

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
SEPTEMBER 15, 2022**

Those present at 7:00 p.m.:

Members:	Kevin Hudson, Chair Chris Rogers Scott Bradley Mark Morehead
Absent:	Jeff Bergstrom
Staff:	Paul Bilodeau, City Solicitor Joshua Solge, Planner I Philip Machado, Administrative Professional I

Mr. Hudson called the meeting to order at 7:00 p.m. and requested the roll call.

1. APPROVAL OF MINUTES FROM MEETING HELD AUGUST 18, 2022:

Mr. Rogers asked that an edit be made on page five to read that Mr. Martuscelli “stated” that he was frustrated. Mr. Machado confirmed.

Mr. Morehead abstained from the vote due to being absent the previous meeting.

MOTION BY MR. BRADLEY, SECONDED BY MR. ROGERS: TO APPROVE THE AUGUST 18, 2022 MINUTES AS AMENDED.

MOTION PASSED. VOTE: 3 to 0.

Aye: Rogers, Hudson, Bradley.

Nay: 0.

Abstained: Morehead.

Absent: Bergstrom.

2. The appeal of Gianmarco Martuscelli, Martuscelli Restaurant Group, property address 158 E. Main Street:

Mr. Machado read the facts of the case into the record:

- **Sec. 32-56.8(1)(a)10.a – Sidewalk cafés, patios, decks, balconies, and parklets in the downtown district** – Roofs and awnings over patios and decks shall not be located within eight feet of a curb. The applicant requests a setback of 6 feet, one inch, which would require a one foot, eleven inch variance.

Mr. Machado confirmed that the meeting was advertised in the Newark Post on December 2, 2022, and direct mail notices were issued on the same day. Mr. Hudson asked if there were any responses to the notices and Mr. Machado informed that there were none.

Mr. Hudson swore in Jaime McCardell, General Manager of Klondike Kate's, who explained that the restaurant was attempting to add an awning to the front porch, as indicated in the previous meeting, to cover outdoor guests during minor inclement weather. Mr. Hudson noted that the packet information included photographs and drawings.

The Chair opened the table to questions from the Board.

Mr. Bradley noted that the original proposal included two separate awnings and asked if the plan was still current. Ms. McCardell explained that it was possible that there would be two awnings due to the length but confirmed that there would be one frame with two separate sheets. Mr. Bradley assumed there would be a roof rafter that would carry the tracks for the retracting roof and Ms. McCardell confirmed.

Mr. Rogers referred to the pictures in the packet which showed the awning on the outside; he asked if the awning would be rolled down on the sides. Ms. McCardell explained that the current awning did not have sides, but the new awning did have the option to add sides; the pictures in the packet were examples of the same awning at another location. Mr. Rogers noted the sides would add another few inches to the front of the post and Ms. McCardell explained that the sides would fold in and be flush.

Mr. Bradley recalled that the last proposal indicated the measurements to be six-feet, four-inches from the curb to the face of the awning, which was the furthest piece. He noted the new variance reduced the measurement to six-feet, one-inch which would provide three inches between the imaginary line and the face of the frame of the rollout. He asked if there would be enough room to accommodate the rolldown and Ms. McCardell confirmed and noted the awning was closer to the curb on the long side.

Mr. Hudson asked if the deck or the curb tapered. Mr. Solge stated that it was unclear whether the sidewalk or the existing deck tapered because it was an old structure but a new side walk. Mr. Morehead referred to the plot plan 1A-100 which indicated that the lot followed the curb while the building did not; he assumed the plan was depicting that the deck was part of the building. Mr. Morehead corrected his assumption and noted that the drawing was the side street.

Mr. Bradley confirmed that the front curb seemed to be parallel to the deck and was certain that the framing went off a few inches. He referred to a photograph where the zipper was on the outside of the frame and noted the zipper protruded two inches and Ms. McCardell explained the scenario would be true if the sides were added. Mr. Bradley asked if there was intent to add sides and Ms. McCardell stated the request could be possible in the future but was not a current concern. Mr. Bradley asked if the roller mechanism hanging over the variance line was an issue. Mr. Hudson noted that if the zippers were in the front for the wall then the projection would be another two inches and theoretically adjust the setback. Ms. McCardell asked if the concern was the zippers on the side or the actual roll on the top. Mr. Bradley was concerned that there would be an issue with anything projecting over the line and requested clarification. Ms. McCardell asked whether the concern was that the hangover would intrude on walking patrons or exceed the line. Mr. Bradley asked if reducing the variance to six-feet, one-inch would offer enough room. Mr. Hudson stated that the variance setback was a set measurement but the addition of the front wall moved the variance line closer to the curb; he was unsure if the Planning Department would handle the question later or if it could be considered de minimis. Ms. McCardell asked if Mr. Hudson meant that staff should be consulted when asking to add the features in the future and Mr. Hudson recommended speaking to the City before proceeding.

Mr. Hudson asked if the front posts would protrude by 4.5 inches. Ms. McCardell confirmed but pointed out in the photograph that the flap was perpendicular to the post and not all would stick out when rolled up which did not excuse the roll but would excuse the flap. She informed that it was possible to pull the rolls inward and secure them with snaps; she was unsure if the rolls were snapped in the photograph.

Mr. Bradley was concerned with the technicality concerning the rolls. Mr. Hudson assumed the flap in the picture was rolled up and was pushed out. Ms. McCardell explained that the presented photograph did not necessarily depict how the establishment would set up the awning. Mr. Hudson suggested that the Board could move forward with the appeal and the applicants could speak to City staff to add the wall and if another appeal was necessary.

Mr. Rogers asked Ms. McCardell to describe the hardships the applicants would face if the appeal was denied. Ms. McCardell explained that the restaurant was specifically concerned with Parents Weekend and Homecoming Weekend where the weather was nice enough to dine outdoors and, if the restaurant was unable to host the 45 patrons on its deck, then there was a loss of around \$20 per head. She continued that restaurant relied on many weekends throughout the semester.

Mr. Morehead asked if the awning would only be used for good weather and would be rolled up and stored in the winter. Ms. McCardell explained that the structure was permanent but was retractable and patrons did not typically sit on the deck during the snow; there were no plans to advertise the deck as a comfortable seating space. She continued that the awning would be very useful for patrons to sit outdoors if there was a light rain, or the weather was sunny.

Mr. Hudson explained that the Board had to apply legal standards to the case and asked how the ability to have customers seated outdoor compared to other restaurants. Ms. McCardell revealed that the restaurant was one of the six main restaurants with outdoor seating. Mr. Hudson asked if other restaurants had similar setups that provided a competitive advantage. Ms. McCardell confirmed and noted that patrons could still sit under Home Grown's awning on a rainy day and Caffè Gelato was fully enclosed.

Mr. Bilodeau interjected that the ordinance indicated that "roofs and awnings over patios and decks shall not be located" so if the rolled up portion exceeded six-feet, one-inch, then the variance would not help the applicant. Mr. Hudson asked if the applicant would have to return and Mr. Bilodeau continued that the round piece would have to be within the variance or it would be in violation.

Mr. Hudson asked Ms. McCardell if the direction was clear, and Ms. McCardell confirmed. Mr. Bradley noted that front skirts would not be allowed and Ms. McCardell confirmed they would not be allowed until further notice.

Mr. Morehead asked for details on the guttering system. Ms. McCardell was unsure of the drainage system and Mr. Solge explained that the gutter was built into the frame of the roof and the columns acted as the downspouts. Mr. Morehead asked if the gutter was directly over the top of the columns. Mr. Solge repeated that the downspouts were inside the columns and Mr. Morehead clarified that he was asking if the gutter was directly over the top of the columns so that the projection of the gutter was not forward of the columns. Mr. Solge confirmed.

Mr. Hudson asked how the awning would impact any neighboring properties. Ms. McCardell did not believe that any neighboring properties would be impacted. Mr. Bilodeau asked if any neighboring businesses had expressed any opinion. Ms. McCardell revealed that none had and that the restaurant was flanked by a

semi-vacant building and an unmanned credit card stand. Mr. Hudson asked Ms. McCardell to describe the property and surrounding areas. Ms. McCardell explained that the applicant property was Klondike Kate's Restaurant which had a front deck and was located directly on Main Street and Choate Street. She continued that Iron Hill was across the street and had a patio with umbrellas for the tables, Kate's Place was to the right of Klondike's which held tenants and the ATM with two other shops.

The Chair opened the floor to public comments. There was no public comment and the Chair returned the discussion to the table.

Mr. Hudson opened the table to deliberation. Mr. Morehead asked Mr. Bilodeau if adding a roof made a structure more permanent. He noted that previous Board decisions regarding decks included language that indicated the addition would not permanently change the footprint of the building and was a temporary change for the purposes of the deck; he asked if the language could be included. Mr. Bilodeau suggested that "the variance shall not change the footprint of the building and was a temporary structure". Mr. Morehead considered the decision to be difficult and complicated by the fact that the deck already existed and was pushing the roof forward. He doubted the Board had jurisdiction about the downspouts coming onto the sidewalk and Mr. Solge confirmed that the Planning Department investigated City Code and found no concerns. Mr. Morehead clarified that the current discussion was for the roof and not the sides. Mr. Bradley agreed with Mr. Morehead. Mr. Morehead explained that the Board assumed the sides would project further than six-feet, one-inch. Mr. Bradley asked if the awning would have physical sides and Mr. Morehead referred to Ms. McCardell's statement that sides might be added later. Mr. Bilodeau interjected that anything that projected more than six-feet, one-inch would be in violation. Mr. Morehead stated that the front curtain could not be rolled up and was not being discussed that evening and was not part of the potential approval. Mr. Bilodeau confirmed that any installed awning, either on the front or the sides, could not be more than six-feet, one-inch from the curb. Mr. Bradley asked if the variance was for a roof-only awning. Mr. Hudson explained that the variance would not apply to the left and right sides if walls were ever installed, and Mr. Morehead agreed.

Mr. Rogers asked if the deck was non-conforming. Mr. Solge informed that decks were permitted to be within six feet of the curb and clarified that the drip edge of the awning needed to be eight feet from the curb which was why the applicant was seeking a variance. Mr. Hudson emphasized that the question regarded the awning and not the deck. Mr. Rogers asked if the variance was for one-foot and eleven-inches and Mr. Hudson confirmed. Mr. Rogers calculated that the variance was 20% of the required setback.

Mr. Rogers reviewed the *KWIK Check Factors*:

1. *The nature of the zone in which the property is located* – The property was zoned BB, Central Business District.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – Character of immediate vicinity was a mix of retail shops, services with residential units on the upper stories.
3. *Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Staff received no opposition from the public so there was nothing on record to indicate a negative impact to adjacent properties.
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 – The use was permitted under the ordinance and the applicant wanted to be able to compete with similar restaurants on Main Street, such as Caffe Gelato, Home Grown, and Ali Baba's. The applicant stated that the lack of an awning presented a disadvantage during inclement weather when other businesses to accommodate patrons for outdoor seating.

Mr. Rogers noted that the awning was inline with an existing deck which made the request easier for him to consider except for the fact the protrusion was only 4.5 inches beyond the existing post of the existing deck, which was permitted in the setback. He continued that the request was only a 24% reduction in the required setback, so he was inclined to vote in favor of the requested the variance with the condition that the deck not be considered a permanent structure. He deferred to staff and Code Enforcement on the issue of the protrusion of the roll.

Mr. Bradley would vote in favor of the variance with the stipulations that the front skirts were worked out with City staff and the enclosure would not be permanent.

Mr. Morehead disagreed with Mr. Rogers that 23 inches versus 8 feet was not a major variance. He explained that the complication was that the deck was allowed to be within the 23-inch space. He would support the request with the understanding that the addition of the temporary awning was a temporary structure and did not give the building a new footprint.

Mr. Hudson agreed with previous Board comments and reiterated that economics could be a factor as long as it was minimal and the resulting harm was from denying the request would be greater than the effect on the neighboring properties. He found no evidence to suggest that the neighboring properties would be impacted. He admitted that the request was distinctive because of where the deck and awning ended and the two different sections of Code; in some sense, the request could be viewed as a 4.5 inch variance of coming out. He added that the historical nature of the building and its appearance was distinctive and emblematic of Main Street and Newark. He would be in favor of the request with the permanent enclosure limit.

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: TO APPROVE THE APPEAL FOR 158 EAST MAIN STREET FOR THE ONE-FOOT, ELEVEN-INCH VARIANCE WITH THE RESTRICTION THAT THE VARIANCE WAS NOT TO BE USED TO CONSIDER THAT THE AWNING AS A PERMANENT ENCLOSURE OR CHANGE THE FOOTPRINT OF THE BUILDING.

MOTION PASSED. VOTE: 4 to 0.

Aye: Rogers, Hudson, Bradley, Morehead.

Nay: 0.

Absent: Bergstrom.

MOTION BY MR. MOREHEAD, SECONDED BY MR. HUDSON: TO ADJOURN.

The meeting adjourned at 7:35 pm.

Nichol Scheld
Deputy City Secretary

/nls