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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, Petitioners Below, Appellants, v. THE BOARD OF ADJUSTMENT OF THE CITY OF REHOBOTH BEACH, DELAWARE Respondent Below, Appellee.	:	C.A. No. 292, 2021

APPELLANTS' REPLY BRIEF

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ARGUMENT IN REPLY[1]

Respondent Below/Appellee, the Board of Adjustment of the City of Rehoboth Beach (the "Board") and the Superior Court in the proceeding below, both wrongly applied the Delaware rules of statutory construction and ignored well-established Delaware case law when disregarding the longstanding interpretation by the City of Rehoboth Beach's Building and Licensing Department ("Building and Licensing Department").

I. THE SUPERIOR COURT SHOULD BE REVERSED BECAUSE LINGO'S INTERPRETATION OF THE CODE IS THE ONLY REASONABLE ONE.

In its Opening Brief, and at the public hearings before the City, Lingo established that the plain meaning of "exterior wall" does not include a deck railing. Such an interpretation is not only consistent with the Zoning Code, but also with the common understanding of an "exterior wall." Lingo further established that the plain language of the Zoning Code's definition of *Gross Floor Area* ("GFA") demonstrates that it was not written to include every horizontal area possible because the Zoning Code's language specifically limits the areas of the building that are to be included in the calculation to the areas within the "exterior face of the exterior walls."[2]

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[1] Unless otherwise noted, capitalized terms and nicknames are the same as defined in Lingo's Opening Brief.

[2] The Code of the City of Rehoboth Beach § 270-4.

Because these are the only reasonable interpretations of the terms at issue, this Court should reverse the Superior Court's conclusion to the contrary. After all, it is well-settled that when a statutory or code provision evinces only one reasonable interpretation, a court will apply the plain language of the statute without further interpretation or gloss.[3] Neither the Board nor the Superior Court followed that approach, so their decisions cannot stand.

By contrast, the alternative interpretation offered by the Board violates "the golden rule of statutory interpretation" because it would produce an absurd or unreasonable result.[4] The "unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[5]

In its Answering Brief, the Board marches through a series of defined terms to bolster the Board's argument that, after several tries, it has landed on the correct interpretation of the provisions in question. For example, according to the Board, a deck is a structure, a building is a structure; therefore, a deck is a building and it "must follow" that the outside of the railing of the deck is a wall forming the exterior surface of an exterior wall of a building. Each of the underlined terms in the

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[3] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of the Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010)

[4] *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hospital, Inc.*, 36 A.3d 336, 343 (Del. 2012).

[5] *Id.* (quotation omitted).

preceding sentence is one of the Zoning Code's defined terms. But, even the Board admits that the definitions of those terms are not black-and-white. The term "structure" is a broad term with items ranging from "swimming pools" to "decks" to "heating, ventilating and cooling devices." Another similarly generic definition exists for the term "wall" as the phrase the Board focuses upon and calls a "distinct definition"[6] is "[t]he vertical exterior surface of a building."[7]

But these linguistic gymnastics ultimately leave the Board flat on its back. In a leap, the Board asserts that,

> As structures, decks and stairways also qualify as buildings because they are usually, though not always, "roofed, walled and built for permanent use." 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.

First, there is no basis in the record, or logic, to conclude that decks are "usually…roofed." Rooftop decks and backyard decks come immediately to mind. These common structures are neither roofed nor bounded by walls, so it is unclear what the Board refers to as the 'usual' case.

Second, the Board's unfounded assumptions create a further inconsistency: Gazebos — which are always roofed and always railed — do not have "walls," but decks — which are sometimes roofed and sometimes railed — always have "walls."

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[6] Appellee Br. at p. 17.
[7] Appellee Br. at p. 14.

This belies common sense, and it is exactly the sort of contorted interpretation that this Court cautions against. And absent these contortions, there is no support for the Board's position that the proposed railing for the Lingo building is the exterior "wall" of its "building," especially when the same railing, according to the Board, would not be a "wall" for purposes of a free-standing gazebo. Rather, the Board's argument merely highlights that certain "structures" are a "building" or part of a "building" and certain structures are not a "building" or part of "building."

For these reasons, the Court should conclude that Lingo's interpretations of "exterior wall" and "Gross Floor Area" are the only reasonable ones offered, and the Court should therefore reverse the Superior Court's conclusion to the contrary.

II. EVEN IF THE CODE PROVISION AT ISSUE IS AMBIGUOUS, THEN THE CODE MUST BE INTERPRETED IN LINGO'S FAVOR.

Delaware law is clear that statutory language is ambiguous "if it is reasonably susceptible to two [or more] interpretations."[8] And Delaware law is equally clear that ambiguous zoning laws are resolved in favor of the property owner.[9]

Thus, in order to prevail, Lingo need only defend the proposition that the Code is ambiguous with respect to "exterior wall" and the GFA calculation. The Board, on the other hand, must show that its interpretation is unambiguously correct. But the Board cannot meet that heavy burden by opposing one reasonable interpretation with an equally plausible (or even better) interpretation. Rather, the Board simply highlights the ambiguity of the Code provisions in question. As such, the property owner, Lingo, must prevail.

A. At minimum, the Code is ambiguous because Lingo's definition, which matches the City and Board's historical interpretation, is reasonable.

There is little doubt that Lingo's interpretations of "exterior wall" and "Gross Floor Area" are reasonable. The definitions comport with the common meaning of the terms, the plain language of the Code, and the Code's traditional application. So,

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[8] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010).
[9] *Norino Properties LLC v. Mayor and Town Council of the Town of Ocean View*, 2010 WL 3610206 (Del. Ch. Aug. 30, 2010) (holding that under Delaware law, zoning ordinance ambiguities must be resolved in favor of the property owner and the free use of property).

even if the Board's newfound interpretation is a reasonable one, it merely renders the Code ambiguous. And under well-settled law that the Board does not contest, ambiguity in a zoning code must be resolved in Lingo's favor.

As explained above and in the Opening Brief, "exterior wall" and "Gross Floor Area" do not lend themselves to be interpreted to mean the railing of an open-air accessory deck. Lingo is not alone in its view.

As the Board's Answering Brief demonstrates, the evidence before the Board was that the Building and Licensing Department had a historical interpretation, from the enactment of the GFA provision in 2006,[10] that excluded decks and stairs. The record below is replete with evidence of this historical interpretation.[11] In fact, in its October 15, 2019 report, the Building and Licensing Department confirmed that it was not a "mistake" or "mathematical error" that led to the longstanding interpretation of GFA as this report from the Building and Licensing Department states that "the Assistant Building Inspector, who has responsibility for residential plan reviews, has not included the outdoor areas with enclosure in the calculation of gross floor area (consistent with his training by his predecessor)."[12] This is also demonstrated by the Building & Licensing Notice which states that "[p]lans submitted prior to September 24, 2019 will be reviewed to previous code

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[10] October Case Summary at A:222.
[11] *See*, Appellee's Br. Exhibit A ¶30.
[12] A:225.

interpretation."[13] No such announcement would have been necessary had there not been a different historical interpretation.

The October Case Summary prepared by the Building and Licensing Department further demonstrates the reasonableness of Lingo's interpretation of decks being excluded from the GFA calculation. When describing how it reached its conclusion about GFA, the Building and Licensing Department stated as follows:

> Under zoning Section 270-4, *Definitions*, a "deck" or a "balcony" are both identified as a structure and a "wall" that can be built of any material to enclose an area. Structural components of a deck or balcony include a horizontal surface (floor) with vertical railings. Sections of a deck or balcony are attached to the exterior wall of the building and the perimeter railings become the vertical exterior surface (wall). The railings are considered the exterior face of the exterior walls on the deck or balcony erected to enclose the area. That defined space is counted as additional floor area and used to compute not only the gross floor area but also used to compute the FAR of the lot on which the building stands. [Underlined emphasis added.][14]

Thus, in defending its position about the Lingo building, the Building and Licensing Department admits that a deck is "attached to the exterior wall of the building" where the definition of GFA says that the calculation of GFA stops.[15] So, both historical

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[13] A:220.

[14] October Case Summary at A:225.

[15] This also highlights the absurdity of the Board's definition in practice. Under the Board's view, apparently, a building has two exterior walls—one that separates the conditioned from unconditioned areas and then one that is formed outside of that exterior wall with a railing, porch post or some other improvement. That has no basis in the Code, in historical practice, or in common sense.

application — and application in this case — reinforce that the long-settled view of the GFA calculation was that it did not include exterior decks and stairways.

B. The Board cannot meet its burden to establish that its newfound interpretation is unambiguously correct, given that it is contrary to history and common sense.

In its Answering Brief, the Board spends the large part of its argument asserting why its newfound interpretation is better, and therefore, why the Code provisions in question are not ambiguous. But that is not how the ambiguity analysis works. Rather, the Board must establish that its interpretation — which is contrary to history and common sense — is the only reasonable way of reading the Code. That, the Board cannot do.

The Board's Answering Brief plainly demonstrates the failure of its quest to find the "sole" interpretation of GFA. ***First***, the Board's own description of this matter demonstrates that the definition is inherently susceptible to more than one interpretation. The Answering Brief goes through the same tortured analysis of various provisions of the Zoning Code in a process it refers to as "harmonizing" the various provisions of the Zoning Code.[16] While the rules of statutory construction do require the usage of defined terms to ascertain the meaning of provisions within the same code, the problem in this instance is that many of the terms the Board says must be relied upon are too vague to answer the specific question being asked—what

[16] Appellee Br. at p. 24.

is the "exterior surface of an exterior wall of a building." If the obvious (plain meaning) definition of that phrase is not used, the generic definitions of those terms do not provide further clarification.

For example, as explained above, the Board tries to string together individual definitions to reach its conclusion. But, even the Board admits that the individual terms, such as "structure," are broad and susceptible to multiple interpretations. For instance, "structure" covers everything from "swimming pools" to "decks" to "heating, ventilating and cooling devices." Likewise, a "wall" is "[t]he vertical exterior surface of a building." This means the Building and Licensing Department has to make a determination about which parts of the generic definition of "structure" form the parts of a "building" and then use the generic definition of "wall" to determine if the structure it is considering forms part of the GFA calculations.

Here again the Board's linguistic gymnastics fail. Because the Board admits that its chain of generic definitions are susceptible to multiple meanings, and therefore require further interpretation or judgment, the Board cannot establish that its tortured definition is the only reasonable interpretation of the Code. To the contrary, the Board's own interpretation is half-formed and requires further interpretation to be applied. And, as demonstrated by this matter and the history of these provisions, the Board's approach underscores that the Code provisions are susceptible to more than one interpretation.

For instance, it is just as, if not more, likely that someone concludes that a deck is a structure but not a building or part of a building as it is for someone to conclude that a deck is a structure that is a building or part of a building. Most importantly, no one has to speculate as to whether its possible that a building official could determine that a deck is a structure that is not part of a building, it was determined that way for many years—the known history of this provision of GFA—by the Building and Licensing Department. In fact, as the Building and Licensing Department's report admits, the training within the department was to exclude outside areas like decks.

Second, the Board's flimsy fallback arguments fare no better. Perhaps sensing the weakness of its position, the Board attempts to turn a blind eye to the ambiguity present in the Code. It argues that the Building and Licensing Department had a commercial side and a residential side that were interpreting the Code differently. This is nonsensical and not supported by the record. The definition of GFA does not distinguish between residential and commercial.[17] Even the September 24, 2019 Notice did not distinguish between residential and commercial when describing that plans would be reviewed pursuant to the "previous code

[17] A:238-239.

interpretation." And, below, even the Board confirmed that there is no difference between residential GFA calculations and commercial GFA calculations.[18]

Similarly, the Board's strawman arguments based upon *City of Rehoboth Beach v. Shirl Ann Associates*[19] do not stand up to scrutiny. According to the Board, what is proposed by Lingo could result in an entry-level employee changing the City's Code. Of course, that is not what is proposed in this matter nor would it make any sense. Decades of the Building and Licensing Department's consistent practice do not amount to the situation that the Board suggests.

Furthermore, *Shirl Ann Associates* is wholly distinguishable both in fact and in law. The Board misreads the case to say that an improperly granted permit does not make a statutory provision ambiguous and subject to multiple interpretations. But that was not the question before the Court in *Shirl Ann Associates*, much less the Court's holding. No one in that case disputed that the City Code prohibited lighted signs or signs larger than two square feet in the applicable zoning district. And the parties agreed that the building permit was granted in error but differed on how to correct the situation. The Court's Solomon-esque solution, based upon equitable estoppel, was to allow the oversized signed to remain but prohibit it from being lighted. In the instant matter, the Building and Licensing Department was not

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[18] *Id.*

[19] 1993 WL 401876, at *1 (Del. Ch. Aug. 31, 1993).

granting permits in error. Instead, it made conscious decisions based upon training it provided to its employees to interpret the Zoning Code to exclude "outside areas" when calculating GFA, and it did so for years without contradiction by the Board.

The Board's cavalier and unsupported dismissal of the Building and Licensing Department's longstanding application of the Zoning Code runs contrary to well-established Delaware case law. Delaware courts have historically afforded great deference to longstanding administrative interpretations of statutes when determining legislative intent. Delaware courts have also rejected disregard of a longstanding interpretation of a statute as a "mistake" because "it would seem rare indeed to discover that a practical construction that had been relied upon for many years was based on an entirely implausible reading of the text at issue."[20]

As stated by the court in *Harvey v. City of Newark*, "[g]iven the complexity of human affairs and the imperfection of human drafters, *the reality is that complex documents like statutes and contracts are often susceptible to more than one meaning*."[21] Thus, the Board's disregard of historical interpretation as "mistake" directly contradicts Delaware case law regarding administrative interpretations and legislative intent. And, the Superior Court's arbitrary deference to the Board's new

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[20] *Bridev One, L.L.C. v. Regency Ctrs., L.P.*, 2018 WL 1535406, at *4 (Del. Super. Mar. 26, 2018) (citing *Harvey v. City of Newark*, 2010 WL 4240625, *6 (Del. Ch. Oct. 20, 2010).

[21] *Harvey*, 2010 WL 4240625, at *6 (emphasis added).

interpretation ignored the historical deference afforded to interpretations of administrative agencies when interpreting a statute and focused only on the Board's newfound interpretation.

When determining the proper interpretation of the tax statute and town charter at issue in *Harvey*, the court stated that "*great weight is given to the practical interpretation that is given to complex documents after their adoption.*"[22] The court's approach in *Harvey* perfectly illustrates Lingo's position regarding the Zoning Code provision at issue in this case. That is (as acknowledged by the Board[23]) the Zoning Code is a complex and voluminous document, and as an especially complex part of that document, the GFA provision is reasonably susceptible to more than one meaning. Furthermore, the *Harvey* court's recognition that great weight should be given to the practical interpretation of complex documents directly rejects the Board's rash dismissal that the longstanding interpretation by numerous Assistant Building Inspectors (not entry-level employees[24]) was a mistake or simply "incorrect."

The Board's sky-is-falling argument as to the alleged threats to municipalities resulting from the mistakes of "entry-level employees" is an unrealistic and dramatized interpretation of the applicable Delaware case law. This was not an

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[22] *Id.*
[23] A:244; 247-248.
[24] Appellant's Br. at p. 21.

arbitrary mistake by an intern, this was a longstanding interpretation by the Building and Licensing Department. So, Lingo is not asking the Board to enforce a one-time mistake or uneducated interpretation of the Zoning Code. Rather, Lingo is asking that the Board acknowledge that the longstanding interpretations of the Building and Licensing Department — *i.e.*, the department tasked with enforcing the Zoning Code — were reasonable, and that if the Board has divined a new definition, then at best, the Code is ambiguous.

Because the Code is ambiguous, then the law is clear: With respect to this property and this permit, the Board and the Superior Court were required to adopt the reasonable interpretation of the property owner, Lingo. Because the Superior Court and the Board ignored well-established Delaware case law in concluding otherwise, this Court should reverse.

III. THE BOARD'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Board's decisions to deny Lingo's application were not based on substantial evidence because the only substantial evidence presented to the Board was the evidence presented by Lingo demonstrating the longstanding administrative interpretation which was contrary to the newfound interpretation posited by the Building and Licensing Department.

First, as stated above, the Board ignored the Building and Licensing Department's long-standing interpretation and arbitrarily concluded that, despite the historical interpretation applied by the Building and Licensing Department, the newfound interpretation was the only reasonable interpretation. Contrary to the Board's position, there was no evidence presented to the Board that the longstanding interpretation by multiple building inspectors was the result of mistake, mathematical error or oversight. Likewise, there was no evidence that the prior interpretation was a one-time occurrence or attributable to an unqualified employee.

Rather, the Board was presented with evidence that numerous building inspectors, individuals who the City of Rehoboth Beach deemed qualified and educated, made a consistent prior interpretation of the GFA provision that did not align with the building inspector's newfound interpretation.[25]

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[25] A: 233-242.

Unfortunately, despite the Board's lengthy discussion regarding the ambiguity of the statute and its prior interpretation,[26] the Board made the wholly unsupported determination to ignore this longstanding interpretation as a "mistake" in favor of the newfound interpretation. Furthermore, the Superior Court never addressed Lingo's arguments and presentation of case law regarding the deference given to longstanding administrative interpretations when interpreting statutes. Instead, the Superior Court's opinion chose to blindly support the Board's newfound interpretation instead of answering the question before it—whether the Zoning Code provision was susceptible to more than one interpretation, not whether the court considered the newfound interpretation to be reasonable.

Second, the Board relied on unsubstantiated testimony from the City Solicitor regarding the legislative intent of the GFA provisions and the amendments to the Zoning Code that had happened over a decade prior. Unlike the statements made by the City Solicitor regarding statutory ambiguity where the City Solicitor was reading from and directly referencing a Delaware case, the City Solicitor's testimony[27] regarding the legislative intent was nothing more than conjecture without any reference to the source of his knowledge. The Board's response is that the City Solicitor was making argument about legislative intent and not legislative history

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[26] A: 250-252.
[27] B:44-47.

thus there was no testimony presented and there was not an objection raised when the City Solicitor spoke. Assuming, for the sake of argument, that the City Solicitor only argued about intent from the text of the statute and did not reference his recollections, then there would have not been a proper objection. The problem is the Board must have subsequently relied upon those statements as there is nothing else to support its decisions.

The Board's Answering Brief also emphasizes another piece of "testimony" from the City Solicitor that was unsupported.[28] During his "argument" the City Solicitor referenced a commercial application to which the Building Official made this same determination about GFA.[29] This reference by the City Solicitor was to a proposed restaurant called Agave—a proposed restaurant that was never built. The Board had no information about this application, its dimensions, its plans or how GFA was calculated, just a statement from the City Solicitor that it allegedly planned to have a deck and that allegedly the Building Official calculated the deck in determining GFA. If the Board knew the weight to give such things it is not evident from the record as that continues to be the "evidence" proffered by the Board to support its finding. The fact that the Board placed significant weight on the City Solicitor's unsubstantiated statements regarding legislative intent and alleged

[28] Appellee Br. at p. 8.
[29] B:47.

treatment of building plans was improper and does not constitute substantial evidence.

Irrespective of the City Solicitor's commentary, testimony or however the Board wants to characterize those statements, the only substantial evidence before the Board was that the Building and License Department had two interpretations of the definition of GFA, (1) a longstanding interpretation, and (2) a newfound interpretation which was applied to the two applications challenged before the Board. The Board was presented with evidence from the Building and License Department's files of eleven (11) examples (including the first review of the Lingo application) where areas with railings were not included within the definition of GFA, with a date range from 2006 to 2018. The following chart shows the date range of those applications.

Property Address	Date of Plan Review/Building Permit
13 St. Lawrence Street	2005
200 Stockley Street	2006
200 New Castle Street	2009
102 New Castle Street	2011
202 New Castle Street	2012
125 Hickman Street	2012
13 Laurel Street	2012
14 Dover Street	2012
1001 South Boardwalk	2014
22 Lake Drive	2017
Original Lingo Application	2018

In stark contrast, the Board was not presented with any documentary evidence to show that the newfound interpretation was anything other than a newfound interpretation. The City did not present information to the Board about a rogue employee or present ten (or even one) set of plans showing where the newfound interpretation was used. The only documented evidence before the Board of the newfound interpretation was the two applications pending before the Board challenging the newfound interpretation.

Of course, the reason the Building and Licensing Department did not present counter documentary evidence is because it does not exist. Instead of producing documents or other evidence to demonstrate mistake, or a rogue employee, the Building and Licensing Department candidly admitted that it did not include "outdoor areas within enclosures" in the calculation of GFA because that was the department policy demonstrated by the training provided to its employees.[30] In addition, the Building and Licensing Department published a Notice immediately after the public hearing on September 23, 2019 for the second application challenging its GFA decision to put everyone on notice "[p]lans submitted prior to September 24, 2019, will be reviewed to previous code interpretation." That notice does not talk about a mistake or mathematical error, it simply states, that it will

[30] October Case Summary at A:225.

consider applications filed prior to a specific date (*i.e.*, the newfound interpretation) would be considered under the "previous code interpretation" of GFA.

Against that, the Board says that it was important that the October Case Summary said in three (3) places that the provision was not ambiguous. No rational fact finder would view the self-serving and self-contradicting statements in the October Case Summary as persuasive in the face of an admission by that same party that another interpretation of the provision existed, it previously trained employees to follow the other interpretation along with actual examples of the other interpretation that were reviewed, permitted and constructed over the course of more than a decade.

Therefore, because the Board ignored substantial evidence presented by Lingo in favor of unsupported evidence presented by the Building and Licensing Department and the City Solicitor, Lingo is entitled to a reversal of the Superior Court's decision.

CONCLUSION

In conclusion, Lingo is entitled to a reversal of the Superior Court decision affirming the Board's decision for several reasons. First, the Board failed to properly apply principles of statutory interpretation. Second, the Board failed to consider the substantial—and only—evidence before it regarding the historical application of the GFA provision in Rehoboth Beach. As a result of these errors, the Board mistakenly affirmed the Board's denial of Lingo's application for a building permit.

For all of the reasons set forth in the Opening Brief and this Reply Brief, Petitioners Below/Appellants request relief from the Board's decisions.

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