SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

February 28, 2013

John W. Paradee, Esq.
Prickett, Jones & Elliott, P.A.
11 North State Street
Dover, DE 19901

Daniel A. Griffith, Esq.
Whiteford, Taylor & Preston, LLP
1220 N. Market Street, Suite 608
Wilmington, DE 19801

RE: Stingray Rock, LLC v. The Board of Adjustment of the City of Rehoboth Beach
C. A. No: S11A-07-010 ESB

Dear Counsel:

This is my decision on Stingray Rock, LLC's appeal of the finding by the Board of Adjustment of the City of Rehoboth Beach that (1) the addition of an outdoor dining patio is an extension of the premises of Stingray's existing restaurant within the meaning of Section 215-7(B) of the City Code, and (2) Stingray did not meet the requirements for obtaining an area variance from the 5,000 square foot floor plan limit.[1] Stingray owns and operates a restaurant known as the "Stingray Sushi Bar and Asian Latino Grill" at 59 Lake Avenue, Rehoboth Beach, Delaware. The restaurant is located in the C-3 zoning district. Restaurants are permitted in this

[1] §270-28.

district. The floor plan of the restaurant covers 6,332.23 square feet. The floor plan of a restaurant is limited to 5,000 square feet. Thus, Stingray is in the proper zoning district to operate its restaurant, but its floor plan is non-conforming. The Delaware Alcoholic Beverage Control Commission issued a liquor license to Stingray prior to June 14, 1991. Thus, Stingray is and has been "an existing restaurant ...whose liquor license was issued by the Delaware Alcoholic Beverage Control Commission prior to June 14, 1991, within the meaning of Section 215-7(B) of the City Code.

Stingray wants to operate an outdoor dining patio on its premises. The patio would have 28 seats and cover 720 square feet of land outside the restaurant.

Stingray filed an application for a permit to operate an outdoor dining patio with the City. The City's Mayor and Commissioners denied Stingray's application. Stingray was told that, in order to operate a patio, it would have to get a certificate of compliance. Stingray was also told that in order to get a certificate of compliance, it would have to get a variance. Stingray's application eventually made its way to the Board.

The issues before the Board were (1) whether the addition of an outdoor patio, without any alteration to the structure or interior floor plan of Stingray's existing restaurant, constitutes an "extension of the premises of the restaurant" within the meaning of Section 215-7(B) of the City Code, and (2) whether Stingray was entitled

to a variance from the 5,000 square foot floor plan limit. I have concluded that the addition of an outdoor patio does not constitute an extension of the premises of Stingray's restaurant and that the Board applied the wrong legal standard when it considered Stingray's application for a variance.

Standard of Review

The standard of review on appeals from the Board of Adjustment is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first instance.[4] "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."[5] In the

---

[2] *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).

[3] *Miller v. Board of Adjustment of Dewey Beach*, 1994 WL 89022, *2 (Del. Super. Feb. 16, 1994).

[4] *Mellow v. Board of Adjustment of New Castle County,* 565 A.2d 947, 954 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).

[5] *Mellow*, 565 A.2d at 956.

absence of substantial evidence, the Superior Court may not remand the Board's decision for further proceedings, but rather, may only "reverse or affirm, wholly or partly, or may modify the decision brought up for review."[6]

The Patio

No one shall construct or operate a patio unless it is included in a special certificate of compliance issued pursuant to Chapter 215 of the City Code.[7] However, an existing restaurant, where alcoholic liquor is sold or consumed, established prior to June 14, 1991, is not required to obtain a certificate of compliance unless required as a condition of extension or modification of the premises of the restaurant.[8] Stingray is an existing restaurant that was issued its liquor license by the Delaware Alcoholic Beverage Control Commission prior to June 14, 1991. Thus, Stingray does not have to get a certificate of compliance for its patio if the patio does not constitute an extension of the premises of Stingray's restaurant. If Stingray does not have to get

---

[6] 22 *Del. C.* § 328(c).

[7] §270-19(A)(1)(g).

[8] §215-7(B) On June 14, 1991, 4 *Del. C.* §543 was amended to provide that every application for a new liquor license must be accompanied by documentation from the appropriate political subdivision that the premises to be used are properly zoned for the applicant's intended use. Effective July 8, 1994, 4 *Del. C.* §543 was again amended to provide that any existing restaurant that was in compliance with applicable state and local laws as of June 14, 1991 shall be permitted to continue to operate in the same manner, notwithstanding any ordinance or other restriction subsequently enacted by a municipal corporation. *Kejand v. Town of Dewey Beach,*1996 WL 361518, at *2 (Del. Ch. June 25, 1996).

a certificate of compliance, then it does not have to get a variance.

Statutory Interpretation

"The goal of statutory construction is to determine and give effect to legislative intent."[9] If the statute is unambiguous, "there is no need for judicial interpretation, and the plain meaning of the statutory language controls."[10] With an ambiguous statute "the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant."[11] A statute is ambiguous if it is "reasonably susceptible of different conclusions or interpretations."[12] The Court must then construe the statute "'in a way that will promote its apparent purpose and harmonize it with other statutes' within the statutory scheme."[13] The statute must be read as a whole "in a manner that avoids absurd results."[14]

Restaurant and modification are defined. Extension and premises are not.

---

[9] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

[10] *Lawhorn v. New Castle County*, 2006 WL 1174009, at *2 (Del. Super. May 1, 2006 (citing *Eliason*, 733 A.2d at 946).

[11] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

[12] *Newtowne Vill. Serv. Corp. v. Newtowne Rd.*, 772 A.2d 172, 175 (Del. 2001).

[13] *LeVan*, 940 A.2d at 933 (quoting *Eliason*, 733 A.2d at 946).

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

"Restaurant" is defined as follows:

> Where alcoholic liquor is sold or consumed on the premises, a totally enclosed, except where a special patio license has been granted, commercial establishment which is regularly used and kept open principally for the purpose of serving complete meals to persons for consideration and which has seating and tables for 35 or more persons and suitable kitchen facilities connected therewith for cooking an assortment of foods under the charge of a chef or cook.[15]

"Modification" is defined as follows:

> "Modification," as used herein, means internal rearrangements limited to the interior walls of only that portion of the structure used for restaurant or dinner theater purposes as shown on the floor plan on file with the City Manager. It shall not authorize the extension of the restaurant or dinner theater use into other parts of the structure not shown on the floor plan filed with the City Manager.[16]

"Extension" is generally defined as enlargement.[17]

"Premises" are commonly defined to include the land and structures thereon.[18]

Thus, if you combined the meanings of the defined terms and the commonly accepted meanings of the non-defined terms, you could conclude, given the broad meaning of premises, that the addition of a patio is an extension of the premises of a restaurant. However, I believe that "premises of the restaurant" has a very specific

---

[15] Rehoboth Beach Code §215-1.

[16] Rehoboth Beach Code §215-11(B).

[17] Merriam-Webster's Collegiate Dictionary 411 (10th ed. 1993).

[18] Black's Law Dictionary 1300 (9th ed. 2009).

and narrow meaning in the City Code that weighs against this interpretation.

Extension and modification are listed together in Section 215-7(B) and focus on, and are connected to, the phrase "premises of the restaurant." Thus, the issue is what are the "premises of the restaurant." Are the "premises of the restaurant" a part of the building, the entire building, or the land and building? A modification means internal rearrangements limited to the interior walls of <u>only that portion of the structure used for restaurant purposes as shown on the floor plan</u>. (Emphasis added.) Given that extensions and modifications both focus on the same thing – the premises of the restaurant – and that modification has been defined to address only that portion of the structure used for restaurant purposes, I conclude that "premises of the restaurant" is limited to that portion of the structure that is used for restaurant purposes. Thus, in order for Stingray to have to obtain a certificate of compliance under Section 215-7(B), the addition of a patio would have to cause an enlargement of the structure that is used for restaurant purposes. The addition of a patio will not require an enlargement of the structure that Stingray uses for restaurant purposes. Thus, Stingray does not need to obtain a certificate of compliance. I find further support for this conclusion in the definition of "permanent seated dining area." This is defined as "[t]he floor space in any restaurant...where complete meals are served."[19]

---

[19] Rehoboth Beach Code §215-1.

"The square footage of floor space of a dining patio, as defined at §270-19A(1)(b),[20] shall not be included as part of the permanent seated dining area or the bar area."[21] The bar area is defined as "the floor space in any restaurant that is used primarily for the service or consumption of alcoholic liquor and not secondary to food consumption."[22] If the square footage of the floor space of a dining patio is not included as part of the permanent seated dining area or the bar area, then it does not count towards the 5,000 square foot floor plan limit of a restaurant. If the square footage of the floor space of a dining patio does not count towards the 5,000 square foot floor plan limit, then it makes sense to conclude that the addition of a dining patio does not enlarge the premises of a restaurant. Lastly, I note that the definition of "patio" supports this conclusion as well. Patio is defined as "a deck or porch, of no more than 750 square feet, whether covered, uncovered, raised or at grade, used in connection with a restaurant and not necessarily attached thereto."[23] If a patio is a deck or porch that is not necessarily attached to a restaurant, then it stands to reasons that it is not a part of a restaurant and that the addition of a patio does not

---

[20] The reference should be to §270-19(A)(1)(a).

[21] *Id.*

[22] *Id.*

[23] Rehoboth Beach Code §270-19(A)(1)(a).

constitute an extension of a restaurant.

The Variance

_____Stingray filed an application for a variance from the 5,000 square foot floor plan limit set forth in Section 270-28. Stingray clearly seeks what is known as an area variance. It argues that the Board applied the standard for a use variance, which is more stringent than the standard for an area variance. I agree. In *Board of Adjustment v. Kwick-Check Realty, Inc.,* the Delaware Supreme Court defined the distinction between "use" variances and "area" variances.[24] A use variance is a variance that changes the character of the zoned district by allowing the land to be used for a purpose otherwise proscribed by the zoning regulations.[25] "An example of a use variance is one which permits a commercial use in a residential district."[26] An area variance, on the other hand, does not involve a prohibited use and "concerns only the practical difficulty in using the particular property for a permitted use."[27] "Examples of area variances include modifications of setback lines and yard

---

[24] 389 A.2d 1289, 1291 (Del. 1978).

[25] *Id.*

[26] *Kostyshyn v. City of Wilmington Zoning Board of Adjustment,* 1990 WL 58226 at *1, (Del. Super. April 12, 1990).

[27] *Id.; Kwik-Check Realty, Inc.,* 389 A.2d at 1291.

requirements."[28] Because of the different purposes and effects of the two types of variance, the standard of "unnecessary hardship" applies to use variances, while the less burdensome standard of "exceptional practical difficulties" applies to area variances.[29]

The standard applied to area variances considers "whether a literal interpretation of the zoning regulations results in exceptional practical difficulties of ownership.[30] In order to determine whether exceptional practical difficulties exist, the Board must weigh the following factors: (1) the nature of the zone where the property lies; (2) the character and uses of the immediate vicinity; (3) whether removal of the restriction on the applicant's property would seriously affect the neighboring property and its uses; and (4) whether failure to remove the restriction "would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.[31] Under the exceptional practical difficulties standard, economic hardship, standing

---

[28] *Kostyshyn*, 1990 WL 58226 at *1.

[29] *Kwik-Check Realty, Inc.,* 389 A.2d at 1291.

[30] *Id* at 1291.

[31] *Id.*

alone, may justify granting an area variance.[32] In *Kwik-Check Realty, Inc.*, the Supreme Court of Delaware concluded that "[t]he inability to improve one's business, or to stay competitive as a result of area limitations," may qualify as a legitimate "exceptional practical difficulty" that would justify granting a variance.[33] "Such practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on neighboring properties if the variance is granted.[34]

The Board, when considering Stingray's application for an area variance, applied the wrong standard and did not analyze the applicable factors. This is evidenced by the fact that the Board and/or its attorney mentioned "hardship" 11 times when discussing Stingray's variance application, but never once mentioned "exceptional practical difficulties."

Therefore, I have reversed the decision of the Board of Adjustment of the City of Rehoboth Beach on both of its findings.

---

[32] *Id.*

[33] *Id.*

[34] *Kwik-Check Realty, Inc.,* 389 A.2d at 1291.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley
E. Scott Bradley

ESB/sal