EFiled: Oct 15 2014 10:22AM EDT
Filing ID 56196953
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,	)	Case No. 392, 2014
Appellants Below, Appellants,	)	Appealed from the Superior Court of the State of Delaware C.A. No. S14A-01-001 ESB
v.	)	
BOARD OF ADJUSTMENT OF THE TOWN OF DEWEY BEACH, WALTER G. BRUHL, JR., and HELENE S. BRUHL,	)	
Appellees Below, Appellees.	)	

APPELLANTS BELOW, APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of the Superior Court in and for Sussex County's order affirming Appellee Below/Appellee Board of Adjustment of the Town of Dewey Beach's (the "Board") reversal of the decision of a building official (the "Building Official") for the Town of Dewey Beach (the "Town") which had limited the height that Appellees Below/Appellees Walter G. Bruhl, Jr. and Helene S. Bruhl (the "Bruhls") could raise a beach house condominium they own located at 125 Read Avenue, Unit 4, Dewey Beach, Delaware (the "Structure" or "Property"). As a result of the Board's reversal, the Bruhls were permitted to raise the Structure eight feet above ground level to the detriment of adjacent property owners and contrary to several provisions of the Code of the Town of Dewey Beach (the "Town Code").

On January 2, 2014, Appellants Below/Appellants James L. Laird and Elizabeth A. Laird (of 119 Read Avenue), Peter H. Lucas and Rose A. Lucas (of 108 Vista Road), Joseph McAvoy and Katie McAvoy (of 102 Hayden Road), Suzanne Messina (of 126 Read Avenue, Unit 9), Kathleen R. Sullivan, as trustee (of 106 Hayden Road), and Philip C. Winkler (of 117 Read Avenue) (collectively, "Appellants" or the "Neighboring Residents") initiated an appeal in Superior Court pursuant to 22 *Del C.* § 328.

On February 25, 2014, as a result of the Board's inability to produce a written transcript of the Board's November 20, 2013 hearing which formed the basis for its later written decision dated December 6, 2013, the Neighboring Residents filed a motion seeking to remand these proceedings to the Board for a new hearing so that a full record of the proceedings could be developed. The Board and the Bruhls opposed the motion, and, on April 4, 2014, after a brief hearing (the "April 4, 2014 Hearing")[1], the Superior Court denied the motion to remand.[2] In denying the motion to remand, the Superior Court ordered the parties to brief the issues, at which point the Court would either rule on the appeal based upon the record available, or would receive additional evidence.

After the parties submitted their respective briefs, the Superior Court issued its opinion on June 26, 2014, affirming the Board's decision reversing the Building Official's decision.

The Appellants Below/Appellants filed their Notice of Appeal to this Court on July 24, 2014. This is their Opening Brief.

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[1] Pages from the transcript of Superior Court Hearing will be referenced as "Super.Ct.Trans., p._"

[2] In addition to there being no record for the Superior Court to review, none of the four attorneys that appeared before the Superior Court at the hearing on the motion to remand had been present at the initial hearing before the Board on November 20, 2013.

SUMMARY OF ARGUMENT

I. The Board committed reversible legal error when it permitted the Bruhls to raise the Structure to a height of eight feet above ground level without first obtaining a variance.

A. There is no Conflict between §§ 101-11 and 185-59 of the Town Code

B. Sections 101-11 and 185-59 are not ambiguous.

C. The Board committed reversible legal error when it concluded that the Bruhls were permitted to raise the Structure eight feet above ground level.

D. The only pathway forward for the Bruhls is requesting and obtaining variances from compliance with §§ 101-11, 185-49, 185-59, and 185-60 of the Town Code.

II. The Board's failure to provide a record of the Hearing to support the basis for its factual determination that raising the Structure results in essentially the same configuration under § 185-59 of the Town Code requires reversal.

III. The Board's failure to permit Appellants and others to be heard at the Hearing violated § 185-65 of the Town Code and Appellants' procedural due process rights and requires reversal.

STATEMENT OF FACTS

On or about October 29, 2012, Hurricane Sandy damaged the Bruhls' Property when wind, rainfall, and the resulting storm surge caused the Structure to be inundated with floodwaters from the Rehoboth Bay. Before Hurricane Sandy, the Structure on the Property, which existed prior to the Town's adoption of Chapter 185 of the Town Code (the "Zoning Code),[3] was located on ground level and did not conform to the requirements of the Zoning Code in several respects, *i.e.* it was nonconforming. Specifically, the Property, which is zoned as Resort Residential (RR), did not conform to the Zoning Code as the Structure encroached into the required setbacks on each of its sides and was one of four buildings on a single lot of insufficient size to comply with the density requirements.[4]

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[3] *See generally* Town Code, ch. 185.

[4] *See* Town Code § 185-24. Table 2 of the Town Code, entitled Bulk Zoning Standards in All Districts, is incorporated by reference into §185-24 of the Town Code and requires a minimum setback distance for buildings in Zoning District RR of: 1) 22 feet for front yards; 2) 10 feet for rear yards; 3) 8 feet for each side yard; and 4) 10 feet between the sides of adjacent buildings. Thus, based on the survey of the Property, the Structure encroaches into: 1) the front yard setback by 15.3 feet; 2) the side yard setback by as much as 4.3 feet; and 3) the adjacent building set back by 1.1 feet. *See* Town of Dewey Beach Board of Adjustment Official Record (hereinafter, "R."), at 9, "Survey of Property", A-5. Thus, a huge portion of the Structure encroaches into the setbacks required by the Zoning Code.

On February 21, 2013, the Town's Building Official and Code Enforcer, William L. Mears (the "Building Official"), sent correspondence to the Bruhls informing them that he had determined that the Structure had been substantially damaged by Hurricane Sandy and, as a result, the Bruhls were required by § 101-15 of the Town Code to bring the Structure into full compliance with the floodplain management provisions of chapter 101 of the Town Code – namely, they were required to raise the Structure to an elevation of seven feet above sea level.[5]

Since early 2013, the Bruhls, primarily acting through their son, Martin, who has been overseeing the work on the Structure, have sought to transform their sleepy little cottage into what Martin Bruhl has described as a "Taj Mahal."[6] The

[5] R. at 15, A-6. The elevation of seven feet above sea level described in the Building Official's letter dated February 21, 2013 is based on the Flood Insurance Rate Map effective June 16, 1995. *See* R. at 11, A-8. On May 17, 2013, the Flood Insurance Rate Map was preliminarily revised and, as a result, the base flood elevation was increased to seven feet; thus, based on that revision, the Bruhls would be required to raise the Structure to an elevation of eight feet above sea level under Chapter 101 of the Town Code. For the Bruhls' Property, eight feet above sea level is a little more than five feet above ground level and eight feet above ground level, as allegedly proposed in the Building Permit Application, is a little more than 11 feet above sea level. *See* R. at 13, A-10.

[6] Affidavit of James L. Laird, at 2, A-70.

desire of the Bruhls and Martin Bruhl to take advantage of the damage caused by Hurricane Sandy (and the insurance proceeds therefrom) in order to transform the Structure into something in excess of mere reconstruction have caused them to push and exceed the limitations placed upon them by the Town Code as owners of nonconforming property.[7]

On May 29, 2013, the Building Official issued Building Permit No. 5680 (the "Building Permit") authorizing the Bruhls to "[r]aise house to FEMA+ standards" and to "[i]nstall "A" frame roof.[8] The plans submitted with the application for the Building Permit indicate that they intended to raise the first floor of the Structure to a height of eight feet above finished grade.[9]

The construction work on the Structure proposed by the Bruhls would transform it into something fundamentally different than what existed prior to Hurricane Sandy. Once the proposed work on the Structure is complete, it will: 1) allow for the parking of vehicles and storage underneath what was previously a ground level structure; 2) relocate the driveway to allow for under-Structure parking; 3) have its total height, including the raising and addition of an A-frame

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[7] *Id.*

[8] R. at 10, A-11.

[9] R. at 18, A-12.

roof, raised at least 12 feet above its previous height; 4) have exterior steps that are at least eight feet high and which will further encroach into the setbacks; and 5) upon information and belief, allow for increased interior ceiling heights or livable space within the Structure.[10] While the Bruhls and Martin Bruhl have advanced pretextual reasons for seeking to raise the Structure to a height of eight feet above ground level, it is not an accident that raising it to such a height would allow the Bruhls a much coveted view of Rehoboth Bay.[11] Indeed, the primary motivation for all of the proposed changes is to increase the usable space of the Structure and to gain a direct view of Rehoboth Bay from the interior of the Structure by elevating it above the surrounding homes.[12]

On September 24, 2013, the Town Solicitor sent correspondence to the Bruhls advising them that the Structure could only be raised approximately five feet above ground level as opposed to the eight feet contemplated in the plans submitted to obtain the Building Permit.[13] According to the Town Solicitor, the Town's position was that: 1) the Structure could only be reconstructed under §

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[10] Affidavit of James L. Laird, at 2, A-70.

[11] *Id.*

[12] *Id.*

[13] R. at 20, A-13.

185-59 of the Town Code if it maintained "essentially the same configuration as existed prior to the damage:" 2) the Structure, as a substantially improved residential structure, had to be elevated to at least eight feet above sea level pursuant to § 101-11(A) of the Town Code; and 3) despite § 101-11(A) permitting a height higher than the eight feet above sea level, § 185-59 of the Town Code acts to limit the permitted elevation to the minimum allowed under § 101-11(A) of the Town Code, *i.e.* eight feet above sea level. [14]

On October 8, 2013, the Bruhls submitted a request for a Board hearing seeking an appeal of the decision of the Building Official, as explained in the Town Solicitor's letter, and, in the alternative, a variance from the strict application of § 185-59 of the Town Code to permit a first floor height of eight feet above ground level.[15]

On November 20, 2013, the Board held a hearing on the Bruhls' appeal and alternative variance request (the "Hearing").[16] The Neighboring Residents, who allegedly received notice of the hearing as "parties in interest" pursuant to § 185-

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[14] *Id.*

[15] R. at 3, A-15.

[16] R. at 1, A-18.

65(C) of the Town Code,[17] attended the Hearing, either in person or through a group representative, but were not permitted to testify or be heard on any matter related to the Bruhls' appeal. The Neighboring Residents were not represented by counsel at the Hearing. Had the Board permitted the Neighboring Residents to testify, it would have heard their position that raising the Structure any height is a violation of the Town Code which cannot be permitted by the Town or its Building Official without the Bruhls first obtaining one or more variances.[18] In addition, the Neighboring Residents would have testified that the motivation of the Bruhls for raising the Structure to a height of eight feet above ground level is to gain a direct view of Rehoboth Bay from the interior of the Structure by elevating it above the surrounding homes.[19] The Neighboring Residents would have further testified that raising the Structure to a height of eight feet above ground level obstructs the view

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[17] R. at 2, A-19. It should be noted that, while the Town of Dewey Beach Board of Adjustment Official Record shows the property owners who allegedly received notice of the Hearing as "parties in interest" under § 185-65(C) of the Town Code, at least some property owners do not recall receiving such notice. *See* Affidavit of James L. Laird, at 2, A-70.

[18] *Id.*

[19] *Id.*

of Rehoboth Bay from their respective properties and, thus, reduces the value of those properties.[20]

After hearing testimony and argument from the Town and the Bruhls at the Hearing, the Board allegedly concluded that the Town had initially interpreted the applicable Town Code provisions as permitting the Bruhls to raise the Structure eight feet above ground level and then modified its position to the position stated in the Town Solicitor's letter dated September 24, 2013.[21] From this change in position and the perceived conflict between §§ 101-11 and 185-59 of the Town Code, the Board concluded that those provisions were susceptible to two reasonable interpretations, *i.e.*, they were ambiguous, and that perceived ambiguity must be resolved in favor of the Bruhls.[22] Having made the legal determination that § 185-59 did not establish a maximum height limitation for nonconforming structures sought to be raised by their owners under § 101-11, the Board then made the factual determination that the "[Bruhls'] plan to raise the Structure eight feet is

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[20] *Id.*; *see also* Affidavit of Peter Lucas, at 2, A-74; Affidavit of Rose Lucas, at 2, A-76.

[21] An Appeal from the Decision of the Building Official Re: 125 Read Avenue, Unit 4 Vista Road Condominiums, Board of Adjustment of the Town of Dewey Beach (December 6, 2013) (attached hereto as Exhibit "A").

[22] *Id.*

permitted under the Town Code as it would result in essentially the same configuration as existed prior to the damage – as that phrase is understood under [§] 185-59."[23]

On December 6, 2013, the Board issued its written decision (the "Written Decision") reversing the decision of the Building Official and permitting the Bruhls to raise the Structure to the proposed eight feet above ground level (the "Written Decision"). No written transcript or audio recording is available of the entire Hearing or the deliberations of the Board for review by the Court.

[23] *Id.*

ARGUMENT I

A. Question Presented

Did the Board commit reversible error when it permitted the Bruhls to raise the Structure to a height of eight feet above ground level without first obtaining variances? Because no written transcript or audio recording is available of the entire Hearing or the deliberations of the Board, Appellants/Appellants Below are unable to refer to a page where this question was preserved pursuant to Supr. R. 14(b)(vi). However, this issue was presented to the Superior Court at the April 4, 2014 Hearing, Super.Ct.Trans. pp. 16-19, A-35-38 , and on pp. 13-18 of Appellants Below/Appellants' Opening Brief filed on April 25, 2014, Transaction No. 55354882, A-58-63.

B. Scope of Review

This Court's standard of review mirrors that of the Superior Court.[24] Where there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of

[24] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

the agency.[25] On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error.[26] Absent an abuse of discretion, the decision of the agency must be affirmed.[27] However, where the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary.[28]

C. Merits of Argument

Neither the Board nor the Building Official has the authority to permit the construction or reconstruction of any structure in violation of the Town Code unless a variance is requested and granted by the Board of Adjustment under the procedures set forth in the Town Code. The Board, by maintaining a narrow focus on the language of §§ 101-11 and 185-59 of the Town Code alone as urged by the Bruhls, failed to construe the relevant chapters of the Town Code as a whole and in a manner that avoided absurd results. Indeed, rather than reviewing these chapters

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[25] *Baker v. Connell,* 488 A.2d 1303, 1309 (Del. 1985).

[26] *State, Dept. of Labor v. Medical Placement Services, Inc.,* 457 A.2d 382, 383 (Del. Super. 1982), *aff'd,* 467 A.2d 454 (Del. 1983).

[27] *Id.*

[28] *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 383 (Del. 1999).

in their entirety, the Board decided to resolve the perceived conflict between §§ 101-11 and 185-59 of the Town Code by manufacturing ambiguity which it resolved in favor of the Bruhls. In doing so, the Board ignored or failed to recognize that both the original Building Permit and their decision permitted the Bruhls to violate the Town Code. As demonstrated below, whatever perceived conflict that exists when considering §§ 101-11 and 185-59 of the Town Code together is resolved by examining those chapters of the Town Code which reveal that the Bruhls had only a single pathway forward – in this instance, variances.

1. The Perceived Conflict between §§ 101-11 and 185-59 of the Town Code

The Board, the Town, and the Bruhls perceived there to be a conflict between the application of the §§ 101-11 and 185-59 of the Town Code. Section 185-59 of the Town Code states that:

> 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 application for all required building permits be made 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.

Thus, under the §185-59 of the Town Code, if a building, such as the Structure, is damaged by a storm, it may be repaired to *essentially the same configuration* that existed prior to the damage and if rebuilt in a different configuration, the Property must conform to all of the regulations in the Zoning Code.

Section 101-11, as applied to the Property by § 101-15,[29] states that:

> 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 (FEMA-designated AE flood zone):
>
> A. Residential structures. Within the general floodplain area (FEMA-designated AE flood zone) 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.

Thus, under § 101-11 of the Town Code, if a building, such as the Structure, is substantially damaged by a storm, then the reconstruction of that building must comply with the height requirements of that section – *i.e.* raised to a height of at least eight feet above sea level.

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[29] Section 101-15(B) of the Town code requires "[a]ny modification, alteration, reconstruction, or improvement of any kind to an existing structure, to an extent or amount of 50% or more of the market value, shall be undertaken (only in full compliance) with the provisions of this chapter."

The Board, the Town, and the Bruhls each struggled with how an owner of a nonconforming property, such as the Bruhls, could both raise a structure at least eight feet above sea level as required by § 101-11 of the Town Code while simultaneously maintaining essentially the same configuration to avoid having to cure the property's nonconformities. The Town made the erroneous argument that a building could maintain essentially the same configuration under § 185-59 so long as the height was raised to the minimum height required by § 101-11, *i.e.*, eight feet above sea level. The Bruhls erroneously argued that § 101-11 of the Town Code permitted the Bruhls to raise the Structure to any height and was a modification to § 185-59 so that any changes made to the Structure under §101-11 resulted in a configuration that was essentially the same. The Board, having decided that both interpretations were reasonable, concluded that §§ 101-11 and 185-59 were ambiguous and that such ambiguity should be resolved in favor of the Bruhls; thus, the Bruhls could raise the Structure to a height of eight feet above ground level or approximately 11 feet above sea level.

2. Sections 101-11 and 185-59 Are Not Ambiguous

The primary error in the Board's conclusion that §§ 101-11 and 185-59 of the Town Code are ambiguous is that neither interpretation advanced by the Town

or the Bruhls is based on the language and plain meaning[30] of the Town Code. Sections §§ 101-11 and 185-59 of the Town Code say what they mean and mean what they say. In other words, and to paraphrase Justice Black, the phrase "the lowest level . . .shall be elevated to at least one foot above the one-hundred-year flood elevation" means the lowest level shall be elevated to at least one foot above the one-hundred-year flood elevation and the phrase "essentially the same configuration" means essentially the same configuration.[31] The plain language of these sections only becomes problematic when one realizes that compliance with § 101-11 by raising the Structure to at least five feet above ground level is going to result in a different configuration under § 185-59 of the Town Code and, thus, requires the Property to be brought into full compliance with the Zoning Code, including setback distances and density. This result may cause an exceptional practical difficulty. That difficulty, however, should not be the basis for erroneously issuing a building permit or a finding of ambiguity where the language

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[30] *French v. State*, 38 A.3d 289, 291 (Del. 2012):

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

[31] *See Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

of the relevant sections is clear, but there is no reason why such a difficulty could not be the basis for requesting one or more variances, as the Bruhls, in fact, also requested in the alternative.

3. The Board Committed Reversible Legal Error When It Concluded that the Bruhls Were Permitted to Raise the Structure Eight Feet above Ground Level.

Both the Board, in its Written Decision, and the Building Official, in the Building Permit, allowed the Bruhls to proceed with the raising of the Structure in violation of the Town Code and without a variance. Section 185-60(B) of the Town Code states that "[a] building which does not conform to the required setbacks in any respect shall not be expanded either vertically or horizontally in the setback area." Based on the Bruhls' survey of the Property, the Structure encroached into: 1) the front yard setback by 15.3 feet; 2) the side yard setback by as much as 4.3 feet; and 3) the adjacent building set back by 1.1 feet.[32] Thus, the Board, by allowing the Bruhls to raise the Structure eight feet, and the Building Official, by allowing the Bruhls to raise the Structure five feet, committed legal error as the expansion of the Structure vertically, by raising it any height, and horizontally, by adding steps higher than four feet above grade and which further

[32] *See* R. at 9, A-5; *see also, supra* at, n. 4.

encroach into the setback area,[33] are all in violation of § 185-60(B) of the Town Code. The violation of §185-60(B) is not addressed by the Board and is not resolved by the Board's resolution of the purported ambiguity of §§ 101-11 and 185-59 of the Town Code. This mistake of law undermined the Board's deliberative process and, therefore, rendered its vote arbitrary and capricious.[34] As such, this Court is required to reverse the Board's decision granting the Bruhls' appeal.

4. The Only Pathway Forward for the Bruhls is Requesting and Obtaining Variances from Compliance with §§ 101-11,185-49, 185-59, and 185-60 of the Town Code.

Based on application of §§ 101-11, 185-49, 185-59, and 185-60 of the Town Code to the Property and the Structure, it is clear that the Bruhls will be in

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[33] *See* Building Plans, A-12. *See also* Town Code § 185-49 ("In residential districts, . . . steps . . . which do not extend above the level of the first floor of the building may extend or project into the required front or rear yard not more than five feet. Such extension or projection *shall not be greater than four feet above grade* and in no event be closer than six feet to the front property line.").

[34] *See Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 61 (Del. 2014) ("We agree with the Court of Chancery's determination that a mistake of law undermined the Council's deliberative process and therefore rendered its vote arbitrary and capricious.")

violation of one section or another of the Town Code as a nonconforming property until and unless the Property is brought into full compliance with the Zoning Code. This is true unless the Bruhls obtain one or more variances under Chapters 101 and 185 of the Town Code.

The Delaware Superior Court, in explaining the constitutional purpose that variances serve, has stated:

> Variances serve as an "escape valve" when strict application of a particular zoning ordinance would result in an unnecessary burden upon a landowner." The purpose of a variance is to protect [a] landowner's rights from the unconstitutional application of zoning law." A board of adjustment should grant a variance from a zoning restriction where "strict application would amount to an unconstitutional taking . . . ." The variance "is intended to strike a balance" between preserving the public's interest in regulating land use and protecting the landowner's interest in exercising his property rights free from unconstitutional deprivations by the government.[35]

Sections 101-21 and 185-68 of the Town Code provide the Bruhls with the "escape valve" described by the Court in *Brown v. City of Wilmington* by allowing the Bruhls to apply for variances to relieve them of the "unnecessary hardships and

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[35] *Brown v. City of Wilmington*, 2008 WL 2943390, at *7 (Del.Super. Mar. 17, 2008) (reversed on other grounds by *CCS Investors, LLC v. Brown*, 977 A.2d 301, 325 (Del. 2009), as corrected (Aug. 10, 2009).

exceptional practical difficulties"[36] of strict compliance with the Town Code. The relief available to the Bruhls under §§ 101-21 and 185-68 of the Town Code are, however, subject to important limitations stated therein – namely, the variances must "represent the minimum variance that will afford relief"[37] and "involve only the least modification to provide relief"[38], and the grant of any variances may be subjected to conditions imposed by the Board.[39] These limitations applied to the Bruhls' Property means that variances may only be granted for the Bruhls to raise the Structure to a height of approximately five feet above ground level, *i.e.*, the minimum height required by § 101-11(A) and the same height approved by the Building Official, as that height represents the least modification to the requirements of the Town Code while still providing relief to the Bruhls.

Rather than conclude that the original proposed plans to raise the Structure were a violation of the Town Code and then address the Bruhls' request for a variance, the Town and the Board ignored the plain meaning of the Code and the only available remedy that could be provided to the Bruhls, albeit within the limitations provided in §§ 101-21, 185-68, and 185-69 of the Town Code, and

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[36] Town Code § 185-68(A)(1).

[37] *Id.* §185-68(A)(5).

[38] *Id.* § 101-21(A).

[39] *Id.* § 185-69.

manufactured an ambiguity as a way of reconciling the need for the Bruhls to raise the Structure without the strict application of the Town Code. While the variance requested by the Bruhls was not addressed by the Board and is not at issue in this appeal, the availability of variances to the Bruhls is important for the Court to recognize as the remedy to the plain and unambiguous application of the Town Code to the Property. A property owner is not relieved of the requirement to seek a variance by virtue of a building permit that was issued erroneously and in violation of the Town Code.[40]

Although this Court's review will not focus on the Superior Court's decision since that Court elected to not receive additional evidence in this matter, one of the lower Court's concerns with the Neighboring Residents' arguments on this issue is worth addressing. The lower Court held:

> The resident's 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

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[40] *Miller v. Bd. of Adjustment of Town of Dewey Beach*, 521 A.2d 642, 647 (Del. Super. 1986):

> "The general rule, however, is that a permit issued illegally, or in violation of the law, or under a mistake of fact does not confer a vested right upon the person to whom it is issued, even though that person has made substantial expenditures in reliance thereon. The underlying principle which supports this rule is that every person is presumed to know the extent of power of the municipal authorities.")(internal citations omitted).

eight feet above grade without first obtaining a variance was not before the Board.[41]

There is nothing in the record regarding whether the residents received proper notice of the issuance of the initial building permit, because there is no record of whether the Building Permit was properly displayed on a conspicuous place of the Structure as is required by § 71-3 of the Town Code. If, in fact, the building permit had not been properly displayed, the Neighboring Residents would have had no opportunity to challenge it prior to receiving notice of the Bruhls' appeal. Because there is no record of the proceedings below, it cannot be determined whether there was any evidence presented to establish whether the initial building permit had been properly displayed. In any event, a Building Permit issued incorrectly and in violation of Town Code cannot be the basis for the property owner to then argue that no variance is needed or that some of the relevant Code sections (but not all) are ambiguous.

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[41] *Laird et. al. v. Board of Adjustment of the Town of Dewey Beach, et.al*, Del. Super., CA. No. S14A-01-001, Bradley, J. (June 26, 2014)(attached as Exhibit "B").

ARGUMENT II

A. Question Presented

Did the Board's failure to provide a record of the hearing to support the basis for its factual determination that raising the Structure results in essentially the same configuration under § 185-59 of the Town Code require reversal? Because no written transcript or audio recording is available of the entire Hearing or the deliberations of the Board, Appellants/Appellants Below are unable to refer to a page where this question was preserved pursuant to Supr. R. 14(b)(vi). However, this issue was presented to the Superior Court at the April 4, 2014 Hearing, Super.Ct.Trans. pp. 3-7, 19-20, A-22-26, 38-39, and on pp. 19-21 of Appellants Below/Appellants' Opening Brief filed on April 25, 2014, Transaction No. 55354882, A-64-66.

B. Scope of Review

This Court's standard of review mirrors that of the Superior Court.[42] Where there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of

[42] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

the agency.[43] On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error.[44] Absent an abuse of discretion, the decision of the agency must be affirmed.[45] However, where the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary.[46]

C. Merits of Argument

An essential part of the Board's reversal of the Building Official was its determination that raising the Structure to a height of eight feet above ground level resulted in a configuration that was essentially the same as before the damage caused by Hurricane Sandy and was, thus, permitted by § 185-59 of the Town Code.[47] This Court may only affirm this determination of the Board if substantial

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[43] *Baker v. Connell,* 488 A.2d 1303, 1309 (Del. 1985).

[44] *State, Dept. of Labor v. Medical Placement Services, Inc.,* 457 A.2d 382, 383 (Del. Super. 1982), *aff'd,* 467 A.2d 454 (Del. 1983).

[45] *Id.*

[46] *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 383 (Del. 1999).

[47] Section 185-59 of the Town Code states in relevant part that:

> 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 application for all required building permits be made within one year and six months of the date of the damage. If a different configuration or an

evidence supports the Board's findings of fact.[48] The General Assembly has "charged the Court with the duty to ensure that the [B]oard follows the law and acts reasonably."[49] "The Court can discharge this duty only if the grounds on which the [B]oard acts are 'clearly disclosed and adequately sustained' . . . ."[50] The record must, therefore, "allow the Court to identify the reasons for the [B]oard's decision and evaluate them."[51]

As this Court stated in *Tate v. Miles*, "unless [the Board] creates a record or states on the record its reasons for [its findings], a court is given no means by which it may review the [Board's] decision."[52] "The Board is ultimately responsible for ensuring a record is created and for providing a transcript to the

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expansion of the original building is proposed, it must conform to all applicable regulations, including all applicable setbacks, height and elevation requirements. Town Code § 185-59 (emphasis added).

[48] *Friends of the H. Fletcher Brown Mansion v. Wilmington*, 2013 WL 4436607, at *7 (Del. Super. July 26, 2013).

[49] *Id.*

[50] *Id.* (quoting *Kollock v. Sussex County Board of Adjustment*, 526 A.2d 569, 574 (Del. Super. 1987).

[51] *Id.* (citing *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989) (holding that the grounds for decision "must be clear from the record")).

[52] 503 A.2d 187, 191 (Del. 1986). *See also Barley Mill*, 89 A.3d at 62 (quoting *Tate*).

Court."[53] "'If judicial review is to be an efficient bulwark against arbitrary conduct, such records must be accurate and reasonably complete.'"[54] Thus, a "failure of a board of adjustment to keep a record of its proceedings is grounds for reversal or remand."[55] With the option of remand unavailable to the Court, "reversal would be the Court's only option."[56]

As noted previously, the Board failed to provide a transcript of the Hearing to support the bases for its factual determination that raising the Structure to a height of eight feet above ground level results in essentially the same configuration under § 185-59 of the Town Code; thus, the Board failed to create a record from which the Court can review its decision. Additionally, to review this factual determination of the Board without as complete of a record as may exist will "undermine the public's expectations that both parties receive a fair shake upon

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[53] *Brittingham v. Bd. of Adjustment of the City of Rehoboth Beach*, 2005 WL 170690, at *12 (Del. Super. Jan. 14, 2005).

[54] *Id.* (quoting ANDERSON'S AM. LAW ZONING §22:27 (4th ed. 1997)).

[55] *Id.*

[56] *Id.*

review."[57] Having failed to create a record sufficient to permit review by the Court, the decision of the Board must be reversed.

Furthermore, and assuming *arguendo* that the Board's Written Decision is a sufficient record to permit judicial review, the Board's determination that raising the Structure to a height of eight feet above ground level results in essentially the same configuration under § 185-59 of the Town Code is not supported by substantial evidence[58] in the Written Decision. The entire basis for this factual determination is contained in a single paragraph where the Board essentially stated that if five feet above ground level is essentially the same configuration, then eight feet above ground level is essentially the same configuration, but never stated any reason or basis why raising the Structure five feet above ground level is essentially the same configuration.[59] Thus, while the Board's discussion in that paragraph may permit the Court to review why the Board believed there to be no appreciable

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[57] *Bethany Beach Vol. Fire. Co. v. Bd. of Adjustment of the Town of Bethany Beach*, 1998 WL 110057, at *4 (Del. Super. Jan. 23, 1998).

[58] Substantial evidence is defined as "more than a scintilla, if less than a preponderance." *See East Lake Partners v. City of Dover Planning Commission*, 655 A.2d 821, 823 (Del. Super. 1994).

[59] *See* Exhibit A.

difference between raising the Structure five feet and eight feet, the Court is left to guess at the reasons why the Board concluded that raising the Structure five feet, in and of itself, was not a configuration that was essentially different from that which existed prior to Hurricane Sandy. Two wrong interpretations of the Town Code do not equate to substantial evidence. As such, that determination is not supported by substantial evidence and must be reversed.

Again, as noted, *supra*, while the Superior Court's decision is not the focus of this Court's review, the lower Court's comments when addressing this issue highlight the problems inherent in attempting to review a case with an insufficient record. The Court below commented:

> 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). [60]

The Court's discussion highlights the problem underlying this case—as the lower Court recognized, there is no record of what the Building Official's rationale was, because there is no transcript of the proceedings. Indeed, if the Building Official, who had no power to issue a variance, did believe that the Bruhls actually had obtained a prior variance to raise their house eight feet, that could be another

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[60] *See* Exhibit B at 7.

reason that the issuance of the permit itself should be reversed; any such alleged variance had never been subject to a public hearing as required by the Town Code.

The lower Court continued:

> 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 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 problem is that the Building Official did not . . . 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."[61]

Again, the problem with the lower Court's analysis is that there is no record of the proceedings before the Board. There is no record of what the Building Official did or did not say at that hearing. Thus, there is no record of whether he, in fact, offered a rationale or facts supporting his conclusion. Similarly, there is no record from which a reviewing court can determine whether the Board considered the testimony of the Building official and fairly and reasonably reached the conclusion it did.[62]

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[61] *Id.* at 11-12.

[62] *Holowka v. New Castle Cnty. Bd. of Adjustment,* 2003 WL 21001026, *3 (Del. Super. Apr. 15, 2003).

ARGUMENT III

A. Question Presented

Did the Board's failure to permit the Neighboring Residents and others to be heard at the hearing violate the Town Code and the Neighboring Residents' Procedural Due Process Rights and require reversal? Because no written transcript or audio recording is available of the entire Hearing or the deliberations of the Board, Appellants/Appellants Below are unable to refer to a page where this question was preserved pursuant to Supr. R. 14(b)(vi). However, this issue was presented to the Superior Court at the April 4, 2014 Hearing, Super.Ct.Trans. pp. 18-19, A-37-38, and on pp. 21-22 of Appellants Below/Appellants' Opening Brief filed on April 25, 2014, Transaction No. 55354882, A-66-67.

B. Scope of Review

This Court's standard of review mirrors that of the Superior Court.[63] Where there is a review of an administrative decision by both an intermediate and a higher appellate court and the intermediate court received no evidence other than that presented to the administrative agency, the higher court does not review the decision of the intermediate court but, instead, directly examines the decision of

[63] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.,* 616 A.2d 1205, 1208 (Del. 1992).

the agency.[64] On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error.[65] Absent an abuse of discretion, the decision of the agency must be affirmed.[66] However, where the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary.[67]

C. Merits of Argument

The Board committed reversible legal error when it arbitrarily refused to permit Appellants and others to testify or otherwise be heard at the Hearing on the issue of whether raising the Structure resulted in essentially the same configuration. Section 185-65(C) states that the Board shall "give public notice . . . as well as due notice to the parties in interest" of the time of its hearings on "an application *or appeal*."[68] In addition, "[u]pon the hearing, any person may appear

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[64] *Baker v. Connell,* 488 A.2d 1303, 1309 (Del. 1985).

[65] *State, Dept. of Labor v. Medical Placement Services, Inc.,* 457 A.2d 382, 383 (Del. Super. 1982), *aff'd,* 467 A.2d 454 (Del. 1983).

[66] *Id.*

[67] *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 383 (Del. 1999).

[68] Town Code § 185-65(C) (emphasis added).

in person or by agent or attorney."[69] Moreover, Rule 9.3 of the Town of Dewey Beach Board of Adjustment Rules of Procedure ("Board of Adjustment Rules") provides that, at any appeal from a decision of the Building Official, "any person desiring to make a statement to the Board regarding the nature of the subject of the proceeding *shall be entitled to do so* at the appropriate time when recognized by the Chairman."[70] Similarly, Rule 9.7.6 of the Board of Adjustment Rules provides, in relevant part, "At the conclusion of the Applicant/Appellant's witnesses and evidence, and subject to Rule 9.7.12 [which deals with repetitive, irrelevant, or argumentative testimony], any person desiring to make a statement in opposition to an application or appeal *shall be entitled to do so*."[71] Each of the Neighboring Residents allegedly received notice of the Hearing as "parties in interest" in compliance with § 185-65 of the Town Code or from the Town's website, but, when they appeared before the Board at the Hearing, they were denied the right to testify or otherwise be heard on any issue in violation of the Town Code, the Board of Adjustment Rules, and the Federal and Delaware Constitutions.[72]

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[69] *Id.*

[70] A-81 (emphasis added).

[71] A-82 (emphasis added)

[72] In *Nottingham Partners v. Dana*, the Delaware Supreme Court explained that:

Had the Board permitted the Neighboring Residents to testify, it would have heard their position that raising the Structure any height is a violation of the Town Code which cannot be permitted without the Bruhls first obtaining one or more variances.[73] In addition, the Neighboring Residents would have testified that the motivation of the Bruhls for raising the Structure to a height of eight feet above ground level is to gain a direct view of Rehoboth Bay from the interior of the Structure by elevating it above the surrounding homes.[74] Appellants would have further testified that raising the Structure to a height of eight feet above ground level obstructs the view of Rehoboth Bay from their property and, thus, reduces the value of their property.[7576]

> The United States Supreme Court has said that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. It has also stated that the judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decision making in all circumstances. Due process is satisfied if the procedures which are followed are tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case.
> 564 A.2d 1089, 1101 (Del. 1989) (internal citations and quotations omitted).

[73] Affidavit of James L. Laird, at 2, A-70.

[74] *Id.*

[75] *Id.*; *see also* Affidavit of Peter Lucas, at 2, A-74; Affidavit of Rose Lucas, at 2, A-76.

[76] In addressing the Neighboring Residents' comments, the lower Court noted:

> "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

CONCLUSION

For the foregoing reasons, the Appellants/Appellant Below Neighboring Residents request that the Court reverse the Board's decision permitting the Bruhls to raise the Structure to a height of eight feet above ground level and remand with instructions to require the Bruhls to seek the variances required by the Town Code.

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this may 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." *Laird* at 12.

Underlying the lower Court's rationale on this issue is its position that the residents should have challenged the Building Official's issuance of the initial building permit (which had permitted the 8-foot building height). Had they done so, and prevailed, then the Bruhls' course of action would have been to seek a variance from the denial of the 8-foot building height. However, as discussed, *supra,* there is nothing on record to indicate that the Neighboring Residents had any notice that the Building Permit had initially been issued, so their first opportunity to address the subject was at the Bruhls' Hearing.