADA-compliant.

Mr. Kevin Wilson, Architectural Alliance and architect for Deemer's Landing I and the proposed Deemer's Landing II, distributed several pictures and artist renderings to the Board and audience and explained the streetscape along Ninth Street, light posts, decorative fencing, balconies, screen parking by way of parking garages, materials to be used to be consistent with Deemer's Landing I, and roof line and height. *(Discussion followed.)*

Mr. Athey suggested the variance request for maximum building height should be rounded up to 68 feet rather than 67.5 feet. Mr. Tucker said an amended application was filed increasing the height variance request to 67.11 feet. He would consider a waiver of this request under the same conditions as parking earlier in the meeting. Mr. Bergstrom confirmed that an amended application had been filed. The Board has not seen the amended application. Mr. Akin expressed concern about doing so much business this evening without giving the public full notice of business to be addressed tonight.

There are three (3) discrepancies with the advertisement involving the application and amended application. The first two involve rear-yard setback and maximum building height. The last discrepancy is the lack of advertisement of the parking matter.

Mr. Tucker said if the variance is granted the applicant would pay for the publishing of the actual variances that were granted and give a time period for residents to object and state their grounds for such objection. If that would occur we would have another hearing to allow those residents to be heard. *(Lengthy discussion followed about this proposal.)*

Mr. Bergstrom suggested that parking for Deemer's Landing II does not need to be on the same lot. There are surplus spaces in the Deemer's Landing I parking lot and enough land on the other side of the street or ditch to compensate for parking required without presenting the parking variance tonight. The applicant can still come back to request a parking variance at a later date. If the Board denies the applicant's request for a waiver of the parking variance tonight then the applicant would have to show dedication of spaces in Deemer's Landing I for the sole use of residents in Deemer's Landing II or they wouldn't have enough parking for Deemer's Landing II. Mr. Tucker suggested the applicant could withdraw the earlier request to add parking and it could be addressed when we go before the Planning Commission or come back for a second hearing. It is Mr. Akin's opinion that this Board should not take

final action on the parking reduction this evening. (*Discussion continued about shared parking between two projects.*) Mr. Tucker withdrew the request to add the parking variance in the revised application and consider coming back later.

Mayor Klingmeyer asked if the variances granted for Deemer's Landing I are being complied with. Mr. Tucker reviewed twelve (12) variances as shown on pages 5-7 of the 7/25/02 letter from Herlihy, Harker & Kavanaugh. Mr. Keller provided a status for each variance accordingly.

Mr. Athey informed that his firm (URS Corporation) did the design of Ninth Street a few years ago and the plan does not show the 10-foot wide easement given to Municipal Services. He is concerned that the applicant is requesting a 12.5 foot setback from the right-of-way line; a 2.5 foot setback from that easement line. There may be electrical conduits in that easement as close as 2.5 feet from the building foundation. He would like to state for the record that they are aware of this and that for maintenance of whatever is in that easement will not be affected if this waiver is granted. The other concern is with the proposed storm sewer in the area; Mr. Athey does not believe this is possible. Mr. Hess confirmed for the record. Mr. Athey suggested they contact the Municipal Services Commission on condition of any approval that may be granted. It was noted that they have already met with Municipal Services and checked the setbacks at that time. The dimensions shown on the survey are field-based. (*Discussion about where the electric and water line will be located took place. The closest utilities are telephone and cable.*) Mr. Athey declared that he is satisfied that the applicant is clearly aware of the easement and has made contact with Municipal Services.

The floor was again opened to the audience.

A resident believes this application should be tabled this evening and re-notify citizens. He cited his concerns with the proposed structure's height and parking across the street creating a safety issue. (*Discussion followed.*)

Another resident stated the back of the proposed building will look directly into her property. Her concerns are that when the storm sewer and the variance for the easement were granted and excavation work began years ago her neighbor experienced minor flooding in her garage. She is concerned that with more work taking place is the storm water run-off being adequately addressed. She also said that when construction was taking place residents could not get to the entrances of their garages because crews had the street blocked off. (*Discussion followed about installation of utilities for Deemer's Landing I; they connected into her sewer pipe improperly and the system failed causing sewage in the neighbor's basement. Representatives for the applicant cited what they have done to remedy this issue.*)

A number of residents of Deemer's Landing I, including the property manager, and a local small business owner spoke in support of the proposed Deemer's Landing II. There is a need for a facility that accommodates the young senior citizens and older population.

Mr. Akin asked Mr. Bergstrom if there is a firefighting reason for the relationship between horizontal setback and fate of the building. Mr. Bergstrom said there is no relationship; that setbacks need to be a percentage of the height of the building. This project is 100% accessible around the perimeter and is accessible for a fire ladder truck.

In closing, Mr. Tucker referred to the portion of the 2003 Updated Comprehensive Plan that addresses the redevelopment of the former Deemer Steel site. Good planning is exhibited in Deemer's Landing I and the applicant wants to emulate that in Deemer's Landing II. The project could be built at a smaller scale and with less amenities, but it would be a hardship because the applicant is not taking into account what is already there and the planning goals that were expressed by the City Planner's report at the 2002 hearing. Lease ability will suffer if amenities are reduced. If you don't have the numbers to get the rents for the type of clientele you want then you can't provide the things that make a difference in this project and other projects. He referred to Kwik-Check factors and submitted that there is no serious impact on surrounding communities. There will be a positive impact because it will be a higher-quality development that is consistent with the character of the building across the street. The hardship related to this property is not self-inflicted. The applicant needs these variances in order to maintain the character he is seeking. This is a reasonable and logical improvement of land considering that Deemer's Landing I has set the benchmark. He reviewed the four (4) provisions of Section 230-57 (C) of the Zoning Code. In its 2002 decision the Board of Adjustment found this type of proposal (Deemer's Landing I) to be harmonious to the community and consistent with planning goals.

Mr. Athey asked what Brownfields has to do with setbacks and heights of buildings, etc. Mr. Tucker responded that the way the standard is written is something unique and peculiar. There is an overwhelming call in the comprehensive plan to encourage Brownfield development. (*Discussion followed.*)

Mayor Klingmeyer offered a history of how the land in this area was developed. He added that this structure covering as much of the land as possible helps to prevent the run-off and thus reduces the contamination in our drinking/ground water. It is consistent with Deemer's Landing I and providing elevators will help with our older population.

Mr. Akin said that listening to the testimony tonight and applying Kwik-Check standards in addition to other City standards, the Delaware Supreme Court has asked Boards of Adjustment to consider several factors. The nature of the zoning

and, in this instance, the zoning makes it a consistent use. The character of the immediate vicinity would be enhanced. There has been limited testimony concerning how this project might affect neighboring property owners and other testimony offers it has been dealt with and problems are being addressed. We have heard no other testimony from neighbors or others of this project who oppose it because they don't believe the size of the structure is consistent with New Castle. The Board is here to decide if the variances from the City Code are warranted. Lastly, we didn't hear much about a hardship during presentation of the evidence. (*Mr. Tucker offered hardship in his closing.*) The applicant testified he does not believe he can attract the type of clientele he is seeking if he must downsize the individual units. He thinks the Brownfield's issue was not an issue that the Supreme Court said you cannot consider in the variance analysis. For these reasons and those Mr. Tucker spoke on, the issues under 230-57 (C) (a) (1-4) which is the City's analysis for a variance, he is inclined to vote in favor of the setback variances and the height variances.

**Mr. Athey made a motion to grant the front setback variance from the required 32.5 feet to 12.5 feet. Mr. Akin seconded the motion.**

Mr. Athey is still concerned with precedent issues and the Board interpreting how much flexibility we should give people to encourage development. The testimony was very good and the variances being sought are minor. It would improve the neighborhood in general. **He is voting in favor of granting the front setback.**

**Mr. Akin referred to his previous statement and votes in favor.**

**Mayor Klingmeyer feels the overall project meets the criteria and the requests are minor.**

**The motion passed by unanimous vote.**

**Mr. Athey made a motion to reduce rear setback from the required 32.5 feet to 27.5 feet. Mr. Akin seconded the motion.**

Point of clarification – Mr. Athey noted that the advertisement was for 16 feet and we agreed earlier that because this is a lesser variance being sought we are on firm ground to go forward with the vote.

**Mr. Athey referred to his statement made in support of the front setback and votes in favor.**

**Mr. Akin referred to his previous statement and votes in favor.**

**Mayor Klingmeyer voted in favor because there will not be any homes in the background.**

**The motion was passed by unanimous vote.**

**Mr. Athey made a motion to allow an increase in the maximum building height from the required maximum of 65 feet to 67.5 feet. Mr. Akin seconded the motion.**

**Mr. Athey and Mr. Akin stand by their earlier comments and vote in favor.**

Mr. Akin noted we are still not sure of the correct calculus of the mean height of the

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top of the roof from grade to top of the roof, but there has been testimony that the developer has erred on the side of caution. Mr. Keller is also on record making a commitment to reduce the mean height to the 67.5 feet as advertised so it is no longer part of the case.

**Mayor Klingmeyer voted in favor citing his agreement with the reasoning of Messrs. Akin and Athey and added that he believes that the applicant has shown good faith in dealing with his neighbors and the City. The motion passed unanimously.**

The hearing was adjourned at 9:50 p.m.

Respectfully submitted,

Debbie Turner  
Stenographer

Exhibit 1 – Aerial photograph of proposed project (McBride and Ziegler)  
Exhibit 2 (a) – Aerial photographs (3) of proposed project (McBride and Ziegler)  
Exhibit 2 (b) – McBride & Ziegler parking study  
Exhibit 2 (c) -- Photographs (3) and artist renderings (2) (Architectural Alliance)  
Exhibit 3 – 2002 City Planner's Report

(Copies of the larger exhibits will be reproduced in a smaller form for the City files.)