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Case Number 392,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES L. LAIRD, ELIZABETH A. LAIRD, PETER H. LUCAS, ROSE A. LUCAS, JOSEPH MCAVOY, KATIE MCAVOY, SUZANNE MESSINA, KATHLEEN R. SULLIVAN, as trustee, and PHILLIP C. WINKLER, Appellants Below, Appellants,	)	Case No. 392, 2014
v.	)	Appealed from the Superior Court of the State of Delaware C.A. No. S14A-01-001 ESB
BOARD OF ADJUSTMENT OF THE TOWN OF DEWEY BEACH, WALTER G. BRUHL, JR., and HELENE S. BRUHL, Appellees Below, Appellees	)	

APPELLEES BELOW, APPELLEES' JOINT ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an Appeal of a decision of the Superior Court of the State of Delaware affirming a decision of the Board of Adjustment of the Town of Dewey Beach (the "Board") reversing a determination made by the Dewey Beach Building Official (the "Building Official").

Appellees Below, Appellees, Walter G. Bruhl Jr. (Mr. Bruhl died on March 9, 2014) and Helene S. Bruhl (the "Bruhls") had appealed to the Board, a determination made by the Building Official, that Sections 101-11 (A) and 185-59 of the Dewey Beach Code (the "Code") limited the height to which the Bruhls could elevate their home to no more than five feet above grade.

The Board, by decision dated December 6, 2013, reversed the Building Official's interpretation of Sections 101-11 (A) and 185-59 of the Code and determined that the Bruhls' plan to raise their home eight (8) feet above grade was permitted by the Code.

Appellants Below/Appellants ("Appellants" or "Appealing Neighbors") filed an appeal of the Boards' decision to the Superior Court on January 2, 2014. The Superior Court issued an opinion on June 26, 2014 affirming the Board's decision reversing the Building Official's determination.

Appellants appealed the decision of the Superior Court to this Court on July 24, 2014, filed their Opening Brief on October 3, 2014 and their corrected Opening Brief on October 15, 2014.

The Bruhls filed a Motion to Affirm with this Court on October 10, 2014 which was denied by the Court on October 31, 2014.

This is the Answering Brief of Appellees Below, Appellees. Although Appellee Board of Adjustment of the Town of Dewey Beach supports the arguments set forth herein, the Board does not join in Appellee Bruhl's argument regarding equitable estoppel, which is set forth in Argument I herein. The Board takes no position on that issue as, while preserved on the record below, it was not an issue before the Board for decision.

SUMMARY OF ARGUMENTS

I. DENIED – The Board and the Superior Court correctly determined that Sections 185-59 and 101-11 (A) of the Code permitted the Bruhls to elevate their home eight feet above grade.

1) The Appellants failed to appeal the issuance of the building permit to the Board and are prohibited from raising the issue collaterally in this Appeal.

2) The Board and the Superior Court correctly determined that Sections 185-59 and 101-11(A) permitted the Bruhls to elevate their home eight feet above grade.

3) The Bruhls are entitled to raise their home to an elevation of eight feet above finished grade based on the doctrine of Equitable Estoppel. Appellee Board of Adjustment for the Town of Dewey Beach takes no position on this argument.

II. DENIED – The Board was not required to make a factual determination concerning the structure's height in order to resolve the legal question at issue on appeal. Thus, a record of the Hearing is not essential for appellate legal review.

III. DENIED – The Board is not required to take testimony from the general public during an appellate review.

STATEMENT OF FACTS

The Bruhls purchased Unit 4 in the Vista Road Condominium, Dewey Beach, Delaware in August 1984.[1] The home was located at ground level and was considered to be a legally permitted nonconforming building since it did not conform to certain setback requirements of the Zoning Chapter of the Code, but pre-existed the adoption of the Zoning Chapter.[2]

The Bruhls' home sustained extensive wind, rain and flood damage as a result of Hurricane Sandy in October, 2012. On February 21, 2013, the Building Official notified the Bruhls by letter[3] that because the cost to repair the damage to the Bruhls' home exceeded fifty percent (50%) of its market value, the home had sustained "substantial damage" and, as required by Section 101-15 of the Code[4], the home was required to be brought into compliance with Chapter 101, The Floodplain Management section of the Code. The Building Official's letter further states:

"The most significant requirement is that the lowest floor, as defined by Regulations/Code, must be elevated to or above the base flood elevation (BFE) (or the elevation specified in the Regulations/Code AE-6 plus one (1) foot. You may wish to contact your insurance agent to understand how raising the lowest floor higher than the minimum required elevation can reduce NFIP flood insurance premiums."

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[1] Town of Dewey Beach Board of Adjustment Official Record (hereinafter "R") at 14, B-1

[2] Dewey Beach Town Code, Chapter 185- Zoning

[3] R at 5, B-4

[4] R at 17, B-6

As a result of the Building Official's determination the Bruhls were required to elevate their home pursuant to Section 101-11 (A) of the Code[5] "To at least one foot above the 100-year flood elevation" as part of the reconstruction of their home.

The Bruhls applied for a building permit and submitted construction plans to the Building Official indicating a finished first floor eight (8) feet in elevation above the finished grade.[6] On May 29, 2013, the Bruhls paid the building permit fee of One Thousand Two Hundred dollars ($1200.00) and were issued building permit number 5680[7] signed by the Building Official. The permit states that it is granted to the owner to perform the proposed construction work in accordance with the plans and specifications filed with the application which indicated the eight foot elevation above grade. The Bruhls hired a contractor and began reconstruction of the home, including raising the building from its ground location, the driving and installation of pilings and construction of a concrete block foundation.[8]

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[5] R at 21, B-7

[6] R at 18, B-8

[7] R at 19, B-10

[8] R at 13, B-11

In late July, 2013, after the above reconstruction work had been done, the Building Official verbally notified the Bruhls that the home could only be elevated to not more than five (5) feet above grade (approximately one (1) foot above the base flood elevation), contrary to the approved building permit, contrary to his prior letter of February 21, 2013 and contrary to the plain language § 101-11 (A) of the Code, which provides that residential structures "Shall be elevated to at least one foot above the one-hundred year flood elevation." (Emphasis added)

No explanation was given for the Building Official's change in position. The Bruhls' attorney, after inquiry to the Building Official and Town Solicitor, received a letter from the Town Solicitor articulating the basis of the Building Official's change in position in a letter dated September 24, 2013.[9]

On October 8, 2013, the Bruhls filed a Request for a Board of Adjustment hearing appealing the determination of the Building Official.[10] The sole issue raised in the Bruhls appeal was whether the Building Official had correctly interpreted Section 101-11 (A) and Section 185-59[11] of the Code as limiting the first floor elevation to no more than five (5) feet above grade, it being the Bruhls' position that Section 185-59 permitted the Bruhls to reconstruct their storm

[9] R at 4, B-12

[10] R at 3, B-14

[11] R at 16, B-17

damaged, non-conforming home and Section 101-11 (A) provided that the required elevation is "at least one foot above" not "no more than one foot above" the one-hundred-year flood elevation.

A hearing was held before the Board on November 20, 2013 on the issue raised by the Bruhls' appeal. The Board, by a vote of four to one, reversed the Building Official's determination and concluded that the Bruhls' reconstruction plan to elevate their home eight (8) feet above finished grade, as proposed in the approved construction plans and authorized by the building permit, was permitted under the Code. [12]

[12] R at 23, B-18

ARGUMENT I

A) QUESTION PRESENTED

Did the Board and the Superior Court correctly determine that Sections 185-59 and 101-11 (A) of the Code permitted the Bruhls to elevate their home eight feet above grade?

B) SCOPE OF REVIEW

Upon review of a Board of Adjustment decision, the Supreme Court applies the same standard as applied by the Superior Court. This Court limits its review to correcting errors of law and determining whether substantial evidence exists to support the Board's findings of fact.[13] The Superior Court's legal determination, including Questions of Statutory Interpretation, are reviewed de Novo.[14]

C) MERITS OF ARGUMENT

The only issue before the Board was the Bruhls' Appeal of the Building Official's change of interpretation of Sections 185-59 and 101-11 (A) of the Code. The Board and the Superior Court correctly reversed the Building Official's

[13] *Rehoboth Art League, Inc. v. Board of Adjustment of Henlopen Acres*, 991 A.2d 1163, 1166 (DEL. 2010)

[14] *Board of Adjustment v. Verleysen*, 36 A.3d 326, 329 (DEL. 2012)

determination and found that the applicable Code Sections permitted the Bruhls' home to be elevated eight feet above grade.

1. **The Appellants Failed to Appeal the Issuance of the Building Permit to the Board and are Prohibited from Raising the Issue Collaterally in this Appeal.**

Before addressing the correctness of the Board's decision and the Superior Court's affirmation of that decision, it is important to clarify the nature and scope of the issue that was before the Board.

Contrary to the arguments raised in Appellants' Opening Brief, the Board does not have unlimited authority to interpret and apply the Code as it may deem appropriate to an issue on appeal to the Board. The Board's authority is very specific. An appeal to a municipal Board of Adjustment is authorized by 22 DEL C. Sec. 324 which provides:

> "Appeals to the Board of Adjustment may be taken by any person aggrieved...by any decision of the Administrative Officer. Such appeal shall be taken within a reasonable time as provided by the Rules of the Board by filing...a Notice of Appeal specifying the grounds therefore".

The purpose of the Section is to provide a means for an aggrieved party to challenge an arbitrary, unreasonable and allegedly unlawful action of a municipal official in granting and revoking a building permit.[15]

In accordance with 22 DEL C. Sec. 324, the Dewey Beach Zoning Code provides in Section 185-66 (A)[16] that the Board has the authority:

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[15] *Willis v. City of Rehoboth Beach*, 2005 Del. Super. Lexis 224 (Del. Super. Ct. June 24, 2005)

"To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter"

Section 185-65 (B)[17] of the Code sets forth the procedure for filing an appeal with the Board:

"An Appeal to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board or bureau. Such appeal shall be taken within 30 days after the decision appealed from by filing with the Board of Adjustment a Notice of Appeal specifying the grounds therefore....."

In accordance with both 22 DEL C. Sec. 324 and the Code, the Bruhls appealed a specific determination made by the Building Official. The Building Official had determined that, as a result of storm damage from Hurricane Sandy, the Bruhls' home had sustained "substantial damage" requiring that the reconstruction of the home comply with the Floodplain Management chapter of the Code, Section 101-11 (A) of which, required the home to be elevated "to at least one foot above the one-hundred year flood elevation."

The Bruhls' construction plans, elevating their home eight (8) feet above grade, were in compliance with Section 101-11 (A) of the Code and were approved by the Building Official. The Bruhls were issued a building permit authorizing the home to be elevated to a height eight (8) feet above grade. After substantial construction work had been completed, the Building Official changed his position

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[16] B-23
[17] B-25

and determined that the home could be elevated to no more than five (5) feet above grade.

It is that decision of the Building Official, and only that decision, that was the subject matter of the Bruhls' Appeal to the Board. The Bruhls' appeal specifically stated:[18]

> "APPEAL FROM THE DETERMINATION OF THE BUILDING OFFICIAL
>
> A) This is an appeal from the determination of the Building Official limiting the elevation of the first floor of the Applicant's dwelling to the minimum elevation permitted by Sec. 101-11 (A) of the Dewey Beach Code as said determination is set forth in a letter from Fred A. Townsend, III, Esquire, Dewey Beach Attorney, dated September 24, 2013 attached hereto as attachment "A""

The Bruhls' Appeal further provided:

> "The Applicant has filed this Appeal from the determination of the Building Official on the grounds that A) such determination is contrary to the requirements of the Dewey Beach Code, including, but not limited to Section 101-11 and Section 185-59, B) such determination is arbitrary and capricious, C) such determination violates the Applicant's rights of Due Process and Equal Protection."

Clearly, the only issue before the Board was the Bruhls' Appeal of the Building Official's determination limiting the elevation of the Bruhls' home to no more than five (5) feet above grade, the minimum elevation required by Section 101-11 (A) of the Code.

[18] R at 3, B-15

The basis of the Appealing Neighbors' Argument I is that the Board maintained a "narrow focus on the language of §§ 101-11 and 185-59 of the Town Code..." (Opening Brief p. 13) However, that "narrow focus" was precisely the issue, and the sole issue, raised by the Bruhls' Appeal.

The crux of Appellants' position and the substance of their arguments is that by focusing on the issue raised by the Bruhls in their Appeal, the Board ignored or failed to recognize that the original building permit allegedly violated the Code.

The fatal error in their position is that the issuance of the building permit was never appealed to the Board. Even though the Appealing Neighbors were aware that a permit had been issued and witnessed the reconstruction work being done on the Bruhls' home, including the elevation of the home from its ground location, the driving and installation of pilings and the construction of a concrete block foundation, they failed to appeal the issuance of the building permit to the Board.

In effect, the Appealing Neighbors are now attempting to expand their appeal of the height issue, which was the only issue before the Board, into an unperfected and time barred appeal of the issuance of the building permit.

The Superior Court properly addressed this maneuver:

"The Residents' first argument fails to recognize the issue actually before the Board. The Building Official issued a building permit authorizing the Bruhls to raise their beach house eight feet above grade. The residents never filed an appeal of that decision. Thus, the issue of whether the Bruhls could properly raise

their beach house eight feet above grade without first obtaining a variance was not before the Board. The Building Official did tell the Bruhls that his interpretation of §101-11 (A) and § 185-59 prevented the Bruhls from raising their beach house more than five feet above grade. The Bruhls filed an appeal of that decision with the Board. Thus, the issue before the Board was whether the Building Officer had correctly interpreted § 101-11 (A) and § 185-59. The Board and I have concluded that he did not, leaving the Bruhls with a building permit authorizing them to raise their beach house eight feet above grade."[19]

Section 185-65 (B) of the Code provided the Appellants with the ability to challenge the issuance of the building permit by filing an Appeal with the Board, if they chose to do so. No such Appeal was filed and the arguments now raised by the Appealing Neighbors have been waived by their failure to properly raise the issue pursuant to 22 DEL C. Sec. 324 and Section 185-65 (B) of the Code.

Aside from having waived their arguments by failing to appeal the issuance of the building permit, the Appellants' position fails on its merits.

Contrary to the Appealing Neighbors' incorrect characterization, the Bruhls' position, as stated in their appeal to the Board was very clear and succinct. Section 185-59 permitted their home to be reconstructed to essentially the same configuration and Section 101-11 (A) required the reconstructed home to be elevated to **at least** one foot above the one-hundred year flood elevation.

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[19] *Laird et.al. v Board of Adjustment of the Town of Dewey Beach, et. al.*, Del. Super., C.A. No. 514A-01-001, Bradley, J (June 26, 2014) at p. 10, 11. (Attached as Exhibit "A")

The configuration of the Bruhls' home was not being changed or expanded. Configuration is defined as "a relative arrangement of parts or elements."[20] The only physical change to the home was its elevation and extension of steps to provide access to the elevated entrances. The "parts or elements" of the home remained essentially the same configuration as existed prior to the damage.

This result is precisely the intent of Section 185-59 authorizing that a storm damaged non-conforming home could be reconstructed, not necessarily to "exactly", but to essentially the same configuration.

Lastly, the Appellants allege there is no record before the Board as to whether the Bruhls' building permit was properly displayed at the site. This diversion actually confirms the point that there was no discussion of the building permit at the Board hearing because it was not an issue before the Board. In addition, despite the fact that they have witnessed the reconstruction of the Bruhls' home for approximately 18 months and litigated the Board's reversal of the Building Official's determination, the Appealing Neighbors have never initiated an Appeal of the building permit and now raise this argument, at this advance stage, for the first time.

2. The Board and the Superior Court correctly found that Sections 185-59 and 101-11 (A) permitted Bruhls to elevate their home eight feet above grade.

[20] *Merriam-Webster's Ninth Collegiate Dictionary*, 275 (9th Ed. 1986)

The proper issue before the Court is whether the Board and the Superior Court correctly interpreted the Sections 185-59 and 101-11 (A) as permitting the Bruhls to elevate their home eight feet above grade.

The Bruhls had the right to reconstruct their storm damaged home pursuant to Section 185-59 of the Code which states:

"If a non-conforming building is damaged by fire, storm, infestation, or other peril not caused intentionally by the property owner, it may be repaired or reconstructed to essentially the same configuration as existed prior to the damage..."

In addition, because the Building Official had determined that the Bruhls' home had sustained substantial damage, the reconstruction was required to comply with Section 101-11 (A) of the Code which provides:

"Residential structures. Within the general floodplain area the lowest floor, including the basement, of all new or substantially improved residential structures shall be elevated to at least one foot above the one-hundred-year flood elevation"

In issuing the building permit, the Building Official had determined that the reconstruction plans submitted by the Bruhls resulted in "essentially the same configuration as existed prior to the damage", as required by Section 185-59 and that raising the house to an elevation of eight feet above grade complied with the requirements of Section 101-11 (A). Such determinations are a prerequisite to the issuance of the building permit and if the Building Official had not made such determinations, he would not have issued the building permit.

It is the Bruhls' position, as affirmed by the Board and the Superior Court, that the Building Official's original determination is the correct interpretation of Sections 185-59 and 101-11 (A) of the Code.

Subsequent to the issuance of the building permit, the Building Official changed his position, limiting the elevation to the minimum required by Section 101-11 (A). In effect, the Building Official interpreted the section as permitting an elevation of no more than one foot, in contradiction of the actual language of the Section which requires "At least one foot" above flood elevation.

It is the Bruhls' position that the Building Official's changed interpretation was arbitrary and capricious, and contrary to the language of Sections 185-59 and 101-11 (A) of the Code.[21]

The basis of the Building Official's changed interpretation, as articulated in the Town Solicitor's letter, was that elevating the Bruhls' home to the minimum required by Section 101-11 (A) resulted in "essentially the same configuration" but elevating it above the minimum, resulted in a "reconfiguration".

[21] On January 11, 2014, The Town of Dewey Beach amended Section 185-59 of the code to provide that non-conforming residential structures suffering substantial damage by storm or similar events shall only be elevated to the relevant minimum building elevation required by the Code.

Both the Board and the Superior Court rejected such reasoning as illogical. As the Board indicated in its decision:[22]

"It struggles to see how raising the structure five (5) feet results in "essentially the same configuration" while raising the structure eight (8) feet does not. The Building Official testified that raising the structure to the proposed eight (8) feet would change the configuration as it would require the addition of steps and otherwise permit parking and storage under the structure. However, these steps and the access would be available even if the structure were only raised to the five (5) foot level as proposed by the Town".

The Board concluded that elevating the Bruhls' home to eight feet is permitted under the Town Code.

In affirming the Board's decision, the Superior Court noted:

"Configuration is generally defined as "a relative arrangement of parts or elements". I do not see how the mere raising of a structure amounts to a change in the arrangements of its parts."[23]

The Building Official's original interpretation of Sections 185-59 and 101-11 (A) was the correct interpretation.

In reviewing an Administrative Agency decision, questions of statutory interpretation are legal questions which the Supreme Court reviews de novo.[24] The Rules of Statutory Construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the Statute. If a Statute is unambiguous,

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[22] R at 23, B-21

[23] *Laird et al v. Board*, at 8 (Attached as Exhibit "A")

[24] *Delaware Bay Surgical Services v. Swier*, 900 A.2d 646,652 (DEL. 2006)(Citing *Coastal Barge Corporation v. Coastal Zone Indus. Control Bd.*, 4912 A.2d 1242,1246 (DEL. 1985))

no Statutory Construction is required, and the words in the Statute are given their plain meaning.[25] Additionally, statutes must be construed as a whole, in a way that gives effect to all of their provisions and avoid absurd results[26] and Zoning Laws are to be interpreted in favor of the occupants of the land.[27]

The Bruhls agree with the Appellants' position that Sections 101-11 and 185-59 of the Code "say what they mean and mean what they say". In other words, the words in the Statute are to be given their plain meaning.

The plain meaning of Section 185-59 authorized the Bruhls to reconstruct their storm damaged non-conforming home. In issuing the building permit, the Building Official determined that the home, elevated to eight feet above grade was "essentially the same configuration as existed prior to the damage". That determination was never appealed to the Board.

The plain meaning of Section 101-11 (A) required the Bruhls to elevate their home "at least one foot above the one-hundred year flood elevation" which permitted the Bruhls to elevate the home eight feet above grade.

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[25] *Chase Alexa, LLC v Kent County Levy Court*, 991 A.2d 1148,1151 (DEL. 2010)

[26] *Levan v. Independence Mall, Inc.*, 940 A.2d 929,933 (DEL. 2007)

[27] *Mergenthaler v. State,* 293 A.2d 287,288 (DEL. 1972) citing: 1. Rathkopfon Zoning and Planning 8.1; 2. Anderson, American Law of Zoning § 12.02

The decision of the Board reversing the Building Official's change of position, as affirmed by the Superior Court, correctly applies the plain meaning of Sections 185-59 and 101-11 (A) of the Code and permits the Bruhls to elevate their home eight feet above grade.

3. The Bruhls are entitled to raise their home to an elevation of eight feet above grade based on the Doctrine of Equitable Estoppel.

The Bruhls are legally entitled to elevate their home to a height of eight feet above grade under the Doctrine of Equitable Estoppel. Equitable Estoppel arises where (i) a party that is acting in good faith, (ii) relies on affirmative acts or representations of the government, (iii) by making substantial improvements to property, and (iv) it would be inequitable to allow the government to impair or destroy the rights the property owner has thereby acquired. [28]

In the present matter, the Bruhls have established the basis for application of the Doctrine of Equitable Estoppel:

A) Good Faith. The Bruhls were advised by the Building Official that the reconstruction of their home had to be done in accordance with the Chapter 101 of the Code and were encouraged to consider elevating the home higher than the

[28] *Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning*, 2002 Del. Ch lexis 15, at 15.

minimum required.[29] The Bruhls prepared plans which were reviewed and approved by the Building Official, indicating an elevation of eight (8) feet above finished grade.[30]

B) Reliance. The Building Official issued a building permit[31] authorizing construction "in accordance with the plans and specification" which permitted an elevation of eight feet above finished grade.

C) Substantial Improvements. The Bruhls hired a contractor and began reconstruction of the home including raising the building from its ground location, the driving and installation of pilings and construction of a concrete block foundation.

D) Inequitable result. In late July, after the construction work had been done, the Building Official verbally notified the Bruhls that the unit could only be elevated to not more than one (1) foot above the base flood elevation, contrary to the approved building permit, contrary to his letter of February 21, 2013 and contrary to the terms of Section 101-11 (A) of the Code. No explanation for the building Official's action was provided until the Building Official's position was articulated in the Town Solicitor's letter of September 24, 2013.

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[29] R at 5, B-4

[30] R at 18, B-8

[31] R at 19, B-10

The Building Official engaged in conduct which initially encouraged and permitted the Bruhls to reconstruct their home to the Eight (8) foot elevation, including the approval of plans and issuance of a building permit. After substantial improvements were undertaken and significant expenses incurred, the Building Official repudiated his prior approval and attempted to impose a different interpretation of the Code. Such action has caused the Bruhls undue delay, expenses and loss of use of their home. Such a result, caused by the Building Official's change in position, is inequitable and the eight foot elevation should be confirmed by the application of the Doctrine of Equitable Estoppel.

ARGUMENT II

A) QUESTION PRESENTED

Was the Board required to make a factual determination concerning the Structure's height in order to resolve the legal question on appeal?

B) SCOPE OF REVIEW

The Supreme Court's review of a Board of Adjustment decision requires application of the same standard applied by the Superior Court in its review: the Court's review is limited "to correcting errors of law and determining whether substantial evidence exists to support the Board's findings of fact".[32] "When substantial evidence exists, [the Court] will not reweigh it or substitute [its] own judgment for that of the Board."[33]

C) MERITS OF ARGUMENT

The Appealing Neighbors' second argument on appeal is predicated on a conclusion that the Board was asked to resolve a contested factual issue regarding whether the Structure would be reconstructed to "essentially the same configuration". As noted above, it was not. As neighboring property owners, the Appealing Neighbors could have decided to avail themselves of the administrative

[32] *Rehoboth Art League, Inc. v. Bd. Of Adjustment of Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010) (internal citations omitted).

[33] *Id.*

remedies available by challenging the Building Official's conclusion that the Structure's lowest floor elevation may be raised to five feet above grade. They did not.

Thus, the issue before the Board on appeal was not whether the Bruhls could raise the Structure under Section 185-59, but instead whether Section 185-59 – as a matter of law – operates to impose a limit on the Structure's height. Stated another way, the issue was not whether the **facts** supported a conclusion that raising the Structure as proposed would result in essentially the same configuration, but instead whether the **law** imposed a height limitation. Consideration of this legal question does not require a review of the hearing transcript, even if it were available.[34]

The procedural posture of this case begins with the Town Building Official's decision – as outlined in the Town Solicitor's September 24, 2013 letter – that while the Structure **may** be raised, it may only be raised to a height of five feet

[34] *See generally, Brittingham v. Board of Adjustment of the City of Rehoboth Beach*, 2005 WL 170690, at *13 (Del. Super.)(reviewing and discussing the question on appeal despite the absence of a transcript from the hearing below, noting that, "there is enough of a record provided for a decision to be rendered on the main issue – whether the settlement agreement was binding so as to bar further proceedings on the appeal and application").

above grade.[35] In offering this opinion, the Town Solicitor expressly acknowledged the requirement in Section 185-59 that any restoration is limited to "essentially the same configuration as existed prior to the damage", yet still concluded that elevation was permissible.[36] On October 8, 2013, the Bruhls challenged the Town's conclusion that Section 185-59 operates to limit the permitted lowest floor elevation to five feet above grade.[37] Restated, the Bruhls challenged the Town's interpretation of the Town Code – not the Town's application of the facts.

Neither party disputed the need to apply both Section 101-11 (A) and Section 185-59 to the matter before the Board.[38] Nor did any party dispute that the Town Code permitted the Bruhls to raise the Structure to five feet above grade.[39] The sole issue in dispute was whether the Code limited the Bruhls to a maximum lowest floor elevation of five feet above grade.[40]

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[35] R. at 4, B-12

[36] *Id.*

[37] R. at 3, B-14

[38] *See* R. at 23, B-18

[39] *See id., see also,* R. at 3, B-14 and R. at 4, B-12

[40] *See* R. at 23, B-20 (providing that, "[t]}he present dispute is over whether the two sections – Section 101-11 (A) and 185-59 – can be read together to impose a maximum height limitation of

To evaluate this question, the Board applied principles of statutory interpretation to ascertain and give effect to the intent of the Town Commissioners, as expressed through the language of the Town Code.[41] The Board concluded that if raising the structure to five feet above grade resulted in essentially the same configuration – which neither party disputed – then the requirements of Section 185-59 had been met.[42] And since the Bruhls had complied with the requirements of both Section 101-11 (A) and Section 185-59, the Structure's elevation cannot arbitrarily be limited to an elevation of five feet above grade.[43] The Board explained – and the Superior Court agreed – that it would be illogical to conclude that raising the Structure five feet above grade complied with Section 185-59 while raising the Structure eight feet did not.[44]

The Appealing Neighbors' second argument is nothing more than a red herring. Recognizing that this Court is capable of conducting a *de novo* review of the applicable legal question without a transcript of the hearing before the Board,

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one (1) foot above the one-hundred year flood elevation [i.e. five-feet above grade] for the repairs to the Structure").

[41] *See* R. at 23, B-18

[42] *Id.*

[43] *Id.*

[44] *Id.* (opining that the Board "struggles to see how raising the Structure five (5) feet results in 'essentially the same configuration', while raising the Structure eight (8) feet does not")

the Appealing Neighbors have sought to manifest the basis for a substantial evidence review by creating a factual dispute that, critically, never existed before the Board. Moreover, the alleged factual dispute is irrelevant to the question currently before the Court.

The Appealing Neighbors' true argument is that the Town and the Bruhls all erred in concluding that **any** elevation of the Structure would result in an impermissible reconfiguration.[45] Thus, the Appealing Neighbors opine, the Structure may only be raised upon receiving a variance.[46] Contrary to the Appealing Neighbors' assertions, however, consideration of this argument, even if it were made before the Board, would not have required a factual determination by the Board and, thus, does not require an evidentiary review by this Court.

As an aside, although the Court below briefly speculated on the Building Official's reasoning for granting the underlying building permit, such speculation was not offered as a basis for the Court's conclusion.[47] Indeed even if the Court below was correct in its speculation – i.e. that the Building Official did in fact read Section 101-11 (A) as providing an exception to the requirements of Section 185-59 – and further even if this reasoning was legally incorrect, the fact remains that

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[45] Appellant Opening Brief at 16

[46] *Id.* at 19

[47] *See* Exhibit A at 7.

the Building Official's reason for concluding that five feet was appropriate was never challenged. That was the Court's ultimate point. The Appealing Neighbors cannot use the appellate process to address arguments that were not properly and fairly raised before the administrative body, here, the Board of Adjustment, in the first instance.[48]

The only applicable question before the Board was "whether the Building Officer [sic] had correctly interpreted §101-11 (A) and §185-59."[49] The Appealing Neighbors have attempted to turn the Board's hearing into something it was not. As noted above, the Board's review began with the uncontested premise that raising the Structure five feet above grade was permissible under the Code. It then engaged in a review of the language in the applicable code provisions. Even if the transcript were available, the testimony would have little probative value to the issue on appeal. Again, the issue on appeal was whether Section 101-11 (A) and Section 185-59 operate together to impose a limitation on the permissible elevation of a reconstructed nonconforming structure.

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[48] *See Preston v. Bd. Of Adjustment of New Castle County,* 2002 WL 254150, at *5; *see also, MacDonald v. Bd. Of Adjustment of Town of Dewey Beach*, 558 A.2d 1083,1088 (Del. Super. Ct. 1989); *see also,* Supr. R. 8.

[49] Exhibit A at 10-11.

The Board did not interpret an increase in height to be *per se* impermissible under Section 185-59, thus enabling it to defer to the parties' uncontested opinion – including the opinion of the Town in interpreting its own Code – that elevating the Structure's base level to five feet did not constitute a reconfiguration. The Board then evaluated whether an additional three feet was impermissible under the Code. It reviewed the applicable statutory provisions and found such a distinction to be illogical and without statutory support. This Court's review of those conclusions is a legal review appropriate for a *de novo* consideration without a transcript of the Board hearing.

ARGUMENT III

A) QUESTION PRESENTED

Is the Board required to take testimony from the general public during an appellate review?

B) SCOPE OF REVIEW

The Supreme Court's review of a Board of Adjustment decision requires application of the same standard applied by the Superior Court in its review: the Court's review is limited "to correcting errors of law and determining whether substantial evidence exists to support the Board's findings of fact".[50] "When substantial evidence exists, [the Court] will not reweigh it or substitute [its] own judgment for that of the Board."[51]

C) MERITS OF ARGUMENT

Initially, Delaware law does not require the Board to transform a public meeting to hear an appeal into a public hearing simply because members of the general public desire an opportunity to offer public comment. Indeed, Title 22, Section 326, only requires that the Board, when sitting to hear an appeal, "fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as

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[50] *Rehoboth Art League, Inc. v. Bd. Of Adjustment of Town of Henlopen Acres*, 991 A.2d 1163,1166 (Del. 2010) (internal citations omitted).

[51] *Id.*

due notice to the parties in interest, and decide the same within a reasonable time".[52]

The parties do not dispute that the Board: (1) fixed a reasonable time for the hearing; (2) provided public notice thereof; (3) provided due notice to the Bruhls and the Town of Dewey Beach – the true parties in interest; and (4) decided the matter within a reasonable time. The parties also do not dispute that the Board permitted the parties to appear in person or by agent or attorney.[53] The Board similarly complied with analogous provisions of the Dewey Beach Town Code.[54]

The Appealing Neighbors maintain that they should have been afforded an opportunity to speak during the meeting as parties in interest. In an appeal, the parties in interest are the parties to the appeal – namely the appellant and appellee. Although members of the public may become parties in interest, they are not automatically parties in interest.[55] Indeed, if members of the public were

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[52] 22 *Del C.* §326.

[53] *Id.*

[54] Consistent with Title 22, Section 185-65 (C) obligates the Board to "fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and decide the same within 30 days following the hearing." Town of Dewey Beach Code, Section 185-65 (C)

[55] *See also*, PARTY, *Black's Law Dictionary* (9th ed. 2009) (defining PARTY, in part, as "one by or against whom a lawsuit is brought")

automatically parties in interest, the Delaware and Town of Dewey Beach Codes would not require separate public notice in addition to specific notice to the parties in interest. Here, the parties in interest were the Bruhls, as the appellants, and the Town of Dewey Beach, as the appellee.

This distinction between a party in interest and the general public is not purely academic. *In In RE FOIA Complaint against Rehoboth Beach Board of Adjustment,* the Delaware Attorney General's Office was asked to review whether the Rehoboth Beach Board of Adjustment violated FOIA when it refused to permit public comment during an appeal.[56] The Attorney General's Office opined that, when the Board sits in an appellate capacity, "a citizen does not have standing to participate, unless he or she meets the criteria to intervene as an interested party [;] it is no different than in a court of law, where the trial may be open to the public to attend, but members of the public do not have any right to voice their opinion because they are not parties to the case."[57]

The rationale behind this distinction is important; decisions on appeal should be based on the merits of the arguments and not on whether the general public supports a particular interpretation of the Town Code. To require otherwise would allow personal preferences and opinions to pressure local boards in the

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[56] Op. Att'y Gen. 04-IB02 (Jan 28, 2004)

[57] *Id.*

interpretation of code language. The Board's role on appeal is to ascertain whether an administrative official properly applied the Code. [58] The meaning and intent of statutory language is determined upon an application of the principles of statutory interpretation – not the preference and popularity of a particular opinion.[59]

Although the Board did not open the hearing to public comment, the Appellants have nevertheless had an opportunity to submit their testimony to the post-hearing record in this matter.[60] Notably, this testimony is not relevant to the question of code interpretation that was before the Board. Specifically, the Appellants note that their testimony would have addressed, for example, the motive behind the Bruhl appeal, views of the Rehoboth Bay, property values, and the character of the construction. Nowhere in the Appealing Neighbors' affidavits is there an argument pertaining to the proper **legal** interpretation of the Code and why the Building Official erred in his reasoning. Instead, the Appealing Neighbors simply express their objection to the house being elevated. While such testimony may be sincere, and may even be relevant in a request for a variance, it has no bearing on the question of statutory interpretation at issue in the appeal.

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[58] 22 *Del. C.* § 327 (a)(1).

[59] *See generally, Sussex County Dept. of Elections v. Sussex County Republican Committee*, 58 A.3d 418, 422 (Del. 2013)

[60] *See* B-27

At the time of the hearing, the Board had one set of generic procedures for hearings. Thus, the procedures outlined for variance requests and appeals were the same – this notwithstanding the fact that there are critical differences between the legal standards for variances and appeals. Regardless, these general procedures were at all times to be balanced against the overarching policy outlined in Board Rule 11:

> These rules have been adopted in order to provide an orderly procedure for matters coming before the Board of Adjustment. However, these rules shall be interpreted and applied so as to afford substantial justice and to promote a *fair but efficient* hearing procedure. Consequently, strict adherence to these rules shall not be required, but the Board of Adjustment may modify and digress from these rules for reasonable cause *as the situation may demand*....[61]

Here, as noted above, public testimony was not relevant for the matter before the Board on appeal. As evident from the Appealing Neighbors' affidavits, the Board was correct in this conclusion. The Appealing Neighbors were provided adequate notice and opportunity to file an appeal of their own and become parties in interest. They chose not to. Now, after the fact, the Appealing Neighbors seek to overturn an unfavorable decision by suggesting that an otherwise generic public notice – which neither expressly nor implicitly provided that public testimony would be permitted – conferred a procedural right to participate in an appeal as a member of the public.[62] No such right exists under the law.

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[61] B-36 (emphasis added).
[62] *See* R. at 1, B-37

The matter before the Board was an appeal of the Building Official's determination and, in the alternative, a request for a variance. As a result, the Board would have only proceeded to the variance request, and applicable public testimony, if it denied the appeal. When sitting in an appellate capacity, the Board was entirely correct to not open the meeting for public comment. However, assuming, *arguendo*, that the Board did err by not opening the appeal for public comment, at most this error would be harmless as the testimony offered in the Appealing Neighbors' affidavits is either irrelevant or cumulative.

CONCLUSION

For the foregoing reasons the Appellees, The Bruhls and the Board, request that the Court affirm the decision of the Board, as affirmed by the Superior Court, permitting the Bruhls to elevate their home to a height of eight feet above grade as originally authorized by the approved plans and building permit issued to the Bruhls.

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Date: November 20, 2014

Exhibit A

EFiled: Jun 26 2014 10:10AM EDT
Transaction ID 55646978
Case No. S14A-01-001 ESB

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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RE: ***James L. Laird, et al., v. Board of Adjustment of the Town of Dewey Beach, et al.***
C.A. No: S14A-01-001 ESB

Dear Counsel:

This is my decision on the appeal filed by nine Dewey Beach residents of a decision by the Dewey Beach Board of Adjustment concluding that §101-11(A) and §185-59 of the Dewey Beach Code do not limit the first floor of a nonconforming structure to be raised only one foot above the 100-year flood plain elevation. §101-11(A) requires the first floor of a residential structure in the flood plain to be at least one foot above the 100-year flood plain elevation. §185-59 permits a nonconforming structure that is damaged by fire, storm, infestation or other peril to be reconstructed

to essentially the same configuration as existed prior to the damage. §185-59 prohibits a nonconforming structure from being reconfigured or expanded unless it is done in accordance with the zoning code. In this case, the Dewey Beach Building Official concluded that raising a nonconforming house that had been damaged by a hurricane constituted a reconfiguration of it, but that, despite the prohibition in §185-59 against allowing a reconfigured, nonconforming house to be reconstructed unless its reconstruction complies with the zoning code, § 101-11(A) provides an exception to §185-59, allowing the house to be raised no more than one foot above the 100-year flood plain elevation. The Board of Adjustment reversed the Building Official's decision, concluding that it made no sense. I have affirmed the Board's decision, albeit for different reasons.

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.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept

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

as adequate to support a conclusion.[2] If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if the court would have decided the case differently if it had come before it in the first instance.[3] "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."[4] In the 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."[5]

STATEMENT OF FACTS

Walter G. Bruhl, Jr.[6] and Helen S. Bruhl own a beach house at 124 Read Street, Unit 4, Dewey Beach, Delaware. The Bruhls' beach house is a nonconforming structure. It encroaches into the required yard setbacks and is one of four houses on a single lot that is not large enough to meet the density requirements for that many houses.

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

[3] *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).

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

[5] 22 *Del. C.* § 328(c).

[6] Walter G. Bruhl, Jr. is now deceased.

The Bruhls' beach house was flooded by Hurricane Sandy on October 29, 2012. Dewey Beach's Building Official sent the Bruhls a letter on February 21, 2013, informing the Bruhls that he had concluded that their beach house had been substantially damaged by Hurricane Sandy and, as a result of that, the Bruhls would have to comply with the "flood damage resistant provisions" of Chapter 101 of the Dewey Beach Code. The principal requirement was for the Bruhls to raise their beach house at least one foot above the 100-year flood plain elevation. The Bruhls then submitted an application for a building permit seeking approval to raise the first floor of their beach house eight feet above finished grade and to install an "A" frame roof. Raising the house would allow for cars to be parked under it and also create space for storage. The Building Official approved the Bruhls' application and issued them a building permit on May 29, 2013. The Bruhls' contractor then began reconstruction of their beach house, which included raising it off of the ground, installation of pilings, and construction of a concrete block foundation. After the work was underway, the Building Officer told the Bruhls in late July 2013, that they could not raise their beach house more than one foot above the 100-year flood plain elevation (approximately five feet above grade). The Town Solicitor followed up with a letter on September 24, 2013, stating that §101-11(A) and §185-59, when read together by the Building Official, only allowed the first floor of a reconfigured,

nonconforming structure to be raised one foot above the 100-year flood plain elevation. The Bruhls then filed an appeal of the Building Official's decision with the Board of Adjustment. The Board reversed the Building Official's decision, concluding that it made no sense.

DISCUSSION

The Building Official read §101-11(A) and §185-59 together to conclude that the Bruhls could only raise the first floor of their beach house one foot above the 100-year flood elevation. Thus, as a practical matter, this meant that the Bruhls could only raise their beach house five feet above grade instead of eight. This case involves the construction of two sections of the Dewey Beach Code. "The goal of statutory construction is to determine and give effect to legislative intent."[7] If the statute is unambiguous, "there is no need for judicial interpretation, and the plain meaning of the statutory language controls."[8] With an ambiguous statute "the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant."[9] A statute is ambiguous if it is "reasonably susceptible of

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

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

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

different conclusions or interpretations."[10] 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."[11] The statute must be read as a whole "in a manner that avoids absurd results."[12]

§101-11(A) states:

> In addition to the standards of §101-10 of this chapter, the following additional standards shall apply for all construction and development to be undertaken within the designated general floodplain area:
>
> A. Residential structures. Within the general floodplain area the lowest floor, including the basement, of all new or substantially improved residential structures shall be elevated to at least one foot above the 100-year flood elevation.

§ 185-59 states:

> If a nonconforming building is damaged by fire, storm, infestation, or other peril not caused intentionally by the property owner, it may be repaired or reconstructed to essentially the same configuration as existed prior to the damage, provided that any repair or reconstruction must be completed within one year and six months of the date of the damage. If a different configuration or an expansion of the original building is proposed, it must conform to all applicable regulations, including all applicable setbacks, height and elevation requirements.

The Building Official's decision rests on a conclusion he made about the

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

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

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

meaning of "configuration" and an interpretation of §101-11(A) that makes it an exception to the requirements of §185-59. The Building Official concluded that, but for Hurricane Sandy, the Bruhls' desire to raise their beach house eight feet above grade constituted a reconfiguration of it, requiring the Bruhls to bring it into compliance with the existing zoning code. The Building Official then interpreted§101-11(A) to provide a limited exception to §185-59. Thus, according to the Building Official, the first floor of a reconfigured, nonconforming structure can only be raised one foot above the 100-year flood plain because that is the minimum exception that §101-11(A) provides to the requirements of §185-59. Although not stated, I believe the Building Official reasoned that since the Bruhls now had to raise their beach house to comply with §101-11(A), that it gave them a variance from §185-59 to at least the minimum height requirements of §101-11(A).

The Board reversed the Building Official, concluding that his reading of §101-11(A) and §185-59 made no sense. The Board reached this decision because it could not see how raising a structure five feet results in "essentially the same configuration," while raising the structure eight feet does not, particularly since parking and storage under the structure and new steps would be there regardless of whether the structure was raised five or eight feet.

There are a number of problems with the Building Official's conclusion about

the meaning of configuration and his interpretation of §101-11(A) and §185-59. One, the Building Official did not offer any explanation for his conclusion that raising a nonconforming structure constitutes a reconfiguration of it. The Dewey Beach Code does not define "configuration." Configuration is generally defined as "a relative arrangement of parts or elements."[13] I do not see how the mere raising of a structure amounts to a change in the arrangement of its parts. It may be, but the Building Official offered no rationale for his conclusion, making it impossible to evaluate. I do note, based on the drawing submitted with the Bruhls' application for a building permit and the pictures of their beach house, that it does not appear that the parts of their beach house have been rearranged during the reconstruction. Two, the Building Official's interpretation of §101-11(A) as providing an exception to the requirements of §185-59 ignores the plain and unambiguous language of §101-11(A), which provides for no such exception. §101-11(A) sets forth a minimum level for the first floor for a structure in the flood plain. It provides for nothing else.

Three, the Building Official's statement that "[a]ny further elevation beyond the minimum required by §101-11(A) represents a reconfiguration of the structure, triggering an obligation to comply with the present zoning" is, as the Board noted, illogical. Stated another way, the Building Official concluded that a nonconforming

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[13] Merriam-Webster's Ninth New Collegiate Dictionary 275 (9th ed. 1986).

structure in a flood plain that is being reconfigured is not a reconfigured structure so long as it does not go above one foot the 100-year flood plain elevation. However, once the structure does, then it becomes a reconfigured structure that must comply with the zoning code. I would think that a structure is either being reconfigured or it is not. The parts of a house are either being rearranged or they are not. You cannot logically have it both ways.

Four, the Building Official's conclusion ignores the fact that §101-21, which is in the Flood Plain Management section of the Code, provides for variances where "compliance with the elevation of floodproofing requirements of this chapter would result in an exceptional hardship" for a property owner. Thus, there was no reason to interpret § 101-11(A) as providing an exception to §185-59. Quite simply, if you need a variance to comply with §101-11(A), then there is a process for obtaining it.

§101-11(A) only sets forth the minimum level for the first floor of a structure in a floodplain. §185-59 provides that when a nonconforming structure is damaged by a peril not intentionally caused by the property owner, then it may be reconstructed to essentially the same configuration as existed prior to the damage. It provides further that if a different configuration or an expansion of the structure is proposed, then it must conform to the zoning code. If the Building Official had concluded that the Bruhls' application for a building permit to raise their home eight feet above

grade constituted a reconfiguration of it, then they would have had to apply for a variance. However, the Building Official did not do that. The Building Official instead issued them a building permit to raise their beach house eight feet above grade. That decision was never challenged. The Building Official then misinterpreted §101-11(A) and §185-59 and told the Bruhls that they could only raise their beach house five feet above grade instead of eight. The Bruhls challenged that decision and it was properly reversed by the Board.

THE RESIDENTS' ARGUMENTS

The nine residents argue that (1) the Board committed reversible error when it permitted the Bruhls to raise their beach house eight feet above grade without first obtaining a variance, (2) the Board offered no factual basis to support its conclusion that raising the beach house results is essentially the same configuration as when it was on the ground, and (3) the Board violated their rights by not allowing them to comment at the public hearing.

The Issue Before the Board

The residents' first argument fails to recognize the issue actually before the Board. The Building Official issued a building permit authorizing the Bruhls to raise their beach house eight feet above grade. The residents never filed an appeal of that decision. Thus, the issue of whether the Bruhls could properly raise their beach house

eight feet above grade without first obtaining a variance was not before the Board. The Building Official did tell the Bruhls that his interpretation of §101-11(A) and §185-59 prevented the Bruhls from raising their beach house more than five feet above grade. The Bruhls filed an appeal of that decision with the Board. Thus, the issue before the Board was whether the Building Officer had correctly interpreted §101-11(A) and § 185-59. The Board and I have concluded that he did not, leaving the Bruhls with a building permit authorizing them to raise their beach house eight feet above grade.

The Building Official's Interpretation of Configuration

The residents' second argument fails to recognize that it was the Building Official who did offer a rationale for his interpretation of "essentially the same configuration." The Building Official concluded that merely raising a nonconforming house constituted a reconfiguration of it. Then he concluded that, based on his interpretation of §101-11(A) and §185-59, raising a nonconforming house one foot above flood plain elevation (five feet above grade) did not constitute a reconfiguration of the house, but that raising it eight feet above grade did. The Board rightly struggled with the notion that raising a house five feet above grade is "essentially the same configuration" while raising it eight feet above grade is not. Quite simply, for the purposes of §185-59, a house is either being reconfigured or it

is not. The problem does not rest with the Board's analysis of the flaws in the Building Official's decision. The problem is that the Building Official did not, as I noted previously, explain how he reached the conclusion that merely raising a house constitutes a reconfiguration of it. It was the Building Official who offered no rationale or facts supporting his conclusion, not the Board.

The Nature of the Appeal

The residents' third argument fails to appreciate the nature of the issue on appeal before the Board. It was an appeal of the Building Official's interpretation of §101-11(A) and §185-59. This was a legal issue. The proffered testimony by the residents had nothing to do with the issue before the Board. Instead, it was all about how the Bruhls' plan to reconstruct their damaged beach house would have negatively impacted their properties. While this may well have been appropriate for a hearing on an application for a variance, which the Board never considered in this case, it had nothing to do with the Building Official's interpretation of §101-11(A) and §185-59.

Conclusion

The Board of Adjustment's decision reversing the Building Official's decision is affirmed for the reasons set forth herein.

IT IS SO ORDERED.

E. Scott Bradley

ESB/sal
cc: Prothonotary
Counsel
Board of Adjustment