

BOARD OF ADJUSTMENT – CITY OF DELAWARE CITY

IN RE: VARIANCE APPLICATION OF)
HENRY & BEVERLY WALTON/WHITTAKER BROS.)
609 FRONT STREET)
DELAWARE CITY, DELAWARE)
PARCEL NO. 22-007.00-209)

NOTICE OF DECISION OF THE BOARD OF ADJUSTMENT

Introduction

The City of Delaware City Board of Adjustment (the “Board”) held a hearing on June 27, 2016 (the “Hearing”) in The City of Delaware City (the “City”) regarding the above-captioned case. The following members of the Board were present at the Hearing representing a properly constituted quorum (*see* Del. City Code § 46-117):

Present:	Paul Parets	Chair
	James Brady	Board Member
	Andrea Nolan	Board Member

Background

Henry Walton/Whittaker Bros. (the “Applicant”) are the owner(s) and equitable owners of that certain real property located at 609 Front Street, Delaware City, Delaware (the “Property”). Prior to the Hearing, the Applicant presented its application for one variance to the City Manager (the “Application”). The variance sought is a variance that should have been requested, but was missed, in 2013 when the initial three lot subdivision was requested. The variance application seeks one variance as follows:

Frontage Variance – Variance from 60’ to 32.50.

It was established at the Hearing that the Property was properly posted and certified mailings were sent out to potentially affected contiguous property owners. Based upon the exhibits entered into the Hearing record, and the testimony provided at the Hearing, the Board finds that all notice prerequisites in the Code to hear the variance were satisfied in advance of the Hearing. Del. City Code § 46-111. This is the Board’s written decision on the Application.

Standard of Review

The standard applied to area variances such as this considers “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.*; *see also* Del. City Code § 46-62.

Testimony Presented

Mr. Whittaker presented in favor of the application. As more fully spelled out on the record, he presented evidence that certain area houses, all similarly zoned, had similar or less frontages and argued that historically certain houses in the area had the same or similar lot frontages. He further testified that this variance should have been presented when the initial subdivision was approved back in 2013 – but it was missed. In addition, he testified that the nature of the surrounding properties is primarily residential, and stated that the exceptional practical difficulty for this application is that if the variance is not granted, the lot will be unbuildable and useless. Mr. Whittaker also testified that while there are some drainage problems in the area, some of those were caused by a defective catch basin pipe that has now been repaired. Pictures and exhibits were presented by Mr. Whittaker – all of which were made part of the record.

Mr. Louis Schultheis, an owner of property adjoining lot one of the 2013 subdivision, opposed the grant of the variance. As more fully stated on the record, he testified that there were drainage problems relating to the construction ongoing on lot 1 of the 2013 subdivision. He further testified, among other things, that trees had been illegally planted in the right of way near lot 1 of the subdivision. He further made a number of complaints regarding the construction on lot 1. He also testified that approximately 75% of the lots surrounding area were conforming

lots, and only 25% of the lots in the same zoning classification contained less than 6,000 square feet with non-conforming frontage. Mr. Schultheis further testified that the variance should be denied because there is insufficient road clearance pursuant to Section 46-46 of the Code, and that the variances initially granted for the project had expired pursuant to section 46-62 of the Code.¹ Mr. Schultheis presented pictures and documents, all of which were made part of the record.

The Board Chair asked the Board Attorney if the Board could consider Mr. Schultheis' code compliance issues prior to deciding the variance requests. The Board Attorney advised that there was only one matter on the agenda – the frontage variance. If Mr. Schultheis desired to make a complaint regarding ongoing construction or other issues, those issues should be presented to the City's Code enforcement department. Following a determination by Code enforcement, the Board would be the appellate body to hear a Code enforcement appeal. As such, the only issue properly before the Board is whether the applicant has met its burden of establishing whether a variance should be granted for the frontage variance requested.

Decision

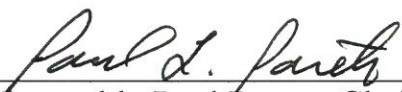
After reviewing the record, hearing testimony, and receiving comments from all persons attending the hearing, the Board GRANTS the Application for the reasons stated on the record by the Board members at the time of their vote (all such reasons are incorporated herein and made part of this written decision by reference).² The Board finds that the Applicant has met its burden for the variance.

¹ It is questionable whether the prior variance granted could expire pursuant to the Superior Court's decision in *Kirkwood Motors v. New Castle County Bd. Of Adjustment*, 2000 WL 710085, at *1 (Del. Super. Ct. May 16, 2000). The Board, however, makes no findings on this issue because that matter was not properly before the Board.

² At the hearing, a Motion was made, seconded, and discussion followed. The Motion carried unanimously that the variances be GRANTED, and each board member articulated the reasons for his or her vote on the record. The articulated reasons are incorporated herein by reference.

The Board finds that the nature of the zone where the property lies and the character and uses of the immediate vicinity will not be altered because the project allows residential uses similar to surrounding homes. Thus, the grant of the variance will not seriously affect neighboring properties and uses. And, as the applicant presented, a number of the surrounding lots (at least 25%) have non-conforming lot frontage consistent with the application at issue. The Applicant has established exceptional practical difficulty, in addition to the reasons stated on the record, by demonstrating that if the variance is not granted, the lot will be unbuildable and useless and the area has already been subdivided to allow for this lot. For these reasons, and for the reasons stated on the record at the hearing, the variance requested is GRANTED.

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.



The Honorable Paul Parets, Chair
On Behalf of the Board

Date of Decision: 6/27/16

Date of Written Decision/Date Filed: 7/11/16

Note: This Board of Adjustment 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 thirty (30) days of this filing in the Office of the Board of Adjustment at Town Hall, 407 Clinton Street, Delaware City, Delaware.