

A New Castle City Board of Adjustment Hearing took place on January 26, 2010 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 JaiHo LLC, by and through its counsel Shawn Tucker, Esq., 1100 N. Market Street, Suite 1000, Wilmington, DE 19801, for a variance from certain provisions in the New Castle Zoning Code to permit reduction of the required front yard setback along Cherry Street from 35 feet to 24 feet, and for a variance to reduce the required off street parking space area from 3 square feet to 0.91 square feet of parking area per square foot of floor area, in order to permit the proposed expansion of the building located at 731 Ferry Cut Off, New Castle, Delaware, parcel number 21-015.10-003.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Tuesday, January 26, 2010, at 7 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Streets, New Castle, Delaware.+

An affidavit of publication in the News Journal was published on 1/11/10. The application fee has been paid. Mr. Bergstrom confirmed that the property has been properly posted.

Mr. Bergstrom provided a background. A notice of appeal has been filed on the property. Applicants wish to take an existing conforming retail commercial use in the commercial service district and modify the building for a new tenant, make some minor adjustments to the Cherry Street set back, and get a variance similar to that across the street to determine the number of parking spaces.

(All parties providing testimony this evening were sworn in by Mayor Klingmeyer.)

Shawn P. Tucker is representing the applicant regarding the two (2) variance requests before the Board. He introduced Mark Ziegler, a professional engineer and a principal with McBride and Ziegler, and Sandeep Butani, the applicant.

Mr. Ziegler has prepared a site plan for the subject location and provided a presentation to the Board on the footprint of the site, photos (4) of the existing building and the location across the street on Cherry Street. The subject location was formerly a used car lot.

A copy of Map 2C of the proposed City of New Castle Comprehensive Plan (Applicant Exhibit 1), which has not been certified by the State as of this date, was shown to Mr. Ziegler. Mr. Tucker asked Mr. Ziegler if Area 13 of the draft

Comprehensive Plan is currently identified to be a redevelopment area in the Comprehensive Plan. Mr. Ziegler confirmed that the area is located in Area 13 and is slated to be a redevelopment area.

Mr. Athey asked Mr. Tucker what the proposed Comprehensive Plan says about redevelopment zones. Mr. Tucker said that the proposed plan calls for redevelopment of this commercial corridor recognizing it is within walking distance from the center area of town. The proposed Comprehensive Plan notes it is not very attractive area and encourages redevelopment in the way of growth and diversity of businesses. The proposed plan is long on vision but short on specifics. Modification of the Zoning Code is encouraged at some point but certification is required before changes can be made to the zoning code.

Mr. Tucker referenced a 1996 (October 4) decision (Applicant Exhibit 2) by the Board of Adjustment concerning a variance on parking standards. When shown a copy of the decision Mr. Ziegler had not seen the decision but confirmed it was a Board of Adjustment decision. (*Copies provided to the Board.*) The decision was the same one utilized for a recent variance Mr. Tucker was involved with that illustrates parking limitations and how the Board has attempted to reconcile them both in 1996 and more recently. Under the City of New Castle's Zoning Code, the parking space requirement would be for the amount of square footage being proposed on his variance exhibit. Mr. Ziegler testified that 62.5 parking stalls would be needed. On the site plan he shows 19 parking stalls. He is familiar with New Castle County parking standards which require 4 stalls for retail use per 1,000 square feet and 4.5 per 1,000 square feet for commercial (shopping center). The 19 parking spaces provided on the site plan exceeds the 17 parking spaces that would be required under the County code. Mr. Ziegler believes the calculation of 62.5 parking stalls is excessive. He is not aware of any other jurisdiction with such stringent requirements.

Besides parking Mr. Ziegler noted the front yard set back variance request applies to the Cherry Street side. The set back requirement is 35 feet. There is an existing non-conforming situation. The application for a small bump out in the rear of the building is being proposed deeper into the set back. Mr. Ziegler said the bump out has a square footage of about 4%-5% of the overall area of the building. A brick patio is being proposed for the location. A buffer of 10 feet is proposed between Cherry Street and the armory that will consist of a landscape area (70-80 feet long, 3%-4% of site area). Landscaping would consist of six (6) trees. In his opinion the trees will provide some buffering. Buffering would also help with drainage at the site. Mr. Ziegler provided a description of the surrounding area that included commercial and residential areas.

Mr. Akin talked about the total proposed additions on the site at the northern corner addition that runs the length of the property at the south side and the brick

patio on the west side. The brick patio would be open air which is not in violation of the set back. The rear portion bump out at the southern corner is the only portion that creates a conflict with the set back.

Mr. Athey noted that if the bump out was not being proposed there would be no need for a variance request for the patio or for the other proposed addition.

Mr. Akin inquired if the building was constructed before the modern setbacks were adopted or if a variance was granted for the one foot, small setback variance. Mr. Ziegler was not aware of any Board of Adjustment decision granting the one foot encroachment. Mr. Bergstrom noted the building was built in the early 1960s, the modern zone code was not established until 1968 and did not take effect until sometime in the 1970s. This makes them a legal non-conforming use. He further noted that the setback line for residential communities is a zero setback because they were grandfathered in.

Mr. Butani confirmed that he is part of the entity known as JaiHo LLC that has a sales contract to purchase 731 Ferry Cut-Off. He is a pharmacist licensed in Pennsylvania and Delaware and intends to return to Delaware to establish a business at the site. He detailed his plans for the site to the Board. He plans to make the building look historical. He has hired an architect to design a proposed architectural scheme for the building which was entered as Applicant Exhibit 3. This scheme is an initial offering for the Board's review. If the Board finds this scheme acceptable Mr. Butani would be willing to condition a variance upon this scheme to be followed and modified if the Board wishes. Mr. Akin noted that this typically is not part of this Board's responsibility. Mr. Butani stated the bump out on the drawing will be brick and he plans on bringing three (3) tenants to the site. Each unit would consist of approximately 1,200 square feet. That size is consistent with other neighborhood uses.

Concerning the Cherry Street setback variance request, Mr. Butani explained they are requesting the setback to create a good flow to the design being proposed at this time. It would also provide some buffering. Looking at the square footage and the amount of money being invested, they determined they needed an increase in square footage in order to make the investment more profitable. He added he feels they need the variances in order to be competitive with other commercial units.

Mr. Tucker offered closing comments. He distributed a package of legal information to Board members that has been entered as Applicant Exhibit 6. The site is in a redevelopment area designed by the City in the proposed Comprehensive Plan. The proposed use being presented this evening enhances something new and different to the commercial character of the City that is outlined in the draft Comprehensive Plan.

Mr. Tucker noted that the Supreme Court of Delaware has reaffirmed *Kwik-Check* factors that are used in these cases. This use is consistent with uses in the area and with the plans outlined in the draft Comprehensive Plan. The current site is in need of updating, repair and redevelopment; if the Board were to grant some modest reduction in the current Code standards he stated that reduction would not seriously affect any neighboring properties or uses; if the restriction is not removed it would create an unnecessary hardship to the applicant who is trying to make normal improvements to the property to make it more attractive to tenants and customers; parking to be provided would be consistent with parking ratios in other jurisdictions; the setback variance is minimal considering the area to be impacted and is located in such a way to buffer noise that is generated from the patio use.

Mayor Klingmeyer asked Mr. Butani what type of businesses he anticipates as tenants. There is currently a Subway store with the other two tenants to be determined. Permitted uses in the area per the Code is any retail use similar to what is located across the street which is Service Commercial. The Mayor read into the record certain permitted uses in a Service Commercial district.

Mr. Tucker commented that the applicant would be willing to accept a limit to uses and building style as permitted in the City's Retail Commercial zoning language as a condition of the variance if the Board grants a variance. The Board may accept the condition if they believe it is an appropriate offer and in the best interest of the City. *(Discussion followed.)*

Mayor Klingmeyer questioned the applicant about where pedestrians would be walking along Cherry Street in the absence of sidewalks. Mr. Tucker acknowledged Cherry Street is one-way to a certain point for vehicular traffic and is very narrow. There is room for a fence in the area. Trash pick-up and deliveries (depending on tenants) will take place in the rear of the structure.

Mayor Klingmeyer again expressed concern about pedestrian traffic along Cherry Street. Discussion included installing sidewalks in the area. Mr. Athey referred to Section 230-22 F (7) of the City Zoning Code addressing streetscapes and landscaping. He read a portion of the section into the record. Discussion then centered on the definition of "development" in the City Zoning Code versus "new development" and how it might apply to "redevelopment". Mr. Ziegler said they consider this application a redevelopment plan and said there is no way a sidewalk can be installed along the front.

Mr. Akin read the definition of "development" into the record from the City Zoning Code. Mr. Tucker argued that the application being considered tonight is not "new development" but rather a site to be "redeveloped". Imposing "new development" rationale would stun redevelopment. Further research of this issue can be done as a condition of any building permits. *(Additional discussion about sidewalks followed.)*

Mr. Athey interprets the City's Zoning Code as stating the applicant should be providing a sidewalk. Mr. Tucker is willing to investigate and provide a legal analysis to Mr. Akin and if it is a requirement he would need to return to this Board to request a sidewalk variance. He also suggested speaking to DeDOT about any possible plans the State may have for the same area, including installation of a sidewalk in the area.

Mr. Tucker said they could offer a verbal amendment to the application understanding that it is not advertised for tonight's meeting and if an appeal were to be filed they would return to the Board to address the issue. Mr. Akin is hesitant to take action on the variance being requested because of several outstanding questions/concerns. He would rather take additional time to satisfy all Code requirements.

Mr. Tucker requested a brief recess to discuss with his client. Upon resumption of the meeting Mr. Tucker said his client has approximately two (2) weeks until settlement. An extension is not an option since other extensions have been granted. He then argued to the Board that it is clear, in his opinion, that language in the current Zoning Code was intended to include "new development" in the Commercial Service zoning district. Their application is not new development. The parking being requested is not new development. He offered that his client would be willing to approach DeDOT and see if they would permit his client to build and pay for sidewalks in the public right-of-way. They would need to work with DeDOT concerning the State's future plans for that road or to work within the right-of-way along Ferry Cut-Off. If the City allows this on Cherry Street they would install in lieu of the landscaping buffer.

Mr. Athey asked Mr. Bergstrom if a sidewalk on private property can be deemed public. His response was if there is a new subdivision that would be case. Mayor Klingmeyer said most of the sidewalks in New Castle City are on private property. He added he is not concerned with installing a sidewalk along the Ferry Cut-Off.

Mr. Akin stated that the phrase "new development" has the meaning of taking an undeveloped parcel and develop something new on that parcel. He does not believe "new development" was intended to refer to rather modest additions to existing buildings. He reiterated that he does not know the legislative history of the language in the Code and would need to research same. Mr. Tucker confirmed that the applicant would be willing to condition the granting of the variances being sought tonight upon installation of sidewalks on both streets, subject to DeDOT's approval along the Ferry Cut-Off.

Mayor Klingmeyer does not consider a variance of existing property to be new development. Mr. Akin noted that most land use attorneys and judges would not

consider this application as new development. Mr. Athey said a condition could be that the sidewalk could be no narrower than the width of the sidewalk along Cherry Street. This may also necessitate a small easement in order to install a sidewalk.

No one was present to speak in support or against the application.

The Board then began discussion of the case. Mr. Athey is concerned about what hardship exists for the bump out. His interpretation of the Zoning Code is that this Board cannot grant the variance by making non-conforming structures non-conformance worse. Mr. Tucker disagreed. The State-law standard allows towns to adopt zoning code sections but the City cannot usurp a State-created Board's authority to grant variances as long as the legal standard for the variance found in State law has been shown. Under Title 21 the General Assembly granted Boards of Adjustment the authority to review variance requests and if an applicant has met the proper legal standard under State law a variance was to be granted in the Board's discretion. He defined legal standard as mirroring language shown in Exhibit A and read that language aloud.

The issue of hardship was argued. Mr. Tucker said in order to make the site more attractive to potential tenants the patio is a reasonable suggestion. He acknowledged the patio may create noise when being used but that the bump out would provide a buffer. Mr. Butani added that the Subway store will require a freezer and rest room facilities in the same area of the building. The Mayor asked to see the architectural drawings for the site. Mr. Butani has not received the drawings to date. Mr. Tucker said the bump out will address multiple things. Mr. Ziegler stated they explored placing the bump out at other places on the site but they all interfered with traffic flow.

Mr. Athey questioned Mr. Tucker's claim that 230-9(A) of the City Zoning Code is superseded by State law. He believes the New Castle City Zoning Code is very specific in what can and cannot be done while language in the State law is less specific. He reiterated that the City Zoning Code states that this Board cannot make a non-conformance worse. He asked Mr. Akin for his interpretation.

Mr. Akin does not agree with Mr. Tucker's position. He does not believe that Delaware law would not permit local elected officials to prohibit an increase in encroachment where one already exists in a non-conforming structure. He also does not feel that this Board can ignore language in Section 230-9(A) of the City Zoning Code.

Mr. Athey stated that the applicant has not demonstrated any extreme hardship in his opinion. Mayor Klingmeyer agreed with Mr. Athey's position.

Mr. Akin asked if the applicant's hardship argument for the bump out is because there is no where else on the site where the bump out can be installed. Mr. Tucker responded that based on the needs of the tenant and the setbacks shown on the site plan that that is the argument. Looking at the State law standard, the four (4) factors in *Kwik-Check* are balanced and there is Delaware case law to support this.

Mr. Butani concluded his testimony by stating that he wants to return to the community and do something good for the community.

Mr. Athey asked Mr. Akin if this Board has latitude in Section 230-9(A). Mr. Akin said that he agrees with the Mayor's assessment that the non-conformity is so modest as to almost be an anomaly when the building was constructed. Encroaching one foot (1') in a 35' setback area should cause this Board to feel we need to apply the language in Section 230-9(A). Mr. Akin added that there is a trend now with some Boards of Adjustment with ordinances being enacted allowing administrators' discretion when granting variances when they are minimal such as 1%-3%.

Mayor Klingmeyer noted that hardship was created by the applicant. Mr. Tucker's argument is that the hardship is the condition in which the applicants found the building. The applicant has testified that the bump out being proposed would square off the building.

Mr. Akin referenced some of the rationale noted in the case of *McLaughlin v. Board of Adjustment of New Castle County* that Mr. Tucker mentioned earlier. The case is entered as an attachment to Applicant Exhibit 6. Mr. Akin is not convinced that the applicant cannot reconfigure the site. He also does not find any hardship associated with this case.

Mr. Athey also is not convinced that some other configuration of the site would not be better to obtain the square footage being sought without seeking a variance. Mr. Ziegler said other options were considered but that traffic would be interfered with and the design they submitted is the most appropriate.

Mr. Athey reviewed the criteria in Section 230-57.C(1) (a) (1) that have not been met by the applicant. He asked what weight, if any, the proposed Comprehensive Plan language should be given. Mr. Akin reminded that until the proposed Plan is adopted and approved, it does not have the force of the law. Once the proposed Comprehensive Plan is approved a municipality is supposed to bring their zoning districts into conformity. There is no redevelopment district in the City, only a redevelopment area. Mr. Bergstrom noted that once a proposed Comprehensive Plan is adopted the City has 18 months to make changes to their respective Zoning Code.

Mr. Athey made a motion that the variance for the setback along Cherry Street be denied for the reasons stated earlier. Mr. Akin seconded the motion.

Mr. Akin concurs with Mr. Athey that a hardship under the terms of the City Zoning Code or the terms under the *Kwik-Check* case have been established. He does not believe the owner has shown exceptional practical difficulty in an effort in making normal improvement of the use of the building that is under a conditional contract. He also does not believe that the current Zoning Code and setback and the minimal portion that causes the setback problem for the owner shows that the building could not be reconfigured so as to eliminate the variance on Cherry Street. A variance from 35 feet to 24 feet is approximately a 33% variance, which is substantial. Even though testimony tonight indicates this area of the City has been slated for redevelopment and there are retail uses in the area of the site and there has not been any objections by neighbors showing that this addition would affect other properties, he said this Board must still consider whether maintaining the setback restriction would create an unnecessary hardship or exceptional practical difficulty for the owner under *Kwik-Check*. In his opinion the applicant's architect/planner/building designer have said it would be more appropriate to place rest rooms and storage in an area of the building causing a setback violation. He is not satisfied that those features could not be placed elsewhere in the building thus eliminating the setback variance in the southwest corner of the building. Mr. Akin supports Mr. Athey's motion.

In addition to the rationale noted by Mr. Akin, Mr. Athey referenced Section 230-9(A) in the Zoning Code. Out of an abundance of caution he is not sure this Board is permitted to grant a variance.

Mayor Klingmeyer stated that he also supports the motion. His rationale is based on language in Zoning Code Section 230-57.C(1) (a) (3). The applicant has created his own conditions by choosing to install the bump out.

Mr. Tucker asked the Board what would happen if a fire occurred at the existing non-conforming structure should the owner decide to rebuild. He said if this Board acknowledges the non-conformity it could prove helpful with lenders who would be more comfortable if an existing non-conformity were made legal. *(Additional discussion took place.)*

Mr. Akin stated that it is lawfully located as a matter of law. All the Board would be doing is acknowledging the existence of the current footprint of the building. By granting the request it would no longer be legally existing non-conforming, it would be legally existing and Section 230-9(A) would no longer apply. Mr. Tucker asked if the non-conforming status prohibited expansion. He believes that one foot is very small. Mr. Bergstrom said the applicant would need to appear before this Board again for anything expansion-wise because it is a non-

conforming use. If this Board grants the affirmation being requested the applicant would not need to appear again in order to expand elsewhere. Mr. Tucker said by receiving this acknowledgement it makes the property cleaner from the title and zoning standpoint and would not require the applicant to appear before this Board again if they wanted to expand the property. Mr. Athey expressed concern with this matter not being part of the Notice of Public Hearing thus giving the public adequate opportunity to voice their support or objections. It was noted that there is no one present tonight opposing the original setback being requested which is larger with the argument being that one foot should not present a problem.

The vote was called on the motion. The motion was approved by unanimous vote to deny the Cherry Street setback variance.

Mr. Tucker requested an oral amendment to the application requesting a one foot variance from the 35 foot requirement to permit a 24 foot building setback. This Board has the discretion to consider a lesser variance than what was originally requested.

A motion was made by Mr. Athey to grant a variance for the existing building to affirm its location by stating that the front yard setback line paralleling Cherry Street be coincident with the western building line of the existing building and run approximately parallel to Cherry Street the entire length between the Ferry Cut-Off and the adjoining properties to the south. Mr. Akin seconded the motion.

Mr. Akin stated that what the Board has done is simply to recognize the lawful nature of the westerly edge of the building where it presently stands and has now granted a variance permitting the one foot incursion in the setback area along the Cherry Street side of the building. It is an accommodation, not a requirement, to the applicant and clarifies any rights they may have with regard to other developments to this building. He also agrees with Mr. Tucker that the one foot variance that was not advertised this evening is far less significant than the original setback variance requested; therefore, it falls within the language of the public notice for tonight's meeting.

Mr. Athey and Mayor Klingmeyer agreed with Mr. Akin's rationale. **The motion was approved by unanimous vote.**

The matter of the parking variance request was then addressed by the Board. **Mr. Athey made a motion to grant the parking variance from three (3) square feet for every square foot of building to 0.91 square feet as presented by the applicant. Mr. Akin seconded the motion.**

Mayor Klingmeyer commented that the variance request is consistent with the idea that in order for the property to be developed in any rational matter it would

be necessary. Mr. Akin said it is consistent with what currently exists across the street and that the City Zoning Code is out of date and the City Solicitor will bring this to the attention of City Council.

Mr. Akin also supports the motion stating that if current parking requirements were applied to the site, it would eliminate any ability of the potential owner to make profitable use of the property. He added that this Board has heard other cases that questions the necessity of the excessive amount of parking spaces needed for some retail uses. He does intend to bring the matter to the attention of City Council should they wish to revisit same. He believes that a hardship has been shown under the *Kwik-Check* factors that if the parking requirements of the City were applied it would almost certainly preclude any development of the property. There has been testimony by Mr. Ziegler that the City of New Castle's stringent parking requirements are independent of other municipalities which suggests perhaps the City's requirements should be revisited.

The motion was approved by unanimous vote.

The hearing was adjourned at 10 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicants Exhibits

Applicants Exhibit 1 -- Map 2C of the proposed City of New Castle
Comprehensive Plan

Applicants Exhibit 2 -- 1996 (October 4) Board of Adjustment Decision

Applicants Exhibit 3 . Architectural Scheme (December 2009)

Applicants Exhibit 4 . McBride & Ziegler Drawing

Applicants Exhibit 5 . Photos (4) presented by Mr. Ziegler

Applicants Exhibit 6 -- Package of Legal Information (provided by
Mr. Tucker) w/attachment of *McLaughlin v. Board of
Adjustment of New Castle County*