

**THE CITY OF NEW CASTLE
BOARD OF ADJUSTMENT**

NOTICE OF DECISION

APPLICANT: Trustees of New Castle Common
201 Delaware Street
New Castle, DE 19720

OWNER: Trustees of New Castle Common
201 Delaware Street
New Castle, DE 19720

NCC TAX PARCEL NO. 21-015.30-194
PUBLIC HEARING DATE: March 5, 2020
DATE OF DECISION: March 20, 2020

REQUESTED: Applicant requested a modification of a special exception for a public parking lot previously granted by the Board of Adjustment on January 24, 2019 under §§230-28.1 and 230-57 B of the Zoning Code of the City of New Castle (the "Code"). The property involved is located in the Historic Residence (HR) District and known as 27 West 3rd Street, NCC Tax Parcel No. 21-015.30-194. The modification requested is to replace all concrete surfaces on the approved parking lot plan with asphalt.

The Board of Adjustment may grant a special exception for a parking lot to permit uncovered, ground-level public or commercial parking lots in the HR District where, upon written application, the Board finds: (1) that the applicant has satisfied the enumerated criteria in section 230-28.1 and (2) that the special exception is in harmony with the purpose and intent of the Code and will not adversely affect the public interest, subject, however to such conditions and safeguards as the Board deems appropriate.

Mayor Michael J. Quaranta chaired the meeting. Also present as Board members were City Engineer David Athey and City Solicitor Daniel R. Losco. Also present was Mr. Jeffrey Bergstrom, New Castle Code Official. The record reflected that the matter was noticed and the property posted in accordance with the law and a copy of the notice was admitted into the record.

Andrew Taylor, Esq., represented the applicant, the Trustees of the New Castle Common, at the hearing. At his request, Mr. Taylor was sworn in as a witness by the Solicitor so that any factual statements he made would be under oath. Mr. Taylor noted that the present application is to seek a modification to the Special Exception already granted by the Board of Adjustment on

January 24, 2019 under Section 230-28.1 of the Code so as to permit the replacement of approved concrete surfaces with asphalt, consistent with City Resolution 2020-06. Mr. Taylor stated that the Applicant understands that this hearing is not to discuss the pros and cons of the proposed parking lot since the parking lot was previously approved and the criteria for a Special Exception for the parking lot under §230-28.1 of the Code had been met. The only issue before the Board is whether the approved concrete surfaces may be changed to asphalt. The Board was presented with the latest approved site plan that included prior Board required modifications.

Mr. Taylor confirmed that there were no other changes to the previously approved site plan proposed other than the change from concrete surfaces to asphalt. He noted that the Planning Commission met on February 24, 2020 to both make recommendation on the change to asphalt and to otherwise review the final site plan for full conformance with all Code requirements and all conditions previously imposed on this application by the Historic Area Commission (HAC) and the Board of Adjustment. He noted that the Planning Commission imposed several conditions on the issuance of a certificate of occupancy including: (1) erection of a “No Right Turn” sign at the egress to be approved by the Building Official; (2) receipt of a final approval letter from the New Castle Conservation District; (3) approval by the Board of Adjustment on the use of asphalt rather than concrete; and (4) approval by Building Official on the location of security cameras. Mr. Taylor stated that those conditions did not require any further revisions to the site plan and that the applicant has agreed to all such conditions. Otherwise, Mr. Taylor explained that the current site plan before the Board implemented the Board required reduction in parking spaces from 42 to 32 and the additional of more landscaping.

Mr. Athey stated that the materials proposed for this parking lot had been the subject of close scrutiny at the time the special exception was first granted and requested that Mr. Taylor explain how the matter is back before the Board of Adjustment. Mr. Taylor responded that concrete was inconsistent with materials used in other parking lots in the City and concrete would actually be an anomaly. He submitted a list of current asphalt parking lots in the City for the Board’s consideration. The concrete surface was proposed in January, 2019 only because asphalt wasn’t permitted by the HAC Design Guidelines as then written. Resolution 2020-06 recently adopted by City Council modified the Guidelines to permit asphalt parking lots prompting the applicant to request HAC approval of the material change on February 18, 2020. The Building Official responded in a letter dated March 5, 2020, stating that the material change request was granted as a Tier 1 approval. Mr. Bergstrom clarified that the Code authorizes the Building Official alone to approve certain HAC applications if fully consistent with the HAC Guidelines under what is known as a “Tier 1” review. Any other more significant changes and improvements (e.g., building additions, new buildings, and substantial modifications to existing buildings) to properties in the Historic District require a “Tier 2” review and approval by HAC

itself. Since City Council changed the Guidelines via Resolution 2020-06 to make asphalt an approved material for public parking lots, the proposed switch from concrete to asphalt only required a Tier 1 review and approval by the Building Official.

Mr. Athey asked whether the HAC Guidelines were mere “guidelines” or if they were mandatory rules. Mr. Bergstrom replied that the Guidelines are followed very closely. Mr. Losco stated that the Guidelines actually prohibit certain things, for example, the old Guidelines prohibited asphalt. Mr. Athey stated his opinion that the Guidelines are mandatory requirements.

Mr. Losco asked Mr. Taylor to explain why the applicant is now requesting a change of materials. Mr. Taylor conceded that it will be much less expensive to construct the parking lot with asphalt versus concrete. Mr. Losco asked if other surfaces that would be viable and more historically accurate were considered, and Mr. Taylor explained that reinforced turf and concrete lattice-work material were both considered; however, it was ultimately determined that both were not feasible in a parking lot.

Mr. Losco asked Mr. Taylor to explain how, or if, asphalt would change the aesthetics of the parking lot. Mr. Taylor responded that much of the parking lot is not visible due to the topography and the most visible area is the entrance-way, which will remain brick. The elimination of four parking spaces in the front of the property along W. 3rd Street and the addition of landscaping in that area as required by the prior Board decision will also help screen the parking lot from public view. Mr. Taylor argued that these changes improved the aesthetics of the parking lot.

Mr. Losco noted that the January, 2019 Board of Adjustment decision required that work commence within two years and asked if the Applicants can hold true to that January 2021 deadline. Mr. Taylor said the work would commence in Spring, 2020 and be completed before January, 2021.

Mayor Quaranta then opened the meeting to public comment.

Christopher Castagno, the Treasurer of the Trustees of the New Castle Common, noted that regardless of zoning classification, the City’s Historic District under HAC’s purview extends from the river to approximately 6th Street. All of the parking lots on the list supplied by the applicant, with the exception of the St. Peter’s School, are technically in the Historic District. He further noted that every parking lot in the City of New Castle is paved with asphalt.

Roderick Gillespie then commented that cost is the driving force behind the change from

concrete to asphalt. He also cited Code section 230-28.1 G and H as mandating HAC approval in order to proceed and complained that in this case, the change from concrete to asphalt was only approved by the Building Office and not HAC itself. Mr. Gillespie opined that the proposed parking lot is the same size, if not larger, than the adjacent M&T parking lot and that, in his opinion, concrete was more durable, aesthetically pleasing, “human-friendly” and better for the neighbors than asphalt. Mr. Gillespie said he felt that concrete showed a design sense that is missing with asphalt. He opined that the location of the proposed parking lot in a residential area is not the right location for an asphalt parking lot.

Karen Whalen testified concerning the effect of §230-28.1 H on the present application. She stated that the Code calls for a three-step process to approve the application including HAC approval of the material change. Since the use of asphalt was not brought to a HAC meeting for review and instead was handled as a Tier 1 review by the Building Official, the process was not properly followed. Ms. Whalen also argued that Ordinance 510 (codified as Code §230-28.1) and the entire process was specifically created for “this pre-ordained site”. It was not a generic Code change intended to apply generally to the expansion or construction of parking lots throughout the City. She argued that things were done to whitewash the process as legitimate to have this parking lot built.

No further public comments were presented.

On rebuttal, Mr. Taylor argued that the applicant carefully followed the process provided in §230-28.1 and that the applicant requested HAC approval of the material change on February 18, 2020 and received Tier 1 approval on March 5, 2020. He added that it was the City’s determination to review the application on a Tier 1 basis. The applicant has secured a positive recommendation letter from the Planning Commission and HAC approval via the Building Official’s Tier 1 review to make the change to asphalt.

Mr. Athey motioned to close the hearing and move into the business meeting. The motion was seconded and unanimously approved.

The Board began its deliberations by discussing the argument that this application required a hearing and approval by HAC, rather than a Tier 1 review by the Building Official, in order to comply with §230-28.1. Mr. Losco noted that the argument was flawed in that it did not consider other provisions of the Code. He referenced §230-51 E wherein City Council established the Tier 1 and Tier 2 reviews process. That section states “The Building Official shall have the authority to issue historic review certificates **on behalf of** the Historic Area Commission, without the Commission's independent review ...”. (*emphasis added*). The HAC

review required by 230-28.1 in this case was properly done at the Building Official level under the modified Guidelines because of the amendment to 230-51. Mr. Losco stated that he intended to support the application as submitted noting that had the current HAC Guidelines been in place when the original parking lot application was filed asphalt would have been an approved material and as such, HAC would have had no authority to prohibit its use. He added that if asphalt had been an approved surface when the application first came before the Board of Adjustment in January, 2019, he could think of no reason why the Board would not have approved it. He felt that the Trustees, as private owners, have the right to choose asphalt as their parking lot surface; and if asphalt is permissible by right in the Historic District, then, absent a compelling reason, the Board of Adjustment should not interfere with the owner's decision.

Mr. Athey expressed his appreciation for public comments about the desirability of saving the money by using a more durable material such as concrete, or disagreeing with the decision to build the parking lot at this particular location, but added that both City Council members and Trustees are elected positions and if decisions are made that the public does not agree with, those officials can be voted out of office.

Mayor Quaranta stated that he looked at the various asphalt parking lots in the City and knows of no complaints by neighbors living near those locations that it was a mistake to approve asphalt parking lots. In fact, many residents take full advantage of such off-street parking where it is available. The Mayor added that he concurred with Mr. Losco's opinion that if the current Guidelines were in place when the Board made its January 24, 2019 decision, and the applicant proposed an asphalt surface, there would have been no cause for denial or change.

Discussion ensued as to whether conditions should be attached to any approval requiring maintenance of the asphalt parking lot in good condition. Mr. Losco questioned the ability to enforce any maintenance plan required by the Board. Mayor Quaranta added that if the Building Official is aware of a condition in the parking lot that needs to be repaired, he has the existing authority to enforce corrective maintenance.

Mr. Losco then made a motion to approve the applicant's request to modify the special exception approval to allow for the change in material from concrete to asphalt as depicted upon the site plan submitted with the stipulation that the start date for construction remain at January 24, 2021. Mr. Athey seconded the Motion. The motion carried unanimously. The Board members each offered the following additional rationale for their votes.

Mr. Athey stated his reasons for approval included the fact that if the issue went to HAC for a full Tier 2 review, asphalt would still have been approved as a permitted material under

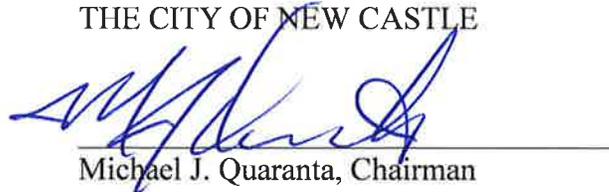
current Guidelines. He agreed with Mr. Losco's observation that if asphalt was an approved material in January 2019, the Board would have approved the Special Exception anyway. He noted the argument raised concerning the alleged need for a full Tier 2 review of the material change, but felt that the argument was rebutted by Mr. Losco's point that §230-28.1 cannot be read in isolation and that §230-51 E effectively delegated this particular request to the Building Official as a Tier 1 review. The Building Official has the authority to act as he did. For those reasons, Mr. Athey votes in favor of the Motion.

In addition to the points he made earlier in the business meeting, Mr. Losco stated that he also adopts Mr. Athey's reasoning, noting that the narrow issue before the Board is the change in materials from concrete to asphalt and nothing more. He also found no significant aesthetic differences between the two materials. He noted that it is largely a private property owner's decision what materials they wished to use and if that material is permitted by right under the Guidelines, the Board should not interfere absent compelling evidence to the contrary. He felt there was no evidence of harm to the community as the result of the change in material and believes the request reasonable and appropriate. He found it compelling that asphalt is consistent with virtually every other parking lot in the City regardless of whether it is in the Historic District or not.

Mayor Quaranta stated that he adopts all of the reasons provided by both Mr. Athey and Mr. Losco. He also noted the consistent use of asphalt in all the other parking lots constructed over the past several decades.

Vote: 3-0 (Grant: Quaranta, Athey and Losco)

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE



Michael J. Quaranta, Chairman

NOTE: This decision is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the applicable governmental agencies prior to construction or establishment of any use on the property. This decision should be kept in a safe place with the property deed. 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.