

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

NOTICE OF DECISION

APPELLANT : Michael Carter
70 Southgate Blvd.
New Castle, Delaware 19720

OWNER: Clare Holdings, LLC
315 Fourteenth Street
New Castle, DE 19720

PUBLIC HEARING DATE: August 12, 2020 (conducted via Zoom technology)

DATE OF FILING DECISION: August 26, 2020

PROPERTY ADDRESS: 423 W. 7th Street/0 Gray Street, New Castle, Delaware,
TAX PARCEL: 21-014.00-491 & part of 21-014.00-555.

BACKGROUND AND JURISDICTION: Appellant filed an appeal pursuant to Section 230-55 of the City Code seeking reversal of the Building Official's decision of March 24, 2020 determining that "collision repair" and "vehicle painting" are not permitted Service Commercial (SC) uses permitted in the Downtown Gateway District under the savings clause provisions of §230-21.1 (E). The decision relates to 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 (the "Property").

The Board of Adjustment has jurisdiction to hear appeals concerning the interpretation or administration of Chapter 230 of the City of New Castle Code, (the "Zoning Code") pursuant to §230-55 of the Zoning Code.

Mayor Michael J. Quaranta presided at the hearing conducted via Zoom technology. Also present as Board members were City Engineer David J. Athey and City Solicitor Daniel R. Losco. The Mayor read into the record the official notice of the hearing. As a preliminary matter, Mr. Losco stated that he was recusing himself from deliberating or voting in this matter due to his representation of the property owner, Clare Holdings, LLC.

Mr. Losco noted for the record that the Property had been properly posted with this appeal application and that notice of the hearing was published in the *News Journal* and the *New Castle Weekly*.

APPELLANT'S CASE IN CHIEF: The appellant was represented by William Rhodunda, Esq. Mr. Rhodunda indicated that he would be calling his client, Michael Carter, his business partner Russell Dalme, and a member of Clare Holdings, LLC, Anthony Gambacorta, to testify. All three witnesses were sworn in by Mr. Losco.

Mr. Rhodunda submitted a 5 page legal memorandum along with several exhibits including the following:

1. A copy of the Building Official's March 24, 2020 decision being appealed from;
2. A copy of Section 230-22 of the City Code relating to the "Service Commercial District SC";
3. A "Proposed Enhancement" plan of the Property illustrating certain proposed landscaping and fencing improvements;
4. A "Landscape Buffer Plan" of the Property;
5. An artistic rendition labeled "Landscape Buffer Elevation Views" for the Property;
6. A list of 9 "Voluntary Assurances" to be completed by the Appellant at the Property; and
7. A Google Maps aerial photograph of an auto body shop located on Rt. 40 near a residential development.

All of the foregoing were accepted into the record.

Mr. Rhodunda stated that the Appellant and Mr. Dalme are the equitable owners of the Property which was formerly zoned Service Commercial (SC), but is now in the Downtown Gateway (DG) zoning. They 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 he had requested a zoning verification letter from the Building Official to confirm that the Appellant's proposed use of the Property. Two of those uses, collision repair and vehicle painting, were determined by the Building Official to be prohibited in the SC zone, and were therefore not permitted on the Property under DG zone savings provisions of §230-21.1 E. Mr. Rhodunda stated that these two uses are a very small part of the overall business model. The business is essentially for corporate vehicle maintenance and repair. However, there is an aspect of the business relative to collision repair and painting; however it is only approximately 10% of the business. Mr. Rhodunda stated that the SC District permits "vehicle services" and noted that "services" is not a defined term in the Code. He stated that where a term is undefined, court decisions from the Delaware Supreme Court and the Delaware Chancery Court have concluded that the widest possible definition should be given to undefined terms. Accordingly, he argued that the term vehicle "services" must also be interpreted to include vehicle "collision repair and

painting”. A number of these court decisions were referenced in his legal memorandum. Alternatively, Mr. Rhodunda argued that since collision repair and painting work constituted only about 10% of the Appellant’s business, it should be permitted as an “accessory” use. He noted that accessory uses that are “incidental, and customary to and associated with, the operation of” a permitted SC use (in this case, general vehicle repair and maintenance) are permitted by §230-22 of the Code. He added that although painting and body work is a small part of the Applicant’s business, it is a critical part.

Mr. Rhodunda next detailed various improvements the Applicant has voluntarily agreed to do to the Property including enhanced landscaping and fencing, HVAC improvements, door replacements, and various other improvements. All painting work would be done indoors with modern water based paints that do not emit significant VOC’s. The Property would be entered into the Brownfields program to address environmental concerns.

Mr. Gambacorta stated that the Property has been for sale since 2008, and the building was originally used as a body shop. He stated that the building was at one time used for auto body work and painting; however it does not presently have the necessary elements required to do paint and body work.

Mr. Carter testified that he and his partner have owned Accurate Collision for 10 years; that they have had no issues with DNREC relative to environmental issues. He confirmed that approximately 10% of the overall business is painting, and the primary business is fleet services for the Post Office, windshields, tires, and collision repairs. The business has a staff of three, but at most two additional employees may be hired. Mr. Carter expressed his desire to improve the Property and make it aesthetically pleasing and an asset to the community. He explained that vehicles requiring excessive repairs are typically not accepted and they charge \$90 per day for storage to discourage long-term storage of wrecked vehicles. The new HVAC system they propose to install will ensure that all work can be done with the doors closed. He plans to make \$100,000 of improvements to the Property.

BUILDING OFFICIAL’S TESTIMONY: Mayor Quaranta asked Building Official Jeffrey Bergstrom to comment on the testimony. Mr. Bergstrom stated that he made his decision based on the law as he understood it for the reasons contained in his March 24, 2020 letter.

PUBLIC COMMENTS: The Board noted two letters of objection to the Application were received by the Board prior to the meeting. The points raised in these letters included:

- The Application does not meet the Code because collision repair and vehicle painting are not SC uses.

- The use of the property for collision repair and vehicle painting would contradict environmental protection standards.
- 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.
- Allowing a new location for a paint/body shop would run counter to the purposes of the Downtown Gateway District.

The Mayor opened the floor to additional public comment and heard from City Resident Phillip Gross in opposition to the appeal. Mr. Gross noted his agreement to comments by Mr. Athey concerning the setting of a precedent allowing auto body shops in the SC zone and comments by the Mayor pointing out that the Code distinguishes between auto sales and service (permitted in the SC zone) and automotive paint and body shops (permitted only in the in the General Commercial GC) zone.

An anonymous attendee made a number of comments in opposition to the appeal. These included questioning why the name of the business is “Accurate Collision” when only 10% of the work is collision/paint work, and whether the Appellant was willing to provide information on the cost of goods sold to prove that paint and body work was only 10-15% of the business.

REBUTTAL: In rebuttal, Mr. Rhodunda argued that the business started 10 years ago and was named “Accurate Collision” because it was more of an auto body shop at the time. Over time it has morphed into more of a corporate maintenance and repair business. He stated the Appellant could provide substantiation of the cost of goods if required. He pointed out that that building was constructed as a body shop and the front portion of the Property retained by the Owner would be developed in accordance with DG zoning. He emphasized the Appellant’s commitment to extensive landscaping in addition to other improvements and that the Property will be cleaned up by participation in the Brownfields program.

DECISION AND RATIONALE: On motion of Mr. Athey, seconded by Mayor Quaranta, the Board voted to affirm the decision of the Building Official that “collision repair” and “vehicle painting” are not permitted SC uses and therefore not permitted on the Property under the savings clause found in §230-21.1 E.

Mr. Athey stated that the opportunity to remediate the Property via the Brownfields Program is attractive, and he appreciated the Appellant’s plans to buffer the site. However, he rejected the argument that the Code is ambiguous. 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 intentionally isolated certain uses in the GC zone and allowed other uses in the SC zone. Mr. Athey noted that despite Mr. Rhodunda’s


compelling argument concerning the uncertainty of the meaning of the word “service”, the clarity of the SC and GC zoning overrides that uncertainty. He further noted that the intent of the DG zoning district as stated in §230-21.1 cannot be ignored, regardless of the savings clause in subsection (E). On the issue of whether collision and painting work is an “accessory use”, he noted that the Code uses the words “incidental” and “subordinate” when defining accessory uses. He opined that even if only 10% of the business related to collision repair and painting, it is an impactive use and is not merely incidental to the other parts of the business. 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.

Mayor Quaranta noted the Appellant’s proposed improvements to the Property would be substantial and he expressed his appreciation of the Applicant’s willingness to make the investment. However, the Mayor stated that the Code clearly intended to differentiate between uses in the GC and the SC districts and since “auto body work” was intended only for the GC zone, he feels it would be inappropriate to reverse the Building Official. The Mayor stated that the creation of the DG zoning district was intended to encourage more residential and less industrial/commercial use. He added that the City has locations set aside that are more appropriate for the Appellant’s proposed use. The Mayor reiterated that the Code is quite clear, and he therefore votes to deny the Appeal.

Based on the fact that the appellants failed to secure a majority vote in favor of overturning the Building Official’s decision, the appeal failed and the Building Official’s Decision was upheld.

Vote: 2–0 (Mayor Quaranta and Mr. Athey in favor of affirming the Building Official’s decision of March 24, 2020; Losco abstaining due to recusal)

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE



Michael J. Quaranta, Chairperson

NOTE: 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.