

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JACK LINGO ASSET :
MANAGEMENT, LLC, a Delaware :
limited liability company, and : **C.A. No.: S20A-05-001 MHC**
SUSSEX EXCHANGE :
PROPERTIES, LLC, FBO LINGO :
BROTHERS, LLC, a Delaware :
limited liability company, :
 :
 : **CITATION ON APPEAL**
Petitioners, : **FROM THE DECISION OF:**
 : The Board of Adjustment of the
v. : City of Rehoboth Beach, Delaware.
 : Case No. 0719-05
 : Dated: April 9, 2020
THE BOARD OF ADJUSTMENT :
OF THE CITY OF REHOBOTH :
BEACH, DELAWARE, :
 :
 :
Respondent. :

AND

RONALD E. LANKFORD, and :
LANKFORD PROPERTIES, LLC, : **C.A. No.: S20A-12-002 MHC**
 :
 :
Petitioners, :
 :
 :
v. : **CITATION ON APPEAL**
 : **FROM THE DECISION OF:**
THE BOARD OF ADJUSTMENT : The Board of Adjustment of the
OF THE CITY OF REHOBOTH : City of Rehoboth Beach, Delaware.
BEACH, DELAWARE, : Case No. 0819-08
 : Dated: November 17, 2020
 :
Respondent. :

PETITIONER RONALD E. LANKFORD AND
LANKFORD PROPERTIES, LLC'S OPENING BRIEF
IN SUPPORT OF APPEAL AND PETITION FOR CERTIORARI

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Dated: March 29, 2021

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NATURE AND STAGE OF PROCEEDINGS
AND STATEMENT OF FACTS

This is an Appeal and Petition for Certiorari (the “Appeal”) filed by Lankford Properties, LLC and Ronald Lankford (“Petitioners”). The Appeal is from a decision of the Rehoboth Beach Board of Adjustment (the “BOA”) dated November 17, 2020. This decision was the most recent of several reviews of the Petitioners’ plans by the City of Rehoboth. The Appeal boils down to this: are decks, porches and balconies included in the determination of “Floor Area, Gross” (“Gross Floor Area” or “GFA”) under the Rehoboth Beach Zoning Code (the “Code”)?

Petitioners own Lots 17, 19 and 21 Baltimore Avenue in Rehoboth Beach (the “Property”). These lots are immediately west of the Atlantic Sands Hotel; lots 17 and 19 are currently a parking lot and Lot 21 is occupied by the restaurant known as “Jam Bistro” and for many years prior to that “The Camel’s Hump”.

Petitioners have been working on plans for a hotel on the Property in accordance with the City’s stated desire to improve Baltimore Avenue.¹ In 2018 Petitioners appeared before the City’s Planning Commission and constructive comments were received regarding the hotel design. Petitioners next sought and

¹ The City has stated in its Comprehensive Plan that Baltimore and Wilmington Avenues should be redeveloped with an improved streetscape; this goal has been largely achieved along Wilmington Avenue but not within the ocean block of Baltimore Avenue.

received several variances, including relief from the City’s Floor to Area Ratio (FAR) requirements for the underground parking and relief from the maximum number of permitted stories (while remaining compliant with the City’s height limit). With those variances in hand, the Petitioners continued to finalize the hotel design. Relevant to this Appeal, the design did not include the hotel’s open porches, balconies and decks in the GFA calculations.

GFA is defined in relevant part as “The sum of the gross horizontal area of the several floors of a building measured from the exterior face of the exterior walls”² (Emphasis added.) FAR is a mathematical equation relying upon GFA: it is the “quotient obtained by dividing the gross floor area of all buildings on a lot by the gross lot area.”³ In commercial districts, the FAR cannot exceed 2.0.

In August of 2019 Petitioners’ representatives met with the Building Inspector, the Assistant Inspector and other City officials to discuss the hotel plans. During that meeting and for the first time the Inspector and his Assistant both stated that the City “had always” included decks, balconies and open porches as part of GFA and therefore FAR.⁴ The Inspector ultimately issued a report (the “2019 Report”) stating that these exterior areas all trigger the application of GFA under the

² Code of Rehoboth Beach, §270-4.

³ Id.

⁴ Transcript of September 2019 Hearing at page 15, lines 18-22 (hereinafter “Sept. 2019 Tr. 15:18-22”).

Code because all railings constituted an “exterior wall” and would therefore increase the GFA of any building.⁵ This Report is contrary to the Code and how it has been applied residentially and commercially. The 2019 Report also stated that this is how the GFA is only “typically” determined and that the GFA is also based upon “usable floor area”, although the latter term is not found anywhere in the Code.⁶

Petitioners appealed to the BOA and a hearing was held on September 23, 2019 (the “September 2019 Hearing”).⁷

The September 2019 Hearing.

During the September 2019 Hearing, the Inspector explained his position that “a building is a structure”⁸ and that he is “including porches, balconies, decks” in the calculation of GFA because “the way I have included those is they do not necessarily – they do not have to be – they do not necessarily have to have a roof.”⁹ He then states “But, it has to be a wall and built for permanent use. So a balcony has already – and deck have already determined to be a structure, because a structure is equivalent to a building And in this case, these balconies are permanently attached

⁵ 2019 Report, Ex. A.

⁶ Id.

⁷ The written decision from this hearing incorrectly states that it occurred on September 20, 2019; the actual date was September 23, 2019.

⁸ Sept. 2019 Tr. 7:10.

⁹ Sept. 2019 Tr. 8:2-7.

to the building, to the building....”¹⁰ Next, relying upon Black’s Law Dictionary and other sources but not the actual Code, he concludes, “So when we are enclosing a deck, the wall – the wall is what – and the vernacular that’s being used is a railing. Well, there’s no such thing as a railing in the building code; in the building code it’s considered a guard. And guard is a building component....”¹¹ Based on all of that, but not the actual Code language, he concludes that “therefore, since it is a wall, I now made the conclusion that I could bring the sum of the gross floor area, calculate some of the – to come with a number; based on that number, I can divide it by -- the total lot area, and come up with the equation for the floor area ratio. So – I believe that the interpretation has been correct as I have applied it”¹² Yet he still hedged on the strength of his opinion by immediately stating that “it’s a matter of discussion still within the department”.¹³

The Petitioners argued that the Inspector’s interpretation was contrary to not only the plain meaning of the Code, but also twenty or so years of the City’s calculation of GFA and that the Inspector’s new and erroneous interpretation makes dozens, if not hundreds, of properties built since the GFA standards were established in 1997 now illegal. The Petitioners also explained that the 2019 Report was not

¹⁰ Sept. 2019 Tr. 8:19-25.

¹¹ Sept. 2019 Tr. 9:13-18.

¹² Sept. 2019 Tr. 10:3-12.

¹³ Sept. 2019 Tr. 10:12-13

supported by the Code; for instance, the Report states that “Typically, the floor area ratio is the relationship between the total amount of usable floor area”,¹⁴ despite the fact that (a) GFA does not rely upon “the total amount of usable floor area” in any fashion; and (b) it doesn’t matter what is “typical”: it matters what the Code actually states.

Petitioners then presented ten random examples of existing structures using the City’s own documentation to prove that the Building Inspector’s statements were untrue and incorrect with regard to the calculation of GFA on commercial and residential properties.¹⁵ Using the City’s own records (including photographs, surveys and the City’s handwritten calculations) for those structures, the Petitioners proved that the City had never included decks, balconies or unenclosed porches within the GFA calculations.¹⁶ These examples included the following:

- **200 Stockley Street.** Built in 2005, the maximum permissible GFA for this lot was 3,500 square feet (“sf”). The City calculated the GFA of this structure at 3,466 sf, just shy of the permitted maximum. There is a railed deck that

¹⁴ 2019 Report, Ex. A.

¹⁵ As will be cited later, the BOA specifically found that there is no distinction between residential and commercial uses when it comes to GFA and FAR calculations.

¹⁶ See Power Point presentation entitled “Rehoboth Beach Board of Adjustment Gross Floor Area/FAR Appeal, September 23, 2019”. This Power Point includes photos, surveys and the City’s calculation sheets for the information referenced in the following paragraphs. Ex. B.

covers approximately 200 sf. This area was not included in the City's calculations; its inclusion would have exceeded the permissible GFA by approximately 166 sf (3,666 sf including the deck versus 3,500 sf permitted). According to the Inspector's statements to the BOA, this property (and the others that follow) is illegal and overbuilt¹⁷, even though it was approved and legally built in 2005.

- **1001 South Boardwalk.** This oceanfront home with extensive railed decking and balconies was approved with a maximum GFA of 7,479 sf and actual GFA calculated to be 6,977 sf. The City did not include the 2,017 sf railed deck and balcony area as GFA; including it would have put the GFA for this house well over the maximum.
- **22 Lake Drive.** This home directly behind City Hall was approved in 2017 by the current Building Inspector and his staff. Railed decking and balconies were not included in the City's GFA calculations. The permitted GFA was 2,800 sf; the actual GFA was calculated to be 2,496 sf. Adding the 390 sf railed decking and balconies would have exceeded the permissible GFA.
- **13 Laurel Street.** The approved plans for this 2012 home did not include two separate railed decks in the GFA. In fact, the City's own hand-written

¹⁷ Sept. 2019 Tr. 35:16-18.

calculations specifically deduct/exclude these areas from the GFA calculations.

- **125 Hickman Street.** This home was permitted and built in 2012. The City approved the plans without including a 94.11 sf railed porch or decking along the front of the home as part of the GFA.
- **102 New Castle Street.** This home was permitted and built in 2011. The maximum GFA was 3,000 sf and the home's actual GFA was calculated to be 2,924 square feet (a difference of only 66 square feet). The City's calculations did not include either the front or rear second-floor deck in its GFA calculations; the front deck alone is 264 square feet which would exceed the permissible GFA.
- **13 St. Lawrence Street.** It not only appears that decks and balconies were not counted, but also that the City's hand-written math calculations were significantly in error. According to those calculations, the 18.67-foot by 30-foot second floor only contained 56 sf of floor area (and not 560 square feet correctly calculated for the identical first floor). The maximum GFA was 3,500 sf; it was calculated to be just under that number at 3,482 sf (not including the approximately 500 sf that was left out of the GFA).
- **14 Dover Street.** This home, owned by a City Commissioner at the time of the hearing, was renovated in 2012. According to the City's plan review,

neither the screened porch nor the railed decking were counted as part of the GFA.

- **200 New Castle Street.** This home was approved in 2009 with a maximum GFA of 2,500 sf. The City calculated this building's GFA to be 2,480 sf. The City did not include a 202 sf rear deck or 114 sf of decking along the second floor as GFA. Counting either would have caused the structure to exceed the permissible GFA.
- **202 New Castle Street.** This home was approved in 2012. The City's plan review did not include the second floor railed deck at the rear of the home in its GFA calculations.

The Inspector responded that these samples were either mistakes by prior inspectors or performed by staff and not him personally, and as a result "these properties have been over, in my opinion, have been over built."¹⁸ Yet, the next day he expressly admitted that these and all of the prior plan approvals were different from his new GFA interpretation and not, in fact, overbuilt at the time they were approved.

During the BOA's deliberations during the 2019 Hearing, Member Katz admitted "it's all very confusing."¹⁹ The Chair acknowledged that it has been proven

¹⁸ Sept. 2019 Tr. 35:16-18.

¹⁹ Sept. 2019 Tr. 36:3.

“that there have been other interpretations that have been utilized” and that “people have been scratching their heads for the last 22 years” about what the Code says.²⁰ Trying and failing to add clarity to the deliberations, the Inspector stated that, “if an area becomes an assembly, and an assembly meaning that it’s going to be used, then I have to count gross floor area.”²¹ Counsel for Petitioners immediately pointed out that the Code does not reference “assembly” in any fashion for determining GFA. After this and other attempts by the Inspector to explain the Code, Member Katz concluded that “the Zoning Code is a mess, truthfully. I said that early on. And we do need to clarify whatever it is, my version or anybody else’s version. There shouldn’t be this much debate.”²² And, “As I have said a couple of times throughout this, I think the whole Code is very confusing, it’s subject to a lot of interpretation.”²³

The BOA denied the Petitioners’ appeal and upheld the Building Inspector’s determination that GFA includes all exterior horizontal areas enclosed by railings and found that “the exterior face of the exterior wall of a building includes balconies and open porches....”²⁴ The 2019 Decision also stated that “[f]or FAR and GFA calculation purposes, there is no distinction between structures devoted to

²⁰ Sept. 2019 Tr. 54:4:7; 64:24-25.

²¹ Sept. 2019 Tr. 68:18-19.

²² Sept. 2019 Tr. 76:13-17.

²³ Sept. 2019 Tr. 89:14-19.

²⁴ Ex. C. (the “2019 Decision”).

commercial or residential purposes.”²⁵ The Inspector was upheld by three votes in favor, none opposed, and one abstention.²⁶

Notwithstanding the Inspector’s adamant affirmation that his interpretation was the only interpretation of the Code for GFA calculations and the BOA’s specific Findings in support of that, the very next day he contradicted his own testimony and the BOA’s Finding by issuing the following “Building and Licensing Department Notice” on the City’s website²⁷:

Property Owners, Contractors and Design Professionals note that the enclosed spaces of decks, balconies, and porches will be counted as contributing to the sum of gross floor area (GFA) for purposes of calculating floor area ratio (FAR). The floor area ratio (FAR) is the relationship between the total amount of floor area that a building has or has been permitted to have and the total area of the lot on which the building stands.

The City of Rehoboth Beach Board of Adjustment on September 23, 2019, upheld the Building Inspector’s interpretation to include the square footage of such structures for computing gross floor area (GFA). *Plans submitted prior to September 24, 2019 will be reviewed to previous code interpretation.* (Emphasis added.)²⁸

²⁵ 2019 Decision, ¶9. Ex. C.

²⁶ Ex. C.

²⁷ *See also* September 23, 2019 BOA Decision at Paragraph 5 in the matter of 240 Rehoboth Avenue (now consolidated with this case) wherein the BOA found, based on the Building Inspector’s own testimony, that “B & L contends that second floor decks historically count as structure and towards GFA.” The very next day after the BOA issued this Finding based on his own testimony, the Inspector contradicted himself and the BOA by posting the Notice that in fact this was not the historical interpretation of GFA. Ex. D.

²⁸ Building & Licensing Notice dated September 24, 2019, Ex. E.

This is an admission that his office and his predecessors did not include decks, balconies and porches in GFA prior to September 23, 2019 for either residential or commercial development, but now would after September 24, 2019. It is also an admission that the data presented in the Petitioners' Power Point was accurate. Petitioners' plans were submitted in 2018; according to the Notice, the hotel's decks, porches and balconies should not be included in the GFA calculations.

The December 2019 Motion For Rehearing

In light of the Notice, which was contrary to the Inspector's testimony, Petitioners filed a Motion for Rehearing based on newly discovered evidence. That Motion was granted by the BOA at its December 2019 meeting. The Chairman stated, "I suggest to my fellow Board Members that the notice of the Building Inspector . . . should be considered newly discovered evidence in the context of this case. I submit that had the Applicant been aware of the notice the night of the hearing, he might well have been able use it to his advantage."²⁹

The Mayor's Statements

Before the rehearing could occur, the Mayor of Rehoboth Beach stated that "the Code is ambiguous, which should be addressed" and that "the city

²⁹ Transcript of 2019 BOA Motion for Rehearing, 4:14-21.

commissioners need to have a long discussion if these outdoor patios and decks should be counted towards the gross floor area for residential and commercial or only commercial.”³⁰

The Contemporaneous Hearings on 240 Rehoboth Avenue

At roughly the same time, a similar case was also pending before the BOA regarding a property located at 240 Rehoboth Avenue over whether an outside railed deck area should be included in GFA (the “240 Rehoboth Avenue Appeal”). That case also received a rehearing by the BOA based upon the Building & Licensing Notice. This is the same matter that has been consolidated with this Appeal.

During the 240 Rehoboth Avenue hearing, attention was also paid to the City’s various and inconsistent interpretations of its Code regarding GFA. For example, the Chairman analyzed the definitions of both GFA and FAR to try to reconcile them. Ultimately, he admitted that “I got news for you – well, we agree it’s a poorly written provision of the Code.”³¹ But at no time did the Chairman consider the important and clearly-stated qualifiers of how to determine GFA: that it must be measured from “the exterior face of the exterior walls”.

³⁰ “Cape Gazette”, October 14, 2019, <https://www.capegazette.com/article/rehoboth-review-calculation-gross-floor-area/190429>. Ex. F.

³¹ Transcript of Nov. 29, 2019 Hearing on 240 Rehoboth Avenue, 40:8-10 (provided by Co-Petitioners).

According to the Minutes of the 240 Rehoboth Avenue hearing, Member Cassell voted that “The Code is susceptible to two different interpretations, therefore it is ambiguous and has to be interpreted in favor of the applicant.”³² Member Katz agreed with his colleague, and added that, “[t]here has been a lot of history of many interpretations of what this Code is.”³³

In the 240 Rehoboth Avenue Appeal, the BOA contradicted its own October 28, 2019 Decision in Petitioners’ case that the GFA of commercial and residential is treated the same³⁴ by stating right the opposite: “B&L submits that the varying interpretations have only been applied in the case of residential structures, whereas B&L has applied its interpretation constantly for commercial structures.”³⁵

The September 28, 2020 Hearing

The rehearing on Petitioners’ appeal occurred on September 28, 2020. The Petitioners presented evidence that the City’s interpretation of the Code’s GFA was not only wrong, but that it had been interpreted multiple different ways by the BOA, the current Inspector and his staff and in the past:

³² Minutes of Nov. 29, 2019 BOA Hearing, Ex. G.

³³ Id.

³⁴ “For FAR and GFA calculation purposes, there is no distinction between structures devoted to commercial or residential purposes.” Ex. C.

³⁵ Dec. 16, 2019 Decision on “In Re: 240 Rehoboth Avenue, Case No. 0719-05, Ex. H.

- The examples of all of the prior properties where railed porches, decks and balconies were not counted as part of the GFA. This argument was recognized by the BOA in Paragraph 5 of its October 2019 Decision: the inclusion of decks and balconies “was a deviation from [the City’s] longstanding practice of not including unenclosed balconies and decks as GFA and, more importantly, that the plain meaning of the definition of GFA set forth in the zoning code does not support his interpretation.”³⁶
- That during the first hearing, the Inspector adamantly stated that the inclusion of decks and balconies in GFA has been the consistent historical interpretation of his office, yet that had not been the case based upon 22 years’ worth of contrary examples.
- That during the first hearing, the Chairman stated that “you have proven to me that there have been other interpretations [of GFA] that have been utilized here....”³⁷
- That contrary to the Inspector’s statements in the first hearing, the very next day he issued his Notice contradicting his own testimony that, in fact, there have been two different interpretations and applications of GFA: one prior to

³⁶ Ex. C.

³⁷ Sept. 2019 Tr. 54:4-7.

September 23, 2019 (excluding porches, decks and balconies) and one after September 24, 2019 (including porches, decks and balconies).³⁸

- That the October 15, 2019 Building & Licensing Report to the Board admitted two different interpretations: “During the most recent Board of Adjustment hearing, it was revealed that the Assistant Building Inspector, who has responsibility for residential plan reviews, has not included the outdoor areas with enclosures in the calculation of gross floor area.”³⁹
- That the City Solicitor admitted during the Board’s August 2019 hearing on 240 Rehoboth Avenue that from “the conversation we are having right now, [the Code] is reasonably susceptible to different conclusions or interpretations.”⁴⁰
- That the Mayor admitted to the Cape Gazette newspaper that “the Code is ambiguous, which should be addressed.”⁴¹

³⁸ Ex. E.

³⁹ Ex. I. Although the B&L Report stated that the Assistant Building Inspector was responsible for residential plan reviews, the BOA previously found that there was no distinction between residential and commercial properties for GFA (Ex. C) and the Inspector had so stated.

⁴⁰ Transcript of Aug. 26, 2019 Hearing, 41:6-11, Ex. J.

⁴¹ Ex. F.

- That in its decision following the 240 Rehoboth Avenue hearing, the BOA recognized “the history of varying interpretations of the definitions of gross floor area.”⁴²
- That the Minutes of the 240 Rehoboth Avenue Hearing reflect that Member Cassel said that “The Code provision is susceptible to two different interpretations; therefore it is ambiguous and has to be interpreted in favor of the applicant.”⁴³
- That the Minutes of the 240 Rehoboth Avenue Hearing reflect that Member Katz agreed with his colleague that the Code is ambiguous and should be interpreted in the applicant’s favor and adding that “there has been a lot of history of many interpretations of what the Code is.”⁴⁴
- That the Chairman went to great lengths to try to determine what the Code is attempting to require for GFA and reviewed the definitions of “structure” and “building” and the use of the word “or” in the Code, even though those were never the basis of the Inspector’s initial determination. Ultimately even he acknowledged that this is a poorly written Code.

In response the City acknowledged that this code “may very well be” ambiguous, but the BOA should look to legislative intent to determine “what did the

⁴² Ex. H.

⁴³ Id.

⁴⁴ Id.

legislators intend.”⁴⁵ Yet, there is no legislative history of this particular Code provision and none was entered into evidence.⁴⁶ Later, the City Solicitor even stated that “there’s been a lot of discussion, I will say, about, you know, maintaining the status quo but very honestly, figuring out what the status quo was is a difficult task.”⁴⁷

The BOA tried (without total agreement) to figure out what the GFA provisions of the Code actually require spending a great deal of time deliberating over what individual words in the Code meant in relation to other words and provisions. Member Mason, who was not on the BOA for the Petitioners’ first hearing, stated that he finds these Code provisions “terribly confusing, and contradictory in places” and that “I see the ambiguity and don’t necessarily see specifically what the intent was legislatively, I mean I think there are different interpretations there as well.”⁴⁸ All of this missed the point of the Inspector’s error

⁴⁵ Sept. 2020 Tr.20:25; 21:2-3.

⁴⁶ *See also* Richard Perry’s (who also served as Chairman of the City’s Planning Commission) testimony: “I have in the past on numerous occasions asked about legislative intent with respect to our Code provisions, and routinely the answer I have gotten is, well, we really don’t have, you know, legislative intent And I think legislative intent in this case is speculative, in my view, trying to piece together not a true legislative intent, because there is no public record of that, in my view, as to this provision.” Sept. 2020 Tr. 54:4-16.

⁴⁷ Sept. 2020 Tr. 33:6-9.

⁴⁸ Sept. 2020 Tr. 42:16-19.

in believing that a simple railing around a deck, balcony or porch is the same thing as an “exterior wall”.

Ultimately the BOA was “unable to reach a consensus” and the Petitioners’ appeal was denied by default following a two-to-two tie vote.⁴⁹ The Chairman and Member Brandt voted to uphold the Inspector’s determination while Members Mason and Cassell voted to reverse it. Member Cassell again found that, “the Code provision is susceptible to different interpretations, it’s ambiguous, and should be in favor of the Applicant.”⁵⁰ Member Katz, who had previously favored the Petitioners, was not present at the meeting to break the tie and vote in the Petitioners’ favor. The BOA failed to address the fact that Petitioner was entitled to approval of its hotel (with the exclusion of its decks and balconies from GFA) in accordance with the Building & Licensing Notice.

On December 14, 2020 Petitioners filed the Notice of Appeal and Petition for Certiorari. In the meantime, Jack Lingo Asset Management, LLC and Sussex Exchange Properties, LLC filed their own Notice of Appeal and Petition for Certiorari in their challenge to the Building Official’s incorrect GFA decision and the BOA’s affirmation thereof in C.A. S20A-05-001- MHC. By Order of this Court, these two cases were consolidated since they both deal with the same GFA issues.

⁴⁹ Nov. 17, 2020 BOA Decision, Ex. K.

⁵⁰ Sept. 2020 Tr. 67:2-5.

This is Petitioners' Ronald E. Lankford's and Lankford Properties, LLC's
Opening Brief.

QUESTIONS PRESENTED

1. Did the BOA err as a matter of law by not finding that the GFA of Petitioners' hotel did not include any balconies, porches, decks or patios in accordance with the "Building & Licensing Notice"?

2. Did the BOA err as a matter of law by not applying the plain meaning of "Floor Area, Gross" (GFA) to the Petitioners' hotel?

3. Did the BOA err as a matter of law by not applying the correct rules of statutory construction to find that where there are multiple interpretations of an ordinance, the one favoring the property owner must prevail?

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review on appeals from a BOA is limited to the correction of errors of law and to determine whether substantial evidence exists in the record to support the BOA's findings of fact and conclusions of law.⁵¹ The burden of persuasion is on the party seeking to overturn a BOA's decision to show that the decision was arbitrary and unreasonable.⁵² The Court may not remand the matter back to the BOA, but instead may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."⁵³

This Court is asked to review whether the BOA legally erred by upholding the Inspector's decision that an exterior railed balcony, deck, porch or patio is included in the calculation of GFA under the City's Zoning Code. GFA is defined in relevant part in §270-4 of the Code: "FLOOR AREA, GROSS: The sum of the gross horizontal areas of the several floors of a building measured from the exterior face of the exterior walls" In its plain meaning, this definition includes what is on the inside of a building, nothing more. The Inspector ignored the phrase "measured from the exterior face of the exterior walls" to include outdoor spaces beyond the

⁵¹ *Janaman v. New Castle Co. Bd. of Adj.*, 364 A.2d 1241, 1242 (Del. Super. 1976).

⁵² *Mellow v. Bd. of Adj. of New Castle Co.*, 565 A.2d 947, 956 (Del. Super. 1988), *aff'd* 567 A.2d 422 (Del. 1989).

⁵³ 22 *Del. C.* §328(c).

exterior walls of a building; he's used terms not found in this definition such as "usable floor area" and areas of "assembly. The BOA itself performed all sorts of literary gymnastics to figure out what it thought the phrase means.

The definition is straightforward and simple. The BOA committed an error of law by not reversing the Inspector's misapplication of it.

Alternatively, the fact that the Inspector made multiple different interpretations of the definition means that it must be interpreted in favor of the landowner. The BOA also erred as a matter of law by not ruling in favor of the Petitioners on this basis.

Finally, the Inspector admitted in an official "Notice" that more than one interpretation and application of GFA has been applied by him and his staff and that plans such as Petitioners' submitted prior to September 24, 2019 should not include outdoor railed balconies, porches, decks and patios in GFA. The BOA erred as a matter of law by not ruling in favor of the Petitioners on this basis.

For all of these reasons the BOA's decision must be reversed.

II. ACCORDING TO THE NOTICE ISSUED BY THE BUILDING & LICENSING DEPARTMENT, THE PORCHES, DECKS AND BALCONIES ON THE PETITIONERS' HOTEL ARE NOT INCLUDED IN GFA.

The City did not include porches, decks, patios and balconies in GFA until the September 23, 2019 Board hearing. That was confirmed by the multiple examples in the record⁵⁴, the Building Inspector's own statements that his staff was applying the Code differently⁵⁵ and that all of the Building Inspector's predecessors "as good individuals that they are, did not focus on the language of the Code" and did not include decks, patios and balconies in GFA.⁵⁶

The Inspector must have realized that his new interpretation is vastly different from the past twenty-two years of applying GFA in Rehoboth Beach. The day after the September 23, 2019 hearing the Inspector acknowledged that he had just created a new rule in Town by posting a "Building and Licensing Notice" on the City's website.⁵⁷ According to that official Notice, "Plans submitted prior to September 24, 2019, will be reviewed to previous code interpretation." In other words, the interpretation of all of his predecessors and his own staff that balconies, decks, porches and patios are not included in GFA applies to all plans submitted prior to September 24, 2019.

⁵⁴ See Ex. B.

⁵⁵ See Sept. 2019 Tr. 33:20-25, 34:6-18 ("It was a mistake – by the staff – Yes.")

⁵⁶ Sept. 2019 Tr. 36:8-11.

⁵⁷ Ex. E.

The hotel plans were submitted well before September 24, 2019. That the plans were the subject of the BOA’s September 23, 2019 hearing confirms that they were “submitted prior to September 24, 2019”. They were also considered by the Rehoboth Planning Commission on September 14, 2018⁵⁸ and were previously considered by the BOA for unrelated variances on March 25, 2019.⁵⁹

The Notice makes no distinction between residential and commercial properties, and the BOA specifically found that “[f]or FAR and GFA calculation purposes, there is no distinction between structures devoted to commercial and residential uses.”⁶⁰

Because the Petitioners’ plans were submitted to the City prior to September 24, 2019, the official Notice dictates that they must be reviewed with the exclusion of all decks, balconies, porches and patios from GFA. This was brought to the BOA’s attention in the Petitioners’ Motion for Rehearing and during the rehearing. The BOA committed an error of law by failing to follow the directive of the official Notice and confirm that the balconies, decks, patios and porches are not part of the hotel’s GFA.

⁵⁸ See Sept. 14, 2018 Planning Commission Agenda, Ex. L.

⁵⁹ See March 25, 2019 BOA Agenda, Ex. M.

⁶⁰ Oct. 28, 2019 BOA Decision, Ex. C.

III. THE BOA’S DECISION TO AFFIRM THE INSPECTOR’S DECISION WAS AN ERROR OF LAW.

The Inspector determined that the decks and balconies of Petitioners’ hotel are included in the calculation of GFA because he believed that the railings are “the exterior face of the exterior walls” under the definition of GFA. The BOA affirmed this determination. Neither decision is correct based upon the plain meaning of the Code.

A. The Relevant Code Provisions.

The following are the relevant Code terms⁶¹:

FLOOR AREA, GROSS [GFA]: The sum of the gross horizontal areas of the several floors of a building measured from the exterior face of the exterior walls or from the center line of a wall separating two attached buildings, including basements but not including any space where the floor-to-ceiling height is less than six feet....⁶²

FLOOR AREA RATIO (FAR): The quotient obtained by dividing the gross floor area of all buildings on a lot by the gross lot area.

WALL

A. A structure of brick, masonry or similar materials erected so as to enclose or screen areas of land;

B. The vertical exterior surface of a building; or

⁶¹ Code of Rehoboth Beach §270-4. (Emphasis added).

⁶² Subpart A of the definition of “Floor Area, Gross” also references space under a building raised on pilings in accordance with FEMA requirements to include “the horizontal area of any space beneath any building created by pilings, piers or structural support which is greater than four feet in height.”

C. The vertical interior surfaces which serve to divide a building's space into rooms.

B. The Plain Meaning of the Code Provisions.

“The ordinance must be read under the familiar principle that the words are to be given their common and ordinary meaning.”⁶³ Any undefined words in an ordinance must also be given their ordinary, common meaning.⁶⁴

To determine the maximum allowable Floor-to-Area Ratio (“FAR”), one must first determine the GFA. GFA measures the “gross horizontal areas of the several floors of a building”, but it has the additional qualifier that it must be measured “from the exterior face of the exterior walls.”⁶⁵ In its most basic sense, the question is, “what is on the inside of the interior walls of a building?” It is this reference to measuring what is inside the “exterior walls” that has been missed by the City and the BOA.

“Walls” are qualified as being one of three things under the Code: (a) brick, masonry or similar materials enclosing or screening areas of land (i.e., your backyard wall or fence); (b) the vertical exterior face of a building; or (c) the vertical structures separating the interior rooms of a building.⁶⁶ There should not be unnecessary

⁶³ *Norino Properties LLC v. Mayor and Town Council of the Town of Ocean View*, 2010 WL 3610206 (Del. Ch. March 31, 2011)

⁶⁴ *Dewey Beach Ent. V. Bd. of Adj.*, 1 A3d 305, 307 (Del. 2010).

⁶⁵ Code, §270-4.

⁶⁶ *Id.*

confusion about what this means: the “exterior wall” for purposes of GFA is simply the vertical exterior face of a building that encloses interior space. It is not a railing, a handrail, a guard, a porchpost or other similar element of a balcony, deck, patio or porch.

Yet, the Inspector has stated:

Typically, the floor area ratio (FAR) is the relationship between the total amount of usable floor area that a building with attached structures has been permitted to have and the total area of the lot on which the building stands. Unquestionably, the zoning code specifically states that a “building” or “structure” that may be roofed, walled and be built for permanent use for either a dwelling or commercial use. Any item constituting a “structure” requiring permanent location on the ground or attachment to something having a permanent location on the ground, such as building having an exterior face of the exterior wall, constitute usable floor area.⁶⁷

And:

Under Zoning Section 270-4, Definitions, a “deck” or a balcony” are both identified as a structure and a “wall” may be built of any material to enclose an area. Structural components of a deck or balcony include a horizontal surface (floor) with vertical railings. Sections of a deck or balcony are attached to the exterior wall of the building and the perimeter railings become the vertical surface (wall). The railings are considered the exterior face of the exterior walls on the deck or balcony erected to enclose that area. That defined space is counted as additional floor area and used to compute not only the gross floor area but also to compute the FAR of the lot on which the building stands.⁶⁸

⁶⁷ Building Inspector’s September 23, 2019 Report (Emphasis added), Ex. A.

⁶⁸ Id.

There are multiple errors with this Report. First, the Inspector leads with how he “typically” applies the Code- suggesting that there is more than one interpretation and not necessarily what the Code actually requires.

Second, the Inspector states that the GFA is calculated using the “amount of usable floor area” of a building.⁶⁹ Nowhere in the definition of GFA is there any reference to “usable floor area” – a term that would likewise be difficult if not impossible to reasonably apply.

Third, he states that decks or balconies are themselves “attached to the exterior wall of the building”. By this admission, there already is an “exterior wall” of a building- and it is not the railing of a deck or balcony.

Fourth, if perimeter railings become “the vertical surface (wall)” because they are “attached to something having a permanent location on the ground” to determine GFA, then any fence, railing or other structure attached to a dwelling or commercial building is an exterior wall. This would include a backyard fence around a patio. Or, as he testified to the Board, “when we’re enclosing a deck, the wall – the wall is what – and the vernacular that’s being used is a railing. Well, there’s no such thing as a railing in the building code; in the building code, it’s considered a guard. And

⁶⁹ Id.

a guard is a building component....”⁷⁰ So, under his strained reasoning the railing, guard (or whatever) is now the “exterior face of the exterior wall”. This was confirmed by his affirmative response to a question from Member Brandt: “The guard or railing, it constitutes the exterior surface of the wall in your interpretation?”⁷¹ This simply defies logic and common sense: who would ever think that a balcony or deck railing or guard is “the exterior face of an exterior wall”? Since most lots in Rehoboth are 5,000 sf in size, if a deck, fenced patio or even backyard is counted as GFA there will be little room left for actual inside living space under the maximum GFA.

Consider 200 Stockley Street where the Inspector said that the post-and-wire railing system surrounding the home’s entire decked patio and pool is an “exterior wall” because it is attached to the residence.⁷² This defies common sense and 22 years of GFA calculations. The same holds true with the other railings on the examples provided to the Board. The definition of GFA only refers to “the exterior face of the exterior walls” as determinative of how to measure GFA and not a “railing” or “guard” as thrown out by the Inspector.

⁷⁰ Sept. 2020 Tr. 9:13-19.

⁷¹ Sept. 2019 Tr. 11:16-19.

⁷² Ex. B.

Fifth, the Inspector deviated from his Report when testifying to the BOA during the 2019 hearing: “When you go to the definition of structures, you also have to look is it a component of a building? You look under the definition of building, and a building is – a building is a structure. . . . Now the way I have included those [porches, balconies and decks] is they do not necessarily – they do not have to be – they do not necessarily have to have a roof.”⁷³ While a hotel (for instance) could be designed with balconies one over the top of another (meaning they are covered by the balcony above), it could also be designed with balconies staggered across the façade. Under the Inspector’s logic as affirmed by the BOA, one design would count against GFA and the other would not although both are identical in structure.

Sixth, the Inspector testified that if an area “becomes an assembly, and an assembly meaning that it’s going to be used, then I have to count gross floor area.”⁷⁴ The definitions of GFA, “walls” and FAR do not rely upon “assembly” in any fashion.

Seventh, through the Inspector’s incorrect application of the GFA, he has single-handedly made properties all over town illegally nonconforming. Because everyone else who ever reviewed plans for the City did not include decks, porches

⁷³ Sept. 2019 Tr. 7:17-21; 8:4-7.

⁷⁴ Sept. 2019 Tr. 68:18-22.

and balconies in GFA, it was the Inspector's testimony that "therefore, these properties have been over, in my opinion, have been over built."⁷⁵

The Inspector (as affirmed by the BOA) used every interpretation but the most common-sense, plain meaning application of the definition of GFA. In its review, the BOA evidently recognized the Building Inspector's illogical and inconsistent application of GFA since it did not even attempt to reconcile it, instead performing its own independent effort to determine what the Code meant.

In summary, the Inspector and the BOA turned common sense into calculus. The plain meaning of the Code and twenty-two years of applying it is simple: a railing or guard rail is not the "exterior face of an exterior wall" and balconies, decks and porches are not part of GFA. The Board's decision should be reversed.

⁷⁵ Sept. 2019 Tr. 35:16-18.

IV. THE INSPECTOR AND THE BOA APPLIED MORE THAN ONE INTERPRETATION OF GFA, THEREFORE UNDER THE RULES OF STATUTORY CONSTRUCTION THE MEANING THAT FAVORS THE LANDOWNER MUST BE USED.

“In short, a regulatory body may, as a general matter, draft its regulations as it sees fit. With that drafting freedom, however, comes the consequences of any ambiguity.”⁷⁶ “A statute is ambiguous if it is reasonably susceptible of two different interpretations”.⁷⁷ Then, “if there are two reasonable interpretations of the statute, the interpretation that favors the landowner controls.”⁷⁸ Stated another way, if there is any doubt as to the correct interpretation of a zoning ordinance, that doubt must be resolved in favor of a property owner and the free use of his property.⁷⁹

Both *Dewey Beach Enterprises* and *Chase Alexa* further state that “[s]tatutes must be construed as a whole, in a way that gives effect to all of their provisions and avoids absurd results”. Only if that fails may it be necessary to look to statutory construction to “give effect to legislative intent.”⁸⁰

The analysis is simplified here because the City has admitted on multiple occasions that it has interpreted GFA in several different ways. The Inspector has

⁷⁶ *Norino Properties*.

⁷⁷ *Dewey Beach Ent.* 1 A.3d 305, 307 (Del. 2010). *See also Chase Alexa, LLC v. Kent. Co. Levy Court*, 991 A.2d 1148, 1151 (Del. 2010)

⁷⁸ *Chase Alexa*, 991 A.2d at 1152

⁷⁹ *Dewey Beach Ent.* 1 A.3d at 310.

⁸⁰ *Friends of Palladin v. N.C.C. Bd. of Adj.*, 206 WL 3026240 (Del. Super. Sept. 12, 2006).

applied more than one (and quite possibly several) interpretations. Faced with these admissions, this Court must apply the interpretation favoring the Petitioners. The Building Inspector and twenty-two years' worth of the City's plan approvals have provided us with this interpretation: GFA does not include balconies, decks, patios or porches.

The admissions of the City's different interpretations are myriad, and some of them are as follows:

- The twenty-two years' worth of buildings approved without including balconies, decks, porches and patios in GFA. The City did not dispute this information and explicitly acknowledged that this interpretation occurred.
- Contrary to the twenty-two years' worth of a different application of GFA, the BOA found in its September 23, 2019 Decision on 240 Rehoboth Avenue that "B&L contents that second floor decks historically count as structure and towards GFA."⁸¹ Yet, the very next day the Inspector issued a formal "Notice" contradicting himself and the BOA's finding, as follows...
- The Building & Licensing Department's Notice that one interpretation (excluding balconies, decks and porches from GFA) existed prior to

⁸¹ Ex. D.

September 23, 2019, and another interpretation (including balconies, decks and porches in GFA) existed after September 24, 2019.⁸²

- The Inspector’s Report to the BOA dated October 15, 2019 admitting that he had one interpretation of GFA, while his Assistant had another: “the Assistant Building Inspector, who has responsibility for residential plan reviews, has not included the outdoor areas with enclosures in the calculation of gross floor area.”⁸³
- The City Solicitor’s admission during the August 26, 2019 240 Rehoboth Avenue Hearing that “the statute is ambiguous when it is reasonably susceptible to different conclusions or interpretations, which I think is the conversation we are having right now, it is reasonably susceptible to different conclusions or interpretations.”⁸⁴
- The BOA’s October 28, 2019 Decision at Paragraph 9 that “[f]or FAR and GFA calculation purposes, there is no distinction between structures devoted to commercial or residential uses.”⁸⁵ Yet the BOA’s December 16, 2019 “Decision on Rehearing” in the 240 Rehoboth Avenue matter included the direct opposite finding based on the Inspector’s testimony: “Concerning the

⁸² Ex. E.

⁸³ Ex. I.

⁸⁴ Transcript of Aug. 26, 2019 hearing, Ex. J.

⁸⁵ Ex. _____

posted notice, B&L contends that varying interpretations have been applied only in the case of residential structures, whereas B&L has applied its interpretation consistently for commercial structures.”⁸⁶ This finding that there have been “varying interpretations” is an admission, as well.

- Member Cassel stated in his deliberations during the 240 Rehoboth Avenue Hearing that “[t]his Code provision is susceptible to two different interpretations; and therefore it is ambiguous and has to be interpreted in favor of the applicant.”⁸⁷
- Member Katz stated in in his deliberations during the 240 Rehoboth Avenue Hearing that “[t]here has been a lot of history of many interpretations of what this Code is and whether the Board clears it up or somebody else clears it up, in this case they should be allowed to go forward.”⁸⁸

There are at least two interpretations of GFA that have occurred. Therefore, under the rule of statutory construction set forth in *Dewey Beach Enterprises* and *Chase Alexa* the interpretation that favors the property owner (the Petitioners herein) must be used. It is not necessary to look to legislative intent to determine the outcome here. First, there is no legislative intent in the record to glean; as Mr. Perry

⁸⁶Ex. H. Note that the Notice (Ex. E) makes no distinction between residential and commercial structures on its face.

⁸⁷ Minutes of Nov. 25, 2019 Hearing, Ex.G.

⁸⁸ Id.

testified, the City does not maintain records of legislative history or intent and none was presented.⁸⁹ More importantly, this Court need only follow the City's own Notice for the interpretation that must be applied: the hotel plans, which were submitted prior to September 24, 2019, "will be reviewed to previous code interpretation" which did not include decks, balconies and porches in GFA.

⁸⁹ Sept. 2020 Tr. 54:4-16.

CONCLUSION

The BOA's decision to uphold the Building Inspector's determination that the decks, porches and balconies of Petitioners' hotel count as part of the building's GFA must be reversed. The BOA's decision is an error of law based upon well-established principles of statutory construction; because it is contrary to the City's own admissions that these outdoor areas have not been previously included in GFA; and because it failed to adhere to the "Building & Licensing Notice" confirming that these elements are not part of Petitioners' GFA.

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