BOARD OF ADJUSTMENT MEETING
CITY OF REHOBOTH BEACH

April 25, 2016

The Board of Adjustment Meeting of the City of Rehoboth Beach was called to order at 7:00 p.m. by Chairman Thomas Evans on Monday, April 25, 2016 on the second floor of the Rehoboth Beach Library, 226 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Mr. Clifton Hilderley
Mr. Chuck Donohoe
Mr. Thomas Evans
Ms. Myrna Kelley
Mr. Doug Popham

Also in attendance: Mr. Craig Karsnitz, Esq., Board of Adjustment Solicitor

A quorum was present.

CORRESPONDENCE

There was none.

APPROVAL OF MINUTES

Minutes of the March 28, 2016 Board of Adjustment Meetings were distributed prior to the meeting.

Ms. Myrna Kelley made a motion, seconded by Mr. Chuck Donohoe, to approve the Minutes of the March 28, 2016 Board of Adjustment Meeting as written. Motion carried unanimously.

OLD BUSINESS

Chairman Evans read the reasons for granting an Appeal from Sections 270-71 & 270-74(A) of the Zoning Code and noted the Public Hearing procedures.

Case No. 1215-13. An APPEAL OF A DECISION OF THE BUILDING INSPECTOR to deny a building permit for failure to satisfy the requirements of Ordinance No. 0715-01. The property is located in the R-1 Zoning District on Lot Nos. 45 & 46 and the easterly portion of Lot No. 47, Block No. 24 at 105 St. Lawrence Street. The Appeal is being requested by Eugene M. Lawson, Jr. Esq. of The Lawson Firm LLC on behalf of Barry & Sharon Covington, owners of the property.

Board of Adjustment Solicitor Craig Karsnitz noted that preliminarily there was an oral motion to dismiss this appeal for a claim of lack of jurisdiction with this Board at the last meeting. Because it was just made orally, the Board continued this hearing as well as a companion case, so both parties would have an opportunity to file written legal arguments as to what their position is on the jurisdictional issue. Those arguments have been filed pursuant to the schedule the parties have agreed to at the last meeting. The Board has all those arguments.

City Solicitor Glenn Mandalas said that the subject matter jurisdiction argument stems from an issue where the Appellant has characterized their appeal as turning on a provision of the City's Charter. The argument of the Appellant is based upon one reading of the Charter that an old zoning ordinance would appeal. The City's interpretation of the Charter is that a newer zoning ordinance would apply. The issue is that because the appeal is characterized as turning on the Charter, as much authority as this Board has to interpret zoning provisions in Chapter 270 of the Code, it is without subject matter jurisdiction to interpret provisions of the Charter. The appeal must be denied due to the lack of subject matter jurisdiction on the part of the Board. City Solicitor Mandalas read the provision in Section 270-71 of the Code that deals with appeals to the Board of Adjustment. Appeals to the Board may be taken by any person aggrieved by or any officer or department, board or bureau of the City affected by any decision of the building inspector. Such appeal shall be taken within a reasonable time as provided by the rules of the Board by filing with the building inspector from whom the appeal is taken and with the Board a notice of appeal specifying the grounds thereof. The building inspector from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appeal was taken from. City Solicitor Mandalas acknowledged that when the building official denied the application, he applied it against the ordinance that was passed and was subject to a challenge that went through the whole

process, and identified certain areas where the application did not comply. City Solicitor Mandalas also acknowledged that the Appellant's view is that the building official should not have applied that because of the Charter provision. He further acknowledged that Section 270-75 of the City Code reads that in exercising its powers, the Board of Adjustment in conformity with the law may reverse or affirm fully or in part or may modify the order, requirement, decision or determination as sought to be made. To that end, the Board shall have all the powers of the building inspector from whom the appeal is taken. City Solicitor Mandalas noted that subject matter jurisdiction is not waivable. As a matter of law, subject matter jurisdiction is defined in the State statute that sets up the Board. He agreed that it was within the building inspector's jurisdiction to make the decision that he made in this case. The issue that is being raised by the Appellant is a question about a decision that was allegedly made under the City Charter. Section 6 of Ordinance No. 0715-01 reads that this ordinance is subject to the pending ordinance doctrine and Section 270-84 of the Code that upon its introduction and the scheduling of a public hearing by the Mayor & Commissioners, the City's Building & Licensing Department shall thereafter reject any new application that is inconsistent with the amendments to Chapter 270 provided in the ordinance until such time as the Mayor & Commissioners take action on the ordinance. Case law was presented to the Board. City Solicitor Mandalas noted that the Board does not have the authority to look to the Charter to make a decision on an appeal. The ordinance is a zoning ordinance, and the pending ordinance doctrine is a zoning doctrine. All of that is within the purview of the Board, but the Appellant is asking that the Board look to the Charter to make the final determination to rest on a Charter provision, not on a zoning provision. It is not within the Board's jurisdiction to make decisions on Charter provisions, it makes decisions on zoning provisions. In the Appellant's original filing, it is noted that this is an appeal that is based on expressed language contained in the City's Charter and its pre-emption of any contrary language contained in an ordinance. With regard to Section 270-75, the Board has the power to review the building official's decisions. The Board will not find on the record of this case that the building official ever made a decision, orally or written, under the Charter. When the City Manager certified the challenge petition to the ordinance, it was known at that time that the ordinance was under challenge, and the ordinance was continuing to be pending. In the Appellant's six pages of a jurisdictional filing, where suspended from taking effect does not need to be described or interpreted, five pages reference and quote that provision of the Charter and discuss it. The zoning issue in this case is whether or not the pending ordinance doctrine applies, and that can be found in Section 6 of the ordinance. City Solicitor Mandalas acknowledged that real argument and the substance of the case, as opposed to the jurisdictional issue, is whether or not the ordinance was pending at the time it was suspended without effect, pending the outcome of the referendum election. Further case law was presented. The common law pending ordinance doctrine qualifies the Charter provision's suspension without effect. The Board has been asked to make a decision under the City Charter and whether it has jurisdiction.

Board Solicitor Karsnitz noted that the argument here tonight is whether the judicially created pending ordinance doctrine directly contradicts a town charter provision and makes it so that the pending ordinance doctrine cannot apply during the period of time when going through the voting process.

Mr. Eugene Lawson, Esq. of The Lawson Firm noted that on Page 2 of the first appeal package, the Appellant's application was rejected based on the content of Ordinance No. 0715-01. The Board is being asked to examine how the Charter affects the Zoning Code. Section 6 of the pending ordinance supposedly adopts the pending ordinance doctrine and the municipal code section that indicates rejecting new applications. Action was taken by the Mayor & Commissioners on July 17, 2015 when they passed the ordinance. At that time, the pending ordinance doctrine did not apply anymore, and the ordinance was not pending any longer because it had been adopted. With respect to the jurisdictional issue, the main concern is that the City and State Codes authorize the Board of Adjustment to have all the powers of the building inspector. Whatever the building inspector can make a decision on, the Board can review and either reverse or sustain the decision. Attorney Lawson agreed that the building inspector applied a code provision that was suspended without effect at the time. He applied the provision that was adopted or pending during the time it was under challenge and going through the voting process. His position is that this provision should have no effect on the applications that were filed during the time when the City gave the litigants in the Chancery Court case the window of opportunity to apply in order to be heard before the Board. The City took the position in the Chancery Court litigation that the remedy was before the Board, and it was not suggested during the litigation that the Board does not have jurisdiction. The two cases before the Board this evening have the same timing conditions with regard to which ordinance should have been in place. The other four cases, with regard to the timing issue, are equally of the same timing.

Mr. David White, Esq. of the law firm McCarter & English, was before the Vice Chancellor. He was the recipient of the brief of the City of Rehoboth Beach where it begged the Vice Chancellor to stop this issue because the administrative remedies were not exhausted. The appeal was crafted upon the letter agreement that

the City provided in the context of the Court of Chancery proceeding.

City Solicitor Mandalas noted that in the October 2015 letter from Attorney Max Walton, which was the basis for withdrawing the litigation, it never references the City Charter or that the Board of Adjustment would be making any decisions under the City Charter. The applications would be reviewed under new Ordinance No. 0715-01 and under the pending ordinance doctrine by the Board of Adjustment.

Board Solicitor Karsnitz noted that not only is there a question of zoning and the application of the pending ordinance doctrine, but also of how the Charter affects a particular zoning ordinance. Chief Building Inspector Damalier Molina made the decision that a new ordinance was applied, and that is why he rejected the applications of the Covington's and others similarly situated. He made the decision that the Charter does not prevent him from applying the new ordinance under the pending ordinance doctrine. The language in Sections 270-71 or 270-75 is very clear. Board Solicitor Karsnitz read that in Section 270-75, the Board has the power to modify or reverse the decisions of the building inspector, and to that end, the Board shall have all the powers of the building inspector from whom the appeal is taken. The City Code tracks the language of the State Code almost identically. In his opinion, the Board has jurisdiction here on this issue, and he cannot read Section 270-71 and 270-75 any other way than to say this if it was a decision made by the building inspector, it is subject to appeal by this Board.

Ms. Kelley made a motion, seconded by Mr. Clifton Hilderley, to deny the proposed motion that the Board does not have subject matter jurisdiction. (Hilderley – for. The Board of Adjustment has only jurisdiction that is granted to it specifically. It has reference to several parts of the statute which makes it clear unequivocally that the Board of Adjustment has the power and the authority to review and pass judgment on what the building inspector has done in connection with the zoning statue of the City. This relates directly to administrative remedy that has been referred to that is part of the authority in effect that the Board of Adjustment has. Donohoe – for. His concern was that Section 270-75 states that the Board shall have all the powers of the building inspector from whom the appeal is taken. The building inspector had the power to select the statute he was going to apply to the building permits. Evans – for. The Board has jurisdiction and therefore deny Attorney Mandalas' motion for the reasons stated by his colleagues. Kelley – for. It was clear to her that jurisdiction does apply. Popham – for. The Board has jurisdiction.) Motion carried unanimously.

The meeting was recessed at 8:15 p.m. and reconvened at 8:25 p.m.

Case No. 1215-13. An APPEAL OF A DECISION OF THE BUILDING INSPECTOR to deny a building permit for failure to satisfy the requirements of Ordinance No. 0715-01. The property is located in the R-1 Zoning District on Lot Nos. 45 & 46 and the easterly portion of Lot No. 47, Block No. 24 at 105 St. Lawrence Street. The Appeal is being requested by Eugene M. Lawson, Jr. Esq. of The Lawson Firm LLC on behalf of Barry & Sharon Covington, owners of the property.

Chief Building Inspector Damalier Molina presented his report. The reason the permit was denied is that the addition of a swimming pool will violate zoning regulations, Section 270-21(A), 270-21(B), 270-21(C), 270-25 & 270-26(A). He acknowledged that the application the Appellant filed was during a period of time that the new ordinance was being subject to the referendum process. He made a decision to apply the new ordinance. He did not consider the Charter provision as to the effect of an ordinance at that time only because he was focusing on the zoning requirements before him to review. The applications were not reviewed based on the old ordinance.

City Solicitor Mandalas noted that ordinance which was in effect under the City's view was the new ordinance. The pending ordinance doctrine was in play, and therefore it was the new ordinance that was in effect.

Assistant Building Inspector Stephen Kordek noted that during this time, there was a transition period between former Chief Building Inspector Terri Sullivan and Chief Building Inspector Molina. Mr. Kordek was performing much of the plan review. To the best of his recollection, whenever an ordinance is enacted, there is a date to be enforced. When the discussion was being performed by the Mayor & Commissioners, applications after a certain date must be reviewed under the new ordinance.

City Solicitor Mandalas noted the City's position. On July 17, 2015, the Board of Commissioners adopted Ordinance No. 0715-01 which amended certain provisions of Chapter 270, Zoning Code. After the ordinance was passed at a duly noticed public meeting, a group of residents presented a petition for reconsideration. The initial petition was insufficient because it did not have the proper signatures. There is no qualifier in the Charter to say whether the ordinance is suspended from taking effect, whether or not the petition is sufficient. The pending ordinance doctrine and the Charter work together because the ordinance is suspended from taking

effect, but it does not mean the ordinance is ineffective. The pending ordinance doctrine is applicable in this case under the Charter provision. Under the pending ordinance doctrine, a property owner is not entitled to obtain a building permit where the proposed construction would be prohibited under the terms of a pending ordinance. Therefore, a municipality may properly refuse to entertain or grant an application for a building permit where the proposed construction would be prohibited under the terms of a zoning ordinance pending at the time of the application. An ordinance is pending when the public is put on notice that there is an ordinance which will be adopted or rejected. An ordinance which is subject to a referendum petition is an ordinance which will be adopted or rejected. It is suspended.

Attorney Lawson said that what has becoming increasingly clear is this entire discussion is not about a pending ordinance under normal circumstances, but a pending ordinance that is in the face of a Charter referendum. When the petitions were filed, the Charter controls the procedures for the referendum, not the City Code. At that point, the ordinance was suspended without effect.

There was no correspondence and no public comment.

Mr. Donohoe made a motion, seconded by Mr. Hilderley, that the Appellant's appeal of the building inspector's decision be denied.

Chairman Evans clarified that the motion was to deny the Appellant's appeal. The appeal was to overturn the decision of the Building & Licensing office which did not process his application essentially.

(Hilderley – for, which is to deny the Appellant's request to have the City's position overturned. It was clear to him that the pending ordinance doctrine applies all of the ramifications explained by counsel which applies in this case, and the pending ordinance doctrine prevails. Donohoe – for. The pending ordinance doctrine applies when an ordinance has not taken effect yet. It certainly would apply in a case where there was an ordinance, and the ordinance was suspended without effect. The policy considerations are clear for the case law. If there was any kind of a sufficient public declaration by the City, which there certainly was with Ordinance No. 0715-01 with what it intends to do with regards to zoning, property owners should not gain the unqualified right to quickly jump in and submit a building permit request that goes counter to that ordinance until the pending referendum issues have been resolved. Popham – for, for reasons stated by Mr. Donohoe and Mr. Hilderley. Kelley – against. She was very conflicted because it was very clear to her what the intent of the City government is and what counsel was, the Commissioners. It was also very clear what the Charter says and what the Board of Adjustment's guidelines are. Because of the wording of the Charter, she voted against the motion. Evans – against, for likewise similar reasons. The Charter is clear about what it says. The City would wish that this was not in there.) Motion carried.

Attorney Lawson requested a continuance on Case No. 1215-14. He will need to consult with his clients regarding the other four cases. Members of the Board of Adjustment agreed.

The meeting was recessed at 9:09 p.m. and reconvened at 9:15 p.m.

Case No. 1215-10. An APPEAL OF A DECISION OF THE BUILDING INSPECTOR in regard to Section 270-46 of the Municipal Code of Rehoboth Beach that the area devoted to habitable space not be expanded and that the area of the overall structure not be expanded beyond that which was registered in 1991, and in regard to limiting the height of the structure such that it not exceed 36 inches above the existing height, per Board of Adjustment Variance No. 0315-03, granted April 27, 2015. The property is located in the R-1 Zoning District on Lot Nos. 28 & 29, Block No. 21, at 204 Philadelphia Street. The Appeal is being requested by Steve Mikkelsen, owner of the property.

City Solicitor Mandalas had filed a motion for continuance with the Board of Adjustment today. On April 22, 2016, the Appellant and his attorney volunteered to send City Solicitor Mandalas a courtesy copy of the presentation they intend to make during this evening's Board of Adjustment hearing. The file was forwarded over the past weekend to the Chief Building Inspector for his review. The presentation consists of 26 powerpoint slides and 61 documents. When the Chief Building Inspector began to review the materials earlier today, it became apparent that there would be no way for him and the City Solicitor to adequately prepare for this evening's hearing if the Board intends to accept and consider the presentation and documents. Rehoboth Beach Board of Adjustment Rule No. 14.6 provides that any substantial materials shall be submitted at least 10 days in advance of the hearing. The materials have not yet been submitted to the Board or arguably they were submitted last Friday, as the City Secretary was copied on the email when the Appellant sent the materials to the City Solicitor. Under any analysis, the substantial materials were not submitted to the Board in accordance with the Board's Rule 14.6. Last week the City and the Appellant were engage in discussions concerning an issue relating to the amount of storage in the existing structure. If the City was able to measure such space, it would

be useful to inform the Board on this application. One of the outstanding matters is whether the structure continues to have the amount of storage space that was identified during the garage apartment registration process in the early 1990's. The Appellant has denied access to the structure for the purpose of measuring the existing storage space. Board of Adjustment Rule No. 14.7 provides that the Board may, at its discretion, continue a hearing for good cause. The voluminous presentation and documents, not provided within the limits established by Rule No. 14.6 sufficiently establishes good cause to continue this evening's hearing. Given the debate over the amount of the existing storage space, a continuance may provide time to resolve that matter and possibly the case altogether. City Solicitor Mandalas requested that the Board strongly encourage the Appellant to allow the Chief Building Inspector access to the structure for the sole purpose of measuring any existing storage space.

Mr. Hal Dukes, Esq. represented the Appellant in this case. He noted that the Appellant had not made up his made as to allowing the Chief Building Inspector access to the structure. The documents Attorney Dukes had given City Solicitor Mandalas provides a number of answers to questions which are not relevant to this case. An email confirmation was sent in December 2015 that the roof would be lowered. On December 17, 2015, the Appellant was told that there are no permits authorizing expansion of the garage. There are no permits to construct a front porch. There are no permits to convert the front porch. There are no permits authorizing the elimination of the required 50% of the garage space. The only thing before the Board is the closet. He was not sure the closet is relevant because under the 1964 ruling, the closet was not considered separate storage space because the building was constructed under the 1942 Code. That Code defined a building as all habitable space. It was changed in 1954. In 1964, there was a distinction between garage space and habitable space. The Appellant was willing to proceed this evening. The powerpoint presentation and documents submitted to City Solicitor Mandalas was Attorney Dukes' file on all the relevant issues that have been brought up. Attorney Dukes acknowledged that he did not want the Board to consider the presentation and documents this evening.

City Solicitor Mandalas said that the City is willing to go forward with this hearing if the representation is that those documents will not be used. He withdrew the request for a continuance.

Chief Building Inspector Molina read his building inspector report. The property owner is requesting an appeal on the denial of a building permit due to the proposed design for reconstruction does not include space within the building to be used as a garage (storage), and the ridge of the proposed garage roof height equates to 38.50 feet or 5.41 feet higher than the "as-built" survey record elevation of 33.09 feet. There is no record of a valid building permit after November 11, 1991, authorizing enlargement of the registered garage apartment dwelling as additional living space. The owner has been authorized to demolish a registered garage/apartment, relocate and erect such building on the same lot to mitigate ground level flooding in the structure. Proposed construction documents were disapproved because reconstruction design does not include space within the building to be used as a garage (storage) and is approximately 12.82 square feet larger from what was legalized in 1991. The proposed new structure would result in a separate detached two bedroom single-family dwelling without storage. There is no evidence of a Board of Adjustment variance approval or issuance of a valid building permit increasing the floor area devoted to human habitation after November 5, 1991 from 79.6% to 100% of the garage apartment. The enlargement of the building without a valid building permit changed the garage apartment from a previously approved non-conforming use to an illegal non-conforming use. The property file contains no records of any approvals or issuance of a valid building permit allowing a separate detached single-family dwelling on the same lot with an existing detached single-family dwelling main building. Removal of the registered storage area on November 21, 1991 and enlargement of the floor area for human habitation resulted in the creation of a separate single-family dwelling with the existing detached single-family dwelling. The separate single-family dwelling requires an additional minimum lot area of 5,000 square feet and has made the formerly conforming single-family lot with an accessory use into an illegal non-conforming lot with two detached single-family dwellings. It is recommended that the appeal be denied without requiring that the balance of 120 square feet, not registered as use for human habitation registered on November 21, 1991, be identified on all new construction documents for the proposed new structure as storage. Any retention or repairs to the existing structure should also require the identification of the 120 square feet that it be identified as storage for code compliance. The ridge of the propose garage roof height should not exceed 36 inches above the existing height per the Board of Adjustment Variance No. 0315-01, granted April 27, 2015. The City has not seen the final drawings for the roof height.

Attorney Dukes noted that the structure was created under the 1942 ordinance, and that particular ordinance did not specify anything about percentages, etc. The structure has not been changed since 1956. In 1974, the percentages on the garage apartment and usage was established. The Appellant's position is that the structure qualifies as living quarters, and it is a dwelling since it was approved in 1956. The actual square footage is 102

as it currently exists. It is undeniable that the roof will be within the Code. The storage itself is insignificant because there is 102 feet and a clearance of over six feet. The blueprint shows there is a nine foot clearance where the storage is going to be in the attic. That would be after moving the height of the roof. This would mean that there will be more habitable space on the first floor. The total space will be the same as it was in 1991. The building footprint is the same as it was in 1956. The only difference is that the storage will be put upstairs in the attic area and not on the first floor.

Mr. Steve Mikkelsen, owner of the property, provided testimony in support of the appeal. On December 11, 2015, Building & Licensing denied his building permit. His application was submitted on October 28, 2015. His application permit for construction was altered on line 6, it was changed to garage apartment. It was altered without his permission. The initial reason for the denial is an incomplete building permit history and no permit to expand the livable space above 50% of the original two-car garage. The ridge height which exceeded the variance request was mitigated by a December 16, 2015 email where Mr. Mikkelsen agreed with the Building & Licensing calculations. No response was received as to how he was to make the correction. In 1954, 50% of the structure was converted to a garage apartment. On December 16, 2015, Mr. Mikkelsen contested the classification of his cottage house as a garage apartment. The cottage house is registered as a dwelling through the 1991 City Code Section 19-59. A building permit granted on April 12, 1956 provides authorization to enclose the porch. Prior to December 21, 2015, he had asked that his building should be classified as a dwelling in order to avail himself his appeal rights to the Board of Adjustment. On December 17, 2015, he received correspondence that he did not have permission to expand the footprint of the original cottage house. Building & Licensing took measurement from a plat provided in 1953 that is not the actual dimension of the building after it was built. The square footage of the building as it exists, according to the survey, is 602 feet, rather than 590 square feet. The size of the building has never changed since construction of it. Building & Licensing has not applied all the grandfathering provisions that apply to his cottage house. The code that should apply to this structure is that in 1942 the structure was built. In 1954, half of the original structure was converted into an apartment. In 1956, a porch was added onto the structure and enclosed. Since 1956, there has not been any changes to the structure. Since its construction, the building has been in compliance with all the City codes. In the 1942 Code, a non-conforming use of a building may be extended throughout the building if no structural alterations are made therein. The approval of the garage apartment may not have been required because there was no limit to the garage apartment size. It happens to be that not to exceed 50% of the space was the permit issued at that point. The 1991 amnesty was filed just in case the structure was not in compliance. The structure is a non-conforming dwelling.

Board Solicitor Karsnitz noted that prior variance had been granted that the building would be constructed in-kind as to what the structure had been with 590 square feet and 120 of that being storage on the first floor.

There was no correspondence.

Public Comment:

1. Mr. Steve Curson, 210 Philadelphia Street – in support of.

Mr. Donohoe made a motion, seconded by Ms. Kelley, to deny the appeal.

Chairman Evans clarified that the motion was to uphold the decision of the building inspector to deny the appeal. The Chief Building Inspector declined to issue a building permit for the house that was designed because the dimensions exceed the amount of space given in the variance, and it is not in-kind. The roof and the height is being complied with. The 120 square feet of separate storage would need to be located on the first floor.

(Popham – against. Whether the storage is on the first floor or in the attic is a moot question in his opinion Kelley – against, for the same reason about storage. At this point, she felt they were splitting hairs. Donohoe – for. Hilderley - against. The request are changes from what is originally there is de minimis in the whole scheme of things. It is more important the fact that they are putting a second livable dwelling on a 5,000 square foot lot that has nothing to do with the Board's considerations except just to point out the absurdity of the discussion. Evans – for, because it is clear what was written. Mr. Mikkelsen will still get his appeal passes, but clearly they could not have done any different.) Motion carried.

NEW BUSINESS

There was none.

OTHER BUSINESS

There was none.

There being no further business, Chairman Evans adjourned the meeting at 10:40 p.m.

Respectfully submitted,

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(Ann M. Womack, City Secretary)

MINUTES APPROVED ON
JULY 25, 2016

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(Thomas Evans, Chairman)