

ANNUAL REPORT OF THE  
NEW CASTLE COUNTY BOARD OF ADJUSTMENT  
FOR 2010

To: The Hon. Paul G. Clark, County Executive, New Castle County  
The Hon. Thomas H. Kovach, Council President, New Castle County  
Members, New Castle County Council

From: David H. Burt, Chairman

Dated: April 1, 2011

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REQUIRING ORDINANCE

Sec. 2.04.001. Annual reports.

All New Castle County Boards, Committees, and Commissions shall be required to submit an annual report to the County Executive and County Council no later than April 1st of each year. The report shall outline the board, committee, or commission's mission, accomplishments of the year, any challenges to the performance of its functions and suggestions for changes for that specific board, commission, or committee.

(Ord. No. 07-004, § 1, 1-23-2007)

BACKGROUND/MISSION

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 decide requests for variances from County zoning regulations,<sup>1</sup> applications for special exceptions from land development/zoning laws, and appeals from decisions applying zoning laws in an allegedly erroneous manner, including appeals from decisions made by the Department of Land Use ("Department") interpreting the Unified Development Code ("UDC"). The UDC includes Chapter 40 of the County Code, including all zoning and subdivision regulations.

The Board is comprised of 7 members, 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 Castle County, and have knowledge of, and experience in, problems of urban and rural development.

The Board, from time to time, adopts regulations to govern its operations, consistent with State law, and approved by the County Executive.

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<sup>1</sup>Variances from County subdivision regulations are committed 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.

## OPERATION/ACCOMPLISHMENTS

The Board holds hearings on the second and fourth Thursdays each month, averaging 12 applications each hearing. However, at various times the Board has held three hearings in a month due to a request for a special hearing, which requires a higher fee. In 2010, the Board issued 391 decisions, as compared to 365 issued in 2009. The Board hears a variety of requests, some of which are outlined below.

The majority of applications that the Board considers are known as “area” or “dimensional” variances from zoning code requirements. The UDC has specific setbacks and other requirements, which could be found to be impractical limitations given the physical features of a property. In many instances, the overlay of the former 1954 code and the UDC on older developments causes non-conformities requiring variances.

Additionally, property owners may purchase homes that have been sited very 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 the variation from the UDC will not cause harm to the surrounding property owners or community. The public has the right to give their view on the requested variances. The decisions are fact driven and require Board members to exercise discretion when applying the law to the facts at hand.

The Board may also considers what are known as “use” variances, which grant 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 of “unnecessary hardship”, in that the property cannot yield a reasonable return on the owner’s investment if only used for permitted purposes; the applicant must show the property has unique features and that the use authorized will not alter the essential character of the locality. The Board rarely grants use variances, which also have to be approved by County Council.

The Board has a unique area of jurisdiction called the beneficial use appeal which is in effect another type of variance. Beneficial use appeals can only be granted where a property owner shows that the application of the UDC to their property has deprived them of all economically viable use of their property, and that on balance, the harm to the property owner is greater than the harm to the public if the relief is not granted. Requests to build in the floodplain, which the UDC forbids, are the most common reason to bring such appeals. Technical criteria, such as implementing sufficient flood proofing measures, must also be met as per the UDC. *UDC Section 40.31.600 - 620*. Because of the unique nature of a beneficial use appeal, to be successful requires an applicant to meet more requirements than does a mere dimensional variance or even a use variance, which does not require a showing of total economic deprivation. *UDC Section 40.31.620*. Most importantly, these standards take into consideration potential adverse health risks as well as the safety of users of the land and its neighbors. *UDC Section 40.31.620.D*. It should be noted, the UDC does not have any provision that operates to limit the "lifespan" of a beneficial use appeal granted by the Board of Adjustment.

In addition, the Board considers requests for a “Special Use Permit”. Special Use Permit requests 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 to tie the permitted activity to the plans submitted to the Board and to lessen the impact of the use on surrounding communities. (§40.31.431). There are a number of particular uses that are subject to specific limitations accompanying a Special Use Permit. Only a few of those uses frequently come before the Board, specifically telecommunications towers.

All of above described standards are established by State and County statutes and ordinances, and case law made by the courts to which Board of Adjustment decisions are appealed, including the Superior, Chancery and Supreme Courts of Delaware. As noted above, New Castle County’s authority to enact zoning laws as well as the Board’s authority to grant variances from those same laws come from the Delaware Legislature in Title 9 of the Delaware Code, and are limited in that regard. The County can neither add nor detract from the Board’s jurisdiction.

#### TRAINING OF BOARD MEMBERS

The members of the Board should receive ongoing education and updates as to the problems of urban and suburban development, and the changes in the laws. The Board suggests that some of this education could be accomplished by including the Board members in training given to Land Use 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 planning. The Board members should be kept apprised of the scheduling of such training, and given continued funding for attendance, where applicable. The Board’s training in 2010 consisted of ongoing exchanges on common and new issues faced by the Board. These discussions focused on general land use law, the Comprehensive Development Plan as it relates to the Board, and on environmental/technical law and issues, including but not limited to the National Broadband Act, Accessory Dwelling Units, and accessory uses.

#### FURTHER INFORMATION

The Board’s Bylaws and meeting scheduling can be found on the Department of Land Use website at this address: <http://www2.nccde.org/landuse/BoardOfAdjustment/default.aspx>. For other information, please contact the Board’s counsel, Tanisha L. Merced, NCC Office of Law, at (302) 395-5130.