

BEFORE THE BOARD OF ADJUSTMENT OF THE TOWN OF FENWICK ISLAND

IN RE: :
 :
APPLICATION OF : **DECISION**
 :
 :
BUAS SANDS HOTEL, LLC :

The Board of Adjustment of the Town of Fenwick Island convened at 1:00 o'clock in the afternoon, prevailing time, on Thursday, August 23, 2018, at the Roxana Volunteer Fire Company, 35943 Zion Church Road, Frankford, Sussex County, Delaware, to hear the application of Buas Sands Hotel, LLC, a Delaware limited liability company (the "Applicant"). Applicant sought to appeal a decision of the Building Official and, alternatively, for a variance from the maximum roof height (*see* Chapter 160 of the Code of the Town of Fenwick Island) for its property located at 1501 Coastal Highway (Sussex County Tax Map and Parcel No. 1-34 23.12 179.00). Present for the Board of Adjustment hearing were Chairman, Tim Collins, members Linda Bunting, Craig Lambertson, and Marlene Quinn, and David C. Hutt, Esquire, counsel for the Board of Adjustment.¹ Also present were Teresa Tieman, Town Manager; Patricia Schuchman, Building Official; William Weistling, Building Committee Chair; and the Town Solicitor, Mary R. Schrider-Fox, Esquire. Spiro Buas, Marianne Buas, Peter Buas, Meaghan Poulin and Keith P. Fisher, AIA, NCARB, LEED AP of Fisher Architecture, LLC appeared and testified on behalf of the Applicant at the hearing. The Applicant was represented by Timothy G. Willard, Esquire at the hearing. The public hearing was attended by a large number of people who were interested in the application. Numerous individuals and several members of the public spoke in favor of and against the application.

FINDINGS OF FACT

The Applicant is the record title owner of commercial property located at 1501 Coastal Highway, within the corporate limits of the Town of Fenwick Island (the "Town"), Sussex County, Delaware. The property is also identified as Sussex County Tax Map and Parcel No. 1-34 23.12 179.00 (the "Property").

The Property is located on the easterly side of Coastal Highway (State Route 1) between Indian Street to the south and James Street to the north. To the east of the Property are residential homes and uses. The Property is currently improved with the Sands Hotel

¹ Richard Benn, a member of the Board of Adjustment present for the prior items on the Board of Adjustment’s Agenda recused himself from considering the application of Buas Sands Hotel, LLC. Mr. Benn left the meeting prior to the start of the public hearing for Buas Sands Hotel, LLC.

which has existed for many years. The Sands Hotel was built in several phases and was originally owned and operated by the Tingle family.

On May 4, 2018, the Applicant filed an Application for a Building Permit with the Town for the construction of a “65-room hotel with swimming pool and elevator” on the Property. The building permit application was reviewed by the Building Official and two Building Committee members.

As part of its review of the Applicant’s building permit application, the Building Official and Building Committee approved the location of the hotel’s HVAC equipment as well as screening for that equipment. The equipment and screening are on the roof of the building and reach a total height of 37 feet, 4 ¼ inches.

On July 20, 2018, the Town disapproved the requested building permit for the Applicant’s proposed hotel because the hotel’s “elevator shaft will exceed maximum roof height permitted in Chapter 160-5B(2).” Under that section of The Code of the Town of Fenwick Island (the “Town Code”), buildings such as this hotel are limited to a height of 32 feet.²

The part of the shaft in question is the overrun which extends above the hotel’s roof. As planned, the proposed elevator overrun would extend to a total height of 35 feet, 3 inches. At the rooftop, the elevator area is approximately 9 feet by 17 feet, or 153 square feet. By comparison, the total rooftop area is approximately 17,000 square feet.

On July 23, 2018, the Applicant appealed the Building Official and Building Committee’s decision and, alternatively, requested a variance of six feet from the maximum height of the proposed hotel building for the elevator’s safety overrun and mechanical features.

Prior to the public hearing, the Board received 87 letters and emails from the public in support of the requested variance and 9 letters and emails from the public in opposition to the proposed variance.

At the public hearing, by show of hands, the number of individuals in support of the requested variance significantly outnumbered the number of individuals in opposition to the requested variance. In recognition of this, as well as the time constraints on the hearing, the Board asked for public comment primarily from those in opposition to the requested variance.

² Typically, the maximum height of a building in the Commercial Zone is 30 feet. Town Code, § 160-5.B(1). However, the proposed hotel has a freeboard of at least 24 inches above base flood elevation, under the Town Code which increases the allowable height of the building to the maximum height of 32 feet. Town Code, § 160-5.B(2).

Five members of the public spoke in opposition to the application and two members of the public spoke in support of the application.

APPEAL OF DECISION OF THE BUILDING OFFICIAL

The Town Code does not separately define “elevator shaft.” At the hearing, the Applicant and the Town disputed whether an elevator shaft fell under the definition of “mechanical equipment” or the definition of “building.”

Section 160-2.B of the Town Code provides the following definitions:

BUILDING—A structure having a roof supported by columns, posts or walls which is utilized for the shelter, support or enclosure of persons, animals or chattels, provided that this definition shall not be constructed so as to include a trailer, travel trailer, recreational vehicle is mounted on wheels or otherwise supported.

MECHANICAL EQUIPMENT—Any equipment, including but not limited to, heat pump, hvac system, air-conditioning equipment, emergency generators, or aboveground propane or fuel tanks, used in connection with a residential or commercial building.

PRIMARY BUILDING—The main building on a lot; the building in which is conducted the principal use of the lot on which it is located and which, in the Residential Zone, is the residential structure on the lot with the largest gross floor area.

PRIMARY STRUCTURE—That which is built or constructed, an edifice or building of any kind or any piece of work artificially built up or composed of parts joined together in in some manner. The term “structure” shall be construed as if followed by words “or part thereof.”

According to the Applicant, the elevator shaft should have been considered part of the “mechanical equipment” and the Building Official improperly applied the definition of “building” to the elevator shaft. The Applicant argued that, pursuant to rules of statutory interpretation, if a particular term is not defined, then the term is given its plain meaning. In the Applicant’s view, the overrun and mechanical features of the proposed elevator are plainly “mechanical equipment” and not a “building.” The Town approved the HVAC equipment to exceed the maximum height of the building, so the Applicant asserted that the Town should have done the same for the elevator’s safety overrun and mechanical features.

The Town took the opposite view. The Town asserted that the Town Code distinguishes between the structure and component parts of a structure of a building and the

equipment used in connection with a building. The Town's position is that an elevator overrun is part of the "building" because it was a component part of the elevator's structure and could not be removed from the building and placed somewhere else. This distinguished the elevator overrun from "mechanical equipment" (such as the HVAC equipment) because mechanical equipment is removable and is not a component part of the structure of the building. Part of the Town's consideration on this issue is that the elevator shaft is within the building envelope, *i.e.*, it is part of what separates the interior and exterior of the building. In short, the Town's interpretation is that the elevator shaft was a structure or part thereof and therefore included within the definition of a "building."

After considering both positions, the Board voted unanimously (4-0) to uphold the decision made by the Building Official and Building Committee.

VARIANCE REQUEST

The variance application filed by the Applicant sought a 6-foot height variance to allow for the elevator's safety overrun and mechanical features. During the hearing the Applicant confirmed that the actual elevator planned as of the hearing date would only require a variance of 3 feet, 3 inches but that it requested a 6-foot variance in case the exact specifications of the elevator installed changed in some manner and required additional height.

The Applicant presented testimony and evidence regarding the size of the elevator (approximately 153 square feet) as a standalone structure and relative to the area of the entire rooftop (approximately 17,000 square feet). The project's architect testified that the area was less than 1% of the total area of the rooftop.

The Applicant also presented exhibits and diagrams to the Board to show that the elevator and hotel were designed to minimize any impact of the shaft overrun. For example, the elevator was located near the rear of the building and would be lower than the HVAC equipment and its screening. In addition, the overall height of the building was lowered to 29 feet by the Applicant to allow for a more aesthetically pleasing façade rather than a building with a flat roof. The lowering of the height of the building also serves to reduce the height of the variance needed for the elevator overrun and mechanical features. Also, the Applicant and its architect testified that the design goal was to achieve the least visual impact so that the elevator shaft would not immediately be recognizable as an elevator shaft as it is for several other buildings in the area. The exterior treatments of the proposed elevator shaft would include façade treatments to make it appear like part of the rest of the hotel building.

The Applicant and its architect also addressed the possibility of an alternate location for the elevator and whether the elevator could be configured in a manner to eliminate the need for a variance. According to the testimony, other potential locations and configurations resulted in the need for a variance and had negative impacts on the neighboring properties.

The location of the proposed elevator was chosen to minimize impacts such as the visual impact on neighboring properties.

In addition, the option of reconfiguring the building to keep the elevator and its overrun within the 32' height limit resulted in the building having to be configured with ramps leading down to the elevator at each floor. The ramps became longer with a higher grade on each successive floor because the height of the elevator door was lower on each floor. While the ramps may have technically met the requirements of a ramp under the applicable building codes, they would not have met the intent of those codes as they would create a situation where an individual needed special knowledge of the building in order to safely navigate in/out of the building in an emergency. In other words, a person would not typically think that one entered or exited an elevator onto a ramp and this could create a situation where someone overshoots the ramp and loses their footing. According to the Applicant, the installation of ramps would be an unusual building alteration that is both impractical and unsafe.

During the testimony presented to the Board, the Applicant confirmed that an elevator could be constructed that did not require a 6-foot variance and that a 4.5-foot variance would provide enough leeway in case the currently specified elevator changed in some respect prior to construction of the hotel.

The individuals who spoke in opposition to the requested variance questioned (1) whether other types of elevators existed that would not require a variance; (2) whether the Town Code should be modified in this manner when the Town has historically been "tough" on enforcing the Town Code; (3) concerns about the interpretation of the Town Code regarding the HVAC equipment; and (4) the impact on views from adjacent properties.

CONCLUSIONS

Pursuant to Section 160-13 of the Zoning Code of the Town of Fenwick Island, Delaware, the Board of Adjustment shall have the powers defined and conferred, and the limitations imposed, by Title 22 of the *Delaware Code*, Sections 321 through 327, inclusive. Said Sections 321 through 327 are included herein by reference.

Title 22 of the *Delaware Code*, Section 327(a)(3), provides that the Board of Adjustment may:

authorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to the owner of the property so that the spirit

of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map.

The Delaware Supreme Court has defined the two types of variances: “use” variances and “area” variances. *Bd. of Adjustment of New Castle Cty. v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978). That Court indicated that “a *use* variance is a variance that changes the character of the zoned district by allowing the land to be used for a *purpose* otherwise proscribed by the zoning regulations.” *Id.* However, an *area* variance “does not involve a prohibited use, and ‘concerns only the practical difficulty in using the particular for permitted use.’” *Id.* at 1291.

The Board concludes that the variance requested in this instance is an area variance to which the “exceptional practical difficulty” standard applies.

The Board further concludes that the Applicant faces an exceptional practical difficulty in making normal use of the Property as a hotel because the testimony presented to the Board demonstrated that no alternatives existed for an elevator shaft that did not require either a variance or an unusual, impractical and potentially unsafe system of ramps in the areas around the elevators.

The proposed use as a hotel is consistent with the long-time use of the Property, which, due to its age and condition, requires replacement. Having an elevator in a hotel is a normal use of the Property as is using this commercially-zoned property for a hotel. The Applicant presented credible testimony and evidence showing that the visual impact of the proposed elevator shaft would be minimal and that the difficulties in redeveloping the site without the variance for the elevator shaft could render the project unbuildable.

The Board concludes that the proposed height variance for the elevator shaft is a reasonable modification of the height limitation and is necessary so that the Property can be redeveloped with the same use it currently has and the Applicant may have reasonable enjoyment and use of the Property.

The Board concludes that there will not be a substantial detriment to the public good as the public overwhelmingly agrees, including several members of the public in opposition to the Application, that a new hotel will economically and aesthetically benefit the Town.

In addition, with the limited square footage of the roof area that will be subject to the variance and with the conditions and limitations placed upon the variance, the Board is persuaded that the elevator shaft will not be higher than the HVAC equipment on the roof and will be constructed in the least obtrusive manner possible.

The Board concludes that there will be little or no negative impact on the neighboring properties and the community in general. The Board recognizes that the neighbor immediately adjacent to the Property opposes the variance request because the neighbor believes it will negatively impact her use. However, the Board notes that the neighbor's concerns as expressed at the hearing related primarily to the overall hotel project, including those parts allowable under the Town Code. The neighbor did not distinguish how a variance for the height of the elevator shaft would cause any greater impact to the adjacent property than the allowable hotel structure.

DECISION

The Board voted 3-1 to grant the requested variance from the Town Code's height restriction of 32 feet but to limit the height variance to 4.5 feet rather than the 6 feet initially requested by the Applicant. The Applicant is permitted to install an elevator to a maximum height of 36 feet, 6 inches. No part of the elevator, including its overrun, shall exceed 36 feet, 6 inches. This variance to the height limit shall only apply to the elevator and not to any other parts of the building or the structure.

[THIS SPACE INTENTIONALLY LEFT BLANK –
SIGNATURES TO FOLLOW ON NEXT PAGE]

BOARD OF ADJUSTMENT OF THE
TOWN OF FENWICK ISLAND

By: _____
Tim Collins, Chairman

By: _____
Linda Bunting, Member

By: _____
Craig Lambertson, Member

By: _____
Marlene Quinn, Member

Dated: