

**BOARD OF ADJUSTMENT – CITY OF DELAWARE CITY**

IN RE: SPECIAL EXCEPTION & USE VARIANCE )  
APPLICATION OF DELAWARE HOLDING, LLC )  
PRESENTED BY KEVIN WHITTAKER )  
70B CLINTON STREET, )  
DELAWARE CITY, DELAWARE )  
PARCEL NO. 2200700122 )

**NOTICE OF DECISION OF THE BOARD OF ADJUSTMENT**

**Introduction**

The City of Delaware City Board of Adjustment (the “Board”) held a hearing on January 4, 2017 (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:	James Brady	Board Member/Acting Chair
	Andrea Nolan	Board Member

**Background**

Delaware Holding, LLC, represented by Kevin Whittaker (the “Applicant”), is the owner of that certain real property located at 70B Clinton Street, Delaware City, Delaware (the “Property”). Prior to the Hearing, the Applicant presented its application for a special exception and a use variance to the City Manager (the “Application”). The Application seeks as follows:

Special Exception – to utilize the Property as a Live/Work concept – a business area in the front of the unit with a residential component in the rear of the Property.

Use Variance – to utilize the Property as a mixed-use facility consisting of both residential and business within a single unit.<sup>1</sup>

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<sup>1</sup> The Live/Work concept is currently not a permitted use in the C-1 District.

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 special exception and use 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 Board may grant a special exception when:

1) The proposed use on a specific lot or parcel is reasonably necessary for the convenience and/or welfare of the public and 2) that the proposed use on the lot or parcel involved is not detrimental or injurious to the neighborhood or the City may grant a special exception, subject to such conditions as the Board of Adjustments deems necessary to protect the health, safety, and welfare of the neighborhood and the city, to permit any of the following uses in the designated districts as provided in the preceding Articles of this Chapter as follows:

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10) In the C-1 District, the conversion of an existing storefront for residential use.

Del. City Code § 46-121; *also see* Del. City Code § 46-3.

The standard for granting a use variance requires that the applicant show "unnecessary hardship," meaning that "1) the property cannot yield a reasonable return when used only for the permitted use; 2) the need for the variance is due to unique circumstance and not general condition in the neighborhood; 3) the use sought will not alter the essential character of the locality; and 4) all uses permitted on the land under existing zoning are economically unfeasible." *Rehoboth Art League, Inc. v. Bd. of Adj. of the Town of Henlopen Acres*, 991 A.2d 1163, 1168 (Del. 2010).

### **Testimony Presented**

Mr. Whittaker presented in favor of the Application. As more fully spelled out on the record, he presented evidence that downtown Main Street experiences vacancies in the 35% range and that he has held difficulties renting the Property for

the last two years. He further testified that the requested special exception and use variance would allow him to experiment with a Live/Work concept wherein a business owner may operate his or her business in the front of the unit, and live in the back. Mr. Whittaker alleged that his research showed that the Live/Work concept was being used in other cities and the method downtown Main Street was historically developed. Mr. Whittaker acknowledged that his request was unique and not supported under the Code – he simply wished to experiment with the Live/Work concept.

In addition, Mr. Whittaker testified that the nature of the surrounding properties were businesses, vacant shops and some residential uses. Lastly, Mr. Whittaker represented that nothing at the Property would change visually, the only exception was how the Property was being used inside – the addition of a residential component. Pictures and exhibits were presented by Mr. Whittaker. Mr. Whittaker previously submitted his Live/Work concept to the Planning Commission, which recommended that his concept be adopted by the Board. The Planning Commission Meeting Minutes were made a part of the record.

No other members of the public attended the Hearing.

### **Decision**

After reviewing the record, hearing testimony, and receiving sufficient answer to questions, the Board GRANTS the Application in part and DENIES the Application in part 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).<sup>2</sup> The Board finds that the Applicant has met its burden for the special exception, but failed to meet its burden for a use variance.

The Board finds that special exception permits the Applicant to experiment with the Live/Work concept and will not alter the character and uses of the immediate vicinity because the concept will be in an area that contains both residential and commercial uses. Thus, the special exception is not detrimental or

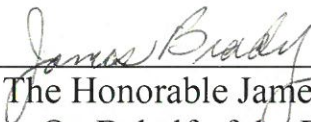
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<sup>2</sup> At the hearing, a Motion was made, seconded, and discussion followed. The Motion carried unanimously that the special exception be GRANTED, and the use variance be DENIED, and each board member articulated the reasons for his or her vote on the record. The articulated reasons are incorporated herein by reference.

injurious to the neighborhood. The special exception shall expire two years from the date of this decision and the Property must maintain *at least 50%* of its area as a commercial use. If the designated commercial space is no longer used for business purposes, the Applicant must immediately commence eviction proceedings. Applicant shall come before the Board at the expiration of the two year period to request an extension the special exception if Applicant desires to continue the Live/Work concept.

The Applicant failed to establish the necessary elements for a use variance because the lot still has commercially feasible value and for the other reasons stated on the record. For these reasons, and for the reasons stated on the record at the hearing, the special exception is GRANTED and the use variance is DENIED.

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.

  
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The Honorable James Brady  
On Behalf of the Board

Date of Decision: January 4, 2017

Date of Written Decision/Date Filed: January 23, 2017

**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.