

New Castle City Board of Adjustment Meeting Minutes
March 5, 2018 - 6:30 p.m.
City of New Castle Town Hall

Members Present: James Gambacorta, Chair
David Athey
Daniel Losco

Also Present: Jeff Bergstrom, Building Official
Josiah Wolcott, Esquire
Robert Colburn
Dorothy Colburn
William Rhodunda, Esquire
Mark Chaump
Erin Chaump

Mayor Gambacorta opened the meeting of the City of New Castle Board of Adjustment public hearing at 6:30 pm.

Applicants, Robert and Dorothy Colburn, of 153 E. Second Street, New Castle, have filed an appeal pursuant to Section 320-55 of the City Code seeking reversal of the Building Official's determination that the right-of-way running parallel to Second Street behind property located at 155 E. Second Street, New Castle, Delaware, Tax Parcel No. 21-015.00-133 is a "street" rather than an "alley".

Mayor Gambacorta introduced Mr. Dan Losco, City Solicitor, Mr. David Athey, City Engineer, and Mr. Jeff Bergstrom, Building Official.

The meeting was turned over to Mr. Losco, who recused himself from decision making or deliberating in the matter since he assisted the Building Official in researching and developing the Opinion that is being appealed. He will be available to the Board for procedural questions.

Mr. Josiah Wolcott of the law firm of Connolly Gallagher, attorney for the Applicants, Mr. & Mrs. Colburn, as well as Dr. Bernadette Ruff of 157 E. Second Street, Michael Dickenson and Catherine Thomas of 151 E. Second Street, and Paul and Judith Guttenplan of 167 E. Second Street, were sworn in by Mr. Losco.

Mr. Wolcott presented his clients' position that the right-of-way in question is an alley and not a street, noting that the section of the right-of-way behind 151, 155 and 157 E. Second Street has always been grass and has never been paved or identified as a street. Mr. Wolcott stated that the Building Official's report was faulty for the following reasons.

First point:
The Decision makes certain assumptions that do not appear to be borne out in the historical record. Mr. Wolcott commended Mr. Chaump for his extensive research on the matter; however, his clients' position is that Mr. Chaump's research and documents do not prove that the right-of-way is a street. The Building Official's Decision notes that the historic research materials "suggest that the right-of-way was originally established in the late 1800's". The Applicants' position is that definitive proof is required that the right-of-way was established as a street. Mr. Wolcott also noted that the Applicants would be in favor of obtaining outside expert to do an analysis of the historical records if necessary.

Mr. Wolcott noted that the main focus of Mr. Chaump's research appears to be in the probate process whereby an Order of the Orphan's Court established a "20' street". Mr. Wolcott did not see anything in the documentation that the Orphan's Court definitively created a 20' right-of-way. Mr. Wolcott presented the Bird Map of 1859 under Tab A of his memorandum, noting that the right-of-way in question is not marked on the map. Mr. Wolcott then submitted a Base Map of 1893 that also does not show a delineation of the right-of-way in question. Mr. Wolcott submitted a third map at Tab C of his memorandum that was made in 1911 by a City Engineer that does not show the right-of-way in question. 1907, 1912 and 1923 maps also do not identify a 20' street. Mr. Wolcott stated that all of the maps presented are consistent in showing that there is no separate 20' street, as the Building Official has determined. The Building Official's decision states "a review of historic deed records for adjacent properties shows surveyors commonly referring to the right-of-way as a street or alley, and thus are not helpful in resolving the question at hand". Based on these maps, Mr. Wolcott asserted that the Building Official's decision is inconsistent with the historical documents and should be reversed. Mr. Wolcott also researched deeds of the Applicants' properties and every deed of properties on that side of the right-of-way refers to the right-of-way as an alley. Mr. Wolcott then called Mr. Bob Colburn to testify.

Second point:

Mr. Colburn was sworn in and Mr. Wolcott asked him to describe the area in question. Mr. Colburn identified the area as being shown on their deed as a 20' wide grass alley and that they were told not to do anything on that parcel because it is a right-of-way. Mr. Colburn stated that E. Second Street is used as their primary ingress and egress to the property, for mail delivery, and for trash pick-up. He said any changes to the right-of-way would change the nature of their yard completely, especially if it were paved. He also asserted that other properties on the right-of-way access their properties on E. Second Street. In addition Mr. Colburn questioned how the right-of-way would be cared for by the City for snow removal and trash pick-up if it were paved.

Mr. Wolcott then called Mr. Michael Dickenson to testify. Mr. Dickenson was sworn in and described how his property at 151 E. Second Street was laid out in relation to the right-of-way. He noted that the right-of-way is part of his lawn, that he has mowed the grass on the right-of-way consistently since 2007, and that it is used primarily for people walking pets and for children. He concurred with Mr. Colburn that any change to the right-of-way would alter his property and the neighborhood considerably if it were paved. He stated that the front of his property is E. Second Street and the rear of his property is the river and the property on the right-of-way and that the principle means of access to his property is E. Second Street.

Third point:

Mr. Wolcott then passed out a Mortgage Inspection Plan from when the Colburns purchased the property and an affidavit of Mr. Michael Paraskewich, Jr., Professional Engineer, stating that in the Plan the right-of-way is identified as an alley. He further stated that the determination was based on the property description in the prior deed which identified the right-of-way as a "twenty (20) foot wide alley running parallel with Second Street."

Fourth point:

In reaching his Decision, it is the Applicants' position that the Building Official used the wrong definition from the Code. Mr. Bergstrom used the definition of streets and alleys from the Subdivision of Lands Chapter. The Applicants' position is that the definition should be a simple interpretation of the Zoning Code. Street and Alley are not specifically defined by Chapter 230 of the Code. Courts in Delaware say that when there is no definition, the common usage should be used. Webster's Dictionary defines an alley as "a narrow street, especially a thoroughfare through the middle of a block giving access to the rear of lots or buildings". That same dictionary defines a street as "a thoroughfare especially in a city, town or village that is wider than an alley or lane, and that usually includes sidewalks". And this definition fits

perfectly with Mr. Paraskewich's characterization that the right-of-way is an alley rather than a street. Many of the deeds make a point of distinguishing between 2nd Street which is 60' wide, and the right-of-way, which has either a 10' or 20' right-of-way, and those deeds have uniformly said it's an alley, excluding the Chaumps' which says it's an alley or a street. The Building Official's Decision states that an alley is defined as "a strip of land ... of which no dwelling or store fronts" and "serving as the rear entrance to two or more properties". Both Mr. Colburn and Mr. Dickenson testified that the right-of-way is the rear of their property. The definition of "street" is defined as "a general term used to describe a right-of-way ... serving as a means of vehicular and pedestrian travel furnishing access to abutting properties and the space for sewers and public utilities. ... A residential street is further defined as a street used primarily as the principle means of access to adjacent residential properties". The term "alley" is a more specific term than "street" and Delaware law says when there is an ambiguity the more specific term should govern. Referencing a Treatise on Tab G, McQuillan on Municipal Corporations says "an alley is a narrow passageway between two parallel streets in a city or village as distinguished from a public street". The Treatise also says that streets and alleys are differentiated usually on the basis of width alone.

Mr. Wolcott referenced the case of Brosius Eliason v Di Mondi in which there was an argument over property ownership. An expert was brought in to review the Base Map and the Bird Map and the Chancery Court determined that because the property had not been used as a public road and because there were actions taken to nullify the intent for public use, it was abandoned as a public road. The Rule of Law in Delaware is that a "public road acquired by use, as opposed by dedication, may be abandoned where there is non-use for at least 20 years and some act by the owner that is inconsistent with public use". Mr. Wolcott asserted that the same rule of law would apply in the case at hand, and stated further that even if the right-of-way was used as a public road, the latest it was used as such was the 1970's. The Building Official's decision states the right-of-way hasn't been used since the 1970's and hasn't been paved. The Applicants' position is that those two facts require the Board to find that any use as a street has been long abandoned.

Fifth Point:

Delaware Law provides that when construing Code provisions, literal or perceived interpretations which yield mischievous or absurd results are to be avoided. The decision of the Building Official is essentially to create properties with two front doors. The Applicants' position is that the Building Official's Decisions is a "mischievous or absurd" result.

Mr. Losco thanked Mr. Wolcott and asked if Mr. Bergstrom was going to present.

Mr. Bergstrom was sworn in. In lieu of a presentation, the Board was asked to present questions to Mr. Bergstrom. Mr. Athey had no specific questions, but stated that both Mr. Wolcott's presentation and Mr. Bergstrom's Decision raised some very compelling arguments. Mr. Bergstrom stated that the determination of whether the right-of-way is a street or an alley hinges on the empty lots on the other side of the alley from the properties in question. Those lots, which are separate tax parcels, will essentially become landlocked building lots if the right-of-way is not a street.

There being no further questions from the Board, Mr. Losco invited Mr. and Mrs. Chaump and their attorney, Mr. William Rhodunda, to present their view. Mr. and Mrs. Chaump were sworn in. Mr. Rhodunda said that at a previous hearing over a setback issue, the Building Official suggested that the right-of-way was probably a street. Subsequently, Mr. Rhodunda and Mr. and Mrs. Chaump met with the Building Official, presenting documentation and maps, and it was decided that the right-of-way should be designated as a street. Mr. Rhodunda 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 Applicants' arguments.

Mr. Rhodunda distributed several pictures of Mr. and Mrs. Chaump's property, the right-of-way and the three building lots. Mr. Rhodunda pointed out that there are two tax parcels owned by Mr. and Mrs. Chaump and the neighbors on either side of the street that are only accessible via the right-of-way. An alley would not permit access, and this defeats the Applicants' argument. He also pointed out that Mr. Paraskewich's Affidavit does not reference the Code, and only states that the right-of-way is "likely an alley-way" because it is only 20' wide; however, there are major subdivisions in New Castle County that have 20' roads. The right-of-way is paved to within 40' of the three lots and the right-of-way could be paved up to their property line, but the lots cannot be developed unless the right-of-way is identified as a street. Mr. Rhodunda also pointed out that because the land use cases available for review are so fact specific it is difficult to find a case on point. Mr. Rhodunda further stated that the Building Official issued a decision after carefully reviewing the documents and meeting with his clients. The Code states the definition of alley is "a strip of land over which there is a right-of-way, municipally or privately owned on which no dwelling or store fronts". Mr. Rhodunda then asked Mr. Chaump to review the research he conducted.

Mr. Chaump gave an historic background of the properties in question as far back as the 1850's when a law was enacted to grant the property to Mr. L. Jefferson. In the 1870's the property was subdivided into two lots on the southeast side of 2nd Street, and a 20' wide street or alley was created. Mr. Jefferson was given property rights to the high water mark, and the right-of-way was created so property owners could access the back portion of their second lots. Eventually the Delaware Ferry Company acquired the back 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 address in the rear known as "149 Rear E. Second Street" and the right-of-way was used as their 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.

The meeting was then opened for public comments.

Resident William Boyle of 209 2nd Street was sworn in by Mr. Losco. Mr. Boyle read from the Building Official's Decision of January 16, 2018: "In fact, the right of way was and is paved from Chestnut Street to the rear of 159 E. Second Street, where it was used as a street access for now razed building owned by the Ferry Company of the State of Delaware". Mr. Boyle stated that the owner of 159 E. Second Street, Mr. Patrick Jefferson informed him that the paving on the right-of-way was done by him privately as far up as his house with 2 parking spaces, and was not paved by the City of New Castle. Mr. Boyle further attested that historic pictures from the late 1940's of the Ferry Company building clearly show it fronting on Chestnut Street with a large parking lot on the river side of the building and parking in front on Chestnut Street, and the side of the building along the right-of-way in question.

Mr. Boyle then read a second quote from the January 16 Decision: "Likewise, City Records acknowledge that a dwelling existed at the rear of 149 E. Second Street until the 1970's when it was accessed by this right-of-way". Mr. Boyle referenced another historic picture showing six garages behind 149 E. Second Street, with a small square structure across the right-of-way behind that is much too small to be a dwelling.

Mr. Boyle then referenced the Section 213-5 of the City Code that defines alley as "a strip of land over which there is a right-of-way, municipally or privately owned on which no dwelling or store fronts". Mr. Boyle noted that there are three named alleys in the City, with dwellings fronting on them: Dolby, Packet and Plum.

Mr. Boyle referenced another quote from the code defining street as “a general term used to describe a right-of-way … serving as a means of vehicular and pedestrian travel furnishing access to abutting properties and the space for sewers and public utilities. … A residential street is further defined as a street used primarily as the principle means of access to adjacent residential properties”. Mr. Boyle noted that there are no public utilities on the right of way, and that the right-of-way is not used as the principle means of access to any adjacent property.

Mr. Boyle noted that if the right-of-way is defined as a street, then the Chaumps property would, in effect, have two front doors and the ruling stands, it could set a precedent that must apply to all properties fronting on a street with a right-of-way at the rear.

Mr. Boyle stated that today, the right-of-way is an alley by definition of the City Code and should remain so; and if and when a house is built on one of the back lots, the street issue should be reconsidered at that time. He further noted that in his opinion the construction project at 155 E. Second Street has become a “City sponsored end-run to placate and allow one resident to dictate the setback rule”.

Mr. Boyle concluded by saying he hopes the previous setback rule would prevail by rejecting this change.

Resident Irving Thatcher was sworn in. He stated there were garages behind 149-129, and the garages behind 149 and 143 had doors on both ends. Mr. Thatcher stated that the property at 135-129 E. Second Street belonged to Canons. When Canons sold 129, which was a liquor store with a lot in the back, there were doors on the back end. Mr. Thatcher asked why there were doors on the back and was told that the deeds from the 1800's required this for access for the honeydew wagon to the bathrooms in the back yard. He further noted that the right-of-way in question was always open land, but on Second Street it had to remain open. He also concurred that Mr. Jefferson did pave the area behind his house.

Resident, Susan McLaughlin, of 140 E. Second Street was sworn in. She attested to the fact that there was a house at the rear of 149 E. Second Street and they used to use the right-of-way as the primary access to the house. She noted that just because the right-of-way is identified as an alley and 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”, does not mean it is not used as a street. She stated her opinion that the right-of-way is a street and the Board should vote No on the Adjustment.

Mr. Wolcott offered a rebuttal, noting that Mr. Rhodunda ‘s main argument relies solely on the three back lots, and he stated that property rights cannot last forever. Once the house on the right-of-way was torn down in the 1970’s and the right of way was no longer being used as a “street”, the property rights were abandoned. He further noted there has been no other affirmative action to make the area anything other than a grassy lot. The Applicants’ position is that any property rights have been abandoned and the area should be considered an alley and not a street. He referenced the Deed for 157 E. Second Street under Tab E of his Memorandum that references a “20’ wide alley”, and his clients’ position is that the property description in the Deeds is the best evidence of what the right-of-way actually was. He also noted that the 20’ right-of- way funnels to a 10’ right-of-way and the back lots are still landlocked because a sufficient road cannot be built to access those properties.

Mr. Athey stated it seemed counter-intuitive that a more specific definition would apply and not a more general definition would be used as the definition of the right-of-way, and that if there were ambiguity, you would default to a more general term as opposed to a specific term. Mr. Losco noted that Mr. Wolcott’s position was the opposite, and that the more specific term should apply.

Mr. Losco presented a question to Mr. and Mrs. Chaump regarding hiring an expert to review the documentation and sharing in costs and Mr. Losco's understanding was they are not in favor of this. Mr. Rhodunda noted that all documentation was provided to the Board several months ago.

Mr. Athey noted that Mr. and Mrs. Chaump did not have the opportunity to review and counter Mr. Wolcott's presentation, and Mr. Losco stated that this case does not necessitate such a discussion. There being no other comments, Mayor Gambacorta closed the meeting.

During discussion by the Board, Mr. Athey stated he is inclined to overrule the Building Official's Decision based on the fact that the Chaump's position comes down to the three landlocked parcels, 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 Applicants 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 Applicants 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 seek relief if necessary, Mr. Athey felt the arguments to call the right-of-way a street were not as strong.

The motion was seconded.

Mr. Athey voted in favor of the Motion. Mayor Gambacorta explained that the Board heard comments from the floor expressing the belief that the property is an alley, and comments expressing the belief that the property is a street. Both sides presented intelligent arguments. Mayor Gambacorta stated he believes the Board should accept the Decision of the Building Official and that the right-of-way should be identified as a street.

Mr. Losco clarified that Mayor Gambacorta's vote on the Motion is No.

Based on the fact that the vote was a one-to-one tie, Mr. Losco declared that the Building Official's Decision would stand.

A Motion to end the meeting at 7:54 p.m. was made, seconded and carried.

Kathy Weirich
Stenographer