

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES**

JUNE 20, 2013

**13-BA-9
CDA Engineering/Cornell Homes
1101 Barksdale Road**

**13-BA-10
William Robeson &
Debra Wetherby
18 Shenandoah Drive**

Those present at 7:00 p.m.:

Presiding: Clay Foster

Members Present: Jeff Bergstrom
Paul Faust
Kevin Hudson

Members Absent: David Levandoski

Staff Members: Bruce Herron, City Solicitor
Michael Fortner, Planning & Development Department

1. APPROVAL OF MINUTES FROM MEETINGS HELD MAY 16, 2013

There being no additions or corrections, the minutes were approved as received.

2. THE APPEAL OF CDA ENGINEERING, INC. ON BEHALF OF CORNELL HOMES, 1101 BARKSDALE ROAD FOR THE FOLLOWING VARIANCES:

A) CH. 32 SEC. 13(a)(1)(c) – LOT COVERAGE (RR DISTRICTS). MAXIMUM LOT COVERAGE SHALL BE 20% OF THE TOTAL AREA TO BE DEVELOPED FOR GROUP DWELLINGS AND 40% OF THE INDIVIDUAL LOT AREA WHERE THE BUILDING IS CONSTRUCTED. YOUR PLAN SHOWS 22.5% OF THE TOTAL AREA WILL BE COVERED, AND 10 OF 14 PROPOSED LOTS HAVE GREATER THAN 40% COVERAGE.

B) SEC. 32-13(a)(1)(f) – OPEN SPACE. AT LEAST 40% OF THE TOTAL AREA TO BE DEVELOPED FOR GROUP DWELLINGS SHALL BE DEVOTED TO OPEN AREA. PLAN SHOWS THE OPEN AREA AS 11%.

C) SEC. 32-13(c)(1) – MINIMUM LOT AREA. THE MINIMUM LOT AREA FOR ANY DWELLING UNIT OR PERMITTED NON-RESIDENTIAL USE, TOGETHER WITH ACCESSORY BUILDINGS, SHALL BE ONE ACRE, WITH 2,725 SQUARE FEET WITH TWO PARTY WALLS IN A ROW OR GROUP, UNLESS CERTAIN DENSITY BONUSES ARE GRANTED. PLAN SHOWS 10 OF THE 14 LOTS ARE LESS THAN 2,725 SQUARE FEET (1,680 SQUARE FEET IS THE SMALLEST LOT SIZE).

Ms. Schiano read the above appeal and stated it was advertised in the Newark Post and direct notices were mailed. One letter was received in objection of the variances.

Mr. Josiah Wolcott, Esquire, Connolly Gallagher, 267 East Main Street, Newark, DE represented Cornell Homes. He stated Kristy Flynn, Cornell Homes and Colm DeAscanis, CDA Engineering were also present. He stated he would like to call Kristy Flynn to the stand.

Ms. Kristy Flynn, Director of Land Development for Cornell Homes, 126 E. Main Street, Media, PA was sworn in. Attorney Wolcott asked what interest Cornell Homes had to the property. Ms. Flynn stated Cornell Homes was the equitable owner. Attorney Wolcott asked Ms. Flynn to describe the project. Ms. Flynn stated Cornell Homes was under agreement to purchase two properties. There were two pieces of "ground" that were "assembled" with the idea of developing town homes on the property. Ms. Flynn stated Cornell Homes had good results with similar townhomes. She further stated this property was desirable due to location and in addition, was a natural extension of the development that had occurred in the surrounding area. Ms. Flynn stated the original proposal requested 18 townhomes however; with input from CDA Engineering the number had been reduced to 14 townhomes to improve the layout of the community.

Ms. Flynn explained the layout of the townhomes was designed in a T shape with common parking and additional parking provided on each property. The proposed townhomes were three stories with three bedrooms and two and one half bathrooms with additional options available. She further stated the target client would be first time homebuyers and older individuals wishing to downsize.

Attorney Wolcott asked Ms. Flynn to make a comparison between existing properties in the immediate area and the proposed townhomes. Ms. Flynn stated the density was comparable to other nearby neighborhoods. It was her belief if the variances were granted; the proposed townhomes would not create adverse conditions. She stated there would not be any thru traffic and stormwater management would be handled through the engineers. Attorney Wolcott asked Ms. Flynn if the variances were not granted, would that create an unnecessary practical difficulty for Cornell Homes to use the land. Ms. Flynn stated the property would not be useable or developable for these townhomes. The proposed dimensions would not allow Cornell to create any more efficient way to use the land. She further noted that with the required expenses that such a project incurs, it would not be financially feasible to continue with the project.

Attorney Wolcott asked Ms. Flynn why the open area variance should be granted. It was Ms. Flynn's opinion the request for an open area variance was not out of range with the surrounding neighborhood. In addition, Ms. Flynn stated the proposed project was located across the street from a park.

Chairman Foster asked Ms. Flynn if the proposed townhomes would become rental units. She stated it was possible. She further stated there were restrictions in place enforced by the homeowners association, such as no short-term rentals in any of Cornell communities.

Mr. Hudson inquired about the exceptional practical difficulty. He asked Ms. Flynn if the restriction were not removed, could the project be developed in any other way. Ms. Flynn stated she could not offer an opinion on what another developer would do.

Mr. Faust asked about the developer's request for a lower density from 18 townhomes. Ms. Flynn stated she would defer Mr. Faust's question to the engineer, Colm DeAscanis. Mr. Faust asked if the change to the 35 foot height restriction had been brought to Council. Mr. Fortner, Planning & Development Department stated it had not.

Mr. Hudson asked for clarification on the issue of stormwater facilities to be considered part of the exceptional practical difficulty. Ms. Flynn stated stormwater management was a crucial piece to development. The expense of creating the stormwater facilities to treat the stormwater had increased substantially.

Mr. Colm DeAscanis, President, CDA Engineering, 6 Larch Avenue, Newport, DE was sworn in. Attorney Wolcott asked Mr. DeAscanis to briefly describe the project. Mr. DeAscanis stated it was a townhouse development with three townhomes to be located on one side of the street and four on the other side. There will be seven townhomes in the back (artist rendering was in the file). Mr. DeAscanis believed it was the most efficient design which allows Cornell Homes to institute efficient stormwater management. The proposed stormwater management consisting of a bio retention area was the best option available. Mr. DeAscanis stated the complexities of the system were one of the reasons they decreased the proposed plan to 14 lots. In addition, DELDOT requested a 15 foot permanent easement. DELDOT also requested a 20 foot bumper from the right of way before stormwater management was permitted. This requirement further challenged the site.

Attorney Wolcott asked Mr. DeAscanis to confirm the updated figures on the variance request as the notice distributed had the request for 16 townhomes not 14.

- Lot coverage – initially the plan showed 22.5% of the total area covered. It was now 20.3%. Initially 10 of the 16 proposed lots had greater than 40% coverage. It has now changed to 8 of the 14 proposed lots have greater than 40% coverage.
- Open space - initial plan showed 11%. It was now 17%.
- Minimum lot area – plan showed 10 of the 16 lots were less than 2,725 square feet. It has changed to 8 of the 14 proposed lots.

Mr. DeAscanis stated it was his opinion the park across the street would alleviate

some of the open area issues. Mr. DeAscanis provided plans of record of Cherry Hill Manor, Blair Village, and Casho Mill Station. He reported the open space in Casho Mill Station was concentrated in the southwest corner. Blair Village had very little open space, the property was L shaped with a cul-de-sac and there was minimal open space between four groups of stacked townhomes. Cherry Hill Manor was a straight line of townhouses. The open space was as follows for the three properties:

- Casho Mill Station – 27% open space
- Cherry Hill Manor – 31.4% open space.
- Blair Village – 0% open space.

Attorney Wolcott asked Mr. DeAscanis if each of the three variances were granted would the removal of the restriction have any impact on the neighboring properties. Mr. DeAscanis stated from an engineering standpoint considering stormwater management, traffic, utilities and landscaping; it was his opinion it would not have a negative impact.

Mr. Hudson asked if from an engineering standpoint would there be any issues if there were fewer units on the property. Mr. DeAscanis said, “No, but then it becomes an economical issue if the number of units were to decrease.”

Chairman Foster asked if the property was owned by Cornell Homes. Ms. Flynn stated the parcels were under agreement, they were equitable owners.

Mr. Faust confirmed there was off-street parking to the units, which consisted of two spots and four additional spots. Mr. Faust confirmed the street width decreased to 28 feet from 32 feet. Mr. Fortner, Planning & Development Department stated this had been clarified on the site plan approval and they were permitted the smaller street. Public Works reviewed and found to be acceptable. Mr. Faust asked Ms. Flynn if vehicles would be permitted to park on the street. She stated it was the City's decision and whatever was decided Cornell would follow.

Ms. Robyn Harland, 1 Ethan Allan Court, President of Cherry Hill Manor Maintenance Association Corporation, was sworn in. Ms. Harland wanted clarification of where the parking spots would be. Ms. Flynn stated there were parking spots in the garage and one space in the driveway. Ms. Harland stated it was her opinion the variance requests were not a hardship and the plan was submitted on how the Developer wanted to build the proposed project. She stated she was very much against the project.

Ms. Harland stated there were eight properties for sale in Cherry Hill Manor for the last three years. She was not pleased of the close proximity of the project to Cherry Hill Manor and stated they were encountering ongoing stormwater issues that needed to be addressed by the City.

Attorney Wolcott stated it was his opinion only a few of Ms. Harland's concerns

were relevant as they pertain to the Kwik Check factors. The fact that eight units were for sale in Cherry Hill should not be a factor in denying this project that can provide a community for people that would like to live in Newark. In addition, it was Attorney Wolcott's belief the exceptional practical difficulty was if the variances were not granted then the project becomes economically unfeasible. There would be a hardship to the equitable owner rather than a negative impact to the neighboring properties.

Chairman Foster stated with the Kwik Check factors in mind the harm to the community needs to be addressed versus the harm done to the owner. It was Chairman Foster's belief that the hardship to the community was greater than the hardship to the equitable owner.

Ms. Flynn stated there was no debate that selling real estate was more difficult than in past years. She further stated Cornell Homes were selling very quickly for several reasons including energy efficiency. In addition, it was Ms. Flynn's opinion; new projects bring more home buyers to the area. Ms. Flynn stated she cannot predict what would happen to the existing homes for sale in Cherry Hill Manor. In addition, she was not aware of the selling price of the Cherry Hill Manor homes and they may be overpriced. She stated Cornell Homes are priced to the market. Chairman Foster stated he did not agree and testimony in front of the Board stated that overbuilding would affect the value of current units for sale. Ms. Flynn concurred overbuilding could affect current units for sale, but only if the overbuilding was of the same quality. She stated one of the reasons Cornell Homes was so focused in Newark was due to the continued success of the City. The redevelopment of the Chrysler Plant would be adding to regrowth as well. Chairman Foster disagreed and stated 1/3 of his development was for sale.

Robyn Harland stated it was her opinion there would be no result from the redevelopment of the Chrysler plant for at least five years. She stated she has serious concerns that if the City were to continue this trend it will not be good for the City. Additionally, Ms. Harland asked whose responsibility it would be if flooding occurred on Barksdale Road. Mr. DeAscanis replied stormwater management was mandated from the E.P.A. to the state then to the City. It was maintained by law.

James Green, 80 Ethan Allan Court, Cherry Hill Manor, was sworn in. His home would back up to the proposed project. His first concern was standing water that collects after heavy rain in the "old farm ground" that was the "back yard" of the two properties. The properties sat a little lower in certain spots than the Cherry Hill Manor alleys. It was his opinion if the project was built with the addition of asphalt driveways taking up a large portion of the lots, the stormwater will have no place to drain. It could potentially cause the runoff into neighboring properties, particularly Cherry Hill Manor.

Colm DeAscanis stated the existing ground consisted of heavy clay and wetland areas with non-draining soils. He stated areas such as this were good to develop because heavy clay areas were impervious. Cornell Home channels the majority of the

stormwater flow to the front of the site to better control the existing drainage issues.

Carol McKelvey, 48 Winslow Road, was sworn in. She wanted to clarify the proposed plan suggested 17% open space when 40% was required. It was her opinion the presence of a park does not give the developer the right to change the amount of open space that was required by the City.

Chairman Foster asked if the Board had any questions or comments. There being none, Attorney Wolcott addressed the Kwik Check factors:

- The nature of the zone where the property was located was zoned residential and would not change.
- The character and use of the immediate vicinity of the subject property and uses of the property within that immediate vicinity were primarily residential and would not change.
- Whether the relevant restriction on the property were removed, the removal would seriously affect neighboring properties and uses. It was the opinion of Ms. Flynn and Mr. DeAscanis the neighboring properties would not be seriously affected.
- If not removed, the restriction would create unnecessary hardship or exceptional practical difficulty to the owner in relation to efforts to make normal improvements in the character and the permitted use of the property. Attorney Wolcott stated there would be a real economic hardship that Cornell would face if the variances were denied. The project would not go forward.

Attorney Wolcott further stated under Delaware law, an exceptional practical difficulty could be found to be when the potential harm to the applicant was greater than the potential harm to the neighboring properties. It was his opinion it had been established through the testimony of Ms. Flynn and Mr. DeAscanis. In addition, Attorney Wolcott stated there would be a real economic hardship that Cornell would face if the variances were denied.

Mr. Hudson stated eight of the fourteen proposed units exceeded the lot coverage. Because that was more than half, 14 should not be considered "minimal." Mr. Hudson asked Attorney Wolcott if he was aware of any case law that would support the argument of open space using the park across the street to circumvent the limited open space of the proposed project. Attorney Wolcott replied, "not specifically."

Chairman Foster asked Bruce Herron if the Board should consider the economic impact of the surrounding areas. Attorney Herron stated he would caution the Board in doing so and would be limited to consider whatever testimony had been given on the issue discussed at the meeting only. Mr. Foster stated it was his opinion the Board could make a judgment on who incurs the most harm. Attorney Herron stated it was not an undue hardship standard. The standard was exceptional practical difficulty and the four Kwik Check factors are required when determining whether to grant the variances.

Mr. Bergstrom stated as the Board considers this matter, they should keep in mind that Mayor & Council would need to rezone the property.

Mr. Hudson addressed the Kwik Check factors:

- The nature of the zone where the property was located was zoned residential and would remain so.
- The character and use of the immediate vicinity of the subject property and uses of the property within that immediate vicinity were primarily residential (townhomes and single family) and would not change.
- Whether the relevant restriction on the property were removed, the removal would seriously affect neighboring properties and uses. There was testimony from the neighbors about the project. It was Mr. Hudson's opinion that considering the variances in total, he did not see an exceptional practical difficulty. In addition, Mr. Hudson did not believe the close proximity of a park should be a factor in granting the area variance.
- If not removed, the restriction would create unnecessary hardship or exceptional practical difficulty to the owner in relation to efforts to make normal improvements in the character and the permitted use of the property. There had been testimony that the land could be developed in other ways such as another residential home. It was Mr. Hudson's opinion that the dimensional change was not minimal.

Given all the considerations in total, Mr. Hudson voted to decline the variances.

Chairman Foster stated the Delaware Supreme Court in acknowledged that in certain isolated cases, economic difficulties may warrant favorable consideration if a property owner was unable to improve his business or to remain competitive as a result of area limitations; and the courts had acknowledged that as a factor which may be considered in granting a variance. However, a request based on economics must be minimal and the harming resulting from denial must be greater than the likely effect on neighboring properties if variances are granted. With this in mind, Chairman Foster stated he would vote against granting the variances.

Mr. Bergstrom stated the proposed project had its attributes however, in light of the large variance request for the open space and given the facts as presented, Mr. Bergstrom was in agreement with Messrs. Hudson and Foster. He also stated this was not a minor area variance the Board can grant. In addition, it was his opinion that an exceptional practical difficulty had not been proven. He would vote to decline the variances.

Mr. Faust stated he was in agreement with the comments of his colleagues. However, his primary concern was a commercial venture that comes before the Board to obtain variances when it's apparent the zoning permits only certain factors to occur in

any development on a particular piece of land. “To ask for a variance prior to going before Council (not that it hasn’t occurred before) and obtaining a rezoning makes it difficult for the Board to reach a conclusion.” In his opinion, it was very difficult to accept the fact that there would be an exceptional practical difficulty based on economic hardship due to the fact that the developer was unable to get approval for enough units on the land to make it economically viable. Mr. Faust would deny the variances, as it was his opinion it was overstated to attempt to get this project on the intended piece of property.

MOTION BY MR. HUDSON, SECONDED BY MR. FOSTER: THAT THE VARIANCES BE DENIED.

MOTION PASSED: VOTE: 4 to 0.

Yay: Bergstrom, Foster, Hudson, Faust

Absent: Levandoski

2. THE APPEAL OF WILLIAM ROBESON & DEBRA WETHERBY, 18 SHENANDOAH DRIVE FOR THE FOLLOWING VARIANCE:

A) CH. 32 SEC. 48 (b) – ON A CORNER LOT, ACCESSORY BUILDINGS SHALL NOT BE NEARER TO THE SIDE OF THE STREET LINES THAN THE MAIN BUILDING. PLAN SHOWS THE PROPOSED SHED TO BE APPROXIMATELY 21 FEET CLOSER TO GLEN VIEW PLACE THAN THE MAIN BUILDING.

Ms. Schiano read the above appeal and stated it was advertised in the Newark Post and direct notices were mailed. No letters in objection of the variance was received.

Ms. Debra Wetherby, 18 Shenandoah Drive, was sworn in. Ms. Wetherby stated their property had a fully fenced in backyard due to an in ground pool. The proposed shed would be located inside the fence in the backyard. The problem they encountered when determining a place to put the shed was their backyard had a steep slope. The proposed location of the shed was the flattest part of the property. The proposed spot was located to the side of house but within the boundaries of the fence.

Mr. Foster asked if the surrounding neighbors had sheds. Ms. Wetherby stated most, if not all of her neighbors had sheds.

There being no one else present to speak the matter was returned to the Board.

Mr. Faust asked if there was additional landscaping on that side of the property. Ms. Wetherby stated there was a juniper groundcover.

Mr. Bergstrom asked the height of the fence. Ms. Wetherby stated she believed it was a six foot fence. Mr. Bergstrom clarified the shed would not be visible from outside the property and that it would not be moved to another spot on the property.

Ms. Wetherby stated the shed would not be moved.

Mr. Hudson asked for confirmation of the area where the home was located. Ms. Wetherby stated it was a residential area with single family homes.

Mr. Faust asked if the shed could be located on the right side of the house. Ms. Wetherby stated the yard sloped downward and a shed could not be placed in that location. Mr. Faust asked what the hardship would be to not have a shed. Ms. Wetherby stated that in order to sustain the materials necessary to operate the pool they needed a place to store them. Mr. Bergstrom stated it was his understanding pool chemicals should not be stored in a house.

Mr. Hudson addressed the Kwik Check factors:

- The nature of the zone where the property was located was zoned residential and would remain so.
- The character and use of the immediate vicinity of the subject property and uses of the property within that immediate vicinity were primarily residential single family homes and would not change. In addition, most if not all of the surrounding homes, had sheds on their properties.
- Whether the relevant restriction on the property were removed, the removal would seriously affect neighboring properties and uses. It was Mr. Hudson's opinion that it would not.
- If not removed, the restriction would create unnecessary hardship or exceptional practical difficulty to the owner in relation to efforts to make normal improvements in the character and the permitted use of the property. The unique circumstance was the slope on the property. In addition, there was a pool on the property and for maintenance purposes; a shed would be needed to store the chemicals.

Messrs. Bergstrom, Faust and Foster agreed and would approve the variance as well.

MOTION BY MR. HUDSON, SECONDED BY MR. FOSTER: THAT THE VARIANCE BE APPROVED THAT THE SHED REMAIN BEHIND THE PRIVACY FENCE OR IN CONFORMANCE WITH THE CODE.

MOTION PASSED: VOTE: 4 to 0.

Yay: Bergstrom, Foster, Hudson, Faust

Absent: Levandoski

3. The meeting was adjoined at 8:49 p.m.

Tara A. Schiano
Secretary

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