

New Castle City Board of Adjustment Meeting Minutes
August 12, 2020 – 6:30 p.m.
City of New Castle Town Hall

Members Present: **Mayor Michael J. Quaranta**
 Daniel R. Losco, Esq., City Solicitor
 David J. Athey, City Engineer

Also Present: **Jeff Bergstrom, City Building Official**

Mayor Quaranta convened the meeting at 6:32 pm. Roll call followed and a quorum to conduct business was declared.

An application has been filed by Clare Holdings, LLC, 315 Fourteenth Street, New Castle, DE 19720 (Owner), and Michael Carter, 70 Southgate Blvd., New Castle, Delaware 19720 (Applicant), to appeal the Building Official’s decision of March 24, 2020 denying “collision repair” and “vehicle painting” as not permitted uses in the Downtown Gateway District, per §230-21.1 (E) for a property located in the Downtown Gateway District, known as 423 W. 7th Street/0 Gray Street, New Castle, Delaware, Tax Parcel No. 21-014.00-491 and part of Tax Parcel No. 21-014.00-555.

Mayor Quaranta stated that the Application was posted on July 28, 2020. Mr. Losco noted that the meeting has been properly noticed and the Record will include notice of the sign photographed on the site to advertise the public meeting, as well as affidavit of publication in the News Journal and the New Castle Weekly.

Messrs. Anthony Gambacorta, Michael Carter, and Russell Dalme were sworn in by Mr. Losco.

Mr. Losco stated that as counsel for Clare Holdings, LLC in another matter he would recuse himself from deliberation and voting; however, he will take notes and be available to answer procedural questions, and he will draft the Decision of the Board.

William Rhodunda, Esquire, counsel for the Applicant, explained the Applicant is appealing the Decision of the Building Official dated March 24, 2020. He added that additional information not available to the Building Official at the time of the Decision would be presented to the Board of Adjustment.

Messrs. Carter and Dalme are the equitable owners of the property and wish to establish a shop for the purpose of vehicle repair and maintenance, collision repair, vehicle painting, vehicle detailing, and tire service. Mr. Rhodunda stated that the two uses the Building Official determined were not permitted uses are a very small part of the overall business model. The business is essentially for corporate vehicle maintenance and repair. There is an aspect of the business relative to collision repair and painting; however it is only approximately 10% of the business.

Mr. Rhodunda submitted a memorandum in support of the Applicant’s request, detailing the five uses required by the Applicant. Of those five uses, the Building Official determined that

collision repair and vehicle painting are not permitted in the SC Zone. Mr. Rhodunda stated that the SC District permits “vehicle services” and argued that “services” is not a defined term in the City Code. He stated that where a term is undefined the Delaware Supreme Court and the Delaware Chancery Court have concluded that the widest possible definition should be given to undefined term.

Mr. Rhodunda cited a number of cases and argued that the matter is a legal issue as to whether or not the two uses should be permitted as a matter of right, or in the alternative, permitted independently as accessory uses to permitted uses.

Chase Alexa, LLC v Kent Cty. Levy Court, 991 A.2d 1148, 1152 (Del. 2010) and *Dewey Beach Enters., Inc. v Bd. Of Adjustment of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010) where “there are two reasonable interpretations of the statute, the interpretation that favors the landowner controls”.

Am. Jur. 2d *Zoning* § 40 (2003) “The wording of a zoning ordinance must be clear and unambiguous so that a person of ordinary intelligence need not guess as its meaning.”.

101A C.J.S., *Zoning* § 98, relative to zoning laws “it has been held that they are subject to strict construction in favor of the right of a property owner to the free use of his or her property ”.

Norino Properties LLC v. Mayor and Town Council of the Town of Ocean View 2010 WL 3610206 (Del. Ch.) in which the question of whether a convenience store (permitted use) included fuel pumps. The Court noted the term “convenience store” was ambiguous and that some convenience stores had fuel pumps and others did not, and ruled in favor of the property owner.

Mr. Rhodunda stated the Building Official agreed that “vehicle repair and maintenance” are permitted uses in the SC district. The Applicant’s position is that if “vehicle repair and maintenance” are permitted uses, collision repair and vehicle painting should be part of that because some vehicle repairs require those services. Mr. Rhodunda reiterated that only 10% of the Applicant’s business is collision repair and vehicle painting. He added that the Code indicates that accessory uses that are incidental, and customary to, and associated with, the operation of the permitted use are permitted in the SC District.

Mr. Rhodunda opined that collision repair and vehicle painting are permitted as a matter of right in the SC district; however, if those services are deemed to be not permitted, a second argument is that those services are accessory uses associated with the permitted uses and should therefore be permitted.

Mr. Rhodunda noted that the SC zoning designation is allowable in the DG zoning district until 2023, and if the Board overturns the Building Official’s Decision the proposed use of the property would be allowed in the DG District as a legal non-conforming use. Mr. Rhodunda

reiterated that the issue before the Board is whether collision repair and vehicle painting are permitted in the SC zoning or if they are an accessory use to a permitted use in the SC zoning.

Mr. Rhodunda cited §230-22 A(4) of the City code, which includes “Automobile, truck, marine equipment sales and service” as a permitted use as a matter of right, and argued that the five uses for which the Applicant is seeking approval are service items one would naturally see in a business that has vehicle sales and service. Mr. Rhodunda also cited §230-22 A(13) that states “Accessory uses ... clearly incidental and customary to and associated with the operation of the permitted uses” are also permitted as a matter of right.

Mr. Rhodunda argued that under §230-22 A(4) and (13) the City of New Castle has already concluded that vehicle repair and maintenance are permitted uses and as an independent basis for approval as an accessory use, painting and body work is certainly incidental and customary to doing vehicle repair. He added that although painting and body work are a small part of the Applicant’s business, it is a critical part.

Mr. Rhodunda detailed improvements the Applicant has voluntarily agreed to do to the property:

- New garage doors
- Landscaping easement with tall growing arborvitaes and evergreen
- New roof and siding on building
- Clean and paint exterior of building, repave parking lot
- Clean and clear rear of property and remove all trash, overgrowth and debris
- Install new wood or vinyl fence
- Property to be inspected for Brownfield approval
- Work with adjacent owners to clean up and/or remove damaged building
- Install all new HVAC System so the entire building is heated and cooled (which will allow for doors to be closed during all maintenance operations)

Mr. Rhodunda described the property in question and explained the improvements the Applicant has committed to do. He also stated that Mr. Gambacorta has committed to develop the front parcel 100% in accordance with the DG zoning requirements regardless of when that parcel is developed. Mr. Rhodunda noted that the subject property is currently a transmission shop, and was previously a body shop for an auto dealer; and is suitable for the Applicant’s purposes.

Mr. Rhodunda also explained that the work done on vehicles brought in for repair would be completed within 3-5 days. Vehicles will be stored in the fenced lot while waiting for work to be done. The building is 6,000 square feet.

Mr. Rhodunda stated that the Applicant wishes to be a good citizen of New Castle; he lives in the area; he has been in the vehicle maintenance business for 18 years; and he has owned his own business for 10 years. He added that if the Application is approved, an Environmental Engineer will inspect the property and apply to enter the property into the Brownfields Program.

Mr. Rhodunda noted that a letter in opposition of the Application stated the proposed use is not permitted in residential areas and referenced Exhibit 16 showing a new 32,000 square foot body shop recently built on Rt. 40 across the street from a residential community.

Mr. Rhodunda stated the business is small; environmental issues will be cleaned up; the one paint box does not present any environmental issues; and no noise or smell issues are expected. He added that paints used today are all water-based and do not present any environmental issues.

Mr. Gambacorta read a prepared statement into the Record in support of the Application in which he noted that an independently owned and operated facility is more desirable than one operated by a renter.

Through questioning by Mr. Rhodunda, Mr. Gambacorta stated that the property has been for sale since 2008, and the building was originally used as a body shop. It was clarified that the prior use was auto body work and painting; however it does not have the necessary elements required to do paint and body work.

Mr. Carter testified that he has been in the auto body business for 18 years. He and his partner have owned Accurate Collision for 10 years, and during those 10 years the business has had no issues with DNREC relative to environmental issues. Through questioning he also testified that approximately 10% of the overall business is painting, and the primary business is AB services, windshields, tires, and collision repairs. Their main client is the Post Office. The business has a staff of three, and Mr. Carter anticipated that an additional two employees may be hired. Mr. Carter stated they want to make improvements to the property to make it aesthetically pleasing to the public and to be an asset to the community. Mr. Carter explained the process and time for repairs; vehicles requiring excessive repairs are typically not accepted; they charge \$90 per day for storage to discourage long-term storage; and they do not have a direct repair shop relationship with insurance companies. The new HVAC system they propose to install will ensure that all work can be done with the doors closed.

In response to a question from Mayor Quaranta, Mr. Carter stated that the business is under \$1M per year, and they are comfortable spending an anticipated \$100,000 for improvements to the property. The Mayor also confirmed that the business does minor body work and not major collision repairs.

Mr. Athey asked for clarification of the Brownfields Program and Mr. Rhodunda explained that the Brownfields Program is for new owners only and allows the State to contribute the first \$125,000 toward investigation and clean-up of the site, and then contribute an additional \$.50 on the dollar up to \$250,000.

Mr. Athey asked Mr. Losco if the Board overturned the Building Official's Decision, would any Decision rendered by the Board stay with the land and not the owner. Mr. Losco stated that provided there is not a substantial change in the nature of the business they are operating, the Decision would stay with the property; however, if it becomes something more than the

particular use the Board approves, it may be a different situation for the Building Official to evaluate. He added that it is not so much that the Decision runs with the property; it is whether or not the use is permitted under this particular Zoning classification.

The Savings Clause under §230-21.1 E permits SC uses for a 10 year period after the adoption of the DG Zoning Ordinance. The SC Zoning classification permits automobile, truck, and marine equipment sales and service. Mr. Bergstrom pointed out in his Opinion that an auto body shop is categorized separately as a permitted use in the GC Zoning District. The argument being made by the Applicant is that it is a “vehicle service” and because the Code does not define “service” it must be interpreted broadly. The Applicant’s alternative argument is that even if it is not a permitted use, it is only an accessory use to the primary use of vehicle repair. The question is not whether or not the Decision runs with the land; it is whether or not a vehicle service shop that does 10% of its work on auto body and painting is a permitted use under the Savings Clause.

Mr. Athey asked if the Board is clarifying the Code by overturning the Building Official’s Decision setting a precedent. Mr. Losco stated that was correct; if you conclude that auto body work is part and parcel of vehicle sales and service, then another facility in the DG zone that was formerly SC could open a body shop.

Mr. Carter stated his understanding that DG zoning will supersede SC zoning in 2023, and if the Application is approved and Accurate Collision goes out of business the zoning classification would automatically revert to DG. Mr. Losco stated that SC uses are permitted on the subject property until 2023 because it was formerly zoned SC. If such a use is put into play and remains beyond 2023, it is a non-conforming use and is permitted to continue; however, if the non-conforming use is interrupted for an extended period then it is lost and any future use of the land would have to conform to the DG zoning Ordinance.

Mr. Rhodunda stated that if the Board determines collision repair and vehicle painting are accessory uses to the primary use, a body shop would not be permitted if the Applicant were to vacate the premises.

Mayor Quaranta turned the floor over to Mr. Bergstrom for comment. Mr. Bergstrom stated that he made his Decision based on the law as he understood it.

Mr. Losco summarized two letters opposing the Application that were received by the Board prior to the meeting.

- The Application does not meet the Code because collision repair and vehicle painting are not SC uses. Mr. Losco stated this is basically the same conclusion reached by the Building Official.
- The use of the property for collision repair and vehicle painting would contradict environmental protection standards. Mr. Losco opined this refers to air quality issues and environmental contamination.

- No town, municipality or county in the state has allowed an automotive business to open or start up next to or adjacent to a residential property. Mr. Losco stated that Mr. Rhodunda addressed this issue.
- Allowing a new location for a paint/body shop would run counter to the purposes of the Downtown Gateway District.

Mayor Quaranta noted that Mr. Rhodunda cited Am. Jur. 2d Zoning §40 (2003). “The wording of a zoning ordinance must be clear and unambiguous so that a person of ordinary intelligence need not guess as its meaning.” The Mayor clarified that the subject property is in the SC zoning district, and stated that he does not find the Code to be unambiguous: Auto repair (fixing tires, mechanical work, etc.) was intentionally placed in the SC District §230-22 A(4) and automotive paint and body shops were intentionally placed in the GC District §230-22.1 A(34)(e). Mayor Quaranta opined that when the Council created the code dividing the two was very intentional.

Mr. Rhodunda referenced cases previously cited and stated that the Code does not define the term “service”, which is permitted in the SC District; and when an essential term is not defined, the widest possible latitude as to what that might include must be given in favor of the landowner. He added that it was an error to leave the term “service” undefined, and that has been upheld in multiple cases by the Delaware Supreme Court and the Delaware Chancery Court.

Mayor Quaranta stated that the two Sections of the Zoning Code very clearly differentiate the permitted uses in a very unambiguous way and asked if Mr. Rhodunda agreed. Mr. Rhodunda stated that he did not agree, noting there is much grey area. He added that the Applicant has a repair shop that does some body work and some painting as a small part of its business. He also noted that the SC Zoning Code allows for an accessory use, and argued that collision repair and vehicle painting are accessory uses to vehicle repair and maintenance.

Mayor Quaranta reiterated that the Code clearly distinguishes between vehicle repair and maintenance and collision repair/vehicle painting.

Mr. Rhodunda opined that the issue was a two-part: First, are collision repair and vehicle painting permitted uses in the SC District; and second, if vehicle repair and maintenance are allowed, are collision repair and vehicle painting permitted as an accessory use.

Mr. Rhodunda argued that the Applicant’s work in body work and painting is minimal and vehicle repair and maintenance will call for collision repair and vehicle painting from time to time. He stated the Applicant’s position is that collision repair and vehicle painting are permitted by right in the SC District; however, if the Board disagrees, he argued that due to the lack of definition in the Code one must err on the side of the property owner. If repairs are permitted, part of repairs will be body work and painting from time to time as an accessory use.

Mayor Quaranta referenced *Norino Properties LLC v. Mayor and Town Council of the Town of Ocean View* 2010 WL 3610206 (Del. Ch.) where the town argued that “a convenience store itself

was permitted, but the Code was silent with respect to convenience stores with fuel pumps...” noting that the Court ruled in favor of the property owner, saying because of the “silence” fuel pumps were permitted. The Mayor stated that the New Castle City Code is not silent; there is a differentiation that is clearly delineated in the SC and GC sections of the Code.

Mr. Rhodunda responded that the definition of “silence” relates to the definition of “service”. Service is not defined and should be given the broadest possible definition. He added that many car dealerships have a full body and repair shop on their sites. The Applicant’s position is that “automobile sales and service” includes the broadest term. He added that the GC specifically permits body shops; but in terms of the “silence” it relates to how “service” is defined, and argued that it is not defined in the Code.

Mayor Quaranta noted that many car dealerships have body/paint shops on site while others have body/paint shops off-site, and asked if Mr. Rhodunda had researched the zoning for any dealerships with and without on-site shops. Mr. Carter responded that many dealerships are authorized dealers for a number of different vehicle manufacturers, and rather than have a separate shop for each manufacturer they have one central location for all repairs and body work. Mr. Carter opined that at the time the Code was written paint practices were not very good and the paint being used was toxic which was the reason for separating “auto sales and service” and “automotive paint and body shops” to two Code sections. He added that paint practices today are better regulated, and stated that Accurate Collision uses EnviroPaint, which is a water-based paint.

There being no further questions from the Board, Mayor Quaranta opened the floor to Public Comment.

Public Comment

Philip Gross

Mr. Gross spoke in opposition of the Application, stating that Winner Ford and other dealerships strictly do body work and farm out mechanical, and suggested that the Applicant farm out the collision repair and vehicle painting work. He added that the Applicant indicated some vehicles brought in will be rebuilt for auction because they are not serviceable and able to go back to the vehicle pool. Mr. Gross also referenced Mr. Athey’s comment about setting a precedent and the Mayor’s comments about the separation of auto sales and service and automotive paint and body shops in the Code.

Anonymous Attendee

An anonymous attendee made a number of comments in opposition to the Application:

- If only 10% of the work is collision/paint, why is the name “Accurate Collision”? Thus 10-15% +/- cost of goods should dictate only paint and body suppliers are only a fraction. Is the Applicant willing to provide that information to support this claim?
- If the property was a body shop, where is the State License?
- DG Zone
- The storage area is currently used for trash. Where would that go?

- The site can only accommodate 4-5 vehicles without trash.
- Phase 1 or 2 has not been done by Applicant (due diligence) so landscaping may not be allowed.
- Timeline for completion of improvements required by Bond or approval with estimates?
- \$90 per day is after completion of work, not while work is being done.
- 230-40.4 Water issues.
- Route 40 is across the street next door.

Mr. Rhodunda responded to the questions/concerns:

- The business started 10 years ago and was named “Accurate Collision” because it was more of an auto body shop. Over time it has morphed into more of a corporate maintenance and repair business.
- Corporate clients require efficiency, and having all services available means the customer is not required to go to two different shops.
- The Applicant can provide substantiation of the cost of goods if required.
- The building was built to be a body shop.
- The front of the property is committed to the DG zoning regardless of when it is developed.
- The Applicant has committed to landscaping in addition to other improvements.
- Phase 1 and 2 will be done prior to purchase and application will be made to the Brownfields Program. Having a COCR will make the property more valuable.
- The Applicant feels all improvements can be completed within six months of purchase with the exception of paving.
- Any vehicle that is deemed “totaled” is charged \$90 every day from the day it is received, which encourages the insurance company to have the vehicle picked up as soon as possible.

There being no further Public Comment, the Mayor called for a Motion to adjourn to the Business Meeting.

Mr. Athey made a Motion to adjourn to the Business Meeting. The Motion was seconded and unanimously approved.

Mayor Quaranta asked Mr. Losco to explain the rules when only two Board members vote. Mr. Losco stated that the Application is an appeal from the Building Official’s Decision. If there is a 1-to-1 tie vote, one in favor and one opposed, the Appeal fails. Two votes are needed to approve the Appeal.

Mr. Athey stated that the opportunity to enter the Brownfields Program is very good and cannot be ignored, and expressed his appreciation of the Applicant’s efforts to buffer the site and be an asset to the community.

Mr. Athey stated that in looking at the SC and GC zoning he concluded that the Code is not ambiguous. §34 of the GC zoning includes a number of “heavy” uses in addition to the paint and body shop – commercial industrial machinery, commercial industrial repair, building development, and general contracting – none of which are permitted in the SC zone. Mr. Athey stated it is clear that the Council in session when the Zoning Code was written intentionally isolated certain uses in the GC zone and allowed other uses in the SC zone.

Mr. Athey noted that Mr. Rhodunda made a compelling argument relative to the word “service”, and opined that if the Code was not so clear between the SC and GC Code, he might be more open to the issue that it is not very well defined; however, he opined that the clarity of the SC and GC zoning overrides that uncertainty.

Mr. Athey stated that the intent of the DG zoning district cannot be ignored, regardless of the Savings Clause.

Mr. Athey stated his opinion of what an “accessory use” is, noting that the Code uses the words of “incidental” and “subordinate” when defining the term. He opined that the Applicant’s argument that only 10% of the business is a subordinate use; however he stated collision repair and painting is a much more impactful use and is not incidental to the other parts of the business.

Mr. Athey stated he is inclined to uphold the Building Official’s Decision of March 24, 2020. He added that he although he often is in favor of approving an Application with conditions, he felt the Application could not be conditioned. Mr. Athey also stated he is very concerned with setting a precedent, noting this is a major Code interpretation issue that would affect not only the DG zone, but any SC zoned commercial property in the City.

In conclusion, Mr. Athey stated he is not inclined to override the Building Official’s Decision of March 24, 2020.

Mayor Quaranta stated that the proposed improvements are substantial and expressed his appreciation of the Applicant’s willingness to make the investment to make those improvements.

The Mayor stated that in looking at the clarity with which the Code was created and the very intentional differentiation between the GC and the SC districts and the calling out of “auto body work” for the GC zone, he feels that this would not the right direction for the Board to go.

The Mayor stated that the trends in the DG zone are materializing along the lines of what the DG zone was intended to do; and the area is progressing in a way that is more residential and is shaking off its industrial/commercial use. He added that the City has locations set aside that are perhaps more appropriate for the Applicant’s intended use.

In conclusion, the Mayor reiterated that the Code is quite clear, and stated that he would deny the Appeal.

Mr. Athey made a Motion to uphold the Building Official's Decision that collision repair and vehicle painting are not permitted uses in the SC District. The Motion was seconded by Mayor Quaranta. On vote, the Motion was unanimously approved.

There being no further business to discuss, Mayor Quaranta called for a Motion to Adjourn.

Mr. Losco made a Motion to adjourn the meeting. The Motion was seconded by Mr. Athey. On vote, the Motion was unanimously approved and the meeting adjourned at 8:19 p.m.

Kathy Weirich
Stenographer