

**New Castle City Board of Adjustment Hearing
February 12, 2018, 6:30 p.m.
City of New Castle's Town Hall
2nd and Delaware Streets**

Present: Jimmy Gambacorta, Mayor
Daniel Losco, Esq., City Solicitor
David J. Athey, City Engineer

Mayor Gambacorta called the hearing to order at 6:30 p.m. Roll call followed.

Mayor Gambacorta read the Notice of Public Hearing that states, "An application has been filed by Krienen-Griffith, Inc./New Castle - Dream Real Estate Holdings, LLC (Owner & Applicant), 101 West Sixth Street, New Castle, Delaware, 19720 for a property located at 101 West Sixth Street, New Castle, Delaware 19720 Tax Parcel No. 21-015.00-041, seeking a variance from City Code Chapter §230 requirements relating to front and side yard setbacks. They are seeking an eleven foot, four inch (11'4") encroachment into twenty foot (20') Sixth Street front yard setback; and a seven foot (7') encroachment into twenty foot (20') Tremont Street front yard setback for the installation of an ADA-compliance access ramp and base (front porch/steps.)

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Monday, February 12, 2018, at 6:30 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Streets, New Castle, Delaware."

(Mr. William J. Krienen was sworn in by Mr. Losco.)

Mr. Brian J. McLaughlin, Esq., Monzack Mersky McLaughlin and Browder, is representing the applicant. The applicant is the owner of Krienen-Griffith, Inc./New Castle Dream Real Estate Holdings, LLC submits its request in connection with its funeral home and casket sales office at 101 West Sixth Street. New Castle Dream Real Estate Holdings, LLC is the owner of the property at 101 West Sixth Street. New Castle Dream Real Estate Holdings is a real estate holding company formed, owned and operated by the principals of Krienen-Griffith, Inc. Krienen-Griffith, Inc. is the owner/ operator of the funeral home. The operation of a funeral home and casket sales office is a permitted use in the R2 district.

The purpose of the request is to permit the installation of an ADA-compliant access ramp at the base of the front porch in connection with the applicant's operation of a funeral home. The American Disabilities Act (ADA) states that installation of a ramp and base is necessary to remove access barrier for persons with disabilities. The application includes a continuation sheet that is part of the record. Mr. McLaughlin submitted seven (7) Google Maps labeled Exhibits A through G as part of the record. He described each exhibit for the Board. The purpose of the maps is to give the Board an idea of where the property is located, the distance between the properties, and description of the property in the neighborhood.

Mr. McLaughlin provided Mr. Krienen's testimony. The City Ordinance prescribes a 20 ft. setback and a front yard setback from the front property line and a 10 ft. side yard setback from the side property line in the R2 district. The property is located on a corner lot, 101 West Sixth Street and Tremont Street. The front of the building and entrance to the building are on West Sixth Street. The side of the building is on Tremont Street. The setback requirements on Sixth Street and Tremont Street are considered setbacks. The existing building was built in 1969 and as constructed is located approximately 23 ft. from the Sixth Street front yard property line with another 12 ft. from the front property line to the curb, and 20 ft., 8 in. from the Tremont Street front yard property line. The side of the property is built almost exactly on the building setback line.

On the Tremont Street side there is an existing chimney that has encroached into the setback line since construction in 1969. Installation of the ramp and base will encroach on the 20 ft. setback by 7 ft. 4 in. on the Sixth Street property line, plus an additional approximate 4 ft. of steps. They were unsure if the steps were part of the encroachment, hence their request for 11 ft. 4 in.

The installation of the ramp will encroach on the 20 ft. setback by no more than 7 ft. on the Tremont Street side front yard. The proposed ramp and front base is an open structure constructed of masonry with a brick veneer matching the existing building and a canvas canopy over the base. The height of the base is approximately 2 ft. off the ground to the sill.

There will be aluminum guard rails and hand rails on the side and front access to the base and a canvas awning that will not be structurally attached to the building. There will be no advertising on the canopy. The dimensional change being requested is minimal. Ramp and porch will be located a distance from adjoining properties. The ramp will be limited to pedestrians. The porch cannot be used as a living space. There are many structures in the immediate vicinity that, including the adjacent properties, currently encroach on the 25 ft. setback line. The applicant is not seeking a waiver of the entire setback line, no view or air obstructions, no site line obstruction on vehicles and the structure as presented is in harmony with the neighborhood and is aesthetically pleasing. In addition to allowing access to people with disabilities, it would enhance pedestrian safety by using the porch area as a congregating area rather along the front street area.

For the record, Mr. Kriesen affirmed Mr. McLaughlin's representation of the applicant's request.

Mr. Losco asked how wide the ramp will be. Mr. McLaughlin stated the width is to be a minimum of 36 in. to meet ADA requirements. There will be about 13 ft. of grassy area remaining.

Mr. McLaughlin explained they are asking for a variance of 7.5 ft. rather than 5 ft. because the chimney is built into the 20 ft. setback. The ramp runs parallel to Tremont Street. Mr. McLaughlin said they have a parking agreement with the United Methodist Church; most of the parking will be in that lot.

(Carl Krienen was sworn in by Mr. Losco.) Mr. Krienen is a brother to the applicant. Mr. Carl Krienen is the architect. Mr. Athey asked questions about the site plan. Mr. McLaughlin clarified the setback is on the building side on the Tremont Street side which contradicts the site plan. He said when the surveyor prepared the site plan he prepared the setback as a side yard setback. They have two corner lots and two front lots.

In summary Mr. Losco stated that from the Tremont Street side it will be open, made of concrete block construction, filled with gravel, brick top, with a concrete sidewalk that will run perpendicular from the end of the ramp. If approved, they need about 4 ft. to cover the existing chimney and 3 ft. to cover the ramp.

Mr. McLaughlin summarized the Sixth Street side (front entrance to the building). From Tremont Street the ramp will run parallel to the building, turn onto the porch area or base that is approximately 2 ft. off the ground, and extend 7 ft., 4 in. into the setback line. The porch does not currently exist; there are four steps that will be removed. The application said 11 ft. but the applicant included an additional 4 ft. for the front steps. The front steps will be removed and a porch will be added to the base and steps will be added for those people not requiring handicap accessibility.

Mr. Losco summarized the Sixth Street side – they will construct a porch, similar construction of concrete block, filled with gravel, brick on top, brick clad in front to match building, and aluminum

railing. The porch will extend 7 ft., 4 in. into the setback line but they need another 3.5 ft. for existing steps. The existing steps are existing nonconforming and once they are moved it requires a variance.

Mr. McLaughlin said when they submitted their application they requested a modification under two alternative basis: 1) the American Disabilities Act to allow for a reasonable modification of the zoning ordinance and requested a variance under Chapter 230. The purpose of the request is to permit the installation of an ADA-compliant ramp. The ramp is necessary to remove the access barrier; 2) the ADA prohibits discrimination against disabled persons or the denial of benefits of services or benefits of local governments based on disability. ADA, Title II prohibits a public entity from discriminating based on disability including their zoning activities. The ADA requires that public entities make reasonable modifications in its policies, practices, and procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would alter the nature of the services. The public entity carries the burden of proof in proving that the proposed modifications would alter the service or program. Modifications are considered reasonable in the zoning context; they do not cause undue hardship or physical or burdens on local governments. Based on the above, Mr. McLaughlin claims the applicant qualifies for a reasonable modification of the zoning ordinance under the ADA.

Mr. McLaughlin said the photo (Exhibit C) will show there are many buildings that encroach on the setback area. Mr. W. Krienen said there are a number of porches in the next block of Sixth Street that are 4-5 ft. from the curb. Looking at the photo Mr. McLaughlin said that immediately across the street they have porches and it is reasonable they are within the 20 ft. setback. The two adjoining properties sit at the setback distance; one has a porch while the other has an enclosed porch with an awning.

Mr. Losco asked if they had an ADA ramp at their former location. Mr. W. Krienen said they never had enough modifications to require them to fall under the ADA requirements at the former location. There is no ground-level entrance at any location of this building on Sixth Street and Tremont Street.

Ms. Losco asked the applicant to explain how they get around the self-created hardship issue. Mr. McLaughlin said in addition to ADA, the property has always been zoned to allow for use as a special exception. Additionally the Zoning allows a corner store as a permitted right with a special exception. The ADA actually creates a hardship. So, the law is the hardship itself.

Mr. Losco wondered why this application for special exception was not submitted with their original application. Mr. W. Krienen testified he spoke with Jeff Bergstrom, Building Inspector, and was told that because it would not be a hard, enclosed structure that would be encroaching that no more action was necessary. *(Mr. Bergstrom was not available for this meeting.)*

Mayor Gambacorta looked at the property. He said this house is a newer house (built in 1969) versus other homes in the area. It is set back more than other homes on the block so when you are finished with this project on Sixth Street you are still not extending beyond the fronts of other houses in the area. He added that once the sidewalk on Tremont Street side and the front porch is completed there is ample green grass around the house. The lot is a large lot.

Concerning the ADA requirement, Mr. Athey noted the funeral home is not a public entity and wonders if the ADA component is optional.

Mr. McLaughlin said his rationale is the City of New Castle is under an obligation to make sure their zoning provisions comply to ADA. The funeral home is a public business and must comply with ADA, hence their request for the ADA-compliant ramp. If the application is not approved the business would

not be able to operate unless they operate in violation of the ADA, and the City may be in violation of ADA for not making reasonable modifications to their zoning ordinance.

Lighting – In addition to the safety lights along the sidewalk, Mr. McLaughlin noted there will be lighting under the canopy and porch lights will be installed.

Mr. W. Krienen testified they have not received any complaints from neighbors.

Mr. McLaughlin addressed the variance standards outlined in §230.57 of the City Code. Self-created hardship -- the interplay and overlap of the ADA requirements in a zone that is primarily residential but allows for special use exceptions that includes Mr. Krienen's use. It is clear that the use they are requesting is not out of harmony with the existing neighborhood.

Mr. Losco stated that ADA applies to all businesses. He inquired whether their building was built much later subjecting them to the 20 ft. setback and did it predate the Code. Mr. McLaughlin said some of the houses on Tremont Street do not predate the Code and are subject to the 20 ft. setback. Mr. McLaughlin said it is peculiar to this property because it is a business property as opposed to a residential property in the R2 Zone. We have a piece of property with a permitted use for a funeral home with an overlay of an ADA regulation.

Mr. McLaughlin asserts that granting the variance is a reasonable modification of the Zoning Code.

Mayor Gambacorta noted the length of the canvas awning and asked about color of the canvas. Mr. W. Krienen said they would select a conservative color.

No one was present to express opposition to the application.

The hearing portion was closed. The Board entered into deliberations.

Mr. Athey – If we deny the application we could put the City in a legal bind.

Mr. Losco – If this were a disabled individual in the City you would grant the variance to that person. On a human level the building needs to be made available to disabled individuals. He does not believe it meets the standards of the typical variance. There is nothing unique about the lot, any building in that zone could get a special exception for a funeral home. However, he believes it is reasonable under the circumstances to bend the rules to accommodate the disabled.

Literal interpretation – if this were a resident asking for a handicap ramp he does not see the City denying the request.

Special conditions – he thinks you need to rely on the professionals you hire. It is a question about bending rules for ADA and the disabled.

Special privileges – we would grant this to any resident.

In light of there being no opposition to the project Mr. Losco said this is a case where bending the rules is the right ruling.

Mr. Athey complemented the applicant on doing a good job minimizing the impact of the business, specifically with lighting. Generally there are homes in the area that have porches and awnings. It does not offend the character of the neighborhood. If we denied the variance it puts the City in an awkward position.

Mr. Losco added that this building was built in the 1960's meaning it had to comply with the 20 ft. setback while other properties do not need to comply. There is going to be 10 ft. plus strip of grass between the porch or the ramp and the sidewalk so passersby will not be on top of the porch.

Mr. Losco placed the following conditions on the request: no signage on the porch, canopy or ramp itself. Safety lighting, porch lighting under the canopy and safety lighting for the walking public is fine.

Mayor Gambacorta can see the need for a rearrange on the front side of the property; currently it does not lend itself to the operation of a funeral home. He can see the need for widening in the front with a porch and an extension to the front. The changes do no harm, there is no problem with it being an eyesore, and it would be a plus for the City.

Mr. Losco made a motion to approve the variance for the reasons stated with the conditions there be no additional lighting except for porch lighting under the canopy and safety lighting on the ramp and there be no signage attached to any of the improvements. Mr. Athey seconded the motion. Motion was approved by a vote of 3-0.

The hearing was adjourned at 7:30 p.m.

Debbie Turner
Stenographer

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

Exhibits entered into the record:

Exhibit A – front view of 101 West 6th Street, applicant's property

Exhibit B – site view of 101 West 6th Street, applicant's property

Exhibit C – aerial view of the neighborhood

Exhibit D – properties directly across the street

Exhibit E – adjoining lots

Exhibit F – Tremont Street

Exhibit G – Fifth Street