

**A New Castle City Board of Adjustment Hearing took place on November 12, 2009 at 7:30 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 Curt A. Nisky, 3081 Old County Road, Newark, Delaware, for a variance to Section 230-7 of the New Castle Zoning Code (relating to nonconforming lots of record in regard to 307 Baldt Avenue).

Applicant seeks a variance from the required 65 foot minimum lot width to permit construction of a new single family home on the existing 60 foot wide lot at 307 Baldt Avenue, New Castle, Delaware, parcel number 21-004.00-116.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Thursday, November 12, 2009, at 7 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 in the News Journal was published on 10/28/09. Mr. Bergstrom confirmed that the property has been properly posted.

Mr. Bergstrom provided a background. This property and the property next to it were in the same ownership of John Nisky (deceased uncle of applicant) and his wife. There is a provision in the Code that states when a non-conforming lot is contiguous with another lot, both under the same ownership, for the purpose of zoning, the lots will be considered as one. This property was transferred by the estate of John Nisky and Mr. Curt Nisky owns the vacant lot while another party owns the lot with the house on it. John Nisky acquired the lots at two (2) separate times. The lot complies with everything except the width.

*(The Mayor swore in Curt Nisky and Tim Scully.)*

Mr. Scully, real estate broker for Mr. Nisky, reported that they have a recorded lot located at 307 Baldt Avenue. Mr. Nisky's uncle took possession of this lot in 1977. He owned 305 Baldt Avenue which he bought in the late 1940s and built a home on it. He purchased 307 Baldt Avenue in 1977 as an investment. When he passed away last year he left the property to his nephew, Curt Nisky. Mr. Nisky intends to sell the lot. It was learned that since it was contiguous to and under the same ownership as the adjacent lot owned by Mr. Nisky's uncle, the applicant needs to get a variance in order to sell the lot. The lot has its own deed and tax parcel number. There is sewer, water and electric available on the lot. They are requesting a five (5) foot lot variance.

Mr. Athey asked for clarification on whether one (1) or two (2) variances are being requested since Mr. Scully mentioned two (2) but the legal notice reference one (1). Mr. Bergstrom stated that it is his understanding they are

requesting one (1) variance in order to be able to construct a new house on the lot. Whether a variance is needed to sell the lot is something that Mr. Akin can address. He believes that since the property has been considered as one lot for zoning it could still be sold as open space. Mr. Akin offered that the sale is irrelevant to discussions tonight. Mr. Scully clarified they are selling the lot as a building lot and the new buyer would like to construct a home on the lot.

Mr. Akin offered that if the variance is not granted then the lot loses its value as a building lot, thus its marketability.

Mr. Athey asked if a five (5) foot part of 305 Baldt (Mr. Nisky does not own 305 Baldt) could be sold and become a part of 307 Baldt, then a variance would not be needed. It was learned this is not practical because of a garage adjacent to the side lot line.

Mr. Scully reported that research of structures along Baldt Avenue revealed lots that are 40, 50 and 60 feet wide. Mr. Nisky's request is not out of line. He added that, to his knowledge, there has been no opposition to this variance request from neighbors.

Mayor Klingmeyer noted that the City has always considered two (2) contiguous non-conforming lots or the acquisition of two (2) contiguous non-conforming lots that preceded the City's current zoning needed to be treated as one. In this case there are different circumstances. One lot is already established and there are two (2) separate owners involved. He questioned if the City zoning says if one property is created would it permit someone to sell part of the property off to make it separate. The question is moot in this case however. The Mayor is convinced that it does comply with this code and the purpose of this board is to allow people to develop lots which were in previous existence and not deprive them of their rights.

Mr. Akin noted that language considering them as a single lot is only a function of the zoning code and does not believe it prohibits the prior owner from deeding two (2) separate lots because they were actually separate lots prior to the enactment of the zoning code and were reflected as such on zoning maps or the Recorder of Deeds Office.

The Mayor continued with his concern that in the future if a person were to buy two (2) separate lots which under previous zoning were legal but are now illegal they would be required to conform to the new zoning code. Would that prevent that person from selling one (1) of those lots to another individual and then building two (2) homes of it. Mr. Akin responded yes and that he feels the language in 230-7 prohibits the buying and selling of identifiable lots that were sub-divided at some point. *(Discussion on this subject continued.)*

No further questions were presented.

Mr. Akin said he would vote in favor of the five (5) foot frontage variance being requested because the facts have proven there is separate ownership of the two (2) parcels and that a literal application of Section 230-7 does not prohibit the granting of a variance of this modest amount (13%-14%) in the width of the lot at the frontage. There is no opposition from neighbors and based on sworn testimony before this Board tonight, it appears the vast majority of homes in the area have lot widths less than the 65 feet that is required in the zoning code.

Because of the age of the lot and the nature in which it and the adjacent lot has been deeded and sold to two (2) separate individuals, there are special conditions that exist that are peculiar to the two (2) lots and which are not applicable to other lands in the same district.

A literal interpretation of the 65 foot requirement in the code would deprive the applicant of his right to develop the lot that he owns and would not be outside the dimensions of most of the lots on Baldt Avenue.

The special conditions did not result in any actions by the applicant. Mr. Nisky did not purchase the lot knowing that it could not be built upon.

Granting of this variance would not convey on the applicant any special privilege denied to other lands in the same district.

Mr. Athey said he would vote in favor of the variance request citing Mr. Akin's rationale. He confirmed with Mr. Scully that the various setbacks will apply.

Mayor Klingmeyer concurred with Mr. Akin's rationale as well and said he would vote in favor of granting the variance request. He reiterated his concern for the future with an owner of non-conforming contiguous lots under current zoning should not be permitted to deviate and create a situation where they can build two (2) homes on two (2) lots that are non-conforming.

**Mr. Athey made a motion to grant the variance for an existing 60 foot wide lot from the required 65 foot wide as the applicant has requested. Mr. Akin seconded the motion.**

**The motion was approved by unanimous vote based on the rationale noted by each Board member.**

The motion was approved by unanimous vote.

The hearing was adjourned at 7:25 p.m.

Respectfully submitted,

Debbie Turner  
Stenographer