

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

July 30, 2009

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**RE: Dewey Beach Enterprises, Inc. v. Board of Adjustment of  
the Town of Dewey Beach  
C.A. No. S08A-08-002-ESB  
Letter Memorandum**

Date Submitted: June 8, 2009

Dear Counsel:

This is my decision on Dewey Beach Enterprises, Inc.'s ("DBE") appeal of the Board of Adjustment of the Town of Dewey Beach's (the "Board") finding that the Dewey Beach Zoning Code's 3600 square-foot minimum lot area per residential unit applies to DBE's plan to expand the "Ruddertown" complex by removing portions of the existing commercial buildings and adding a parking garage and 62 residential units.

**BACKGROUND**

DBE submitted to the Dewey Beach building inspector an application for a building permit and a site plan for a three-story, mixed-use structure on 2.36 acres of land in Dewey Beach, Delaware. The site plan is for an expansion of the existing "Ruddertown" complex and is broken down as follows:

<u>Floor (use)</u>	<u>Square Feet</u>	<u>Parking Stalls</u>
<u>Basement</u>		
Parking	76,710	212
<u>First Floor</u>		
Ruddertown Building	53,600	
Light House Restaurant	1,810	
Decks	14,747	
Parking	30,544	90
<u>Second Floor</u>		
31 Residential Units	62,656	
Parking	29,193	90
<u>Third Floor</u>		
31 Residential Units	62,656	
Parking	29,193	56

The purpose of the project, as stated on the site plan, is to construct a three-story, mixed-use structure and a basement parking garage to support the mixed uses. The basement parking garage will be operated as a commercial parking garage. John F. Brady, Esquire, the Dewey Beach attorney at the time, told DBE, in a letter dated December 24, 2007, that its site plan did not comply with the Dewey Beach Zoning Code, specifically § 185-53(A), which requires each unit of a residential multi-unit structure to comply with the minimum lot area per unit specified in Chapter 185, which is 3600 square feet per unit.<sup>1</sup> This would require DBE to substantially reduce the “Ruddertown” expansion.

DBE filed an appeal of Brady’s decision with the Board. The Board held a hearing. Mark Ziegler, David Sills, Jim Baeurle and Bill Mears testified at the hearing. Sills and Baeurle are partners in DBE. They testified about the approval process for the project and their dealings with Mears and Brady. Ziegler is a civil engineer with McBride & Ziegler, Inc. He prepared the site plan for the “Ruddertown” expansion and testified that it complied with the Dewey Beach Zoning Code.

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<sup>1</sup> Dewey Beach C. § 185-53(D)(1).

Ziegler further testified that he did not know what a residential multi-unit structure was, but was quite sure that the portion of DBE's Ruddertown expansion containing 62 residential units was not one. Mears is Dewey Beach's building inspector. He testified that § 185-53(A) was ambiguous and that he deferred to Brady's interpretation of it. DBE concluded its presentation to the Board without calling Brady as a witness. One of the Board members wanted to question Brady, but Dewey Beach's new attorney, Glen C. Mandales, Esquire, asserting the attorney-client privilege, would not allow it. The Board denied DBE's appeal, reasoning that § 185-53(A) does apply to DBE's site plan. DBE filed an appeal of the Board's decision with this Court. DBE argues on appeal that (1) the 3600 square-foot minimum lot area per residential unit does not apply to mixed-use structures, (2) only the building inspector could deny the issuance of a building permit, and (3) Brady should have testified at the Board hearing.

#### **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.<sup>2</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>3</sup> If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first

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<sup>2</sup> *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).

<sup>3</sup> *Miller v. Board of Adjustment of Dewey Beach*, 1994 WL 89022, \*2 (Del. Super. Feb. 16, 1994).

instance.<sup>4</sup> “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.”<sup>5</sup> 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.”<sup>6</sup>

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## **DISCUSSION**

### **1. The 3600 Square-Foot Requirement**

The Dewey Beach Zoning Code provides for the following zoning districts:

1. Neighborhood Residential
2. Resort Residential
3. Resort Business
4. Planned Residential

“Ruddertown” is in the Resort Business district. The purpose of this district is to provide sufficient space in appropriate locations for a wide variety of commercial and miscellaneous service activities not inappropriate for a resort area.<sup>7</sup> There are 34 categories of permitted uses in this district. DBE submitted its application for a building permit and site plan pursuant to §185-25(B)(2), which permits the following uses:

“Multiple-family dwellings, structures of mixed commercial and residential uses, subject to the mixed use provisions of Articles VI, VII and VIII.”

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<sup>4</sup> *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)(TABLE).

<sup>5</sup> *Mellow*, 565 A.2d at 956.

<sup>6</sup> 22 Del. C. § 328(c).

<sup>7</sup> Dewey Beach C. § 185-25.

DBE's planned expansion of Ruddertown is a structure of mixed commercial and residential uses and is, as such, subject to the other applicable provisions of § 185-25 and, by specific reference, Articles VI, VII and VIII.

§ 185-25(G)(1)(b) requires townhouses and multi-family dwellings to have a lot area of 3600 square feet per dwelling unit. Articles VI and VII address off-street parking and conditional uses, respectively, and, as such, do not address the disputed issues in this case. Article VIII addresses supplementary height, area and bulk regulations. The stated purpose of it is to qualify or supplement the district regulations appearing elsewhere in Chapter 185.<sup>8</sup> Article VIII consists of sections dealing with height regulations, lot area, yards and open spaces, front, side and rear yards, corner visibility, accessory buildings and structures, boat houses, piers and bulkheads, special regulations for townhouses and multi-unit structures, parking and storage of certain vehicles, and parking areas. Section 185-53 is titled "Special regulations for townhouses and multi-unit structures." § 185-53(A) states:

"Each unit of a residential multi-unit structure must comply with the minimum lot area per unit specification in this chapter."

The only applicable minimum lot area per unit specification in Chapter 185 is 3600 square feet per dwelling unit.<sup>9</sup>

The issue in this case is whether § 185-53 (A) applies to DBE's Ruddertown expansion. I have concluded that it does. "The goal of statutory construction is to determine and give effect to legislative intent."<sup>10</sup> If the statute is unambiguous, "there is no need for judicial interpretation, and

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<sup>8</sup> Dewey Beach C. § 185-45.

<sup>9</sup> Dewey Beach C. § 185-53(D)(1).

<sup>10</sup> *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

the plain meaning of the statutory language controls.”<sup>11</sup> With an ambiguous statute “the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant.”<sup>12</sup> A statute is ambiguous if it is “reasonably susceptible of different conclusions or interpretations.”<sup>13</sup> 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.”<sup>14</sup> The statute must be read as a whole “in a manner that avoids absurd results.”<sup>15</sup>

I have concluded that § 185-53(A) is unambiguous. Even though “residential multi-unit structure” is not defined in the Dewey Beach Zoning Code, there is no confusion about what it means. It means a structure containing more than one residential unit. This meaning is supported by the definitions of the words used in the phrase. “Residential” is defined as a place used as a residence.<sup>16</sup> “Residence” is defined as a place where a person actually lives.<sup>17</sup> “Multi” is defined as more than one.<sup>18</sup> “Building” is defined as “any structure having a roof supported by columns or walls for the housing enclosure of persons or property of any kind.”<sup>19</sup> The words “building” or

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<sup>11</sup> *Lawhorn v. New Castle County*, 2006 WL 1174009, at \*2 (Del. Super. May 1, 2006) (citing *Eliason*, 733 A.2d at 946).

<sup>12</sup> *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

<sup>13</sup> *Newtowne Vill. Serv. Corp. v. Newtowne Rd.*, 772 A.2d 172, 175 (Del. 2001).

<sup>14</sup> *LeVan*, 940 A.2d at 933 (quoting *Eliason*, 733 A.2d at 946).

<sup>15</sup> *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

<sup>16</sup> Webster’s Ninth New Collegiate Dictionary 1003 (9<sup>th</sup> ed. 1991).

<sup>17</sup> Webster’s Ninth New Collegiate Dictionary 1003 (9<sup>th</sup> ed. 1991).

<sup>18</sup> Webster’s Ninth New Collegiate Dictionary 779 (9<sup>th</sup> ed. 1991).

<sup>19</sup> Dewey Beach C. § 1-16.

“structure” include any part thereof, and the word “building” includes the word “structure.”<sup>20</sup> DBE’s planned expansion of Ruddertown includes 62 residential units. There is no doubt that DBE’s Ruddertown expansion is a residential multi-unit structure.

DBE argues that because “Ruddertown” is a mixture of commercial and residential uses that any Dewey Beach Zoning Code requirements applicable to residential uses do not apply. I have concluded that there is no merit to this argument. Section 185-25(B)(2) applies to both multiple-family dwellings and structures of mixed commercial and residential uses and specifically makes them subject to Article VIII. Article VIII, as I have previously noted, covers supplementary height, area and bulk regulations and sets forth special regulations for townhouses and multi-unit residential structures. DBE’s planned expansion of “Ruddertown” is certainly a multi-unit residential structure and there is simply no exception to or limitation in § 185-53(A) for a structure that is partly a multi-unit residential structure. Moreover, as I noted before, the drafters of the Dewey Beach Zoning Code specifically made mixed use structures subject to Article VIII, clearly evidencing their intent to subject mixed-use structures to the requirements of §185-53(A).

## **2. The Authority to Deny Issuance of the Building Permit**

DBE argues that the Board’s decision must be reversed because Dewey Beach’s former attorney and not the building inspector decided that DBE’s site plan did not comply with the Dewey Beach Zoning Code. This argument is based on § 185-75(a), which states that “it shall be the duty of the Building Inspector to enforce the provision of this chapter and to refuse to issue any permit for any building or certificate of occupancy or [sic] for the use of any premises which would violate any of the provisions of said chapter.” Since I have concluded that DBE’s site plan did not comply

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<sup>20</sup> Dewey Beach C. § 1-15 (D).

with the Dewey Beach Zoning Code, it is a moot issue as to whether it was proper for Dewey Beach's former attorney to have decided that DBE's site plan did not comply with the Dewey Beach Zoning Code.

**3. The Uncalled Witness**

DBE argues that the Board's decision must be reversed because Dewey Beach's new attorney, Glenn C. Mandales, Esquire, would not allow Brady to testify at the hearing. DBE did not call Brady as a witness in its presentation to the Board. Instead, one of the Board members wanted to question Brady. Mandales refused to allow Brady to testify, asserting the attorney-client privilege. I have concluded that there is no merit to DBE's argument because DBE, by declining to call Brady in its presentation to the Board, waived its right to complain on appeal about the fact that Brady did not testify.<sup>21</sup>

**CONCLUSION**

The Board of Adjustment of the Town of Dewey Beach's decision is affirmed for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office  
Timothy G. Willard, Esquire

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<sup>21</sup> *Romain v. State Farm Mutual Automobile Insurance Company*, 1999 WL 1427801, at \*2 (Del. Super. Dec. 2, 1999).