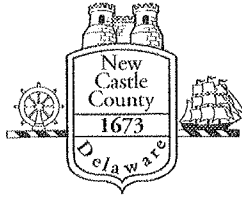


**Thomas P. Gordon**  
County Executive



**David M. Culver**  
General Manager

## OFFICE OF LAND USE

### NOTICE OF DECISION

REFERENCE:           Application 2012-0555           DECISION FILED: May 9, 2013

1707 Concord Pike, Parcel No. 0610000086

APPLICANT:           **Henry Black, Mary Lou Black, and Blackball Properties, LLC**  
1709 Concord Pike,  
Wilmington, DE 19803

PUBLIC HEARING DATE: April 16, 2013           DATE OF DECISION: April 16, 2013

Henry Black, Mary Lou Black, and Blackball Properties, LLC (the "Appellants") appeal from the grant of a Change of Use Certificate ("Certificate") by the Department of Land Use (the "Department") to Gary Staffieri and Adria Charles (the "Staffieris") on July 27, 2012. Specifically, the Appellants allege that the Department erroneously issued the Certificate to the Staffieris despite the failure of the property to meet the parking space requirement for the intended business, as set forth in the New Castle County Unified Development Code ("UDC").

#### **PROCEDURAL POSTURE**

On September 13, 2011, the Staffieris submitted an application for a building permit in order to change the use of the existing building located at 1707 Concord Pike (the "Property") to one suitable for an auto detailing business. Pursuant to the Department's Use Permit Requirements, certain paperwork is required to be submitted in addition to the building permit application, including, *inter alia*, zoning verification for certain situations. On October 11, 2011 and October 27, 2011, the Property was inspected by Department inspectors who made conflicting determinations of "passed" and "failed." The Inspection Advice Form of October 27<sup>th</sup>, completed by Inspector John Robitaille, indicates that the final inspection failed. There are

handwritten notes on this form indicating “per Jim Smith<sup>1</sup> – incorrect parking spaces.” On October 28, 2011, a General Inspection Checklist was completed by Mr. Robitaille who indicated under the comments section that the Property was “missing [the] correct number of parking spaces.” This Checklist further indicated that the Property passed the required electrical inspection by the state and that the state Fire Marshal had given its approval. The instant Certificate was subsequently issued on July 27, 2012.<sup>2</sup>

The Appellants, represented by Richard Abbott, Esquire, filed the instant appeal on August 15, 2012 and a hearing was held on September 5, 2012. As an initial matter during this hearing, the Department, represented by James Edwards, Esquire, raised the question of whether or not the Board of License, Inspection and Review (the “Board”) had jurisdiction to hear the Appellants’ appeal. After hearing arguments from both parties, the Board requested each party submit briefs on the issue of the procedure by which the Appellants, as neighbors, could seek relief from the issuance of the Certificate and whether the Department would be able to refund the Board’s fee if, in fact, the Board would not have jurisdiction to hear the appeal.

The parties timely submitted briefs on the above mentioned subject areas and, on November 14, 2012, the Board held another hearing on the points of law discussed in the briefs. At the conclusion of this hearing, the Board determined that it did have jurisdiction to hear the Appellants’ claims. However, because the notice for the hearing only referenced the jurisdictional issue, the hearing was rescheduled and eventually held on April 16, 2013.<sup>3</sup> This is the Board’s written decision on the jurisdictional issue and the substantive merits of Appellants’ appeal.

#### **THE RECORD BEFORE THE BOARD**

During the September 5, 2012 hearing, the Department raised an objection that the Board did not have jurisdiction to hear the appeal based upon two separate bases. With respect to the first basis, the Department stated that the Board’s authority to hear appeals is set forth in 9 *Del. C.* §1315, which allows individuals directly affected by the issuance of a County permit to

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<sup>1</sup> Mr. James Smith is an Assistant General Manager in the Department whose testimony is discussed below.

<sup>2</sup> According to the documents in the Board’s possession, it appears as though some issues involving wheel stops and a fence delayed the Department’s ability to approve the Staffieri’s application.

<sup>3</sup> The Board notes that due to a subsequent lack of enough Board members to field a quorum, there was a delay in the scheduling of this hearing.

submit an appeal. According to the Department, the Appellants are a non-interested third party with no standing to bring the instant appeal.

The Department next argued that the foundation of the Appellants' argument sounded not in the Building Code, as stated in the appeal application, but rather in the UDC, a code section completely under the auspices of the Board of Adjustment and the Planning Board.<sup>4</sup> As such, the Board is prohibited by the New Castle County Code to hear this appeal, because the fundamental issue being appealed is the lack of parking spaces required under the UDC, which is a proper issue to bring before the Board of Adjustment. The Department called Joe Abele, a Land Use Planner assigned to the Board of Adjustment, as a witness at the hearing. Mr. Abele testified that his job responsibilities include reviewing zoning verifications to determine whether new businesses are allowed to open at a specific site and whether there is adequate parking for a new business. In this case, the zoning verification for parking spaces was made by Mr. Abele and four of his colleagues. Mr. Abele testified that he made his determination to "sign off" on the zoning verification for the Certificate based upon the provisions of the UDC. Mr. Abele further testified that the Board of Adjustment hears zoning appeals and the Planning Board hears applications for a subdivision variance. According to Mr. Abele, the Board of Adjustment is able to grant requests for a reduced parking space requirement.

The Appellants argued that the broad language of 9 *Del. C.* §1315 provides an appeal procedure to the Board for any person aggrieved by the issuance of a County license, which is defined as "any permit required by statute, ordinance, or regulation to be obtained from any County . . . Department . . . as a prerequisite to engaging in any activity . . . or using any property."<sup>5</sup> In the instant case, according to the Appellants, the Staffieris were required to obtain the Certificate in order to change the use of the Property to a light auto service use. The Appellants contend that despite the Property's non-conformity with a UDC requirement of four parking spaces for light auto service use, the Change of Use Certificate was granted. The Appellants argue that they constitute an "aggrieved person" because the issuance of the Certificate allows the Staffieris to change the type of business being conducted on their Property,

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<sup>4</sup> The Department cited the case of *Paladin v. New Castle County*, as authority for its position that the Board of Adjustment is the sole body in the County vested with the authority to consider zoning issues.

<sup>5</sup> 9 *Del. C.* §1302(1).

without requiring the Staffieris to create additional parking. The Appellants state that the Property, which directly abuts their own property, already has limited parking available.

Appellants further argue that while the Certificate was issued under the New Castle County Building Code, the Board must consider all relevant, ancillary code sections in determining whether the Certificate was validly issued. This is so because in order for a Certificate to be issued, the application must be approved by multiple divisions within the Department, many of which are governed by ancillary code sections, one of which is the UDC. Thus, the Board may contemplate the requirements of the UDC to the extent that such requirements affect whether or not a County license is issued. In addition, the Appellants argued that the Board of Adjustment would not be the proper Board to hear the instant appeal because there was no request for a variance from the parking space requirement, which would generally come from the property owner. At the conclusion of the hearing, the Board requested that the parties brief the issues and a subsequent hearing was rescheduled for November 14, 2012.

At the November hearing, the Department reiterated its previous argument that the State and County codes do not provide the Board the authority to hear appeals involving all County Code sections, or ancillary State agency decisions, just because a permit has been issued. The Department did concede that the instant Certificate constitutes a County "license" within the meaning of the State code. The Appellants argued that while no County Board has the authority to review decisions rendered by State agencies, the State code does provide an appeal procedure for any person aggrieved by the issuance of any County license, the definition of which term includes any permit required to be issued by the County. The Appellants further argued that the Board should apply the plain meaning of the statutory language in the State code and find that the Board has jurisdiction to hear the appeal.

At the conclusion of the November hearing, the Board unanimously voted that it had jurisdiction to hear the appeal. However, the hearing on the merits of the appeal was rescheduled because the legal notice for the November hearing only referenced the briefing on the jurisdictional issues.

On April 16, 2013, the Board reconvened to hear the substance of the Appellants' appeal. Present for the hearing were: Richard Abbott, Esquire, on behalf of the Appellants, and

Marlaine White, Esquire and Mary Jacobson, Esquire, on behalf of the Department.<sup>6</sup> As an initial matter, the Appellants entered into evidence a compilation of materials that was previously submitted to the Board at the September 5<sup>th</sup> hearing. The Appellants proffered that the materials in the compilation indicated that the County Building Code, in Chapter 6, demands that any change in use of a building must comply with the provisions of the UDC §40.03.521A which requires a new use of a building to conform with the UDC off-street parking requirements. The Appellants also described the County Code's definition of a parking space and the provisions related to parking space shape, location and marking. For instance, the UDC requires parking spaces to be striped and sized to be 9 feet wide by 18 feet deep. The compilation also provided several photographs of the Property before and after the Staffieris changed the use of the building existing thereon by essentially converting it into an auto detailing garage with one bay.

Appellants pointed out that when the Staffieris purchased the Property, a nonconforming situation existed and was grandfathered in. Specifically, the Property held only one parking space, where the UDC demanded three. This nonconformity was permitted by New Castle County so long as the Property was used for office purposes. The Appellants argued that once the Staffieris applied for the Certificate to change the use to a light automobile service, the UDC demands that the nonconforming lack of parking spaces be rectified and increased to the requisite four parking spaces.

Appellants called James Smith, an Assistant General Manager of the Department, to provide testimony. Since at least 2012 to the present, Mr. Smith has overseen code enforcement with the County. Mr. Smith testified that in the instant case, the Planning Division reviewed the off street parking spaces located on the Property and determined that Section 40.08.020 applied, which allows for continuation of nonconforming uses. This Section would then justify the continuation of deficient parking on the Property which existed under the prior use of the building for office purposes. The Planners considered the bay in the converted garage to constitute the fourth required parking space.

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<sup>6</sup> At the time of the September and November LIRB hearings, the Board members present were Mr. Joseph Schorah, Mr. Michael Annone and Ralph Walsh, Jr. However, Mr. Walsh subsequently resigned from the Board, and his membership on the Board was replaced by Mr. Kevin Williams. It should also be noted that during the September and November hearings, the Board's attorney was Ms. Julie Sebring, Esquire. However, at the time of the April 2013 hearing, the Board's attorney was Ms. Monica Horton, Esquire.

Mr. Smith further testified that at one point there were four angled parking spaces that he believed were the required spaces. However, the exhibit that was submitted to the Planning Division (“Division”) did not show any parking spaces, just an open paved area in front of the building. The Division counted that open paved area as being nonconforming for three spaces, because the Property had historically accommodated uses that required three spaces. According to Mr. Smith, this is permissible because when a change of use involves a category that does not implicate a higher intensity use which would then generate a higher parking use, the Department considers it a “wash.”<sup>7</sup> Mr. Smith acknowledged that the Division is prohibited by the Code from extending a nonconformity, so, instead the Division deemed the bay inside the garage as a fourth parking space. When asked whether a commercial garage space could be considered a parking space, as defined by the Code, Mr. Smith testified that there was nothing in the Code prohibiting considering it as such.

In its presentation, the Department first noted the legal standard to be applied by the Board. The Department re-called Mr. Smith to provide testimony regarding the procedure by which a change of use application is processed by the Department. When such an application is submitted, the license division sorts and allocates the application, which involves reviewing a standard set of documents and conditions required in order for the application to move forward in the process. Once an application is deemed complete, it is assigned to the Division for a zoning permit review, which includes such areas as proper zoning, historic issues, parking issues and general compliance with the UDC. If the application is found to comply with the zoning permit review, then it would next go to a drainage review and then on to licensing for a final inspection or to a plan examiner for an evaluation. Once an application has met every requirement for a change of use permit, the Department issues a certificate, pursuant to Section 6.03.019. The Department noted that the issuance of the certificate constitutes an automatic, ministerial act, which does not allow discretion.

In the instant case, the Staffieris’ application was triaged and received a sewer waiver and a review from the Fire Marshall. The application was then sent to the Department and reviewed by planners John Janowski, Joseph Abele and Kenneth Bieri (the “Planners”). The Planners determined that light automotive use was permitted in a commercial neighborhood zone – the

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<sup>7</sup> Tr. of April 16, 2013 LIRB hearing, page 29. (hereinafter cited as “Tr. at \_\_\_”).

type of zoning in which the Property is located. Because the newly modified garage has one bay intended for light automobile use, the Code requires the Property to be able to accommodate four parking spaces. The Department determined that the existing nonconformity could continue to meet three of the parking space requirements. With the garage bay counting as an additional space, four parking spaces were determined to be in place. The application completed its rounds of review and inspections and the Certificate was issued by the Department.

On cross-examination, Mr. Smith testified that he had originally placed a hold on the Staffieris' application as a result of a Department meeting after a wheel stop barrier was erected adjacent to the Property. The wheel stop barrier would have rendered useless the angled parking spaces about which he previously testified. Mr. Smith released his hold once he realized that the Division was not considering the angled parking spaces in the zoning permit review, but rather took into account the previous nonconforming situation along with the garage bay to determine that the parking requirement was met. Mr. Smith agreed that there were alternative means by which the Staffieris could have validly had a Certificate of Use issued, including receiving a variance from the Board of Adjustment, obtaining an administrative reduction from the Department, adding additional parking, or leasing off-site parking spaces. Nevertheless, according to Mr. Smith, the Staffieris had no legal need to pursue any action before the Board of Adjustment because the Department considered the garage bay to be the fourth parking space.

At this point, the parties rested and the Board members asked questions of the parties. When asked what was different about the nature of the Property between the first and final inspection that caused the Certificate to be issued, Mr. Smith stated that "the first issues had been rectified, the Fire Marshal had signed off [and] the exit sign was in."<sup>8</sup> In addition, "there was no longer a hold on the parcel as a result of non-functional parking. So there were no building issues for the building inspector to fail another inspection."<sup>9</sup>

The Board next asked Appellants' counsel, Mr. Abbott, about parking space encroachment. Mr. Abbott noted that there were two types of encroachment: when cars parked in the previously striped diagonal spaces, the rear of the vehicle encroached onto the adjacent driveway between the properties. The second type would occur if the Staffieris attempted to have two UDC dimensionally compliant parking spaces – one of the spaces would encroach

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<sup>8</sup> Tr. at 72.

<sup>9</sup> *Id.*

upon property located at 1709 Concord Pike, a location upon which the 1707 Property does not enjoy an easement or lease. The Board then asked whether the previously existing striped diagonal spaces met the UDC dimensional standards. Mr. Abbott replied that they did not and, moreover, they were not, and could not be, grandfathered into compliancy because they were installed after January 1998. Mr. Abbott further stated that the dimensions of the Property will not allow for the required number of dimensionally compliant parking spaces under the UDC.

The Board also asked Mr. Smith for clarification of the language in the UDC regarding reconfiguration of existing nonconforming use. Mr. Smith testified that in this case, there was a nonconforming situation and the Staffieris did not make any changes to that situation; rather, they added a brand new parking spot in the shape of the garage bay. Mr. Smith further testified that that code is silent with respect to whether it is permissible for a garage bay to constitute a parking spot. Per Mr. Smith, “[w]hether the code allows it or not is another discussion.”<sup>10</sup> He could not say whether the Department has ever previously permitted a garage to be counted as a parking spot. Lastly, the Board heard several comments from the public.

## **LEGAL STANDARDS**

The Board hears appeals regarding the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of a County license or with respect to the effect of any County inspection. The Board is authorized by 9 *Del. C.* §1315 and Section 02.05.103 of the New Castle County Code, and is vested with the authority to consider administrative appeals pursuant to Section 06.09.003 of the New Castle County Code. Pursuant to Section 06.11.003, the Board may affirm, modify, reverse, vacate, or revoke the action appealed, provided that such action by the County shall be affirmed if the action was not arbitrary or capricious or was not taken contrary to law. Appeals shall be heard based solely upon the materials (e.g., plans, documents, reports, studies, drawings, and testimony) available to the official or body rendering the initial decision. Appeals shall not be used to consider new or additional information. Information submitted but not discussed in rendering a decision shall be considered part of the original record and may be considered on appeal. Testimony may be given based upon the material submitted to the decision-maker.

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<sup>10</sup> Tr. at 76.



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### The Board has jurisdiction to hear the Appellants' appeal

After considering the arguments of the parties, the Board agrees with the Appellants that the General Assembly has vested this Board with the authority to hear the instant appeal. The Delaware Code gives the Board the authority to hear appeals brought by any party aggrieved by the issuance of any County license, the definition of which includes permits issued by the County.<sup>11</sup> The Board disagrees with the Department's position that because the UDC is within the province of other County Boards, the County Code prohibits the Board from hearing appeals with a basis in that Chapter. The Building Code provides an appeal procedure for any person who in good faith claims that the true intent of Chapter 6 has been incorrectly interpreted. Furthermore, the section regarding change of use specifically states that compliance with the provisions of the UDC is required for any change of use of a property. Accordingly, the Board finds that it has the authority to hear the instant appeal.

### The Department acted arbitrarily and capriciously and also erred as a matter of law in granting the Staffieris a Certificate for Change of Use

Having found that it has jurisdiction to hear this appeal, the Board now turns to the substantive merits thereof. The Board is persuaded by the Appellants' argument. The Board is particularly troubled that the Department did not document its rationale regarding any physical changes made to the parking area on the Property that would support its decision to sign off on the parking nonconformity. Mr. Smith testified that the ultimate decision makers in the process were the Planners, who were the only individuals involved in the decision to sign off on the zoning permit.<sup>12</sup> The only documentation before the Board appears to indicate that two separate Department employees, Mr. Robitaille and Mr. Smith, had concerns regarding the lack of parking spaces. There is no written indication that these concerns were addressed and alleviated, despite the Planners' ultimate determination that the nonconformity was resolved. The Board is also troubled by the fact that the Department could not specify any other instance in which the Department considered a garage bay as a parking space within the meaning of the UDC. The

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<sup>11</sup> 9 Del. C. §1315.

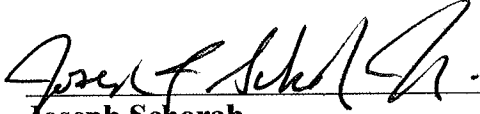
<sup>12</sup> Tr. at pg. 27.

Board finds that these aspects of the Department's decision were arbitrary and capricious, as they were not reasonably related to the facts or the law.

The Board further finds that the Department erred as a matter of law in allowing an existing nonconformity to continue on a property that underwent a change of use that requires additional parking. Specifically, the Board disagrees that the bay within a garage constitutes a parking space within the meaning of the UDC. The Board agrees with Appellants' argument that the UDC prohibits such a continuation.

**VOTE: 3-0 (Schorah, Annone and Williams).**

**BOARD OF LICENSE, INSPECTION AND REVIEW**

  
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**Joseph Schorah**  
**Chairperson**