



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CLEAR SPACE THEATRE COMPANY)
and REHOBOTH SPOTLIGHT, INC.,)

Petitioners,)

v.)

C.A. No. _____

THE CITY OF REHOBOTH BEACH,)
THE MAYOR AND COMMISSIONERS)
OF THE CITY OF REHOBOTH BEACH,)
and THE CITY OF REHOBOTH BEACH)
PLANNING COMMISSION,)

Respondents.)

**VERIFIED PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI
AND REVIEW OF A DECISION OF THE CITY OF REHOBOTH BEACH
MAYOR AND CITY COMMISSIONERS**

Petitioners Clear Space Theatre Company (“Clear Space”) and Rehoboth
Spotlight, Inc. (“Rehoboth Spotlight”) hereby seek the reversal of a decision by the
City of Rehoboth Beach’s Mayor and City Commissioners (the “Mayor and City
Commissioners”) by writ of certiorari and in support thereof,¹ state as follows:

BACKGROUND

1. Petitioners are theatre companies headquartered at 20 Baltimore
Avenue, Rehoboth Beach, DE 19971. Petitioners are the owners of certain property

¹ The City of Rehoboth Beach Planning Commission is named in the caption for the
purpose of bringing up the complete record, and in the event that it is determined by
the Court that they are an indispensable party.

located in the City of Rehoboth Beach, Sussex County, Delaware. Clear Space seeks to develop its property, 415 Rehoboth Avenue, Parcel I.D. Nos. 334-13.20-164.00 and 334-13.20-165.00, as a two-story theatre building (“Site Plan Review Application 0620-03 – Clear Space Theatre”); while Rehoboth Spotlight seeks to develop its property, 417 Rehoboth Avenue, Parcel I.D. No. 334-13.20-166.00, as a three-story “spotlight” studio building and black box theatre (“Site Plan Review Application 0620-03 – Rehoboth Spotlight”; together with Site Plan Review Application 0620-03 – Clear Space Theatre, the “Applications”). The Applications were reviewed in tandem under one application number by the City under City of Rehoboth Beach Code of Ordinances (“City Code”) ch. 236, Art. VII, Site Plan Review.

2. The Planning Commission initially voted to approve the Applications, but its decision was appealed to the Mayor and City Commissioners due to alleged procedural violations. The Mayor and City Commissioners voted to remand the Applications back to the Planning Commission. On remand, the Planning Commission again voted to approve the Applications, and its decision was again appealed to the Mayor and City Commissioners. The Mayor and City Commissioners again reversed the Planning Commission’s approval of the site plans, this time alleging that the Petitioners’ revised building plans (which are not, by law, subject to the Planning Commission’s jurisdiction) were not brought before

the Planning Commission for a public hearing and, also, that educational uses are not a permitted accessory use to the proposed principal theatre use.

3. However, in its reversal, the Mayor and City Commissioners ignored the clear directive of the City Code, which granted jurisdiction and legal authority for the Planning Commission to approve the Petitioners' *site plan*, but did not grant the Planning Commission the power to approve the Petitioners' building plans—revised or otherwise. Further, in determining that an accessory educational use was not permitted, the Mayor and City Commissioners again ignored the clear directive of the City Code (which broadly permits accessory uses, including such uses that are customarily incidental to a permitted theatre use), ignored the substance of the Applications (which did not propose an educational use, although the Planning Commission, *sua sponte*, approved an accessory educational use on the Rehoboth Spotlight parcel), and additionally ignored State law limiting such zoning determinations to the City of Rehoboth Beach Board of Adjustment.

4. Accordingly, Petitioners bring this matter for review to this Court, under a *writ of certiorari*, and ask this Court: to reverse the Mayor and City Commissioners' reversal of the Planning Commission's site plan approval as contrary to controlling City Code and State law.

JURISDICTION

5. Under Delaware law, this Court has the common law authority to issue a writ of certiorari to review a lower tribunal's decision.²

FACTS

6. The Applications were first submitted to the City on June 12, 2020. Following submission, the Applications were referred to the Planning Commission for site plan review by the Building Inspector pursuant to City Code § 236-30(A).

7. Site Plan Review Application 0620-03 – Clear Space Theatre proposed a 14,948 square foot gross floor area (“GFA”), two-story theatre building on the existing vacant lot located at 415 Rehoboth Avenue, consistent with the lot's existing C-1 (Central Commercial) zoning designation.

8. Site Plan Review Application 0620-03 – Rehoboth Spotlight proposed a 9,950 square foot GFA, three-story “spotlight” studio building on the existing vacant lot located at 417 Rehoboth Avenue, consistent with the lot's existing C-1 (Central Commercial) zoning designation.

9. Prior to the formal submission of the Applications, Petitioners communicated with the City's then-Building Inspector, Mr. Damalier Molina,

² DEL. CODE ANN. tit. 10, § 562. *See also Dover Historical Society v. City of Dover Planning Comm'n*, 2004 WL 1790164 (Del. Super. Ct. July 30, 2004); *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830 (Del. Dec. 16, 2004).

regarding the Applications' site plans and building plans. Mr. Molina issued a Building Inspector's Report on June 1, 2020.

10. On July 10, 2020, the Planning Commission held a preliminary review public hearing on the Applications. Mr. Molina testified at the hearing that the Applications had been reviewed "based on the provisions of the Zoning Code . . . [and] based on the submitted interior review."³

11. The Planning Commission held the virtual public hearing on the Applications on August 14, 2020, at which they voted 7-2 to approve the Applications' site plans, subject to conditions. Mr. Molina was again in attendance and provided testimony relating to the Applications' site plans and building plans.⁴

12. The first appeal (the "First Appeal") was filed by opponents to the Applications on August 24, 2020. The Mayor and City Commissioners heard oral argument on the First Appeal on October 29, 2020, and voted 4-3 on November 12, 2020 to remand the Applications back to the Planning Commission for an alleged procedural error.

13. On December 11, 2020, the Planning Commission held its first preliminary review hearing on remand for the Applications' site plan review. The preliminary review hearing continued on January 8, 2021, at which the Planning

³ Ex. A at p. 3.

⁴ Ex. B at p. 3.

Commission agreed to hold the public hearing on remand on the Applications on January 29, 2021.

14. At the January 29, 2021 hearing, Building Inspector Matthew Janis, who took over from the previous Building Inspector, Mr. Molina, testified that “the former Chief Building Inspector deemed the proposed buildings to be buildable.”⁵ The hearing was continued for further deliberations.

15. The public hearing resumed on February 12, 2021. The Planning Commission set forth conditions on the Applications and continued the hearing until February 26, 2021.

16. At the February 26, 2021 public hearing, the Planning Commission discussed alleged discrepancies in the Applications’ building plans. The City Solicitor testified that “before the plans were submitted to the Planning Commission, they were deemed zoning compliant by the former building inspector,” Mr. Molina.⁶ During Mr. Molina’s review of the building plans, “the former building inspector . . . noted certain things that were not in compliance with the zoning code such as certain ceiling heights and gross floor area. There was a series of discussions and emails between Clear Space and the former building inspector that identified these problems and worked them out through addendums.”⁷ Importantly, the

⁵ Ex. C at p. 4.

⁶ Ex. D at p. 5.

⁷ *Id.*

Applications' *site plans* did not change: these addendums pertained to the building plans before the Building Inspector for the issuance of a building permit, not the Planning Commission's site plan review. Accordingly, the Planning Commission voted unanimously that:

Site plan is more about travel lanes, the placement of a building, entrances, exits, outside staging, etc. Getting into the detail of the interior of the building is under the purview of the building inspector. A building inspector cannot issue a permit without confirming compliance with the zoning code, building code, fire code, etc. The plan would not come back to the Planning Commission for matters of the interior view.⁸

The Planning Commission adopted what became final Condition 15 in accordance with the above rationale. Condition 15 required that, “[p]rior to [the] issuance of a building permit, [Petitioners] shall revise and resubmit the permit drawings to the Chief Building Inspector to include sufficient detail demonstrating compliance with the Gross Floor Area requirements of the Zoning Code, and making CAD drawings available to the Chief Building Inspector to verify compliance.”⁹ The condition appropriately relegated the building plans to the purview of the Building Inspector while retaining the Planning Commission's jurisdiction over the site plans, in which neither the Planning Commission nor the Building Inspector had identified an error.

⁸ *Id.* at p. 6.

⁹ Ex. E at p. 5.

17. In a motion made at the February 26, 2021 public hearing, the Planning Commission voted 5-3 to approve both Applications, subject to conditions.

18. On March 12, 2021, opponents of the Applications (hereinafter the “Appellants”) brought a *second* appeal (which is the subject of this petition) to the Mayor and City Commissioners. The Appellants raised multiple grounds for appeal. In relevant part, the Appellants asserted that: (1) the Planning Commission acted arbitrarily and capriciously by approving the Applications without reviewing the revised building plans;¹⁰ and (2) the Planning Commission erred by approving alleged education-related services in a C-1 district and without requiring off-street parking for the alleged educational use.¹¹

19. On March 12, 2021, the Mayor and City Commissioners voted to hear the appeal at an April 8, 2021 hearing. However, on March 18, 2021, the Mayor and City Commissioners rescheduled that appeal hearing to June 14, 2021. On May 19, 2021, the appeal hearing was again rescheduled to June 30, 2021.

20. The Appeal Hearing was held June 30, 2021.

21. On July 16, 2021, the Mayor and City Commissioners adopted a final written decision recounting the five motions made following the arguments of the

¹⁰ See Ex. F at p. 4.

¹¹ *Id.* at p. 12. The Applications did not propose an educational use on the properties.

parties. Of the five motions made to affirm the Planning Commission’s decision, two failed to carry.

22. First, the Mayor and City Commissioners voted 4-3 to deny a motion made to affirm the Planning Commission’s decision on Site Plan Review Application 0620-03 – Clear Space Theatre “and find no arbitrary and capricious conduct because the plans, as amended or with conditions imposed, demonstrate [City] Code compliance, compliance with the parking requirements, and compliance with [City Code] § 236-33A.”¹² The written decision states:

In so holding, a majority of the [Mayor and City] Commissioners determined that, because Clear Space did not submit Code-compliant plans for the Planning Commission’s review, and because the Planning Commission did not review Code-compliant plans, the Planning Commission did not satisfy the requirements of [City Code] § 236-30(E). The Planning Commission’s failure to satisfy the requirements of [City Code] § 236-30(E) results in the decision of the Planning Commission being reversed as arbitrary and capricious under the standards articulated in [City Code] § 236-6(A)(6).¹³

The Mayor and City Commissioner’s decision erroneously conflates the Applications’ site plans, which were before the Planning Commission for approval, with the Applications’ building plans, which were not.

¹² Ex. G at p. 7.

¹³ *Id.* at p. 10.

Further, the proper authority to review error in the Building Inspector's interpretation of the City's zoning code is not the Planning Commission, nor the Mayor and City Commissioners, but the City of Rehoboth Beach Board of Adjustment as provided by State law,¹⁴ and by City Code.¹⁵

23. Second, the Mayor and City Commissioners voted 4-3 to deny a motion made to affirm the Planning Commission's decision on Site Plan Review Application 0620-03 – Rehoboth Spotlight “because it was not arbitrary and capricious to find that the education-related services constitute a permissible accessory use as presented.”¹⁶ The written decision states:

The [Mayor and City] Commissioners held that due to the number of classes held, the tie vote of the Planning Commission on a specific accessory-use finding, contradictory reasoning on the educational-use issue in relation to at least one vote in favor of the approvals, and because the record overall and as presented did not support the conclusion that the educational component of the [Rehoboth] Spotlight building was customarily incidental to the “Black Box” theater, the Planning Commission's decision was arbitrary and capricious and the other requirements of standards articulated in [City Code] § 236-6(A)(6) were not met.¹⁷

However, the Mayor and City Commissioners' vote is legal error for multiple reasons. First, the Applications did not propose an educational use on the site plans,

¹⁴ DEL. CODE ANN. tit. 22, § 327.

¹⁵ CITY OF REHOBOTH BEACH CODE OF ORDINANCES § 270-71.

¹⁶ Ex. G at p. 13.

¹⁷ *Id.* at p. 15.

as defined by City Code;¹⁸ rather, the Planning Commission *sua sponte* approved an accessory educational use. Second, even if the Applications had proposed an accessory educational use, “number of classes” is not a required finding for an accessory use under the City Code. The City Code defines an accessory use as “[a] use on the same lot with and customarily incidental to any permitted uses.”¹⁹ Indeed, accessory uses are permitted “unless the accessory use is incompatible with the primary use.”²⁰ Here, theatre training and rehearsal are customarily incidental uses to the primary, and permitted, theatre use. Third, the Planning Commission’s resolution approving Site Plan Review Application 0620-03 – Rehoboth Spotlight incorporated its *sua sponte* approval of the accessory use not identified on the site plan. And, any Planning Commissioner who felt that the accessory use was not Code-complaint would have voted to deny the application, as several

¹⁸ The City Code does not define “educational use” but defines “educational facilities” as follows: “(A) CENTER FOR HIGHER EDUCATION[:] An educational facility offering postsecondary education and enrichment such as a community college, satellite college or university facility. (B) ELEMENTARY SCHOOL[:] A public or private educational institution along with related facilities accommodating students from pre-kindergarten through the eighth grade. C. SECONDARY SCHOOL[:] A public or private educational institution along with related facilities accommodating students through grade 12. D. Related facilities include sports fields, athletic fields, courts, tracks and pools as long as they are accessory to the main use and generally used by the students and teams, or competitors of students, attending the schools within the school district.” CITY OF REHOBOTH BEACH CODE OF ORDINANCES § 270-4 (“Educational Facilities”).

¹⁹ CITY OF REHOBOTH CODE OF ORDINANCES § 270-4.

²⁰ *Id.* § 270-18(A).

Commissioners did.²¹ Finally, the Mayor and City Commissioners do not possess jurisdiction to determine what is or is not an accessory use; rather, the ability to hear challenges to or appeals of such zoning-related decisions rests solely with the City of Rehoboth Beach Board of Adjustment, unless an appeal is taken therefrom to the Superior Court of Delaware.

WHEREFORE, Petitioners pray that this Court issue a writ of certiorari affording Petitioners the following relief:

1. Issue a *writ of certiorari* directing the Mayor and City Commissioners to file with this Court the entire record, including, but not limited to, all audio, video, and transcribed records of proceedings, as well as drafts and approved minutes of those proceedings, held before the Planning Commission and Mayor and City Commissioners regarding the Applications; and

2. Following a review of the record below, reverse the Mayor and City Commissioners' decision reversing the Planning Commission's Site Plan Approval of Application 0620-03 – **Clear Space Theatre** as arbitrary, capricious, not

²¹ For example, Planning Commissioner Patterson, in voting to deny the motion to adopt the resolutions approving the Applications with conditions, stated as part of his rationale that “there is not substantial evidence that the educational uses proposed in the two sites are customarily incidental to the permitted uses[.]” Ex. D at pp. 8-9. Mr. Strange incorporated Mr. Patterson's rationale in his vote to deny the Applications. *Id.* at p. 9.

supported by substantial evidence, and contrary to the applicable City Code provisions;

3. Following a review of the record below, reverse the Mayor and City Commissioners' decision reversing the Planning Commission's Site Plan Approval of Application 0620-03 – **Rehoboth Spotlight** as arbitrary, capricious, not supported by substantial evidence, and contrary to the applicable City Code provisions; and

4. Award such other relief as this Court deems appropriate.

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