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# SAUL EWING

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August 14, 2024

## By Email and Overnight Mail

Mayor and Commissioners of the  
City of Rehoboth Beach, Delaware  
Municipal Hall  
229 Rehoboth Avenue  
Rehoboth Beach, DE 19971

Re: **Appeal of Planning Commission Decision, App. No. 1221-05 (the “Decision”)  
2 Rehoboth Avenue (Belhaven Hotel) Site Plan Review**

Dear Mr. Mayor and City Commissioners:

Please allow this letter to serve as the Applicant’s appeal of the Decision referenced above regarding Site Plan for the proposed Belhaven Hotel issued on August 5, 2024. A copy of the Decision is enclosed along with a check in the amount of \$150.00 representing the fee for the appeal.

Located at the end of Rehoboth Avenue along the Boardwalk, the Belhaven Hotel was a fixture in Rehoboth Beach from the early 1900s through 1962, when it was heavily damaged in the historic ’62 nor’easter. Ultimately, the hotel was torn down and replaced with commercial shops and eateries. The current structure is now at the end of its useful life, and the time has come to rebuild. The Papajohn family, which has owned and operated the property since 1938, would like to build a new hotel that not only features modern amenities, but also that recalls the historic and majestic Belhaven Hotel that originally occupied the property. The family further wants to retain the Boardwalk “experience,” with retail establishments, ice cream, and other eateries at the ground level. In order to justify the expense of underground parking, though, so as to be able to maintain the Boardwalk “experience,” the project requires more hotel rooms and floor area than could otherwise be built without a variance. The alternative would be a “hotel on stilts” – with surface parking and no Boardwalk or Rehoboth Avenue stores, but that is not what the Papajohns want. They want to build an architecturally rich hotel that can be featured on postcards for decades to come, just as the old Belhaven Hotel is featured on historic postcards today.

In accordance with this goal, the proposed hotel is designed to meet the City’s Comprehensive Plan, which calls for redevelopment with high quality design. The Comp Plan’s stated goal is to attract upscale visitors and improve the quality of merchandise in the stores along

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Rehoboth Avenue. In the 2010 and 2020 Comprehensive Plans, a priority action item was the consideration of a mixed use zone that would allow upscale buildings and use. The Board of Adjustment recognized the difficulties the Papajohns faced in meeting this goal and the economic difficulties presented, and so granted an increase in the FAR (Floor to Area Ratio) from 2.0 to 3.0. However, this increase does not result in an increase in the bulk or height or size of the building. Rather, the variance allowed the underground parking, retention of the stores and upscale amenities like a conference room/wedding venue, higher ceilings and balconies in the hotel.

But, of course, there are complications. Years after first starting the process, the Planning Commission issued its final decision on the preliminary site plan on August 5, 2024. The Decision imposes 18 conditions, and the applicant appeals 7 of them as contrary to the City's Code and/or Delaware law more generally, as follows:

**1. Condition E, "Review and Approval By Independent Structural and Geotechnical Engineer."** Generally speaking, we do not believe the Planning Commission – which is conducting a review for conformance of the site plan to the applicable City Code provisions – has the authority to require or otherwise tell the Building Inspector how to review future construction plan submissions, or to mandate who reviews other permit applications. It is up to the Building Inspector to determine how to review these other submissions.

**2. Condition F, "Review and Approval By Independent Flood Plain Expert."** As with its attempt to mandate that the City retain an "independent" structural engineer, the Planning Commission has also mandated the City retain an "independent" flood plain expert. Again, the Planning Commission lacks authority to require or otherwise tell the Building Inspector and the City more generally how to review future plan and permit submissions.

**3. Condition H, "Amendments to Site Plan or Drawings."** The Planning Commission requires that any change to the Site Plan must come back to it – but, of course, the Commission only reviews the *preliminary* site plan. There might very well be minor or technical corrections to the plan as a part of the *final* site plan review and approval. Certainly if there are substantive changes, such that the Building Inspector believes further review by the Planning Commission appropriate, we would not object; but, for example, if the number of hotel rooms and parking spaces is increased or decreased by one or two rooms, we see no basis for the Planning Commission to require another hearing. Similarly, if the location or size of a particular hotel room changes, so long as the plan complies with the code, no further Planning Commission review should be required.

**4. Condition K, "Number of Loading/Unloading Berths."** This may be the most egregious "condition" imposed by the Planning Commission. As both the Applicant *and the City Building Inspector* read the City Code, only 1 loading dock is required for the project. The Planning Commission, however, has imposed a requirement for 2 loading docks *notwithstanding the Building Inspector's unappealed ruling on this issue*. Simply put, the Planning Commission lacks authority to overrule the Building Inspector's interpretation – only the Board of Adjustment may do that.

To begin, we should note that none of the current retail areas on the boardwalk or Rehoboth Avenue currently have any loading dock whatsoever. No one disputes that the proposed hotel use requires a loading dock under the Code (which dock will be shared with the retail tenants); and the City Code only otherwise requires a loading dock for a “retail or service establishment or other commercial use with over 15,000 square feet of gross floor area.” Code, §270-36. None of the retail uses which are part of the project will exceed 15,000 square feet, and the only fair reading of the Code with respect to the 15,000 square foot threshold is that it applies to a single user. “Retail or service establishment or other commercial use” is all written in the singular. If the Code had meant the requirement to apply to a group of small establishments with a total of 15,000 square feet or more, the word “establishment” and words “commercial use” would be plural and the Code would have the word “totaling” before the words “over 15,000 square feet.” The Building Inspector, who is the chief enforcement officer of the Zoning Code issued his letter confirming this interpretation in June, 2023, and, if there was any doubt as to the meaning of the language, Delaware courts have long held that any ambiguity is interpreted in favor of the property owner.

Moreover, two loading berths would further impede on pedestrian traffic along Wilmington Avenue, and further diminishes the aesthetics of that street for no good reason. The applicant has already committed to creating a dock-sharing plan that will allow the retail users/tenants to make use of the loading dock for the hotel. Simply put, there is no legal or practical requirement for two loading berths.

In short, the Planning Commission simply disagreed with the Building Inspector and preferred its own reading of the Code – but it is not entitled to do this. Indeed, one can readily imagine the mischief that would ensue if the Planning Commission was free to impose its own interpretations of the Code as compared to the Building Inspector. Property owners would be caught in the middle and face expensive redesigns, as the Building Inspector may inform a property owner as to how he interprets a code provision, only to have the Planning Commission take a contrary view. Fortunately, the Zoning Code settles the issue when it states: “The Building Inspector shall enforce the provisions of this chapter.” Code, §270-82.

**5. Condition M, “GFA (Allocation of 3.0 FAR re Floor 2 and Average of Floors 2-4).”** When the Applicant received a variance from the Board of Adjustment to increase the floor area ratio (FAR) from 2.0 to 3.0, the Board did not address the fact that other provisions in the Code state that no one floor may exceed 75% and the average of all four floors of a building may not exceed 50%. Mathematically, of course, four floors with an average of 50% equals the Code limitation of 2.0 FAR (50% plus 50% plus 50% plus 50% equals 200% or 2.0 FAR). Thus, when the Board granted an increase in the FAR from 2.0 to 3.0 it was implicitly indicating that the maximum and averages for individual floors could exceed the other Code requirement – otherwise, the grant of the 3.0 FAR is meaningless. Moreover, the drawings of the planned hotel shown to the Board of Adjustment showed floors exceeding the 75% maximum and the 50% average. Thus, no one can claim surprise or that the Board did not consider the issue when it granted the FAR variance for the Belhaven Hotel. Moreover, the Building Inspector was asked to review this issue in the spring of 2023, and, in June 2023, he found that the variance was sufficient for all individual

floors in excess of the 75% and 50% requirements, reaching the logical conclusion that to hold otherwise would make the 3.0 FAR variance meaningless.

Nevertheless, the Planning Commission – despite having knowledge of the Building Inspector’s ruling on this issue since July, 2023, a full year ago – imposed a condition on the Applicant to go back to the Board of Adjustment for another variance.

Not only is the Planning Commission’s one-year delay in imposing its requirement inexplicable, but, in so requiring, the Commission ignores the Board of Adjustment’s similar decision for a hotel at 1 Rehoboth Avenue granting a variance for 2.75 FAR, where the Board stated:

Having found that an increase in permitted FAR from 200% to 275% is appropriate, it follows that an increase in the maximum FAR from floors 2-4 is presumed appropriate. Otherwise, the increase in total FAR would be meaningless and unachievable. Accordingly, the 76% FAR increase may be apportioned among floors 2-4.

Note that the 1 Rehoboth Avenue variance was granted in June, 2023 – after the Planning Commission had raised this issue – and this language was presumably included in the written decision in response to the Commission’s question of the variance for the Belhaven. Like the Applicant here, the applicant in the 1 Rehoboth Avenue did not request or apply for a variance from the individual floor limitations. The Board of Adjustment’s common sense statement is correct. Any increase in overall FAR includes, by implication, an increase in the individual floor limitations as the variance for total FAR would otherwise be “meaningless and unachievable.”

**6. Condition O, “Height (proposed safety railings).”** The City Code excludes HVAC equipment, elevator shafts, one stairway entry for maintenance access, and certain other items from the otherwise applicable height requirement. Code, §270-20. Here, there are two areas on the roof where such equipment exists, and the Applicant proposed the walkway between these two areas include a safety railing to protect maintenance workers from falling, particularly given the stiff ocean winds which can frequently occur. The Applicant believes that safety features such as the proposed safety railing are properly considered part of the permitted roof apparatus, but the Commission has directed the railings be removed, unless a variance is obtained from the Board of Adjustment.

**7. Condition Q, “Height (Antenna).”** The City Code specifically exempts antennae from the otherwise applicable height requirements. Period. *See* Code, §270-20(A) note 2. Nevertheless, the Commission is requiring the Applicant to go to the Board of Adjustment for a variance – but a variance from what? Neither the Building Inspector nor the City’s outside consulting engineer, Montgomery-Wallace, ever questioned the height of the antennae.

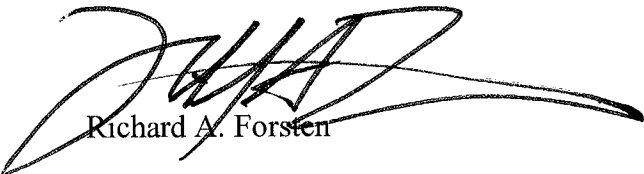
In sum, the Applicant submits that the Planning Commission exceeded its authority and jurisdiction in significant ways – chiefly with the loading dock and individual floor area

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“conditions,” but with respect to all of the foregoing conditions. For example, how does one obtain a variance for the height of an antennae when there is no height limitation on an antennae? Where does the Planning Commission have the authority to dictate to the Building Department as to who reviews plans and submissions? That is the purview of the Building Inspector and his department, not the Planning Commission. Finally, we would submit that it is the Building Inspector, as the enforcement officer for the Zoning Code, who has the final say as to the Zoning Code’s meaning as opposed to the Planning Commission. The Building Inspector applied solid reasoning as to his interpretation of the loading dock and individual floor area issues, and the Planning Commission is *not* free to reverse his decisions because its members might prefer a different outcome.

This letter is only intended as a summary of our concerns on appeal and we look forward to making a formal presentation to you at your earliest convenience.

Very truly yours,



Richard A. Forsten

cc: Harold E. Dukes, Jr., Esquire  
Pamela J. Scott, Esquire  
Alex Burns, Esquire  
Luke Mette, Esquire  
Ann Womack, City of Rehoboth Beach  
Mr. John Papajohn  
Mr. Alex Papajohn

**BEFORE THE PLANNING COMMISSION OF  
THE CITY OF REHOBOTH BEACH, DELAWARE**

In Re: :  
 :  
 :        Application No. 1221-05  
 :  
 2 Rehoboth Avenue                    :  
 (Belhaven Hotel)                      :  
 Site Plan Review                      :

**NOTICE OF DECISION**

The Rehoboth Beach Planning Commission (“RBPC”) met in quorum on June 7, 2024, July 11, 2024 and July 12, 2024 to conduct a public hearing (“Hearing”) on the Site Plan Application (Application No. 1221-05<sup>1</sup>, or “Application”) of Belhaven Investments, Inc. (“Applicant”) regarding a proposed project (“Project”) to be located in the C-1 Central Commercial District at 2 Rehoboth Avenue (Tax Map Parcel Nos. 334-14.18-20.00, 21.00 & 35.00) (Lots 2, 3, 4, 5, 6, 7, part of 9, 17 and 18) (the “Property”).

This Notice of Decision conforms to the proceedings of June 7, 2024, July 11, 2024 and July 12, 2024. Part I of this Notice of Decision summarizes relevant procedural background. Part II references certain, general provisions of Chapter 236 of the Rehoboth Beach City Code. Part III provides a summary of evidence and arguments presented. Part IV sets forth the RBPC’s findings and conclusions. Part V contains the RBPC’s decision.

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<sup>1</sup> A prior iteration of an application related to this Project was designated as Application No. 0721-03.

## I. Procedural Background

Applicant has appeared before the RBPC and the City's Board of Adjustment ("BOA") regarding plans to develop a hotel at the Property, in various iterations and in different contexts, dating back at least to 2019. A brief summary of the procedural history of the Project is warranted<sup>2</sup>.

Applicant appeared before the RBPC on April 12, 2019 for a project concept review of plans dated March 13, 2019. Applicant returned to the RBPC on June 14, 2019 for a project concept review of revised plans dated May 24, 2019 and June 14, 2019. Applicant appeared before the RBPC on June 12, 2020 for a project concept review of revised plans dated April 20, 2020, May 28, 2020 and June 10, 2020. Applicant appeared before the RBPC on October 8, 2021, November 12, 2021 and November 19, 2021 for a project concept review of revised plans dated September 24, 2021.

By way of a notice of decision dated January 24, 2022, the BOA in Case No. 0921-07 granted Applicant's request for a single variance from City Code Section 270-21B(5) restricting floor area ratio for all buildings located within a commercial district to 2.0. Specifically, the Applicant sought, and was granted, an FAR variance of 3.0 for six adjacent parcels Applicant wished to consolidate and develop (the "Belhaven BOA Decision").

The City's Building Inspector ("BI") prepared a report related to the Application dated January 31, 2023. The City's Planning Consultant, Wallace Montgomery ("WM") prepared a report related to the Application dated January 30, 2023. The BI and WM prepared a joint report related to the Application dated April 10, 2023<sup>3</sup>.

Applicant appeared before the RBPC on April 14, 2023 for an initial preliminary review of the Application, based on plans dated August 26, 2022 and December 13, 2022. Applicant appeared before the RBPC on May 5, 2023, and July 14, 2023 for a continuation of preliminary review of the Application, including based on revised plans submitted on April 24, 2023 and May 17, 2023.

Thereafter, Applicant submitted revised plans (dated January 12, 2024 and January 10, 2024) related to the Application.<sup>4</sup>

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<sup>2</sup> This procedural summary does not purport to be an exhaustive summary of the lengthy and complex history of this Project or the Application.

<sup>3</sup> The City's BI and Planner issued other, prior reports related to this Project; not all such prior reports are referenced herein.

<sup>4</sup> The January 2024 plans state they are the seventh iteration of the plans.

The BI and WM submitted to the RBPC a revised joint report on the Application on or about March 12, 2024 (the “March 2024 Joint Report”). The March 2024 Joint Report, among other things: (1) provides comments for the RBPC’s consideration, including general information regarding the Application and recommendations for clarification/revision; (2) provides the BI’s square footage calculations; (3) recognizes that the RBPC may identify items beyond those identified in the joint report; (4) reserves the right to provide responses beyond the content contained in the joint report; and (5) expressly states “This letter and the comments contained herein in no way indicates [sic] approval of the subject Application, nor do they vest any rights to the Applicant. The authority to formally review, hold public hearing on, consider, decide, and prepare written findings of fact (if required) for any site plan application rests with the City of Rehoboth Beach Planning Commission.”

The RBPC resumed preliminary review of the Application (based on the Applicant’s January 10 and 12, 2024 revised plans) on April 11, 2024 and May 9, 2024. Applicant submitted revised site plan drawings to the RBPC on May 10, 2024.

Bohler’s Revision 7 sealed survey dated January 12, 2024, combined with Fillat Architecture’s drawings dated May 10, 2024, collectively, are referred to herein as the “Drawings” or the “Site Plan”.

In accordance with its Rules of Procedure, the RBPC waived its requirement that Applicant submit the Drawings at least 30 days prior to any hearing at which the RBPC was asked to consider an application, so as to permit the Hearing to commence on June 7, 2024.

The March 2024 Joint Report was submitted prior to Applicant’s submission of the May 2024 portion of the Drawings.

The Hearing on the Application, based on the Drawings, commenced on June 7, 2024, continued on July 11, 2024 and July 12, 2024 and concluded on July 12, 2024, at which time the RBPC deliberated and voted on the Site Plan.

## **II. Certain (General) Provisions Under Chapter 236 of the City Code**

Pursuant to Section 236-30D of the City of Rehoboth Beach Municipal Code (the “City Code”), the general purposes of site plan review include: (1) protection of the architectural massing, composition, scale, and character of the neighborhood; (2) compatibility of new construction and structural alterations with the existing scale and character of nearby properties; (3) preservation of streetscapes; (4) protection of natural resources; and (5) protection of the public's health, safety, and general welfare.

Pursuant to Section 236-30E of the City Code, the RBPC is specifically charged with the duty to review site plan applications in view of the City of Rehoboth Beach's comprehensive development plan, Chapter 270 of the City Code, Chapter 236 of the City Code, and other applicable federal, state, county, and City laws and regulations.



In addition, pursuant to Section 236-30E, the RBPC shall consider the specified factors and may require changes to site plans or attach conditions or restrictions when such changes, conditions, or restrictions are consistent with the general purposes of site plan review described in Section 236-30D. Those factors are as follows:

- Motorized or nonmotorized vehicular traffic flow, both on-site and off-site.
- Access to structures.
- Access to public or private streets, easements or other rights-of-way.
- Pedestrian movement.
- Fire equipment and other emergency access.
- Refuse removal.
- Landscaping and maintenance of natural features.
- Drainage flow and structures.
- Stormwater management.
- Signage.
- Lighting.
- Screening for certain uses.
- Recreational and open space areas.
- Utilities and community facilities.
- Height of buildings.
- Existing scale and character of nearby properties.
- Streetscape.
- Impact on nearby properties or the neighborhood.
- Air flow, natural light and similar environmental considerations.
- Other public health, safety and welfare concerns.
- Comments and recommendations received from the City Engineer, City Departments, and the public.

Pursuant to City Code Section 236-30F, RBPC does not have power to grant a variance or exception to the regulations of the City or to abridge or modify the procedures or requirements of Chapter 236 or the laws and ordinances governing zoning in Chapter 270.

Pursuant to City Code Section 236-32C, site plans shall be clearly drawn to scale so that they are legible, shall be submitted in paper form and in digital format acceptable to the City, and must show specifically identified items, including but not limited to: existing and proposed structures and uses; the boundaries or property lines of the property involved; dimensions of all off-street parking spaces; specifications as to construction of entrances and drives; indications of proposed traffic flows within interior drives and for ingress/egress to the project; location, size, height, and orientation of all existing and proposed signs; and occupancy and use density calculations.

Pursuant to Section 236-32I of the City Code, after a public hearing, the RBPC may vote to approve, approve subject to changes or conditions, or deny a site plan review application. If a site plan review application is approved subject to changes or conditions, or denied, the RBPC shall prepare written findings of fact in support of the changes or conditions or denial.

### **III. Summary of Evidence and Arguments Presented<sup>5</sup>**

#### **A. Summary of Applicant's Presentation of Evidence and Arguments**

All submissions made by Applicant to the City related to this Project and Application, including but not limited to any such submissions expressly referenced herein, were made part of the record of these proceedings. Among other things, Applicant specifically requested that the following documents be made part of the record:

- March 31, 2023 letter, Bohler Engineering to Planning Commission
- April 17, 2023 letter, State Fire Marshal to Peter Fillat
- May 17, 2023 letter, Saul Ewing LLP to Planning Commission
- June 28, 2023 letter, City Building Inspector to John Papajohn
- January 9, 2024 letter, Tunnel & Raysor to Building Inspector
- March 12, 2024 letter, Building Inspector to Planning Commission
- May 3, 2024 letter, Tadjer-Cohen-Edeison Associates to Peter Fillat
- Parking space square footage calculations by Fillat Architects
- June 7, 2024 pdf presentation by Fillat Architects
- Board of Adjustment Decision, dated January 24, 2022, regarding 2 Rehoboth Avenue
- Board of Adjustment Decision, dated June 26, 2023, regarding 1 Rehoboth Avenue
- June 25, 2024 letter, Saul Ewing LLP to Counsel to Rehoboth Beach Planning Commission
- Photographs of parking spaces regarding Gerar Place, Tidewater House, Crosswinds Hotel, Henlopen Condo, Boardwalk Plaza, Edgewater House, Admiral on Baltimore, The Coast Hotel

All written correspondence between Applicant and the RBPC related to this Project and Application, and certain other documents, including but not limited to any such correspondence expressly referenced herein, were made part of the record of these proceedings. Among other things, the following documents were also specifically made part of the evidentiary record:

- February 23, 2023 letter, Rehoboth Beach Planning Commission to John Papajohn
- March 8, 2023 letter, Rehoboth Beach Planning Commission to John Papajohn
- April 4, 2023 letter, Fillat Architecture to Office of State Fire Marshal
- June 12, 2024 written questions and comments from Commissioner Mike Strange

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<sup>5</sup> This Summary does not purport to be an exhaustive recapitulation of the entire record of evidence and arguments presented to the RBPC.

Applicant generally proposes a Project that includes both hotel and retail use (Tier 2 and Tier 3 use in the C-1 Central Commercial District). Applicant proposes 92 hotel rooms. Applicant contends the Project complies with the City Code and that many of the issues raised during the Site Plan review process can and will be addressed during the construction phase of the Project. Specific aspects of Applicant's presentation and arguments are summarized below.

Signs. Applicant stated any signs will comply with the City Code.

Structural integrity and impact on neighboring properties. During the Hearing, Applicant referenced its prior written submissions, stated that underpinning of adjacent properties is routine for construction projects such as this, stated that it can "almost guarantee" underpinning will be conducted in a way that neighboring buildings will be protected, and stated that the structure will be designed to withstand a 100-year flood event.

Applicant contends it can construct the Project without having to access neighboring properties.

Drop-Off Zone. During the Hearing, Applicant stated it will use City procedures to obtain permission to use portions of Wilmington Avenue as a drop-off zone for the hotel. Applicant acknowledged that if it does not obtain such permission from the City, Applicant would have to identify alternative drop-off locations, such as in the underground parking garage.

Off-Street Parking. Applicant proposes 94 parking spaces, to be located in a one-story, underground parking garage, based on a hotel containing 92 hotel rooms. Applicant proposes 3 ADA parking spaces, and 1 ADA van parking space, as depicted in the Drawings.

Applicant contends the number and size of the proposed parking spaces comply with the City Code. During the Hearing, Applicant stated that even if the Site Plan Drawings appear to show encroachment in certain of the proposed parking spaces of the 162 square feet ("SF") of usable space required by the City Code, the final design and construction plans will ensure 162 SF of usable space per parking space.

During the Hearing, Applicant acknowledged the width of the entrance to the parking garage will have to comply all applicable building codes.

Loading/Unloading Berths. Applicant proposes 1 loading/unloading berth with a dimension of 12 feet x 48 feet and a GFA of 854 SF (a portion of the proposed loading dock being proposed as "double height"). Applicant proposes aggregate retail space on Level 1 of 26,441 SF, but each individual retail space is proposed to be less than 6,000 SF.

Applicant contends no additional loading/unloading berths are required for the 26,441 SF of commercial retail use on the ground floor of the hotel structure because the Drawings depict total retail space divided into six separate retail spaces, each of which is less than 15,000 SF. Applicant specifically contends: that each “establishment” for purposes of City Code Section 270-36 is less than 15,000 SF; that “other commercial use” for purposes of City Code Section 270-36 is different from “retail establishment”; that the BI stated in a letter dated June 28, 2023 that only one loading/unloading berth is required for the Project; and that the *pro forma* financial projections do not support a second loading berth. Applicant also contends that, under Delaware law, if a Zoning Code provision is ambiguous and reasonably susceptible to more than one interpretation, then the property owner’s reasonable interpretation of that provision should prevail.

During the Hearing, Applicant stated that it would agree to only one loading berth, in part because one rather than two berths would create a more visually pleasing streetscape and in general the public desires ground floor retail stores. Applicant contends a second loading berth for this Project is not needed, “Code or no Code.” Applicant expressed the view that it did not want to seek a variance for a second loading berth.

During the Hearing, Applicant also stated that the loading/unloading berth will be available for the retail stores and that the hotel will coordinate pickups and deliveries. Specifically, Applicant suggested a condition of approval for the Project could be that access and use of the loading/unloading berths (including the trash area) be managed by a master loading dock (schedule and management) agreement, which would be approved by the City.

Floor Area Ratio (“FAR”) and Gross Floor Area (“GFA”). Applicant proposes an aggregate FAR for the building of 2.97, based on an aggregate gross floor area (“GFA”) of 114,393 square feet (“SF”). Applicant proposes FARs and GFAs by floor as follows:

On Level 1: an FAR of 1.02 based on a GFA of 39,086 SF. On Level 1, Applicant proposes 26,441 SF (GFA) of “retail only” use (such retail use, together with services, loading, trash and garage ramp proposed as totaling 30,061 SF (GFA)). On Level 1, Applicant proposes 12,645 SF (GFA) of “area without retail”, of which 9,024 SF (GFA) is proposed for “hotel use”.

On Level 2: an FAR of 0.84 based on a GFA of 32,250 SF. On Level 2, applicant proposes 27,250 SF (GFA) for “total hotel” use (including amenity, bar, circulation, 23 guestrooms, housekeeping/storage, kitchen, lobby, open to below, restaurant, restrooms, balcony/terrace and pool), or 71% of “lot occupancy”. On Level 2, Applicant proposes an additional 5,000 SF (GFA) of “ballroom only” total “meeting space” use (including restrooms, prefunction, housekeeping/storage, ballroom and balcony/terrace), or 13% of “lot occupancy”; of this “total meeting” space, Applicant proposes a “ballroom” comprising 2,714 SF GFA;

On Level 3: an FAR of 0.54 based on a GFA of 20,647 SF of “total hotel” use (comprising balcony/terrace, circulation, 32 guestrooms, housekeeping/storage and open to below).

On Level 4: an FAR of 0.58 based on a GFA of 22,410 SF for “total hotel” use (comprising balcony/terrace, circulation, enclosed roof terrace, 37 guestrooms, housekeeping/storage, restrooms, and roof terrace).

Applicant contends the January 24, 2022 Belhaven BOA Decision, in addition to expressly approving a variance for a 3.0 FAR, also implicitly granted a variance from the GFA restrictions in City Code Section 270-21B(5) with regard to a single residential floor (floor 2) and the average GFA for all residential floors (floors 2-4). Applicant also relies on a BOA decision involving a different property to support its implied variance argument.

Storage of Refuse. Applicant proposes a trash room with a dimension of approximately 1,122 SF. During the Hearing, Applicant stated the trash room will be located inside the proposed structure.

Height. Applicant proposes a building with 4 floors and a height of 42 feet. Applicant proposes a cupola on the roof of the building with a height of 50 feet, comprising 1,898 SF. Applicant proposes that “roof access is for maintenance only.” Applicant proposes a “metal antenna stealthed with translucent shingles” on the roof of the building and extending 11.5 feet above the top of the cupola. Applicant proposes mechanical enclosures and an elevator shaft enclosure on the roof of the building.

Applicant contends a proposed antenna should not be included in the height of the building pursuant to City Code Section 270-20 fn. 2. During the Hearing, Applicant stated the proposed antenna is intended to be used as a functional antenna and that the antenna is properly “stealthed.” During the Hearing, Applicant also stated that the “only reason” it proposed the antenna is because an antenna existed previously at the former Belhaven hotel and Applicant desires to bring back the nostalgic feel of the former hotel.

Applicant contends a proposed cupola is permitted pursuant to City Code Section 270-20 fn. 4 as long as the total height with such “embellishments” does not exceed 50 feet.

Applicant contends the solar panels are part of the HVAC system. During the Hearing, Applicant stated that if the City will not approve the solar panels, Applicant will remove the solar panels from the Site Plan.

During the Hearing, Applicant stated that the railings on the roof are needed for safety reasons, and that the Applicant would work with the BI to address any issues regarding the height of the railings.

During the Hearing, Applicant stated that the planters on the roof act as storm water retention vessels for a green roof.

During the Hearing, Applicant stated that, with the exception of the elevator enclosure, the mechanical enclosures are not roofed.

#### B. Summary of City BI's and Planner's Presentation of Evidence

All reports of the City's BI and Planner related to this Project and Application, including but not limited to those reports expressly referenced herein, were made part of the record of these proceedings. Among other things, the March 2024 Joint Report was specifically made part of the evidentiary record.

During the Hearing, the City's BI testified, among other things, as follows:

- He confirmed he acts as the City's floodplain administrator.
- He confirmed that State Fire Marshal approval is required before a building permit can be issued.
- He clarified his prior verbal testimony from June 7, 2024 regarding the basis for his June 28, 2023 written statement that the proposed first floor retail units do not require a second loading/unloading berths (contrary to his prior determination that two loading berths were required). During the June 7, 2024 portion of the Hearing, the BI testified that the rationale for his June 28, 2023 statement included: examples of buildings that house commercial uses that do not require their own loading berth in a single building (*e.g.*, the Atlantic Inn, the Avenue Inn); that none of the proposed retail uses here meet the 15,000 SF threshold; and that the relevant provision of the Code refers to "each" retail establishment. However, during the July 11, 2024 portion of the Hearing, the BI clarified that: upon further review, there are no examples in the City similar to what Applicant proposes here; in fact, there is an example in the City where a loading berth exists in connection with aggregate retail space exceeding 15,000 SF; and that he now agrees that no basis exists (either in terms of historical precedent or in terms of Code interpretation) for his June 28, 2023 determination that only one loading/unloading berth is required for the Project.
- He would seek third party expertise in the areas of floodplain and structural engineering to assist him in reviewing construction plans.
- He stated that a determination under the Building Code regarding the safe maximum number of people per hotel room is yet to come.

Wallace Montgomery noted the Site Plan lacks sufficient documentation for Wallace Montgomery to provide meaningful comment related to the building's presence in a flood zone, but also contends such documentation is not required until Applicant seeks a permit under City Code Chapter 159 (Flood Damage Reduction). Wallace Montgomery's initial comments and questions, as articulated in the March 2024 Joint Report, raised various potential issues, including with regard to:

- Hyrdostatic and hydrodynamic loads and the effects of buoyancy;
- Groundwater seepage in the subterranean level of parking;
- Dewatering strategies;
- Prohibitions on the placement of fill within the flood hazard zone;
- NFIP regulations and International Building Codes, specifically those regulations pertaining to construction within a coastal high hazard flood zone;

During the Hearing, Wallace Montgomery further noted they are neither hydrologic nor structural engineers, nor are they floodplain managers.

### C. Summary of Presentation of Evidence and Arguments by Members of the Public

All submissions made by members of the public to the City related to this Project and Application, including but not limited to any such submissions expressly referenced herein, were made part of the record of these proceedings.

During the Hearing, neighboring property owner Dr. Michael Trahos referred to his various written submissions to the RBPC. Dr. Trahos stated that although he is not opposed to the building of a hotel on this property, he has concerns regarding the Project's impacts on adjacent properties, including his, in particular with regard to risks posed by hydrostatic pressure and liquefaction. He stated he is concerned soil underneath the structure on his property could collapse. He referenced an April 1, 2022 report from Applicant's geotechnical engineer (Hillis Carnes) stating that neighboring properties would collapse unless Applicant undertook structural underpinning activity.<sup>6</sup> Dr. Trahos stated underpinning of adjacent properties must be a pre-requisite for, not a condition of, any site plan approval. Alternatively, Dr. Trahos contended that, were the RBPC to approve the Site Plan, it should attach several specific conditions of approval, including with regard to documentation, commitment to repair and damage to adjacent parcels, monitoring and communication.

During the Hearing, another neighboring property owner, Allison Blyth, referred to her submissions to the RBPC, in particular with regard to the need for geotechnical studies she believes are necessary to ensure her property is not structurally impaired by the Applicant's

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<sup>6</sup> The Hillis-Carnes Belhaven Hotel Geotechnical Engineering Study Report Project No. D22040 is dated April 1, 2022, but was not submitted to the RBPC for discussion until over one year later.

Project. Ms. Blyth also expressed concerns regarding the size of the proposed trash area and potential gridlock on Wilmington Avenue resulting from delivery vehicles to the hotel and retail units.

During the Hearing, other members of the public offered general support for the Project and urged the RBPC to approve the Site Plan Application, including on the bases: that the City's CDP supports a flexible approach to site plan review; that the hotel would be an upgrade to existing hotels; that the Project will enhance the City; that it is important for the City to permit this type of development; that the "beach block" needs the Project; that the Rehoboth Beach Dewey Beach Chamber of Commerce unanimously supports the Project; that Southern Delaware Tourism supports the Project as a boost to tourism; that the Project combines modern amenities with nostalgic charm; that the Project is a "spectacular building" that would help revitalize the City; that the structures currently located at the Project site are dilapidated; and that the Project is aesthetically pleasing and unobtrusive.

During the Hearing, other members of the public expressed concerns regarding climate change, sea level rise, structural safety and subterranean parking in the floodplain. One member of the public expressed shock that not more people were opposed to the Project and cited concerns regarding seismic impact on neighboring properties, delivery truck blockage of streets, changes to the City's skyline, and prior approved changes to the FEMA flood zone.

#### **IV. RBPC Findings and Conclusions**

##### **A. General Findings and Conclusions**

Based on the record of the Hearing proceedings, the RBPC makes the following findings and conclusions.

1. The Hearing was duly noticed as required by the City Code Chapter 236, Articles VI and VII.
2. The Drawings constitute the Site Plan upon which: (a) the present Application is based; (b) the RBPC evaluated the Application during the Hearing; and (c) the RBPC based its decision during the Hearing.
3. The Application proposes the demolition of existing retail and restaurant structures and the redevelopment of approximately 38,475 square feet of land located at the Property between Rehoboth Avenue and Wilmington Avenue and abutting the Boardwalk into a 4-story complex spanning multiple parcels. The proposed structure would contain a 92-room hotel, restaurant and retail shops, along with underground parking (94 spaces) and ballroom/meeting space availability



4. The Project requires site plan approval pursuant to City Code Section 236-30.
5. The Site Plan is not inconsistent with the City's 2020 Comprehensive Development Plan ("CDP") adopted by the City's Board of Commissioners ("BOC") as of June 28, 2022.
6. Although there is much to like about the Project (including its design and aesthetics), and although Applicant is to be commended for its patience and commitment to enhance the City of Rehoboth with the proposed hotel, as set forth below, various changes, restrictions and conditions to the Site Plan are necessary: (1) to address certain deficiencies in the Site Plan, as proposed; (2) to ensure compliance with the City Code, among other laws; and (3) for the RBPC to fulfill its statutory mandate. Among other things, Applicant is entitled to seek from the City's Board of Adjustment the variances identified below, which, if granted, would eliminate certain of issues identified by the RBPC herein.

#### B. Specific Findings and Conclusions

##### 7. Applicable Federal, State, County and City Law

City Code Section 236-30E specifically charges the RBPC with the duty to review site plan applications in view of, among other things, "other applicable federal, state, county, and City laws and regulations."

The RBPC concludes (and neither Applicant, nor the public, nor the City appear to dispute) that the Site Plan must still comply with various, applicable, federal, state, county and City laws and regulations.

##### 8. Independent Structural and Geotechnical Engineering Review and Approval

Two, immediately adjacent property owners voiced considerable and repeated concerns that the construction of the proposed Structure might undermine the structural integrity of the existing structures located on their properties.

The City's BI and Planning Consultant welcomed the notion of having independent, structural engineering and geotechnical review and approval of Applicant's construction plans for the Project, and Applicant itself did not appear to object to this concept.

Independent, structural engineering and geotechnical review and approval of Applicant's construction plans for the Project is necessary and appropriate under the circumstances.

9. Floodplain Expert Review and Approval

Applicant proposes to build this structure, including an underground parking garage, in the AO and AE flood zones. The City's BI and Planning Consultant welcomed the notion of having an independent flood plain expert assist the City in its review and approval of Applicant's construction plans for the Project, and Applicant itself did not appear to object to this concept.

Independent, floodplain review and approval of Applicant's construction plans for the Project is necessary and appropriate under the circumstances.

10. Lot Consolidation

By letter dated January 9, 2024, Applicant stated that "If the Planning Commission approves the Belhaven [site plan] application, it is the intention of the Papajohn family to consolidate the three (3) tracts into a single tract under the name of Belhaven Investments, Inc." In the same letter, Applicant further requested "that the approval for lot consolidation be included in the Planning Commission Hearing for site plan approval."

Lot consolidation approval by the RBPC will be required for this Project.

11. Amendments to Site Plan or Drawings

Pursuant to City Code Section 236-33A, with the exception of those deemed to be minor amendments, the procedure for amendments and additions to site plans shall be the same as for a new application. Minor amendments of an approved site plan, or conditions attached to a site plan which are clearly highlighted on a revised site plan with an itemized list of all revisions, may be approved by the Planning Commission if the amendment or addition, in the reasonable judgment of the Planning Commission:

- (1) Does not alter a recorded plat.
- (2) Does not conflict with requirements set forth in this chapter.
- (3) Does not change the general character or content of an approved development plan or use.
- (4) Applies to an approved condition originating with the Planning Commission, but does not remove such condition or alter it in more than a minimal way.
- (5) Has no appreciable adverse impact on adjoining or nearby properties.
- (6) Does not result in any change of major external access points in more than a minimal way.

- (7) Does not increase the approved number of dwelling units or height of buildings.
- (8) Does not decrease the minimum specified yards and open spaces or minimum or maximum specified parking and loading spaces.

#### 12. Drop-Off Zone

To the extent Applicant intends to use portions of a City street (such as Wilmington Avenue) for a drop-off zone, as shown in the Drawings, Applicant should obtain the City's permission to do so, including as a possible partial abandonment of a public way and related parking spaces.

#### 13. Size of Parking Spaces

City Code Section 270-30(a) provides: "Every parking space on the premises, outdoors or in a garage, and every parking space in a public lot or private lot serving a specific property, shall consist of not less than 162 square feet of usable area for each vehicle, and the dimensions thereof shall be not less than nine feet in width and 18 feet in length."

The word "usable" in City Code Section 270-30(a) is intentional.

The Drawings indicate that vertical, structural support columns impinge on certain of the 94 proposed parking spaces.

Compliance with this section of the Code is necessary and should not be burdensome to accomplish; alternatively, the Applicant should seek a variance.

#### 14. Number of Loading/Unloading Berths

City Code Section 270-36 provides that "No building to be used in any district for the uses specified in the following table shall be erected unless loading/unloading berths are provided on the premises in accordance with the requirements of said table". The referenced table requires: a minimum of 1 loading/unloading berth for a hotel with 15,000 to 100,000 square feet of gross floor area in commercial districts; a minimum of 2 loading/unloading berths for a hotel with over 100,000 square feet of gross floor area in commercial districts; and a minimum of 1 loading/unloading berth for "Retail or service establishment or other commercial use with over 15,000 square feet of gross floor area in commercial districts".

The Application proposes a single loading/unloading berth, with a dimension of 12 feet by 48 feet (576 SF). The proposed structure comprises 114,393 square feet, of which the

“hotel” portion of the structure comprises 87,952 square feet and the aggregate “retail” portion of the structure comprises 26,441 square feet. Applicant proposes that the “retail” space will be broken into separate retail spaces, each of which is less than 15,000 SF GFA.

The plain meaning of City Code Section 270-36 requires two loading/unloading berths for this Project: one for a hotel with 15,000 – 100,000 SF of GFA in a commercial district; and one for “retail or service establishment or other commercial use with over 15,000 square feet of gross floor area in commercial districts”. No other reading of this Section of the Code is plausible. Here, the proposed commercial space exceeds 15,000 SF of GFA. Unlike in other sections of the City Code (*e.g.*, the parking requirements in City Code Section 270-35), the word “each” does not appear in Section 270-36 to limit the loading berth requirement to each retail use in excess 15,000 square feet. Instead, the Code sets forth a generic loading berth requirement for any building that includes retail or commercial use in excess of 15,000 square feet. If the drafters of the Code intended to limit the loading berth requirement to each individual retail establishment of more than 15,000 square feet, they could have done so in Section 270-36; but they did not.

The first sentence of City Code Section 270-36 starts with the words “No building”, and here Applicant proposes a “building”. Applicant proposes a loading berth in one building, and accordingly it is appropriate to combine the square footage of the individual retail or commercial uses for purposes of determining the minimum number of loading berths required.

Moreover, based on the testimony of the BI during the Hearing, and as the BI now admits, the BI’s June 28, 2023 letter to Applicant provides no Zoning Code or historical precedent or support for the Applicant’s position that only a single loading berth is required for this Project. The BI’s determinations under City Code Section 236-32A are preliminary, and, as a matter of law, are not binding on the RBPC. But even if the RBPC were required to show deference to the BI’s determination regarding the number of loading berths required, here there is no justification for relying on the BI’s June 28, 2023 determination that only 1 loading berth is required. Any determination by the BI must have a reasonable basis. As the BI acknowledged during the Hearing, there is no language in Section 270-36 that explicitly limits the loading berth requirements to each retail or other commercial use exceeding 15,000 square feet. Similarly, the BI also acknowledged during the Hearing that he had been unable to identify any City building with aggregate retail and/or commercial uses exceeding 15,000 square feet for which the requirement of a loading berth had been waived or ignored. Thus, the BI’s June 28, 2023 letter to Applicant provides no evidentiary or legal support for the Applicant’s position that only a single loading berth is required for this Project.

In fact, historical precedent supports a requirement for a second loading berth here. The First Street Station complex has a loading berth for multiple small retail and other

commercial uses that individually are less than 15,000 square feet but in the aggregate total more than 15,000 square feet.

Finally, City Code Section 236-30E requires the RBPC to consider a number of factors that bear on public safety related to access to a loading berth at Wilmington Avenue, including: motorized or non-motorized vehicular traffic flow, both on-site and off-site; access to structures; access to public and private streets; pedestrian movement; fire equipment and other emergency access; and impact on the neighborhood. The City's traffic consultant has identified freight delivery trucks as a safety issue for both vehicular and pedestrian traffic on City streets, and there is evidence in the record concerning current problems with traffic flows and pedestrian safety issues caused by delivery vehicles.

The Project can accommodate a second loading berth in the space adjacent to space shown in the Drawings for a single loading berth.

Alternatively, Applicant can seek a variance to be excused from the Code requirement for a second loading berth.

#### 15. Management of Motor Vehicle Entrance to Loading/Unloading Berth and Trash Room

City Code Section 270-4 defines "Loading/Unloading Berths" as "Accommodation off the street for loading and unloading motor transport equipment and designed to provide adequate space for efficient maneuvering into and out of loading position at properly constructed docks located either within a building or in the yard on the same lot. The minimum space on the premises where such facility is required shall be 576 square feet of usable area for each such berth, which shall be not less than 12 feet in width and 48 feet in length."

Independent of the requisite number of loading/unloading berths for this Project, the motor vehicle entrance to the loading/unloading berth and interior trash room must be properly managed to mitigate traffic congestion and protect the safety of the public at this particular location. The RBPC appreciates, and accepts, Applicant's offer to enter into a master loading dock management schedule agreement, which is necessary.

#### 16. GFA (Allocation of 3.0 FAR re Floor 2 and Average of Floors 2-4).

City Code Section 270-21B(5) provides, "In all commercial districts, the floor area ratio ("FAR") for all buildings or structures shall not exceed 2.0; however, total FAR devoted to Tier 1 uses shall not exceed 0.60. For all mixed-use buildings (i.e., residential uses and commercial uses), the average of the gross floor area of all residential floors shall not

exceed 50% of the gross lot area and the gross floor area of any one residential floor shall not exceed 75% of the gross lot area.”

City Code Section 270-21B(5)(b) provides, “Any one residential floor in a building in a commercial district used, in whole or in part, as a hotel, motel or inn may include meeting rooms for use as convention facilities. To the extent that the aggregate gross floor area of these meeting rooms does not exceed 25% of the gross lot area or 5,000 square feet, whichever is less, such area exclusively devoted to meeting rooms and no other purpose will not be counted in calculating the fifty-percent maximum lot coverage in Subsections C(2) and B(5). In no case shall the floor area ratio (FAR) of 2.0 be exceeded. The meeting rooms as permitted in this section shall contain no food preparation areas or areas devoted to the dispensing of alcoholic beverages.”

Section 270-4 of the Code defines a “commercial floor” as “A floor or story of a building that is entirely devoted to commercial use and has no living accommodations.”

Section 270-4 of the Code defines a “residential floor” as “A floor or story of a building, any portion of which is devoted to residential use, such as motel rooms or residential condominiums.” Levels 2 through 4 of the proposed structures are residential floors within the meaning of the Code.

The Site Plan before the RBPC clearly demonstrates that the gross floor area of the second floor of the proposed hotel exceeds 75% of the gross lot area. Similarly, the average gross floor area of the second-through-fourth floors of the proposed hotel exceeds 50% of the gross lot area (even excluding the proposed areas exclusively devoted to meeting rooms and no other purpose).

The Code defines FAR separately from GFA, and the Code sets forth separate restrictions for FAR and GFA.

Absent a variance, the Site Plan is not compliant with these Sections of the Code.

By way of the January 24, 2022 Belhaven BOA Decision, the BOA granted Applicant’s request for a single variance from City Code Section 270-21B(5) restricting floor area ratio for all buildings located within a commercial district to 2.0. Specifically, the Applicant sought, and was granted, an FAR variance of 3.0 for six adjacent parcels Applicant wished to consolidate and develop.

The total FAR for the proposed structure (2.97) is consistent with the Belhaven BOA Decision.

However, the RBPC does not agree with Applicant that the Belhaven BOA Decision implicitly granted variances for the 75% GFA and 50% average GFA restrictions for the residential floors of the hotel described above.

Applicant did not request that the BOA grant a variance from the 75% and average 50% gross floor area restrictions set forth in City Code Section 270-21(B)(5) for residential floors of the hotel, and the Belhaven BOA Decision does not mention, much less grant such variances.

The scope of the Belhaven BOA Decision is limited to the scope of the variance requested and the specific variance granted.

If, as Applicant contends, the BOA intended to grant such additional variances implicitly, it should be relatively easy to obtain express, written confirmation from the BOA that the Belhaven BOA Decision also included variances for the 75% and 50% gross residential floor area restrictions in City Code Section 270-21B(5).

To the extent Applicant relies on a subsequent BOA decision regarding a different property owner's request for specific variance(s) for a different hotel project, such a subsequent, and different, variance cannot be read into the prior Belhaven BOA Decision. Variances are unique, and specific determinations made by a BOA are based on the unique facts and circumstances presented by the applicant requesting a variance.

Variances are not Code amendments, and the RBPC is not authorized to grant variances.

#### 17. Storage of Refuse

City Code Section 270-27 (Storage of refuse) provides as follows:

In C-1, C-2 and C-3 Districts all refuse storage areas and refuse containers shall be screened from public view with an acceptable screen material, including wood, lattice, fine-mesh fencing, plantings or other suitable material erected in conformance to all building and zoning codes. Said screened refuse storage areas and refuse containers shall not be located within setback areas.

Applicant acknowledges that it will comply with this Section of the Code. To the extent refuse containers are stored outside, Applicant will need to screen them accordingly.

18. Height (proposed railings, planters, antenna and solar panels)

City Code Section 270-20A provides that the height of a building or structure erected shall not exceed (for Tier 2 and Tier 3 uses) 42 feet, not to exceed 4 floors or stories above grade.

Footnote 2 to Section 270-20 provides: "Heating, ventilation and cooling devices, which are to be enclosed so as to be obscured from view, elevator shafts, one stairway entry for maintenance access to the roof, chimneys and antennas shall not be included in calculating height."

Footnote 4 to Section 270-20 provides: "A dome, spire, cupola, belfry, chimney or pinnacle serving as an architectural embellishment and not for occupancy or storage may be erected to a height in excess of that authorized in this subsection for the district in which the building concerned is located, provided that the aggregate of the bases of all such structures does not exceed 10% of the building's ground floor area. The total height of a building with such embellishments shall not exceed 50 feet."

The height of the Proposed Structure -- excluding the proposed railings, planters, antenna and solar panels and cupola -- does not exceed 42 feet.

The proposed railings exceed 42 feet in height. Although the railings might serve as an important safety feature, the height of the railings requires a variance, which the RBPC does not have the authority to grant.

The proposed planters exceed 42 feet in height. If the planters are not fixtures, then this may not be a Code issue. But to the extent the proposed planters are fixtures, even if they serve a good purpose as rainwater retention vessels, the height of the planters requires a variance, which the RBPC does not have the authority to grant.

The height of the antenna (which would rise 11.5 feet above the 50 foot top of the proposed cupola) is disproportionate to, and incompatible with, the architectural massing, composition, scale and character of the current neighborhood and nearby properties. This proposed structure is already at an FAR of 3.0 rather than 2.0. The Applicant has added a cupola, which is permitted, but Applicant proposes to mount an antenna on top of the cupola. Applicant appears to admit that the antenna is primarily intended as architectural embellishment, even if it does function as an actual antenna. Although the proposed antenna evokes a nostalgic architectural feel, the antenna should either be removed or the height of the antenna requires a variance, which the RBPC does not have the authority to grant.



The proposed solar panels depicted in the Drawings on top of the roof of the structure appear to exceed the height restriction of a building under City Code Section 270-20 whether they are placed flat, horizontally, on top of the roof, or are angled. The proposed solar panels exceed 42 feet in height. The height of the solar panels requires a variance, which the RBPC does not have the authority to grant, even though Applicant is to be commended for proposing solar panels generally.

## V. Decision of the RBPC

### Section 1. Approved Motion With Conditions

Upon a duly made and seconded motion, as amended, with all 9 members of the RBPC voting in favor thereof and 0 members of the RBPC voting against, the RBPC voted to approve the Site Plan Application, subject to the following changes, conditions and restrictions:

- A. Additional Approvals under Federal Law. Prior to the issuance of any building permit for the proposed Project (or, if not possible prior to the issuance of a building permit, as soon thereafter as is reasonably practicable), Applicant shall demonstrate compliance with, and obtain all permits, approvals and agreements for the Project required by, applicable federal laws and regulations, including but not limited to: (1) any applicable federal or international building laws or regulations; (2) any applicable federal stormwater run-off or point-source discharge laws or regulations; and (3) any applicable FEMA laws or regulations regarding (a) design standards (e.g., to withstand wind), (b) any encroachment of the applicable building line and (c) a sufficient number of emergency exits for the underground parking garage.
- B. Additional Approvals under State Law. Prior to the issuance of any building permit for the proposed Project (or, if not possible prior to the issuance of a building permit, as soon thereafter as is reasonably practicable), Applicant shall demonstrate compliance with, and obtain all permits, approvals and agreements for the Project required by, applicable State of Delaware laws and regulations, including but not limited to: (1) applicable state building laws and regulations; (2) any applicable state stormwater run-off or point-source discharge laws or regulations; (3) any DNREC approval required for any underpinning activity; (4) any additional State Fire Marshal approvals or conditions required regarding (a) the maximum safe number of inhabitants per proposed hotel room, (b) the installation of a second fire department connection (FDC) and a second lock box as specified in the State Fire Marshal letter to Peter Fillat dated April 17, 2023, at locations to be agreed upon by the State Fire Marshal and the Chief of the Rehoboth Beach Volunteer Fire Company, (c) the eight terms specified in the April 4, 2023 letter from Peter Fillat to the Fire Marshal, (d) the use of any batteries in connection with the proposed solar panels on the roof of the proposed structure and (e) a sufficient number of emergency exits for the underground parking garage; (5) any DelDOT approval regarding the Project's impact on vehicular or pedestrian traffic; (6) any additional Preliminary Land Use Service

(“PLUS”) review and approval by the Office of State Planning Coordination (“OSPC”); and (7) and any access or easement agreements with neighboring property owners or the City that may be required in connection with designing, surveying, constructing, stabilizing, maintaining, repairing, modifying or using the proposed structure.

- C. Additional Approvals Under County Law. Prior to the issuance of any building permit for the proposed Project (or, if not possible prior to the issuance of a building permit, as soon thereafter as is reasonably practicable), Applicant shall demonstrate compliance with, and obtain all permits, approvals and agreements for the Project required by, applicable Sussex County laws and regulations, including but not limited to: (1) approval from the Sussex County Conservation District regarding stormwater management.
  
- D. Additional Approvals Under City Law. Prior to the issuance of any building permit for the proposed Project (or, if not possible prior to the issuance of a building permit, as soon thereafter as is reasonably practicable), Applicant shall demonstrate compliance with, and obtain all permits, approvals and agreements for the Project required by, applicable City of Rehoboth laws and regulations, including but not limited to: (1) City Code Chapter 102 (Building Construction); (2) a license from the City for the proposed awning encroaching into or over public property pursuant to City Code Chapter 102, Article XIX; (3) City Code Chapter 159 (Flood Damage Reduction); (4) City Code Chapter 215 (Restaurants); (5) City Code Chapter 220 (Sewers and Water); (6) City Code Chapter 206 (Pools); (7) City Code Chapter 253 (Trees); (8) City Code Chapter 270, Article VII (Signs); (9) City Code Chapter 232 (Streets and Sidewalks) (including specifically Sections 232-43, 232-44, 232-45, 232-46 and 232-47); (10) the maximum safe number of inhabitants per proposed hotel room, and (11) and any access or easement agreements with neighboring property owners or the City that may be required in connection with designing, surveying, constructing, stabilizing, maintaining, repairing, modifying or using the proposed structure.
  
- E. Review and Approval By Independent Structural and Geotechnical Engineer. As a condition of this approval, prior to the issuance of any building permit by the City related to the proposed structure, an independent, qualified structural and geotechnical engineer shall be retained to assist the Building Inspector in reviewing all proposed design and construction drawings for consistency with all applicable building codes. No building permits shall be issued by the City until the independent, structural and geotechnical engineer has reviewed and approved all final design and construction drawings submitted by Applicant. Copies of any written review or approval by the independent, structural and geotechnical engineer shall be furnished to the Planning Commission at least 14 days prior to the issuance of the building permit.

- F. Review and Approval By Independent Floodplain Expert. As a condition of this approval, prior to the issuance of any building permit by the City related to the proposed structure, an independent, qualified floodplain expert shall be retained to assist the City's Floodplain Administrator in reviewing all proposed design and construction drawings for consistency with all applicable requirements for constructing the proposed structure at this location (including in the AO and AE Flood Zones). No building permits shall be issued by the City until the independent, flood plain expert has reviewed and approved all final design and construction drawings submitted by Applicant. Copies of any written review or approval by the independent, floodplain expert shall be furnished to the Planning Commission at least 14 days prior to the issuance of the building permit.
- G. Lot Consolidation: Prior to the issuance of any building permit for the proposed Project, Applicant shall submit an appropriate application to, and obtain approval from, the Rehoboth Beach Planning Commission to consolidate lots, as may be necessary, pursuant to City Code Chapter 236.
- H. Amendments to Site Plan or Drawings. Any amendments to the proposed Site Plan, including any modifications to the Drawings, shall be submitted to the Planning Commission at the same time they may be submitted to any City official for review, and are expressly subject to any additional approvals as may be required pursuant to City Code Section 236-33.
- I. Drop-Off Zone. As a condition of this approval, prior to the issuance of a building permit for the proposed Project (or, if not possible prior to the issuance of a building permit, as soon thereafter as is reasonably practicable), Applicant shall obtain approval from the City of Rehoboth Beach, including consistent with 22 Del. C. Section 708, with regard to any laying out, alteration, relocation, abandonment or discontinuance of a portion of any public way resulting from or related to the Project's proposed drop-off zone on Wilmington Avenue for arriving and departing hotel patrons, as depicted in the Drawings.
- J. Size of Parking Spaces. City Code Section 270-30A requires that each parking space in the proposed parking garage shall consist of not less than 162 square feet of usable area for each vehicle and the dimensions thereof shall be not less than nine feet in width and eighteen feet in length. As a condition of this approval Applicant shall either: (1) demonstrate, with additional, detailed drawings, compliance with City Code Section 270-30A (that is, exclusive of structural columns), or alternatively (2) obtain a variance from the requirements of City Code Section 270-30A by the City's Board of Adjustment regarding the requirement of 162 square feet of usable space.
- K. Number of Loading/Unloading Berths. Because City Code Section 270-36 requires two loading/unloading berths for this Project (one for a hotel of the size proposed and one for

a building with retail use in excess of 15,000 square feet, the Applicant shall, as a condition of this approval, either: (1) add a second loading/unloading berth in an amended site plan for the commercial retail use, or alternatively (2) obtain a variance from the requirements of City Code Section 270-36 by the City's Board of Adjustment.

L. Management of Motor Vehicle Entrance to Loading/Unloading Berth and Trash Room.

As a condition of this approval, the motor vehicle entrance to the proposed loading/unloading berth and trash room area shall be actively managed, including by way of a signed, enforceable, master loading dock management and schedule agreement, approved by the City of Rehoboth Beach, and applicable to deliveries/pickups to/from the hotel and commercial spaces, so as to ensure that delivery and/or waste management vehicles (1) will not protrude onto the sidewalk (2) will not park on Wilmington Avenue or adjacent streets while waiting for access to a loading/unloading berth and (3) otherwise will not negatively impact pedestrian safety or vehicular traffic or parking.

M. GFA (Allocation of 3.0 FAR re Floor 2 and Average of Floors 2-4). Because the gross floor area of the second floor of the proposed hotel exceeds the requirement in Section 270-21B(5) that no single residential floor of the hotel may exceed 75% of the gross lot area, and because the average gross floor area of the second-through-fourth floors of the proposed hotel exceeds 50% of the gross lot area (even excluding the proposed areas exclusively devoted to meeting rooms and no other purpose), the Applicant shall either: (1) obtain a variance from the City's Board of Adjustment regarding the 75% gross floor area restriction for any a single residential floor and the 50% gross floor area average restriction for all residential floors, both of which restrictions are set forth in City Code Section 270-21B(5); or, alternatively (2) to the extent Applicant contends the Notice of Decision of the City's Board of Adjustment dated January 24, 2022, approving a 3.0 FAR variance implicitly included an additional variance from the gross floor area restrictions for residential floors in City Code Section 270-21B(5), Applicant shall obtain an express, written confirmation from City's Board of Adjustment to that effect.

N. Storage of Refuse. To the extent refuse containers are placed outside the proposed structure, including for trash pick-up, as a condition of this approval, such refuse containers shall be screened as required by City Code Section 270-27.

O. Height (proposed railings). As a condition of this approval, Applicant shall either (1) amend the Site Plan so as to bring the proposed railings into compliance with City Code Section 270-20 or (2) obtain a variance from the height restrictions of City Code Section 270-20 by the City's Board of Adjustment regarding the height of the proposed railings.

P. Height (proposed planters). To the extent the proposed planters depicted in the Drawings on the roof of the structure are permanently affixed to the roof, as a condition of this approval, Applicant shall either (1) remove the planters or (2) obtain a variance from the

height restrictions of City Code Section 270-20 by the City's Board of Adjustment regarding the height of the planters.

Q. Height (Antenna). As a condition of this approval, Applicant shall either (1) remove the proposed antenna or (2) obtain a variance from the height restrictions of City Code Section 270-20 by the City's Board of Adjustment regarding the height of the proposed antenna.

R. Height (Solar Panels). To the extent the proposed solar panels on the roof of the proposed building exceed 42 feet in height, the solar panels must be removed unless Applicant obtains a variance from the height restrictions of City Code Section 270-20 by the City's Board of Adjustment.

## **Section 2. General Limitations of this Decision**

S. This Notice of Decision is not, does not purport to be, and should not be construed as, a determination by the RBPC regarding any application by Applicant (a) to subdivide land under Chapter 236 of the City Code, (b) to obtain a variance or exception to the requirements under Chapter 270 of the City Code or (c) to obtain any approval other than as expressly set forth herein. Pursuant to City Code Section 236-33, with the exception of those deemed to be minor amendments, the procedure for amendments and additions to site plans shall be the same as for a new application. Minor amendments of an approved site plan, or conditions attached to a site plan which are clearly highlighted on a revised site plan with an itemized list of all revisions, may be approved by the Planning Commission if the amendment or addition, in the reasonable judgment of the Planning Commission meets the eight (8) factors set forth therein.

T. This Notice of Decision is based on the Site Plan and evidence presented during the Hearing. To the extent the actual structure to be constructed is inconsistent with the Site Plan upon which this Notice of Decision is based, such inconsistencies shall not be deemed to have been approved by the RBPC.

U. This Notice of Decision is not, does not purport to be, and should not be construed as, a determination by the RBPC regarding the existence or extent of a nonconforming use under Article VI, Chapter 236, of the City Code.

V. This Notice of Decision constitutes a final action of the RBPC for purposes of City Code Section 236-6.

W. This Notice of Decision shall be valid for a one-year period from the date hereof and expires at the end of that period unless substantial building construction has begun. The RBPC may grant an extension of not more than one year upon written request by the Applicant, within 90 days before the expiration of the approval.

X. Building Inspector to provide report. Within 10 days after Applicant satisfies all Conditions of Approval, the Building Inspector shall submit to the RBPC a written report so stating.

Y. This Notice of Decision may be appealed to the BOC in accordance with City Code Sections 236-6 and 236-35.

\*\*\*\*\*

Signed on behalf of the Planning Commission  
Of the City of Rehoboth Beach, Delaware,  
As conforming to the above-described Hearing

  
By: Michael Bryan, Chair of the RBPC

Dated: August 5, 2024

VENDOR : 52052 City of Rehoboth Beach

<u>Invoice Date</u>	<u>Invoice Number</u>	<u>Invoice Description</u>	<u>Amount Paid</u>
08/12/2024	081224	Filing fee for Administrative Appeal	\$150.00

TOTAL: \$150.00

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ATTORNEY OPERATING ACCOUNT  
 SAUL EWING LLP  
 1201 N. MARKET STREET, SUITE 2300  
 P.O. BOX 1266  
 WILMINGTON, DE 19899-1266

TD Bank  
 55-780/312

920289

DATE  
 08/13/2024

AMOUNT  
 \$ 150.00

ONE HUNDRED FIFTY AND 00/100 DOLLARS \*\*\*

PAY TO  
 THE  
 ORDER  
 OF

City of Rehoboth Beach  
 229 Rehoboth Avenue  
 Rehoboth Beach, DE 19971



*[Handwritten Signature]*

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