

**CITY OF DELAWARE CITY
BOARD OF ADJUSTMENT**

NOTICE OF DECISION

APPLICANT: Delaware Holding, LLC/Whittaker Brothers
PO Box 531
Delaware City, DE 19706

NCC TAX PARCEL NOS. 22-007.00-062
PUBLIC HEARING DATE: January 26, 2010
DATE OF DECISION: February 3, 2010

REQUESTED: Applicant use variance to permit a three row home subdivision on a property zoned C-1 under the City's Zoning Code located at 59 Washington Street, NCC Tax Parcel No. 22-007.00-062.

The Board of Adjustment may grant a variance from the use requirements of the City of Delaware City Zoning Code where it finds the applicant or property owner is experiencing unnecessary hardship in complying with the specific standards of the Zoning Code applicable to the subject property and where substantial justice can be done without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map.

The subject property is located in the C-1 zone and is in the historic district. The lot is approximately .2 acres in size, 79 feet wide and 108 feet deep. The property was the subject of a variance and special exception application in 2006 which resulted in the approval of a condominium project comprised of 7 residential condominium units and 2 commercial units on the first floor. The applicant has not implemented the condominium plan within 12 months of the grant date and so all variances and the special exception for condominiums previously granted have expired and are now null and void per Zoning Code §46-62. The applicant's current plan is to subdivide and develop the site as three row house lots to permit either residential use or a mixed commercial use (on one or more of the first floors) and residential use (on one or more of the second floors). The subject property was also granted a variety of dimensional variances in a decision of the Board of Adjustment dated December 4, 2009.¹

¹ Specifically, the applicant requested, and was granted with conditions, dimensional variances: (i) from the 15 foot front yard set back requirement of the Zoning Code, §46-31 to permit a zero foot set back on each of three proposed townhouse lots; (ii) waiver of off street parking requirements of Section 46-96; (iii) from the height limitation of 35 feet set forth in Zoning Code §46-31 to permit a building up to 46 ft high; (iv) from lot area requirements (5,000 sq. ft.) to permit two 3,100 sq. ft. lots and one 2,000 sq. ft. lot; (v) from lot frontage requirements (50 ft.) to permit two lots with 29 ft. frontage and one lot with 20 ft. frontage.

As to the present application, the Planning Commission has recommended approval of the plan and the requested use variance. The Historic Preservation Commission retains approval rights over the appearance of exterior facades which have not been finalized by the applicant. Subdivision approval of the site is contingent upon the grant of the use variance requested since row houses are an R-2 use (with a special exception) under §46-17 of the Code. Only R-1 residential uses are permitted in the C-1 zone as a matter of right and row houses are not permitted as an R-1 use.

The applicant testified that he is suffering unnecessary hardship in complying with the specific standards of the Zoning Code at the subject property. He described the immediate area as including 2 warehouse type structures (one of which is immediately adjacent to the subject property), the Post Office building and parking lot to the side and rear, as well as various other row or semi-detached dwelling structures. He could point to no other retail or office use of property in this block of Washington Street. The applicant pointed out that there was minimal vehicular or pedestrian traffic on this block of Washington Street again illustrating that the property is poorly situated for office or retail use. The applicant argued that while he will endeavor to market and sell the properties to owner occupants who would utilize the first floor for commercial purposes, the likelihood of locating three retail or office occupants in this block where there is no other retail or office activity and minimal through traffic by car or by foot was not realistic in the present economy and results in unnecessary hardship.

The applicant further argued that unique soil conditions on this site combined with its presence in the flood zone make utilizing the property as a detached single family home (as permitted in the C-1 zone) cost prohibitive, especially when combined with the fact that the property is surrounded by a warehouse property and the post office's loading zone and parking lot. The soils in question are soft and unstable for up to 20 feet below ground requiring the extra expense (estimated at \$25,000) of 30 foot pylons to support the structure. The applicant testified that this expense could not reasonably be recovered if the site were developed with a single family home but was better spread out between the three proposed row homes. Moreover, the first floor of living space must be set above the flood plain (i.e. over elevation 10---grade is presently at elevation 5) thus making its entryway and street appearance less desirable for a single family residence.

Another area of hardship claimed by the applicant as unique to this property involved compliance with the State Fire Code. For a commercial on the subject property, the applicant testified that the Fire Code would require on site fire lanes permitting emergency vehicle access around at least 50% of the property to the property. With zero side yard setbacks permitted under the Code, there is insufficient area to provide the required fire lanes. The fire lanes would not be required for row home use. Alternatively, sprinklers may be required by the Fire Marshall under certain commercial configurations. The applicant pointed out and the City Manager confirmed that adequate water pressure in this area to service a sprinkler system is problematic. The applicant testified that under these circumstances, an additional \$30,000.00 pumping system would likely be required by the Fire Marshall to adequately pressurize a sprinkler system. The additional cost further drives the selling price for a commercial property higher than the current economic market can bear.

Finally, the applicant pointed to hardship resulting from the need to comply with the City's parking regulations for commercial properties if the subject property were used for such purpose.

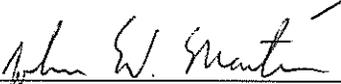
In most cases under C-1 zoning, the Code requires 1 off street parking space per 200 sq. ft. of floor area used for most commercial uses. With approximately 2400 sq. ft. of total first floor area proposed, up to 12 off street parking spaces would be required. The applicant testified that there is no room for off-street parking on the proposed plan and that shrinking the foot print of the building to permit the necessary off-street parking would diminish the total area the project such that it would not be economically viable.

The City Manager testified that appropriate public posting and certified mail notices to surrounding property owners as required by Code had been completed. No written letters of support or objection were received. No members of the public appeared at the Board of Adjustment hearing to either ask questions, support or object to the application.

Following lengthy discussion, the Board voted to grant the requested use variance to permit a 3 row home subdivision in a C-1 zone. The variance is consistent and compatible with other properties and uses in this area of Washington Street. HPC and the Planning Commission have recommended approval pending finalization of the facade design. Moreover, the harm to the applicant and the community as a whole if the variance were denied would be greater than the probable effect on neighboring properties if the variance is granted. The granting of the use variance will not cause substantial detriment to the public good, nor will it substantially impair the intent and purpose of the Zoning Code. The Board found that the applicant was experiencing unnecessary hardship in complying with C-1 use requirements due to unique soil conditions on site, its presence in the flood plane, questionable water pressure to support a sprinkler system, and the difficulty in complying with Fire Marshall regulations and City parking regulations all as described by the uncontroverted testimony of the applicant. Furthermore, the Board found that developing the property as a detached single family dwelling would neither be consistent with the character of the area nor would it likely provide a reasonable return on investment to the owner due to incompatible surrounding uses and the unique soil and flood plain conditions that exist on site.

Vote: 2-1 (Grant: Stewart and Losco; Deny: Martin)

BOARD OF ADJUSTMENT OF
THE CITY OF DELAWARE CITY



John W. Martin, Chairperson

NOTE: This variance is neither a building permit nor a Certificate of Occupancy. Appropriate permits must be obtained from the applicable governmental agencies prior to construction or establishment of any use on the property. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within 30 days of its filing in the Office of the Board of Adjustment.