

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

NOTICE OF DECISION

APPLICANT: Battery Fee Owner, LLC
1007 N. Orange St., 4th Flr.
Wilmington, DE 19801

BUILDING OWNER: Jaksn, LLC
427 W. Seventh Street
New Castle, DE 19720

NCC TAX PARCEL NO. 21-014.00-400
PUBLIC HEARING DATE: December 22, 2022
DATE OF DECISION: February 09, 2023

REQUESTED: Applicant requested a special exception under sections 230-21.1 B (2) and 230-57 B of the Zoning Code of the City of New Castle (the "Code") to allow a mixed use multi-family residential-commercial development at property zoned DG and known as 427 W. Seventh St., NCC Tax Parcel No. 21-014.00-400. In addition, Applicant requested the following five (5) dimensional variances:

- a variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet (§230-21.1.C(1)(a));
- a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16' (§230-1.B);
- a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces (§230-28.A(15)(a));
- a variance from the required one (1) off-street loading space to permit a project containing no off-street loading spaces (§230.28.C); and
- a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units (§230-21.1.B(2))

Per Zoning Code section 230-21.1 B (2), the Board of Adjustment may grant a special exception in the Downtown Gateway (DG) zoning district zone for a mix of uses in a single building or group of buildings with first-floor nonresidential uses permitted in the DG zone and multifamily residential on the upper floors; provided residential density of upper floor residential uses shall not exceed 10 units per acre. To grant relief, the Board must find that the special exception is in harmony with the purpose and intent of the Zoning Code (the "Code") and will not adversely affect the public interest. In considering special exception applications, the Board

must consider the various factors listed in §230-57 B (2) of the Code including:

- a. The suitability of the property for the use desired, assuring itself that the proposal is consistent with the spirit, purpose and intent of the Code and, the City's Comprehensive Plan;
- b. Whether the proposed will substantially injure or detract for the use of neighboring property or from the character of the neighborhood and that the use of the adjacent property is adequately safeguarded;
- c. Whether the proposal will serve the best interests of the City, the convenience of the community, and benefit the public welfare;
- d. The effect of the proposal upon the public services and facilities, such as public water, sewers, police and fire protection, and public schools;
- e. The probable effects upon highway traffic and pedestrian movements, and assure adequate access and circulation arrangements in order to protect major roads from undue congestion and hazard; and
- f. The application of sound standards of subdivision and land development practice where applicable.

The Board may further prescribe conditions and safeguards as are necessary to assure that the intent of the Code is complied with. *See*, §230-57 B (2).

Mayor Michael J. Quaranta chaired the meeting. Present as Board members were Megan McClelland, Steven Zorrer, Robert Irwin and Dennis Anuszewski. Also present were City Planner Christopher Rogers, City Solicitor Daniel R. Losco, and City Code Official Jeffrey Bergstrom. Mayor Quaranta read into the record the official notice of the hearing. That notice was timely published in accordance with the law and a copy of the notice was admitted into the record.

John Tracey, Esq. represented the applicant before the Board. Also presenting testimony for the applicant were Robert Snowberger and David Rinnier of 9SCD LLC, and William Wendling, a civil engineer with MidAtlantice Engineering Partners.

Mr. Tracey described the subject property as being an irregularly shaped 4.13 acre parcel fronting W. Seventh Street. Currently, the property is largely paved with a 3,500 sq. ft. liquor store on site. Wetlands sit to the rear of the property which is otherwise bordered by The Garrison mixed use residential-commercial development and other industrial uses. The property is a "Brownfields" site with environmental contamination that has not yet been fully remediated. Mr. Tracey recited various sections of the City's Comprehensive Plan ("CP") stating that formerly industrial properties in the DG zone are envisioned to be redeveloped as a new pedestrian-oriented neighborhood district supporting the CP's goals of encouraging mixed

residential/retail/office uses, and incentivizing private investment in the City's remaining undeveloped parcels and brownfields harmoniously with nearby land uses. Mr. Tracey argued that the applicant's proposal is fully consistent with these goals.

Specifically, the applicant proposes a mixed-use project that retains the existing commercial use, a 3,000 sq. ft. liquor store on the first floor fronting W. Seventh Street, while incorporating two, 4-story 43' tall buildings containing 152 total apartments. Renderings offered for the record show first floor commercial, parking, and tenant amenity space, while the second, third and fourth floors would house 152 total apartments. The residential units include 3 studio apartments, 78 1-bedroom apartments, 64 2-bedroom apartments and seven 3-bedroom apartments. The applicant will be obligated to finish the environmental remedy under the Brownfields program that was begun but never completed.

Mr. Tracey noted that the proposed buildings are below the Code's 45 ft. height restriction. The property will be built up to a level that is 2 ft. above the projected end-of-century flood plain. No tidal wetlands will be disturbed and only ½ acre of non-tidal wetlands will be filled under an Army Corps of Engineers permit. The proposed development includes subdividing off certain wetlands which the applicant expects to donate to a preservation organization for long term stewardship and maintenance.

Addressing the specific considerations listed in §30-57 B (2) of the Code, Mr. Tracey presented a market study demonstrating a deficiency of 617 new residential units being available for rent in the area as evidence that the development would serve the best interest of the City, the convenience of the community and benefit the public welfare. He noted that the Planning Commission has reviewed the proposed plan and found the project to be consistent with the CP and the intent of the DG zone. He stated that the project would not substantially injure or detract from the use of neighboring property or the character of the neighborhood, but rather would improve the aesthetic of the City's gateway by improving a largely paved and unimproved parcel that currently contains only the existing liquor store. He argued that the applicant is unaware of any negative impacts to City services. Sewer and water are available to the site and the predominance of proposed studio and 1-bedroom apartments (81 units out of 152) will generate few new school children while providing significant school tax revenues. He supported this argument with a study from Long Island, New York on the impact of apartments on school districts. On the subject of traffic impact, Mr. Tracey conceded that no traffic impact study ("TIS") has been performed since the project meets the DelDOT Area Wide Study Fee standards. However, the applicant has conducted a traffic operational analysis of the 7th St. and Washington Ave. intersection consistent with DelDOT standards. The analysis concluded that the functionality of the intersection will remain the same.

Turning to the five (5) variances requested, Mr. Tracey noted that three (3) of them are

prompted by the CP's desire to encourage the mixed use aspect of the project favored by the CP and DG zoning. Without the retail-commercial component, these three (3) variances would not be required. The first variance seeks relief from the required one (1) off-street loading space to permit no off-street loading spaces. In response to a question from Mr. Anuszewski, Mr. Tracey stated that signs would be installed in front of the retail space that would allow parking for loading/unloading. Delivery times can be controlled so they are done when parking demand is at its lowest.

The second variance request seeks a 9 space reduction in the required 237 shared parking spaces to permit 228 shared parking spaces. Mr. Tracey submitted a Parking Analysis done by MidAtlantic Engineering Partners examining neighboring apartment communities. Based on this study, he argued that due to the large proportion of studio and 1-bedroom apartments proposed for the project, the site is probably over-parked at 237 spaces. Mr. Tracey reiterated that without the retail component of the project, this variance would not be required.

The third variance request seeks relief from the residential density limit of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre. Mr. Tracey argued that this request is minimal in nature as evidenced by the fact that if the project were purely residential there would no residential density cap whatsoever under the Code.

The fourth variance seeks permission to reduce the minimum area for a parking space from 9'x18' to permit 55 compact parking spaces each having an area of 8'x16'. This would represent less than 25% of the total parking spaces available. While not driven by the mixed-use aspect of the project, Mr. Tracey stated that the City of Wilmington Code (§48-447) and New Castle County (§40.22.612) create the opportunity to have reduce-size parking spaces (Wilmington – 30% / New Castle County – 25%). The applicant incorporated the New Castle County model in their parking layout. He argued that the reduced-size accommodates sub-compact, compact, and most mid-size vehicles. The parking study included four apartment communities and revealed that 45%-55% of the vehicles parked there were sub-compact or compact, well in excess of 25% of vehicles in the proposed project that would fit in the reduce-size space. Mr. Tracey concluded that there would be no negative impact by incorporating reduce-size spaces into the project.

The final variance seeks relief from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet (§230-21.1.C (1) (a)). Mr. Tracey noted that most of the properties within the DG zoning classification could not accommodate 40,000 square foot buildings because they are all less than one acre. He submitted a list of tax parcels and their acreage to illustrate the point. For larger DG zoned parcels such as this one, Mr. Tracey argued that a reasonable interpretation of

the Code is that the 40,000 sq. ft. limitation applies on a per-building basis as opposed to a per-property basis. As written, the Code would appear to suggest that no single building can exceed 40,000 square feet as opposed to combined square footage of multiple buildings on one site. The larger properties in the DG zone, including the subject parcel, could easily accommodate much more than 40,000 square feet. If the limitation is imposed on larger properties, it would create heavily underutilized real estate. Mr. Tracey argued that 40,000 square feet makes sense from a per-building standpoint because it allows larger properties to be developed to take full advantage of their size. Separate from these arguments, Mr. Tracey mentioned the unique features of this property that justified expansion of the total building footprint including the fact that it is a Brownfield site requiring remediation; it is located in a flood plain and needs to be elevated above base flood elevations; and substantial and costly necessary construction features that must be incorporated into the property before any building can be constructed. Absent the ability to reclaim these expenses this project is not viable. He cited several Delaware Superior Court cases supporting the idea that such costs unique to this property support a finding of exceptional practical difficulty to justify the grant of a variance for additional square footage. Testimony from applicant representative Robert Snowberger indicated the additional square footage was necessary to build apartments that are competitive with other area apartment developments. He stated the The Garrison development was recently sold at a cost of \$265,000 per unit. Without a variance, the applicant would be limited to 117 units at a construction cost of approximately \$339,000 per unit. At that price, rental rates would not be market competitive. He added that the odd shape of the site with minimal road frontage on 7th Street combined with the 43' building height, create unique conditions involving non-typical construction costs, such as the need for custom trusses.

Mr. Tracey concluded his presentation by summarizing the legal standard relating to dimensional variances under the *Kwik Check* case, as it related to the balance of the harm between the impact to the public if the variances are approved vs. to the applicant if the variances are denied. The applicant does not believe that there is any significant negative impact to the public if approved. The benefits of the project include meeting the goals of the CP; fulfilling the obligation of remediation of the Brownfields; aesthetic improvements to the property, and bringing a desired mixed-use to the area.

Questioning from the Board ensued concerning the construction costs unique to this Brownfields property located in the flood plain and containing non-tidal wetlands; proposed amenities for residents at the project; and the impact of the requested reductions in parking space size and number.

City Planner Christopher Rogers of AECOM provided his recommendations to the Board concerning the instant application. He stated that in general he is in favor of the proposed development and in the granting of the special exception. He was concerned that his company

did not have sufficient time to fully vet the traffic data that was submitted by the applicant. The applicant averred that the intersection operates at an acceptable level of service (LOS) and will continue to so operate. Mr. Rogers explained that Level A is the best operating intersection, but the lowest acceptable LOS is D. The Applicant is stating that the intersection will continue to operate at an LOS of C.

Regarding the maximum building coverage, Mr. Rogers explained the intent of this requirement is to ensure that developments maintain a pedestrian-oriented scale. He stated that given the configuration of the lot, there is very little of the building that impacts the streetscape.

Mr. Rogers stated that he had no issues with the other requested variances. His only concern with the application as a whole is AEACOM's inability to fully vet the traffic data.

Mr. Rogers further indicated that the applicant had addressed the comments made by the PC at its August meeting. Specifically:

- The plan was submitted for PLUS review;
- The applicant has provided elevation and floodplain data showing the first floor will be 2' above the end of century flood plain elevation projections, with residences at 10' above projected sea level elevations;
- The applicant has provided architectural plans which will be further vetted by the PC during site plan review to confirm compliance to the DG design standards;
- The applicant has provided traffic data that has not yet been fully reviewed by AECOM, but that this could be done in short order. AECOM's review of the data will ensure that the intersection is operational at acceptable levels, and if it is not, then AECOM would recommend a full Traffic Impact Study be submitted to DelDOT.
- The Head of Operations for New Castle County Sewers has stated that they have many pump stations near residential communities and they do not typically need odor control devices at the pump stations.
- Mr. Rogers opined that a certain easement agreement in favor of the City was created ensure access from this property to an adjacent lot, but that with this development, the easement will no longer be needed. City Council can extinguish the easement.
- The applicant worked with City Fire Marshall Jeff Bergstrom in creating its site plan. This Plan will be vetted during the plan review process.
- The applicant has submitted photos of a riprap type wall structure proposed for the development that Mr. Rogers found to be satisfactory.

- The applicant has provided building height calculations and Mr. Rogers confirmed that the building will be less than the 45' maximum permitted.
- Mr. Losco noted the PC's concern regarding the tidal wetlands proposed to be subdivided from the main parcel. The concern is that it would be a land-locked parcel that would fall into neglect and could become a problem that the City would have to maintain. The applicant seeks to dedicate the lot to a conservation group for perpetual maintenance.
- The applicant has delineated the wetlands on the site. The Army Corps of Engineers has confirmed this delineation and they are on record with the amount of fill and disturbance that is necessary in order for this development to occur.

The floor was opened to public comment and several parties appeared both in support and in opposition to the application. Philip Gross expressed support for the project as originally presented to the PC, but voiced concerns over traffic congestion and evacuation routes, flooding issues from sea level rise, the lack of off-street loading space. He ultimately opined that the special exception should be rejected. Thomas Whitehead objected to the grant of any variances and suggested the Zoning Code should be strictly enforced. Alison Fuentes spoke in support of the project as it will improve the appearance of the property and provide her with a place where she can walk to work from her home. Paula Gambacorta, a neighboring property owner, spoke in favor of the project and its positive impact on property values. Brian DiSabatino also spoke in favor of the project and its developer noting that when the CP's vision agrees with a developer's, reasonable accommodations are appropriate to address the reality of marketplace and site unique constraints. The Mayor also read several letters into the record generally opposing any new development and questioning why the Board's hearing should be held during the holiday season. Mr. Tracey was given reasonable rebuttal time to address these objections, re-emphasizing points he had already made in his presentation. The Board then adjourned to its business meeting at 8:56 p.m. after a five minute recess.

During the business meeting discussion ensued among the Board as to the special exception and variances requested, with each Board member being given opportunity to address their thoughts on the matter. The general consensus was that the property was currently a contaminated eyesore and should be redeveloped in conformance with DG zoning and the CP; that traffic congestion was a concern but that AECCOM should be given time to evaluate the traffic data submitted; that the future maintenance of the tidal wetlands were a concern; and that the issue of extinguishing the existing easement was a matter for City Council to address.

The Special Exception: Mr. Irwin moved to approve the special exception to utilize the property as a mixed use multi-family residential-commercial development conditioned upon AECOM's review of the traffic data and confirming that the 7th Street and Washington Street intersection will continue to operate at a level of service D or better following build-out of the

project. If this condition cannot be met, the applicant must submit a Traffic Impact Study for review by DelDOT as part of the Site Plan submission of the Planning Commission. The motion was seconded by Mr. Anuszewski. **The motion passed unanimously.** The Board reasoned that the project is: (a) consistent with the CP and DG zoning; (b) similar and in harmony with other developments in the area; (c) is good for the City in that it aesthetically improves and remediates a Brownfields site; (d) unlikely to have negative impact on City services; and (e) conditioned upon the applicant's verified traffic data illustrating no worsening levels of service at the 7th St. and Washington St. intersection.

The Board then addressed the five (5) variance requests.

Variance 1: Mr. Anuszewski moved to approve the variance from the maximum building footprint of 40,000 square feet to permit a project containing two (2) buildings with a combined building footprint of 52,273 square feet. The motion was seconded by Mr. Irwin. **The motion passed unanimously.** The Board found exceptional practical difficulty in making reasonable, cost effective improvements to the property due to the unique challenges presented by the site in terms of the need to elevate it from the flood plain, remediate environmental contamination, and fill in non-tidal wetlands. The Board also found the request to be consistent with DG zoning and not injurious to surrounding uses.

Variance 2: A motion was made by Mr. Zorrer to approve variance 2, a variance from the minimum area for a parking space of 9'x18' to permit a project containing 55 (24%) compact parking spaces each having an area of 8'x16'. The motion was seconded by Mr. Irwin. **The motion passed unanimously.** The Board found exceptional practical difficulty in making reasonable, cost effective improvements to the property due to the unique challenges presented by the site in terms of its irregular shape and the fact that most modern autos, especially EV vehicles, tend to be smaller in size. The Board also found the request to be consistent with DG zoning and not injurious to surrounding uses or the community in general.

Variance 3: A motion was made by Mr. Irwin, seconded by Ms. McClelland to approve variance 3, a variance from the required 237 shared parking spaces to permit a project containing 228 shared parking spaces. **The motion passed unanimously.** The Board found exceptional practical difficulty in that the majority of apartments proposed are studio or one bedroom units generating fewer vehicles to park. A reduction of 9 spaces is minimal in nature and is only required to accommodate the commercial use of the property favored by the CP. The mixed use is encouraged by and consistent with DG zoning. It is consistent with, and would not harm, surrounding properties and uses.

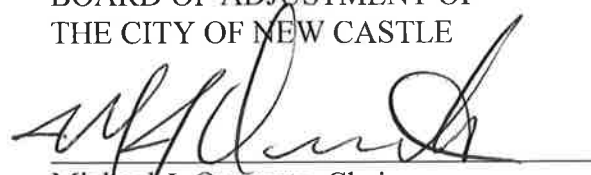
Variance 4: A motion was made by Mr. Irwin to approve a variance from the required one off-street loading space to permit a project containing no off-street loading spaces. The motion was amended by unanimous vote to include a condition that there be a prohibition of on-

street loading and unloading that would be enforceable as a condition of the Board and under the City Code. The amended motion was seconded by Mr. Zorrer. **The amended motion passed unanimously.** The Board found that the property does presents unique practical difficulties (Brownfields remediation, flood plain elevation requirements, wetlands filling as discussed above) that require a certain number of units to make the project economically viable. The Board found no negative impact to the community. The CP encourages mixed use developments in this area. Testimony indicated that the applicant will be able to manage on-site loading times for the single commercial tenant. The condition imposed guards against safety issues with street loading/unloading and related traffic congestion.

Variance 5: A motion to was made by Mr. Anuszewski to approve a variance from the permitted residential density of 10 residential units per acre within a mixed use project to permit a mixed use project having 36 residential units per acre - 152 total residential units. The motion was seconded by Mr. Irwin. **The motion passed by a vote of 3 to 2, Mr. Zoerer and Ms. McClelland voting in the negative.** A majority of the Board found that the unique character and nature of the property as described above presented the requisite exceptional practical difficulty. The evidence illustrated that the requested unit count was essential to building a viable project. Board members noted that the majority of the units will be 1-bedroom and studio apartments suggesting a lower population density than would be experienced with larger apartment units.

There being no further business to discuss, the meeting adjourned at 10:17 p.m.

BOARD OF ADJUSTMENT OF
THE CITY OF NEW CASTLE


Michael J. 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.