

A New Castle City Board of Adjustment Continued Hearing took place on May 7, 2009 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 7:10 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 Paul J. and Deborah L. Freebery, 213 Baldt Avenue, New Castle, Delaware 19720, requesting a variance to permit the construction of a 6 foot solid fence with a 0 foot front yard setback along 13th Street on their property at 213 Baldt Avenue, New Castle, Delaware, known as tax parcel number 2100700179.

For the purpose of considering this application, the Board of Adjustment will continue a Public Hearing on Thursday, May 7, 2009, at 7 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Street, New Castle, Delaware.+

An affidavit of publication in the News Journal was published 3/25/09 and the New Castle Weekly on 3/26/09. The completed application has also been submitted.

(Mr. Freebery was reminded that he is still under oath.)

Mr. Jeff Bergstrom confirmed that the property was posted in accordance with the law. The notice for the original hearing did not state the variance request for the fence itself, it didn't call a variance for the setbacks for the deck itself that is attached to the house, and it did not call for a variance request for another matter that was withdrawn by the applicant. Without proper posting of the fence variance the Board could not hear it at the last meeting. The hearing was continued until this evening.

Using a graphic picture showing the proposed deck, shed and lot, Mr. Akin asked for clarification on the application for the variance being requested. Mr. Bergstrom responded it is the front yard setback area from the backyard line along 13th Street to the end of the deck. Mr. Freebery was asked to draw a line on the graphic drawing (in red) where the fence is being requested. The drawing will be entered as applicant exhibit number 3. An internet picture (two pages) showing the type of fencing (5 foot fence + 1 foot lattice) being proposed is entered as applicant exhibit number 2. Photos showing the current landing, current fence, property line and ground markings of the deck layout have already been submitted as applicant exhibit number 1.

The home is on a corner lot and has two front yard lots, Baldt and 13th Street.

When the Board voted at the April hearing it was conditional upon moving the deck on the 13th Street side back six inches (6") from the survey line. The applicant was asked if the fence being proposed would be moved back six inches (6") as well. The applicant confirmed that is the case.

Mr. Athey made a motion to grant the variance request to construct a six foot (6') solid fence with a 0', 6" foot front yard setback along 13th Street for the subject property. Mr. Akin seconded the motion for the purpose of discussion.

Mr. Akin is not convinced a variance should be granted. He feels there are reasons in the Code for having fences set back out of the set back area or at least set back some reasonable distance. Other than the fact the applicant wants the fence to come out to the line of the new deck, and there were reasons stated concerning privacy, he is not convinced the applicant has made a case under the conditions in the Code we must follow. He agrees that some special conditions exist with this lot that pre-existed the modern zoning code. Under 230-57(C)(1)(a), literal application or interpretation of the provisions of the zoning code would deprive rights commonly enjoyed by other properties in the district, he is not convinced that a number of other property owners have been committed to building fencing not only into the setback area or out to the outer perimeter of their property line. A special condition in this case has been caused by the applicant in choosing the place to locate the fence and deck. The applicant has created the conditions he is seeking relief from. City Council has determined that fencing should be kept out of the setback area and if this variance is granted a privilege would be conveyed to the applicant that has not been conveyed to any significant extent to his neighbors. He is not in favor of the motion.

Mr. Athey disagreed with Mr. Akin's comments. A corner lot does create a peculiarity. The property is zoned R1. If we look at the R1 requirement of 30q because the house predates the zoning code it already violates both front yard setbacks because of how the house is situated. If we required the fence to be at that setback we are telling the applicant he cannot fence in his backyard.

Mayor Klingmeyer questioned if there is a zoning ordinance against fences in general. (*Discussion followed about fences—size, slates, solid.*) Mr. Akin said fencing becomes offending when site lines are an issue. According to the applicant there are no site line problems. Mr. Bergstrom added that this district permits a four foot (4q) tall, ¼ solid fence (widely spaced picket fence, chain link, split rail) in the yard. Adding vinyl inserts makes the fence illegal. Mr. Akin confirmed that if the vinyl inserts were removed it would then become a legal fence per Mr. Bergstrom. City ordinance does not permit solid, privacy-type fences. Homes in the area that already have privacy-like fencing cannot be used as examples. Other illegalities are not permission to continue another illegality.

Mr. Athey questioned whether an illegality precludes this Board from granting a variance. He is not asking for a variance for the existing fence but he wants to install something new that would preclude the Board from acting on the variance.

Mayor Klingmeyer questioned if the application complies with existing law. What makes it illegal . the fact that it is solid?

Mr. Akin said that under Zoning Code 230-40(a) the definition for a solid fence is defined. *(He read the definition aloud.)* He feels that the public policy of this city is that one cannot build a solid fence as defined in the City Code. They cannot be installed in the front yard setback area.

Mr. Bergstrom said an ordinance was passed in the R1 district to permit the front yard setback to be what it is for any building that complied with the zoning at the time it was built and he has no reason to suspect this building doesn't comply. The Mayor concurred. If you modify that for the deck then it is a new front yard setback and a six foot (6') high solid fence is permitted up to the front yard setback. *(Discussion where the front yard setback is situated followed.)*

After rethinking his position Mr. Akin stated this pre-existing, non-conforming structure on the applicant's parcel, where the home is not placed in the center of the parcel and the lot configuration is a problem, if the variance is denied no privacy fence could be installed in the rear yard. Special conditions and circumstances do exist that are peculiar to this lot and are on the lot. He is still concerned with building a non-pervious fence at the property line and the 13th Street side is a front lot for purposes of a code application. He is also concerned with granting a variance for a 0' 0" setback fence at the front yard of the property. The true entrance of the home is on Baldt Avenue.

(Discussion between the Board and the applicant followed.)

It was noted that matters that come before the Board must be judged based on the legality of the application and are different from pre-existing conditions. The applicant is trying to secure and privatize his property. The Mayor understands what the applicant wants to do, but securing and privatizing does not exist in the current code.

(Brief discussion about path forward for the applicant took place.)

Mr. Freebery stated that he has appeared before three organizations in the City. He has approached the Tree Commission to plant trees in the right-of-way to provide privacy and it was denied because trees are not permitted in the right-of-way. He has had theft of items in his yard and has had damage to items on his property. The existing four foot (4') fence does not provide the security and privacy he is seeking.

Mr. Bergstrom stated that the front yard along 13th Street is established by the house itself. He based his statement on the change to the zoning ordinance for all homes that were not in non-compliance to whatever code existed when they were built. The front yard setback is 4' and he believes the applicant should be permitted to build a six foot (6') tall solid fence at that line as requested. *(This is cited in Zoning Code Section 230-9(e) which was read aloud by Mr. Athey.)*

Mr. Akin is less concerned after hearing Mr. Bergstrom's interpretation of the law. The variance being sought is less than four feet (4') meaning the setback variance being requested is far less than what he originally thought.

(The applicant's path forward was discussed again.)

A roll call vote was called.

Mr. Akin voted against granting the variance for the reasons stated earlier applying the factors under Section 230-57(C)(a)(1-4). He believes there is a reason for restricting construction within setback areas as well as fences in setback areas. The applicant is proposing to construct a solid six foot (6') fence along a substantial portion of his front lot line along 13th Street. He chose not to back the fence up. Mr. Akin would have been satisfied had the applicant elected that path. He does not feel the applicant stated a good reason why he should be permitted to consume the entire front setback area with the fence and the conditions presented to us were self-imposed by the applicant. There was some evidence of others in the same zoning district who have constructed fences, no evidence was shown by photographs of those homes with solid fences constructed along a 0 set back on front lot lines.

Mr. Athey voted in favor of granting the variance because extenuating circumstances that were not the fault of the applicant were that it is a corner lot and the configuration of the existing house and the now 4.4' setback in the Code and followed by the applicant would render it impossible to place the fence in the rear yard and he does not feel that was the intent of the Code.

Mayor Klingmeyer voted in favor of granting the variance citing the uniqueness of the property location between 13th Street and Baldt Avenue. Previously this Board approved the deck and to require a setback for the fence with a tree in the area would not provide the protection and privacy being sought by the applicant. This decision does not automatically mean that future applications will be met in a favorable manner.

The motion to grant the variance was approved by a vote of 2-1.

The hearing was adjourned at 8:15 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibit 1 . Photos (4) showing current landing, current fence, property line and ground markings of the deck layout

Applicant Exhibit 2 . Type of fencing (5 foot fence + 1 foot lattice) being proposed (2 pages)

Applicant Exhibit 3 . Drawing of property with red marking drawn by applicant indicating where fence is being proposed