

New Castle City Board of Adjustment Meeting Minutes
November 20 2018 – 6:30 p.m.
City of New Castle Town Hall

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

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

Application 2018-07 – 108 Brylgon Avenue

An application has been filed by Marty Mellinger, (Owner & Applicant), P.O. Box 289, Yorklyn, DE 19736, for a property located in the R-1 Zoning District at 108 Brylgon Avenue, New Castle, DE 19720, Tax Parcel No. 21-004.00-025, seeking a variance from the 65 foot lot width requirement of §230-7 of the City's Zoning code to allow subdivision of the property into two lots, each with a width of 50 feet.

Mayor Gambacorta invited Mr. Mellinger and William J. Rhodunda, Jr., Esquire, attorney for the Applicant, to approach and present their case.

Mr. Losco recued himself from the hearing in making a decision stating that Mr. Mellinger is a client of his law partner, which provides a conflict of interest. Mr. Losco will take minutes and will ultimately be the drafter of the Decision; however, he will not take part in the decision.

Mr. Rhodunda stated that the matter before the Board is a variance to allow a lot with a 50' vs the required 65' width. He submitted for the Record a packet of documents as Applicant 1.

Mr. Rhodunda explained that the first item in the packet is a survey of the property which shows 108 Brylgon Avenue being 100' wide x 150' deep. He made special note that the address of the property is 108 Brylgon, and the adjoining property to the right is 112 Brylgon. Mayor Gambacorta clarified the location of the property. Mr. Rhodunda noted that the property was originally split into five separate lots, but the applicant does not know the entire history of the property. He added that the structure on the left side of the property is in a dilapidated condition and requires demolition. Mr. Mellinger proposes subdividing the 100' wide lot into two 50' wide lots for the purpose of constructing a home on each lot. The matter under consideration before the Board is whether or not a 50' wide lot is appropriate in the particular neighborhood. The Zoning Code calls for a 65' width; however Mr. Rhodunda presented as supporting evidence data under Tab 1 of his packet that various properties neighboring the subject property have widths between 30' wide and 60' wide, which shows that 50' wide lots are the norm and is consistent with lots in the area. Mr. Rhodunda also suggested that because the house numbering goes from 108 to 112, at some previous time a lot designated as 110 may have existed. Mayor Gambacorta pointed out that house numbers not running sequentially is not unusual in New Castle.

Mr. Rhodunda explained that Mr. Mellinger proposes building new houses on the property, that he has built other homes in the area, and directed the Board to Tab 2 of Applicant 1 showing the home that he proposes to build, noting that the home can be built on the lots with no other variance beside the 50' width being requested. He added that Mr. Mellinger hopes to sell the homes for approximately \$240,000, which will increase the property values of the surrounding homes.

Mr. Losco swore Mr. Mellinger in for the Record.

Mr. Athey asked where the pictured home was located, and Mr. Mellinger identified the location of the pictured property is Moore Avenue and stated there were two more homes that he built at the end of Brylgon. Mr. Athey clarified that he would be building the same style of home on the proposed lots. Mayor Gambacorta asked for details on the home, and Mr. Mellinger advised the house has three bedrooms, is sided, and has a garage and a single-lane driveway. Mr. Rhodunda pointed out that the front yard setback is 30' and that with the 10' right-of-way there will actually be 40' of paving to the garage door that will easily accommodate two vehicles on the driveway plus one car in the garage.

Mr. Rhodunda stated that Mr. Mellinger has spoken with all the neighbors about the requested variance, and referenced a number of letters from neighbors in support of the application at Tab 3 of Applicant 1, including 106 and 200 Brylgon, as well as 201, 203, 205 and 207 Moore Avenue. He expressed his opinion that one of the reasons the neighbors' have been so receptive of the application is that Mr. Mellinger will demolish the house currently on the lot and construct new homes which will potentially increase property values in the area.

Mr. Rhodunda argued that a 100' wide lot is actually out of the ordinary for the neighborhood, and a 50' lot is very consistent with other lot sizes in the immediate area. Mr. Athey asked how and when the original five lots became one lot, and Mr. Rhodunda advised that they were not certain of the history of the parcels. Mr. Athey did note that the existing house appeared to meet setback guidelines if the property were narrower.

Mr. Rhodunda added that adjacent properties would not be adversely affected if the variance is granted, and although the Code calls for a 65' setback, none of the lots in the immediate area are 65' wide. Mr. Rhodunda also commented that disapproval of the application could result in financial hardship to Mr. Mellinger in that he would be able to build only one house on the lot. Mr. Athey asked when Mr. Mellinger acquired the subject property, and Mr. Mellinger stated he acquired it in the summer through a foreclosure proceeding.

Mr. Athey noted that the more common situation in requesting a variance is that the application will be submitted to the Board prior to purchase of the property and asked Mr. Losco's legal opinion as to whether the purchase of a property up for Sheriff's sale can be made contingent on obtaining a variance. Mr. Losco stated that a Sheriff's sale is an auction sale where the property goes to the higher bidder and no contingencies can be added to it. He also noted that at the time of sale the highest bidder puts down a deposit and if the sale does not proceed, the deposit is lost. Mr. Athey stated that there was no practical way Mr. Mellinger could have come before the Board prior his purchase of the property and Mr. Losco explained that all investigations with respect to a property up for Sheriff's sale must be made prior to the auction sale.

Mr. Rhodunda noted that the New Castle County would allow an administrative subdivision for the subject property; however the City of New Castle does not allow administrative subdivisions; thus, a variance must be granted.

Mr. Athey stated that one of the conditions of granting a variance is "that the special conditions and circumstances do not result from the actions of the applicant" and noted that the applicant wants to draw the line which is actually causing the situation, and Mr. Rhodunda explained that a self-created hardship in itself does not make a variance non-approvable. He referenced a recent case in which a99 Delaware Superior Court Judge stated that a self-created hardship is one thing you look at, but it is not a bar to

granting variances. He added that it is certainly a factor, and that it should be considered; but the self-created hardship is not definitive in the disapproval of a variance and that is supported by case law.

Mayor Gambacorta opened the floor to public comment.

Dan Young – 203 Moore Avenue

Mr. Young stated that his property is not directly adjacent to the subject property, but that he and several neighbors on Moore Avenue support the application and Mr. Mellinger's initiative. The neighbors feel that the subject lot is currently an eyesore and that Mr. Mellinger's proposed use will improve their properties. Mr. Young noted that there is a row of very old, large trees on the boundary between the neighbors' properties and the subject lot and that the trees have been neglected and are in need of trimming and/or removal. He referenced a large berry-bearing tree on the border of his property that draws animals and stated that he had discussed making the area safe with Mr. Mellinger. He added that the only property that actually borders the subject property is 207 Moore Avenue. Mr. Young understood that Mr. Mellinger would only be able to make improvements to the trees on his property; but asked if the City could look at the properties or have the owners take care of the trees to make them safer for the homeowners of 201, 203, 205 and 207 Moore Avenue.

Mayor Gambacorta clarified that the residents on Moore Avenue have no objection to the homes proposed to be built.

Mr. Athey noted that the Board does not have the authority to have the City do any work on the trees, and suggested that Mr. Young speak with Mr. Bergstrom. Mr. Athey asked Mr. Young to describe the tree area, and it was clarified that in addition to the trees that border 207 Moore Avenue, there is one tree at the corner of 205 Moore Avenue that Mr. Mellinger can address. Mr. Mellinger gave a further explanation of the property as it borders homes on Moore Avenue. Mr. Mellinger stated he would address overhanging limbs affecting 209 Moore Avenue as well as the tree he and Mr. Young discussed. He also noted there was a large pine tree that needed some limbs trimmed back. Mr. Athey stated that the Board has the authority to assign conditions to an approval; however, he did not feel Mr. Young's issue does warranted any conditions to an approval. Mr. Young noted that he will contact Mr. Bergstrom.

John Wipf – 109 Brylgon Avenue

Mr. Wipf noted that he and his brother both support Mr. Mellinger's application, and that his main concern was off-street parking. He stated that since the homes Mr. Mellinger is proposing to build all have driveways, he is satisfied that on-street parking will not be increased by the new homes. Mayor Gambacorta clarified that Mr. Wipf's home faces the subject parcel and that there is no off-street parking for the homes on that side of the street. Mr. Wipf stated that he uses the end of 13th Street, which is a dead-end street, for parking. Mayor Gambacorta showed Mr. Wipf the picture of the proposed home and clarified that Mr. Wipf has no problem with the parking situation.

Mr. Losco asked Mr. Rhodunda if he had the citation for self-created hardship. Mr. Rhodunda stated that he did not have the citation on the case with him but that he would email that information to Mr. Losco.

Mr. Athey asked Mr. Losco if procedurally since the applicant has entered the approximate size and style of proposed house to be constructed into the Record is it necessary to make that a condition of any decision. Mr. Losco stated that was not required, noting that if Mr. Mellinger applies for a building permit that requires additional variances because it does not comply with the Code he will have to come back to the Board of Adjustment. He added that other than that, it was up to the Board if it wants to

impose conditions with respect to some other issue relevant to the lot. Mr. Mellinger offered to enter into the Record the model name being proposed. Mr. Rhodunda referenced the 2009 Delaware Supreme Court case of CCS Investors LLC v Brown in which the decision stated a self-created hardship is not a, per se, prohibition to getting a variance.

Mr. Athey moved that the Board go into a Business Meeting to discuss the application. Mayor Gambacorta seconded the Motion. On vote, the Motion was unanimously passed.

Mr. Losco declared the Hearing was closed and the Business Meeting would proceed. He also noted that the Board could go directly into the next meeting and consider both matters at the same time, or decide to consider each matter separately.

Mr. Athey suggested that the Board consider both matters at the same time. Mr. Losco stated that a Motion to continue the business meeting was required to proceed to the next matter. He added that both hearing notices state that Marty Mellinger is the owner and applicant.

Mr. Athey made a Motion to continue the Business Meeting for 108 Brylgon Avenue until the Board considers the application of 112 Brylgon Avenue. Mayor Gambacorta seconded the Motion. On vote, the Motion was unanimously passed.

Application 2018-08 – 112 Brylgon Avenue

An application has been filed by Marty Mellinger, (Owner & Applicant), P.O. Box 2898, Yorklyn, DE 19736, for a property located in the R-1 Zoning District at 112 Brylgon Avenue, New Castle, DE, 19720, Tax Parcel No. 21-004-00-026, seeking a variance from the City Code Chapter §230 for a 30 foot front yard setback requirement so as to allow a proposed dwelling 19 feet from the East Thirteenth Street right of way line.

Mr. Losco advised Mr. Mellinger that he is still under oath.

Mr. Rhodunda stated that the matter before the Board is a variance for a setback. He noted that 112 Brylgon is a corner lot that has two 30' front-yard setbacks; one at the front (Brylgon Avenue) and one on the side (East 13th Street). He added that according to the diagram, a side-yard setback is typically 8', but the combined side-yard setbacks must be 20'. The applicant's plan shows an 8' setback on the 108 Brylgon Avenue side, and a 19.5' setback on the East 13th Street side, for a total of 27.5'. He also pointed out that according to the survey the surveyor did not include an approximate 12' wide right-of-way that appears to be the side yard of 112 Brylgon Avenue. Therefore, if the house is constructed and approved, there will actually be 30' from the street to the side of the house. He added that the applicant is seeking a variance to 19' because the property line is inside the street by 12-13' and explained that the physical structure of the house will be 33' from the street, which is farther back than the original dwelling that was on the lot.

Mr. Rhodunda stated that the lot is 60' wide, and there will be approximately 40' from Brylgon Street to the garage door with three off-street parking spaces. He added that the exhibit package includes the survey and photographs of two houses across 13th Street, which shows that one house is 17' from the street and one house is 22' from the street; whereas the proposed house will be 33' from the street.

Mr. Rhodunda offer for the Record letters from the neighbors supporting the proposed variance. Mr. Losco noted that Mr. Rhodunda referenced Applicant 1.

Mayor Gambacorta clarified that the dilapidated home would be demolished and three new homes facing Brylgon would be constructed; two on lots of 50' width each and one on a lot of 60' width with three off-street parking spaces each. Mr. Losco asked what the width of the building envelope would be if the variance was not approved and Mr. Rhodunda stated it would be 22' wide. Mayor Gambacorta asked if the Building Inspector had any issues with the application, and Mr. Bergstrom stated he had no problems with it.

Mr. Athey reiterated his question of self-created hardship, noting the applicant offered citations where courts have ruled that the hardship is not the only criteria to follow, but one of several criterions.

Mr. Losco asked the reason the applicant was not asking for a lot width variance, and Mr. Rhodunda stated that was because it is a pre-existing lot. Mr. Athey noted that the lot width does not come into play, and Mr. Losco stated that it is the applicant's position that it is a pre-existing lot but the plan says the lot width requirement is 65'. If it is not a pre-existing condition, then he will not be able to build the house he proposes and will have to return to the Board of Adjustment.

Mayor Gambacorta asked if there was any public comment on the issue. There was no comment from the floor.

Mr. Athey made a Motion to move into the business Meeting. Mayor Gambacorta seconded the Motion. On vote, the Motion was unanimously approved.

108 Brylgon Avenue

Mr. Athey asked if Mr. Bergstrom had been asked if the properties were duly posted. Mr. Losco stated that he did not ask, but that the affidavit of publication and photographs of the posting were in both applications.

Mr. Athey stated that he supports Application 2018-08, variance for the lot width requirement that will allow the applicant to subdivide the lot that is currently approximately 100' wide into two lots approximately 50' wide each, which will enable him to construct two homes. He added that will be a vast improvement over the current lot condition. He also noted the applicant made a good faith effort to reach out to neighbors and that several of the neighbors are supportive of his application. He found it to be in harmony with the rest of the neighborhood and his concerns about the self-created hardship have been allayed.

Mr. Losco reiterated that he had recused himself from voting.

Mayor Gambacorta noted that he spoke with approximately seven families who live on Brylgon Avenue and that he saw no objection to the application, and stated his approval of the application.

Mr. Athey made a Motion to grant the variance that will allow the subdivision of an approximately 100' wide lot into two 50' wide lots for the reasons so stated. Mayor Gambacorta seconded the Motion. On vote, the Motion was unanimously approved.

112 Brylgon Avenue

Mr. Athey stated that he supports Application 2018-07 for a side-yard variance that will enable the applicant to construct a home on 112 Brylgon Avenue as shown on the submitted exhibit. He stated that

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it is an overall improvement to the neighborhood and that the applicant reached out to neighbors who are supportive of his application. He added that it is in overall harmony with the area, and the self-created hardship issue was adequately addressed by the applicant's attorney.

Mr. Athey made a Motion to grant the application for a side-yard variance that will enable the applicant to construct a home on 112 Brylgon Avenue for the reasons so stated. Mayor Gambacorta seconded the Motion. On vote, the Motion was approved unanimously.

There being no further business, a Motion to adjourn was called.

Mr. Athey made a Motion to adjourn the meeting. Mayor Gambacorta seconded the Motion. On vote, the Motion was approved unanimously.

The meeting adjourned at 7:40 pm.

Kathy Weirich
Stenographer