

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
JANUARY 27, 2016**

Those present at 7:00 p.m.:

Members: Kevin Hudson, Presiding
Dave Levandoski
Bill Moore

Not present/recused: Jeff Bergstrom
Jim McKelvey

Counsel: John W. Paradee, Esquire, Baird Mandalas Brockstedt LLC
Special Council to the Board of Adjustment

1. ELECTION OF ACTING CHAIR

MOTION BY MR. LEVANDOSKI, SECONDED BY MR. MOORE TO ELECT KEVIN HUDSON ACTING CHAIR

MOTION PASSED UNANIMOUSLY: VOTE: 3 to 0.

Aye: Hudson, Levandoski, Moore
Not present: Bergstrom, McKelvey

2. APPROVAL OF MINUTES FROM MEETING HELD OCTOBER 15, 2015:

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

MOTION PASSED UNANIMOUSLY: VOTE: 3 to 0.

Aye: Hudson, Levandoski, Moore
Not present: Bergstrom, McKelvey

Ms. Schiano read the above appeal. The appeal was advertised in the Newark Post and direct notices were mailed to the surrounding neighbors within 300 feet. One letter in objection was received, read and entered into the record (Exhibit D).

Mike Fortner, Planning & Development Department presented on behalf of the City. He reviewed for the benefit of the Board the materials that was used by the Planning Department in making their determination. Mr. Fortner presented Exhibit 1 which details the Zoning Code for BB district as they Mays business is located in this district. Mr. Fortner stated the list of permitted uses details the allowable uses. He further stated the Zoning Code is organized into Sections A and B.

There is a list of permitted uses under each section. Under Section A there is a list of permitted uses that are generally permitted by right. This means no further review is necessary. Section B are the listed items that require a conditional use or a special use permit. These usually go before Council and they are permitted in the zoning but have an extra layer of review and needs Council approval. To be a permitted use, the use has to be listed in the Zoning Code (how the City Zoning Code works).

A body piercing establishment is not listed as a permitted use. The closest comparison is a personal service establishment. To determine if it is a personal services establishment, determination is given by looking at the definitions which is located in the Zoning Code under the Sec. 32-4(a). Permitted uses are listed under attached Exhibit 2 or in the City Zoning Code Sec. 32-4(a) (91) *personal service establishments*: Barber, beauty, shoe repair or tailor shops, drycleaners (retail outlet only). Massage parlors and related uses are excluded. Using this criteria, the Planning & Development Department determined a body piercing shop would not be included. Mr. Fortner stated if Council wished to permit body piercing shops they may amend the Zoning Code to reflect such.

Mr. Hudson asked if Mr. Fortner was aware if “A Cut Above” (a hair salon located in the City) was doing piercings. Mr. Fortner stated he was not aware. He believed if the hair salon was doing ear piercing then it would be as an accessory use (meaning an incidental or subordinate use) and was permitted.

Mr. Paradee asked if the applicant requested to just sell jewelry would this be permitted. Mr. Fortner stated they would not be permitted to do so. Mr. Paradee asked if body piercing or tattoo artistry expressly permitted in any zoning district in the City of Newark. Mr. Fortner stated it was permitted. Mr. Paradee asked if it was expressly prohibited in any zoning district. Mr. Fortner stated he was not aware that it was expressly prohibited. Mr. Paradee confirmed the City viewed the Zoning Code as a permissive Ordinance meaning that if the use is not expressly permitted than it is prohibited as opposed to essentially saying one is permitted to do whatever they want unless it is expressly prohibited. Mr. Fortner confirmed this was the case.

Mr. Levandoski asked if the term beauty parlor was defined in the Webster’s dictionary. Mr. Hudson stated (per Merriam Webster’s online dictionary) beauty shop was defined as: an establishment or department where hairdressing, facials and manicures are done. It may also be called a beauty parlor or beauty salon.

Mr. Moore asked if there any other types of shops that would fall under the definition of personal services that are not listed that are doing business in any of the City districts. Mr. Fortner stated there are tanning salons that are not expressly listed in the Zoning Code. Mr. Paradee asked if the City had taken any action to close down any tanning salons. Mr. Fortner stated the City had not closed any tanning salons down.

Mr. Brandon May (aka Cheshire May) and Eve May were sworn in.

Mr. May stated he was aware there were day spas operating in the City that offered massage services. Mr. May addressed the email from Ms. Lara Welch. His written response was entered into the record as Exhibit E.

Mr. May stated he believes the qualifications he and his wife have, advance business degree (Mr. May) and Bachelor of Science in Nursing from UDEL (Mrs. May) make them more than qualified to operate a business that includes piercing services and high end body jewelry. Their intent is to run a compliant business that follows not just the basic minimum Board of Health regulations but a business that exceeds those standards.

Mr. Hudson stated the applicants do not need to detail policies and regulations as they pertain health inspections, and business operations are way beyond the purview of the Board of Adjustment.

Mr. May made a Power Point presentation of his proposal for the piercing establishment Looking Glass Body Arts, LLC. (Exhibit F).

The matter was returned to the Board.

Mr. Levandoski asked the applicant what type of piercings would be conducted. Mr. May stated they were uncertain at this time what type of piercings they would do. He further stated if there restrictions placed on the type of piercings permitted, they would adhere to those restrictions.

Mr. Hudson stated the Code defined (for its purposes) what a personal services establishment is (beauty, barber, dry cleaner). He asked Mr. May what category he believed the piercing studio would fall under. Mr. May believed his establishment would fall under beauty shops. Mr. Hudson his difficulty with that was City Code dictates when something is defined that is not within the Code, then they are to turn to Webster's dictionary. Mr. Hudson stated Webster's Dictionary definition of beauty shop does not encompass a piercing studio.

Mr. Paradee asked if there were any other personal services establishments currently operating in the City of Newark other than barber, beauty, shoe repair, tailor shops or dry cleaners. Mr. Fortner stated he could not think of any other personal services establishment that does not fall under this category besides the tanning salons. Mr. Paradee asked if the City of Newark viewed this definition as exclusive. In other words, the only personal service establishment that are permitted have to fall within one of these five categories (ex. barber, etc.) or is the listing viewed as examples of personal services establishments.

Mr. Fortner stated the City Solicitor had advised him this was an exclusive list and since a piercing studio was not listed, it was not permitted. Mr. Paradee countered if that was the case why would you not need a definition for personal service establishment. Mr. Fortner stated this was the way the Code was interpreted.

Mr. Moore asked what other types of shops have come up for approval and have been denied based on the Code. Mr. Fortner said there had been a tattoo parlor that was denied. Mr. Moore asked the applicants if they had considered approaching Council and asking for a change in the Code. Mr. May stated they were advised to come before the Board of Adjustment first. Mr. Fortner agreed.

Mr. May said, with regard to the list of uses for personal services establishment. He would argue based upon the way the Code is phrased (beauty, barber, tailor, etc. shops) *excluding* massage parlor, in his interpretation would be those are *examples* of permitted personal service establishments as there is a specific exclusion of massage parlors.

Mr. Paradee stated if the Ordinance was truly an exclusive list and not examples, then you would not need the second sentence (Massage parlors and related uses are excluded)

Mrs. May asked their proposed shop would be included under the retail establishments because they will sell jewelry and have the accessory of piercing.

Mr. Paradee confirmed the applicants will not be performing tattoos. The applicants stated they will not be performing tattoos.

Mr. David Scott, 1101 Capitol Trail, Newark, was sworn in.

Mr. Scott stated many people have tried to open tattoo studios in the past and all have been rejected. He believed the City would be setting a precedence if they allowed this studio. He stated there are six studios in the area that do body piercing with all being licensed and some are board certified.

Mr. Nathan Roby, Wilmington, was sworn in.

Mr. Roby asked if the Board of Adjustment were to rule in favor of granting the variance, would Council be able to change the Code to indicate specifically that tattoo studios or piercing are prohibited. Mr. Paradee stated nothing would prohibit City Council from doing so. Mr. Fortner stated if the applicant were granted the variance and opened the business, they would be grandfathered. Mr. Paradee concurred and stated any proposed restrictions, i.e. limiting establishments to only piercing would be under Council's discretion as well.

Mr. Hudson closed the hearing to public comment and the Board began deliberations.

Mr. Moore stated he appreciated the applicant's purpose and presentation. However, he believes the interpretation of the City Planning Department with the Code as being a permissive Code. He understands there could be some leeway, and he understands the door may have been opened with the opening of tanning salons; however he is not inclined to open the door further and

would not grant the variance without City Council approval first.

Mr. Levandoski concurred with Mr. Moore. He stated he had done research on body piercing studios. He further stated there were interesting things that come about with these Ordinances. There may be restrictions placed in zoning districts or who may do the procedures. He thought it would be prudent for the City to establish an Ordinance stating this would be allowed before approval would be given. He would not approve the variance.

Mr. Hudson stated he would concur with Messrs. Levandoski and Moore. He believed it has to do with definition of Personal Services Establishment definitions. He views the list under contained in the Code as exclusive. He does not see it as an accessory use.

Mr. Moore made the following motion:

MOTION BY MR. MOORE, SECONDED BY MR. LEVANDOSKI: THAT THE APPLICANTS CHALLENGE FAILS.

MOTION FAILS UNANIMOUSLY: VOTE: 0 to 3.

Aye: Hudson, Levandoski, Moore
Not present: Bergstrom, McKelvey

3. The meeting was adjourned at 8:29 p.m.

Tara Schiano
Secretary