

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

May 15, 2008

**08-BA-4
James P. Lisa
50 & 56 Choate Street**

Those present at 7:30 p.m.:

Presiding: Clayton Foster

Members Present: Jeffrey Bergstrom
Cathy Johnston

Members Absent: Michael Harmer, Linda Shopland

Staff Members: Tom Sciulli, Building Director

1. APPROVAL OF MINUTES FROM MEETING HELD APRIL 17, 2008

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

2. THE APPEAL OF JAMES P. LISA, FOR THE PROPERTY AT 50 & 56 CHOATE STREET FOR THE FOLLOWING VARIANCE TO REDUCE THE MINIMUM LOT SIZE REQUIREMENT OF ONE-HALF ACRE IN A BLR ZONING DISTRICT TO .3658 ACRES:

A) CH. 32, SEC. 32-16.1(d)(1) FOR APARTMENTS OR APARTMENTS IN CONJUNCTION WITH NON-RESIDENTIAL USES, THE MINIMUM LOT AREA SHALL BE ONE-HALF ACRE, WITH A MAXIMUM NUMBER OF DWELLING UNITS PER GROSS ACRE NOT TO EXCEED SIXTEEN (16). SITE PLAN SHOWS A TOTAL AREA OF .3658 ACRES (BY DEED) AND .3513 ACRES (BY SURVEY). A VARIANCE OF .1342 ACRES* (BY DEED) AND/OR .1487 ACRES* (BY SURVEY) IS REQUIRED.

***Revised variance numbers**

Ms. Van Veen read the above appeal and stated that it was advertised in the *Newark Post*, and direct notices were mailed.

Mr. Sciulli made two corrections to the variance figures provided by the Building Department.

Shawn Tucker, Esquire, Wolf Block LLP, 1100 N. Market Street, Suite 1001, Wilmington, represented the applicant James P. Lisa.

Mr. Tucker said this was a unique situation for his client, James Lisa, who applied to the City's Planning Department on 4/27/06 to develop the Choate Street property under a new BLR zoning district. At that time there was no conflict with the minimum lot standards in the Code. The property size was .3658 acres, and the application was accepted into the planning process with a letter generated by the Planning Department. Unbeknownst to Mr. Lisa, on 9/11/06 (several months after the initial application) an ordinance was adopted which required a half-acre minimum property under BLR zoning. Mr. Lisa was not made aware of the ordinance change, and he submitted a revised plan to the City on 6/29/07. Shortly after that resubmission, Mr. Lisa was advised by the Planning Department that the lot size requirements had changed, and a variance would be required. Mr. Tucker, who was involved in handling the zoning aspect, was approached by Mr. Lisa for advice on the lot size problem. After several discussions with the Planning Department, Mr. Tucker was told that because the application was filed before the ordinance change, Mr. Lisa would be able to move forward with the project.

A revised plan was submitted on 3/17/08 that was based on comments Mr. Tucker and the engineer had with the Planning Department. According to Mr. Tucker, the revision was one of the more significant changes to the plan because the number of units requested was reduced from five to four to address some of the planning concerns. Just prior to resubmitting the plan, Mr. Tucker had conversations confirming the grandfathered status, and he was assured that the project would be processed. When Mr. Lopata became the Acting City Manager, Mr. Tucker began working with Ms. Roser who spoke with Mr. Lopata to confirm the plan could be processed and that it was grandfathered. To the surprise of Messrs. Lisa and Tucker, after the plan was submitted on 3/17/08, they received a letter stating that the project could not be processed. Mr. Tucker said that out of an abundance of caution, the Planning Department felt the applicant should come before the Board of Adjustment to seek its quasi-judicial approval.

Mr. Tucker noted the Board had a letter from Mr. Lopata recommending that the variance be granted. Further, by applying for a variance, Mr. Lisa hoped to rectify the non-conforming situation created by the law change. Mr. Tucker understood there were several factors the Board normally focused on when considering a request. First, he believed the evidence would show that if the Board were to grant the variance, it would not be contrary to the public interest, and, in fact, the plan was to the advantage of the public given the proposed redevelopment. Second, he believed the situation created an unnecessary hardship for Mr. Lisa because the BLR zoning was no longer an option in the absence of this variance. In addition, Mr. Lisa spent in excess of \$35,000 throughout the process and received numerous assurances that his project would be processed based on the grandfathering. Mr. Tucker thought Mr. Lisa was the only person caught in this unique situation. He emphasized that given Mr. Lisa's financial expenditures and good faith

based on Code requirements when Mr. Lisa began the process as well as assurances that had been received, substantial justice would be done if the variance was granted.

James Lisa, 211 S. Pond Road, Hockessin, DE was sworn in.

Mr. Lisa described an exhibit which showed the four lots at the existing site on Choate Street, and there were two homes on those lots. The engineering survey and New Castle County confirmed the existence of four lots. Mr. Lisa owned the first home and adjoining lot since April 1998 and the second lot and home since August 2003. Mr. Lisa estimated the approximate ages of the homes to be between 100-125 years old.

Mr. Lisa explained that during the annual rental inspection of the properties in 2003, the City's inspector asked him if he had considered replacing the houses with more modern, efficient housing based on the fact that both of the houses were beyond their useful life. Mr. Lisa began the process of working to redevelop the site in 2003. As part of the preliminary process, he hired an engineer to conduct surveys and prepare plot plans. In 2005, Mr. Lisa hired another engineering firm to complete a more formal detailed survey since the parcels were unusually shaped with the location of the lot lines. In December 2005 to early 2006, Mr. Lisa hired Apex Engineering to recertify the survey and to work with him to prepare engineering plans.

Mr. Lisa said that before he proceeded with his plans, he spoke and met with most of the neighbors to discuss his redevelopment ideas. He obtained letters of support from some of the property owners which Mr. Tucker presented to the Board. Mr. Lisa explained the documents supporting his project were signed by a variety of people at different times, from when the plan depicted seven units and then changed from six units and later to five. The current plan presented to the Board would be less dense with only four units than any of the plans the neighbors had agreed to support.

According to Mr. Lisa, he filed an application for his project with the City on 4/27/06. He received comments from the Planning Department about adjustments and about his plans. None of those comments referenced a potential change in the BLR minimum lot size requirements. In addition to the original filing, Mr. Lisa made two resubmissions to the City over the course of the past two years. The revisions were based on input he received from the City through the normal planning review process. Mr. Lisa and the engineering firms also met with the Planning Department. Each time a resubmission was made, he incurred additional engineering fees.

Mr. Lisa learned in late July or early August 2007 that the minimum lot size in the BLR district had been changed which created a non-conforming situation for his project. He was upset because he had spent thousands of dollars on engineering and legal services, and although he was in the City system, he never received any type of notification, verbal or written, that his project could be impacted by the change in the lot size requirements.

After learning of this problem, Mr. Lisa scheduled a meeting between Messrs. Tucker,

Davies and Lopata to determine how to proceed. He understood from that meeting that his project would be grandfathered since it was submitted before the law changed. Mr. Lisa decided to continue the process at that time and submitted a third revised application on 3/17/08. That submission was rejected by the City with a letter on March 19th.

Mr. Lisa estimated his total expenditures to date in engineering services, architectural drawings, surveying and legal expenses were \$39,611.08. Prior to 9/11/06 when the ordinance was passed, he spent \$20,749.67. As of 8/1/07, the date he first understood there to be an issue with regard to the variance, he spent \$24,644.12.

Mr. Lisa explained the variance being sought ranged between 27% and 29% depending on deed acreage of .3658 acres vs. survey acreage of .3513 acres. The size difference related to land involving roadway rights.

Mr. Tucker reviewed with Mr. Lisa some of the factors the Board would consider in determining whether to grant the variance.

- If the variance was granted, would it be contrary to the public interest - Mr. Lisa did not believe so since the adjacent property owners supported the application, and redevelopment of the site would benefit them.
- If the variance was granted, would the spirit of the zoning code be observed and substantial justice done - Mr. Lisa believed the variance was exactly what was allowed by the law when he originally filed and what he had relied upon as he went forward and invested thousands of dollars in the project. He felt substantial injustice would be done if the variance was not granted.
- Was the applicant suffering from a special condition or hardship - Mr. Lisa felt if the variance was not granted, he would suffer a unique hardship since he was the only one who had been told his project was grandfathered.

Mr. Foster asked the reason for the long time span from the project's conception to this point. Mr. Tucker said it was not unusual for these types of applications to take a year or more with the engineering and revisions involved, the preparation of drainage designs, responding to comments and other things. Mr. Tucker further noted there was no section in the Code that designated a specific amount of time before declaring a project "stale."

Mr. Steve Davies, 27 West Market Street, Newport, DE, was sworn in. Mr. Davies was employed by Apex Engineering. He said this was a small and not very complex project, but sometimes the smaller ones might run into more difficult issues. Stormwater management was an issue they were working on with the Public Works Department.

Mr. Lisa said the redevelopment of the site had been a long, but not totally drawn out, process. The project began during the building boom, and such a small site did not warrant a lot of attention from engineers and others in the building industry at that time.

Mr. Bergstrom asked Mr. Lisa if he had received any indication as to where the perception came from that the project got stale. Mr. Tucker replied this was not explained to him or his client, and when Mr. Lopata suggested they proceed to file for a variance, Mr. Tucker respected his suggestion and was pleased to have Mr. Lopata's support.

Ms. Johnston said she appreciated the applicant's candor and commended the professional testimony.

Mr. Bergstrom added that the evidence put before the Board was very clear, and it was a pleasure to hear the case in the manner in which it was presented.

The Chair opened the discussion to the public.

Mrs. Jean White, 103 Radcliffe Drive, was sworn in.

Mrs. White asked for the original date of the submission and was told the first submission was made on 4/27/06, and a second revision was made on 6/29/07. Mr. White asked if the current plan was being done by site plan approval or by normal regulations, and Mr. Tucker verified it was a site plan approval. She also clarified that the proposed buildings would be three stories.

Mrs. White commented that she came to the meeting planning to oppose the project. She pointed out to the Board that the property was currently zoned RM, and the corrected variance being requested of .1487 (by survey) was for BLR zoning. However, the variance under its current zoning was .6484 (approximately 65%), and Council had the right to reject the rezoning. Mrs. White felt the presumption was being made that the applicant already had the BLR zoning, which was not the case. Further, she believed the project would impact the area and preferred for the applicant to put in a duplex similar to those on Prospect Avenue. The residences on Choate Street were single-family houses, and one was on the National Register of Historic Places.

In one sense, Mrs. White felt there was no hardship since a developer was not given a zoning change by right. On the other hand, Mrs. White was sorry about the developer's plight based on the Code revision and his understanding that he was grandfathered. However, she believed that in light of the amount of money spent up to the time the applicant first learned of the change, there was a financial hardship, and the variance should be granted.

There being no further comments forthcoming, the discussion was returned to the table.

Mr. Tucker said in the 2007 application they looked at the density in the Comprehensive Plan which called for medium density in this area. The proposed plan was for four parcels which he believed was consistent with the Comprehensive Plan. Mr. Tucker referred to the case of Wilmington Materials, one of the leading cases for this type of situation. Mr. Tucker referenced page 7 where the rules were summarized by the court and two doctrines were discussed, the

concept of vested rights and the concept of equitable estoppel. While Mr. Tucker agreed the applicant was ultimately seeking rezoning from the City, he did have the right to be processed under the existing rules for that zoning approval once the monies were invested.

Mr. Tucker said the zoning change that took place was a change in the BLR minimum lot size requirements, and the applicant sought to be processed under those requirements. Further, if the applicant met the requirements in the Comp Plan and the Zoning Code, Council while they have much discretion, should approve the rezoning. Mr. Tucker advised the Delaware Supreme Court made it clear that if a rezoning was rejected, specific reasons for such a rejection would have to be explained based on the Comprehensive Development Plan and zoning standards.

Mr. Foster confirmed that the property was originally zoned RM. Mr. Tucker responded it was RM, and the proposal included the provision that it needed a rezoning to BLR. Mr. Foster asked why a developer would proceed to spend money on a project knowing a zoning change was needed. Mr. Tucker said the reason was that the comprehensive development planning process required by the state was a five-year recycling of the planning tools which set the blueprint for rezoning. Further, state law required all applications, whether they be rezoning or otherwise, be approved in accordance with the Comp Plan. Developers look at the Comp Plan and then make decisions about whether they are going to invest based on the planning tools. Once they make an application, developers reasonably expect that the Comp Plan and any zoning provisions will be followed.

Mr. Bergstrom asked Mr. Herron if the only relief that could be granted by the Board was the variance the applicant had requested, and Mr. Herron said that was correct. Mr. Herron reported that he had been involved in the Wilmington Materials case referenced by Mr. Tucker and although the facts in this case were somewhat different, the general principle that Mr. Tucker outlined was correct and could be applied to this situation.

Mr. Foster felt the applicant got caught in a time warp, and it was an unfortunate and unforeseen event.

Mr. Sciulli was asked to explain the requirements for a building permit to remain valid. He advised there was a life span of about three years for building permits, and active work had to be continued for six months.

Mr. Sciulli asked for clarification about the number of tax parcels. Mr. Lisa advised the tax maps showed three tax parcels with four lots. At one time, the largest of those was two separate tax parcels, but New Castle County consolidated them in 1970 for billing purposes. Mr. Tucker distributed a letter from the NCC Department of Land Use stating the parcels could be separated with approval from the City. Mr. Sciulli confirmed that tax parcel 148 (50 Choate Street) was currently two lots but one tax parcel.

MOTION BY MR. BERGSTROM, SECONDED BY MS. JOHNSTON: TO GRANT THE

VARIANCE REQUESTED TO REDUCE THE MINIMUM LOT SIZE REQUIREMENT OF ONE-HALF ACRE IN A BLR ZONING DISTRICT TO .3658 ACRES (BY DEED) OR .3513 ACRES (BY SURVEY), SUBJECT TO REZONING BY COUNCIL, WITH A CONDITION THAT CONSTRUCTION BEGIN WITHIN ONE YEAR AFTER ISSURANCE OF THE FINAL BUILDING PERMIT.

MOTION PASSED UNANIMOUSLY. VOTE: 3 to 0.

Aye: Bergstrom, Foster, Johnston.

Nay: 0.

Absent: Harmer, Shopland.

4. Meeting adjourned at 9:12 p.m.

Alice Van Veen
Secretary

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