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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE BOARD OF ADJUSTMENT OF THE CITY OF REHOBOTH BEACH, et al., Respondents-Below, Appellants, v. STINGRAY ROCK, LLC, a Delaware Limited Liability Company, d/b/a Stingray Sushi Bar & Asian Latino Grill, Petitioner-Below, Appellee.	No. 154, 2013 On Appeal from the Superior Court of the State of Delaware in and for Sussex County C.A. No. S11A-07-010-ESB

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

NATURE OF PROCEEDINGS

This controversy does ***not*** present a case of first impression. Instead, this controversy entails a rather typical, garden-variety appeal from a decision of the City of Rehoboth Beach Board of Adjustment (the "Board") which (1) denied an appeal filed by Stingray Rock, LLC ("Stingray") from an October 12, 2010 administrative determination of the City Manager, and (b) denied Stingray's alternative prayer for relief in the form of an application for an area variance.

The action commenced on July 27, 2011, when Stingray filed a Petition for Writ of Certiorari, Declaratory Judgment, and Other Relief in Superior Court. On August 23, 2011, the Board filed a Notice of Removal which removed the case to the United States District Court for the District of Delaware. Shortly thereafter, in order to expedite consideration of its state law claims, Stingray dismissed its federal constitutional claims (without prejudice), thereby divesting the District Court of jurisdiction and returning the case to Superior Court. Stingray then filed an Amended Petition on December 9, 2011, and the Board filed its Answer to the Amended Petition on December 29, 2011. Thereafter, pursuant to a Stipulation entered into by the parties and approved by the Superior Court, the case was submitted for adjudication based upon a stipulated record.

Following briefing and oral argument, the Superior Court concluded – in an 11-page opinion issued on February 28, 2013 (the "Opinion" or "Op.") – that Stingray is not required to obtain a "certificate of compliance" in order to operate an outdoor dining patio, because the addition of an outdoor dining patio does not constitute an "extension of the premises of the restaurant" within the meaning of Section 215-7(B) of the City Code, and further, the Board applied the wrong legal standard when it denied Stingray's application for a variance. The Superior Court therefore reversed the decision of the Board on both grounds.

On March 5, 2013, the Board filed a Motion for Reargument, which the Superior Court denied on March 11, 2013. The Board then filed a Motion for Stay Pending Appeal on March 21, 2013, which the Superior Court denied on April 5, 2013.

On March 26, 2013, the Board filed a Notice of Appeal to this Honorable Court, and on June 10, 2013, the Board filed its Opening Brief. On June 19, 2013, Stingray filed a Motion to Affirm, which this Honorable Court denied on June 20, 2013.

This is Stingray's Answering Brief.

SUMMARY OF ARGUMENT

1. **Denied**. The Superior Court did ***not*** conclude that the terms "modification" and "extension" were "interchangeable and mean the same thing", such that the phrase "or extension" would be rendered "entirely meaningless". Rather, the Superior Court – reading the Code as whole in order to properly construe § 215-7(B) – found "that 'premises of the restaurant' has a very specific and narrow meaning in the City Code that weighs against" a conclusion that the addition of an outdoor dining patio constitutes an "extension of the premises of a restaurant." Op. at 6.

2. **Denied**. The Superior Court properly focused its statutory construction analysis upon the applicable provisions of the City Code which, when read as a whole, yield the conclusion that the addition of an outdoor dining patio does not constitute "an extension of the premises of the restaurant." The Board's argument here – that the Superior Court erred by "dismissing, or ignoring" similar language found in Rule 42.1 of the DABCC Rules and 4 Del. C. §§ 543(g) and (h) – was never properly presented below[1], but even if it were, the argument is unpersuasive, for the reasons that (a) there is nothing in the record to substantiate

[1] *See* the Superior Court's March 11, 2013 decision denying reargument ("I was not interpreting the meaning of laws and rules governing the sale of alcoholic beverages. In my view, the meaning of those laws and rules is of no help in determining the meaning of the zoning ordinance. I also note that the Board never raised this argument in the briefing, making it inappropriate to raise it at this time."). (B-305).

that § 215-7(B) of the City Code "originated from and is modeled after" language in either Title 4 or the DABCC Rules, and (b) the City Code provisions at issue, read as a whole, yield a different meaning for the phrase "extension of the premises of the restaurant" than the meaning ascribed by either Title 4 or the DABCC Rules.

3. **Denied**. The Superior Court was tasked with interpreting a specific provision in the City Code. The legislative purposes and intentions behind the City's adoption of zoning regulations are entirely different than the legislative purposes and intentions of the General Assembly in enacting laws and regulations governing the sale of alcoholic beverages, and thus, it was utterly unnecessary for the Superior Court to attempt to reconcile the former with the latter.

4. **Denied**. The variance sought by Stingray was a variance from the 5,000 square foot limitation on restaurant floor space imposed under § 270-28 of the City Code – and that restriction is clearly an "area" restriction, not a "use" restriction. Furthermore, Stingray was not seeking a variance for the purpose of engaging in any activity prohibited by the City Code in the C-3 zoning district – rather, Stingray was merely seeking a permit to engage in the very same activity (restaurant dining) outside the premises of its restaurant as is already permitted inside those premises, and that is a permitted use in the C-3 zoning district.

STATEMENT OF FACTS

At all times relevant hereto, Stingray has owned and operated a restaurant business located at 59 Lake Avenue, Rehoboth Beach, Delaware (the "Property"), known as "Stingray Sushi Bar & Asian Latino Grill" (the "Restaurant"). (B-2).[2] The Property is zoned for C-3 use. (B-24). The floor plan for the interior of the Restaurant comprises a total of 6,332.23 square feet, of which 3,071.82 square feet constitutes permanent seated dining area and 718.90 square feet constitutes bar area. (B-9). The balance of the floor plan – comprised of a lobby area, bathrooms, a coat room, kitchen areas, server stations, walk-in coolers, storage areas, office space, and utility areas – takes up the remaining 2,541.41 square feet of the Restaurant's interior. (B-9).

The Delaware Alcoholic Beverage Control Commission issued a liquor license for the Restaurant prior to June 14, 1991. (B-2, 10). Accordingly, at all times relevant hereto, the Restaurant is and has been an "existing restaurant...whose liquor license was issued by the Delaware Alcoholic Beverage Control Commission prior to June 14, 1991", within the meaning of § 215-7(B) of the City Code.[3]

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[2] The citation "(B-[page #])" refers to pages within the Appendix to this Answering Brief, which contains pertinent documents from the record below.

[3] Copies of various provisions of the City Code, as those provisions existed on April 19, 2010, were attached as Exhibit "B" to Stingray's Amended Petition and are included in the Appendix to this Brief. (B-298-304).

On or about April 19, 2010, Stingray filed an application (the "Application") with the City of Rehoboth Beach (the "City") for a permit to operate an outdoor dining patio at the Property. (B-18, 24). As proposed, the dining patio would be comprised of "28 seats in a zen garden type of atmosphere", confined within 720 square feet of space located ***outside*** of the Restaurant structure. (B-2).

§ 215-7(B) of the City Code provides that Stingray "is not required to obtain a certificate of compliance[4] pursuant to this chapter unless required as a condition of extension or modification of the premises of the restaurant." (B-299).

On May 21, 2010, Stingray's Application was presented to the City Council by Terri Sullivan ("Ms. Sullivan"), the Chief Building Inspector for the City. As presented to the City Council, however, the Stingray's Application was mistakenly characterized as a request to "expand the dining area of the restaurant...onto a patio...." (B-2). Consequently, the City Council denied the Application on May 21, 2010. (B-2-5).

Stingray subsequently sought an administrative clarification from the City Manager, pursuant to § 215-11(A) of the City Code, regarding those provisions of the Code applicable to Stingray's Application. (B-10-12). Specifically, Stingray sought clarification that "Stingray is [proposing] nothing that would be considered an expansion of the restaurant, and therefore, Stingray is grandfathered from the

[4] The City uses the phrase "certificate of compliance" and "permit of compliance" interchangeably, both in its Code and in its administrative practice.

provisions of the Code which might otherwise require Stingray to obtain a variance as a prerequisite to securing a permit to operate an outdoor dining patio." (B-10). In essence, Stingray was asking the City Manager to clarify whether the addition of an ***outdoor*** dining patio – without any alteration to the structure or interior floor plan of the Restaurant – constitutes an "extension or modification of the premises of the restaurant" within the meaning of § 215-7(B) of the City Code. (B-10).

On October 12, 2010, the City Manager issued his determination of Stingray's request for clarification, concluding that although "Stingray is permitted to operate as is despite its various nonconformities because of its grandfathered status", Stingray is nevertheless required to secure a permit of compliance in order to operate an outdoor dining patio at the Property, and further, no such permit of compliance can issue "unless and until Stingray is either brought into compliance or is granted the proper variances." (B-13-15).

On November 10, 2010, Stingray filed an appeal from the City Manager's determination to the Board, coupled with an application for variances (the "Appeal"), as suggested by the City Manager's October 12, 2010 determination. (B-16-23).[5]

[5] Although the Appeal initially sought two variances – one from the 5,000 square foot maximum permitted floor space for a restaurant (§ 270-28 of the Code) and one from the prohibition against restaurants having a "bar area" in excess of "25% of the square footage of the permanent seated dining area" (§§ 215-1 and 270-19(3) of the Code) – the City ultimately conceded that only the former variance was required in order for Stingray's Restaurant to be deemed "compliant". As acknowledged by the City Building Inspector in her May 2, 2011 Report to the

On May 12, 2011, the Board held a public hearing upon Stingray's Appeal. Rather than grant the Appeal, however, the Board arbitrarily and capriciously determined to deny Stingray's Appeal by (a) refusing to reverse the City Manager's legally-erroneous interpretation of the City Code, and (b) refusing to grant Stingray's request for a variance. (B-28-29, 32-89).

At the outset of the Board's May 12, 2011 hearing, the Board first considered Stingray's Appeal from the City Manager's October 12, 2010 determination. Unfortunately, in rendering its determination of Stingray's Appeal, the Board failed to recognize or understand that Stingray was not appealing from the May 21, 2010 decision of the City Council to deny Stingray's initial Application for a permit of compliance – rather, Stingray was appealing from the City Manager's October 12, 2010 interpretation and application of § 215-7(B) of the City Code.[6] Thus, the Board voted to deny Stingray's Appeal on grounds that

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Board, "the lounge and bar area combined equal 23% of the permanent seated dining area and is no longer an issue for compliance." (B-26). The City Solicitor and the Board's Solicitor both confirmed that, in light of Stingray's submission of an affidavit affirming the "lounge area" is actually part of the permanent seated dining area, no variance is required in order for Stingray to achieve compliance with the 25% maximum bar area ratio mandated by the City Code. *See* B-47, line 2 ("there's not a variance needed") and B-54, line 1 ("He's grandfathered").

[6] The Board also misread and misapplied the applicable provisions of the City Code. For example, in determining that Stingray's proposed outdoor dining patio "is part of the restaurant" (B-65), the Board misread and misapplied the definitions of "bar area" and "permanent seated dining area" in § 215-1 of the Code, which provides that "[t]he square footage of floor space of a patio ***which is not a dining patio*** shall be included as part of the bar area [emphasis added]", and further, that "the square footage of floor space of a dining patio...shall not be included as part of the permanent seated dining area or as part of the bar area." Stingray's proposed outdoor patio ***is*** a dining patio, however. Therefore, Stingray's proposed outdoor dining patio is ***not*** includable within the calculation of square footage of either the "bar area" or the "permanent seated dining

the Board was bound by the May 21, 2010 decision of the City Council – a decision which was not the subject or basis of Stingray's Appeal.[7]

Following its denial of Stingray's Appeal, the Board undertook consideration of Stingray's alternative prayer for relief – in the form of an application for a variance from the 5,000 square foot maximum permitted floor space for a restaurant, as established by § 270-28 of the City Code. And from the outset, the Board repeatedly demanded that Stingray demonstrate what "hardship" Stingray would suffer in the absence of the requested variance:

Chairman Evans: "***Hardship*** is really more the issue here. ***This is the issue, to define the hardship caused to you by not being granted variance*** [emphasis added]." (B-75, lines 15-17).

Mr. Karsnitz: "Mr. Mansoory, in order to grant a variance, as Mr. Evans read when we started this hearing, ***you have to show us some hardship***, some reason that the Code should be varied. Can you tell us what reason you think you need this patio and ***why it would be a hardship*** to you not to have it [emphasis added]?" (B-76, lines 8-13).

Mr. Mansoory: Well, the hardship would be coming into compliance...in order to come into compliance, it would be a major construction undertaking...." (B-76, lines 14-19).

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area". As Stingray's proposed outdoor dining patio is not part of "the bar area" and not part of "the permanent seated dining area", it is not part of the interior structure or premises of the Restaurant. Instead, it is an outdoor dining patio which must be excluded from the 5,000 square foot calculation – because it is neither part of the bar area nor part of the permanent seated dining area.

[7] *See* pages 42-44 of the transcript of the Board May 12, 2011 hearing (B-73-75) (Ms. Kelley: "I agree with the denial of the appeal, based upon the findings of what we have had, and the report from the Building Inspector, and from the minutes of the motion made by the Commissioners"; Mr. Cooper: "I would base my opinion on the opinion of the City attorney, and the discussion of the Commissioners, and I think we are bound by their findings"; Mr. Hilderley: "The case has not been made consistent with what the Commissioners have done").

Mr. Karsnitz: "No. Sir, sir...We're not suggesting you come in compliance...The question is ***what hardship there would be to you to not grant this request***; that's what I'd like you to address, please [emphasis added]." (B-76, line 20 through B-77, line 3).

Mr. Mansoory: "Well, there's lots of competition, there's competition out there where people can serve on patios. It is a seasonal town, people like the sunshine in the summertime, all of which we seem to, you know, lose business to...we're open year-round and, you know, so the fall and spring are a great time to bring seating and bring another option to the diners, which we currently don't have." (B-77, lines 8-23).

Mr. Karsnitz: "Would what you're suggesting, in your view, in any way harm the neighborhood?" (B-77, line 24 through B-78, line 1).

Mr. Mansoory: "Well, no, I'm very concerned, no absolutely not." (B-78, lines 2-3).

Mr. Karsnitz: "Tell us why." (B-78, line 4).

Mr. Mansoory: "As a matter of fact, the last hearing, the neighbor, at the previous hearing that was denied, the neighbor across the street was here to speak on my behalf in pro of the patio. I have no – I know there's no external speakers, no waiting for tables, people that are out there must dine not after 10:00 o'clock; all these things, I've done before. And the object is not to pack more people in there, just to offer another style of dining which seems to be popular throughout, especially in the summertime with the seasonal town, that we're unable to do." (B-78, lines 5-17).

Following the testimony of a neighbor who owns a home located behind the Restaurant, expressing concerns relating to noise, Stingray offered the following additional testimony in support of its application for a variance:

Mr. Mansoory: "There are – the City has actually taken your concerns into consideration before my application that there are guidelines that are set that we're bound by any new patios, which are such things like no external speakers, nobody on the patio after 10:00 p.m., use for dining only, not to be used for waiting of tables. There's that one or two other criteria, which I mean I have no intention of

asking for any of those to be waived...And really just the risk of conversation of diners, I mean there's obviously no patio or external speakers – no loud music was another one, no loud music out on the patio. So the City's already taken these into consideration in making any new patio applicants, you know, adhere to these rules, and I'm not here to ask for any of those to be waived." (B-81, line 10 through B-82, line 5).

At the conclusion of Stingray's testimony, Mr. Hilderley made a motion to deny Stingray's variance request, which Mr. Cooper seconded. (B-82, lines 10-18). During their deliberations upon the motion, members of the Board repeatedly cited a lack of "hardship" as the basis for their votes to approve the motion and deny Stingray's variance request:

Chairman Evans: "Any other discussion on the issue about the merits of ***hardship*** for this? [emphasis added]." (B-85, lines 9-10).

Mr. Hilderley: "Well, I vote for the motion to reject the request for a variance. ***Hardship*** was never a factor in the presentation here...[emphasis added]." (B-86, lines 23-25).

Mr. Cooper: "I don't see that the ***hardship*** on the restaurant rises above the impact on the neighborhood; therefore, I vote in favor of the motion to deny [emphasis added]." (B-87, lines 6-9).

Ms. Kelley: "I vote in favor of the motion. I can't get past the fact that we've got a 5,000 square foot limitation." (B-87, lines 11-13).

Mr. Popham: "I vote to reject; I feel the case wasn't made for ***hardship***, and that we're expanding the restaurant [emphasis added]." (B-87, lines 15-17).

Chairman Evans: "I vote for the motion to deny, but strictly for the grounds that no case was really made for ***hardship***, and that's strictly the reason I'm making the decision [emphasis added]. So it's five/zero against the application for variance. And sorry about that, that's how she rolls tonight." (B-87, line 24 through B-88, line 6).

On May 23, 2011, Stingray submitted to the Board a Motion for Rehearing of the Appeal, pursuant to Rule 16.1 of the Board's Rules of Procedure. (B-90).[8] On June 21, 2011, prior to the Board entertaining Stingray's Motion for Rehearing and at the specific request of the Board Chair, Stingray submitted a Summary of Argument upon Stingray's Motion for Rehearing. (B-91-92).

On June 27, 2011, the Board entertained Stingray's Motion for Rehearing. After hearing the arguments of counsel for Stingray upon said Motion – requesting a rehearing based upon grounds of mistake and excusable neglect, including the Board's application of the incorrect legal standard of review to Stingray's Application for an "area" variance – the Board denied Stingray's Motion for Rehearing. (B-103-105). Both the Board Chair and the Board's Solicitor insisted that the Board had inquired about and applied the "exceptional practical difficulties" standard during the Board's determination of Stingray's Appeal (B-103), a contention which is plainly refuted by the record of the Board's May 12, 2011 hearing (B-27-89). Thus concluded the Board's adjudication of Stingray's Appeal.

On several occasions prior to Stingray's variance request in the instant case, the Board has been presented with requests for a variance from the 5,000 square foot maximum permitted floor space for a restaurant established by § 270-28 of the

[8] A copy of the Board's Rules of Procedure can be found at pages B-93-99.

City Code, under identical circumstances – i.e., where the applicant was seeking the variance for the purpose of obtaining a certificate of compliance, in order to secure a permit to operate an outdoor dining patio – and on each and every one of those prior occasions, the Board readily granted the requested variance. Furthermore, on each and every one of those occasions, the requested variance was of significantly larger magnitude than the variance requested by Stingray in the instant case (i.e., the restaurants exceeded the 5,000 square foot limitation to a far greater degree than Stingray's Restaurant) ***and*** the size of the proposed patio was larger than the size of the patio proposed by Stingray's Application.[9]

[9] *See* pages B-106-295 of the Appendix to this Answering Brief, evidencing that the Board has previously granted variances from the 5,000 square foot maximum permitted floor space for a restaurant established by § 270-28 of the City Code – and the City has previously issued certificates of compliance for the operation of an outdoor dining patio – to Grotto Pizza, The Cultured Pearl, Nicola's Pizza, and The Greene Turtle.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE PHRASE "PREMISES OF THE RESTAURANT" HAS A UNIQUE AND SPECIFIC MEANING UNDER THE CITY CODE.

A. Question Presented

Did the Superior Court properly construe the phrase "premises of the restaurant" as employed by § 215-7(B) of the City Code?

B. Scope of Review

Whether the Superior Court correctly interpreted a statute is a question of law, which the Supreme Court reviews *de novo*.[10]

C. Merits of Argument

Section 270-28 of the City Code provides, in pertinent part, that "[t]he area in a given building devoted to restaurant purposes where alcoholic liquor is consumed on the premises shall not be larger than 5,000 square feet of floor space, including seated dining area, food storage and preparation area, passageways and entrance foyer, restrooms, dance floor and bar area...." (B-304). It is undisputed that the floor space area of Stingray's Restaurant devoted to restaurant purposes exceeds 5,000 square feet, and therefore, Stingray's Restaurant is a non-conforming "grandfathered" use. (B-2). It is also undisputed that Stingray's Restaurant is an "existing restaurant...whose liquor license was approved or issued by the Delaware Alcoholic Beverage Control Commission prior to June 14, 1991."

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[10] *Broadmeadow Investment, LLC v. Delaware Health Resources Board,* 56 A.3d 1057, 1059 (Del. 2012).

Therefore, under § 215-7(B) of the City Code – as § 215-7(B) read at the time of Stingray's Application[11] – Stingray "is not required to obtain a certificate of compliance...unless required as a condition of extension or modification of the premises of the restaurant." Stated otherwise, so long as Stingray is not proposing the extend or modify the premises of its Restaurant, Stingray can never be compelled to obtain a certificate of compliance from the City, for any reason.

As the Superior Court aptly noted below, the City Code provides definitions for the terms "restaurant" and "modification", but does not define the terms "extension" or "premises". Thus, for example, § 215-1 of the City Code defines "restaurant" as follows:

> Where alcoholic liquor is sold or consumed on the premises, a totally enclosed, except where a special patio license has been granted, commercial establishment which is regularly used and kept open principally for the purpose of serving complete meals to persons for consideration and which has seating and tables for 35 or more persons and suitable kitchen facilities connected therewith for cooking an assortment of foods under the charge of a chef or cook.

Likewise, § 215-11(B) of the City Code provides that "Modification, as used herein, means ***internal arrangements limited to the interior walls*** of only that portion of the structure used for restaurant or dinner theater purposes as shown on the floor plan on file with the City Manager. It shall not authorize the extension of

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[11] § 215-7 was amended on April 30, 2010, ***after*** Stingray filed its application for a permit to operate an outdoor dining patio (on April 19, 2010). A copy of § 215-7, as it existed on April 19, 2010, is included within the Appendix to this Brief. (B-299).

the restaurant or dinner theater use ***into other parts of the structure*** not shown on the floor plan filed with the City Manager [emphasis added]."[12]

Stingray is not proposing to alter any of the "internal arrangements" or "interior walls" of the structure shown on its record floor plan, or to otherwise extend its present uses into other parts of the structure shown on its record floor plan. Rather, Stingray is merely proposing to utilize 720 square feet of space ***outside*** the restaurant for an ***outdoor*** dining patio, without ever altering or rearranging any part of the structure shown on its record floor plan. Clearly, then, Stingray's proposed outdoor dining patio does not constitute a "modification" of the premises of Stingray's Restaurant for purposes of § 215-7(B) of the City Code.

Unfortunately, the City Code does not define the terms "extension" or "premises". In its construction of § 215-7(B) below, the Superior Court noted that "extension" is generally defined as "enlargement", while "premises" are commonly defined "to include the land and structures thereon." Thus, combining the defined meaning of "restaurant" and the commonly accepted meanings of "extension" and "premises", one could possibly conclude that the addition of a

[12] Indeed, as the City Manager correctly noted in his October 12, 2010 determination, Stingray's application for a permit to operate an outdoor dining patio does not entail a proposed modification to the floor plan of the Restaurant ("Section 215-11(A), however, pertains to requests to modify a floor plan. The more appropriate section for your request appears to be Section 215-7."). (B-13). Unfortunately, the City Manager's October 12, 2010 determination applied the incorrect version of § 215-7, which was amended on April 30, 2010, ***after*** Stingray filed its application for a permit to operate an outdoor dining patio (on April 19, 2010).

patio is an enlargement ("extension") of the land and structures ("premises") of a restaurant. As the Superior Court properly noted, however, such a conclusion does not comport with the balance of the applicable Code provisions, read as a whole.[13]

For starters, the operation of an outdoor dining patio (as proposed by Stingray's Application) would not entail any "enlargement" of either the land or the structures comprising Stingray's existing premises. Rather, the operation of Stingray's proposed outdoor dining patio would merely entail the addition of "28 seats in a zen garden." (B-2). The existing "structure" of the restaurant would remain unchanged.

Furthermore, the provisions of the City Code which define the component parts of a "restaurant" make it clear that the "premises" of a restaurant – for purposes of determining whether the addition of an outdoor dining patio constitutes an "extension or modification of the premises" – is comprised solely of the ***internal*** elements of the structure utilized for restaurant purposes, excluding any outdoor dining patio. For example, the definition of "permanent seated dining area" in § 215-1 of the City Code specifically states that "the square footage of floor space of a dining patio...shall ***not*** be included as part of the permanent seated dining area or as part of the bar area." Accordingly, when calculating the square footage of floor space of a restaurant, for purposes of the 5,000 square foot

[13] *See Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

limitation imposed under § 270-28, the City Code expressly excludes the square footage of an outdoor dining patio from the calculation of the permanent seated dining area or bar area of a restaurant. Thus, as the Superior Court recognized, "[i]f the square footage of the floor space of a dining patio does not count towards the 5,000 square foot floor plan limit, then it makes sense to conclude that the addition of a dining patio does not enlarge the premises of a restaurant." Op. at 8.

Finally, as if all of the foregoing were not compelling enough, § 270-50(B) of the City Code makes it abundantly clear that, under the circumstances here encountered – even if the addition of an outdoor dining patio constitutes an "extension or modification of the premises" of Stingray's Restaurant – Stingray may nevertheless open and operate an outdoor dining patio at Stingray's Restaurant without the need to obtain a prerequisite certificate of compliance.

§ 270-50(B) of the City Code provides as follows:

> Any legal nonconforming structure devoted to a conforming use may be extended, provided that such extension conforms to the applicable dimensional requirements of the zoning district in which the legal nonconforming structure is located.

Applying § 270-50(B) to the facts of the instant case, Stingray's Restaurant is clearly a "legal nonconforming structure", as the square footage of the Restaurant's floor space has always exceeded the 5,000 square foot limitation imposed under § 270-28 of the Code. Furthermore, there can be no question but that the use of the Petitioner's Property (as a restaurant) is a "conforming use",

given that restaurants are a first permitted use in the C-3 zoning district. That is, to the extent that Stingray's Restaurant is nonconforming, it is the structure of the Restaurant (and not the restaurant use) that is non-conforming. Thus, according to § 270-50(B) of the Code, the structure (or premises) of the Restaurant "may be extended, provided that such extension conforms to the applicable dimensional requirements of the zoning district in which the legal nonconforming structure is located." Here, the "applicable dimensional requirement" is the 750 square foot limitation on the floor space for an outdoor dining patio, dictated by § 270-19(1)(a) of the Code. Since Stingray's proposed outdoor dining patio would be comprised of no more than 720 square feet, Stingray's proposed patio "conforms to the applicable dimensional requirement" and would therefore constitute a permitted extension of Stingray's Restaurant.

In sum, then, because of its grandfathered status, Stingray's Restaurant as it presently operates is already compliant (i.e., legal non-conforming) with all applicable City Code requirements governing the operation of Stingray's Restaurant. The addition of an outdoor dining patio at Stingray's Restaurant does not constitute an "extension or modification of the premises" of the Restaurant. Therefore, as provided by § 215-7(B) of the City Code, Stingray "is not required to obtain a certificate of compliance" as a prerequisite to obtaining a permit to operate an outdoor dining patio. On the other hand, even if the addition of an outdoor

dining patio at Stingray's Restaurant does constitute an "extension or modification of the premises" of the Restaurant, that extension is plainly authorized by § 270-50(B) of the City Code.

The Board's argument (at page 18 of its Opening Brief) that "'extension' can only be interpreted to [apply] to outside the interior walls of a restaurant" is simply too restrictive, as "extension" can easily be interpreted to mean "enlarging" the interior of a restaurant (e.g., by enclosing more space) – an interpretation which more readily comports with the holistic reading of § 215-7(B) rendered by the Superior Court below. Likewise, the Board's suggestion (at page 19 of its Opening Brief) that Stingray "knew it was seeking an 'expansion'" and "even characterized the project as an 'expansion' on the check accompanying [its] application" is plainly off-target. The record below demonstrates that Stingray has consistently and steadfastly maintained the position that it is ***not*** required to obtain a certificate of compliance in order to operate an outdoor dining patio, because (a) Stingray is an existing "grandfathered" restaurant under § 215-7(B) of the City Code, and (b) Stingray is not seeking to expand its premises. (B-2). The reality here is that Stingray was ***forced*** to apply for a certificate of compliance (and, in the alternative, a variance) in order to exhaust its administrative remedies. Finally, it is the language of the City Code itself, and not a notation on the check accompanying Stingray's application, which should control the outcome here.

II. THE SUPERIOR COURT CORRECTLY APPLIED WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

A. Question Presented

Did the Superior Court correctly apply the principles of statutory construction when interpreting § 215-7(B) of the City Code?

B. Scope of Review

Whether the Superior Court correctly interpreted a statute is a question of law, which the Supreme Court reviews *de novo*.[14]

C. Merits of Argument

The Board's argument (at pages 21-25 of its Opening Brief) that "the Court should consider, among other things, the regulatory history of the provision and Rehoboth Beach's own interpretation of that provision" – is a new argument which was never properly raised below, and therefore, cannot now be raised on appeal.[15] But even if permitted, the argument is without merit for two reasons. First, Title 4 of the Delaware Code was adopted by the General Assembly for the purpose of regulating the sale of alcoholic beverages, not for the purpose of regulating land use in the City of Rehoboth Beach. Thus, not only are the legislative purpose and intent underlying Title 4 and the City Code entirely different, but, more critically, there is nothing in the record below to support the Board's suggestion that § 215-7(B) of the City Code "intentionally recites important terms of art...in §§ 543(g)

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[14] *Broadmeadow Investment, LLC v. Delaware Health Resources Board,* 56 A.3d 1057, 1059 (Del. 2012).

[15] *HSU v. CitiBank South Dakota*, 931 A.2d 437 (Del. 2007).

and (h) of Title 4 and the [DABCC] rules", with the consequence that § 215-7(B) thereby incorporates the definitions set forth in Title 4 and the DABCC Rules. In short, there is no need to reconcile the language of § 215-7(B) of the City Code (which deals with local land use regulation) with the language of Title 4 (which concerns the sale of alcoholic beverages). Second, as the record below clearly demonstrates, the City and the Board have repeatedly interpreted the City Code provisions here at issue in such a manner as to confirm that the addition of an outdoor dining patio does ***not*** constitute an extension of the premises of a restaurant. Indeed, on each and every previous occasion where the Board and the City have been presented with a non-conforming restaurant's request for a variance from § 270-28 of the City Code – for the purpose of obtaining a certificate of compliance, in order to secure a permit to operate an outdoor dining patio – the Board has readily granted the variance request and the City has routinely issued the certificate of compliance, without hesitation.[16]

In sum, the Superior Court properly construed § 215-7(B) of the City Code by reading the provisions of § 215-7(B) in such a manner as to achieve an interpretation which is consistent with all other applicable provisions of the Code, read as a whole. Accordingly, the Superior Court's construction of § 215-7(B) of the Code should be affirmed.

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[16] *See* pages B-106-295 of the Appendix to this Brief.

III. THE SUPERIOR COURT CORRECTLY FOUND THAT THE BOARD OF ADJUSTMENT APPLIED THE WRONG LEGAL STANDARD IN EVALUATING STINGRAY'S VARIANCE APPLICATION.

A. Question Presented

Did the Board of Adjustment apply the wrong legal standard in denying Stingray's variance application?

B. Scope of Review

Upon appeal from a decision of a municipality's Board of Adjustment, the standard of review – both in the Superior Court and in the Supreme Court – is limited to the correction of errors of law and determining whether there exists substantial evidence in the record to support the Board's findings of fact and conclusions of law.[17] When the Board clearly commits legal error, it is within the Court's discretion to reverse the Board's decision.[18]

C. Merits of Argument

The Board should have granted Stingray's request for an area variance – just as the Board has granted area variances for every other, similarly-situated restaurant in the City, on every other occasion when the Board has been presented with the same request – which in turn would allow Stingray to secure a certificate of compliance. Unfortunately, however, the Board failed to apply the proper legal

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[17] *Harley v. Potter*, 683 A.2d 59 (Del. 1996).

[18] *Id.*

standard in its review of Stingray's request for an area variance and otherwise arbitrarily denied Stingray's application.

The Board applied the incorrect legal standard.

22 Del. C. § 327(a)(3) provides, in pertinent part, that:

> The board of adjustment may [a]uthorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to the owner of property so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map...

There are two types of variances which the Board has the authority to grant under 22 Del. C. § 327(a)(3) – a "use" variance, which "changes the character of the zoned district by permitting a proscribed use",[19] and an "area" variance, which authorizes a permitted use that would otherwise be precluded, solely for failure to achieve strict compliance with certain dimensional restrictions:

> Area variances are customarily concerned with 'practical difficulty', i.e., that the property or a structure thereon cannot, as a practical matter, be used for a permitted use without coming into conflict with certain of the restrictions of the ordinance such as side yard, rear yard, setback or area restrictions or those affecting bulk or density.[20]

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[19] *See Kwik-Check Realty Co., Inc. v. Board of Adjustment of New Castle County*, 369 A.2d 694, 697 (Del. Super. 1977), *aff'd*, 389 A.2d 1289 (Del. 1978).

[20] *Id.* at 698 (internal citation omitted).

While the legal standard for "use" variances is "unnecessary hardship", "[t]he proper test to be applied for area variances is one of whether a literal interpretation of the zoning law results in exceptional practical difficulties of ownership."[21] As this Court has articulated:

> The rationale, which we approve, is that a use variance changes the character of the zoned district by permitting an otherwise proscribed use, whereas an area variance concerns only the practical difficulty in using the particular property for a permitted use. Accordingly, given the differing purposes and effects of the two types of variance, a lesser standard of the owner's 'exceptional practical difficulties' is appropriate for obtaining an area variance.[22]

In applying the "exceptional practical difficulties" standard, this Court has affirmed that economic consideration, standing alone, may be a sufficient justification for the grant of an area variance:

> The inability to improve one's business, or to stay competitive as a result of area limitations, may be a legitimate 'exceptional practical difficulty' that would justify a grant of a variance. Such practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on neighboring properties if the variance is granted. Therefore, to determine if the difficulties presented by the owner are practical rather than theoretical, and exceptional rather than routine...the Board should take into consideration the nature of the zone in which the property lies; the character of the immediate vicinity and the uses contained therein; whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; [and] whether, if the

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[21] *Id.*

[22] *Kwik-Check Realty Co., Inc. v. Board of Adjustment of New Castle County*, 389 A.2d 1289, 1291 (Del. 1978) (internal citations omitted). Note that the language of the statute at issue in *Kwik-Check* – 9 Del. C. § 1352(a)(3) – is identical to the language of the statute at issue in the case at bar – 22 Del. C. § 327(a)(3).

> restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.[23]

In the case at bar, the record is unequivocally clear that the Board below applied the incorrect legal standard – i.e., "unnecessary hardship", rather than "exceptional practical difficulties" – in its consideration and determination of Stingray's variance request. From the outset of its May 12, 2011 hearing, the Board repeatedly demanded that Stingray demonstrate what "hardship" the Petitioner would suffer in the absence of the requested variance:

Chairman Evans: "***Hardship*** is really more the issue here. ***This is the issue, to define the hardship caused to you by not being granted variance*** [emphasis added]." (B-75, lines 15-17).

Mr. Karsnitz: "Mr. Mansoory, in order to grant a variance, as Mr. Evans read when we started this hearing, ***you have to show us some hardship***, some reason that the Code should be varied. Can you tell us what reason you think you need this patio and ***why it would be a hardship*** to you not to have it [emphasis added]?" (B-76, lines 8-13).

Mr. Mansoory: Well, the hardship would be coming into compliance...in order to come into compliance, it would be a major construction undertaking..." (B-76, lines 14-19).

Mr. Karsnitz: "No. Sir, sir...We're not suggesting you come in compliance...The question is ***what hardship there would be to you to not grant this request***; that's what I'd like you to address, please [emphasis added]." (B-76, line 20 through B-77, line 3).

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[23] *Id.* (internal citations omitted).

Furthermore, during their deliberations upon Mr. Hilderley's motion to deny Stingray's variance request, an overwhelming majority of the Board (4 of 5 members) specified a lack of "hardship" as the basis for their vote to deny Stingray's variance request:

Chairman Evans: "Any other discussion on the issue about the merits of ***hardship*** for this? [emphasis added]." (B-85, lines 9-10).

Mr. Hilderley: "Well, I vote for the motion to reject the request for a variance. ***Hardship*** was never a factor in the presentation here...[emphasis added]." (B-86, lines 23-25).

Mr. Cooper: "I don't see that the ***hardship*** on the restaurant rises above the impact on the neighborhood; therefore, I vote in favor of the motion to deny [emphasis added]." (B-87, lines 6-9).

Mr. Popham: "I vote to reject; I feel the case wasn't made for ***hardship***, and that we're expanding the restaurant [emphasis added]." (B-87, lines 15-17).

Chairman Evans: "I vote for the motion to deny, but strictly for the grounds that no case was really made for ***hardship***, and that's strictly the reason I'm making the decision [emphasis added]. So it's five/zero against the application for variance. And sorry about that, that's how she rolls tonight." (B-87, line 24 through B-88, line 6).

Despite protestations to the contrary during the Board's June 27, 2011 hearing (B-103-105), wherein the Board refused to entertain Stingray's Motion for Rehearing, nowhere in the record of the Board's May 12, 2011 decision did the Board ever consider the "exceptional practical difficulties" test for an area

variance. On this basis alone, it was within the Superior Court's discretion to reverse the Board's decision.[24]

Had the Board applied the proper legal standard of review below, the Board would have been compelled to grant Stingray's variance request, for the evidence presented on behalf of Stingray was more than adequate to satisfy the "exceptional practical difficulties" test for an area variance enunciated under *Kwik-Check*.

As articulated in the Memorandum enclosed with Stingray's November 10, 2010 Appeal (B-18-21), strict application of § 270-28 to Stingray's Property would, "owing to the peculiar pre-existing physical dimensions of the Property. . . result in exceptional practical difficulties to Stingray, particularly so given the relatively minor degree of Stingray's present non-conformity and the minimal public interest to be served by declining to grant the requested variances." That is, in order to obtain a permit of compliance so that it could operate an outdoor dining patio, Stingray would be required to eliminate its pre-existing, grandfathered, and *de minimus* nonconformity with § 270-28 by reducing the gross floor area of the restaurant approximately 1,332.23 feet, which would impose "exceptional practical difficulties" upon the Petitioner – i.e., Stingray "would be forced to expend significant resources to substantially modify its existing floor plan and remodel the interior of the restaurant, none of which would serve or advance any legitimate

[24] *Kwik-Check Realty Co., Inc. v. Board of Adjustment of New Castle County*, 369 A.2d 694 (Del. Super. 1977), *aff'd*, 389 A.2d 1289 (Del. 1978).

public interest. By contrast, granting the requested variance from § 270-28 would not result in any detriment to the public good...." (B-20). Furthermore, absent the granting of the requested variance from § 270-28, Stingray would "be precluded from making improvements to its business which will allow Stingray to remain competitive in the local restaurant marketplace, due solely to pre-existing non-conformities which are intrinsically related to the Property itself. On the other hand, allowing Stingray to operate an outdoor dining patio at the Property would be consistent with both the nature of the Property's zoning and the character of the immediate vicinity and the uses permitted therein." Finally, the impact of granting the minimal variance requested "would be far less that the impact imposed upon Stingray" if the variance were denied – i.e., simply recognizing the grandfathered status of the Property's existing non-conformity and allowing it to continue "would result in no impact whatsoever upon neighboring properties." (B-20).

None of the foregoing record evidence was ever disputed or controverted in any way. Moreover, only two witnesses appeared to offer live testimony upon Stingray's application – Darius Mansoory, principal for Stingray, and Raymond Lecates, a neighbor who owns a home located behind the Restaurant (B-75, line 12 through B-82, line 5) – and there is nothing contained within any of that testimony to refute Stingray's evidence upon the issue of "exceptional practical

difficulties".[25] Mr. Lecates' only concern was "anything with a lot of loud music or a lot of activity that would cause chaos", such as "drinking" and the noise associated with "hearing everything that's going on". (B-79, line 23 through B-80, line 17). As both Chairman Evans and Mr. Mansoory explained, however, Stingray's proposed outdoor dining patio would be located at the front of the Restaurant (on the opposite side of the Property from Mr. Lecates' house), and further, the patio would be "pocketed on three sides" with planters and bamboo screening. (B-79, lines 18-22; B-81, lines 19-23). More critically, because the City has very strict regulations regarding the operation of outdoor dining patios[26] – a requirement that all patrons be seated for dining purposes; a ban on "live entertainment"; "no external speakers or amplifiers. . . and no internal speakers. . . directed to the patio; "there shall be no bar on the patio"; and limitations upon hours of service and occupancy – all of Mr. Lecates' concerns were already addressed by existing and applicable provisions of the City Code. As Mr. Mansoory noted, "the City has actually taken your concerns into consideration

[25] Any letters which may have been submitted to the Board in opposition to the Petitioner's Application, as well as any recitation of statements alleged to have been made by members of the public as set forth in the minutes of the May 21, 2010 meeting of City Commissioners, constitute hearsay utterances that cannot provide a basis for any material finding of fact by the Board. *See, e.g., Connell v. New Castle County*, 2000 WL 707105 (Del. Super.), *citing Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950) (although hearsay evidence is permissible in certain instances in administrative hearings, administrative board may not rely upon hearsay evidence as the sole basis for its decision).

[26] *See* § 270-19 of the City Code. (B-301-303).

before my application...the City's already taken these into consideration in making any new patio applicants, you know, adhere to these rules, and I'm not here to ask for any of those to be waived." (B-81, line10 through B-82, line 5).

All of the foregoing factors – undisputed within the record below – clearly demonstrate that Stingray's variance request satisfies the "exceptional practical difficulties" test for an area variance. The Property sits within the C-3 commercial zoning district, in close proximity to other restaurant businesses which already operate outdoor dining patios. (B-24). Accordingly, Stingray's proposed outdoor dining patio is consistent with both the "nature of the zone in which the property lies" and the "character of the immediate vicinity and the uses contained therein". Certainly, it cannot be credibly maintained that granting Stingray's variance request "would seriously affect such neighboring property and uses." And finally, as the undisputed record evidence also reveals, denial of Stingray's variance request gives rise to "exceptional practical difficulties" for Stingray in relation to its "efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance." At a minimum, denial of Stingray's variance request places Stingray at a distinct economic and competitive disadvantage vis-à-vis Stingray's immediate competition in the highly-competitive restaurant market which exists in City of Rehoboth Beach. (B-20).

For all of the foregoing reasons, the Board's decision to deny Stingray's request for an area variance was erroneous as a matter of law, and the Superior Court was within its discretion to reverse the Board.

The Board's decision is not supported by substantial evidence and is otherwise arbitrary and capricious.

Because the Board applied the incorrect legal standard to Stingray's request for an area variance – "unnecessary hardship" instead of "exceptional practical difficulties" – the Board's decision is not supported by substantial evidence. That is, because the Board failed to apply the 4-pronged test for an area variance enunciated by *Kwik-Check*, the Board's decision is devoid of any evidence or rationale to support denial of the requested area variance. For this reason, the Superior Court was within its discretion to reverse the Board's decision.[27]

But there is another, equally-compelling reason to uphold the Superior Court's ruling reversing the Board's decision in the case at bar – the Board's decision is entirely arbitrary and capricious, on at least two grounds. First, the Board applied a completely different standard of review to Stingray's variance request than the Board has applied to all other, similarly-situated variance

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[27] *See, e.g.*, *Bauscher v. City of Newark Board of Adjustment*, 2002 WL 183935 (Del. Super.); *Dexter v. New Castle County Board of Adjustment*, 1996 WL 658861 (Del. Super.). *See also Reidinger v. Board of Adjustment of Sussex County*, 2010 WL 3792198 at *4 (Del. Super.) (wherein the Superior Court reversed a board of adjustment decision as "arbitrary and capricious", defined as "unreasonable or irrational, or that which is unconsidered or which is willful and not the result of a winnowing or sifting process").

applicants. Second, in all other instances where the Board has been presented with a non-conforming restaurant's request for a variance from § 270-28 of the City Code – for the purpose of obtaining a certificate of compliance, in order to secure a permit to operate an outdoor dining patio – the Board has readily granted the variance request, without hesitation. (B-106-295).

In sum, then, the Board has previously granted variances, and the City has previously issued certificates of compliance – thereby allowing restaurants to operate outdoor dining patios – in each and every one of the prior instances where the Board and the City have been confronted with facts and circumstances identical to the facts and circumstances presented by Stingray's Application and Appeal.[28] Moreover, in each and every one of those prior instances, the degree of the requested variance was of significantly greater magnitude than the variance requested by Stingray in the instant case ***and*** the size of the proposed patio was larger than the size of the patio proposed by Stingray's Application. (B-106-295). Accordingly, the Board's denial of Stingray's variance request in the instant case – utilizing a completely different standard of review than the Board has applied to all other, similarly-situated variance applicants – is wholly arbitrary and capricious.

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[28] *See* the September 7, 2012 Affidavit of Nicole M. Faries (B-296-297), evidencing that the ***only*** restaurants for which the Board has previously granted variances from § 270-28 of the City Code and for which the City has previously issued certificates of compliance – thereby allowing said restaurants to operate outdoor dining patios – are the four restaurants discussed herein, namely: Grotto Pizza, The Cultured Pearl, Nicola's Pizza, and The Greene Turtle.

For this reason, the Superior Court's decision reserving the Board's denial of Stingray's variance request must be upheld.

CONCLUSION

Reading § 215-7(B) of the City Code in harmony with all other applicable provisions of the Code, the Superior Court correctly determined that the addition of an outdoor dining patio at Stingray's Restaurant does ***not*** constitute an "extension or modification of the premises" of the Restaurant. Therefore, Stingray is not required to obtain a certificate of compliance as a prerequisite to obtaining a permit to operate an outdoor dining patio. Alternatively, the Board should have granted Stingray's request for an area variance, which in turn would have allowed Stingray to secure a certificate of compliance. Unfortunately, however, the Board failed to apply the proper legal standard in its review of Stingray's request for an area variance and otherwise arbitrarily denied Stingray's application.

For all the foregoing reasons, the decision of the Superior Court below should be affirmed.

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