

BOARD OF ADJUSTMENT – CITY OF NEW CASTLE DELAWARE

IN RE: VARIANCE APPLICATION OF)
Parkway Gravel, Inc.)
130 & 150 Lukens Drive) CA. No. 2024-__
New Castle, DE 19720)
)
CITY OF NEW CASTLE, DELAWARE)
PARCEL NO. 21-023.00-001 and)
21-022.002)

NOTICE OF DECISION OF THE BOARD OF ADJUSTMENT

Introduction

The City of New Castle Board of Adjustment (the “Board”) held a hearing on April 2, 2024 (the “Hearing”) in The City of New Castle (the “City”) at the New Castle City Police Conference Room regarding the above-captioned case. The following members of the Board were present at the Hearing representing a properly constituted quorum:

Present:	Valarie Leary (Mayor)	Chair
	Steve Zorrer	Board Member
	Robert Irwin	Board Member
	Dennis Anuszewski	Board Member
	Assunta Scarpitti	Board Member

Also present were:

Jeffrey Bergstrom, City Building Official
Christopher Rogers, City Planner
Max Walton, City Solicitor

Background

Parkway Gravel, Inc. (the “Applicant”) is the owner of that certain real property located at 130 & 150 Lukens Drive, New Castle, DE, City of New Castle, Delaware (the “Property”). The Applicant was represented at the hearing by the law firm Barnes and Thornburg. Shawn Tucker made the presentation for the Applicant and Michael DeNote also attended. Prior to the Hearing, the Applicant presented an application for a special exception and variances to the City (the

“Application”), and the Application was provided to the Board. The Application seeks the following:

1. A Special Use Exception to construct residential apartments on a portion of the Property proposed to be rezoned from IOP-Industrial Office Park to GC-General Commercial. Section 230-22.1(B)(1) of the City of New Castle Municipal Code permits residential use in the GC District upon approval of the Board of a special exception.
2. Variance from Section 230-28 of the City of New Castle Municipal Code which requires 1087 parking spaces for the project to allow 885 parking spaces.
3. Variance from Section 230-28(G)(1)(a)-(b) of the City of New Castle Municipal Code to allow installation of an evergreen screen in lieu of a solid brick or steel ornamental fence.

Based upon the Board of Adjustment packet and file, the Board finds that all notice prerequisites in the Code to hear the variance were satisfied in advance of the Hearing.

Standard of Review

In this case, the Applicant is seeking a special exception for apartments, in addition to a pair of area variances. The standard for the grant of a special exception for the apartments is set forth in the City of New Castle municipal code, Section 230-57B (2). That section states, in pertinent part:

In considering any special exception application, the Board of Adjustment shall:

- (a) Consider the suitability of the property for the use desired. Assure itself that the proposal is consistent with the spirit, purpose, and intent of this chapter, the Comprehensive Plan, and other relevant plans.

(b) Determine that the proposal will not substantially injure or detract from the use of neighboring property or from the character of the neighborhood and that the use of the adjacent property is adequately safeguarded.

(c) Determine that the proposal will serve the best interests of the City, the convenience of the community, and benefit the public welfare.

(d) Consider the effect of the proposal upon the public services and facilities, such as public water, sewers, police and fire protection, and public schools.

(e) Consider 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.

(f) Be guided in its decision by sound standards of subdivision and land development practice where applicable.

(g) Prescribe conditions and safeguards in addition to those otherwise required by the City Code as are necessary to assure that the intent of this chapter is complied with, which conditions may include (but are not limited to) harmonious design of buildings, planting and its maintenance as a sight and sound screen, the minimizing of noxious, offensive or hazardous elements, and adequate standards of parking, loading and sanitation.

The standard applied to the two area variances sought here are well settled. Area variances such as these consider “whether a literal interpretation of the zoning regulations results in exceptional practical difficulties of ownership.” *Kwik-Check Realty, Inc. v. Bd. of Adjustment of New Castle County*, 389 A.2d 1289, 1291 (Del. 1978). The Board must weigh: 1) the nature of the zone where the property lies; 2) the character and uses of the immediate vicinity; 3) whether removal of the restriction on the Applicant’s property would seriously affect the neighboring property and its uses; and 4) whether failure to remove the restriction “would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.” *Id.*

Testimony Presented

Mr. Tucker walked the Board members through a PowerPoint presentation of the proposed project and the timeline (which is incorporated into the record):

- The existing zoning allows the construction of a logistics park on the site; instead, the Applicant wanted to preserve the river views for residential enjoyment.
- The Applicant is proposing 46 single family homes, 26 twin homes, 107 town homes, and 451 apartment units.
- The Planning Commission voted in favor of advancing the project on February 27, 2023, and City Council voted in favor of the zoning changes that would allow the proposed project with conditions on May 9, 2023.
- The Comprehensive Plan states that mixed use can be beneficial and should be encouraged.
- The property is located in a Level 1 area and partly in a Level 2 area according to the Comprehensive Plan.
- The Charter School of New Castle supports the proposed project.
- The approximate revenue to the City of New Castle from taxes and impact fees is estimated to be \$264,000.00. Estimated revenue to the County is \$73,000 annually.
- Trash pick-up will be private, and therefore, not a burden to the City public works.
- Some public comment in favor of the proposed project included (1) the close proximity of affordable housing for young people in the City and (2) a residential project would not have as much blacktop/parking as would a warehouse.
- The Applicant agreed to provide a motorized gate at a secondary exit from the site that would be controlled by law enforcement and fire departments to mitigate emergency evacuation.
- The concept plan was tied to the rezoning voluntarily.

- The Applicant met with the Police Chief and nearby Fire Companies, and the only comment was that they were encouraged to have someone monitor the site during construction. No concerns were raised regarding emergencies.
- DelDOT did not require a traffic study; however, a traffic study was done following DelDOT standards. A peer review was done of the study that identified a number of items that were recommended and the Applicant agreed to comply with those recommendations.
- Mr. Tucker reviewed the variances being requested.
- Based on parking studies done across the country the number of parking spaces proposed in the variance is adequate. In addition, the site offers several options for overflow parking if necessary.

Mr. Tucker concluded his presentation and called witnesses to testify.

Mike Loftus, Civil Engineer, testified that:

- The site consists of approximately 168 acres with approximately 49 acres of green space.
- Mr. Loftus identified the following areas on the presentation slide:
 - The retail space of the 4-story units.
 - The area consisting of retail (12,000 square feet), a clubhouse and a restaurant (22,000 square feet combined).
 - The single-family homes (46 units).
 - The primary access for ingress and egress.
 - The town homes (107 units).
 - The twin homes (26 units).
 - The storm water facility.
 - The overflow parking area (120 spaces) and an additional area that could be used for parking if necessary (170 spaces). Mr. Loftus explained additional requirements that would be necessary if the additional area were used for parking.
- No buildings will be built in the flood plain.

- All buildings will have a minimum elevation of 3' above the 100-year flood elevation.

In response to a question from the Board, Mr. Loftus explained the parking that is available at the clubhouse/pool/restaurant area.

Seth Shapiro, Director of Urban Design with Barton Partners, testified that:

- The views were incorporated into the design and were the guiding principle for the plan design.
- Mr. Shapiro explained the mass and scale of the proposed residential/retail areas.
- The single-family homes have garages and are currently designed for rent, but can potentially be sold.
- The twin homes are two-stories and have garages.
- The town homes are two-stories and have shared surface parking.
- There are six three-story garden-style apartment buildings served by stairways on either side of the buildings. Each stairway serves four units per floor.
- The four-story mixed-use buildings will be served by elevators.
- The retail/residential mix was clarified.
- The amenities at the clubhouse were identified.
- The retail space was identified on the presentation slide.
- The site is designed to encourage connectivity and enjoyment of the river views.
- The mix of residential and retail uses is suitable for the property and provides residential units close to job centers.
- The proposed subdivision use is consistent with the current zoning and the Comprehensive Plan.
- The proposed subdivision will not substantially injury or detract from the use of the neighboring properties or the character of the neighborhood.

- The proposed subdivision will serve the best interests of the city and benefit the public welfare.
- The design was guided by sound standards of subdivision and land development.
- By strictly adhering to the Code, the site would be overparked, and the site was planned very carefully to provide sufficient parking while maintaining green space. The Code does not specifically address a mix of units as proposed in the plan and it does not recognize how contemporary family communities operate; *i.e.*, the Code calls for two parking spaces per residential unit and one parking space per 100 square feet for the clubhouse, which is completely walkable to the community. Retail parking in the Code is four per 1,000 and that number has been provided in the plan. Forty spaces have been provided for the restaurant, and overflow parking is available. National studies for the residential units indicate that two spaces per unit is far beyond demand; and the independent study the Applicant had done mirrors those studies relative to the actual demand which is 1.38 to 1.4 parking spaces per unit for stacks, studios, and one- and two-bedroom apartments. Mr. Shapiro referenced a study done in New Jersey that mirrored their findings of 1.4 parking spaces per unit. The proposed project provides for two parking spaces per unit for town homes and twins homes; and 1.5 parking spaces for the stacked flats and garden apartments. The Applicant is seeking a variance to provide 885 parking spaces.
- The plan was intentionally designed with a water-front element.

Mr. Tucker added that:

- The Applicant reached out to New Castle County regarding sewer capacity demand.
- The Applicant reached out to MSC regarding water and electric.
- Impact fees are still being studied. The current statute does say that impact fees are required and the Applicant will comply with the State laws.

In response to a question from the Board, Mr. Shapiro explained that the plan includes loading/unloading areas at the clubhouse and behind the two retail sites.

Nicole Kline-Elsier, a Certified Professional Transportation Operations Engineer with McMahan & Bowman testified that:

- The Traffic Impact Study was done voluntarily using DelDOT standards evaluating site accesses and the main entrance at Lukens Drive and Cherry Lane, as well as a number of intersections along the Rt. 9 corridor. The process of how the study was done was explained.
- The study concluded that the roadway network in the area is sufficient to accommodate the traffic that will be generated by the proposed development.
- Traffic improvements were recommended through the study process that the Applicant has agreed to:
 - Pedestrian facilities will be provided within the site and along Lukens Drive.
 - A new bus stop with two companion bus stop pads will be provided in the vicinity of the site on Lukens Drive as well as an appropriate cross walk to allow pedestrians to safely cross between the bus stops. A cross walk to the existing parking area in the event overflow parking became necessary can be provided as well.
 - Additional striping on Lukens Drive will be provided so the existing cartway on Lukens Drive will indicate two 11' travel lanes and two 5' shoulders on either side.
 - Additional 25-mile-per-hour posted speed limit signage will be installed along Lukens Drive in the vicinity of the proposed project.
- The Traffic Impact Study demonstrated that the intersection of Cherry Lane and Rt. 9 currently meets the DelDOT Level of Service (LOS) standards of D or better, and it will continue to meet those standards with the implementation, construction and occupation of the proposed project. Ms. Kline-Elsier explained the LOS standard, noting that LOS D or better is the prescribed DelDOT standard.

- A separate parking needs study on multi-family units was done using the most updated standards, and the results concurred with the study done by Barton Partners. Peak parking demand is 1.27 spaces for studio and one-bedroom units and 2.59 spaces per two-bedroom unit. The weighted average demand is 1.38 spaces per unit. Ms. Kline-Elsier opined that based on the analysis, the proposed plan provides adequate parking per unit.

Mayor Leary called for a five-minute recess at 8:13 p.m.

Following the recess, Ellen Tracey, Landscape Architect, testified for the Applicant, explained the Landscape Plan, and stated that:

- Where parking areas are adjacent to the roadway the Code calls for fencing or a continuous hedgerow of 26” in height.
- The proposed Landscape Plan calls for a fairly dense evergreen screen of large evergreen plantings where the parking area is adjacent to the street and where the parking area butts an open space to the street.
- The proposed Landscape Plan calls for a combination of 5’ to 6’ high spruce, holly, and cedar evergreens along with a mix of shrubs to be planted in those areas to provide an immediate screen.
- The evergreens will grow an average of 1’ and 3’ each year while they are getting established.
- The mass planting will also adjoin the perimeter wall that screens the loading zones.

In response to a question from Mayor Leary, Ms. Tracey stated that two pocket parks with seating, walkways and gathering spaces are being proposed. A community playground is also being proposed. Ms. Tracey detailed areas within the site that will be landscaped with trees.

Mr. Tucker reviewed the Kwik-Check standards for the two variances:

Landscaping

- In this context, the Code requirement is not nearly as desirable as Ms. Tracey’s Landscape Plan.

- In the nature of the zone and the uses therein, if the variance is granted it will have no adverse impact on the surrounding area, and is a reasonable improvement in the normal course of developing properties such as this where the Code is actually bringing a hardship. This is the exceptional practical difficulty.

Parking

- Both witnesses who testified regarding parking and traffic concurred that the parking proposed would meet and slightly exceed the actual demand in this use. In a worst-case scenario, if there is a parking problem, the Applicant understands that additional parking would need to be provided.
- The Applicant did not create the hardship, and expert testimony indicates that if the Board were to grant the parking variance, it would not have an adverse impact and there is a failsafe of additional parking if needed.

Mayor Leary asked for clarification of the special exception. Mr. Tucker explained that the special exception is to construct residential apartments on a portion of the property that was just rezoned to GC.

Mr. Bergstrom stated that the Applicant has presented an excellent project that incorporates a way to enjoy the view of the river.

Mr. Rogers stated that the proposed plan is consistent with the plan presented to the Planning Commission and City Council, and was part of the Ordinance that was approved to rezone the site.

Mr. Rogers asked for confirmation that the overflow parking is not required parking for any other previously approved site plan. Mr. Tucker stated that Mr. Loftus testified that based on his research of the records, the site is a stand-alone parking area and no other use was dependent upon it.

Mr. Rogers asked if it is appropriate to discuss an easement being placed on the overflow parking site. Mr. Walton stated that the hearing is for the two variances and the special exception, and an easement on the overflow parking area is more of a site plan issue.

In response to a question from the Board, Mr. Tucker stated that there is lighting in the internal parking areas.

Nicholas Ferrara from Parkway Gravel testified that:

- The proposed plan does not include lighting for the overflow parking area; and there would be no objection to lighting being added to that overflow parking area.

Public Comment

Richard Smith

Mr. Smith spoke in favor of the proposed development, noting that the developer has been very responsive in working with the community during this process and that the NAACP and the community support the project. He added that the developer is very nice and opined that there is sufficient parking.

Phil Gross – 1301 13th Street

Mr. Gross spoke in favor of the proposed development, noting that the developer has worked very closely with the community on the project. He suggested fencing around the playground to ensure child safety.

Jeannette Swain

Ms. Swain spoke in favor of the variances and the proposed development, noting that it will bring new life to the area.

Rod Miller – East 3rd Street

Mr. Miller spoke in opposition of the proposed project. He noted a number of issues that residents of the proposed project will have to deal with: the condition of Lukens Drive, the fact that very few motorists adhere to speed limits, traffic jams, limited ingress and egress, limited emergency access, and the rail road tracks. He noted that there are already 2,300 people who work in that area, and by adding an outrageous number of vehicles car crashes could increase.

Dora Williams

Ms. Williams noted that Mr. Miller brought up some valid points, and said that she was initially skeptical about the proposed project; however, she stated that she feels that the new community will discourage heavy industry and the mixed use

will be the answer to that dilemma. She stated that the community aspect of the project and the heavy evergreen screening is excellent. She added that the developer really thought about the surrounding communities during the process.

Mr. Tucker made final comments:

- The alternative use of the site would have been warehousing, and the proposed community will add less traffic to the site than an industrial use.
- He opined that traffic jams at the intersection and by a train passing by would be minimal.
- The Police and Fire Department will have the ability to open the emergency access gate in an emergency.
- Fencing around the playground could be reviewed during the subdivision process; however, DNREC does not require fencing around playgrounds because in its opinion, it is not a good idea to put up fences where you need to get to a child quickly because children are very good at getting over a fence but adults are not.
- The Police Chief shared with Mr. Tucker that this project actually gives the department standing to hire an additional officer to fill an existing need.

Decision

After reviewing the record, hearing testimony, and receiving comments from all persons attending the Hearing, the Board APPROVED the Application by a unanimous vote for the reasons stated on the record by the Board members at the time of their vote (all such reasons are incorporated herein and made part of this written decision by reference). The Board finds that the Applicant has met its burden for the grant of the approvals requested.

Regarding the special exception request, adopting the undisputed testimony of the Applicant's witnesses, Mr. Zorrer indicated that for the reasons stated by the witnesses (summarized above), the requirements of Section 230-57B (2) (a-g) were satisfied. All Board members incorporated Mr. Zorrer's reasons as part of their vote, and the special exception request passed unanimously. For the reasons stated in the record, the special exception portion of the Application was thereby APPROVED.

Regarding the parking variance from the required 1087 parking spaces to the requested parking of 885 spaces, the Board voted unanimously for a condition that if the overflow parking lot is going to be used for the restaurant, retail shops, or visitors, that lights be installed so there is no hazard with parking in that area. With that condition, the Board found that that the nature of the zone where the property lies and the character and uses of the immediate vicinity will not be altered. The Board further found, as articulated in Mr. Zorrer's motion, that the Applicant had established an exceptional practical difficulty because, based upon the evidence presented, it is unreasonable make the Applicant use two parking spaces per single family unit and 1.5 parking spaces per multi-family units and the proposed project is unique to the area. All Board members concurred that an exceptional practical difficulty was established and adopted this reasoning for the grant of the variance.

For the landscape variance, the Board voted to grant the variance for landscaping per §230-28(G)(1)(a)-(b) of the City of New Castle Municipal Code to allow the installation of an evergreen screen in lieu of a solid brick or steel ornamental fence in selected areas. The Board voted to approve the variance because the nature of the zoning in which the property lies is not inconsistent with anything in the area, it provides a barrier to Lukens Drive, it is superior to the 26" screening requirement, it will not have a negative impact on any property already in the area, there is exceptional practical difficulty because the screening required in the Code is insufficient for the property, and based on testimony presented an evergreen screen will better screen the loading docks on the property. It was also noted that the evergreen screen is much better suited to the site. The Code and the unique nature of this property establish exceptional practical difficulty in complying with screening requirements and an evergreen barrier is superior.

For these reasons, and for the reasons stated on the record at the Hearing, the special exception requested was APPROVED and the pair of variances requested were APPROVED.

A copy of this written decision shall be mailed to the Applicant, and all persons requesting a copy of the written decision in writing, on the date it is filed.

Board of Adjustment Decision – Parkway Gravel, Inc.

130 & 150 Lukens Drive

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A handwritten signature in cursive script that reads "Valarie Leary". The signature is written in black ink and is positioned above a horizontal line.

The Honorable Valarie Leary, Mayor/Chair
On Behalf of the Board

Date of Decision: April 2, 2024

Date of Written Decision/Date Filed: April 30, 2024

Note: This decision may be appealed to the Superior Court by any person aggrieved by it within thirty (30) days of this filing in the Office of the Board of Adjustment at Town Hall, 220 Delaware Street, City of New Castle, Delaware, 19720.