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.	)	
AND	)	C.A. No.: S20A-05-001 MHC
RONALD E. LANKFORD, and LANKFORD PROPERTIES, LLC,	)	
Petitioners,	)	
v.	)	
THE BOARD OF ADJUSTMENT OF THE CITY OF REHOBOTH BEACH, DELAWARE,	)	
Respondent.	)	

Submitted: May 14, 2021
Decided: August 13, 2021

Upon Appeal from the Decisions of the Board of Adjustment of the City of Rehoboth Beach, Delaware. **AFFIRMED**.

Attorneys and Law Firms

Vincent G. Robertson, Esquire, Parkowski, Guerke & Swayze, P.A., Rehoboth Beach, Delaware, Attorney for Petitioners Ronald Lankford and Lankford Properties, LLC.

David C. Hutt, Esquire, Michelle G. Bounds, Esquire, Morris James LLP, Georgetown, Delaware, Attorneys for Petitioners Jack Lingo Asset Management, LLC and Sussex Exchange Properties, LLC, FBO Lingo Brothers, LLC.

Frederick A. Townsend, III, Esquire, D. Barrett Edwards, IV, Esquire, Hudson, Jones, Jaywork & Fisher, LLC, Dover, Delaware, Attorneys for Respondent The Board of Adjustment of the City of Rehoboth Beach, Delaware.

Mark H. Conner, Judge

OPINION AND ORDER

Presently before the Court is a consolidated appeal of two cases similarly situated with respect to both law and fact. Over the course of four hearings, the Board of Adjustment of the City of Rehoboth Beach considered Petitioners' shared position that decks, porches, balconies, and stairways should not be included in the "Floor Area, Gross" calculations pursuant to the City of Rehoboth Beach Zoning Code. The Board of Adjustment held to the contrary. Petitioners now seek to reverse the Board's decision. The Court affirms the decision of the Board of Adjustment for the reasons set forth herein.

Factual and Procedural Background

1. Preliminarily, it is necessary to briefly explain what is meant by the "Floor Area, Gross" ("Gross Floor Area" or "GFA") and the "Floor to Area Ratio" ("FAR"). Gross Floor Area is defined as the "sum of the gross horizontal area 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 to attached buildings, including basements but not including any space where the floor-to-ceiling height is less than six feet, six inches […]."[1] Floor to Area Ratio is the "quotient obtained by dividing the GFA of

[1] Rehoboth Beach Zoning Code § 270-4.

all buildings on a lot by the gross lot area."[2] In commercial districts, the FAR cannot exceed 2.0.[3]

2. In both of the following cases, the statutory interpretation of the GFA is at issue. More specifically, whether decks, porches, balconies, and stairways, must be included in the GFA calculations under the Zoning Code.

Lankford Properties Appeal

3. Ronald E. Lankford and Lankford Properties, LLC (collectively "Lankford Properties") own Lots 17, 19, and 21 on Baltimore Avenue in Rehoboth Beach immediately west of the Atlantic Sands Hotel. At the time of this opinion, Lots 17 and 19 are collectively a parking lot, and Lot 21 is occupied by the restaurant "Jam Bistro", previously "The Camel's Hump". Lankford Properties had been planning to construct a hotel on Lots 17, 19, and 21. Lankford Properties appeared before the City's Planning Commission where it received constructive comments regarding the hotel's design. Lankford Properties also sought and received several variances for the underground parking and the number of stories for the hotel. The designs did not include the hotel's open porches, balconies, and decks in the GFA calculations.

[2] *Id.*

[3] *Id.* at § 270-21(B)(5).

4. In August of 2019, the Building Inspector and Assistant Inspector informed Lankford Properties that the City "had always" included decks, balconies, and open porches as part of the GFA and, by consequence, the FAR.[4] The Inspector issued a report stating, among other things, "balconies" and "decks" were included in the definition of "structure" under Section 270-4 of the Code, the railings constituted "exterior walls", and, therefore, the areas within those railings increased the GFA.[5] Lankford Properties appealed the Inspector's decision to the Board of Adjustment.

5. At the Board hearing on September 23, 2019, the Inspector testified that the inclusion of areas such as balconies, decks, and porches in the GFA is the only correct application of the Code. Lankford Properties argued the Inspector's interpretation was contrary to the plain meaning of the Code and renders "dozens, if not hundreds" of properties built since 1997 now illegal. Despite confessing the prior applications of the Code caused some confusion, the Board upheld the Inspector's verdict stating, "the exterior face of the exterior wall of the building includes balconies and open porches such as those in question and that implicit in the

[4] Frankford Properties Opening Brief 2, Mar. 29, 2021.

[5] Building Inspector's Recommendation Report, Sept. 23, 2019.

exclusion of the first 250 sq. ft. of open porches set forth in §270-21B(1)(a) is that drafters of the code intended for such areas to constitute gross floor area."[6]

6. The next day, September 24, 2019, the Inspector issued the following "Building and Licensing Department Notice" (the "B&L Notice") on the City's website:

> 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.[7]

Lankford Properties successfully requested a re-hearing by reasoning the B&L Notice constituted "newly discovered evidence".

7. At the re-hearing on September 28, 2020, Lankford Properties presented evidence of the Inspector's inconsistent applications of the Code with respect to the GFA calculations. Lankford Properties averred, since the Code had

[6] Board Decision, Oct. 23, 2019.

[7] B&L Notice, Sept. 24, 2019.

been interpreted two different ways, it was reasonably susceptible to different interpretations. Lankford Properties' request was denied following a tie vote, 2-2.[8]

8. On December 14, 2020, Lankford Properties filed a Notice of Appeal and Petition for Certiorari with this Court.

JLAM and Sussex Exchange Appeal

9. Jack Lingo Asset Management, LLC ("JLAM") and Sussex Exchange Properties, LLC FBO Lingo Brothers, LLC ("Sussex Exchange") are each limited liability companies organized and existing under the laws of the State of Delaware. Sussex Exchange owns the building and property located at 240 Rehoboth Avenue, Rehoboth Beach, Delaware 19971. The property is in the C-1 Commercial District of the City. The building located on the property has two floors. The first floor is used for professional offices (Jack Ringo Realtor), and the second floor has been used for residential purposes.

10. In October of 2018, JLAM and Sussex Exchange submitted a building permit to convert the second-floor apartment into office space to the Building & Licensing Department of the City of Rehoboth Beach ("B&L Department"). The plans included a second-story deck, approximately 25' x 25', with a walkway from the deck leading towards the rear of the building and a set of stairs leading to the

[8] Decision, Dec. 17, 2020.

ground. One month later, JLAM and Sussex Exchange were informed that the permit was processed and ready for pickup. JLAM and Sussex Exchange began construction except for the second-story deck.

11. During construction, the State Fire Marshall Office advised JLAM and Sussex Exchange that they must provide a separate egress from the second floor or permanently close a door on the first floor. JLAM and Sussex Exchange subsequently applied to the B&L Department to construct a walkway and stairs to use as an emergency exit for the second floor. The Building Inspector denied the application stating, "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."

12. JLAM and Sussex Exchange disagreed with the Building Inspector's decision. First, the emergency egress was smaller than the previously approved second-story deck. Second, the railings did not appear to qualify as an "exterior wall". Through counsel, JLAM and Sussex Exchange sent a letter to the Building Official requesting further information.[9] Pointedly, the letter stated the GFA has not been increased because the deck "is completely outside and beyond the exterior

[9] JLAM and Sussex Exchange Letter, Jul. 1, 2019.

walls of the existing building."[10] Still, the Building Inspector did not change his decision.

13. In July of 2019, JLAM and Sussex Exchange appealed the Building Inspector's decision and, alternatively, requested a variance from the parking space requirement.

14. At the Board hearing on August 26, 2019, JLAM and Sussex Exchange argued that the City misinterpreted the plain meaning of the term "exterior wall". Moreover, if there was disagreement between members of the Board, the statute should be considered ambiguous. The Board affirmed the Building Inspector's decision and denied the variance because it found the railing enclosed the deck and made for an exterior wall.[11]

15. In October of 2019, the Board decided to re-hear JLAM and Sussex Exchange's appeal due to, among other grounds, the above-mentioned B&L Notice.

16. At the re-hearing on November 25, 2019, the issue boiled down to the matter of statutory construction. JLAM and Sussex Exchange repetitively, though unavailingly, brought to the Board's attention the prior applications of the Code. The B&L Department submitted that contrasting interpretations of the Code have been applied to residential structures, but the Code has been applied consistently to

[10] *Id*.

[11] Board Hearing, Sept. 23, 2019.

commercial structures. JLAM and Sussex Exchange countered that, when calculating the GFA, the Code does not differentiate between "commercial" or "residential" nor does the B&L Notice mention a "commercial" or "residential" interpretation. Further, the Code has been subject to multiple interpretations in recent years, and this ambiguity compels the Board to find in favor of the property owner. The Board, nevertheless, affirmed the Building Inspector's decision by a split vote of 3-2.[12]

17. In May of 2020, JLAM and Sussex Exchange appealed the Board's Decision from the November 2019 re-hearing. On October 13, 2020, JLAM and Sussex Exchange submitted a letter requesting a stay to allow for consolidation of their appeal with the Lankford Properties Appeal.[13]

* * *

18. The Court consolidated the Lankford Properties Appeal and the JLAM and Sussex Exchange Appeal so it may uniformly resolve the same question of law regarding statutory interpretation of the Rehoboth Beach Zoning Code.[14]

[12] Board Decision, Dec. 16, 2019.

[13] JLAM and Sussex Exchange Letter Requesting Stay, Oct. 13, 2020.

[14] Order of Consolidation, Feb. 19, 2021.

Standard of Review

19. The Court's standard of review for appeals from a Board of Adjustment decision is limited to correcting errors of law and determining whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.[15] Questions of law are reviewed *de novo*.[16] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[17] Even if the Court would have decided the case differently, the Court must uphold the Board's decision if it finds the decision is supported by substantial evidence.[18] The Court does not have the authority to remand the matter back to the Board but may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."[19] The party seeking to overturn the Board's decision has the burden of persuasion to show that the decision was arbitrary and unreasonable.[20] An

[15] *Protect Our Indian River v. Sussex County Board of Adjustment*, 2019 WL 2166807, at *2 (Del. Super. May 17, 2019).

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] 22 *Del. C.* § 328(c).

[20] *Protect Our Indian River*, 2019 WL 2166807, at *2.

arbitrary and unreasonable decision is a product of an unreasoned, irrational, or unfair process.[21]

Discussion

I

20. Interpretation of a zoning ordinance receives a *de novo* standard of review.[22] When a Board misinterprets the language of an otherwise clear and unambiguous ordinance, the Board's decision may be subject to reversal as an error of law.[23] In that event, "it is the intent of the ordinance and the plain meaning of its language that are controlling."[24] Conversely, the Board's interpretation of an ambiguous ordinance "should be given great weight and should not be overturned unless contrary to law."[25] An ambiguous ordinance, in this context, means one that is reasonably interpreted two different ways or renders an absurd or unreasonable

[21] *Barn Hill Preserve of Delaware, LLC v. Board of Adjustment of Town of Ocean View*, 2019 WL 2301991, at *4 (Del. Super. May 29, 2019); *see Save Our County, Inc. v. New Castle County*, 2013 WL 2664187, at *9 (Del. Ch. Jun. 11, 2013).

[22] *W & C Catts Family Limited Partnership v. Town of Dewey Beach*, 2018 WL 6264709, at *5 (Del. Super. Nov. 30, 2018).

[23] *Id*.

[24] *4th Generation, Ltd. v. Board of Adjustment*, 1987 WL 14867, at *3 (Del. Super. Jul. 16, 1987).

[25] *W & C Catts*, 2018 WL 6264709, at *5; *quoting 4th Generation, Ltd.*, 1987 WL 14867, at * 3.

result.[26] In the event of an ambiguous ordinance, the Court "must keep in mind that zoning laws are to be interpretated in favor of the occupants of the land."[27]

21. With these principles in mind, the Court is first charged with determining whether the Rehoboth Zoning Code is ambiguous. The pertinent sections of the Zoning Code were adopted as a whole by the Commissioners of the City of Rehoboth Beach. Accordingly, the Court must observe the following guidelines:

> [E]ach part or section should be read in light of every other part or section to produce [a] harmonious whole. Undefined words in a statue must be given their ordinary, common meaning. Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.[28]

22. In this case, the terms "structure", "building", and "wall" are germane to the Court's discussion and may be read together to create an unambiguous reading of the Zoning Code. The Code defines a "structure" as:

> [a]nything constructed or erected, including any part thereof, the use of which requires permanent location on the ground or attachment to something having a permanent location on the ground, including, but without limiting the generality of the foregoing, house trailers, mobile homes, relocatable homes, signs, swimming pools, swimming pool pumps, filters and equipment, porches, balconies, decks, canopies, fences, backstops for tennis courts, pergolas, gazebos, heating,

[26] *Id*.

[27] *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

[28] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

> ventilating and cooling devices, compressors or pumps and showers, and excluding driveways and sidewalks.[29]

Further, a "building" is "[a] structure, usually roofed, walled and built for permanent use, as for a dwelling or for commercial purposes."[30]

23. The argument proffered by the attorney for the Board, with which this Court agrees, is that, when these terms are read synchronically, structures like decks, porches, balconies, or stairways do not require walls connected to roofs to qualify as buildings. A building inspector could reasonably determine such structures defined by the Code qualify as buildings subject to GFA calculations because they are usually, although need not be, roofed, walled, and built for permanent use.[31] Contrarily, structures like pergolas, gazebos, pools, fences, HVAC equipment, and the like, that usually lack walls or roofs, do not.

24. Finally, a "wall" can be "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 C. The vertical interior surfaces which serve to divide a building's space into rooms."[32] Under this definition, a "wall" can be the "vertical

[29] Rehoboth Beach Zoning Code § 270-4.

[30] *Id*.

[31] Respondent Answering Brief 15-16.

[32] Rehoboth Beach Zoning Code § 270-4.

exterior surface" of any structure that constitutes a building such as porches, balconies, decks, and stairways.

25. Although the term "exterior walls" referenced in the GFA definition is not expressly defined, it can be read harmoniously with the terms defined above.[33] Decks, porches, balconies, and stairways qualify as buildings. Walls are the "vertical exterior surfaces" of those buildings. In fact, such walls can be made of any material meant to enclose or screen areas of land. Accordingly, the area within the exterior face of the walls, or "vertical exterior surfaces", of deck, porches, balconies, and stairways are included in the GFA calculations.

26. Moreover, it is inconsequential that a "building" subject to GFA calculations is comprised of sub-buildings that would individually meet the same definition. That is, the building, in whole or in part, must be included in the GFA calculations. When read together, these provisions produce one "harmonious whole".

27. In addition to the definitions in § 270-4, the Code includes an "Open Porch Exclusion" to the GFA calculations. An "open porch" is "[a]ny porch attached to the *outer wall or walls of a building* and which on its other side or sides is entirely

[33] *Id.*

open to light and air, from the floor to the ceiling […]."[34] This definition lays the foundation for the Open Porch Exclusion pursuant to § 270-21(B)(1)(a):

> [t]he first 250 square feet of an open front porch shall be excluded from the gross floor area, provided that such porch is on the street side of the building, at the first-floor level, roofed, one floor with no living space or deck above the porch, meets the definition of open porch in § **270-4**, and is not heated or air-conditioned. Any square footage in excess of 250 square feet shall be included in the gross floor area.[35]

28. This provision demonstrates that the drafters of the Code knew how to make exclusions from the GFA. If the drafters also wanted to exclude portions of decks, balconies, and staircases from the GFA, they easily could have done so. Once more, when this provision is read together with the previous sections, the Code is unambiguous with respect to the GFA.

29. The Court also must address the Board's previous applications of the Code that have been thoroughly discussed by both sides during the Board hearings, the briefs, and now this Opinion. As the attorney for the Board points out, it is not a bright-line rule. When a statute has been applied two different ways, it need not automatically be deemed ambiguous then, by consequence, interpreted in favor of the landowner. Such an instruction commits an appellate body to affirm a statutory construction favoring the landowner, but which may be inconsistent with the

[34] *Id*. (emphasis added).

[35] *Id*. at § 270-21(B)(1)(a).

legislature's intent solely because the statute's ambiguity was the product of agency or departmental error. Instead, the Court must first determine whether the Code is reasonably susceptible to two interpretations.[36] Then, "to the extent that there is any doubt as to the correct interpretation, that doubt must be resolved in favor of the landowner."[37]

30. In light of the preceding analysis, the Code is reasonably susceptible to *one* interpretation – the inclusion of decks, porches, balconies, and staircases in the GFA calculations. This reading of the statute is acquiescent with the legislators' intent to "lesson congestion in the streets […] to prevent overcrowding of land [and] to avoid undue concentration of population […]."[38] For that reason, no doubt exists that would oblige the Court to find in favor of the landowners, here, the Petitioners. The Board did not err as a matter of law in finding the Zoning Code was unambiguous.

II

31. Before the Court endeavors with the latter half of its Discussion, the Court must clarify that it is not in a position to confirm or reject the past applications

[36] *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 308 (Del. 2010).

[37] *Id*. at 310.

[38] *Id*. at § 270-1(B).

of the Code by the City but may only consider the decision presently before it and the Board's supportive reasoning. The Mayor's statements and the patent frustrations from several of the Board members alluded to in the briefs must not weigh on the Court's decision-making.

32. With that said, through testimony presented at the hearings, the Board heard substantial evidence in support of its decision that decks, porches, balconies, and stairways must be included in the GFA calculations. The Board heard exhaustively from Glenn Mandalas, the City Solicitor, that the Code was unambiguous in each of the hearings. After the issuance of the B&L Notice, the Board, to its credit, held re-hearings for both Petitioners where it heard testimony on the Code's application to residential and commercial properties. Mr. Mandalas testified the GFA is applicable to both residential and commercial properties.[39] The GFA's application to commercial properties has always been the same, and the B&L Notice was meant to clarify the GFA's application to *residential* properties.[40]

33. The Board also separately heard testimony from the Petitioners that the duplicative applications of the Code rendered it ambiguous which, in turn, compelled the Board to find in favor of the landowners. On this point, the Board discerned that "regardless of the history of varying interpretations of the definition

[39] November 25, 2019 Hearing Tr. 9:22.

[40] *Id*. at 4:3.

of gross floor area, the decision from which the applicant appeals is the correct one."[41] Further, in its later decision, noted "[t]he existence of a mistake, even a long standing mistake, does not require the Board of Adjustment perpetuate a mistake once the mistake is revealed. Good governance, on the other hand, requires that mistake be corrected."[42] Importantly, moreover, the Court's focus is on the Board's findings with respect to the Code not its purported misapplication by the State. The Board found consistently over the course of four hearings and there exists substantial evidence in the record to support those findings.

34. The votes, although split in both instances, were properly recorded in favor of denying Petitioners' appeal. No evidence exists to suggest the Board's hearing processes deviated from its standard procedures which would otherwise make its decision a product of an irrational or unfair process.

[41] Board Decision 2, Dec. 16, 2019.

[42] Board Decision 2, Dec. 17, 2020.

Conclusion

35. Accordingly, the Board's decision to include the above-mentioned porches, balconies, decks, and staircases in the Gross Floor Area calculations pursuant to the City of Rehoboth Beach Zoning Code is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ *Mark H. Conner*
Mark H. Conner, Judge

via File Serve Express
oc: Prothonotary