

**CITY OF NEWARK  
DELAWARE  
BOARD OF ADJUSTMENT  
MINUTES  
MARCH 18, 2021**

Those present at 7:00 p.m.:

|          |                                                                                                                                                |
|----------|------------------------------------------------------------------------------------------------------------------------------------------------|
| Members: | Jeff Bergstrom, Chair<br>Kevin Hudson<br>Bill Moore<br>Mark Morehead<br>Chris Rogers                                                           |
| Staff:   | Paul Bilodeau, City Solicitor<br>Renee Bensley, City Secretary<br>Tom Fruehstorfer, Planner II<br>Nichol Scheld, Administrative Professional I |

Mr. Bergstrom called the meeting to order at 7:00 p.m.

**1. APPROVAL OF MINUTES FROM MEETING HELD FEBRUARY 18, 2021:**

MOTION BY MR. ROGERS, SECONDED BY MR. HUDSON: TO APPROVE THE MINUTES.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Moore, Rogers, Morehead.

Nay: 0.

**2. The appeal of Joseph and Ann Faccenda, property address 0 West Park Place, for the following variance:**

- **Sec. 32-9(c)(2) – Maximum lot coverage** – The maximum lot coverage for any building, exclusive of accessory buildings, shall be 20%. The proposed building coverage is 21.2% requiring a variance of 1.2%.

Ms. Scheld read the facts of the case into the record.

Mr. Bergstrom asked who would present the case and Joe and Anne Faccenda, the homeowners, introduced themselves.

Mr. Morehead interjected and informed that he attended a Board of Adjustment (BOA) training event that morning through UD's Institute of Public Administration, taught by Max Walton. During the training, he learned that discussion of the case (with either party to the case) was not allowed by BOA members and, in an effort to gather sufficient information to support an informed decision about that evening's hearing, he unknowingly caused a situation where he was forced to recuse himself from the agenda item.

Mr. Bergstrom thanked Mr. Morehead for his candor and reminded all members that BOA hearings were judicial proceedings. Mr. Bilodeau added a point of order and recommended that Mr. Morehead step away from his computer and Mr. Bilodeau would contact him on his cellphone when the hearing was over. Mr. Bergstrom confirmed that Mr. Morehead should rejoin the meeting to offer his opinion on the third agenda item. Mr. Morehead left the hearing.

Mr. Faccenda stated he had received letters of support and Ms. Scheld confirmed they would be read into the record after the applicants spoke. He and his wife created a presentation to help explain the background and details of their proposal.

Mr. Bergstrom swore in the applicants.

Mr. Faccenda informed the variance request for the new construction of a single-family home in a residential neighborhood on a skewed corner lot with two setbacks. The home was designed as a single structure, including the garage, which exceeded the 20% restriction. The applicants requested a variance of 1.2% additional lot coverage for a single structure.

Mr. Rogers interjected and asked what the percentage equated to in square feet. Mr. Faccenda searched for the figure and Ms. Faccenda continued with the presentation. She explained that she and her husband lived in the area for 40 years and wanted to have their forever home in the City. They loved the college feel and close community atmosphere. They purchased the lot in September 2018 and began the design process with three main objectives: blend in with and enhance the neighborhood, contain within a single structure, and have an accessible design with wheelchair mobility.

Ms. Faccenda reiterated they purchased the lot in 2018 and began working on the designs in 2019. The original designs featured a first-floor master bedroom suite and a covered front porch, but the applicants realized the allowable footprint would be exceeded due to the size and shape of the lot. They then moved the designs to include an elevator to allow for future mobility issues and settled on a layout in 2019 which appeared to meet City Code. When the architect finalized the details, including increasing the space for the elevator and additional minor structural details, the applicants discovered that the coverage slightly exceeded the allowable 20%. They then submitted the plans to the City with the question of whether the additional 1.2% lot coverage was acceptable and specifically asked if their calculations matched staff's calculations as well as if the coverage would be considered de minimis and therefore approved by the City. The applicants received verbal and written assurance that the plans would be approved for zoning as submitted.

Ms. Faccenda explained they moved forward based upon the pre-approved plans and hired Bancroft Construction to build the home, signed contracts, and paid a deposit. They also hired a structural engineering firm to produce sealed engineering drawings, which exceeded the City's requirements, to ensure their plans were suitable. Next, they hired PELSA, a land survey engineering firm, to produce the lines and grades plans where the engineer doublechecked the area coverage and other aspects of the Code. The applicants applied for and obtained construction financing and learned the appraised value of their proposed home was at or above the neighborhood values which confirmed their belief that the proposed home would enhance the neighborhood and increase surrounding property values. Upon submitting the building permit application in January 2021, the applicants learned that staff were unable to approve the plans without a variance. Mr. Faccenda interjected that he was unable to locate the square footage amount and he was hesitant to estimate in a judicial hearing. Mr. Hudson asked for the square footage of the lot and Mr. Faccenda replied it was 0.27 acres. Mr. Fruehstorfer interjected that the variance was for a little over 100 square feet.

Mr. Bergstrom noted that PELSA called out the area lot as 0.28 acres +/- and assumed the amount would be on the subdivision plan. Mr. Rogers noticed the lot size was on the plan and Mr. Faccenda would continue searching. Mr. Bergstrom pointed that the survey only called the amount out to two decimal points when four was standard. Mr. Rogers calculated 105 square feet based on 0.28 acres and Mr. Hudson was satisfied that the Board had the range.

Mr. Faccenda emphasized that if the variance was not approved, the applicants would have to retrofit the design to minimize the change impact. He indicated the garage was larger than a two-car with the intent to have a storage area. If the variance was not passed, the applicants would consider reducing the storage area in the garage which would also reduce the second story. He continued that the storage area was necessary for bicycles, equipment for their grandchildren, and gardening equipment. He suggested they could add an auxiliary storage building to regain the space but felt that a second building detracted from the look of the home. He indicated the second building would add significant cost and time to the project and Ms. Faccenda confirmed it would be a hardship.

Mr. Faccenda then presented his interpretation of the *KWIK Check Factors*:

1. *The nature of the zone in which the property is located* - The property was zoned RS.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* - The immediate vicinity of the subject property was utilized exclusively for larger, single-family homes so the proposed home is in character with the existing homes and consciously designed as such.
3. *Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* - There was absolutely no negative impact to neighboring properties that would occur if this de minimis and visually imperceptible additional area coverage were approved. Non-objection letters from neighbors were received to support the proposal.
4. *Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements in the character of that use of the property* - Multiple hardships would be created:
  - The appearance of the auxiliary storage building would detract from the neighborhood as compared to the single structure
  - Wheelchair accessibility was reduced (garage ramp, accessibility to storage area). The space above the elevator had space for mechanical equipment and the garage was extended to fit the vehicles. The initial design was three feet shorter but renovated plans allowed for a ramp.
  - Revised roof lines would need to be retrofit to accommodate the design change, versus the cleanly integrated design
  - Significant costs and time delays would be incurred with any re-design at this point in the process

Mr. Faccenda summarized that the applicants consulted with City staff throughout the process and the area was de minimis with no impact to the neighborhood. He emphasized that the hardships in changing the design were significant and would decrease functionality of the home and detract from the neighborhood aesthetics. The applicants respectfully requested that the variance be granted. He then displayed various angles of the home's rendering.

Mr. Rogers asked if the covered deck was part of the lot coverage and Mr. Faccenda confirmed. Mr. Rogers asked for clarification on how decreasing the size would impact the wheelchair accessibility. Mr. Faccenda explained the top part of the garage was currently configured for storage and he was unsure how a reduction would impact the elevator. He explained that the ramp could be lost depending on from where they pulled the space and acknowledged there were possible reconfigurations that could work but would have difficulty in placing the ramp. Ms. Faccenda noted that the area in question was an access point for the storage area from the wheelchair and would be compromised. Mr. Rogers asked if the applicants considered eliminating the roof the on the deck to meet the lot coverage requirements. Mr. Faccenda confirmed it was an easy solution but noted that the family had a screened-in porch for 35 years that was the center of their lives for six months of the year and they were not willing to give it up. Mr. Rogers did not realize that the porch was screened and thanked the applicants.

Mr. Moore was unfamiliar with the community and asked if there were other areas with auxiliary storage areas and Mr. Faccenda confirmed there were a number of detached garages. Mr. Hudson added the home behind the property had a detached garage. Mr. Faccenda noted the home to the left on Orchard Road had an attached garage with an added carport or breezeway and admitted that an auxiliary storage building would not be 100% out of character for the neighborhood but argued that since the home was on a corner, an auxiliary building would be an obvious additional structure instead of a less visible backyard.

Mr. Fruehstorfer interjected that if the garage was separated from the house and moved five feet, it would have the exact same impact and meet the required coverage. Mr. Bergstrom agreed.

Mr. Hudson had no questions.

Mr. Moore interjected and asked Mr. Faccenda about his interpretation of the City's approval based on the de minimis nature of the 2019 proposal and if the approval was written or verbal. Mr. Faccenda replied that the approval was in an email. Mr. Moore asked if the email indicated that the plans could move forward without coming before the Board of Adjustment and Ms. Faccenda replied that the email stated the plans would be approved. Mr. Faccenda said the plans were reviewed and discussed and the email said the plans would be approved but provided no other detail. Mr. Moore understood.

Mr. Bergstrom asked for public comment and Ms. Scheld read the letters of support into the record:

Beth Mineo wrote:

Hi, Joe and Ann— My apologies for the delay in getting back to you. I'm on the UD faculty and also run UD's Center for Disabilities Studies, and it has been a particularly busy last few weeks. The other thing contributing to the delay is that I really didn't understand the issue in question. If I'm understanding correctly, the footprint of your house covers more of the lot than the code permits. It does seem like a minimal amount of overage, however, so I have no objection to the 21.2% lot coverage for the home you plan to construct at the corner of Orchard Road and West Park Place. I do hope that your plans for the property will be respectful of the magnificent magnolia that lives at the back edge where our properties abut. It is quite the amazing specimen. My husband Gary Heckert and I look forward to meeting you. Best wishes, Beth Mineo.

Carol and James Aftosmis, 78 West Park Place, wrote:

Dear Ann and Joe, we received your letter yesterday and are pleased to know that you will be starting the construction of your house. You must be anxious to get the project going. We have no

objection to the 21.2% lot coverage for the proposed home to be constructed at the corner for W Park Place and Orchard Road. Let us know if you need anything else. Looking forward to you getting to know you. Sincerely, Jim and Carol Aftosmis

Dawn Crowley, 58 West Park Place, wrote:

Hi Ann, this is your future neighbor at 58 West Park Place in Newark. I wanted to take a minute to write to you and let you know that we have no objection to the 21.2% lot coverage for the proposed home to be constructed at the corner of West Park Place and Orchard Road. We very much look forward to meeting our new neighbors. Have a wonderful evening. Thank you again, Dawn.

Laura Lessard, 324 Orchard Road, wrote:

Greetings, I would like the following added to the public comment for tonight's meeting in reference to the property at 0 West Park Place: I am a resident of Orchard Road, just two properties away from this lot, and support Mr. and Mrs. Faccenda's application for a variance. We want as many properties as possible to remain single family, consistent with the family-friendly nature of our neighborhood. Orchard Road has a unique architectural style and is a warm and welcoming community. In their presentation, the Faccenda's explain that they want to build something that blends in with our neighborhood. I appreciate this thoughtfulness and look forward to welcoming them. Best, Laura Lessard.

There was no further public comment.

Mr. Bilodeau requested that Mr. Bergstrom grant staff the opportunity to respond to the comments about potentially misleading the applicants. Mr. Fruehstorfer could not recall the exact conversation because it took place over a year ago, but he did remember the 21.7% coverage and stated that he was not authorized to approve a plan that exceeded the allowable coverage and he was confident that he would have informed the applicants as such. He could not locate the original plans but remembered the front porch was not covered and he would have designed a Code compliant coverage. He recalled that most conversations were via telephone and he reviewed the last email which indicated the plan would be approved but he argued that the plan referred to in the email was not the same plan presented to the Board that evening. He maintained that he would never suggest the 21.7% coverage would be approved. He acknowledged there was a misunderstanding at some point in the exchange, but he claimed he never said the coverage would be approved. Mr. Bergstrom suggested 21.2% and Mr. Fruehstorfer said he might have allowed an overage of 0.1% to 1% and agreed it was de minimis but reiterated that he did not have the authority to grant the variance. Mr. Hudson interjected that an approval was not an approval unless it was formal, and Mr. Bergstrom agreed. Mr. Bergstrom asked the applicants if the 21.2% coverage was enough and if the exact size of the lot was known because the survey data was inconclusive. Mr. Faccenda could not recall whether he obtained the figure from the site plan or New Castle County but explained the site plan included the parcel lines, so he traced out the building for what was included in the coverage. He noted the plan indicated the coverage was 21.7% but he was confident the figure was actually 21.2%. Mr. Bergstrom wanted to be confident that the number was correct, and Mr. Fruehstorfer confirmed the coverage was 21.2%.

Mr. Hudson noted the plans did not have the site area listed. Mr. Bergstrom said that PELSA called out the site area as 0.28 +/- acres and he believed the variance exceeded 1.2% but would defer to Mr. Fruehstorfer. Mr. Fruehstorfer revealed that the front porch was not covered and was not included in the coverage. He continued that the Faccenda's engineer included extras in the calculations that the City did not include.

Mr. Bergstrom closed the public portion of the hearing and entered the deliberation phase.

Mr. Rogers described the KWIK Check Factors:

1. *The nature of the zone in which the property is located* – The property was zoned single family detached in accordance with the surrounding zone.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – The character was single family detached houses.
3. *Whether, if the relevant restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – There was nothing in the record that indicated so and the applicants received letters of support.
4. *Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements in the character of the permitted use of the property* – Based on the applicants' testimony and submittal, Mr. Rogers agreed there would be unnecessary hardship and exceptional practical difficulty based on the information provided. He had no reason to think that the applicants would need to reduce the storage which would detract from the architectural character of the structure, reduce the possibility of wheelchair accessibility in the storage area, and require that the roof lines be redesigned which could impact the integrated design of the home. He understood there would be additional cost and time delays but noted the Board was not to be concerned about delays, so the argument was more towards the three factors provided by the applicant in their submittal. He would vote in favor of the variance request.

Mr. Hudson agreed with Mr. Rogers' points but was undecided regarding hardship. He reiterated that the request was de minimis and indicated the property was trapezoidal. He assumed if the property was a more regular shaped, coverage would not be an issue and he reiterated that if the garage was separated by five feet, there would also not be an issue. Given the de minimis request and the reasons stated, Mr. Hudson was considering approving the variance request.

Mr. Moore did not disagree with Mr. Rogers' points in the *KWIK Check Factors* and agreed with Mr. Hudson's concerns regarding the hardships. He reiterated the request was de minimis, the corner lot was large and would likely not be a concern if the shape was a rectangle. Given the points, Mr. Moore was considering approving the variance request.

Mr. Bergstrom agreed with previous Board comments about the first three *KWIK Check Factors*, but he had concerns regarding the fourth. He explained the lot was a new lot with a new home design, but the rules were established. He believed the home could have been configured differently and he was not inclined to vote in favor of any application with such a variance although he understood the Board members' decision given the irregularly shaped lot and the de minimis request.

MOTION BY MR. ROGERS, SECONDED BY MR. MOORE: TO APPROVE THE REQUESTED VARIANCE BASED ON THE FACTORS AS ARTICULATED BY HIMSELF, MR. HUDSON, AND MR. MOORE,

SPECIFICALLY THE DE MINIMIS NATURE OF THE VARIANCE REQUEST AND THE ODD SHAPE OF THE LOT.

MOTION PASSED. VOTE: 3 to 1.

Aye: Hudson, Rogers, Moore.

Nay: Bergstrom.

Absent: Morehead.

**3. Discussion and direction regarding current advertising and packet procedures and potential process improvements.**

Mr. Morehead reentered the meeting. Mr. Rogers formally thanked Mr. Morehead for his recusal.

Mr. Bergstrom supported Ms. Bensley's suggestions in her memo to the Board dated March 9, 2021 (*attached*).

Mr. Rogers referred to the Main Street application from February and believed that staff was trying to react to some of the confusion on the part of the applicant in submitting the various plans; he had no issue with staff's action. He asked if the intent was to hold off submitting additional information until a set date prior to the meeting. Mr. Bergstrom confirmed and stated when there were multiple iterations, he did not want Board members to encounter any confusion as to what was coming before the Board.

Mr. Morehead explained that his request to discuss the matter was because he did not own a printer that could produce large drawings. He was unable to put himself in a position to view a drawing where with legible print so he either needed support staff to print amended drawings, have a definite rule about changing drawings, or allow the Board to review plans on the floor. He was opposed to attending meetings where new information was presented in drawings that were unavailable to the Board prior to the meeting because he wanted to be prepared. He suggested that no changes be made after a deadline and referred to Ms. Bensley's suggestion of two days prior to the meeting which would only allow members time Tuesday through Thursday to prepare.

Mr. Hudson supported holding the agenda until seven days before the meeting and agreed that supplemental materials created confusion. He supported Bright Rules and Regulations so if an applicant was going to resubmit a new plan, then the applicant should be required to wait until the next cycle so all of the information was submitted, especially for commercial projects because the onus was on the applicant to have all of the information in order. His only concern for the seven-day suggestion was around large projects, such as the Data Center. All members agreed.

Mr. Moore explained that in his experience with working with the Public Service Commission in Dover, by rule of law, if applicants missed a deadline then they were required to wait until the next go-around. He did not think two days was enough time to review information. Mr. Hudson emphasized that the next cycle was four weeks.

Mr. Bilodeau informed that Council had a rule that submissions were due one week prior to the meeting and he thought the Board was within its rights to set a cutoff date. He noted that there were situations where lengthy communications were received on the day of a hearing with the direction to distribute to all members and, while he fully supported public comments, he agreed that a deadline was necessary for an applicant to submit additional information. Mr. Hudson agreed that public comment should

not be cutoff but did support a cutoff date for evidence. Mr. Bergstrom clarified that Mr. Hudson was speaking about modifying a request and Mr. Hudson confirmed and explained he was also concerned about lengthy submittals against a proposal. He specifically recalled the Data Center and Mr. Bergstrom agreed because the rebuttal for that particular hearing was a banker's box full of documentation.

Mr. Bilodeau suggested a deadline of the close of business the Friday before the meeting if the meeting was on Thursday. He clarified the ruling would be for the applicant to submit any changes to the application. Ms. Bensley interjected that if the discussion was between Thursday versus Friday then she suggested remaining with a seven-day standard for everything. She argued that to say that all documentation would be posted seven days in advance for FOIA compliance only to be followed up with a second packet one day later was not an improvement for the applicant, staff, or the Board as far as process. Mr. Moore agreed, and Mr. Hudson said that he was considering a submittal deadline of no more than two weeks out.

Mr. Fruehstorfer shared the Planning Department's process that staff reviewed applications and decided if the plans met Code. At that point, the applicant could return and present a completely different plan before deciding to come before the Planning Commission. If at any time after the Planning Department finished its review, sent a denial letter, and forwarded the information for the Board to review, the applicants changed their application, the burden was on staff to reconsider the plans, ensure the request was acceptable, and organize an additional review. He noted that enacting solid time limits for Council submissions was an attempt to give staff enough time for review and he maintained that seven days was not excessive.

Mr. Hudson thought two weeks was a minimum because staff had other tasks and he did not think it was fair for applicants to try to squeeze in extra materials and expect a second review from staff. Mr. Morehead asked if there were any legal requirements in Code regarding timeframes. Mr. Hudson asked for the purpose behind allowing supplemental packets and for the deadline for material submissions for hearings. Ms. Bensley responded that staff required a minimum of three weeks prior to the hearing to meet the advertising deadlines. Mr. Hudson supported the current rule and thought that if the deadline was two weeks then the material was submitted with a one-week revision period. Ms. Bensley informed Mr. Morehead that the appeal to the Board of Adjustment had to be taken within 30 days of the denial letter issuance, according to Section 32-62 of the Code. Mr. Bergstrom asked if there was an exception to delay with the consent or request of the applicant and Ms. Bensley said she would investigate further because it was not stated in that specific section. Mr. Bergstrom shared that it was common practice in New Castle but assumed it was because the attorneys or Board members could not meet and admitted the process was less formal than the City's. He suggested that applicants should abandon their first requests and pay for another hearing and agreed with Mr. Morehead that the Board did not want to have last minute submittals because it was confusing. He believed the case that evening put urgency on the Board to decide an issue when the applicants understood for some time that the parameters of the zoning code were not met. Ms. Bensley further clarified that the applicants had 30 days to initially file an application to the Board from the receipt of the denial letter; the Board had to hear the case within 60 days from the date of filing the appeal. Mr. Bergstrom agreed that the clarification was more reasonable.

Mr. Morehead asked if an application would be considered the same appeal if the applicants made changes and Mr. Hudson noted a good lawyer would ask the definition of a change. Mr. Moore recalled that applicants could go lower but could not go higher. Mr. Rogers believed that changes which reduced the variance or changed the architecture were confusing and he did not think changes of that nature should be submitted after the application was filed. He was less concerned with late supplemental submittals and more with changes to the plan because the public expected to hear what was advertised. He understood that applicants could never change requests to a higher variance, but he still found it confusing for the Board and

the public. Mr. Hudson concurred which was why he suggested no new changes or submissions two or three weeks out, excluding public comment. Mr. Moore clarified that Mr. Hudson's suggestion would include any changes that an applicant would file to lower the requested variance and hypothesized that if a project called for an area variance of 4% and the architecture and design were changed to require a variance of 1%, then the applicant would have to refile and be rescheduled. Mr. Hudson confirmed based on the clarity of clear rule. Mr. Rogers stated that he would be fine if Mr. Moore's example was changed on the floor and Mr. Moore agreed because if an applicant was willing to decrease the request while still requiring an approval, he was hesitant to deny the hearing. Mr. Rogers admitted he would get confused if he received the information three days in advance of the meeting, but he would entertain an applicant's reasoning as long as the variance was a reduction. He was not receptive to comparing two different plans to discern any changes. Mr. Hudson maintained his support for clear Bright Rules. Mr. Rogers agreed but was also opened to floor changes if the applicant had good reason although he did not want to receive a revised plan two days in advance of the meeting. He wanted a hard deadline while allowing for reasonable floor changes. Mr. Hudson summarized the discussion in that there was a Bright Line rule drop dead unless the variance request was reduced. Mr. Bergstrom added that the request could be made on the floor.

Mr. Moore asked Mr. Bilodeau for direction on legality. Mr. Bilodeau believed if the applicant submitted materials that changed the application, the amendments needed to be submitted seven days in advance for any new plans, but the Board could consider a reduction of a variance on the floor. He clarified that although the Board would be willing to consider the changes, if the plans still caused confusion at the hearing, the Board would be within its rights to table or postpone the hearing until they received more information. Mr. Hudson concurred. Mr. Bilodeau continued that there could be a Bright line for materials submission but at the same time, the Board could be willing to consider reductions in variances on the floor with the understanding that if the request was too complicated, the hearing could be tabled until more plans were presented in a timely fashion. Mr. Hudson confirmed and maintained his two-week minimum prior to the meeting. Mr. Bergstrom agreed with Mr. Hudson. Mr. Hudson asked Mr. Fruehstorfer for input. Mr. Fruehstorfer thought it was a completely reasonable rule because the applicant should understand their own request before applying for a hearing. He emphasized that the applicants had endless opportunities to revise plans with staff until one was finalized prior to a BOA hearing. He continued that three weeks was for advertising and thought that whatever time was required by the City Secretary to distribute information to the BOA was not an unreasonable request.

Mr. Hudson asked Ms. Bensley what her Department required, and she revealed the biggest challenge was reconciling the contents of the denial letter and its various details with what the Department received in the application. She needed to make sure staff had the ability to ensure there was uniform presentation for the Board as far as the original denial, the applied for variance, as well as if and where multiple variances were needed. She emphasized that her Department would take additional efforts to ensure that all information was clarified earlier in its process so staff was not facing an advertising deadline while still working through discrepancies, so a larger variance was not advertised just to make sure the application was covered. She continued that another challenge that staff faced was that applicants pushed for a denial letter only to immediately submit a BOA application to meet the next deadline. Doing so did not provide staff with enough lead time to work with the Planning Department and Code Enforcement to make sure that all of the details were presented. She noted that if the applicant submitted by the deadline then staff was required to hold the hearing. She reiterated that staff needed to ensure that all materials were suitable and that any questions were addressed, and staff might only have a day to assess the information before the advertisement needed to be submitted but it would be staff's responsibility.

Mr. Fruehstorfer interjected that one Department performed the review and another created the denial letter so last-minute changes presented a potential for mistakes and poor quality. Mr. Hudson asked if

two weeks worked for the Departments or if more time was needed. Mr. Bergstrom asked if the current windows was three weeks. Ms. Bensley confirmed and said there needed to be some opportunity where questions on submissions could be addressed prior to the advertising deadline so the public and Board had a clear presentation. She noted that most hearings were for local residents who were not well-versed in the process and she did not want to make the process so burdensome that it discouraged the average resident from applying or offered unreasonable delays for smaller applications. Mr. Hudson interjected that if staff needed clarification on a submission then it should not be considered a submission. Ms. Bensley suggested a rule that once a project was advertised and packets were sent to the Board, any supplemental information from the applicant needed to be brought to the floor the night of the meeting and the Board could decide whether or not additional time was needed for review and postpone if necessary. Ms. Bensley explained that staff tried to publish information early enough so the public had the appropriate time to review additional submissions but if it was too confusing and needed to be presented the night of the meeting then staff would do so.

Mr. Hudson summarized that the deadline would be three weeks and the applicant was permitted to minimize the request at the Board meeting and Mr. Bergstrom agreed. Mr. Bergstrom asked if the Board needed to formalize the rule or if staff could generate it as a policy and procedure. Mr. Bilodeau suggested a motion to adopt the changes to be in place by the May meeting.

MOTION BY MR. HUDSON, SECONDED BY : THAT THE BOARD OF ADJUSTMENT HAS A THREE WEEK PRIOR TO THE MEETING DEADLINE FOR ALL APPLICANT-INTIATED SUBMISSIONS FOR THEIR APPLICATIONS AND THE BOARD WOULD HEAR REDUCTIONS IN THE ACTUAL VARIANCE AT THEIR DISCRETION.

Ms. Bensley noted that the deadlines for the Board of Adjustment meetings were published for 2021 and suggested that all applicant materials needed to be submitted by the deadlines. She noted it was approximately three weeks but could be off by a day or two and reiterated that the posted deadlines for 2021 should remain as advertised but no supplemental submissions would be accepted after the dates. Mr. Hudson amended his motion.

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: THAT THE BOARD OF ADJUSTMENT HAS A THREE WEEK PRIOR TO THE MEETING DEADLINE FOR ALL APPLICANT-INTIATED SUBMISSIONS FOR THEIR APPLICATIONS AND THE BOARD WOULD HEAR REDUCTIONS IN THE ACTUAL VARIANCE AT THEIR DISCRETION; AND FOR THE REMAINDER OF 2021, THE BOARD WOULD FOLLOW THE PUBLISHED DEADLINES IN LIEU OF THE THREE WEEKS.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Moore, Rogers, Morehead.

Nay: 0.

Mr. Bergstrom thanked Ms. Bensley, Mr. Fruehstorfer, and Ms. Scheld for their efforts and Mr. Rogers concurred. Mr. Hudson added that he did not appreciate that an applicant could withdraw their application in the middle of a hearing on their own and thought it should require a Board vote. Mr. Moore recalled that Mr. Hudson raised the issue before, and Mr. Hudson added he also opposed when an applicant tried to discern how many Board members would be in attendance. Mr. Bergstrom suggested adding the topic to the next meeting agenda and Mr. Hudson agreed.

MOTION BY MR. MOORE, SECONDED BY MR. BERGSTROM: TO ADJOURN.

The meeting adjourned at 8:27 pm.

Nichol Scheld  
Administrative Professional I

/ns



**CITY OF NEWARK  
DELAWARE**

March 9, 2021

TO: Board of Adjustment Members

FROM: Renee Bensley, City Secretary

CC: Paul Bilodeau, City Solicitor  
Michael Fortner, Planner II  
Nichol Scheld, Administrative Professional I

RE: Proposed Changes to Board of Adjustment Packet Procedures

Recently there have been cases that have come before the Board of Adjustment where there were changes both in the variances being requested and the materials being provided. While the changes were reductions in the requests and therefore permissible within the advertising requirements, this caused confusion at the Board meetings as to what the requests were, and which materials were the most current. Subsequently, Board members requested via email that staff provide options for better clarifying changes to variance requests prior to the meeting and updates to supporting materials being provided for variance applications.

Variance reduction requests

In reviewing the variance requests from the last two meetings, the reductions in variances fell into two categories – (1) reductions caused by differences between what was on the denial letter and what was submitted by the applicant and (2) reductions caused by subsequent changes in the applicant's request after submission.

Reductions caused by differences between the variance needed on the denial letter and the variance requested as part of the application can be resolved during the review process internally prior to the advertising of the project.

Reductions caused by subsequent changes in the applicant's request after submission can be handled by the posting of a revised agenda similarly to how the Planning Commission handles agenda changes. The Planning Commission publishes their agenda in the newspaper 15 days in advance to comply with City Code. However, they do not post their agenda and packet until 7 days in advance of the meeting in compliance with the Delaware Freedom of Information Act (FOIA). The agenda posted is a revised agenda that incorporates any changes between the time of the original advertisement and the time of posting. The changes can only be decreasing requests or deleting items and adding informational items that are not for discussion or action.

In the case of the Board of Adjustment, staff would advertise the notice for the meeting within the Code required timeframe of 10 days in advance (which means notices are finalized 16 days in advance to meet publication deadlines). We would then hold the agenda and packets until 7 days prior to the meeting and issue a revised agenda as part of that packet. The final variances

would be read into the record at the meeting to provide additional clarity around the applicant request being considered by the Board.

#### Supplemental packet submissions

Another area causing confusion has been the submission of supplemental materials to the Board for applications. Past practice has been to send these to Board members as they are received via email to get them out to the Board as quickly as possible. However, this seems to have caused some issues in that emails are missed and there is not always clarity around which versions of documents are the current ones. Staff would propose changing the procedure regarding distribution of supplemental materials to holding all submissions until two days prior to the meeting and providing a hard copy supplemental packet to the Board members with documents and versions clearly labeled for consideration as part of the hearing materials. Any items received after the supplemental packet is issued would continue to be delivered via email, but with additional details regarding if the item is meant to replace an existing item already distributed.

#### Path Forward

If the Board would like to adopt the changes as outlined, they will be put into place with the April 15 Board of Adjustment meeting.

If there are any questions, please do not hesitate to contact staff in advance of the meeting.

/rkb