

Mr. Wolcott submitted a written memorandum with exhibits A through H attached which was accepted into the record. He cited seven (7) distinct arguments why appellants believe the Building Official's decision was in error. First, he argued that none of the materials relied upon by the Building Official provided by the Chaumps definitively proves when and for what reason the right-of-way was established. Thus, it should not be relied upon in concluding that the right-of-way is a "street". Instead, he suggested that an expert be allowed to testify in this regard. However, the appellants did not proffer any expert testimony at the time of the hearing in support of their appeal.

Second, he argued that the Building Official's decision is inconsistent with 'accepted' maps of New Castle. He pointed to a map of the City dating from 1859 and retraced in 1907. This map shows neither a street nor an alley in the location of the right-of-way. Another map, referred to as the Baist Map of 1893 also fails to show the right-of-way in any form. Likewise, maps submitted by the appellants dating from 1907, 1912 and 1923 similarly fail to show the right-of-way in any form. Mr. Wolcott concluded since these maps do not identify the right-of-way as a street, it should not be determined as such now.

Mr. Colburn then testified that E. Second Street is used as their primary ingress and egress to their property as well as for mail delivery and for trash pick-up. He said any changes to the right-of-way would change the nature of their property completely, especially if it were paved. He also stated that other properties abutting the right-of-way access their properties on E. Second Street. Michael Dickinson, 151 E. Second Street, testified in a similar manner.

Third, Mr. Wolcott stated that the Building Official was incorrect in stating that a "review of historic deed records for adjacent properties show surveyors commonly referring to the right-of-way as a 'street or alley' and thus are not helpful." Mr. Wolcott submitted deeds from several adjacent properties all referring to the right-of-way as an "alley", but conceded that certain deeds in the Chaumps' chain of title did in fact use the phrase 'street or alley'.

Fourth, Mr. Wolcott argued that the Building Official's reliance on definitions of the terms "street" and "alley" found in §213-5 of the City Code was error since Chapter 213 deals with land subdivisions and not zoning issues. The Board's appellate authority is limited to matters arising under Chapter 230, the Zoning Code. Since the Chaumps were not seeking a subdivision of their land, Chapter 213 should not apply. Mr. Wolcott noted that the Zoning Code contains no definitions for "streets" or "alleys". He thus argued that undefined terms should be construed according to their common usage. Relying on the online Merriam-Webster Dictionary (Mar. 5, 2018), he found an "alley" defined as "a narrow street; especially a thoroughfare through

the middle of a block giving access to the rear of lots or buildings.” A “street” was defined in the same source as a “thoroughfare especially in a city, town, or village that is wider than an alley or lane and that usually includes sidewalks.” From these definitions, Mr. Wolcott concluded that the main difference between the two forms of right-of-way is their width. Since 2nd Street is 60 feet wide and the right-of-way is 20 feet wide, he argued that the right-of-way is more akin to an alley than a street.

Fifth, Mr. Wolcott argued that the Building Official’s decision leads to an absurd result--- he argued a property cannot have two street fronts.

Sixth, Mr. Wolcott argued that the term “alley” is more specific than the term “street” and that the more specific term should govern the decision, as is done in cases where there are ambiguities in a contract. He argued that an alley is a more specific type of street, typically differentiated on the basis of width.

Lastly, Mr. Wolcott cited a court decision that rights-of-way, acquired by use, as opposed to dedication, can be abandoned due to non-use. This was to counter the Building Official’s argument “streets of an unbuilt community do not lose their status as streets just because the homes haven’t been built yet.” The Building Official was referring specifically to three (3) undeveloped lots on the side of the right-of-way closest to the Delaware River (the “Lots”), one of which is owned by the Chaumps and all of which may be legally improved with residences accessed by the right-of-way.

BUILDING OFFICIAL’S TESTIMONY: Building Official Jeffrey Bergstrom testified next. Mr. Bergstrom stated that the determination of whether the right-of-way is a street or an alley hinges on the Lots on the other side of the right-of-way from the appellants’ property. The Lots, which are separate tax parcels, will become landlocked parcels if the right-of-way is not determined to be a street since §213-5 defines as alley as a right-of-way “on which no dwelling fronts”.

THE CHAUMPS’ COUNTERARGUMENTS: William Rhodunda, Esq., representing the Chaumps, next made argument to the Board. He noted that the three buildable lots on the right-of-way would be landlocked if the right-of-way was determined to be an alley. Mr. Rhodunda asserted that under the City Code the definition of “alley” does not permit the construction of homes on those lots, and that fact alone defeats the appellants’ arguments. He further argued that many streets constructed in New Castle County are only 20 feet wide. The fact that the right-of-way is that width does not mean it isn’t a street.

Mark Chaump was then sworn in to provide the results of his historical research into the origin of the right-of-way. He testified that he found record that the property encompassing the right-of-way and the Lots was subdivided in the 1870's by order of the Orphan's Court into separate lots as a means of selling off a decedent owner's assets to pay estate debts. The Court ordered subdivision established the 20' wide right-of-way to provide access to those lots. He testified that the Delaware Ferry Company acquired portions of the lots and used the right-of-way as their primary access. When they went out of business, the State of Delaware came into possession of the lots, and the lots were sold to the property owners on the other side of the right-of-way. The historical records also show that the property known as 149 E. Second Street had a second dwelling in the rear known as "149 Rear E. Second Street" and the right-of-way was used as its primary access.

Mr. Rhodunda concluded by stating his clients' position that the definition of "alley" as it appears in the Code controls the situation and requires the right-of-way be designated as a street.

PUBLIC COMMENTS: Other members of the public also testified including William Boyle, 209 E. 2nd Street. After being sworn in, Mr. Boyle testified that the portion of the right-of-way that is paved up to 159 E. Second Street was not paved by the City, but rather by a private owner. He also testified that the Ferry did not use the right-of-way as its primary access point and that historical photos show only garages, not a dwelling, at 149 Rear E. Second Street. Mr. Boyle stated that as of today, the right-of-way is an alley. If and when a house is built on one of the Lots, the street issue should be reconsidered at that time.

Irv Thatcher, 135 E. Second Street, was sworn in and affirmed most of Mr. Boyle's statements. He stated that he was told the right-of-way was primarily used in the 1800's by the "honey dipper" wagon cleaning out houses to the rear of houses on Second Street.

Susan McLaughlin of 140 E. Second Street was sworn in and attested to the fact that there was a house at 149 Rear E. Second Street and the occupants used the right-of-way as the primary access to the house. She noted that even through the right-of-way is not currently being used as a street, it was used as a street in the past. She also noted that because it is named an "alley" in some deeds does not mean it is not used as a street.

REBUTTAL POINTS: Mr. Wolcott offered rebuttal points focusing on the street abandonment argument and that deed references to an "alley" should be given the most weight in the Board's decision.

BOARD DELIBERATIONS AND DECISION: Mayor Gambacorta then closed the

public hearing and the Board began deliberations on the evidence and testimony. Mr. Athey stated he is inclined to overrule the Building Official's decision based on the fact that the Chaumps' position comes down to the three landlocked Lots, and this is not a unique situation in New Castle. Further if one of the three owners chose to build something on the back lots, they could seek relief from the Board at that time; whereas the appellants presented multiple compelling arguments to reverse the decision.

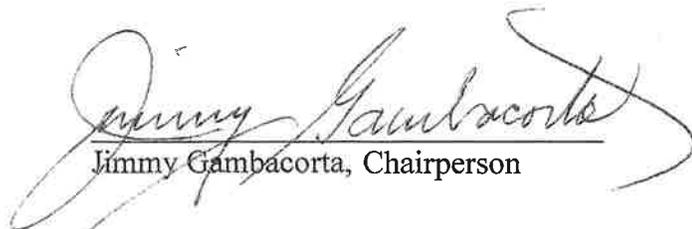
Mr. Athey moved that the Board overrule the Building Official's decision of January 18, 2018, based on the weight of the evidence, definitions, maps and deeds presented by the appellants that show more clearly that the right-of-way is an alley. Recognizing that there are other situations where houses in New Castle are accessed through an alley and the owners of the three landlocked Lots could later seek relief from the Board if necessary, Mr. Athey felt the arguments to call the right-of-way a street were not as strong.

The motion was seconded by the Mayor and a vote was taken. Mr. Athey voted in favor of the Motion. Mayor Gambacorta stated he believes the Board should accept the rationale of the Building Official that the right-of-way should be identified as a street. Mr. Losco confirmed that Mayor Gambacorta's vote on the pending motion was "No".

Based on the fact that the appellants failed to secure a majority vote in favor of overturning the Building Official's decision, the appeal failed and the Building Official's Decision was upheld.

Vote: 1-1 (Athey in favor of reversal; Mayor Gambacorta opposed to reversal; Losco abstaining due to recusal)

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE



Jimmy Gambacorta, Chairperson

NOTE: This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the Office of the Board of Adjustment.