

**A New Castle City Board of Adjustment Hearing took place on January 4, 2012 at 7 p.m. in the City of New Castle's Town Hall.**

Present: Donald Reese, Mayor  
Daniel R. Losco, City Solicitor  
David J. Athey, City Engineer

City Personnel: Jeff Bergstrom, City Code Official

Mayor Reese called the meeting to order at 7:05 p.m. Roll call was taken.

Mayor Reese read the Notice of Public Hearing that states, "An application has been filed by Laura L. Fontana, 119 Dasher Avenue, Bear, Delaware 19701 for property located at 46 East 4<sup>th</sup> Street, New Castle, Delaware, parcel number 21-015.10-110, seeking an appeal from the decision of the Historic Area Commission to require the replacement of the recently installed windows at the property.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Wednesday, January 4, 2012, 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 was published in the News Journal on 12/20/11 and the New Castle Weekly on 1/4/12.

Mr. Steve Zorrer, co-owner of the property, presented. He described materials provided to the Historic Area Commission (HAC) at its 7/21/11 meeting and given to Board members. The drawings show what the applicants were doing and information about windows they proposed to install. The sashes, jam liners and head profile are vinyl clad on the windows that were installed. The window information submitted show jam liners, head profile and sill head profile all made of vinyl. Mr. Zorrer testified this information was part of the original package provided to HAC. Before submitting to HAC they submitted to the building department as part of the building permit application. Also submitted was a set of drawings showing jam liners, sill and head profile all made of vinyl. Using a sample of the window, Mr. Zorrer illustrated to the Board the sash is wood painted with a white vinyl-based, maintenance-free paint, factory painted on the exterior. It is not clad sash. The composite is made of 40% wood and 60% vinyl mixed together. Anderson 200 windows were installed because the applicants felt they were more appropriate, but Anderson 400 windows were part of the original proposal. Solicitor Losco asked what detail is provided in the package about the windows and their composition. Mr. Zorrer testified it doesn't give the composition. He agreed the building official did not know what kind of window would be installed in terms of composition. Mr. Zorrer further testified he did not provide a sample of the Anderson 400 window to the building official and was not requested to provide a sample. What was presented to the building department (Anderson 400) was different from what was presented to HAC. The difference between the windows is that the Anderson 400 series is less wood, more vinyl cladding with clad sashes. The Anderson 200 series is a full wood core that is vinyl clad with a full wood sash and no cladding.

Mr. Zorrer confirmed the package provided to the building department was different from what was provided to HAC. Mr. Athey asked why the packages were different. According to Mr. Zorrer they highlighted what was to be done in the HAC package and they were not aware drawings they submitted to the building department were not provided to HAC.

Mr. Athey asked Mr. Bergstrom if an applicant makes an application to HAC does his department also receive that information. Mr. Bergstrom said normal procedure is that whatever submissions are made to HAC are provided to the building department. HAC deals with historic issues that are presented. From there instructions are given to the applicant and they can officially apply for a building permit to do the work.

Mr. Athey asked Mr. Zorrer why the information was different in the two (2) packages. Mr. Zorrer testified that at the time they were unsure which product (Anderson 200 v. Anderson 400) they wanted to use. The Anderson 200 series window was approved by HAC on 7/21/11. The package presented at this meeting contained the drawing showing the Anderson 400 series, but they were not installed.

Ms. Fontana said when they applied for the building permit a full set of drawings was submitted to the building department and HAC. They appeared at the 6/12/11 meeting for the first piece of the building permit, which was approved. They returned to HAC on 7/21/11 to seek approval for the Anderson 200 series windows, and were granted approval. HAC did not ask about the drawings at the 7/21/11 meeting. Mayor Reese asked if they informed HAC they changed from Anderson 400 to Anderson 200. Ms. Fontana said that HAC was concerned with the guidelines (found on the City website). They did not ask about the drawings. The applicants confirmed they presented a pack of information to HAC in July 2011 that contained Anderson 200 series information. They have installed Anderson 200 windows. The Anderson 400 series windows were on the drawing presented with the original pack of information. Mr. Zorrer said the historic guidelines do not mention that metal clad or vinyl clad is “not permitted”, rather they are “discouraged.” The litany was not mentioned at the 7/21/11 meeting.

They believe by installing the two over two window pane design they met the historic guidelines. Mr. Zorrer testified there was no discussion on the composition of the wood on the window itself at the July HAC meeting. The verbatim notes say nothing about the composition of the windows.

Solicitor Losco asked the applicants if they had a copy of the litany. Mr. Zorrer said they did have a copy but it does not state that vinyl clad is not permitted and states that wood is permitted. Their windows are wood; wooden sashes, jam liners are wood covered in vinyl. Mr. Zorrer agreed that what is visible to the exterior is non-wood material. Again, the applicants testified the litany was not mentioned in the July HAC meeting, only the guidelines were referenced which they believe are vague.

The applicants testified they did receive a copy of the litany and access to the guidelines before the July meeting. They did not review them prior to the July meeting. No indication was given as to what they were. The guidelines state that anything other than wood is “discouraged.” They believed the Anderson 200 series are wood; the sashes are wood painted with a factory-installed heavy paint. Ms. Fontana said when they received approval in July for the windows, two over two, they believed the windows were an approved material, especially since no other discussion about materials took place.

Solicitor Losco asked if the applicants have looked into the cost for replacing all the windows. Mr. Zorrer said it would be approximately another \$12,000.

The applicants appeared again before HAC in October and November 2011. At the October HAC meeting members abstained from a decision until they had a detailed review of the July minutes (verbatim text). They trimmed the windows out in wood, which they chose to do. HAC did suggest when they did trim that all the windows match.

There is an addition to the original house. When the applicants bought the house the front windows were the six over nine pane design and HAC requested they return to two over two design. Ms. Fontana said they replaced all windows in the house, including the addition which is non-historic. They are removing aluminum siding on the non-historic portion and putting up cedar.

Mr. Zorrer said they believe there is a difference in interpretation of the guidelines. The guidelines on the City website have a lot of latitude versus language in the litany. From the time an applicant applies for a permit, Ms. Fontana said there is not a clear process of what is required of the applicant. Mr. Zorrer added that when the litany is referred to at HAC meetings he didn't know what HAC was talking about. He said he did not think to question the vinyl cladding. Ms. Fontana said the pack of detailed information was reviewed with HAC and if they wanted wood windows they should specify the parts. Mr. Zorrer again testified the window composition was never discussed before HAC.

Solicitor Losco asked if the only difference between the type of window they installed and what was supplied to HAC is the number of panes, otherwise the composition is identical. Mr. Zorrer said that is correct. Ms. Fontana said that was HAC's recommendation and they followed that recommendation.

Mr. Athey asked if the word "wood" appears in the verbatim motion text (7/21/11). Mr. Zorrer said, "not about the windows."

The floor was opened for comments.

Mr. Tom McDowell, member of HAC, testified in the July meeting the print presented to them showed six over six windows. He discussed with the couple that the windows should be two over two and comply with the other properties of similar Victoria style and size. He also indicated the windows should be all wood, true divided light. The particular windows that are there are vinyl clad and the muntin is vinyl and everything in that window is against what the litany states. The litany states "all wood" window. He added that if this Board rules in favor of the applicants a new precedent will be set for HAC and they will not be able to turn down any other application that shows vinyl windows. The Board will also be showing an injustice to other citizens who wanted Anderson clad windows and HAC suggested they put in wood windows, his home being one of those homes.

Solicitor Losco showed Mr. McDowell a document that was submitted tonight by the applicant that they said they presented at the July HAC meeting. He was asked if he saw the document at that meeting. He testified he had never seen the document and it was not part of the materials provided. He did not see any details on the type of window to be installed. He said Mr. Zorrer agreed to go to two over two. Mr. McDowell stated the applicants provided a print of the front of the house showing six over six windows at the July meeting.

Solicitor Losco asked Mr. Bergstrom if he has a copy of the exhibit pack that was provided to HAC in July. Mr. Bergstrom said the complete file is in his office. Solicitor Losco asked if the document showing four over four with vinyl cladding presented this evening was in the HAC pack since the applicant says it was part of the July pack and Mr. McDowell has testified he had not seen it. Mr. Bergstrom looked at the document and said it is a replacement system and he believes that HAC thought the applicant was going to install replacement sashes and vinyl jam liners, not vinyl jams, and keep the existing jams and sills in the building. Mr. McDowell informed the document is not a cut of the window that the applicant has. It is a tilt package meaning you take the frame out of the existing windows, put new jam liners in the side of them, and put new sashes in and the exterior wood sash and sill remains.

Ms. Sally Monigle, chair of HAC, referenced page 3 of the litany that clearly states what is permitted regarding factory-made windows and whatever is permitted should be followed. If there is any exception to that then the applicant needed to ask for clarification. Solicitor Losco presented the document to Ms. Monigle and asked if she had seen the document. She could not testify with certainty that she had or had not seen the document. Solicitor Losco asked if wood windows were discussed at the July meeting. She testified she was sure they discussed that the storm door and trim needed to be wood. She could not testify if wood windows were required. There may not be any clear statement excluding any other type of window. The inference and understanding is that “wood, wood, and wood” is to be used.

Mr. Athey asked about the purpose of the verbatim motion text. Ms. Fontana said it was requested by a member of HAC who abstained from voting until details of the July meeting were known. She added there is no mention of wood windows. Solicitor Losco noted a statement in the verbatim text by Ms. Monigle, “you don’t have to do anything just when you do it follow the guidelines.” The applicant states, “ok.”

Solicitor Losco asked Mr. Zorrer if his testimony earlier was that he did not know what the litany was at the time of the July meeting. They confirmed they had the document (litany), but did not know what HAC was talking about at the June meeting and did not ask.

Mr. William Hentkowski, member of HAC, referenced the guidelines that say anything other than wood is “discouraged” so how the applicants went from “discouraged” to “encouraged” is not clear to him. Solicitor Losco asked if the applicant make clear to HAC that windows incorporating vinyl were going to be used. Mr. Hentkowski said if the word “vinyl” came up there would have been some response from HAC. Solicitor Losco asked him if HAC has approved vinyl-clad windows in the past and he responded “no.” He has been a member of HAC for 17 years. He added there may be some vinyl-clad windows installed but doubted they were approved.

Mr. Zorrer addressed Mr. McDowell’s comment about windows, nine over nine, that were submitted to HAC in the original pack. In 2005 a resident on The Strand submitted for vinyl-clad windows and installed those windows. HAC requested they remove the windows (Anderson 400) and they are still in place today. Ms. Fontana said because of this situation a historic area certificate of compliance is required before getting a certificate of occupancy. The windows are still installed at this property and they disputed that they are setting precedence. Ms. Fontana stated that they did give the full pack of information to HAC members in July; it is up to them whether they go through the information.

Mr. Zorrer said the trim and jams are vinyl clad. The window itself is a vinyl paint. The sash and muntins on the outside are the composite (vinyl and wood). Mr. McDowell said HAC's objection is the vinyl muntins in the middle, the vinyl trim on the sash and the sides, which has been trimmed over with wood, but still visible on the edging. Ms. Fontana said that HAC did not ask specifics about the exact windows. They were not requested to submit catalog cuts, but other applicants have been requested to submit catalog cuts. Mr. Zorrer said they didn't know what they were to submit and Ms. Fontana added there is no clarification on what is to be submitted and when, and in the information it does not state specifically that it has to be all wood. In the minutes HAC does not mention anything about wood windows. Solicitor Losco noted that a HAC member did state in the minutes they are welcome to have storm doors, "wood, wood, wood, wood." He asked the applicants if they got the impression from HAC that it was important to use wood materials and did they think there would be a historical inconsistency in having vinyl clad windows and wooden doors. Mr. Zorrer said the storm door was wood and the base of the window is wood. They think the windows met the requirements and they look historic. Solicitor Losco said wood is discouraged in the guidelines which the applicants acknowledged using and the litany, which they also received, says 'wood' and does not say anything about vinyl. The applicants carry the burden of proving to HAC what they intend to do. Mayor Reese stated HAC said in a meeting that 'when they are in doubt they should ask.' The applicants said that was in November 2011; they didn't hear that statement before. As a former HAC member, Mayor Reese said HAC will talk to any applicant who needs assistance.

Ms. Fontana reiterated there needs to be a clear process from the time you apply for a building permit to what you should be presenting. When they received the historic certificate that stated the proviso of two over two was interpreted that they could go forward. They believe they have done a lot and are trying to satisfy reasonable expectations. It will be economically difficult to replace all windows. They have contacted their vendor and learned there is no recourse.

Mr. Bergstrom said the building on The Strand was built originally with Anderson clad windows and when it was remodeled the windows were replaced in kind. He believes they were inadvertently approved by HAC.

Mr. Zorrer said the addition that was put on the house in the late 1960s is in the back of the house and contains the same windows. It faces a residential area. The applicants feel that portion of the house should be excluded. Mr. Zorrer said replacing the five (5) front windows would be negotiable.

*(The hearing was adjourned at 8:10 p.m. and reconvened for deliberations at 9:10 p.m.)*

Mr. Athey reviewed the issues. There is uncertainty of what was submitted to HAC. He agrees that clarity is needed. The language between the guidelines and the litany is not identical and need to be clarified. The applicants were unclear which document governs. While we know what the word 'discouraged' means, it doesn't say 'forbidden.' The word 'design' can be interpreted in different ways. The applicants believe they met the design, but the word can also be interpreted to mean materials. The applicant admitted what they built was not what they submitted to HAC. He considered this to be unfortunate. The word 'wood' was mentioned numerous times, but not pertaining to the windows. There are a number of issues that causes him to lean towards the applicant. Lack of clarity between the guidelines and litany. He suggested that HAC clarify these documents to avoid future

issues. The words ‘discouraged’ and ‘design’ are vague and wood windows is not referred to specifically. On the other hand, there was enough lack of clarity and multiple arguments that support that HAC’s intentions were clear.

Solicitor Losco stated that an applicant bears the burden of showing HAC what they want to do. He agrees the guidelines are not clear, but if the applicant wanted to install vinyl clad windows they should have informed HAC and they did not. On the other hand, the windows are wood frame painted with a clad type of material. The underlying material is wood and nothing would prohibit the applicants from painting the windows white and they would look the same way. The applicants have also trimmed out the windows. He recognizes that while there may be other windows in the historic district that are clad, approved or not approved, our ruling could be looked at as a precedent for HAC in future applications. In the rear addition the windows have apparently always been clad. He believes there is fault on HAC’s side for not saying absolutely that windows should be all ‘wood’ and fault with the guidelines and litany for not clearly stating ‘no vinyl clad windows.’ Perhaps they need to be rewritten to be consistent. However, the applicants bear some responsibility as well. HAC was not informed what windows the applicants planned to install. The applicants had the litany that refers to ‘wood’ and HAC is presuming you have read it. HAC speaks of wood throughout the minutes, although not pertaining to windows. There are factors favoring both sides. He suggested that the front windows facing the street be replaced, but not the windows to the rear. Those (front) windows are readily visible to visitors and people coming to town to appreciate the historic aspect of New Castle, especially if the city becomes a national park as is being proposed. Vinyl clad is not consistent to that feature and he believes it would be a loss to the City if the vinyl-clad windows remained on the front side of the house.

Mr. Athey said this Board is always concerned with setting precedents that could surface later. In this matter he is not too concerned with setting precedent. More important is clarifying the guidelines to reflect what HAC intends. He wonders if HAC and the applicant can work out the matter. If this is not possible he would agree with Solicitor Losco’s suggestion. There is responsibility to be shared by all parties, but the applicants will bear the cost. Solicitor Losco said it would preserve the historic integrity of the front façade while limiting the penalty on the applicants.

Mayor Reese is concerned that this suggestion would shrink the historic area. The district used to extend to houses that face Fifth Street. If they are not asked to do the rear of the house as has been asked of everyone else, then other residents will install vinyl windows. Mr. Athey and Solicitor Losco feel HAC can modify its regulations quickly to avoid future such occurrences. Solicitor Losco understands an issue could be made of the matter that rear windows don’t need to be consistent with the guidelines, but there are unique circumstances involved with this application. If HAC changes the guidelines this kind of confusion cannot occur again. Going forward he believes HAC will be thorough and clear about what type of windows and how they will be composed. If this kind of would come up again, it would appear before this Board and we could distinguish the issues.

Mayor Reese agrees there needs to be more information provided, but maintains his concern with the integrity of the historic area.

Mr. Athey does not believe that replacing all of the windows (21) is the best outcome. Solicitor Losco noted there is a hardship factor favoring the applicants. It bothers him that

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the applicants weren't more explicit in describing the type of window to be used and the composition of the window, and he believes HAC presumed everyone understands the litany. There is an interpretation factor. When the guidelines say 'discouraged' it doesn't mean 'prohibited.' He thinks imposing a hardship of replacing all of the windows under these circumstances is troubling.

**Solicitor Losco made a motion that the rear windows not be replaced but that the front-facing windows and any side windows be replaced per HAC's requirements (HAC's decision is reaffirmed for all but the rear-facing windows). Mr. Athey seconded the motion.**

Mr. Athey asked Mayor Reese to further explain why he believes if the motion is approved this Board has reduced the historic area. Mayor Reese said anyone living on Fifth Street that wants vinyl windows and gets turned down could install those windows and pay the \$600 fee to appear before this Board. Solicitor Losco and Mr. Athey believe that could be remedied by HAC clarifying the guidelines. Mr. Athey said he was reluctant to make the applicants bear the \$12,000 hardship. He thinks this is the fairest solution.

**Mayor Reese called for the vote. Solicitor Losco and Mr. Athey voted in favor of the motion and Mayor Reese abstained. The motion was approved.**

The hearing was adjourned at 9:30 p.m.

Respectfully submitted,

*Debbie Turner*

Debbie Turner  
Stenographer