IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

PETITIONERS' OPENING BRIEF IN SUPPORT OF APPEAL FROM THE DECISION OF THE BOARD OF ADJUSTMENT OF THE CITY OF REHOBOTH BEACH, DELAWARE

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NATURE AND STAGE OF THE PROCEEDINGS

On May 7, 2020, Petitioners, Jack Lingo Asset Management, LLC and Sussex Exchange Properties, LLC FBO Lingo Brothers, LLC, appealed to and petitioned the Superior Court of the State of Delaware pursuant to 22 *Del. C.* § 328 and Rule 72 of the Civil Rules of the Superior Court, for judicial review of the decision of the Board of Adjustment of the City of Rehoboth Beach, Delaware dated April 9, 2020.

The Court issued a Briefing Schedule on September 21, 2020. Thereafter, on October 13, 2020, Petitioners filed a letter requesting a stay to allow for the consolidation of Petitioners' action with another case. The letter explained to the Court that on September 28, 2020, Respondent decided another matter involving the same question of law against Lankford Properties, and that counsel for Lankford Properties had informed Petitioners' counsel that they intended to file an appeal of Respondent's decision. On October 19, 2020, this Court granted an order to permit the consolidation of this case with a case to be filed on behalf of Lankford Properties (BOA Case No. 0819-08) and on February 25, 2021, the Court issued an amended briefing schedule.

This is Petitioners' Opening Brief.

STATEMENT OF FACTS

Petitioner Jack Lingo Asset Management, LLC ("JLAM") is a limited liability company organized and existing under the laws of the State of Delaware. Petitioner Sussex Exchange Properties, LLC FBO Lingo Brothers, LLC ("Sussex Exchange") are limited liability companies organized and existing under the laws of the State of Delaware (hereinafter individually JLAM and Sussex Exchange are the "Petitioner" or collectively the "Petitioners"). Respondent is the Board of Adjustment of the City of Rehoboth Beach, Delaware (hereinafter the "Board"), an agency or instrumentality of the City of Rehoboth Beach, a municipal corporation of the State of Delaware (hereinafter the "City").

A. The Building Application

Petitioner Sussex Exchange is the record owner of a building and property located at 240 Rehoboth Avenue, Rehoboth Beach, Delaware 19971, also being known and designated as Sussex County Tax Parcel 334-14.17-316.00 (hereinafter the "Property" or the "Building"). The Property is located in the C-1 Commercial District of the City.[1]

The Property was a two-story building with the first floor used for professional offices (Jack Lingo Realtor) and the second floor used for residential purposes. Part of the Building includes a flat roof over the first floor. In 2018, Petitioners decided

[1] A-10.

to convert the upstairs portion of the Building from a residential apartment to additional office space, like the existing use on the first floor.[2] With the renovation of the second floor residential apartment, the entire Building would have one use – professional office space.[3]

In October 2018, Petitioners submitted a building permit application for conversion of the second floor residential apartment to office space to the Building & Licensing Department of the City of Rehoboth Beach (hereinafter the "B&L Department").[4] The plans submitted with the building permit application included a second-story deck, approximately 25' x 25' in size, with a walkway from the deck leading towards the rear of the building and a set of stairs leading down to the ground.[5] On November 16, 2018, Petitioners received an email informing them that the permit had been processed and was ready for pickup.[6]

After the submitted plans were approved, Petitioners decided to move forward with the construction project with the exception of the aforementioned second-story deck, walkway and stairs.[7] However, during the construction Petitioners received notice from the State Fire Marshall Office informing them that they would have to

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 19.

either provide a separate egress from the second floor or permanently close a door on the first floor.[8] Thereafter, Petitioners submitted a building permit application to the B&L Department (hereinafter the "Petitioners' Application") to construct a walkway and stairs to be used as an emergency exit for the second floor.[9]

On June 10, 2019, the Building Inspector issued a decision by email to Petitioner JLAM (hereinafter the "Building Inspector's Decision") denying Petitioners' Application.[10] The Building Inspector's Decision states as follows:

> Please be advised that the proposed 2nd level egress walkway is an increase in size requiring one (1) additional parking space as provided under the City of Rehoboth Beach, Zoning Section §270-29B.[11]

There is no room available at the Property for an additional parking space as the long-standing building that takes up almost the entirety of the Property.

B. Petitioners Appeal the Building Inspector's Decision

Petitioners were surprised by the Building Inspector's Decision for at least two reasons. First, the proposed walkway for the emergency egress was significantly smaller than the original 25' x 25' deck that was approved approximately eight (8)

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[8] *Id.*

[9] *Id.*

[10] A-1.

[11] §270-29B reads: "This article shall not apply to any existing structure unless 75% or more of the gross floor area of the structure is altered or the gross floor area of the structure is increased in size. In the case of a structure being increased in size only, the gross floor area of the portion of the structure being increased shall be used to compute the number of parking and loading and unloading spaces required."

months earlier without triggering the application of §270-29B.[12] Second, the section of the Zoning Code in the Code of the City of Rehoboth Beach (hereinafter the "Code") referenced by the Building Inspector used the term "gross floor area" which by definition is the area within the "exterior walls" and the railings on a deck, walkway or landing did not appear to qualify in any respect as an "exterior wall."[13]

After the surprising response from the Building Official, counsel for Petitioners, by letter dated July 1, 2019, requested further information from the Building Official.[14] In particular, with respect to the question about gross floor area and exterior walls, counsel for JLAM stated as follows:

> However the gross floor area of the building is not increased in size. Gross floor area, as defined by the City's Code, does not include areas beyond the exterior face of the exterior walls. The proposed deck (both the original deck proposed in 2018 as well as the egress deck proposed to satisfy the State Fire Marshall's requirement of a second means of egress) is completely outside and beyond the exterior walls of the existing building. Thus, the second phrase of Section 270-29.B does not apply either.[15]

The Building Inspector did not change his decision and on July 10, 2020, Petitioners filed an Appeal of the Building Inspector's Decision and alternatively requested a variance from the one parking space requirement.[16]

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[12] August Hearing Transcript at p. 20, *see* A-109.

[13] August Hearing Transcript at p. 21., *see* A-110.

[14] A-5.

[15] A-6.

[16] A-2.

C. The August Appeal Hearing

The Board scheduled Petitioners' Appeal of the Building Inspector's Decision and alternative variance application for a public hearing on August 26, 2019. At the public hearing, Petitioners reminded the Board that it was sitting in a quasi-judicial capacity and that it was being asked to undertake statutory construction or analysis to consider the Building Inspector's Decision.[17]

Petitioners argued to the Board that under rules of statutory construction, it must interpret the Code based on the plain meaning of the term "exterior wall."[18] In support of its position, Petitioners cited to colloquial and common definitions of a "deck" and, more importantly, to the 2012 version of the International Building Code (as adopted by the City of Rehoboth Beach) which states that an exterior wall shall be insulated and provide support and weather protection for the building.[19] Petitioners argued that the City's interpretation of the Code went beyond the plain meaning of the words to create an absurd result.[20]

Petitioners further discussed how, if the Board disagreed with the plain meaning of "exterior wall" described in its own Building Code, then this would mean

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[17] August Hearing Transcript at p. 21, *see* A-110.

[18] *Id.*

[19] August Hearing Transcript at pp. 26-28, *see* A-114-116; *see also International Building Code*, Chapter 14 (2012), *see* A-150-163.

[20] August Hearing Transcript at pp. 21-24, *see* A-110-114.

that there was a different interpretation of "exterior wall," that the Zoning Code was ambiguous and pursuant to established Delaware law, an ambiguity in a Zoning Code is construed in favor of the property owner because it is in derogation of the free use of property.[21]

Remarkably, during the August public hearing before the Board, the City Solicitor (counsel for the Building Official) acknowledged that the language of §270-29B was ambiguous because "it's reasonably susceptible to different conclusions or interpretations."[22]

Despite the City Solicitor's admission that the Zoning Code was ambiguous, the Board affirmed the Building Inspector's Decision and denied the Petitioners' variance request on the basis that the railing "enclose[ed] space and add[ed] structure," therefore, the railing constituted an "exterior wall."[23] The Board's written decision was filed on September 23, 2019 (hereinafter the "September Decision").[24]

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[21] August Hearing Transcript at p. 30, *see* A-117.

[22] August Hearing Transcript at p. 41, *see* A-118; referencing the holding in *Friends of Paladin v. New Castle County Board of Adjustment*, 2006 WL 3026240 (Del. Super. Sept. 12, 2006).

[23] A-23.

[24] A-21.

D. The Historical Application of the Code

While Petitioners dispute many aspects of the September Decision, for reasons that are set forth hereafter, one of the most incredible statements in that decision is Paragraph 5 of the Findings of Fact which states:

> "B&L contends that second floor decks historically count as structure and towards GFA. The Applicant contests this assertion and cites B&L's posture with respect to JLAM's recent previous application for a permit to construct a second floor deck that did not trigger an application of §270-29B."[25]

The day after the publication of the September Decision, *i.e.*, on September 24, 2019, the City of Rehoboth Beach posted the following Building & Licensing Department Notice (hereinafter the "B&L Notice") on its website[26]:

> Property Owners, Contractors and Design Professionals note that *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)[27]

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[25] A-22.

[26] A-57. The Building & Licensing Department placed the B&L Notice on the City's website following a public hearing before the Board of Adjustment in which the applicant identified ten (10) examples of the City's historical interpretation that decks with railings were not included when calculating gross floor area.

[27] A-57. Source: https://www.cityofrehoboth.com/news/general/building-licensing-notice.

This admission by the City was in direct conflict with the testimony provided during the August public hearing as demonstrated in the 5th Finding of Fact from the Board's September Decision. What occurred between the B&L Department's contradictory statements was the public hearing in the companion case to this matter, *Ronald E. Lankford and Lankford Properties, LLC v. The Board of Adjustment of the City of Rehoboth Beach*, C.A. No. S20A-12-002 MHC (the "Lankford Appeal").

At the public hearing on September 23, 2020 for the Lankford Appeal, the Lankford Petitioner was also appealing the Building Inspector's decision regarding the definition of the term "Gross Floor Area." The Lankford Petitioner, having witnessed the information presented and discussed during the August public hearing in the instant matter, presented the Board with numerous properties where the City did not consider deck railings to be exterior walls when calculating gross floor area.[28]

While not a scientific method, counsel for the Lankford Petitioner rode a bicycle around the City and casually observed properties with railings and decks and then compared those properties to the records in the B&L Department. The following list does not constitute a comprehensive representation of every property but was intended to demonstrate the history of multiple interpretations of § 270-29B,

[28] A-25-56.

where decks, porches and similar structures were not counted towards or included as part of the gross floor area for that property:

- 200 Stockley;
- 1001 South Boardwalk;
- 22 Lake Drive;
- 13 Laurel Street;
- 125 Hickman Street;
- 102 New Castle Street;
- 13 St. Lawrence Street;
- 14 Dover Street;
- 200 New Castle Street; and
- 202 New Castle Street.[29]

At the conclusion of the September 23, 2019 public hearing for the Lankford Appeal, where the above-referenced historical interpretations were discussed, the Board also denied Lankford Petitioner's appeal of the Building Official's decision. As noted above, on the very next day, the B&L Department issued the B&L Notice that there was a prior interpretation of the disputed provision regarding Gross Floor Area.

Ignoring, for the moment, the B&L Department's contradictory statements, the Petitioners thought their case had been resolved by the City's statement in the B&L Notice that "[p]lans submitted prior to September 24, 2019, will be reviewed to previous code interpretation."[30] As indicated by the on-going nature of this

[29] *Id.*

[30] A-57.

matter, the City did not, in fact, review the Petitioners' plans using the "previous code interpretation."

The City further confirmed the ambiguity (multiple interpretations) in an October 11, 2019 article published in *The Cape Gazette*.[31] The October 11, 2019 article quotes then-Mayor of the City of Rehoboth Beach, Paul Kuhns, who states that "the Code is ambiguous, should be addressed" (referring to the calculation of gross floor area).[32]

E. The Motion for Reargument

Due to the City's numerous admissions regarding the ambiguity and multiple interpretations of the Zoning Code in question, on October 3, 2019, Petitioners filed a Motion for Re-Hearing with the Board.[33] In that Motion, the Petitioners requested a re-hearing for the following reasons:

> 9. Applicant requests a rehearing based upon all three (3) reasons for a rehearing described in Rule 16. First, B&L's position at the August 26, 2019 was surprising given the long-standing history of the treatment of decks within the City. Second, the B&L Notice, which prompted the filing of this appeal, constitutes "newly discovered evidence" as the Notice was not posted until after Applicant's August 26, 2019 hearing date (hereinafter "August Hearing"). Finally, B&L misrepresented the City's historical interpretation of what constitutes an "exterior wall" for the purposes of calculating gross floor area.[34]

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[31] A-58.

[32] A-59.

[33] A-60.

[34] A-62.

In the Motion, the Petitioners also described for the Board, the well-established Delaware law regarding ambiguity (multiple interpretations) in zoning code provisions and that such ambiguities are required, by law, to be interpreted in favor of the property owner.[35]

The Petitioners further questioned why a building permit would not issue for the exterior walkway and stairs as their application was submitted long before the September 24, 2019 change in code interpretation described in the B&L Notice.[36]

On October 28, 2019, the Board considered the Petitioners' Motion for Re-Hearing and granted a re-hearing on the basis of newly discovered evidence (*i.e.*, the B&L Notice) in accordance with Rule 16.1(2) of The Rules of Procedure of the Board of Adjustment of the City of Rehoboth Beach, Delaware.[37]

F. The November Re-Hearing

The Board scheduled the public hearing for the re-hearing for November 25, 2019.[38] At the start of the re-hearing, members of the Board questioned "why we're even here" if Petitioners' plans had been submitted prior to September 24, 2019 as the matter was "pretty black and white."[39] The City Solicitor explained that, even

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[35] A-63.

[36] *Id.*

[37] A-72.

[38] *Id.*

[39] November Hearing Transcript at pp. 3-4, *see* A-120-121.

though it was not stated in the B&L Notice, the Notice only applied to residential applications as the residential side of the B&L Department was interpreting the definition of gross floor area in a different way than the commercial side.[40]

Petitioners noted that the City's position was remarkable in several respects on this point. First, the B&L Notice did not mention a "commercial" or "residential" interpretation.[41] Second, and even more importantly, the section of the Zoning Code being discussed does not differentiate between "commercial" or "residential" when calculating "Gross Floor Area."[42]

Members of the Board then expressed their concern that at the initial hearing "there was no discussion that there were different ways of [interpreting the Code]" and had they had this information, they "would not have agreed with the Building Inspector."[43] Despite the Board's concerns about the purpose of the re-hearing and the City's new position about prior interpretations, the Board allowed the City to proceed with its presentation.[44]

As the re-hearing continued, Petitioners argued that the re-hearing came down to an issue of statutory construction and that, pursuant to Delaware law, where a

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[40] *Id.* at p 4, see A-121.

[41] *Id.* at p. 10, *see* A-125.

[42] *Id.* at p. 11, *see* A-126.

[43] *Id.* at pp. 6-7, *see* A-122-123.

[44] *Id.* at p. 13, 127.

zoning code provision is ambiguous (*i.e.* reasonably susceptible to two interpretations), the interpretation favoring the landowner controls.[45] In support of Petitioners' contention that the Code was ambiguous, Petitioners cited to the several admissions made by the City and its administrative offices confirming the ambiguity:

- Mayor Kuhns' prior comments that the Code was "ambiguous" and "should be addressed;
- The City Solicitor's prior comments that the relevant provision of the Code was "reasonably susceptible to different conclusions or interpretations;"
- The Building Inspector's admission in the Board of Adjustment Case Summary dated October 15, 2019 that "[d]uring the most recent Board of Adjustment hearing, it was revealed that the Assistant Building Inspector…has not included the outdoor areas with enclosures in the calculation of gross floor area (consistent with his training by his predecessor);"[46] and

[45] *Id.* at pp. 22-23, *see* A-129-130.

[46] A-78.

- Most importantly, the B&L Notice that acknowledged that the pertinent provision of the Code addressing gross floor area had been subject to at least two interpretations over the years.[47]

During the public hearing, the Board appeared to argue that the different interpretations were because the Code was confusing and complex, not ambiguous.[48] The Chairman of the Board who drew this distinction later stated "I got news for you – well, we agree it's a poorly written provision of the Code."[49] Despite the Board's acknowledgement that the Code had been subject to multiple interpretations over the years,[50] the Board ultimately voted 3-2 to affirm the Building Inspector's report on the basis that the Code was "not ambiguous."[51]

On or about April 9, 2020, the Board issued its decision (hereinafter the "April Decision") affirming the decision of the Building Inspector by a vote of 3-2.[52] The members of the Board who voted to affirm the Building Inspector's decision opined that the Code was not ambiguous and that "regardless of the history of varying interpretations of the definition of gross floor area, the decision from which the

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[47] A-57.

[48] November Hearing Transcript at pp. 31, 48-50, *see* A-131, 134-136.

[49] November Hearing Transcript at p. 40 *see* A-132.

[50] *Id.* at pp. 4, 7-8, 14, 50-57, *see* A-121, 123-124, 128, 136-143.

[51] *Id.* at pp. 76-81, *see* A-144-149.

[52] A-83.

applicant appeals is the correct interpretation."[53] The members of the Board who opposed the motion found that the Code was ambiguous because it was "reasonably susceptible to differing interpretations as acknowledged by the actions of [Building & Licensing]" and therefore the Applicant was not subject to the requirements supposedly imposed on them.[54]

The B&L Department was not alone in its varying positions on this issue. Tellingly, in the Board's October 28, 2019 Decision in the Lankford Appeal it found as follows:

> For FAR and GFA calculation purposes, there is no distinction between structures devoted to commercial or residential uses.[55]

But in the April Decision, the Board reiterated the B&L Department's position, stating as follows:

> Concerning the posted notice, 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.[56]

The record in this matter is replete with this type of *Alice in Wonderland* inconsistency and contradiction both by the B&L Department and the Board.

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[53] A-84.

[54] A-85.

[55] A-106.

[56] A-84.

QUESTIONS PRESENTED

1. **WHETHER THE COURT SHOULD REVERSE THE BOARD'S APRIL DECISION DENYING THE PETITIONERS' APPLICATION BECAUSE IT CONTAINS ERRORS OF LAW.**

   Yes, this Court should reverse the Board's April Decision because it wrongly applied recognized rules of statutory construction for zoning ordinances.

2. **WHETHER THE COURT SHOULD REVERSE THE BOARD'S APRIL DECISION DENYING THE PETITIONERS' APPLICATION BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD.**

   Yes, this Court should reverse the Board's April Decision because it is not supported by substantial evidence on the record and the substantial unrebutted evidence presented to the Board by the Petitioner requires a reversal of the Building Official's Decision.

3. **WHETHER THE COURT SHOULD REVERSE THE BOARD'S APRIL DECISION DENYING THE PETITIONERS' APPLICATION BECAUSE IT IS ARBITRARY AND CAPRICIOUS.**

   Yes, this Court should reverse the Board's April Decision because it contradicts the recognized law on statutory construction, is not supported by substantial evidence on the record, and ignored the City's own historical interpretation of its Code resulting in an arbitrary and capricious decision.

ARGUMENT

When a decision of a Board of Adjustment is appealed in Delaware, the Superior Court's review is "restricted to a determination of whether [the Board's] decision is free from legal errors and whether [its] finding of facts and conclusions of law are supported by substantial evidence in the record."[57] The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was "arbitrary and unreasonable."[58] Questions of law are reviewed *de novo*.[59] In the matter *sub judice*, the Board's decisions contain errors of law, its decisions are not supported by substantial evidence in the record and are flatly contradicted by the evidence in the record and, finally, the Board's errors of law and disregard of the record renders its decision arbitrary and capricious or unreasonable.

I. THE BOARD'S APRIL DECISION DENYING THE PETITIONERS' APPLICATION CONTAINS ERRORS OF LAW BECAUSE IT WRONGLY APPLIED RECOGNIZED RULES OF STATUTORY CONSTRUCTION FOR ZONING ORDINANCES.

During each of the public hearings, Petitioners presented the Board with the basic rules of statutory construction because, ultimately, this appeal of the Building Inspector's Decision is about statutory construction, *i.e.*, the interpretation of the

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[57] *Ebert v. Kent Cnty. Dep't of Planning Servs.*, 2019 WL 994578, at *3 (Del. Super. Feb. 22, 2019)

[58] *W & C Catts Family Ltd. P'ship v. Town of Dewey Beach*, 2018 WL 6264709, at *3 (Del. Super. Nov. 30, 2018).

[59] *Id.*

Zoning Code's definition of Gross Floor Area. The rules of statutory construction in Delaware are well-settled and are "designed to ascertain and give effect to the intent of the legislators."[60] As stated in *Dewey Beach Enterprises* "[a]t the outset, the court must determine whether the provision in question is ambiguous."[61] According to Delaware law, statutory language is ambiguous "if it is reasonably susceptible to two [or more] interpretations." [62] Whenever a Court, or in this case a quasi-judicial body like the Board,[63] determines that a statute is not ambiguous, then "the words in the statute are given their plain meaning."[64]

If the Court/quasi-judicial body finds that the statute or code is ambiguous, then rules of statutory interpretation apply. One of the well-established principles of law when interpreting zoning statutes is based upon the restriction of property owner's rights, *i.e.*, a zoning code by its very nature restricts a property owner's right

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[60] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010), *see also Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151-52 (Del. 2010).

[61] *Dewey Beach Enters.*, 1 A.3d at 307.

[62] *Chase Alexa*, 991 A.2d at 1151-52 (Del. 2010), *see also Norino Properties LLC v. Mayor and Town Council of the Town of Ocean View*, 2010 WL 3610206 (Del. Ch. Aug. 30, 2010) (holding that under Delaware law, zoning ordinance ambiguities must be resolved in favor of the property owner and the free use of his property).

[63] *Re: Rehoboth Art League, Inc. v. Bd. of Adjustment of the Town of Henlopen Acres*, 2009 WL 3069672, at *2 (Del. Super. Aug, 20, 2009) (stating that the power granted to the Board is not an uncontrolled power to do as the Board desires but must be exercised in accordance with the evidence of physical facts and circumstances as a neutral arbiter and not as an advocate for one position or another).

[64] *Dewey Beach Enters.*, 1 A.3d at 307.

to the free use of his land. The principle of law is that restrictions upon an owner's basic property rights cannot be ambiguous. If, however, a zoning code is ambiguous, then Delaware law expressly requires that "if there are two reasonable interpretations of the statute, the interpretation that favors the landowner controls."[65]

A. The Code Provisions.

This dispute arises out of the definition of an "exterior wall" – something that children appreciate from the time they are told not to go "outside." In the Code, this basic determination of what is an "exterior wall" impacts the determination of "Gross Floor Area" which is defined as follows:

> 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 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; subject to the following…[Emphasis Added; the additional language is not relevant to this matter].[66]

The definition of Gross Floor Area has meaning to this matter because on its second review of this application, the B&L Department claimed that the emergency access, walkway and stairs added Gross Floor Area to the building which implicated the parking provision in Section 270-29.B of the Zoning Code, which states that the provisions of the parking chapter of the Code are not applicable when:

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[65] *Chase Alexa*, 991 A.2d at 1151.

[66] The Code of the City of Rehoboth Beach § 270-4.

> B. This article shall not apply to any existing structure unless 75% or more of the gross floor area of the structure is altered or the gross floor area of the structure is increased in size. In the case of a structure being increased in size only, the gross floor area of the portion of the structure being increased shall be used to compute the number of parking and loading and unloading spaces required.[67]

Of course, when the building permit application included a 25x25 deck, walkway and stairs to a landing the building permit was granted. Then, less than a year later when the request was limited to the walkway and stairs, the B&L Department found that a railing created an exterior wall on both the walkway and the stairs.

The B&L Department's first interpretation was the correct interpretation and was likely the basis of that building official simply applying the plain meaning of the term exterior wall to the application—the historical practice of the B&L Department. As set forth in this brief and in the companion case, subsequently, the B&L Department undertook a tortured view of this language and the Zoning Code and manufactured a description of an "exterior wall" to including a railing and a deck, walkway and stairs leading to the ground.

[67] The Code of the City of Rehoboth Beach § 270-29B.

B. Plain Meaning and Other Code References.

At both the August public hearing and the November public hearing, Petitioners argued that the plain meaning of "exterior wall" should control this matter. During the November hearing, counsel for Petitioners observed that everyone in the room could recognize the difference between an interior and an exterior wall.[68] Petitioners also presented common definitions of things like "decks" to contrast those definitions with the interpretation being proposed by the Building Inspector.

Finally, while part of the Building Code and not the Zoning Code, there is little doubt about the definition of an exterior wall under the City's Building Code. As set forth in the 2012 version of the International Building Code (as adopted by the City), and consistent with the term's everyday definition, an exterior wall is one that is insulated and provides support and weather protection for the building.[69]

These "technical" interpretations of an exterior wall square with the historical interpretations as well as the B&L Department's first interpretation in this matter. The plain meaning of an exterior wall is more than enough to decide the case. As a matter of common sense, a railing is not an "exterior wall" which would mean that a rooftop deck, a walkway and stairs from that walkway are not within an exterior

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[68] November Hearing Transcript at p. 43, *see* A-133.

[69] August Hearing Transcript at pp. 27-28, *see* A-115-116; *see also International Building Code*, Chapter 14 (2012), *see* A-150-163.

wall and do not create Gross Floor Area which means there is no need for an additional parking place.

Although Petitioners argued and still consider the plain meaning of this statute to be dispositive, the majority of the argument will focus on statutory interpretation of ambiguous provisions given the Board's April Decision and the City's numerous admissions regarding the ambiguity of the Code.

C. The Board's Position.

At the November public hearing and in its April Decision, the Board attempts to interpret the Zoning Code to mean that it is the Gross Floor Area of the "structure" that is considered rather than the Gross Floor Area of the "building." The Board further argued that its decision was supported by the City's exclusion of certain portions of Open Porches for residential structures specifically described in Section 270-21(B)(1)(a).

These arguments do not support the Board's position. First, the Board's attempt to distinguish between "building" and "structure" is futile as the Code uses these terms indiscriminately and oftentimes without meaningful distinction. For example, the exclusion from parking requirements found in Section 270-29.B. describes its calculation as being based upon "the gross floor area of the structure." However, the definition of Gross Floor Area never mentions the word "structure" but only uses the term "building." Both "building" and "structure" are separately

defined terms within the Zoning Code. Thus, the Board's attempt to state that the City should use the definition of "structure" in determining the increase in gross floor area for the parking exclusion does not match the definition of "gross floor area" itself which calculation is defined as the measurement of the "exterior face of the exterior walls" of a "building." As detailed in the next section of this Argument, this is part of what renders the Code ambiguous.

Similarly, the Board's reliance upon the Open Porch exclusion only serves to further demonstrate the ambiguity of the Code. While the April Decision alludes to the legislative intent of this provision, no meaningful history of legislative intent was presented to the Board. In the first instance, this subsection expressly states that it only applies to residential structures in the R-1(S), R-1 and R-2 Districts. The subject property is in the C-1 District within the City of Rehoboth Beach. Also, the last sentence of this subsection regarding exclusion of square footage from the specifically defined term "Open Porch" states that "any square footage in excess of 250 square feet shall be included in the gross floor area." No such statement exists within the Code regarding any other porches, decks or similar features of a building or in reference to any other zoning district. Thus, this section does not support the Board's position regarding property in the C-1 District and the subsection specifically states that it includes the "gross floor area" of an "open porch."

The Board's misplaced reliance on the Open Porch exclusion is highlighted by the information presented to the Board regarding the City's prior interpretation of its Code. The ten examples provided to the Board where the B&L Department did not include decks and other such structures in the calculation of Gross Floor Area were predominantly located in the residential districts to which the Open Porch exclusion applies. The purpose of those examples was to demonstrate what the B&L Department eventually admitted in the B&L Notice, which is that it historically did not count decks and similar structures when calculating Gross Floor Area. However, those examples not only prove that decks and similar structures were not previously part of Gross Floor Area, but also show that even with the existing of the Open Porch exclusion in the Code, the B&L Department was not including decks and similar structures when calculating Gross Floor Area.

What the Board's arguments during the public hearing and its statements in the April Decision demonstrate is that the Code has been subject to numerous interpretations over time and the interplay of the use of the words, "structure," "building" and "porch" have all been subject to multiple interpretations, *i.e.*, they are ambiguous.

D. Ambiguity.

During the public hearings, Petitioners presented the Board with substantial evidence to support its argument that the pertinent Code provision was ambiguous,

as set forth in the City's own words. First, Petitioners presented the comments by the Mayor that "the Code was ambiguous" and "should be addressed." Second, the statements made by the City Solicitor at the August Hearing acknowledged that the language of §270-29B was ambiguous because "it's reasonably susceptible to different conclusions or interpretations." Third, and most importantly, Petitioners relied on the B&L Department's own public admission that the Code had been subject to at least two interpretations over the years (*i.e.*, the B&L Notice).

Further, the City Solicitor's argument on behalf of the B&L Department at the outset of the November Hearing most clearly demonstrates the absurdity of the B&L Department's position and the Board's failure to properly apply the law. At the outset of the hearing, when the Petitioners and the Board were convinced that the B&L Notice resolved the issue, the B&L Department's position, as stated by the City Solicitor, was that the Notice only applied to residential construction and not commercial construction despite the fact that (1) the B&L Notice does not distinguish between commercial and residential, and (2) the definition of Gross Floor Area does not distinguish between commercial and residential.

Setting aside the absurdity of the B&L Department's practice of randomly inserting self-serving terms into both the Code and the B&L Notice, the fact that people within the same department interpret the same language in two (2) different ways is only further proof of the multiple interpretations of this Code provision. The

multiple interpretations of this language are *prima facie* evidence that it is ambiguous—and requires interpretation in the favor of the property owner.

In the April Decision, the Board made numerous findings. One of those findings was that the "respective code provisions were not ambiguous." As set forth above, the Board's decision directly contradicts, the Mayor, the City Solicitor and the B&L Department. During the public hearing, the Board contested Petitioners' argument by attempting to distinguish between ambiguity and "confusion." The Board argued that simply because the Code is confusing or complex in nature, it does not necessarily rise to the level of ambiguity. However, by the Board's own admission, § 270-29B of the Code has historically been subject to at least two different interpretations by the City, and therefore Delaware law requires that the interpretation that favors the landowner must control.[70]

Even though the majority of the Board did not agree that the relevant Code provision was ambiguous, the B&L Department's own conflicting interpretations of the Code clearly indicate that the language of the Code is subject to at least two reasonable interpretations, *i.e.*, the definition of ambiguity under Delaware law. That is, the B&L Department has confirmed that historically it has found both that (1) deck railings **do not** constitute exterior walls and **shall not** be considered in the

[70] November Hearing Transcript at pp. 4, 7-8, 14, 50-57, *see* A-121, 123-124, 128, 136-143.

calculation of gross floor area; and (2) that deck railings **do** constitute exterior walls and **shall** be considered in the calculation of gross floor area.

Since the City, through numerous means, most notably the Board's own statements at the November hearing and the B&L Notice, has acknowledged that the meaning of what constitutes an "exterior wall" is susceptible to different interpretations, the interpretation that favors the landowner must control. Specifically, the B&L Department's previous code interpretation that deck railings do not constitute "exterior walls" must apply to Petitioners' Application. The fact that this Code, like many other zoning statutes, is a complex or even confusing document does not negate the fact that § 270-29B has historically been subject to more than one interpretation, making it ambiguous under Delaware law. Thus, the Board cannot interpret and cannot apply the Code in such a manner as to deny approval of Petitioners' Application.

II. THE BOARD'S DECISION DENYING THE PETITIONERS' APPLICATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND THE SUBSTANTIAL EVIDENCE PRESENTED TO THE BOARD REQUIRES A REVERSAL OF THE BUILDING OFFICIAL'S DECISION.

Under Delaware law, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[71] The Board's decision whether to apply the provisions of § 270-29B rested on the issue of whether a deck railing constitutes an exterior wall.

Petitioners submitted abundant evidence regarding the plain meaning of the term "exterior face of the exterior walls." That evidence included not only the common sense of what is or is not an exterior wall but also the definition and description of an exterior wall found within the 2012 version of the International Building Code adopted by the City.

The Board's decision rested largely on its finding that the deck railings constituted exterior walls therefore increasing the gross floor area and triggering the parking provisions of § 270-29B. The Board's finding that the railings constituted an exterior wall was based on the fact that the railing "encloses space and adds structure." The Board's interpretation of the Code goes beyond the plain meaning of the words and creates an absurd result with areas that only have railings now being considered "exterior walls." For example, consider a fenced area for a pet where

[71] *Ebert*, 2019 WL 994578 at *3.

one end of the fence is attached to the house—pursuant to the Board's decision, this becomes a structure.

While there was abundant evidence of the plain meaning, there was overwhelming evidence that the Code provisions in question were ambiguous. The number of admissions by the City's Mayor, the City Solicitor and, notably, the B&L Department plainly demonstrates the ambiguity of the provisions. The indiscriminate use of the words "structure" and "building" in the Code further foster this ambiguity. Finally, the different interpretations that existed within the B&L Department are more than substantial evidence of ambiguity.

Unfortunately, the Board ultimately ignored the evidence of both the plain meaning and historical interpretation of the term "exterior wall" in its decision to deny Petitioners' Application. Because the Board's unsupported interpretation of what constitutes an "exterior wall" was not based on sufficient probative evidence, it must be reversed by this Court.

III. THE BOARD'S APRIL DECISION DENYING THE PETITIONERS' APPLICATION IS ARBITRARY AND CAPRICIOUS BECAUSE IT CONTRADCITS THE RECOGNIZED LAW ON STATUTORY CONSTRUCTION, IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD, AND IGNORED THE CITY'S OWN HISTORICAL INTERPRETATION OF ITS CODE.

After considering whether a Board of Adjustment committed errors of law, a court's review of the record from a zoning decision by a legislative body is limited to determining whether the decision is supported by substantial evidence and, if so, whether the decision was arbitrary and capricious.[72] Arbitrary and capricious has been interpreted as referring to an action:

> which is unreasonable or irrational, or to that which is unconsidered or which is willful and not the result of a winnowing or sifting process. It means *action taken without consideration of and in disregard of the facts and circumstances of the case*. Action is also said to be arbitrary and capricious if it is whimsical or fickle, or not done according to reason; that is, it depends upon the will alone.[73] (Emphasis added).

At the re-hearing members of the Board questioned "why we're even here" if Petitioners' plans had been submitted prior to September 24, 2019 as the matter was "pretty black and white."[74] The City Solicitor explained that, even though it was not stated in the B&L Notice, that the Notice only applied to residential applications as

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[72] *See Gibson v. Sussex County Council*, 877 A.2d 54 (Del. Ch. 2005).

[73] *Concerned Citizens of Cedar Neck, Inc., v. Sussex County Council*, 1998 WL 671235 *4 (Del. Ch. August 14, 1998) citing *Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970).

[74] November Hearing Transcript at pp. 3-4, *see* A-120-121.

the residential side of the B&L Department was interpreting the definition of gross floor area in a different way than the commercial side.[75] Members of the Board then expressed their concern that at the initial hearing "there was no discussion that there were different ways of [interpreting the Code]" and had they had this information, they "would not have agreed with the Building Inspector."[76]

Despite the concerns of the Board, the City proceeded with its presentation during which it acknowledged that the City had historically interpreted the relevant provision differently than they were interpreting it in the case *sub judice*.[77] The City further argued that the B&L Notice only applied to residential applications even though the relevant provisions of the Code did not differentiate between residential and commercial applications.[78] Petitioners' response to the Board's concern and the City's argument was that the City never released any information to indicate that the B&L Notice applied only to residential properties as it was not listed on the B&L Notice on the B&L website nor posted anywhere at the B&L Department. Petitioners echoed the concerns of the Board by emphasizing that Petitioners' Application should be treated the same as every other application submitted prior to September

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[75] *Id.* at p. 4, *see* A-121.

[76] *Id.* at pp. 6-7, *see* A-122-123.

[77] *Id.* at p. 7 (stating that "previous building inspectors had reviewed commercial plans differently than the current Building Inspector"), *see* A-123.

[78] *Id.* at p. 7-8 (stating that the "definition of gross floor area [is] a generally applicable definition to both residential and commercial"), *see* A-123-124.

24, 2019, that is, the Application did not trigger the provisions of §270-29B because a deck railing does not constitute an exterior wall.

Here, the Board's decision was arbitrary and capricious because it "disregarded the facts and circumstances" surrounding Petitioners' Application by ignoring the historical interpretations of the Code and the fact that the B&L Department's own B&L Notice stated that "[p]lans submitted prior to September 24, 2019, will be reviewed to previous code interpretation." Despite the City's own acknowledgment that the historical interpretation and its own B&L Notice dictated that Petitioners's Application be granted, the Board refused to acknowledge that Petitioner was entitled to relief and instead chose to uphold its previous decision. Therefore, the Board's decision was arbitrary and capricious because it was not based on substantial evidence or reason and Petitioners are entitled to a reversal of the Board's decision.

CONCLUSION

In conclusion, Petitioners respectfully pray that this Honorable Court reverse the decision of the Board of Adjustment of the City of Rehoboth Beach on April 9, 2020 by finding that deck railings do not constitute exterior walls and shall not be considered in the calculation of gross floor area and such other and further relief as the Court deems just and proper.

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