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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, 2013D On Appeal from the Superior Court for the State of Delaware in and for Sussex County C.A. No. S11A-07-010 ESB

APPELLANTS' REPLY BRIEF ON APPEAL

Dated: July 25, 2013

WHITEFORD TAYLOR PRESTON, LLC
Daniel A. Griffith (DE ID 4209)
The Renaissance Centre, Suite 500
405 North King Street
Wilmington, DE 19801
Telephone: (302) 357-3254
Facsimile: (302) 357-3274
dgriffith@wtplaw.com

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LEGAL ARGUMENT

I. THE SUPERIOR COURT IMPROPERLY CONSTRUED THE REHOBOTH BEACH MUNICIPAL CODE.

A. The Rehoboth Beach Municipal Code Should Be Given Its Plain Meaning As The Code Is Not Ambiguous.

Appellant, the Rehoboth Beach parties, (hereinafter "Rehoboth Beach") contends, as it has since the inception of this dispute, that the provisions of the Rehoboth Beach Municipal Code ("RBMC") are clear and unambiguous. The Superior Court should have applied it's plain and ordinary meaning that Appellee, Stingray Rock, LLC (hereinafter "Stingray") concedes has been applied in other similar circumstances. If a statute is unambiguous, there is no need for judicial interpretation; the court applies the plain meaning of the statutory language. ***Doroshow, Pasquale, et al v. Nanticoke Mem. Hsp., Inc.***, 36 A.3d 336, 343 (Del. 2012). The Superior Court erred in applying its "tortured analysis" of the statutory language, changing the long-standing meaning of the terms and their effect. The Superior Court's decision must be reversed.

What is plainly apparent from Stingray's argument is Stingray has improperly focused the Court below on a small section of language in the Code from Section 215-7B, ignoring how the Code is set up which, if read as a whole, clearly and unambiguously shows Stingray is wrong and the decision of the Superior Court below must be reversed. In its Answering Brief Stingray

recognizes, and even points out, the RBMC does not include outdoor dining patios within the term "premises," but Stingray fails to see, or at least admit, that the RBMC characterizes outdoor dining patios as what is called an "extension of the premises," meaning the areas outside of the interior space of a restaurant. Not only does the RBMC treat outdoor dining patios this way, separately from interior space, but so does the Delaware State Code. The RBMC unambiguously legislated requirements for new patios. Stingray's argument that because the interior space of its restaurant was "grandfathered" as a legal non-conforming use it is exempted from complying with the RBMC requirements for constructing a *new* patio, which Stingray admits through its own argument is not included in the terms and definitions pertaining to the interior space of the restaurant, fails on its face.

Stingray sought to construct a *new* outdoor dining patio for its restaurant. The process to do so is clear pursuant to the RBMC's unambiguous terms. The first step, find the Code section addressing outdoor dining patios; it's located under "Use restrictions" in Chapter 270 "Zoning," specifically, §270-19A, which states:

> "Patios. **(1)** Patios, as defined herein, ***licensed, constructed or expanded after June 14, 1991***[1], and located in a commercial zone shall only be used for consumption of food and beverages **consistent with the following conditions**:
>
> > (a) "Patio" shall mean a deck or porch, of no more than 750 square feet, whether covered, uncovered, raised or at grade, *used in connection with a restaurant* and not necessarily attached thereto.

[1] ***Stingray does not have a patio that pre-existed June 14, 1991***; it is a new patio that Stingray intends to construct; therefore, all conditions contained in this Section apply to Stingray.

(b) Food and beverages may be served only to seated patrons and no patrons may await seating on the patio.

(c) There shall be no live entertainment on the patio.

(d) There shall be no external speakers or amplifiers on the patio and no internal speakers from the premises are to be directed to the patio.

(e) There shall be no bar on the patio.

(f) (Former section A(1)(f)was repealed) – *no longer applicable.*

(g) <u>No one</u> shall construct or operate a patio unless it is included in a <u>special permit of compliance issued pursuant to Chapter 215 of the Municipal Code of Rehoboth Beach, Delaware.</u>

(2) For all patios, any overflow of patrons onto public ways, pedestrian or vehicular is prohibited.

(3) For all patios, the blocking of the public ways, pedestrian or vehicular, by related activities is prohibited.

(4) A patio existing as of June 14, 1991, shall be considered a legal nonconforming use but shall be subject to all of the provisions of this chapter if expanded pursuant to a permit of compliance.[2]"

Pursuant to the clear and unambiguous RBMC provisions, to license, construct or expand a patio that did not exist prior to June 14, 1991, as is the case for Stingray, one ***must*** obtain a permit of compliance through the procedure outlined in Chapter 215 of the RBMC. See, §270-19A(1)(g).

The analysis should end here. The RBMC unambiguously requires Stingray to get a permit of compliance through the procedure set forth in Chapter 215 to

[2] Stingray intends to *build* a patio; it is not a pre-existing patio prior to June 14, 1991. As this section makes clear, even if it were pre-existing, if it were to be expanded a permit of compliance, as outlined in Chapter 215, would also be necessary as a pre-requisite.

construct its *new* patio as the RBMC permits **<u>"no one"</u>** to construct a new patio after June 14, 1991 without one. Stingray attempts to muddy the waters, arguing its "restaurant" existed before June 14, 1991, so it is exempted from complying with the provisions requiring the permit of compliance.[3] Stingray's argument is flawed on its face because, as Stingray acknowledges, the interior portion of the restaurant (which pre-existed) and the patio (which is yet to be constructed) are addressed independent of each other in the RBMC.[4],[5] One could look to Chapter 215, wherein §215-1 defines the "*permanent seated dining area*" of a restaurant to exclude the "square footage of floor space of a dining patio, as defined at §270-19A(1)(b)." Contrary to Stingray's argument,[6],[7] this underscores why the Superior

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[3] Importantly, Stingray has never argued it is entitled to receive a permit of compliance, therefore, acknowledging it needs a variance to obtain one as it is non-conforming.

[4] For example, see §270-53 "Relocation of nonconforming restaurant" followed by §270-54 "Relocation of nonconforming patio." The RBMC repeatedly addresses requirements for patios independently, supporting the point that §270-19A(1)(g) controls and requires Stingray to obtain the permit of compliance to construct its patio, necessarily requiring Stingray to get a variance first so a permit of compliance can be issued.

[5] Stingray's argument the patio is not a "structure", claiming the "structure" would remain unchanged with the patio addition, is false. RBMC §270-4 defines "structure" very broadly, and specifically including in the definition "decks and porches." Section 270-19A(1)(a) defines "patio" as a deck or porch. The addition of the patio would therefore enlarge the structure.

[6] Stingray mistakenly claims Rehoboth Beach contends the dining patio enlarges the permanent dining space making the variance/permit of compliance for the patio necessary; that is incorrect. Stingray presently operates as a legal non-conforming entity because its present indoor, permanent dining space exceeds permissible limits, but had so exceeded the limits prior to June 14, 1991, so it was permitted to continue to operate without first obtaining a variance. However, Stingray now wants to construct a *new* outdoor dining patio. To do so, §270-19 requires it to obtain a permit of compliance first, because the *patio* did not exist prior to June 14, 1991; however, a permit of compliance cannot be issued without the variance because the present status of the restaurant as a whole was non-conforming. In other words, the variance wasn't needed to continue to operate without any changes, but when a change came up, the variance had to be obtained to get the permit of compliance.

Court's analysis was flawed. We can refer to the plain language of Chapter 215 to confirm this.

The RBMC only has one procedure for obtaining a permit of compliance; it is the same procedure to obtain a permit of compliance for any reason the RBMC requires and is found in §215-3.[8] Pursuant to §270-19A(1)(g), Stingray *must* get this permit of compliance before it can construct a *new* patio. Despite being required by the clear and unambiguous language of §270-19A(1)(g), requiring the permit of compliance when one is going to license, construct or expand any patio after June 14, 1991, Stingray argues that §215-7B exempts it from having to obtain the necessary permit of compliance. But, again, Stingray's argument fails on its face. Not only would Stingray's argument render the purpose and meaning of §270-19A(1)(g) completely useless and unnecessary, the clear and unambiguous language of §215-7B also supports Stingray's position that the RBMC required Stingray to get the permit of compliance for the new patio. Section 215-7B states:

> "An existing restaurant or dinner theater, where alcoholic liquor is sold or consumed, established prior to June 14, 1991, is not required to obtain a

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[7] This is not to be confused with Rehoboth Beach's argument on the meaning of "extension of the premises." It argues the terms "modification" and "extension" in §215-7B have different meanings; "modification" applies to the restaurant's interior space, whereas "extension" means "extension of the premises," a phrase referring to areas outside the interior space, such as outdoor dining patios. This was discussed in detail in Rehoboth Beach's Opening Brief.

[8] There is no separate Section in Chapter 215 providing a procedure for obtaining a permit of compliance specific to patios; this is the only permit of compliance available, and when one needs a permit of compliance pursuant to the RBMC, such as in §270-19A(1)(g), requiring a permit of compliance to construct a new dining patio, it is the same permit of compliance that one would obtain for any other Code-required purpose.

> permit of compliance pursuant to this chapter, ***unless required as a condition of extension or modification of the premises of the restaurant*** or dinner theater. ***<u>However</u>, all such existing restaurants or dinner theaters shall have filed a floor plan, <u>including any patio areas,</u> with the City Manager on or before May 15, 1992.***"

Stingray, and the Court below, ignored the second sentence in §215-7B, focusing only on the words "extension or modification of the premises of the restaurant" in the first sentence, confusing the real issue, when by simply continuing to read the rest of the Section, the Code makes it clear that exemptions only apply to construction that pre-existed June 14, 1991, so *any* new construction, like a new patio, requires obtaining the permit of compliance. The Code uses the word "however", meaning the preceding sentence is modified by the requirements of the subsequent sentence. The second sentence, beginning with "however," requires the floor plans, explicitly ***"including any patio areas,"*** that qualify for exemption to be filed with the City Manager on or before May 15, 1992.[9] Stingray does not qualify for exemption from the requirement to obtain the permit of compliance because Stingray did not and could not have filed a floor plan that included "any patio area" before May 15, 1992, as the patio will be *newly* constructed; it is not pre-existing. Because the Code is clear and unambiguous, the plain and ordinary meaning of the provisions apply, requiring Stingray to obtain the permit of compliance to construct its new patio; the Superior Court must be reversed.

[9] The explicit reference to patios in §215-7B supports the conclusion the term "extension of the premises" refers to areas outside the interior space, such as outdoor dining patios.

To further solidify that the provisions were so plainly clear as to require a permit of compliance to construct a new patio, even Stingray pointed out that the other restaurants in Rehoboth Beach that sought to construct outdoor dining patios after June 14, 1991 followed this procedure and were required to first, get a variance (as their restaurants exceeded the square-footage requirements prohibiting them from being issued a permit of compliance without one) and then, apply for the permit of compliance so each could construct outdoor dining patios. As Stingray pointed out, this procedure has been followed over and over, uniformly, making it plainly clear that Stingray was also required under the clear and unambiguous Code provisions to first, get a variance, as a permit of compliance could not be issued without one since its interior dining space exceeds the square footage limitation (just like all the others), and then, once a variance is granted, Stingray could seek the necessary permit of compliance to construct its new patio. Yet, Stingray now argues the RBMC doesn't require the process that has been plainly apparent to all other previous applicants. This "tortured" analysis of the RBMC is contrary to the legislative intent, and would change how the law has been applied uniformly in the past to every other applicant.

The RBMC provisions are clear and unambiguous; no statutory construction analysis to construe terms was required. The Superior Court erred in doing so. It should have applied the plain and ordinary meaning of the RBMC, which has been

uniformly interpreted and applied to all other applicants in the past. The Superior Court must be reversed.

B. Even If This Court Finds Ambiguity In The Code Requiring Statutory Construction, The Superior Court's Analysis Was Incorrect and Renders An Absurd Result; It Must Be Reversed.

As outlined in the Opening Brief, the Superior Court improperly concluded, by way of a "tortured analysis" of statutory construction, that the phrase "extension or modification of the premises of the restaurant" should be read extraordinarily narrow to refer solely to modifications made to the interior of the restaurant. First, as outlined above, the Court failed to read the RBMC as a whole to give all provisions meaning, force and effect, particularly the specific provisions pertaining to patios, outlined in §270-19A, requiring Stingray to obtain the permit of compliance to construct a *new* outdoor dining patio, independent of any other RBMC provision. The Superior Court's failure to construe the RBMC terms in a manner in which all provisions have effect renders §270-19A(1)(g) completely meaningless, which is an absurd result, and is contrary to legislative intent and the principles of statutory construction.[10] Courts are required to construe the terms contained in statutes to give effect to all provisions, to every extent possible. See, ***Arbern-Wilmington, Inc. v. Director of Revenue***, 596 A.2d 1385 (Del. 1991) Also see, ***Moore v. Wilmington Housing Authority***, 619 A.2d 1166, 1173 (Del.

[10] Further, as outlined in the Opening Brief, Title 4 of the Delaware Code still requires Stingray to get the permit of compliance anyway, leading to another absurd result.

1993)("If uncertainty exists, the rules of statutory construction must be applied so as not to yield mischievous or absurd results," citing ***Spielberg v. State***, 558 A.2d 291 (Del. 1989)). Not only did the Superior Court fail to give appropriate force and effect to the other RBMC provisions through it's "tortured" statutory construction, it failed to recognize those provisions in the State Code that provide guidance, insight into the legislative history, and support Rehoboth Beach's position as to the meaning of the RBMC.[11]

Stingray's argument in its Answering Brief that the legislative purposes and intentions of the General Assembly in enacting the laws and regulations governing the sale of alcoholic beverages are not related to the RMBC provisions at issue is simply wrong; they are directly related. In fact, the RMBC provisions at issue arose as a result of it. Title 4 of the Delaware Code, the "Delaware Liquor Control Act," ("DLCA") refers to and uses the same terms referenced in the RBMC. The comparison, as well as the legislative history and context surrounding enactment of the provisions, provide additional support that the term "extension of the premises"

[11] Stingray claims Rehoboth Beach's objections to the Court's statutory interpretation, and/or reference to the State Code, were not properly raised before the Superior Court and therefore, cannot be raised now. However, as is clear by the arguments and briefs in the Court below, it has been Rehoboth Beach's position since inception that the RBMC is unambiguous and no statutory construction analysis was necessary. However, the Superior Court raised the issue of statutory construction in its Opinion by finding the statutory term(s) ambiguous. The Court was the first to reference Title 4 of the Delaware Code in its Opinion. It is proper and timely for Rehoboth Beach to address on appeal why the Court's statutory construction in interpreting the allegedly ambiguous term(s) was flawed, including an analysis of the references to which the Court cites, as it is Rehoboth Beach's first opportunity to do so.

is in fact referring to areas outside the internal dining space of the restaurant, particularly areas such as outdoor dining patios. Section 543(g) of Title 4 of the Delaware Code states:

> "The Commissioner **shall not** grant a ***new license*** of any type and **shall not** grant an ***extension of the premises of an existing license*** of any type **unless** **the application for said** new license or for said ***extension*** **is accompanied by a Certificate of Compliance from the appropriate political subdivision** showing:
>
> (1) That the premises where the license is to be used are properly zoned for the applicant's intended use; and
> (2) That all necessary permits have been approved; and
> (3) That the application has complied with all other applicable licensing requirements of the appropriate political subdivision."

Section 543(g) was signed into law by the Governor of the State of Delaware on **June 14, 1991.** See, 68 Del. Laws 44; 1991 Del. ALS 44; *also see,* http://delcode.delaware.gov/sessionlaws/ga136/chp044.shtml. It is evident the State enacted a law on June 14, 1991 requiring a Certificate of Compliance from municipalities for every license for an *extension of the premises.* Rehoboth Beach complied by requiring every applicant seeking to construct an outdoor dining patio, which is an extension of the premises, to obtain the now State-required permit of compliance to do so. The RMBC was clear that if the patio extension of the premises or other internal modification was in place prior to the State statute's enactment on June 14, 1991, the permit of compliance was not necessary.

Further, the State Code refers to a "premises" *and* an "extension of the premises" separately, because, like in the RBMC provisions, the "premises" refers

to the building and interior space of a restaurant, whereas an "extension of the premises" refers to areas outside thereof, such as outdoor dining patios. The Alcoholic Beverage Control Commission, through its Commissioner, promulgates Rules pertaining to the statutes in Title 4 of the Delaware Code. 4 *Del. C.* §308. The Delaware Alcoholic Beverage Control Rules ("DABC Rules") provide definitions of these terms, making it clear an outdoor dining patio is an extension of the premises. "Premises" is defined in Rule 42.1(B)(1). (A-160) Similar to the RBMC, the definitions in DABC Rules do not include the patio as part of the term "premises;" a patio is an "extension of the premises." The DABC Rules separately define the term "patio" at Rule 42.1(B)(2). (A-160) Thereafter, DABC Rule 42.1(C) addresses the "Patio Permit" wherein it states:

> "An ***extension of the premises patio permit*** may be issued, and valid during the term of the basic license, providing the following procedures are followed and said ***extension*** is approved by the Commissioner." (A-160)

The Rule then addresses "standards for patios" at Rule 42.1(F), the same standards outlined in the RBMC in §270-19 for patios. (A-161) The contents of the Rules and correlation to the terms in the RBMC confirm the inescapable conclusion that a patio is an "extension of the premises". Therefore, even if this Court finds the term "extension of the premises" in the RBMC was ambiguous, the statutory construction applied by the Superior Court was flawed; it reached an improper conclusion, and its decision must be reversed.

II. THE SUPERIOR COURT WAS INCORRECT IN REVERSING THE BOARD'S DENIAL OF THE VARIANCE

A. The Rehoboth Beach Board of Adjustment Applied The Proper Standard.

As outlined in the Opening Brief, the Superior Court incorrectly reversed the Board's decision for applying the use variance standard of "unnecessary hardship" as opposed to the area variance standard of "exceptional practical difficulties." The Board's decision denying Stingray's request for a zoning variance was supported by substantial evidence and should not have been reversed by the Superior Court.

However, even if this Court finds the standard for an area variance was proper, curiously, the Superior Court solely relied upon the Board's use of the word "hardship" various times during the hearing to conclude the Board applied the use variance standard as opposed to the area variance standard. But no one ever characterized the variance as either a "use" variance or an "area" variance during the hearing. Instead, Stingray was asked to identify the "hardship" he would face if the variance were denied. The term "unnecessary hardship" was not actually used. The standard for granting an area variance has five elements:

> "(1) the nature of the zone in which the property is located, (2) the character of the immediate vicinity, (3) the uses in that vicinity, (4) whether, if the restrictions were removed, would there be a serious effect on the neighboring property and uses, and (5) if the restriction(s) were not removed, would there be a ***hardship*** on the owner to make normal improvements allowed for the use permitted in the zoning regulations for that property." See, ***Wawa, Inc., v. New Castle Co. Board of Adjustments***, 929 A.2d 822 (Del. Super. Ct. 2005) (citing ***Kwik Check Realty, Inc., v.***

> ***Board of Adjustment of New Castle Co.,*** 369 A.2d 694 (Del. Super. Ct. 1977), *aff'd* at 389 A.2d 1289 (Del. 1978)).

Accordingly, ***both*** the use standard and the area standard require a showing of some hardship. The Superior Court should not have concluded the Board applied the "use" standard simply because it referenced the word "hardship." In reviewing the hearing transcript the Board also asked whether granting the variance to Stingray would harm the neighborhood in anyway, (A-095-A-096) which is directly related to element (4) for the area variance standard, and has nothing to do with the use variance standard. When Stingray came before the Board requesting a re-hearing, asserting the Board applied the wrong standard, the Board did not acknowledge having applied the use standard; instead, the June 27, 2011 minutes reflect the Board members recalled asking questions about hardship, but also recalled comments about the exceptional practical difficulty test. (See, A-116 – A-117). Further, in its Opinion the Superior Court, quoting the Delaware Supreme Court in *Kwik-Check Realty, Inc.*, 389 A.2d at 1291, said, "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." (A-145) In denying the variance, one of the Board members said, "I don't see that the hardship on the restaurant rises above the impact on the neighborhood; therefore, I vote for the motion to deny." (See, A-105). This is the same language the Delaware Supreme

Court used to evaluate an area variance under the exceptional practical difficulties standard. Therefore, it is possible for this Court to determine that the Superior Court's initial conclusion, (that a use variance standard as opposed to an area variance standard was applied during the Board hearing), was incorrect and that the Board did in fact apply the area variance standard. The Court could also find there was substantial evidence on the record to support the denial of the variance under that standard. Accordingly, the Superior Court's decision should be reversed.

If this Court concludes the Board did apply the use variance standard, and did so improperly, then under the law, if Stingray wanted to proceed, it would be required to re-file its request for a variance with the Board. The Superior Court, as the reviewing Court of the Board decision, is "not free to review the evidence and apply a different, more lenient, legal standard because to do so would be to substitute its own judgment for that of the Board." ***Hellings v. City of Lewes Bd. of Adjustment***, 734 A.2d 641, *5 (Del. 1999). This Court previously determined that on review of a Board's decision, the Superior Court, and consequently this Court, do not have the power to remand when the wrong legal standard was applied by the Board. ***Id.*, (citing *Searles v. Darling*,** 83 A.2d 96, 99-100 (Del. 1951) (other citations omitted.)) Instead, if this Court concludes the Board applied the use variance standard, and did so improperly, the decision of the Board would be reversed, but absent the power of remand, "such a reversal vacates the Board's

decision and the applicant may re-apply with the proceedings before the Board beginning anew." ***Hellings***, 734 A.2d at *7 (citing ***New Castle County Bd. Of Adjustment v. White***, 577 A.2d 754 (Del. 1990) (other citations omitted)). Therefore, the appropriate course of action under those circumstances is for Stingray, if it so chooses, to re-file a request for a variance with the Board so the Board may consider the testimony and evidence under the proper standard.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested this Honorable Court reverse the Decisions of the Superior Court of Delaware and deny Stingray's Appeal from the Board of Adjustment Decision below.

Respectfully submitted,

Dated: July 25, 2013

WHITEFORD TAYLOR PRESTON, LLC

/s/ Daniel A. Griffith

Daniel A. Griffith (DE ID 4209)
The Renaissance Centre, Suite 500
405 North King Street,
Wilmington, DE 19801
T: (302) 357-3254
F: (302) 357-3274
dgriffith@wtplaw.com

2058626