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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACK LINGO ASSET MANAGEMENT, LLC, and SUSSEX EXCHANGE PROPERTIES, LLC, FBO LINGO BROTHERS, LLC,	:	No. 292, 2021
Petitioners Below, Appellants,	:	On Appeal from the Superior Court of the State of Delaware, C.A. No. S20A-05-001 MHC
v.	:	
THE BOARD OF ADJUSTMENT OF THE CITY OF REHOBOTH BEACH, DELAWARE	:	
Respondent Below, Appellee.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: January 6, 2022

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NATURE OF PROCEEDINGS

The Rehoboth Beach Board of Adjustment ("Board") heard an appeal filed by Jack Lingo Asset Management, LLC and Sussex Exchange Properties, LLC FBO Lingo Brothers, LLC (collectively "Lingo") on August 26, 2019. After denying Lingo's appeal, the Board granted a motion for a new hearing, which was heard on November 25, 2019. The Board denied Lingo's second appeal.

Lingo appealed to the Delaware Superior Court on May 7, 2020. In its August 13, 2021 opinion, the Superior Court affirmed the Board's decision denying Lingo's appeal.

Lingo filed this appeal with the Delaware Supreme Court on September 10, 2021. As more fully detailed in Lingo's Opening Brief, Lingo made an error in filing its Notice of Appeal, but in an order dated October 28, 2021, the Court retained jurisdiction. Lingo filed its Opening Brief on December 8, 2021.

This is Appellee's Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly applied the Delaware rules of statutory construction to uphold the Board's decision that decks and stairways should be included in gross floor area calculations. The Superior Court appropriately harmonized the terms *wall*, *structure*, and *building* as defined in the City's Zoning Code to find that decks and stairways are unambiguously part of the gross floor area. This finding was supported by the Zoning Code's exclusion of the first 250 feet of open porches from the gross floor area, which demonstrates legislative intent to otherwise include open porches and similar structures in gross floor area calculations. The Superior Court correctly affirmed the Board's decision finding that multiple applications or interpretations of a statutory provision cannot be deemed to establish ambiguity without engaging in the Delaware rules of statutory construction.

2. Denied. The Superior Court correctly held that the Board's decision was based on substantial evidence. The Board heard substantial evidence to determine that errors had been made in the gross floor area calculations by the Building and Licensing Department, and the Department acted appropriately to not perpetuate the errors. Lingo's objection to the City Solicitor's statements at the hearings was not adequately raised before the Board and should be deemed waived. Even if Lingo's objection was adequately preserved, the City Solicitor engaged in proper legal arguments to which the Board could assign appropriate weight.

STATEMENT OF FACTS

The Board is appointed by the City of Rehoboth Beach ("City") pursuant to 22 *Del. C.* § 321 and § 270-70 of the Rehoboth Beach Zoning Code ("Zoning Code"). The Board is authorized to hear appeals from "any person aggrieved . . . by any decision of the Building Inspector."[1] Lingo filed an appeal with the Board pursuant to an adverse decision by the Building Inspector, which is the subject matter of this case.

Recognizing the need to appropriately regulate development, the City adopted a Zoning Code, the stated purpose of which is, *inter alia*, "to prevent overcrowding of land" and "to avoid undue concentration of population."[2] Directly correlated to these purposes, the City enacted regulations limiting building size, known as the "floor area ratio" ("FAR").[3] FAR is calculated by "dividing the gross floor area of all buildings on a lot by the gross lot area."[4] This appeal involves the calculation of "gross floor area" defined in the Zoning Code as "Floor Area, Gross" ("GFA").

A. Building And Licensing Department's Application Of The Zoning Code

In reviewing Lingo's building plans for property situated at 240 Rehoboth Avenue, Rehoboth Beach, Delaware ("Property"), the City's Building and Licensing

[1] Code of City of Rehoboth Beach § 270-71; *see* B:113.
[2] *Id.* § 270-1(B); *see* B:101.
[3] *Id.* § 270-21(B); *see* B:109-11.
[4] *Id.* § 270-4; *see* B:106.

Department ("BLD") has made mistakes. The BLD initially approved plans for Lingo that should have been denied.[5] The Board subsequently discovered in a related appeal that one or more Assistant Building Inspectors had incorrectly applied GFA calculations to residential properties,[6] inconsistent with the correct method the Chief Building Inspector employed for commercial properties.[7] Seizing the opportunity to improve, the BLD issued a notification that all future building permits would be subject to the correct GFA calculations ("GFA Notice").[8] Unfortunately, the notice created confusion by not mentioning that this course correction just applied to residential properties since GFA calculations had been correctly applied to commercial properties over the years.

Hindsight is always twenty-twenty. With what it now knows, the BLD could have operated more carefully to ensure that the correct GFA calculations were being applied to residential properties. Nevertheless, the BLD's missteps were considered by the Board, and notwithstanding the BLD's mistakes, the Board concluded that the BLD's interpretation of the GFA statute was correct.[9]

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[5] Bd. of Adjustment Hr'g Tr. 17-19, 34-35, Aug. 26, 2019 (hereinafter "Aug. 2019 Hr'g Tr."); *see* B:23-25, 37-38.
[6] Bd. of Adjustment Hr'g Tr. 28-29 Nov. 25, 2019 (hereinafter "Nov. 2019 Hr'g Tr."); *see* B:68-69.
[7] Bd. of Adjustment Case Summary, ¶ 10/11 (Oct. 15, 2019); *see* A:225.
[8] Bldg. & Licensing Notice (Sept. 24, 2019); *see* A:206.
[9] Bd. of Adjustment Decision, No. 0719-05, at 2 (Apr. 9, 2020); *see* A:264.

B. Initial Review Of Building Plans

Lingo seeks to redevelop the Property by converting a second-floor residential use into office space, creating one consolidated commercial use. The initial redevelopment plan included the installation of a second-floor deck and stairway.[10] The BLD was prepared to issue a permit for these improvements, but Lingo decided to eliminate the deck and stairway.[11] The State Fire Marshall's Office reviewed Lingo's revised building plans and refused to approve them because the second-floor offices did not have a dedicated stairway.[12] Lingo could have chosen to close off the first-floor access to the existing interior stairway so the stairway could exclusively serve the second floor, but Lingo decided instead to construct an exterior deck and stairway to serve the second floor.[13]

The City's Building Inspector determined that the proposed exterior deck and stairway would increase the GFA, thus triggering the need for an additional parking stall under § 270-30(B) of the Zoning Code.[14] At first glance, the Building Inspector mistakenly considered the parking requirement inapplicable to the first application because the renovations would not alter more than 75% of the Property's GFA

[10] Aug. 2019 Hr'g Tr. 18-19; *see* B:24-25.
[11] *Id.*
[12] *Id.*
[13] *Id.* 9; *see* B:15.
[14] Aug. 2019 Hr'g Tr. 8-9; *see* B:14-15.

pursuant to § 270-29(B).[15] In reviewing the revised plans, he realized he had overlooked the second condition in § 270-29(B) that triggers the parking requirement when a structure's GFA is increased.[16] Unwilling to close off the first-floor access to the existing interior stairwell to satisfy the fire code requirements, Lingo appealed the Chief Building Inspector's decision that the exterior deck and stairway would increase the Property's GFA and require an additional parking spot.

C. August 26, 2019 Hearing

The Board heard Lingo's first appeal on August 26, 2019 ("August Hearing"). Although Lingo's appeal stems from its unwillingness to comply with the Zoning Code parking requirements, this controversy centers on whether the parking requirement is triggered because the second-floor walkway and deck should be included in the GFA. Lingo presented minimal evidence at the August Hearing. No witnesses were called.[17] Lingo cited two alternative definitions of decks, along with the International Building Code's ("IBC") construction standards for exterior walls, and referenced the Building Inspector's report.[18] Otherwise, Lingo's entire presentation consisted of commentary and legal arguments by Lingo's counsel.

Lingo argued that the Zoning Code was unambiguous and the plain meaning

[15] *Id.* 34-35; *see* B:37-38; Code of City of Rehoboth Beach § 270-29(B); *see* B:112.
[16] *Id.* 8; *see* B:14.
[17] *Id.* 17-30; *see* B:23-36.
[18] *Id.* 26-29; *see* B:32-35.

of the phrase "exterior face of the exterior walls" should not be interpreted to include an exterior structure enclosed by a railing.[19] Alternatively, Lingo argued that if an ambiguity existed, it should be resolved in favor of Lingo.[20] Lingo attempted to clarify the definition of exterior walls in the Zoning Code by referencing the IBC exterior wall construction standards.[21] Lingo disputed the City's ability to use Zoning Code definitions to interpret the GFA, but Lingo did not provide an alternative interpretation of the defined terms.[22]

The City's presentation included testimony from the Building Inspector and legal arguments and commentary by the City Solicitor.[23] Lingo never objected at the August Hearing to the City Solicitor's comments as constituting improper evidentiary testimony. Tom Evans testified in support of the City's position, pointing out that the Zoning Code's definition of wall in § 270-4 included materials and a description consistent with a railing.[24]

After acknowledging that the hearing involved a potential ambiguity in the Zoning Code, the City Solicitor argued how the potential ambiguity could be resolved through appropriate statutory analysis.[25] The Solicitor argued that the intent

[19] *Id.* 23; *see* B:29.
[20] *Id.* 30; *see* B:36.
[21] *Id.* 27-28; *see* B:33-34.
[22] *Id.* 25; *see* B:31.
[23] *Id.* 7-16, 40-44; *see* B:13-22, 43-47.
[24] *Id.* 36-38; *see* B:39-41.
[25] *Id.* 40-44; *see* B:43-47.

behind the FAR calculations was to reduce the bulk of structures.[26] He further argued that legislative intent to include decks and walkways within the GFA was illustrated by the Zoning Code expressly excluding the first 250 square feet of an open porch from the GFA ("Open Porch Exclusion").[27] In support of the Building Inspector's decision, the City Solicitor noted that the GFA for the Agave restaurant included a proposed deck.[28]

After considering the evidence and arguments presented by both parties, the Board unanimously affirmed the Building Inspector's decision, finding that "the railing makes for additional GFA because the railing constitutes an exterior wall."[29]

D. November 25, 2019 Hearing For 240 Rehoboth Avenue

A month after Lingo's August Hearing, the Board heard another appeal involving GFA calculations for a commercial property situated at 17, 19, and 21 Baltimore Avenue ("19 Baltimore Avenue").[30] Consistent with its decision for the Lingo Property, the BLD determined that exterior decks attached to the proposed hotel should be included in GFA calculations.[31] The Board again upheld the BLD's

[26] *Id.* 41-42; *see* B:44-45.
[27] *Id.* 42-43; *see* B:45-46; Code of City of Rehoboth Beach § 270-21(B)(1)(a); *see* B:110.
[28] *Id.* 44; *see* B:47.
[29] Bd. of Adjustment Decision, No. 0719-05, at 3 (Sept. 23, 2019); *see* A:173.
[30] Chris Flood, *Rehoboth to Review Calculation of Gross Floor Area,* The Cape Gazette, Oct. 24, 2019, at 23; *see* A:208.
[31] *Id.*

interpretation of GFA calculations,[32] but the hearing revealed a number of errors committed by the BLD in calculating the GFA for residential properties.[33] Contrary to the Open Porch Exclusion, all 289.33 square feet of the porch at 13 Laurel Street were excluded from GFA calculations when only the square footage exceeding 250 square feet should have been excluded.[34] A mathematical error was made calculating the GFA for 13 Saint Lawrence Street.[35] Additionally, decks and similar structures had been excluded from GFA calculations for the residential properties identified in the presentation.[36] Upon learning of these errors, the BLD issued the GFA Notice the following day to clarify that all future building applications would be reviewed using the correct method of calculating GFA.[37]

At Lingo's November 25, 2019 re-hearing ("November Hearing"), the Board initially questioned why the GFA Notice did not resolve Lingo's appeal in Lingo's favor.[38] As the City Solicitor explained, the notice was intended to correct errors in residential GFA calculations.[39] The Solicitor admitted that the GFA Notice could

[32] *Id.*
[33] 19 Baltimore Ave. Presentation (Sept. 23, 2019); *see* A:175-205.
[34] *Id.* p. 17; *see* A:190.
[35] *Id.* p. 25; *see* A:198. The dimensions of the second floor measure 18.67 feet by 30 feet, but only 56 square feet were included in the GFA calculation instead of the full 560.1 square feet.
[36] *Id.*; *see* A:175-205.
[37] Bldg & Licensing Notice (Sept. 24, 2019); *see* A:206.
[38] Nov. 2019 Hr'g Tr. 3; *see* B:49.
[39] *Id.* 4; *see* B:50.

have been better drafted, but since the BLD's previous errors had not involved commercial properties, the notice was not needed to correct errors with building plan reviews for commercial properties.[40]

Lingo's only witnesses at the November Hearing consisted of brief statements made previously by the Mayor, Solicitor, and Building Inspector.[41] Lingo also relied on the presentation prepared by the attorney representing the 19 Baltimore Avenue property.[42] The City referenced the Building and Licensing Department's Case Summary prepared October 15, 2019 ("October Case Summary") and answered the Board's questions regarding the GFA Notice.[43] Both the City Solicitor and Lingo presented extensive legal arguments for their respective positions. Lingo never objected to the City Solicitor's statements except for a parting comment about the Board "not considering a lot of the City Solicitor's comments that have been about the legislative history of [the GFA provision]."[44]

Lingo's arguments and evidence offered to prove ambiguity were unpersuasive. The Mayor's unofficial comments in *The Cape Gazette* were not

[40] *Id.* 4-8; *see* B:50-54.
[41] *Id.* 17-18, 25-28; *see* B:63-68. Lingo indicated it cited the October Case Summary at the November Hearing as an evidentiary statement by the BLD proving ambiguity. Op. Br. 15. The October Case Summary was part of the record, but the only document Lingo cited appears to have been the GFA Notice. Nov. 2019 Hr'g Tr. 25-28; *see* B:65-68.
[42] Nov. 2019 Hr'g Tr. 28-29; *see* B:68-69.
[43] *Id.* 4-16; *see* B:50-62.
[44] *Id.* 73; *see* B:97.

afforded much weight given his questionable familiarity with the Zoning Code.[45] Chairman Capone engaged in a meaningful exchange with Lingo's Counsel regarding statutory interpretation in which Chairman Capone analyzed the defined terms pertinent to the GFA calculation, including the Open Porch Exclusion.[46] Board Member Brandt commented that "as [the Chairman] walked through 270-4, it was clear to me it was not ambiguous."[47] Despite being initially skeptical about the need for Lingo's second hearing, Board Member Kauffman was persuaded by the evidence and legal arguments presented by the City that the statute was unambiguous.[48] After weighing the legal arguments and evidence presented, the Board found the statute to be unambiguous and upheld the Building Inspector's decision.[49]

[45] *Id.* 50; *see* B:90.
[46] *Id.* 31-46; *see* B:71-86.
[47] *Id.* 48; *see* B:88.
[48] *Id.* 3, 50; *see* B:49, 90.
[49] Bd. of Adjustment Decision, No. 0719-05, at 2 (Apr. 9, 2020); *see* A:264.

ARGUMENT

I. THE SUPERIOR COURT AND THE BOARD CORRECTLY APPLIED THE RULES OF STATUTORY CONSTRUCTION TO UPHOLD THE CITY'S INTERPRETATION OF THE GROSS FLOOR AREA PROVISION

A. Question Presented

Should this Court affirm the Superior Court's holding that the Board correctly applied the rules of statutory construction to determine that the GFA provision in the Zoning Code is unambiguous?

B. Scope Of Review

This Court reviews questions of law, including questions of statutory interpretation, *de novo*.[50]

C. Merits Of Argument

Application of the well-settled rules of statutory construction support the Board's finding that decks and stairways are part of the GFA. The plain language of the Zoning Code unambiguously encompasses decks and stairways within the GFA, and to the extent a perceived ambiguity exists, the application of the rules of Delaware statutory construction resolves any potential ambiguity.

1. The Superior Court Followed The Delaware Rules Of Statutory Construction To Affirm The Board's Decision That The Gross Floor Area Provision Is Unambiguous

[50] *Walker v. State*, 230 A.3d 900, 2020 Del. LEXIS 168, at *3 (Del. May 4, 2020).

As this Court has stated, "the first step in any statutory construction requires us to examine the text of the statute to determine if it is ambiguous."[51] A statute is ambiguous if it is "reasonably susceptible of different interpretations"[52] or "a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature."[53] Analyzing the GFA provision within the context of the applicable Zoning Code definitions clarifies that the Zoning Code unambiguously requires decks and stairways to be included in GFA calculations.

The Zoning Code definitions create the framework for calculating the GFA. The commonly understood meaning of a term only controls if it is undefined.[54] In another case involving the interrelationship between the terms *building* and *structure* as defined in the City's Zoning Code, the Superior Court noted that "it is within the city's authority to say what a building is or is not through statute."[55] When read together, the Zoning Code definitions of *building*, *structure*, and *wall* establish decks and stairways as necessary components of GFA calculations.

The Zoning Code defines *Floor Area, Gross* or GFA as "[t]he sum of the gross

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[51] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007) (citation omitted).
[52] *Chase Alexa, LLC v. Kent County Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010).
[53] *Leatherbury*, 939 A.2d at 1288 (citation omitted).
[54] *French v. State*, 38 A.3d 289, 291 (Del. 2012) ("[I]f the words are not defined, they are given their commonly understood, plain meaning.").
[55] *Neon Oyster v. City of Rehoboth Beach*, 2002 Del. Super. LEXIS 466, at *8 (Del. Super. Ct. June 27, 2002).

horizontal areas of the several floors of a *building* measured from the exterior face of the *exterior walls* . . . ."[56] *Building* is defined as a "*structure*, usually roofed, walled and built for permanent use, as for a dwelling or for commercial purposes."[57] The Code defines *structure* as follows:

> Anything 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, ventilating and cooling devices, compressors or pumps and showers, and excluding driveways and sidewalks.[58]

In a case holding that the City's expansive definition of structure included bulkheads, the Superior Court stated, "There is nothing ambiguous about the zoning code's definition of 'structure.' Given the broad definition of 'structure' and the definition of a 'bulkhead' as a particular type of structure, it is only logical that a bulkhead is a structure . . . ."[59] Decks are structures by express inclusion in the definition. Given the broad definition of structure recognized by the Superior Court to include bulkheads, stairways also qualify as structures.

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[56] Code of the City of Rehoboth Beach § 270-4 (emphasis added); *see* B:105. By way of clarification, subsequent to Lingo's appeal, the City amended the definition of *Floor Area, Gross* to include subsections (C) – (F); *see* B:105-06.
[57] *Id.* (emphasis added); *see* B:103.
[58] *Id.* (emphasis added); *see* B:107.
[59] *Silver Nine, LLC v. Bd. of Adjustment of Rehoboth Beach*, 2010 Del. Super. LEXIS 111, at *6 (Del. Super. Ct. Mar. 8, 2010).

As structures, decks and stairways also qualify as buildings because they are usually, though not always, "roofed, walled and built for permanent use."[60] Meanwhile, defined structures such as pergolas and gazebos that do not usually have walls, and structures like pools, fences, and HVAC equipment that do not usually have roofs, would not be considered buildings that would be subject to GFA calculations.

The Zoning Code definition of wall establishes the exterior railings of a building, such as a deck or stairway, as exterior walls enclosing horizontal areas that are to be included in GFA calculations. *Wall* is defined as:

> 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.[61]

Since a wall is the "vertical exterior surface" of any structure qualifying as a building, deck and stairway railings would be defined as walls. As buildings with exterior walls, contrasted with the interior stairway situated at the Property, decks and stairways such as those proposed by Lingo would unambiguously be included in the GFA.

The Board's analysis of the Zoning Code to clarify the meaning of exterior

[60] Code of the City of Rehoboth Beach § 270-4; *see* B:103.
[61] *Id.*; *see* B:108.

wall may in fact be "long-winded and tortured" as Lingo suggests, but the Board contends its analysis is nevertheless accurate. Inaccurate, however, is the allegation that the Board's interpretation of the definitions has "no basis in the plain language of the Code."[62] The Board's analysis actually gives meaning to the defined terms in a synchronized and harmonious way and is consistent with the purpose of the Zoning Code "to prevent overcrowding of land" and "to avoid undue concentration of population."[63]

Lingo attempts to demonstrate ambiguity by proposing its own exterior wall definition that excludes decks and stairways from the GFA.[64] While the Zoning Code may not define exterior wall, Lingo ignores the Zoning Code's actual definition of wall. Lingo even proposes its own definition of exterior wall by relying on the Merriam-Webster Dictionary definition of wall instead of the Zoning Code's definition of wall.[65] There is no legal basis to suggest that the dictionary definition of wall should be used to create a definition for exterior wall when the term wall is expressly defined in the Zoning Code. Any attempt to give meaning to the phrase "exterior walls" should include the Zoning Code's definition of wall.

Lingo also inaccurately attempts to rely on the International Building Code

[62] Op. Br. 24.
[63] Code of the City of Rehoboth Beach § 270-1(B); *see* B:101.
[64] Op. Br. 23-24, 27.
[65] Op. Br. 24.

("IBC") definition and construction standards for exterior walls to establish a Zoning Code definition for exterior walls.[66] The Zoning Code and IBC are part of the comprehensive City Code, but they are separate sections with their own defined terms.[67] The City is free to define Zoning Code terms in the manner it deems most appropriate,[68] and the City has elected to not incorporate the IBC definition of wall or exterior wall into the Zoning Code.

In contrast to the three-pronged Zoning Code definition of wall,[69] the IBC simply defines wall as "[a] vertical element with a horizontal length-to-thickness ratio greater than three, used to enclose space."[70] It would be illogical to replace the Zoning Code definition of wall with the IBC's definition of wall or to incorporate the IBC definition of exterior wall into the Zoning Code when the root term, wall, is already defined in the Zoning Code. With wall being distinctly defined in the Zoning Code, the IBC construction standards for exterior walls as defined in the IBC would be immaterial.

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[66] Op. Br. 23-24.

[67] Shortly after the November Hearing, the City of Rehoboth Beach adopted the 2018 IBC in place of the 2012 IBC. Code of the City of Rehoboth Beach § 102-1; *see* B:100. There are not believed to be any material differences between the two Codes with respect to the matter before the Court.

[68] *Neon Oyster*, 2002 LEXIS 466, at *8.

[69] Code of the City of Rehoboth Beach § 270-4; *see* B:108.

[70] International Building Code § 202 (2018); *see* B:123. A number of other terms are also defined differently in the IBC and Zoning Code, such as attic, basement, building, building area, dwelling, and dwelling unit. *Id.* § 202; *see* B:118-21; Code of the City of Rehoboth Beach § 270-4; *see* B:102-04.

Anticipating potential overlap with other municipal regulations, the IBC provides that "[t]he provisions of this code shall not be deemed to nullify any provisions of local, state or federal law."[71] To the extent there is any conflict between defined terms, the terms defined in the Zoning Code should apply to Zoning Code regulations, such as calculating GFA using the Zoning Code definition of wall. Defined terms in one code cannot be used interchangeably with the other code, and any reliance on the definition or construction standards for exterior walls in the IBC is misplaced and cannot "be deemed to nullify any provisions of [the Zoning Code.]"[72]

As Chairman Capone demonstrated at the November Hearing, the definitions of *structure, building*, and *wall* all work together to create an unambiguous interpretation of the GFA definition.[73] The Zoning Code's definitions for these terms clarify that decks and stairways fall within the definition of building as types of structures, while deck and stairway railings fall within the definition of walls. When these terms are harmonized together, the Zoning Code unambiguously requires

[71] International Building Code § 102.2 (2018); *see* B:116. With respect to resolving conflicting laws, § 102.4.1 resolves conflicts between the IBC and "referenced codes and standards" in favor of the IBC. The referenced codes and standards are found in Chapter 35 and § 101.4; *see* B:115-16, 124-52. Local zoning codes, such as the Rehoboth Beach Zoning Code, are not referenced in § 101.4 nor Chapter 35 and would not be controlled by the IBC.
[72] *Id.* § 102.2; *see* B:116.
[73] Nov. 2019 Hr'g Tr. 31-46; *see* B:71-86.

decks and stairways to be included in the GFA.

2. Mistakes Committed By Municipal Employees Do Not Automatically Establish Ambiguity In The Zoning Code

A municipal employee's incorrect application or interpretation of the Zoning Code is insufficient to automatically establish a statutory ambiguity in the Zoning Code.[74] An ambiguity arises when a statute "is reasonably susceptible of two interpretations."[75] Lingo argues that two different interpretations of the GFA provision "are *prima facie* evidence that it is ambiguous—and requires interpretation in favor of the property owner."[76] This rationale is flawed for several reasons.

The Delaware rules of statutory construction do not support a bright-line rule establishing ambiguity in favor of landowners any time two municipal employees interpret or apply a code provision differently. This Court has summarized the statutory construction rules as follows:

> The rules of statutory construction are well settled. First, the goal is to ascertain and give effect to the intent of the legislature. Second, if the statute is unambiguous, the language of the statute controls. Third, if the words are not defined, they are given their commonly understood, plain meaning. *Finally, if the statute is ambiguous, because it is reasonably susceptible to two interpretations, the Court must apply additional rules designed to resolve the ambiguity.*[77]

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[74] *Jack Lingo Asset Mgmt. v. Bd. of Adjustment of the City of Rehoboth Beach*, 2021 Del. Super. LEXIS 561, at *15 (Del. Super. Ct. Aug. 13, 2021).
[75] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).
[76] Op. Br. 30.
[77] *French v. State*, 38 A.3d 289, 291 (Del. 2012) (emphasis added) (citations omitted).

A finding of a potential ambiguity does not conclude the analysis in favor of the property owner. To the contrary, the first step in statutory construction is to determine if a potential ambiguity exists.[78] If there is a question of ambiguity, the Court must then apply the rules of statutory construction to determine whether the ambiguity is reconcilable. If a potentially ambiguous statute cannot be reconciled *after* applying the rules of statutory construction, only then would the statute be deemed ambiguous and interpreted in favor of the landowner.

Key rules of statutory construction for an ambiguous statute were highlighted by this Court in *Dewey Beach Enterprises v. Bd. of Adjustment of Dewey Beach*.

> *Several rules guide courts in the construction of an ambiguous statute*: [E]ach part or section [of a statute] should be read in light of every other part or section to produce an harmonious whole. Undefined words in a statute 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 the statutory language, if reasonably possible.[79]

After finding a term in the Dewey Beach zoning code to be ambiguous, this Court engaged in meaningful statutory interpretation to clarify the ambiguous term.[80] Only after utilizing the rules of statutory construction should a court determine whether a statute is irreconcilably ambiguous. Consequently, different code interpretations by

[78] *Leatherbury*, 939 A.2d at 1288 (citation omitted).
[79] *Dewey Beach Enters., Inc.*, 1 A.3d at 307-08 (emphasis added) (citations omitted).
[80] *Id.* at 308-10.

municipal employees do not automatically establish an ambiguity. Instead, they open the door to statutory analysis to determine whether an irreconcilable ambiguity exists.

Lingo's argument is not only contrary to the Delaware rules of statutory construction, but it would empower entry-level municipal employees to effectively change the law contrary to their supervisor's opinion and legislative intent. Anytime the City's Assistant Building Inspector interprets or applies a code provision differently than another employee, Lingo's bright-line rule would create an irrefutable ambiguity benefiting the property owner. It would not matter if the Assistant Inspector made a mistake, was unintentionally acting contrary to the Chief Inspector's interpretation, was applying the provision in an unreasonable manner, or was disregarding the intent of the legislature. The Assistant Building Inspector's application or interpretation would undermine the actions of everyone else to establish an ambiguity to the detriment of the municipality. As the Superior Court pointed out, this could undercut the purpose of a statute and be contrary to legislative intent.[81]

Lingo's interpretation would also limit a supervisor's ability to correct subordinate employees without legislative action. Every time the Chief Building Inspector discovers the Assistant Building Inspector has incorrectly interpreted a

[81] *Jack Lingo Asset Mgmt.*, 2021 LEXIS 561, at *15.

code provision, Lingo's approach would prohibit the Chief Inspector from making an administrative course correction to create a consistent code interpretation within the department. The mere fact that there had been two interpretations of the code would automatically establish an ambiguity, effectively altering the law to benefit the property owner. The Chief Inspector's only remedy would be to petition the legislature to amend the code provision to eliminate the presumed ambiguity, even if the Chief Inspector and legislature determined the provision was clear and unambiguous and did not need amending. To avoid such an absurd result, a department's future application of municipal laws should not be restricted by an employee's prior incorrect code interpretation or application.

Following the Delaware rules of statutory construction prevents such a result because two different interpretations by Building Inspectors would not effectively alter the law to the detriment of the municipality by automatically establishing an ambiguity. Instead, the supervisor could appropriately determine how the department should apply the code to give effect to legislative intent. If the legislative body disagreed with the supervisor's interpretation, the legislative body could clarify the law. This is the correct and logical approach.

Delaware law pertaining to illegal building permits supports a municipality's ability to correct employee actions that contradict the law. In *City of Rehoboth Beach v. Shirl Ann Assocs.*, the City sought to have a hotel sign removed that had been built

pursuant to an incorrect permit issued by the building inspector "in contravention of the clear provisions of the Rehoboth Beach Zoning Code."[82] Despite the building inspector's error, the Court ruled partially in the City's favor by limiting the illumination of the sign, explaining that an illegally issued permit has no validity, "whether its issuance was caused by error as to what the ordinance provided or an error as to the facts of the case, no matter how induced."[83] To hold otherwise would empower a building inspector to alter the law by issuing illegal building permits that would be irrevocable.

Potentially ambiguous statutes must be interpreted following the Delaware rules of statutory construction to try to reconcile any potential ambiguity, and an ambiguity is not automatically established just because a subordinate employee interprets a statute differently than a supervising employee.

3. If The Zoning Code Is Ambiguous, Application Of The Delaware Rules Of Statutory Construction Eliminate Any Question That Decks And Stairways Should Be Included In The Gross Floor Area

The Delaware rules of statutory construction support the BLD's interpretation that decks and stairways should be included in the GFA. When a statute is determined to potentially be ambiguous, the rules of statutory construction must be

[82] *City of Rehoboth Beach v. Shirl Ann Assocs.*, 1993 Del. Ch. LEXIS 225, at *2 (Del. Ch. Aug. 31, 1993).
[83] *Id.* at *2-3, 8 (citing *Rathkopf's The Law of Zoning and Planning* § 49.09, pp. 49-59 (1992)).

applied to try to resolve the ambiguity.[84] The rules of statutory construction require defined terms to be read in light of their definitions,[85] while undefined terms are "given their ordinary, common meaning."[86] All parts of a statute "should be read in light of every other part or section to produce an harmonious whole."[87] Statutory language "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."[88] Additionally, "the Board's interpretation of an ambiguous zoning ordinance should be given great weight and should not be overturned unless contrary to law."[89]

Any doubt about GFA calculations is resolved by harmonizing the GFA definition with the Open Porch Exclusion, which supports including decks and stairways in the GFA calculation. In creating an exclusion from the GFA requirements, the Code states:

> The 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

[84] *French*, 38 A.3d at 291.
[85] *Id.*
[86] *Dewey Beach Enters., Inc.*, 1 A.3d at 307-08.
[87] *Id*. at 307.
[88] *Chase Alexa, LLC*, 991 A.2d at 1152 (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)).
[89] *W & C Catts Family, L.P. v. Town of Dewey Beach*, 2018 Del. Super. LEXIS 1535, at *25 (Del. Super. Ct. Nov. 30, 2018).

> air-conditioned. *Any square footage in excess of 250 square feet shall be included in the gross floor area*.[90]

This exemption applies to a limited subset of porches that meet the six criteria outlined, and for those qualifying porches, it only applies to the first 250 square feet. If porches were never intended to be included in the GFA calculation, there would be no need for this narrowly-drawn exception pertaining to porches.[91] Just as the City expressly decided to carve out an exception to the GFA for a porch, which is a structure qualifying as a building, the City could have also chosen to exclude other similar structures like decks or stairways, but it did not.[92] Harmonizing these provisions and giving meaning to the Open Porch Exclusion requires decks and stairways to be included in GFA calculations. Ignoring the Open Porch Exclusion would be to construe it as surplusage, which is contrary to the Delaware rules of statutory interpretation.[93]

The October Case Summary highlights other Zoning Code provisions that also support the inclusion of structures like decks and stairways in GFA calculations. For example, in order to determine whether 1,000 feet of a basement can be excluded

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[90] Code of the City of Rehoboth Beach § 270-21(B)(1)(a) (emphasis added); *see* B:110.

[91] Bd. of Adjustment Decision, No. 0719-05, at 2 (Apr. 9, 2020) (The Open Porch Exclusion demonstrated that "the intent of the drafters of the code was to include external areas in the [GFA] calculation such as the ones proposed by [Lingo]."); *see* A:264.

[92] *Jack Lingo Asset Mgmt.*, 2021 LEXIS 561, at *14-15.

[93] *Dewey Beach Enters., Inc.*, 1 A.3d at 307-08 (citation omitted).

from GFA calculations of a residence, the FAR "of the residence structure combined with the accessory structures" must meet a certain threshold.[94] The October Case Summary also highlights how FAR calculations in commercial districts, which are dependent on and related to GFA calculations, include both buildings and structures.[95] The parking requirement at issue in this appeal also expressly references structures.[96]

While a reference to structure could at first glance be construed as duplicative when buildings are also mentioned, the repeated references to structures emphasize the importance of structures to GFA calculations. When these provisions are harmonized with the key definitions and the Open Porch Exclusion, the logical result is that structures like decks and stairways must be included in GFA calculations.

A principal purpose of statutory construction is to "give effect to the intent of the legislators, as expressed in the statute."[97] The Open Porch Exclusion clarifies that the legislature intended to include structures qualifying as buildings in the GFA

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[94] Code of the City of Rehoboth Beach § 270-21(B)(1)(b)(3); *see* B:110; Bd. of Adjustment Case Summary, at p. 3 (Oct. 15, 2019); *see* A:223.
[95] Code of the City of Rehoboth Beach § 270-21(B)(5) ("In all commercial districts, the floor area ratio (FAR) for all buildings or structures shall not exceed 2.0. . . ."); *see* B:110; Bd. of Adjustment Case Summary, ¶ 12; *see* A:225.
[96] Code of the City of Rehoboth Beach § 270-29(B) ("This article shall not apply to any existing structure unless 75% or more of the gross floor area of the structure is altered or the gross floor area of the structure is increased in size."); *see* B:111-12; Bd. of Adjustment Decision, No. 0719-05, at 2 (Apr. 9, 2020); *see* A:264.
[97] *Dewey Beach Enters., Inc.*, 1 A.3d at 307 (citation omitted).

calculations, with the exception of the first 250 square feet of porches that meet narrowly defined criteria. This interpretation reduces the bulk of buildings and furthers the intent of the Zoning Code to lessen congestion in the streets, prevent overcrowding of land, and avoid undue concentration of population.[98] As stated by this Court, "[r]ead any other way, the statute would not make sense."[99]

[98] Code of the City of Rehoboth Beach § 270-(1)(B); *see* B:101.
[99] *Chase Alexa, LLC*, 991 A.2d at 1152.

II. THE SUPERIOR COURT CORRECTLY HELD THAT THE BOARD RELIED ON SUBSTANTIAL EVIDENCE TO FIND THAT THE BUILDING AND LICENSING DEPARTMENT HAD CORRECTLY INTERPRETED THE ZONING CODE TO INCLUDE DECKS AND STAIRWAYS IN GROSS FLOOR AREA CALCULATIONS

A. Question Presented

Should this Court affirm the Superior Court's holding that the Board relied on substantial evidence to find that decks and stairways are included in the GFA calculations?

B. Scope Of Review

This Court reviews the Board's decision in order to determine if "substantial evidence exists to support the Board's findings of fact and conclusions of law."[100]

C. Merits Of Argument

The Board heard substantial evidence over two public hearings to support its decision that decks and stairways should be included in the GFA calculations. "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. It is greater than a scintilla and less than a preponderance."[101] Substantial evidence is "a low standard to affirm, and a high standard to overturn."[102] Unlike the preponderance of the evidence standard, substantial evidence does not

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[100] *New Cingular Wireless PCS v. Sussex County Bd. of Adjustment*, 65 A.3d 607, 610 (Del. 2013) (citation omitted).
[101] *Gala v. Bullock*, 250 A.3d 52, 69 (Del. 2021) (citations omitted).
[102] *Dover Land Holdings, LLC v. Kent County Bd. of Adjustment*, 2016 Del. Super. LEXIS 331, at *6 (Del. Super. Ct. July 15, 2016).

require a finding of "the greater weight of the evidence" for a particular party.[103] As part of a substantial evidence review, this Court "will not weigh the evidence, determine questions of credibility, or make [its] own factual findings."[104] Although a court may limit the weight given to a building inspector's code interpretation,[105] deference should be given to the Board's factual findings that are supported by substantial evidence.[106]

This Court should uphold the Superior Court's decision that the Board relied on substantial evidence to find that decks and stairways should be included in GFA calculations.[107]

1. The Board Relied On Substantial Evidence To Determine That Decks And Stairways Are Included In Gross Floor Area Calculations

After the City and Lingo presented evidence and legal arguments to the Board over two hearings, the Board concluded twice that decks and stairways are part of the GFA. At these hearings, the Board was responsible "to weigh evidence and

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[103] *Taylor v. State*, 2000 Del. LEXIS 58, at *7 (Del. 1999).
[104] *New Cingular Wireless PCS*, 65 A.3d at 610 (citation omitted).
[105] *Clark v. Packem Assoc.*, 1991 Del. Ch. LEXIS 133, at *25 (Del. Ch. 1991).
[106] *Id.* at *24 n.14 (citation omitted).
[107] Lingo has not briefed its argument raised before the Superior Court that the Board's result was arbitrary and capricious, which argument should be considered waived by this Court. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.") (citation omitted).

resolve conflicting testimony and issues of credibility."[108] The record of both hearings indicate that the Board heard evidence "which a reasonable mind might accept as adequate to support" the Board's decision that decks and stairways are part of the GFA.[109]

Lingo presented unpersuasive evidence at both hearings that decks and stairways were not intended to be included in GFA calculations or, in the alternative, the GFA calculations were ambiguous and should be resolved in Lingo's favor. Lingo offered the former Mayor's personal opinion regarding ambiguity, but when his comments were read in context, he actually implied that decks and patios should always be included in GFA calculations for commercial properties.[110] In the words of the Mayor, "[T]he city commissioners need to have a long discussion if these outdoor patios and decks should be counted toward the gross floor area *for residential and commercial or only commercial.*"[111] The Board was entitled to give minimal weight to the Mayor's unsubstantiated statements regarding ambiguity in which the sole justification was that the GFA requirement was confusing and needed to be clarified.[112]

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[108] *Mellow v. Bd. of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd* 567 A.2d 422 (Del. 1989).
[109] *Gala*, 250 A.3d at 69.
[110] Chris Flood, *Rehoboth to Review Calculation of Gross Floor Area*, The Cape Gazette, Oct. 24, 2019, at 23; *see* A:208.
[111] *Id*. (emphasis added).
[112] *Id*.

The GFA Notice and October Case Summary cited by Lingo as evidence of ambiguity acknowledge that residential and commercial building inspectors were inconsistently applying the GFA calculations to residential properties.[113] The Board could reasonably determine these were not concessions of ambiguity, however, since the same October Case Summary expressly refutes any ambiguity in the GFA provisions in at least three instances.[114] As summarized in paragraph 12, "There is no ambiguity in the interpretation of the code and decks do constitute a structure considered in the calculation of gross floor area."[115]

Likewise, the Board could reasonably find the City Solicitor's August Hearing comments to not be a declaration of ambiguity but rather an introduction to his legal arguments about using statutory interpretation to analyze potentially ambiguous statutes. In particular, the Board reasonably found the Solicitor's arguments about the Open Porch Exclusion indicative of legislative intent to include structures, such as porches, decks, and stairways, in GFA calculations.[116] Planning Commission Chairman Richard Perry provided testimony questioning the appropriate weight the

[113] Bd. of Adjustment Case Summary, ¶ 10/11 (Oct. 15, 2019); *see* A:225.
[114] *Id.* ¶ 2, 12, 13; *see* A:224-26.
[115] *Id.* ¶ 12; *see* A:225.
[116] Aug. 2019 Hr'g Tr. 41-44; *see* B:44-47. Lingo expressed concern over the City Solicitor's reference to the FAR at the August Hearing. Op. Br. 34-35. Since FAR cannot be calculated without first calculating the GFA, the two terms are directly correlated with each other. Any comments regarding the legislative intent of the FAR would also be applicable to the GFA.

Open Porch Exclusion should be given towards determining legislative intent.[117] However, Mr. Perry's comments actually supported the Solicitor's arguments because Mr. Perry testified that the Open Porch Exclusion was adopted in response to a commissioner's concern that the City would otherwise be losing front porches.[118] If structures like open porches were not intended to be included in GFA calculations, there would have been no need to include the Open Porch Exclusion in order to save front porches as indicated by Mr. Perry.

Substantial evidence existed for the Board to find that prior applications of the GFA calculations were mistakes and not indicative of legislative intent. Lingo presented evidence that the GFA for residential properties had been calculated incorrectly.[119] Building inspectors had made a mathematical error,[120] had failed to properly apply the Open Porch Exclusion,[121] and had not included decks and similar structures in GFA calculations.[122] The October Case Summary confirmed that the Assistant Building Inspector was applying the GFA calculations to residential properties in a manner the Chief Building Inspector determined to be inaccurate.[123] Except for the initial mistake with the Lingo application, the record confirms the

[117] Nov. 2019 Hr'g Tr. 71-72; *see* B:95-96.
[118] *Id.*
[119] 19 Baltimore Ave. Presentation (Sept. 23, 2019); *see* A:175-205.
[120] *Id.* p. 17; *see* A:190.
[121] *Id.* p. 25; *see* A:198.
[122] *Id.* pp. 8-32; *see* A:181-205.
[123] Bd. of Adjustment Case Summary, ¶ 10/11 (Oct. 15, 2019); *see* A:225.

BLD consistently included structures like decks and stairways in GFA calculations for commercial properties, including the Property and 19 Baltimore Avenue. The record includes no examples of the BLD excluding decks and stairways from GFA calculations for commercial properties.[124]

The Board heard substantial evidence to find that any difference between residential and commercial permit application reviews was erroneous, making it necessary to correct residential building permit review errors to align with the correct interpretation being used for commercial properties. As the Board summarized in its final decision for 240 Rehoboth Avenue, "[R]egardless of the history of varying interpretations of the definition of gross floor area, the decision from which the applicant appeals is the correct interpretation."[125] Given the substantial evidence upon which the Board's decision rested, and in light of the deference the Court gives the Board,[126] the Board's decision must be upheld as a rational and reasonable decision supported by substantial evidence.

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[124] The City Solicitor appears to have misspoken at the November 2019 hearing when he stated that the attorney in the 19 Baltimore Avenue case demonstrated that different building inspectors had "reviewed commercial plans differently than the current Building Inspector." Nov. 2019 Hr'g Tr. 7; *see* B:53. The 19 Baltimore Avenue case only included examples for residential properties. 19 Baltimore Ave. Presentation (Sept. 23, 2019); *see* A:175-205.

[125] Bd. of Adjustment Decision, No. 0719-05, at 2 (Apr. 9, 2020); *see* A:264.

[126] *W & C Catts Family, L.P.*, 2018 LEXIS 1535, at *25.

2. The Board Did Not Rely On Improper Statements By The City Solicitor To Find Substantial Evidence, And Any Such Arguments Are Waived As They Were Not Raised Before The Board At The August Or November Hearings

The City Solicitor's comments at the August Hearing did not constitute improper testimony, and Lingo waived such arguments by failing to appropriately raise them before the Board.[127] To the extent this argument was adequately preserved, the City Solicitor's comments constituted appropriate legal arguments to which the Board was permitted to assign appropriate weight.

Lingo failed to adequately raise allegations of improper testimony by the City Solicitor at either the August Hearing or the November Hearing. "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."[128] In this case, there are no grounds on which the interest of justice would require the Court to consider Lingo's argument regarding improper testimony by the City Solicitor, and the Court should consider this argument waived by Lingo.

At the August Hearing where the City Solicitor's allegedly improper testimony occurred,[129] Lingo never raised any objection to the Solicitor's comments.

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[127] *DiFebo v. Bd. of Adjustment*, 132 A.3d 1154, 1158-59 (Del. 2015).
[128] Supr. Ct. R. 8.
[129] Op. Br. 34.

In response to comments by the Board's attorney about legislative history several months later at the November Hearing, Lingo's counsel questioned the City Solicitor's statements about legislative history,[130] but this did not constitute an adequate objection to the Solicitor's comments at either hearing. Failure to adequately raise this argument at either the August Hearing or November Hearing prevented the Board from considering and acting on the objection. Had an objection been properly raised, the Board could have sought clarifying testimony from the BLD representative in attendance at each hearing or decided whether it was necessary to adjourn the hearing to compel the attendance of additional witnesses. Lingo cannot raise this argument at this stage in the proceeding, and the Court should deem this argument waived.

Even if Lingo had adequately preserved its objection before the Board, Lingo's claim that the City Solicitor provided improper testimony at the August Hearing or the November Hearing regarding legislative intent is without merit. There is a difference between legislative history and legislative intent. *Black's Law Dictionary* defines legislative history as "[t]he background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates."[131] Legislative intent is defined as "[t]he design or plan that the legislature had at the

[130] Nov. 2019 Hr'g Tr. 73; *see* B:97.
[131] Black's Law Dictionary (7th ed. 1999).

time of enacting a statute."[132] This distinction matters.

At the November Hearing, the City Solicitor read the following from *Dewey Beach Enterprises*. "The rules of statutory construction are well settled; they are designed to ascertain and give effect to the *intent of the legislators*."[133] The Solicitor proceeded to make legal arguments regarding the *legislative intent* surrounding the GFA calculations, [134] perhaps the most fundamental argument an attorney will make in a statutory analysis case. The Solicitor did not make factual claims regarding legislative history.

Lingo's comment at the November Hearing, however, targeted legislative history and not legislative intent. After hearing from Richard Perry regarding "the background and events leading to the enactment of" the Open Porch Exclusion, a brief conversation ensued regarding legislative *history*.[135] The Board's attorney questioned whether anything heard at the November Hearing constituted legislative history.[136] Lingo's counsel responded, "Well, then, we need to go back to not considering a lot of the City Solicitor's comments that have been about the legislative history of that."[137] Delaware law is clear that the attorney for a party

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[132] *Id.*
[133] Nov. 2019 Hr'g Tr. 62 (citing *Dewey Beach Enters., Inc.*, 1 A.3d at 307 (emphasis added)); *see* B:91.
[134] Nov. 2019 Hr'g Tr. 62-65; *see* B:91-94.
[135] Nov. 2019 Hr'g Tr. 71-73; *see* B:95-97.
[136] *Id.* 72-73; *see* B:96-97.
[137] *Id.* 73; *see* B:97.

cannot testify at a hearing,[138] but that is not what occurred. The City Solicitor had been making appropriate legal arguments about the legislative intent at the November Hearing and was not commenting on the events constituting legislative history. To the extent the City Solicitor made comments from first-hand knowledge that would be considered evidence, Lingo never raised any such objection to such comments at either the August Hearing or November Hearing. Additionally, the Board Chairperson indicated that all testimony would be given proper weight by the Board.[139]

If the Solicitor's comments at the August Hearing involved improper testimony, then Lingo's case was based upon improper testimony because Lingo cited the Solicitor's comments from the August Hearing as evidence at the November Hearing.[140] It is inconsistent to rely on the Solicitor's August Hearing comments as evidence at the subsequent November Hearing while now claiming the Solicitor's comments from the same August Hearing constituted "unsupported testimony."[141]

Lingo's case at the November Hearing focused on a presentation from the 19 Baltimore Avenue hearing identifying inaccuracies in the application of GFA

[138] *Rollins Broad. of Del., Inc. v. Hollingsworth*, 248 A.2d 143, 145 (Del. 1968).
[139] Nov. 2019 Hr'g Tr. 73; *see* B:97.
[140] *Id.* 26-27; *see* B:66-67.
[141] Op. Br. 34.

calculations to residential properties.[142] However, this evidence was created by the 19 Baltimore Avenue attorney based on the attorney's bicycle ride through the City and his review of the BLD records.[143] If the City Solicitor provided any improper testimony at either hearing, it was less egregious than the evidence created and presented by the 19 Baltimore Avenue attorney for a hearing before the Board that Lingo subsequently relied on at the November Hearing.

The City Solicitor's comments at the August Hearing and November Hearing constituted appropriate legal argument and to the extent that those arguments might have involved evidentiary testimony, the Board's Chairman correctly indicated that the Board was entitled to give such comments appropriate weight.

3. The Board Relied On Substantial Evidence To Find That Prior Interpretations Of The Gross Floor Area Calculations Were Not Indicative Of Legislative Intent

The incorrect interpretation of GFA calculations by the Assistant Building Inspector in contravention to the Chief Building Inspector's correct application does not establish substantial evidence indicative of legislative intent. To be clear, this is not a case where the City asked the Board to uphold a statutory interpretation that had been consistently applied by the City over a number of years. To the contrary, after inconsistencies in GFA calculations were revealed, the City argued the

[142] Nov. 2019 Hr'g Tr. 28-29; *see* B:68-69.
[143] Op. Br. 10-11.

interpretation of the Chief Building Inspector should control.[144] Neither *Harvey v. City of Newark* nor *Bridev One, LLC v. Regency Ctrs., LP* involved situations analogous to this situation, and both cases are distinguishable on the facts.

In *Harvey*, the City of Newark argued that it had broad taxing power despite a 1958 Court of Chancery case expressly limiting the City of Newark's taxing authority and over 50 years of City of Newark actions recognizing its limited authority.[145] As then Vice-Chancellor Strine summarized, the City of Newark was asking him to "blind [himself] to a broad view of fifty-nine years of history and the traditions of Delaware jurisprudence regarding the interpretation of the taxing authority of local municipalities."[146] Vice-Chancellor Strine ultimately relied on the 1958 judicial decision and the principle of *stare decisis* to decide the matter.[147]

In contrast to *Harvey*, the City did not ask the Board to overturn an established Court of Chancery decision or fifty years of consistent application of the GFA calculation by the City. The City's position as presented to the Board was that the same department was inconsistently applying the GFA calculations over a much shorter period of time, and the Chief Inspector's opinion about the correct interpretation should control. An Assistant Building Inspector's inaccurate

[144] Bd. of Adjustment Case Summary, ¶ 10/11 (Oct. 15, 2019); *see* A:225.
[145] *Harvey v. City of Newark*, 2010 Del. Ch. LEXIS 215, at *2-4 (Del. Ch. Oct. 20, 2010).
[146] *Id.* at *11.
[147] *Id.* at *82.

application of a Zoning Code provision falls far short of the longstanding interpretation of the Newark City Charter that was given deference in *Harvey*.

Bridev One, L.L.C. is another case decided upon *stare decisis* that does not involve an agency trying to correct a mistaken interpretation of a statute. In *Bridev One, L.L.C.*, the Superior Court considered whether the Superior Court retained jurisdiction over charging orders after the General Assembly had amended the controlling statute to grant jurisdiction to the Court of Chancery.[148] In upholding the jurisdiction it had maintained for many years, the Superior Court touched on the Court's longstanding practice of issuing charging orders, but its decision ultimately rested on the fact that it failed to find "'compelling justification' for the departure from the doctrine of *stare decisis.*"[149] Again, the Assistant Building Inspector's application of the GFA calculation was not based on a prior judicial action, making this case distinguishable from *Bridev One, L.L.C.*

Harvey and *Bridev One, L.L.C.* are not only inapplicable to this case, but the longstanding interpretation rule articulated in those cases does not apply because the BLD has not consistently interpreted the GFA calculations and because the statute

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[148] *Bridev One, L.L.C. v. Regency Ctrs., L.P.*, 2018 Del. Super. LEXIS 134, at *3-6 (Del. Super. Ct. Mar. 26, 2018).

[149] *Id.* at *10. Without finding any mistaken application or interpretation, the Superior Court distinguished on the facts a prior Superior Court case holding that the Court of Chancery did have exclusive jurisdiction over charging orders. *Id.* at *10-11 (citing *Hanna v. Baier*, 2017 Del. Super. LEXIS 667 (Del. Super. Ct. Dec. 19, 2017)).

is not one of "doubtful meaning." Pursuant to *Harvey*, a practical application of a statute should be given deference "when a statute has been applied by the relevant government organ *in a consistent way* for a period of years. . . ."[150] As this Court has further articulated, "A long-standing, practical, and plausible administrative interpretation of a statute of doubtful meaning will be accepted by this Court as indicative of legislative intent."[151] The Assistant Building Inspector was applying GFA calculations contrary to the Chief Building Inspector's interpretation, establishing neither a "consistent" application of GFA calculations nor "a plausible administrative interpretation" since it directly contradicted the supervisor's interpretation. The BLD's actions did not create a pattern of longstanding interpretation that established substantial evidence of legislative intent that the BLD should be compelled to follow.

[150] *Harvey*, 2010 LEXIS 215, at *30.
[151] *Am. Fed'n of State, County, & Mun. Employees v. State Dep't of Finance*, 293 A.2d 567, 571 (Del. 1972).

CONCLUSION

For the reasons stated herein, the Board respectfully requests that the well-reasoned decision of the Superior Court be affirmed.

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