

NEW CASTLE COUNTY BOARD OF ADJUSTMENT
2012 ANNUAL REPORT

To: New Castle County County Executive Thomas P. Gordon
New Castle County Council President/Doctor Chris Bullock
New Castle County Council Members

Through: David H. Burt, Esquire, New Castle County Board of Adjustment
Chairperson

From: Julie M. Sebring, Assistant County Attorney

Dated: June 13, 2013

Sent via email to all recipients

According to New Castle County Code Section 2.04.001, this report, to the County Executive and County Council, “shall outline the board[‘s]...mission, accomplishments of the year, any challenges to the performance of its functions and suggestions for changes for that specific board....” *New Castle County Code*, Section 2.04.001. Please accept the following as the annual report for calendar year 2012 from the New Castle County Board of Adjustment (“Board”).

MISSION/BACKGROUND

The New Castle County Board of Adjustment (the “Board”) is an independent quasi-judicial body, created by Title 9 of the Delaware Code, Section 1313. The Board has the exclusive jurisdiction to hear and decide requests for variances from County zoning regulations¹, applications for special exceptions from certain land development/zoning laws, and appeals from decisions applying zoning laws in an allegedly erroneous manner, including especially appeals from decisions made by the Department of Land Use (“Department”) interpreting the Unified Development Code (“UDC”). The UDC includes Chapter 40 of the New Castle County Code, which includes all County zoning and subdivision regulations.

The Board is comprised of 7 members², who serve terms of 4 years, except for the chairperson, who serves at the pleasure of the County Executive. The members are appointed by the County Executive, with advice and consent of the County Council. They are compensated as determined by County Council. They must be residents of New

¹ Variances from County subdivision regulations are submitted to the Planning Board. The Board of License, Inspection and Review hears appeals from decisions of the Code Official, as defined in the County Code.

² In 2012, the Board had one vacancy, which was created by the resignation of James Harmon in 2011. As of the date of this writing, however, the vacancy has been filled by William E. Brooks, and his first hearing date is June 13, 2013. There are many advantages to a full, seven member Board, including the ability to obtain the quorum necessary to transact Board business.

Castle County, and have knowledge of, and experience in, problems of urban and rural development. The Board, from time to time, adopts rules to govern its operations, as authorized by State law, and approved by the County Executive. The Board's Rules of Procedure were last amended in 2008, and adopted in 2009.³

OPERATION/ACCOMPLISHMENTS

The Board is in session during the evenings of the second and fourth Thursdays of each month. On average, the agenda includes 10 to 12 applications. On the advertised date, the Board hears each application on the agenda, and, after all applications noticed for that date have been heard, the Board holds a business meeting during which it renders its decision on each application. On occasion, in addition to the regularly scheduled hearing dates, the Board will hold an additional hearing and business meeting due to a request for a special hearing. Special hearing dates require a higher application fee. In 2012, the Board heard over 170 applications.

The vast majority of applications placed before the Board are known as "area" or "dimensional" variances from zoning code requirements. The UDC has specific setbacks and other requirements which could be found in certain situations to be impractical limitations given the physical features of a certain property. In many instances, the overlay of the former 1954 code and the UDC on older developments caused nonconformities requiring variances. Additionally, property owners may purchase homes that have been sited close to the property line making normal improvements to the property problematic. The property owner must show that he/she is experiencing "exceptional practical difficulty" preventing them from complying with the setback requirements (or that complying with the UDC requirement will cause an unnecessary hardship), and that the variation from the UDC will not be harmful to the surrounding property owners or community. The Board must also take into consideration the nature of the neighborhood within which the property lies, the character of the immediate vicinity and uses contained thereon, and if the restriction on the property were removed, such removal would seriously affect neighboring property or uses. The public has the right to give their input on these applications. The Board's decisions are fact driven and require Board members to exercise discretion when applying the law to the facts at hand.

Infrequently, the Board also hears applications for what are known as "use" variances, which contemplate an exception, or variance, from the portions of the UDC that restrict properties to certain types of activities and structures allowed. Use variances require a showing by the applicant of an "unnecessary hardship" (a higher standard than the "exceptional practical difficulty" required for the issuance of an area variance), in that the property cannot yield a reasonable return on the owner's investment if only used for permitted purposes. Further, the applicant must show the property has unique features and that the use authorized by the Board will not alter the essential character of the

³ As of the date of this writing, the Board Chairperson and Board counsel are currently in the process of reviewing the Board Rules; under consideration, among other things, is the addition of language related to Board member attendance.

locality. The Board rarely grants use variances, which also have to be approved by County Council.

The Board also has a unique area of jurisdiction called the beneficial use appeal which is in effect another type of variance. An applicant for a beneficial use appeal has a rather high standard to reach as such appeals may only be granted by the Board where the property owner has shown that the application of the UDC to its property has deprived him or her of all economically viable use of the property, and that, on balance, the harm to the property owner is greater than the harm to the public if the relief was not granted. The most common reason for an applicant to file an application for a beneficial use appeal in this jurisdiction is in order to build in the floodplain, which is otherwise prohibited by the UDC. In those instances, technical criteria, such as implementing sufficient flood proofing measures, must also be met, per the UDC. These code standards take into consideration potential adverse health risks as well as the safety of users of the land and its neighbors.

The Board often hears requests for Special Use Permits, which are subject to the provisions of §40.31.430(A). These general requirements include that the use is compatible with the character of the land in the immediate vicinity and that the applicant minimizes adverse impacts, including visual impacts, on adjoining land. The Board has the power to condition the Special Use Permit so that the permitted activity is tied to the plans submitted to the Board and to lessen the impact of the use on surrounding communities. There are a number of particular uses that are subject to specific limitations accompanying a Special Use Permit. In addition to the requirements found in Article 31 of the UDC, these uses must also satisfy specific standards established by Article 3 of the UDC.

All of the above described standards are established by State and County statutes and ordinances, and Delaware case law, including decisions of the Superior, Chancery and Supreme Courts of Delaware. Because both the creation and jurisdiction of the Board is entirely a result of law enacted by the State, the County is without the authority to add or detract from the Board's jurisdiction.

TRAINING OF BOARD MEMBERS

The members of the Board receive ongoing education and updates as to the problems of urban and suburban development, and the changes in the laws. Such ongoing education is provided by the Board's legal counsel and the Department. The Board's training in 2012 consisted of discussions on common and novel issues which are included in applications before the Board. These discussions focused on general land use law and methodology, the Comprehensive Development Plan as it relates to the Board, and on environmental/technical law and issues. The Board suggests that additional opportunity for education could be accomplished by including the Board members in training given to Department employees. Other training could be received by attending local seminars, such as those offered by the Delaware Bar Association and other organizations, that train lawyers and others participating in certain specialized fields, such as land use. The Board members should be kept apprised of the scheduling of such training, and given funding for attendance, when appropriate.

FURTHER INFORMATION

The Board's Bylaws and meeting scheduling can be found on the Department website at this address: <http://www2.nccde.org/landuse/BoardOfAdjustment/default.aspx>. For other information, please contact the Board's counsel, Julie M. Sebring, Assistant County Attorney, New Castle County Office of Law, at (302) 395-5130.

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