



BOARD OF ADJUSTMENT

NOTICE OF DECISION

APPLICANT: Diamond State Port Corporation
PUBLIC HEARING DATE: June 4, 2020
DATE OF DECISION: June 4, 2020
DATE DECISION FILED: August 10, 2020

REFERENCE NO.: 2020-0216-A

MEMBERS OF BOARD PRESENT: David H. Burt, Terry Parker, Izuru Osegbu-Rivers, Edward Thomas, Richard Farmer, William Brooks and Monique Slowe

APPLICATION: Area variances to facilitate the recordation of a Land Development Plan:

1. To permit a Landscape Surface Ratio (LSR) of ~~0.03~~ **0.04**¹ landscape surface ratio (0.10 minimum LSR required). *See* UDC Table 40.04.110.A. 2. To permit a 0.0 bufferyard opacity along the Hay Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. 3. To maintain a 0.0 bufferyard opacity along the Lighthouse Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. 4. To permit 0 street trees along the Hay Road right-of-way for Lot 1 (83 street trees required). *See* UDC Table 40.04.111.C. 5. To maintain 0 street trees along the Lighthouse Road right-of-way for Lot 1 (23 street trees required). *See* UDC Table 40.04.111.C. 6. To maintain 0 open space plant units per acre for Lot 1 (6 on-lot plant units per 1-acre required). *See* UDC Table 40.04.111.A. 7. To maintain 0 parking lot plant units per acre for Lot 1 (1 plant unit per 40 parking spaces). *See* UDC Table 40.04.111.A. 8. To maintain paving 0 feet from the Hay Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. 9. To maintain paving 0 feet from the Lighthouse Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. 10 To construct 60 120-foot high light poles (50-foot maximum height is permitted). *See* UDC Table 40.04.110.C.

SUBJECT PROPERTY: 4600 Hay Road, Wilmington, DE 19809

Parcel No.: 06-153.00-006
06-153.00-003

Zoned: HI

CD: 8

The Board of Adjustment (the "Board") is empowered to hear and decide the merits of the Application pursuant to 9 *Del. C.* § 1313.

LEGAL STANDARD

¹ This variance was originally advertised as "0.03 LSR." At the hearing, the Applicant requested it to be amended to "0.04." Since the amended variance is less relief than the original variance requested, it is not required to be re-advertised. The amendment was granted by the Board by unanimous vote.

The Board may grant a variance from the area or dimensional requirements of the zoning code where it finds that the applicant or property owner is experiencing exceptional practical difficulty, rather than routine difficulty, in complying with the specific provisions of the zoning code applicable to the Subject Property. 9 *Del. C.* § 1313(a)(3). The Delaware Supreme Court set forth a four-prong analysis for the Board to use “to determine if the difficulties presented by the owner are practical rather than theoretical, and exceptional rather than routine.” *Bd. of Adjustment of New Castle Cty. v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978) (citation omitted). The Board should take into consideration:

- 1) The nature of the zone in which the property lies.
- 2) The character of the immediate vicinity and uses contained therein.
- 3) Whether, if the restriction upon the applicant’s property was removed, such removal would seriously affect the neighboring property and uses.
- 4) Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to the owner’s efforts to make normal improvements on the character of that use of the property which is a permitted use under the zoning code.

Id. See also *Dexter v. New Castle Cty. Bd. of Adjustment*, 1996 WL 658861, at *2-3 (Del. Super. Sept. 17, 1996), *aff’d*, 692 A.2d 414 (Del. 1997). The Board must also weigh “the potential harm to the neighboring properties by granting the variance against the potential harm to the property owner by denying it.” *McLaughlin v. Bd. of Adjustment of New Castle Cty.*, 984 A.2d 1190, 1192-93 (Del. 2009). The Board may grant an area variance “provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map.” 9 *Del. C.* § 1313(a)(3).

BOARD HEARING

The Applicant has requested 10 variances to facilitate the recordation of a Land Development Plan to construct a port facility that will consist of a container storage yard, security gates, and several structures, including a warehouse, an inspection platform, a 2,600-foot-long shipping wharf and associated parking. Shawn Tucker, Esq. presented the Application on behalf of the Applicant, along with Eugene Bailey, the Executive Director for Diamond State Port Corporation (DSPC), Eric Casey from GT USA Wilmington, a global maritime port operator, and Brian Devine, Jeff Bross and James Taylor, professional engineers from Duffield Associates. The evidence presented in support of the Application was as follows:

GT USA Wilmington has entered into a 50-year agreement to operate and develop the Subject Property into the proposed container terminal as depicted on slide 4.² The containers will be stacked 5 high, which is the industry standard. The ship to shore cranes are rubber tires and completely electric with zero emissions. Because of the shape and size of the Subject Property, the Applicant is experiencing an exceptional practical difficulty to provide the require landscaping while maximizing storage of stacks in order to reduce safety hazards. Multiple site designs were

² The Applicant presented a detailed PowerPoint in support of the Application.

created before the final proposal before the Board. These proposals sought to maximize the productivity of the port. Although the Application lists 10 variances, variances 3, 5, and 9 are duplicative of variances 2, 4, and 8 respectively because Hay Road becomes Lighthouse Road. Furthermore, these variances are to maintain existing conditions which are depicted on slide 16 and which also show the impediments the Applicant must overcome to develop a fully code compliant site.

For Variance 1, slide 10 demonstrated that the existing conditions of the Subject Property include 96.04 acres of impervious coverage. The Applicant is proposing to add 18.7 acres of impervious coverage, 76% of which is directly related to the new docks, backfilling and a retaining wall. Only 4.5 acres of existing site will have new impervious coverage. The Applicant's witnesses testified that ideally, they would like to cap 100% of the Subject Property to prevent ground water contamination. The present proposal is capped approximately 97%. The other 3% is mostly river which cannot be capped.

Variances 2 through 7 are related to landscaping. There are environmental factors driving the Applicant's request for relief regarding plant units and street trees. The Subject Property is a Resource Conservation and Recovery Act (RCRA) site and best practices require the site to be capped and best practices prohibit trees and shrubs, whose growth deteriorates the drainage layer and buffer soils as depicted on slide 19. Additionally, the United States Coast Guard must review and approve the security plan for the port and its operations. The Coast Guard has created Maritime Security (MERSAC) Security Levels which the port operation is subject to. The Applicant's witnesses testified that to comply with MERSAC no plantings are allowed within 10 feet of the perimeter of the security fencing for security purposes, which inhibits the ability to provide the code required bufferyard. To mitigate for capping and the security fence, the Applicant has entered into an agreement with the State of Delaware to planting trees and native species plants at Fox Point Park and Bellevue State Park. A total of 35 street trees and 35 plant units will be provided. The Applicant will also investigate planting vegetation on the west side of Lighthouse Road; however, the property is under different ownership.

Variances 8 and 9 are existing conditions of the site and cannot be removed in part due to the existing rail spurs which will be used by the port operation. The remainder of the paving is necessary to satisfy the requirement of capping or impervious coverage under RCRA regulations.

Slide 22 demonstrated the proposed lighting plan associated with the relief requested in variance 10. The 120-foot tall lighting pole is in line with the industry standard and is high enough to clear the container stacks which are 45 feet in height and the cranes which are between 70 and 80 feet in height. In addition, the increase in height allows for more illumination within the site and requires fewer light fixtures in total. The lighting plan will ensure safety on the site and will bleed out no further than 10 feet beyond the security fence. Denial would result in more light fixtures that would interfere with circulation and functionality of the port operations as demonstrated on slides 21 and 22.

Overall, the shape of the lot, environmental constraints, federal regulations and industry standards are creating an exceptional practical difficulty for the Applicant to develop the Subject Property for use as a maritime port which is permitted under the zoning code.

Public comment was invited by the Board. The Board received letters in support of the Application from the Delaware State AFL-CIO, the Delaware Building Trades Council, and the International Longshoreman's Association. Bob Valihura, the Chairman of the Council of Civic Organizations of Brandywine Hundred (CCOHB), took no position on the Application, but stated the proposed business would create jobs. Mr. Valihura was concerned about traffic, noise, light and environmental pollution from the proposed operation.

The Department of Land Use (the "Department") recommended that the Board grant the requested variances because, among other reasons, the hardship from the result of a denial would outweigh the probable effect on neighboring properties if the variances were granted. In support of its recommendation, the Department submitted a written Report of Recommendation.

In response to Mr. Valihura's comments, the Applicant's witnesses stated that a traffic study will be completed regarding access from I-495 not only to the Subject Property via Hay Road but access to Fox Point Park as well. The Applicant is amenable to working with the adjacent property owners to improve the view shed at the intersection of Edgemoor Road and Lighthouse Road. This development is estimated to create 2400 new jobs.

After hearing the Applicant's presentation, the Department's recommendation and public comment, Mr. Burt moved to grant the Application (the "Motion"). The Motion sought to approve the following: **Area variances to facilitate the recordation of a Land Development Plan:** 1. To permit a Landscape Surface Ratio (LSR) of 0.04 landscape surface ratio (0.10 minimum LSR required). *See* UDC Table 40.04.110.A. 2. To permit a 0.0 bufferyard opacity along the Hay Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. 3. To maintain a 0.0 bufferyard opacity along the Lighthouse Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. 4. To permit 0 street trees along the Hay Road right-of-way for Lot 1 (83 street trees required). *See* UDC Table 40.04.111.C. 5. To maintain 0 street trees along the Lighthouse Road right-of-way for Lot 1 (23 street trees required). *See* UDC Table 40.04.111.C. 6. To maintain 0 open space plant units per acre for Lot 1 (6 on-lot plant units per 1-acre required). *See* UDC Table 40.04.111.A. 7. To maintain 0 parking lot plant units per acre for Lot 1 (1 plant unit per 40 parking spaces). *See* UDC Table 40.04.111.A. 8. To maintain paving 0 feet from the Hay Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. 9. To maintain paving 0 feet from the Lighthouse Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. 10 To construct 60 120-foot high light poles (50-foot maximum height is permitted). *See* UDC Table 40.04.110. **Conditions:** The Applicant shall retain the services of a registered landscape architect, and shall cause to be prepared and submitted to the Department the following: 1. A plan for the provision of 35 street trees and 35 plant units to be installed at Bellevue and Fox Point State Parks in cooperation with DNREC. 2. A detailed architectural and landscape plan to promote the enhancement of the appearance of the environs at the intersection of Edgemoor, Hay and Lighthouse Roads. Said plan shall be to the satisfaction of the Department. The Applicant shall coordinate with any government

agency or other entities to acquire necessary approvals for the execution thereof. The plans shall be executed in a manner consistent with the Applicant's representations to the Board. Mr. Thomas seconded the Motion.

DECISION

The Board votes to **grant** the: “**Area variances to facilitate the recordation of a Land Development Plan:** **1.** To permit a Landscape Surface Ratio (LSR) of 0.04 landscape surface ratio (0.10 minimum LSR required). *See* UDC Table 40.04.110.A. **2.** To permit a 0.0 bufferyard opacity along the Hay Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. **3.** To maintain a 0.0 bufferyard opacity along the Lighthouse Road right-of-way for Lot 1 (0.6 bufferyard opacity required). *See* UDC Table 40.04.111.A. **4.** To permit 0 street trees along the Hay Road right-of-way for Lot 1 (83 street trees required). *See* UDC Table 40.04.111.C. **5.** To maintain 0 street trees along the Lighthouse Road right-of-way for Lot 1 (23 street trees required). *See* UDC Table 40.04.111.C. **6.** To maintain 0 open space plant units per acre for Lot 1 (6 on-lot plant units per 1-acre required). *See* UDC Table 40.04.111.A. **7.** To maintain 0 parking lot plant units per acre for Lot 1 (1 plant unit per 40 parking spaces). *See* UDC Table 40.04.111.A. **8.** To maintain paving 0 feet from the Hay Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. **9.** To maintain paving 0 feet from the Lighthouse Road right-of-way for Lot 1 (40-foot street yard paving setback). *See* UDC Table 40.04.110.B. **10** To construct 60 120-foot high light poles (50-foot maximum height is permitted). *See* UDC Table 40.04.110.C. **Conditions:** The Applicant shall retain the services of a registered landscape architect, and shall cause to be prepared and submitted to the Department the following: **1.** A plan for the provision of 35 street trees and 35 plant units to be installed at Bellevue and Fox Point State Parks in cooperation with DNREC. **2.** A detailed architectural and landscape plan to promote the enhancement of the appearance of the environs at the intersection of Edgemoor, Hay and Lighthouse Roads. Said plan shall be to the satisfaction of the Department. The Applicant shall coordinate with any government agency or other entities to acquire necessary approvals for the execution thereof. The plans shall be executed in a manner consistent with the Applicant's representations to the Board.”

The Board finds that if the variances are denied, and the restrictions are not removed, “the restriction[s] would create...exceptional practical difficulty for the owner in relation to his/her efforts to make normal improvements on the character of that use of the property which is a permitted use under the use provisions of the ordinance [involved].” *Kwik-Check Realty, Inc.*, 389 A.2d at 1291. The Board finds:

- 1) The nature of the zone in which the Subject Property lies is identified as a Heavy Industry district. This district is intended to be used primarily for larger heavy industrial developments that are not suited to other industrial districts and the uses that support those types of developments.
- 2) The character of the immediate vicinity and the uses contained therein consists of heavy industrial uses and Fox Point State Park to the northeast.

- 3) It is unlikely that the requested variances will have a serious adverse effect on the surrounding properties because the resulting nonconformities are consistent with the character of the surrounding area.
- 4) If the restrictions are not removed, the Applicant would suffer an exceptional practical difficulty to construct a normal improvement of a port facility, which is permitted under the zoning code.

On balance, the Board finds that, while the requests are significant in nature, the proposed port facility is a normal and necessary improvement that will be consistent with the surrounding community character and is unlikely to create a significant adverse impact on neighboring properties. The Board also concludes that granting the variances will not cause "substantial detriment to the public good," nor will it "substantially impair the intent and purpose of the zoning code, regulation or map," 9 *Del. C.* § 1313(a)(3), especially because of the need to redevelop a distressed site. The LSR requirement is superseded by capping requirement which prevents ground water contamination. Moreover, relief from the landscaping requirements protects the capping of the site. The Board finds that its conditions mitigate the need for onsite landscaping by proposing the enhancement of the adjacent environs. Paving and bufferyard relief are necessary to maintain the existing railroad spurs and allow for the highest and best use of the property as it stores containers and needs adequate space to maneuver trucks and cranes. The Board finds that the lighting plan was thoughtfully developed and the increase in height is justified by the height of the cranes system. The Board recognizes that the impervious coverage is an asset to the Subject Property to prevent leaching of PCBS and other pollutants but is relying on the Applicant to seize opportunities to add landscaping when possible.

**VOTE: 6-0-1 (Grant: Parker, Burt, Thomas, Farmer, Osegbu-Rivers, Slowe)
(Abstain: Brooks)**

BOARD OF ADJUSTMENT
OF NEW CASTLE COUNTY



David H. Burt
Chair

DATE: August 7, 2020

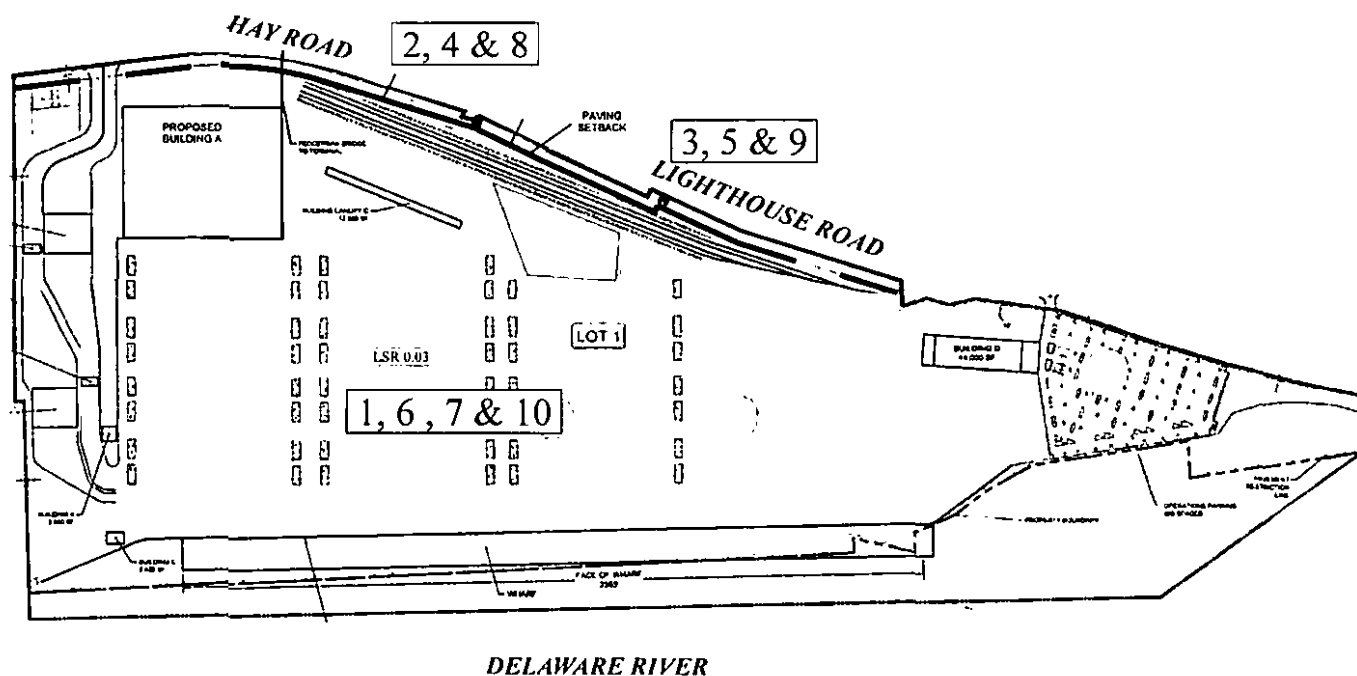
NOTE: Variances are neither building permits nor Certificates of Occupancy. Appropriate permits must be obtained from the Department of Land Use prior to construction or establishment of the use. This decision should be kept in a safe place with the property deed. This decision may be appealed to the Superior Court by any person aggrieved by it within thirty (30) days of its filing in the office of the Board of Adjustment.

NOTE: A variance becomes void if the variance is not put into effect within two (2) years of the filing date of this decision. *New Castle County Code* § 40.31.390.

PUBLIC HEARING DATE: June 4, 2020
COUNCILMANIC DISTRICT: 8

ZONING: HI

APP. NO. 2020-0216-A
TAX PARCELS: 06-153.00-006
06-153.00-003



BOARD OF ADJUSTMENT NEW CASTLE COUNTY, DELAWARE

Applicant:
Address of Subject Property:

New Castle Hospitality
4600 Hay Road
Wilmington, DE 19809

Applicant seeks: Variances

Area variances to facilitate the recordation of a Land
Development Plan: Various

DECISION:
DATE OF DECISION:

SCALE: NTS