

**A New Castle City Board of Adjustment Hearing took place on
October 28, 2010 at 7 p.m. in the City of New Castle's Town Hall.**

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

City Personnel: Jeff Bergstrom, City Code Official

Mayor Klingmeyer called the meeting to order at 7:10 p.m.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Carol T. Gardner, 19 Karlstad Road, New Castle, Delaware, for a variance from certain provisions in the New Castle Zoning Code to permit reduction of the required rear yard setback from 20 feet to 6.3 feet, in order to permit a deck to be maintained at the rear of the existing home located at 19 Karlstad Road, New Castle, Delaware, parcel number 21-001.00-201.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Thursday, October 28, 2010, at 7 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Streets, New Castle, Delaware.+

An affidavit of publication was published in the News Journal and the New Castle Weekly on 10/13/10. The appropriate application fee has been paid. Mr. Bergstrom testified the property has been properly posted.

Mr. Brian Murray, attorney for the applicant, presented to the Board. The property is located in a new development in New Castle and backs up to open space. Many of the houses in this development have decks and some have additions. Having a deck in this position would not be out of character in this development. The subject property is fenced (picket) and adjacent properties have privacy fences thus limiting the visual impact if the variance is granted. To bring this deck into compliance requires a 20 foot backyard. There is approximately 22 feet from the back of the house to the rear property line according to the survey, which would make the deck extremely small. None of the surrounding property owners would suffer economic damage if the deck is permitted to remain in its current place. The house was built in 1999. The deck was added after the house was built and the applicant has not been able to determine from the previous homeowner when the deck was installed. The current homeowner bought the house on 9/24/10. A survey was done on the property and showed the deck was outside the building envelope.

Mr. Athey noted that it can be assumed a deck was added some time after 1999 without a building permit or it would have been noticed and they would be here in a proactive sense versus a reactive sense.

Mr. Bergstrom was asked if he was aware of the number of decks in the area that could be in a similar situation. He is not aware of any decks this close to the property line.

Mr. Murray testified this lot is a smaller lot than some of the others because of the open space behind it. Mr. Athey disagreed with Mr. Murray's comment. He used a diagram showing lot 99 which appears to be the same depth as the others in the same row.

Mr. Murray further testified the properties at 9, 13, 15, and 17 Karlstad Road all have decks. He noted the property at 24 Kristen (across from the open space) has a small deck but has a large screen porch on the back. The Mayor inquired if any of those decks are as extensive as the one at 19 Karlstad Road. Mr. Murray said one is smaller and a couple of the decks are of similar size. His client has not received any comments in favor or against her application. She has posted a sign in front of her house making neighbors aware and requesting comments.

Mr. Murray was asked about future plans for the deck. In speaking with his client, she has no plans to close in the deck and plans on maintaining the deck in its current state. He added that this body could place conditions on any variance approval. Mr. Athey noted the fence and deck have likely been there for years but any attempts to enclose it may create an issue for neighbors and the City.

Mr. Athey understands the applicant bought a home containing a deck that was built without a building permit. The Mayor expressed concern about future requests when a homeowner follows the Code and wants to do something similar and the City denies the request.

Mr. Athey asked Mr. Bergstrom if the height of the deck off the ground is an issue in this situation. Mr. Bergstrom responded the deck is about three feet off the ground. Mr. Murray testified it is one step down from the first floor with a small slope. The sloping gives the appearance that the deck is higher.

Mr. Akin stated that in the past the Board of Adjustment has taken the position that if a structure such as were to be enclosed in the future that the applicant should return to this Board for a variance to permit that enclosure. *(A prior decision that predated this Board was noted that supports Mr. Akin's statement.)*

Several subsections of Section 230-57 of the Zoning Code were discussed in detail by the Board to determine whether the Board can impose conditions on an approval in cases such as this. *(Section 230-57 addresses provisions governing the granting of variances that this Board is governed by.)*

Mayor Klingmeyer believes there is a strong possibility there are a number of homeowners in this area who have decks without obtaining a building permit that could be illegal because they don't meet the Code and are non-conforming. Those homeowners would need to prove to this Board their lots were odd in shape that would allow them to keep a deck. Mr. Bergstrom supported the Mayor's comment but cautioned he does not know all the lot sizes.

Mr. Athey said that because of the set back requirements in the area (25 foot) it is very difficult to put a deck on any of the houses.

Mr. Murray argued that the special condition in this matter is the lot is very small. A 2 foot deck could not fit into the building envelope and if a deck was to be built, then all residents would need to appear before this Board to request a permit to build a deck. Since no other residents have done this he proposed his client be granted a permit noting the small lot size. The Mayor argued the applicant is creating something that is illegal. This Board cannot grant a variance under current conditions.

Mr. Akin noted this Board is struggling with the special condition or exceptional condition that exists on this lot versus others in the area, other than the lot's size or the building footprint. Mr. Murray was asked what hardship that his client has in this case. He testified it would create an economic hardship for his client. His client would need to either remove the deck entirely or move it back to a 2 foot deep deck to meet the building envelope which renders it practically useless.

Mayor Klingmeyer is sympathetic but does not believe this Board has the power to change the law. The proper avenue would be to approach City Council to amend the ordinance. He considers a deck a part of recreation for a backyard.

Mr. Athey inquired what legal requirements exist if the homeowner goes forward with keeping the deck. Mr. Akin suggested that the Code Official could order the homeowner to remove the deck that is non-conforming to the Zoning Code. He is unaware of other penalties or remedies that exist.

The Mayor suggested this issue is a matter the civic association of this area should approach City Council about. The land beyond the backyards in this development is private open space. This Board does not have the power to change the Zoning Code which is what we would be doing if we granted this variance.

Mr. Murray was the settlement attorney for his client. He is familiar with the set back requirements in the City which prompted their request for a variance. He could not provide an exact number of homes near 19 Karlstad that have offending decks.

Mr. Akin expressed surprise in the large number of property owners in the vicinity who entered into contracts for construction of decks without dealing with this setback issue.

Mr. Athey asked Mr. Murray why his client is requesting a variance now. Mr. Murray indicated the survey showed a front and rear setback violation. His client wants to do the right thing.

Mr. Akin suggested this Board may see more of these requests in the future as homeowners refinance as a result of lower interest rates.

Mr. Athey does not see hardship in this matter. Mr. Murray stated if this Board does not make a decision tonight, he would advise his client to go to the civic association to see if, as a group, they would want to do something.

Mr. Akin informed an unenclosed, elevated deck that is attached to a home is considered part of the structure per the City's Zoning Code. Mr. Bergstrom asked if an area variance could be granted. Mr. Akin feels it might send a message to others who already have non-conforming decks or are thinking about constructing same that this Board would consider lot size as a hardship. The size of the building lot in this case causes a significant encroachment. In making decisions he considers the impact of those decisions on others in the area that may be encroaching and may cite this case as authority for the granting of other variances. He added that he agrees with the Mayor's concern that this Board is doing what City Council should be doing.

Mayor Klingmeyer asked Mr. Murray if he has a written application for a variance responding to questions asked under Section C(1)(a)(1-4). Mr. Murray is unsure about the conditions the Mayor noted. The Mayor inquired if this Board could consider the application as incomplete. Mr. Akin said there is a short reference on the application to what the applicant considers are the conditions that should justify the variance in this case. Mayor Klingmeyer would like to see a response to all the questions in Section C(1) before granting a decision on this matter.

Mr. Athey referenced the Schedule of District Regulations table at the end of the Zoning Code and said since this is a planned development, the table says the front, rear and side setback lines minimum yards are not applicable. Mr. Bergstrom noted the applicant chose to include setback requirements that were all the same on the record plan (zero ft. side yard, 25 ft. front, 20 ft. rear). Mr. Athey believes that whoever was responsible for the layout of the subdivision made the lots so small and/or the houses so big it precluded the placement of porches/decks. Mr. Bergstrom added that no consideration was given to lots backing up to private open space that may have a different rear yard setback.

Mr. Athey stated that if this is a planned development this Board would not be blanket changing the Zoning Code because the planned development has its own criteria and we would be changing a plan that was approved by City Council. Mayor Klingmeyer said a planned development goes beyond this Code. He reiterated that this Board needs answers to Section 230-57 C(1)(a)(1-4).

The Mayor would like to continue the application until answers are provided in writing to the conditions in the aforementioned section.

Mr. Murray indicated there are no immediate circumstances in this case. He will submit written comments before another hearing is scheduled. He will also speak with his client

about having the civic association address this matter. Mr. Akin advised Mr. Murray to also look into responses to Kwik Check factors (Supreme Court decision on standards of Boards of Adjustment).

Mr. Athey asked Mr. Akin if what the homeowner association would be doing is asking to have the setbacks as stated on the record plan to be changed to allow decks to be built or blanket wording to allow decks in the rear setback yards to be built in the Boothurst subdivision or go through the proper channel. Mr. Akin said if the civic association, or this applicant, wants to take up the matter with City Council they would ask for either no application for rear yard setbacks or a reduction in the degree of the footage in setback requirement given the size and similarity of the lots and the technically encroaching structures there. The decision to grant relief would be City Council's decision. He would entertain any further arguments the applicant wants to make addressing the factors in the Zoning Code.

For the record there were no other parties present to oppose or support this application.

The Mayor commented that in the future if plans were to go to the Planning Commission, some reasonable guidelines should be given as far as extending decks in these areas so there is some control and possibly grandfathering existing situations.

A motion was made by Mr. Akin that this matter be continued subject to a further hearing after 1/1/2011 and that in the interim the applicant be requested to submit further argument addressing the factors in Section 230-57C (1)(a)(1-4) so the Board may consider those facts when it reconvenes.

Mr. Athey seconded the motion.

The Mayor suggested that the applicant should respond to the Code requirements without defining specifically since this has already been stated during the hearing. Mr. Athey asked if there is any amendment necessary to the main motion should the homeowner's association go before City Council who are then successful in obtaining a blanket exception or change to the planned development thus rendering going to this Board as moot otherwise we may have a continued Board of Adjustment that doesn't get closed. The Mayor said a brief meeting could be called to go on record that the applicant met the requirements of the Code. Mr. Akin suggested asking Mr. Murray to determine between now and December 31st whether his client is going to pursue the matter before City Council and, if so, whether they would choose to withdraw their application before this Board. The applicant has a right to a decision from this Board until their application is withdrawn.

Mr. Akin amended his motion to include that if between now and December 31st the applicant determines to pursue relief before City Council in lieu of this hearing, then the applicant should notify this Board they are withdrawing their application. If not then the hearing will go forward sometime after January 1st.
Mr. Athey seconded the amendment to the main motion.

Mr. Akin voted to support the motion because there appears to be a lack of factual information provided to the Board tonight with regard to the factors this Board uses to consider variance requests and in light of the potential precedence of any decision this Board makes in this particular case we should have the full record before voting on the case.

Mr. Athey voted to support the motion citing the City Solicitor's comments and adding that it will give the applicant the opportunity to talk to the homeowner's association to determine if there is a possibility for a blanket agreement with City Council that would potentially make the applicant's application moot.

Mayor Klingmeyer supported the motion citing his colleagues' rationale and his concern that the next hearing will be at the request of the applicant and it will give the Board reasonable time to close the case.

The motion was approved.

The hearing was adjourned at 8:10 p.m.

Respectfully submitted,

Debbie Turner

Debbie Turner
Stenographer