

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

July 17, 2008

**08-BA-6
Louviere Federal Credit Union
177, 185, 187 Elkton Road**

Those present at 7:30 p.m.:

Presiding: Clayton Foster

Members Present: Jeffrey Bergstrom
Michael Harmer
Cathy Johnston
Linda Shopland

Staff Members: Roger Akin, City Solicitor
Tom Sciulli, Building Director

1. APPROVAL OF MINUTES FROM MEETING HELD JUNE 19, 2008

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

2. THE APPEAL OF LOUVIERS FEDERAL CREDIT UNION FOR THE PROPERTY AT 177, 185, 187 ELKTON ROAD FOR THE FOLLOWING VARIANCES:

A) CH. 32, SEC. 32-19 (d)(8)a. REQUIRES A MINIMUM DISTANCE OF 50 FEET BETWEEN BUILDINGS USED FOR COMMERCIAL PURPOSES AND ANY RESIDENTIAL DISTRICT. PLAN SHOWS A DISTANCE OF 35.63 FEET. A VARIANCE OF 14.37 FEET IS REQUIRED.

B) CH. 32, SEC. 32-19 (d)(8)b. REQUIRES A MINIMUM DISTANCE OF 50 FEET BETWEEN THE ACCESS DRIVEWAY OF A COMMERCIAL BUILDING AND ANY RESIDENTIAL DISTRICT. PLAN SHOWS A DISTANCE OF 11 FEET. A VARIANCE OF 39 FEET IS REQUIRED.

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

Mr. Foster disclosed that he was a member of the Louviere Federal Credit Union since 1973, but he did not think that was a reason to recuse himself from the appeal.

Mr. Sciulli pointed out the application contained an error in the address for parcel number 18-025.00-223. The 187 Elkton Road address should be 189 Elkton Road, and the error was carried over to the refusal letter and to the public hearing notice.

James Everhart, President of Louviers Federal Credit Union, 2612 Kirkwood Highway, was sworn in.

Mr. Everhart said the Credit Union looked forward to being in Newark. They have been associated with the City for 40 years, and a number of their members resided, worked, or went to school in Newark. The project would be a new administration/operations building with a branch on the Elkton Road site. Mr. Everhart felt the building would be in keeping with the decorum of the downtown business district and would be a good fit with the expansion and beautification of Elkton Road.

Colm DeAscanis, Civil Engineer from CDA Engineering, 1419 N. Clayton Street, Wilmington, was sworn in.

Mr. DeAscanis prepared the application on behalf of Louviers Federal Credit Union. He said plan changes occurred between the time the appeal was filed and the Board of Adjustment hearing and were driven by the request of the Planning Department to incorporate DelDOT's changes into the preliminary plans. Mr. DeAscanis mentioned he had been in discussions with DelDOT since January. In considering the project in relationship to the master plan for improvements to Elkton and Apple Road and existing conditions, DelDOT recommended removing three of the four proposed accesses from Elkton Road and including an access from Apple Road. The current plan showed a right-in, right-out configuration, but in recent discussions DelDOT suggested eliminating the right-in and having a full exit access instead. This modification lessened the degree of the variance requested.

The reason for the location of the building was that DelDOT wanted it as far back from Elkton Road as possible. Mr. Foster asked if the new entrance and exit were closer to Elkton Road. Mr. DeAscanis said the exit was about the same since the right in was eliminated, and seven feet of the paving was also eliminated.

Ms. Shopland asked when the decision was made to develop the property, whether they were aware a variance would be needed and proceeded with the expectation that it would be granted. Mr. DeAscanis said the need for a variance was not anticipated early on, as they had other configurations that did not require a variance. He pointed out that the location and the layout of the building were controlled by the access points which controlled circulation, so by losing three accesses from Elkton Road, it changed the site and building layout. As far as the building access, revisions were made to pull that back.

Mr. DeAscanis discussed modifying the variance requested for the access driveway based on the changes driven by DelDOT. He said the hardship occurred when the DelDOT right-of-way was taken.

Mr. Harmer clarified the applicant's variance for the minimum distance between buildings – Ch. 32, Sec. 32-19(d)(8)a. – would remain the same at 14.37 feet. The access driveway variance – Ch. 32, Sec. 32-19(d)(8)b. – would change from a distance of 39 feet to 34 feet. After further consideration, however, Mr. DeAscanis said he preferred to keep the variance as originally requested to be on the safe side.

Ms. Shopland asked Mr. Sciulli if he saw any negative impact to Elkton Road's traffic pattern, parking issues, etc. if the variance was granted. Mr. Sciulli said he did not believe this project would create any such problems.

Mr. Bergstrom asked if the variance was for the open part of the building rather than the enclosed part. Mr. DeAscanis said it was for the overall building.

Mr. DeAscanis advised that the applicant reached out to the neighbors including Hal Prettyman, Linda Coleman and Delbert Lawson, and made repeated unsuccessful calls to Joseph Balascio of Apple Road. He explained there currently was screening along the back line from mature trees, and they would plant new landscaping to provide a buffer. The site was only 133' deep with the DelDOT right-of-way taken, and the drive-through service required extending the building out to where it was on the permanent easement as far as DelDOT would allow to Elkton Road.

Ms. Shopland asked if the Credit Union was transferring the business from the Kirkwood Highway location to Newark. Mr. Everhart reported they were moving the administration and operations center from Kirkwood Highway to Newark and opening a new branch on the first floor with a drive-through. Mr. Everhart confirmed that additional employees would be hired for the Newark location which Ms. Shopland felt was a plus for the City.

Mr. Foster expressed concern that the properties behind the building might have additional stormwater runoff from the property and asked what precautions would be taken to keep that from occurring. Mr. DeAscanis reported that testing had been done at the site, and they were looking into the potential for infiltration. Currently, there was a large concrete vault designed to hold water and infiltrate with a large manhole with 36" pipes across Apple Road and a 50" catch basin on the Credit Union side of Apple Road. They contacted DelDOT and explained their intent to tie into the larger-junction manhole. In addition, they were considering designing an underground system for detention similar to the existing system. Although there were a number of challenges to overcome, the new system would definitely improve the existing conditions.

Ms. Johnston discussed the landscaping along the back property line. She noticed the trees behind the existing fence had been trimmed, and asked if the fence would remain. Mr. Everhart replied they would do whatever was necessary to meet the architectural and landscaping requirements of the City and planned to install a new fence and some type of berm or barrier. Ms. Johnston remembered when Mr. Balascio, whose property bordered the proposed site, previously appeared before the Board, that his big concern was noise and traffic, and she felt landscaping would be an important buffer.

Mr. Akin reported that these parcels had been before the Board on several occasions. He briefly reviewed the prior variance applications pertaining to the area along the residential zoning district lot line and referenced several legal citations that might be of some benefit to the Board.

- In 1972, Sibarco Stations Inc. sought several variances. One was a 10' variance from the minimum distance between a building and the residential lot line depicted on the current plans. The request was denied.
- In May 1972, Sibarco Stations again sought an 8' variance from the minimum distance between a building on the parcel and the residential lot line as depicted on the current plans. The request was denied.
- In June 1979, Arco sought a variance to the minimum setback from the residential lot line. The request was withdrawn.
- In October 2000, Getty sought a number of variances, one of which was to construct a mini-mart 11 feet from the residential lot line. The request was denied.

Mr. Akin said that under Delaware statute law and under cases decided by courts in Delaware, there was no clear guidance on whether a board which has once denied a variance must deny a similar variance in perpetuity. He did not believe that was the state of the law in Delaware, and he did not think the Board's hands were tied in this case. Mr. Akin cited several references from McQuillin's The Law of Municipal Corporations. In Section 25.273 McQuillin states, "The action or decision of a board of adjustment, affirmed by a court, has been held res judicata, forbidding the reopening of the question on the same ground. A board does have jurisdiction over a second application for an exception, however, where it is substantially different from the first." In Section 25.275 McQuillin states, "A zoning board may ordinarily entertain new or successive applications for the same relief, based upon changed conditions or new circumstances, although it is a general rule that after an application or petition has been decisively acted upon by a zoning board no new application or petition touching the same subject matter may be presented to the board within a designated time, or within a reasonable time." Finally, a further reference in the same section of McQuillin, "A board is not required to hear a second application which is precisely the same as a prior one which had been disposed of by the board. According to the practice in some states, (Delaware was not listed as

one of them), it is required that where there is a change in physical conditions after a first appeal to a board of adjustment from denial of an application for a permit, a new application with the building inspector and not a new appeal to the board should be filed.”

Mr. Akin advised that the Board should be apprised of the fact that this parcel and specifically the relationship of this commercial parcel and the residential zoning district lot line immediately adjacent, had been a subject of a number of cases before the Board. Further, as recently as 2000, the construction of a mini-mart on the site by Getty was denied by the Board. However, he did not believe prior denials tied the hands of the Board to the extent that the Board must rule consistently with prior denials if the Board felt the facts of the application were substantially different from the prior cases. The Board had the discretion to take a new look at these variance requests.

Mr. Harmer thanked Mr. Akin for his thorough research and providing pertinent information to the Board.

Mr. Bergstrom noted there was no member of the public present to speak for or against the appeal.

Mr. Foster said, as noted by the Solicitor, the facts of the appeal changed dramatically from the previous cases. In regard to the mini-mart, he remembered the concern was noise, and the Credit Union would not be open for extended hours. Mr. Akin said in reviewing the minutes of the October 2000 meeting, Mr. Balascio spoke at some length, and Mr. Akin summarized the testimony of Mr. Balascio from the meeting.

Mr. Bergstrom said point for point, Mr. Balascio’s concerns were not the case in this appeal.

Mr. Foster thought it was interesting that there was no mention of ground water run-off problems in the past.

Ms. Shopland reviewed the Kwik Checks.

- The nature of the zone in which the property was located was not a problem.
- The character of the immediate vicinity of the subject property and the uses of the property within the immediate vicinity – the properties along the street were almost all commercial, and a commercial building was proposed where another commercial building had been. Since nothing was being changed, there would be no impact on the other properties.
- If the relevant restrictions on the property were removed, such removal would not seriously affect neighboring properties and uses.
- If the restriction was not removed, exceptional difficulty would be created for the applicant. In weighing what the applicant was doing for the benefit of the City, she

thought the proposed building was beautiful and would be an asset on the block. In addition, several new employees would be hired which would be a plus for the local economy.

Based on the facts of the case and the Kwik Checks, Ms. Shopland saw no problem in granting both variances.

Mr. Foster agreed with Ms. Shopland and said he was pleased the applicant was aware of the need for work on the fence. Overall, he felt the proposed plan was a big improvement to the property, and he would vote in favor of the variances.

Mr. Bergstrom echoed Mr. Foster's comments and said the property was very narrow with restricted access. While considering the variance requests, the ingress and egress would drive the footprint of the building, and he believed there had been responsible engineering and site planning for the project. Thus, he was in favor of the variances, particularly since no member of the public spoke against the project.

Ms. Johnston saw no reason to object to the variance requests. She agreed with Ms. Shopland's assessment of the Kwik Checks. When she first reviewed the plans, she was surprised by the amount of paved parking, but then she reconsidered what was there before, and it was similarly paved. Ms. Johnston was delighted the Credit Union had chosen the location, particularly in light of the Elkton Road improvements. Further, she was pleased they were working with DelDOT and felt the plan made sense in terms of the ingress and the egress.

Mr. Harmer said he would vote in favor of both variances as he thought the project was good for the City, and he applauded the design. He agreed with the comments made by other Board members and wished the applicant the best of luck.

MOTION BY MR. BERGSTROM, SECONDED BY MS. SHOPLAND: TO GRANT THE MINIMUM DISTANCE VARIANCE BETWEEN BUILDINGS USED FOR COMMERCIAL PURPOSES AND ANY RESIDENTIAL DISTRICT OF 14.37 FEET.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye: Bergstrom, Foster, Harmer, Johnston, Shopland.
Nay: 0.

MOTION BY MR. HARMER, SECONDED BY MS. SHOPLAND: TO GRANT THE MINIMUM DISTANCE VARIANCE OF 39 FEET BETWEEN THE ACCESS DRIVEWAY OF A COMMERCIAL BUILDING AND ANY RESIDENTIAL DISTRICT AND TO REQUIRE CONSTRUCTION TO BEGIN WITHIN ONE YEAR.

MOTION PASSED UNANIMOUSLY. VOTE: 5 to 0.

Aye: Bergstrom, Foster, Harmer, Johnston, Shopland.
Nay: 0.

3. Meeting adjourned at 8:30 p.m.

Alice Van Veen
Secretary