

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

NOTICE OF DECISION

APPLICANT: Centerpoint 2001, LLC & Centerpoint 2021, LLC
1201 N. Market Street, Suite 400
Wilmington, DE 19801

OWNERS: Centerpoint 2001, LLC & Centerpoint 2021, LLC
1201 N. Market Street, Suite 400
Wilmington, DE 19801

NCC TAX PARCEL NO. 21-013.00-030
PUBLIC HEARING DATE: August 19, 2020 (Conducted via Zoom technology)
DATE OF DECISION: October 5, 2020

REQUESTED: Applicant requested: (1) a variance from Section 230-28(G)(1) of the City of New Castle Code to permit the construction of a 26 inch continuous evergreen hedge along Johnson Way without steel ornamental fencing where the City of New Castle Code requires steel ornamental fencing and a continuous evergreen hedge, and (2) a variance from Section 230-28(G)(2) of the City of New Castle Code to permit the installation of thirteen (13) 1.5 to 2 inch caliper shade trees where the City of New Castle Code requires forty-nine (49) 4 inch caliper shade trees, all in connection with the construction of a parking lot on property located at **1401 Johnson Way, New Castle, Delaware, New Castle County Tax Parcel No's. 21-013.00-106**, (the "Property" or "Lot A"). The Property is zoned OS & R, and I.

The Board of Adjustment may grant a variance from the requirements of Chapter 230 of the City of New Castle Code, (the "Zoning Code"), as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the Code would result in exceptional practical difficulty or unnecessary hardship, and where the applicant has demonstrated: (a) that special conditions and circumstances exist which are peculiar to the land, structure or buildings involved and which are not applicable to other lands, structures or buildings in the same district; (b) that literal interpretation of the provisions of the Zoning Code would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the Zoning Code; (c) that special conditions and circumstances do not result from the actions of the applicant; and (d) that granting the variance requested will not convey on the applicant any special privilege that is denied by the Zoning Code to other lands, structures or buildings in the same district.

Mayor Michael Quaranta chaired the meeting. Present as Board members were City Engineer David J. Athey and City Solicitor Daniel R. Losco. Also present was City Building Official Jeff Bergstrom. Mayor Quaranta read into the record the official notice of the hearing and noted for the record that the property was properly posted and advertised in the newspaper.

Shawn Tucker, Esq., represented the applicant at the hearing. Messrs. Mark Ziegler, Michael McConnell, and Gary Burcham were called forward as witnesses for the applicant and the Solicitor swore them in. Mr. Tucker gave a description of the applicant's project involving the construction of a commercial parking lot on, and introduced various exhibits including copies of the by-right plan previously approved by the Planning Commission, aerial photographs of the Property, an alternative landscape plan labeled 'Exhibit "A,"' correspondence with the Planning Commission, an overview of the Kwik-Check legal standard, and the text of Code §230-57.

Mr. Tucker provided a history of the development plan for the three lots affected by the Application. He stated that the Applicant had presented a "by-right" plan with respect to the parking lot to be developed on Lot A. This would involve installing ornamental fencing along the front of Lot A facing Johnson Way, and installing 49, 4 inch caliper shade trees on Lot A. However, Mr. Tucker explained that the applicant also owns two adjacent properties that are impacted by this application: an existing parking lot at 1501 Johnson Way, NCC Tax Parcel 21-013.00-030 ("Lot B"), and an undeveloped parcel used for storm water management at 1521 Johnson Way, NCC Tax Parcel 21-013.00-119 ("Lot C"). Mr. Tucker stated that while the Planning Commission approved a "by right" plan it suggested requesting relief from the Board of Adjustment to enact an alternative plan to address concerns raised by residents of the neighboring Washington Park community with regard to landscape buffering. Lot B and Lot C border the Washington Park community. Community residents were upset that construction of the parking lot on Lot A made it necessary to relocate a storm water management pond located thereon to Lot C, resulting in the loss of an existing tree buffer between the community and the Centerpoint Business Complex on Lot C.

Mr. Tucker stated that the Code required ornamental fencing along Johnson Way on Lot A would be out of character with the rest of the industrial park as no other lots have similar fencing along the roadway. He further argued that neither the ornamental fencing nor the 4 inch caliper shade trees required on Lot A provide substantial benefit to the neighboring residential properties. Instead, granting the proposed variances would create significant buffering to the benefit of the neighborhood's residents. Specifically, the applicant proposes eliminating the ornamental fence and reducing the size and number of shade trees on Lot A, and instead installing a fence along the rear of Lot A and planting a variety of new trees along the rear of Lot B and Lot C to buffer the Washington Park community from the industrial park properties.

Mr. Tucker introduced Mr. Ziegler, a professional engineer, who testified as to the nature of the variances sought, and the absence of ornamental steel fencing along Johnson Way elsewhere in the industrial park. He suggested that a more beneficial alternative for the community would be to eliminate the ornamental fence while maintain a 26 inch continuous evergreen hedge along the front of Lot A; reduce the number of plantings on Lot A and instead install a 6 ft. high wood or vinyl fence with landscaping along the rear of Lot B, and install a double line of landscaping along the rear of Lot C to provide a suitable buffer for the

neighborhood. The concept has been discussed with adjacent residents who prefer a 6 ft. vinyl fence, earth tone in color.

Gary Burcham, a registered landscape architect, next testified that the proposed landscaping would include smaller 1.5-2 inch caliper shade trees, and that these trees would have a higher chance of thriving as opposed to 4 inch caliper shade trees, due to the damage to severed tree roots required to transplant the larger trees. On question from Mayor Quaranta, Mr. Burcham stated that healthy smaller trees would be less likely to topple in strong winds. Mr. Burcham stated that by reducing the size to 1.5-2 inch caliper shade trees, the Applicant is proposing to plant 101 evergreen trees and 13 shade trees, as well as evergreen edging along the front of Lot A. This would include a double line of screening composed largely of non-deciduous native species planted along Lot C, including Norway Spruce, Eastern White Pine and Loblolly Pine. Short Leaf Pine and Virginia Pine would be planned closer to the new storm water management pond on Lot C and should thrive there. The end result would be a dense visual screen that over time will virtually obscure any view into the industrial park from the neighboring properties. Finally, Mr. Burcham explained that there is very little value in an ornamental fence, but that the proposed fencing and landscaping would address the neighbors' concerns, will provide sound reduction, and will benefit the community at large. Mr. Burcham also noted that the applicant has agreed to install light cutoffs in Lot A, and to retrofit light cutoffs in Lot B to reduce light migration into neighboring residential yards.

Mr. Burcham also addressed the fact that underground utility lines exist along this section of Johnson Way, creating a problem if an ornamental fence is erected along the front property line of Lot A. If a fence is located too close to the road such that it interferes with existing utilities, it may be damaged or have to be removed if the utility lines require work or repair. Conversely, if the fence is located deeper into the new parking lot on Lot A, it is likely to interfere with snow removal efforts or be damaged by snow piled next to the fence.

Mr. Athey asked if a location farther from Washington Park had been considered for the new storm water management pond, to which Mr. Ziegler explained that the current site on Lot C is optimum and allows for the redirection of 17 acres of water away from Washington Park. Mr. Ziegler also explained that there had been ongoing issues with the storm water management pond that had been on Lot A resulting in flooding onto Johnson Way.

Mr. Tucker introduced Michael McConnell with McConnell Development. Mr. McConnell testified to the size, age, character, and development of the industrial park, and that its further development is necessary to accommodate its current tenant, Amazon. He stated that the original development of the industrial park was not subject to the Code requirements currently in effect and that the current Code landscaping and fencing requirements do not align with the character of the park as built. He testified that the variances sought after will provide better functionality to the Lot A parking lot than the by-right plan, and saw no benefit to the

ornamental fence requirement. Mr. McConnell further noted potential practical issues with an ornamental steel fence built upon utilities lines including a 4 inch high pressure gas line and 480 volt power lines.

Mr. Tucker stated that the Applicant has entered into private agreements with interested neighbors to provide additional planting beyond the scope of the initial alternate landscape plan, provide perpetual maintenance of plantings if a tree dies or topples due to storm damage, and provide perpetual maintenance to repair or replace the fence along Lot B. He further reiterated that the Applicant has acted in good fair with the neighbors in Washington Park to address their concerns.

Mr. Tucker provided an analysis of the legal standard as applied to the sought after variance: (1) The site is zoned Industrial, none of the park was subject to the requirements of the Code adopted in 2004, and the ornamental fence is out of character of the industrial park. (2) The character of the immediate vicinity is largely residential to the east and industrial to the west. The alternate landscape plan will not alter the character of the vicinity, but will greatly benefit the residential neighbors. (3) The alternate landscape plan offers significant benefit to the community by relocation Lot A plantings to provide a buffer along Lots B and C, which is not required by the Code, and the Applicant has entered into agreements to provide additional plantings of benefit to the residential neighbors, and the relocation of the storm water management pond benefits the City as well as the community. (4) The hardship was not created by the Applicant, and denial of the variances will create an unnecessary hardship to Centerpoint Industrial Park by impeding its ability to improve the property, and may result in fewer living trees in the parking lot due to the significantly lower survivability of 4 inch caliper trees.

Mr. Bergstrom agreed the prior pond maintained on Lot A was insufficient to handle storm water events resulting in flooding. He stated the new pond on Lot C rectifies this and is a major asset to the City. He believes the alternate landscape plan is beautiful, and noted that it would mitigate noise and light pollution.

On question from Mayor Quaranta, Mr. Tucker stated that the Applicant currently has an agreement in spirit with the residents, and a contractual private agreement regarding additional plantings will be executed, including maintenance in perpetuity, tree replacement, and reinforcement from the industrial park tenant that its employees may not park in the community, but that no agreement currently existed despite multiple attempts to contact residents directly.

Public comments were received from Mr. Phillip Gross, and Ms. Angela Quinn. Mr. Gross requested clarification as to the extent of the proposed fencing. Mr. Tucker responded saying the fencing would run at the rear of Lot B and wrap around toward Johnson Way on the border with Lot C about 30 ft. Mr. Gross felt that a fence should surround the new pond on Lot C but Mr. Tucker stated DNREC discourages fencing around storm water management ponds.

Finally, Mr. Gross recommended a virtual meeting to allow for continuing discussion between the applicant and residents to finalize the private agreement.

Ms. Quinn voiced her support for granting the variances, and noted the general community concerns with noise and light pollution, the current visibility of the industrial park from the neighborhood, and the fact that a general agreement has been reached with the applicant regarding additional landscaping beyond what is proposed on the applicant's landscape plan.

There being no further public comment or testimony, the Board adjourned to its business meeting.

Mr. Losco noted that the variances would accomplish the following, to the benefit of all interested parties: improved drainage, improved screening, suppressed noise, enhanced parking, and an adequate and necessary buffer for the residents of Washington Park. He further stated the industrial park predates the 2004 Code Amendment, that the Board is not granting special privileges to the applicant in that no other tenants were required to install industrial fencing. He felt that the need for the variances did not arise from any actions of the Applicant, but that strict adherence to the Code would deprive the Applicant of rights enjoyed by other properties in the same district. Finally, Mr. Losco stated the unnecessary hardship or exceptional practical difficult standard was satisfied by the concerns raised regarding damage to a fence due to snow plowing, and interference with existing utilities lines. He indicated he would support the variance requests for these reasons, conditioned upon implementation of the alternate landscape plan.

Mr. Athey acknowledged the long standing drainage issues in Washington Park and agreed that the alternate landscape plan is superior to the by-right plan. Nonetheless, he voiced concern with setting a precedent that applicants can merely state that their alternate landscape plans are better than plans that meet Code requirements. He acknowledged the problems associated with planting large caliper trees and said that the City Council might be advised to consider reviewing this Code requirement. He noted that "hardship" is not defined in the Code and that the Board might actually be creating a hardship for residents of Washington Park if it were to deny the variances. Similarly, the Code directs the Board to reject a variance if contrary to public interest, but in this case, denying the variances create a situation that is contrary to the public interest. Thus, he concluded that he would support the variances requested conditioned on the final landscape plan being approved by the Code Official, Mr. Bergstrom.

Mayor Quaranta agreed that the "Kwik Check" hardship standard had been met for the reasons mentioned and that the alternative landscape plan is far superior to the by-right plan. He was pleased that the neighboring residents have been engaged in the landscape planning process voiced his support of both variance requests.

On motion of Mr. Athey, seconded by Mr. Losco, the Board votes to grant (1) the variance permitting the construction of a 26 inch continuous evergreen hedge along Johnson Way without steel ornamental fencing, and (2) the variance permitting the installation of thirteen (13) 1.5 to 2 inch caliper shade trees on Lot A, both variances being conditioned upon the approval of an alternate landscape plan by the Building Official substantially in conformance with the alternate landscape plan submitted by the applicant. All Board members concurred that the character of the industrial park, the community's storm water management needs, the concerns with utilities and snow removal, and the needs of the community presented a reasonable, exceptional practical difficulty for the applicant to develop and maintain the Property in conformity with the Code. No other part of the industrial park features ornamental steel fencing, and 1.5-2 inch caliper shade trees would improve their chances of survival while, when combined with the other features of the alternate landscape plan, would confer a greater benefit to the adjacent community. The difficulties presented are not of the applicant's own making, and the grant of the variance will not convey any special privileges to them, nor will either variance negatively affect third parties.

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

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE

A handwritten signature in black ink, appearing to read 'Michael Quaranta', is written over a horizontal line.

Michael Quaranta, Chairperson

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.