

New Castle City Board of Adjustment Hearing
July 26, 2017, 7 p.m.
City of New Castle's Town Hall
2nd and Delaware Streets

Present: Linda Ratchford, City Council President, Acting Chairperson
Daniel Losco, Esq., City Solicitor
David J. Athey, City Engineer

Also Present: Jeff Bergstrom, City Building Inspector

The hearing was called to order at 6 p.m. Mrs. Ratchford presided in the absence of Mayor Reese.

Mrs. Ratchford read the Notice of Public Hearing that states, "An application has been filed by Stephenson S. Samuels, (Owner and Applicant), 19 S. Lunenburg Drive, New Castle, DE 19720 for a property zoned SC-Service Commercial and located at 3 Merit Drive, New Castle, Delaware, 19720, Tax Parcel No. 21-011.00-020, seeking a Special Exception from Zoning Code §230-57B to permit use as a daycare center pursuant to §230-57B and §230-21C per §230-22A(1).

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Wednesday, July 26, 2017, at 6 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Streets, New Castle, Delaware."

(Carmen Casper, Engineer with Howard L. Robertson, Inc., and Stephenson Samuels were sworn in by Mr. Losco.)

Mr. Casper presented a package of information and reviewed the documents. He said the Service Commercial (SC) Zoning District states that all uses permitted in the Retail Commercial (RC) Zoning District are also permitted in a SC Zoning District. Additionally, the RC Zoning District states that daycare centers may be permitted as a special exception with certain conditions. In this case, an outdoor play area that is fenced in with at least 50 ft. of play space per child is required. Mr. Casper stated the applicant is compliant as to both requirements.

Other submittals include the minutes of the 6/26/17 Planning Commission meeting indicating a recommendation from the Planning Commission, the plot plan showing the 50 ft. per child of fenced-in play area confirming a total of 323 square ft. that will provide adequate space for six (6) children. The daycare center will be a home daycare center with no more than six (6) children. Mr. Samuels testified he has spoken with all four (4) of his neighbors and received no objections. The neighbors are John Stachowski at Benchmark Transmission, Merit Construction, Ron Dills, Paul Gallagher and Rocky DeAscanis. The latter two live across the street.

Mr. Losco referred to RC Zoning District §230-21 that states that "outdoor play space shall be fenced, otherwise enclosed on all sides, shall not include driveways, parking areas or land unsuited by other usage or natural features for children's active play space." Referring to the plot plan exhibit, Mr. Losco asked what the surface of the 323 sq. ft. of fenced-in play area will be. Mr. Samuels is discussing this with the builder and plans to remove the existing blacktop and install grass. Mr. Samuels testified there is no equipment such as HVAC equipment in the play area. Further, he said that only grass and play equipment will be in the enclosed 323 sq. ft. of play area, and children will access the play area from the back door of the facility. Mr. Samuels stated the daycare center will be on the first floor of the proposed addition (not part of discussions tonight). The current building contains a beauty salon and a window tint shop. Those uses will remain. He said the children would not be able to access the beauty salon or window tint shop.

Mr. Losco noted the Planning Commission recommended approval of the special exception. The motion was amended to state that if the special exception is approved the applicant will submit a site

plan to the Planning Commission. Mr. Casper said the site plan was submitted with the application, but he does not know why it was not provided to the Planning Commission. Mr. Bergstrom confirmed the Planning Commission recommended approval and had lengthy discussion about conditions.

Mr. Losco acknowledged the SC Zoning District states that all uses permitted in the RC Zoning District are permitted here as a matter of right. However, the RC Zoning District does not necessarily permit a daycare center as a matter of right; rather it requires a special exception. It is Mr. Casper's opinion that "anything permitted in a RC zone" is eventually permitted with approval of a special exception.

Mr. Losco asked for a timeline for when the applicant wants to open the daycare center. Mr. Samuels said he needs to get a building permit approved and the construction crew is ready to begin work. He anticipates the building to be completed within a year. Mr. Samuels' spouse, Mrs. Tyrea Samuels, will be a joint owner of the business and building with her husband and will be the operator of the daycare center. Mr. Casper indicated they have removed the area from the flood plain and have a letter of map amendment because the area is higher than the flood plain.

Mr. Samuels testified he intends to comply with State regulations for the operation of a daycare center and be properly licensed by the State. Mr. and Mrs. Samuels currently operate another daycare center in their home, but intend to close that facility and move the daycare center to the subject location if approval for special exception is received.

Mr. Losco asked about parking arrangements. Mr. Samuels said there is room for about 20 parking spaces; none are delineated.

Mr. Bergstrom was asked about the size of the building. He said it is about 52 ft. X 24 ft. or about 1,000 sq. ft. He added that Merit Drive is a cul de sac.

Mr. Samuels was asked about his plans for a drop off and pick up area. He testified that vehicles will come onto his lot to drop off and pick up children. He testified there is room for vehicles to turn around.

Mr. Bergstrom said a minimum of two parking spaces would be needed for staff. Parking spaces can be in the 35 ft. setback. Mr. Athey noted there are three uses in the area and wonders what the cumulative requirements for parking might be. Mr. Bergstrom is confident there is enough parking for the area.

Mrs. Ratchford was asked about access to the second story deck over the sunroom. Mr. Samuels said it is accessed privately from the second floor. He and his wife will occupy that apartment space. Mr. Athey confirmed that Code §230-21A(13) allows for mixed use. He noted that more information will need to be provided to the Planning Commission if the special exception is granted.

Mr. Losco asked about surrounding uses. Mr. Casper responded that Merit Construction and Benchmark Transmission occupy space, the offices of DeAscanis Builders is across the street, and there is open space owned by the City at the rear of the property.

The floor was open to the public.

Mrs. Tyrea Samuels testified she will be the operator of the daycare center. She has been licensed in the State of Delaware for 31 years. State law limits small family daycare centers to six children. She

believes the new location is safer for the children and helps limit disturbances to her parents at their current location.

A motion was made and seconded to close public discussion portion of the hearing and begin deliberations.

Mr. Losco noted the ‘interplay’ of language between the RC Zoning District and SC Zoning District. He said this application is not a controversial application. He was not successful in finding case law to use with this application. Further, Mr. Losco stated that a special exception is a permitted use subject to special approval and conditions. This is not a prohibited use. The SC Zoning District says that all uses permitted in the SC Zoning District are permitted in the RC Zoning District. The Code does not state ‘including uses permitted by special exception’, thereby making the intent ambiguous. Case law is clear that when ambiguity is present then they must be construed in favor of the free use of the land. It is Mr. Losco’s conclusion that the applicant’s interpretation is acceptable, that if the daycare use is permitted as a special exception in the RC Zoning District then it should be acceptable in the SC Zoning District under the §230-22A(1).

Mr. Losco said it is unfortunate when the Code is silent on issues. He agrees with Mr. Losco’s interpretation as presented.

Mr. Losco noted the SC Zoning District is more intensive than the RC Zoning District. As an example, a massage parlor is allowed in the SC Zoning District, although it cannot be within 1,000 sq. ft. of a residence.

Mrs. Ratchford stated the application is straight forward even though details concerning direction and intent are lacking.

Mr. Losco referred to Code §230-57 that states the Board of Adjustment shall prescribe a time limit within which the action for which the special exception shall begin, be completed, or both. Failure to begin, complete, or both within the time limits imposed shall void the special exception. Mr. Losco suggested giving the applicant 13 months in the event he experiences any problems getting the daycare constructed and to begin operating.

The Board discussed timeframes. Mr. Losco believes that once a special exception is granted then the timeframe should begin on the date of the decision. The Board agreed to grant the applicant 18 months to build and begin operations.

Mr. Losco talked about the number of children in this daycare center. The license could change and he thinks it is wise to make certain we are in compliance with the 50 sq. ft. of play area per child. Mrs. Samuels responded that she has no plans to increase the number of children; she would need to get additional education in child care in order to care for more children. Mr. Losco noted there are variables such as hiring someone with the required education or selling the business. He informed that if the owners want to expand operations in the future they can return to the Board of Adjustment, but for now we need to comply with the Code. Further, Mr. Losco said if they violate the special exception and have more than six (6) children they would lose their special exception. Violations are controlled by Code §230-65, there could be fines levied, and there could be criminal citations.

Mrs. Ratchford wondered if the Code was changed should it be attached to what is in the Code so if the Code changes their approval would stand. Mr. Losco said the applicant would not have to comply with

the Code; they would be grandfathered in. This is what the applicant has offered, this is what the applicant has committed to, and he thinks they should be locked into it.

Mr. Athey does not feel the location is ideal for a daycare center, but he will not deny the application. He prefers delineated parking spaces between all three uses. He wonders if there is interest in delineating two spaces in some way for the daycare center to make them truly separate from the other uses. Mrs. Ratchford does not believe there is an issue with parking given the size of the site. Mr. Losco agreed noting the size of the site. He agreed the location is not ideal, but there is open space behind it.

Mr. Losco made a motion to approve the special exception application to permit a daycare center limited to six (6) children at any one time and that they open for business within 18 months from the date of the decision or the special exception will expire. Mr. Athey seconded the motion. Motion was approved by unanimous vote.

A motion was made and seconded to adjourn the hearing. Motion approved 3-0. The hearing was adjourned at 6:40 p.m.

Debbie Turner
Stenographer

Exhibits entered into the record:
Exhibit #1 – Planning Commission 6/26/17 Minutes
Exhibit #2 – Plot Plan

(Stenographer not present at hearing. Minutes prepared from recording.)