

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: THE RESORT AT MASSEY'S LANDING, LLC**

**(Case No. 11811)**

A hearing was held after due notice on August 1, 2016. The Board members present were: Mr. Dale Callaway, Mr. John Mills, Mr. Jeff Hudson, Mr. Norman Rickard, and Mr. Brent Workman.

Nature of the Proceedings

This is an appeal of a determination by the Planning & Zoning Director regarding the use of a package / liquor store at a campground.

Findings of Fact

The Board found that the Appellants filed an appeal of a determination by the Planning & Zoning Director regarding the use of a package / liquor store at a campground. This application pertains to certain real property located on the north and south sides of Long Neck Road approximately 833 feet southeast of Walker Road (911 Address: 36625 Long Neck Road, Millsboro); said property being identified as Sussex County Tax Map Parcel Number 2-34-25.00-31.00, 31.04, & 31.02. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the appeal, minutes of the Sussex County Council meetings on June 19, 2013, and December 9, 2014, minutes of the Planning & Zoning Commission on May 23, 2013, and June 27, 2013, a letter from Lawrence Lank dated May 19, 2016, and a portion of the tax map of the area.
2. The Board found that the Office of Planning and Zoning received no letters regarding the appeal.
3. The Board found that Thomas Burbage was sworn in to testify about the appeal. James Fuqua, Esquire, presented the case on behalf of the Appellant and submitted exhibits for the Board to review.
4. The Board found that Mr. Fuqua stated that the Appellant proposes to open a package / liquor store to primarily serve the campground patrons. The package / liquor store will be a small business located on the campground site.
5. The Board found that Mr. Fuqua stated that the Appellant is seeking an appeal of a determination by the Planning Director. No variance or special use exception is being requested.
6. The Board found that Mr. Fuqua stated that, in a letter from the Director of Planning & Zoning dated May 19, 2016, it was determined the package / liquor store is not a permitted use. His client believes that the interpretation by the Director wrong and that the Ordinance says the use is permitted.
7. The Board found that Mr. Fuqua stated that the Ordinance states that small retail businesses primarily for patrons of the campground "shall" be permitted.
8. The Board found that Mr. Fuqua stated that the campground was approved by Sussex County for 322 camping sites and a welcome center.
9. The Board found that Mr. Fuqua stated that there is public access to the welcome center but a gate restricts access to the campground area and the campground area is not open to the general public.
10. The Board found that Mr. Fuqua stated that the welcome center consists of approximately 9,585 square feet and the proposed package / liquor store will occupy approximately 8% of the total floor area of the welcome center.
11. The Board found that Mr. Fuqua stated that the other uses in the welcome center are permitted by Sussex County.
12. The Board found that Mr. Fuqua stated that the term "shall" is mandatory as stated in the Sussex County Zoning Code.
13. The Board found that Mr. Fuqua stated that the Sussex County Zoning Code provides that small retail businesses intended primarily for occupants of the park area shall be permitted within the park area.
14. The Board found that Mr. Fuqua stated that the issue is that the Appellant considers the liquor store a small retail business as mentioned in the Sussex County Zoning Code.

15. The Board found that Mr. Fuqua stated that the store will primarily serve the occupants of the park but may serve others as well.
16. The Board found that Mr. Fuqua stated that the campground is open from April 1 through the first Sunday in November. The welcome center, including the liquor / package store will only be open during the months the campground is open.
17. The Board found that Mr. Fuqua stated that the plain reading of the ordinance allows for the package / liquor store in the campground.
18. The Board found that Mr. Fuqua stated that the Board is acting as an appellate court in this instance.
19. The Board found that Mr. Fuqua stated that the Delaware Supreme Court has stated that, if a statute is unambiguous and there is no reasonable misunderstanding of the words used, then the Court's role is limited to application of the literal meaning of the words. This rule of statutory construction applies also to the Board.
20. The Board found that Mr. Fuqua stated that courts have no authority to vary the terms of clear meaning or ignore mandatory provisions and that, if a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such a literal interpretation could not have been intended by the legislature.
21. The Board found that Mr. Fuqua stated that, when a statute is clear and unambiguous, there is no need for statutory interpretation.
22. The Board found that Mr. Fuqua stated that the language in the Ordinance is not ambiguous and the words must be given their clear meaning.
23. The Board found that Mr. Fuqua stated that the package store is a small retail business to be used primarily by occupants of the park.
24. The Board found that Mr. Fuqua stated that the reasons stated in Mr. Lank's letter are irrelevant because the Ordinance is clear.
25. The Board found that Mr. Fuqua stated that the other businesses in the welcome center are intended for the occupants of the park and the package / liquor store can be a convenience to patrons of the park.
26. The Board found that Mr. Fuqua stated that the Ordinance does not say that the retail businesses are to be exclusive to park patrons but primarily for park patrons.
27. The Board found that Mr. Fuqua stated that the restaurant in the welcome center is also open to the public.
28. The Board found that Mr. Fuqua stated that the store in the welcome center can sell any beverage except alcoholic beverages.
29. The Board found that Mr. Fuqua stated that the ability to sell liquor is determined by the Alcoholic Beverage Control Commission ("ABCC") not by Sussex County. Approval from the ABCC, however, cannot be obtained until the Appellant has obtained a land use approval letter from Sussex County.
30. The Board found that Mr. Fuqua stated that the park just opened and is successful.
31. The Board found that Mr. Fuqua stated that there is a public access area near the entrance of the park so that the recreational vehicles do not back up on the adjacent roadway.
32. The Board found that Mr. Fuqua stated that the convenience of the businesses in the welcome center offer the neighboring area another option.
33. The Board found that Mr. Fuqua stated that the Ordinance does not require that those businesses be exclusive to the campground.
34. The Board found that Mr. Fuqua stated that the public cannot access the campground and other amenities within the campground.
35. The Board found that Mr. Fuqua stated that the Appellant believes that §115-15 of the Code does not apply.
36. The Board found that Mr. Fuqua stated that the package / liquor store was not mentioned at the Planning and Zoning Commission and County Council hearings.
37. The Board found that Mr. Fuqua stated that the entire welcome center is closed when the campground is closed.
38. The Board found that Lawrence Lank was sworn in to testify on behalf of the determination made in reference to the package / liquor store use.
39. The Board found that Mr. Lank testified that it is his opinion that the package / liquor store is not permitted. A liquor store is not a permitted use in the AR-1 (Agricultural Residential District) zoning district and the campground is only permitted in the AR-1 district with a Conditional Use approval.

40. The Board found that Mr. Lank testified that the package / liquor store cannot be limited to just the campground because ABCC rules require that the package / liquor store be open to the public.
41. The Board found that Mr. Lank testified that the package / liquor store was not identified as a proposed amenity and considered during the public hearings.
42. The Board found that Mr. Lank testified that Conditional Use approval comes with limitations in place.
43. The Board found that Mr. Lank testified that the Appellant's conditional use approval listed several other uses but did not list the package / liquor store.
44. The Board found that Mr. Lank testified that the liquor store is a retail type use but most approvals are for specific retail and there was no mention of package / liquor store.
45. The Board found that Mr. Lank testified that the Appellant was only given approval for alcohol sales within the campground.
46. The Board found that Mr. Lank testified that the Appellant has the option to file for an amendment to the Conditional Use to allow the package / liquor store within the campground area, if the Board supports the Director's decision but, if the Board agreed with the Appellant's determination, no further zoning action would be needed.
47. The Board found that Mr. Fuqua stated that the Appellant has sought an appeal to the Director's decision because the Appellant feels it already has the approval for the use and an additional Conditional Use approval is not required.
48. The Board found that Mr. Fuqua stated that the Ordinance states "shall be small retail" and the term general store / retail covers a package/liquor store.
49. The Board found that Mr. Fuqua stated that the Ordinance is not ambiguous.
50. The Board found that Mr. Fuqua stated that the Appellant had always planned to include a package / liquor store. The amenities were not a controversial issue at the Conditional Use hearings.
51. The Board found that Mr. Fuqua stated that the "general store" mentioned should cover the package / liquor store use.
52. The Board found that Mr. Fuqua stated that the package / liquor store is no different than the restaurant, ice cream parlor, and other retail options at the welcome center.
53. The Board found that Mr. Fuqua stated that there have been no complaints about the ice cream parlor in the welcome center. The ice cream parlor was not an identified amenity in the Conditional Use.
54. The Board found that Mr. Fuqua stated that the ABCC has exclusive jurisdiction on the location of the package / liquor store.
55. The Board found that Mr. Burbage, under oath, affirmed the statements made by Mr. Fuqua, and testified that the package / liquor store is intended primarily for the campground guests.
56. The Board found that Mr. Burbage that he owns campgrounds in Maryland and Virginia and provides a package / liquor store at those locations. The Delaware Law is the only difference with this application.
57. The Board found that Mr. Burbage that their primary market is the campers.
58. The Board found that David Smith was sworn in and testified in opposition to the appeal and testified that he opposes the appeal and that the Board should uphold the Director's decision.
59. The Board found that Mike Pitcavage was sworn in and testified in opposition to the appeal and testified that there is a difference in a "general store" and a "package / liquor" store. He believes the Board should uphold the Director's decision.
60. The Board found that no parties appeared in support of the appeal.
61. The Board found that (2) parties appeared in opposition to the appeal.
62. The Board tabled the discussion on the appeal until October 3, 2016.
63. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board overturns the Director's decision in part. The findings below support the Board's decision.
  - a. The Appellant operates a campground in the Long Neck area. At the entrance of the campground is a parking lot and welcome center. These areas are open to the public; though access to the campground's 322 individual campsites is restricted.

- b. The welcome center consists of approximately 9,585 square feet and the Appellant proposes to use a portion of the welcome center for a liquor store.
- c. In order to apply for approval from the Delaware Alcoholic Beverage Control Commissioner for the proposed liquor store, the Appellant must first receive approval from Sussex County for the proposed use. Earlier this year, the Appellant contacted the Sussex County Planning & Zoning Department about this proposed use and received a written determination from Planning & Zoning Director Lawrence Lank dated May 19, 2016, that the proposed liquor store is not a permitted use within this campground. The Appellant has appealed the Director's decision to the Board of Adjustment pursuant to Sussex County Code §115-208(B). The Board of Adjustment has the power to hear such appeals pursuant to Sussex County Code §115-209.
- d. At issue before the Board is whether the proposed liquor store is a permitted use within this campground.
- e. In rendering his determination, the Director cites three reasons why the liquor store is not a permitted use within this campground.
  - i. First, the Director noted that the subject property is in the AR-1 Agricultural Residential District and liquor stores are not permitted within this zoning district.
  - ii. Second, the Director found that a liquor store does not fall within the category of permitted uses under Sussex County Code §115-172(H)(6) because the proposed package / liquor store cannot be limited in scope to just (or primarily) the campground.
  - iii. Third, the Director noted that the proposed liquor store was not a use considered at the public hearing.
- f. Sussex County Code §115-172(H)(6) provides that a campground may include "small retail businesses intended primarily for occupants of the park area" and that "grocery stores, automatic laundries, beauty shops, and similar uses are appropriate."
- g. Sussex County Code §115-4(A) provides that "the following rules of construction shall apply to the regulations of this Chapter" and Sub-Section (3) states that "the word 'shall' is always mandatory."
- h. This appeal involves a question of law and is very limited in scope. The only issue before the Board is the meaning of Sussex County Code §115-172(H)(6). As such, the Board is acting in the capacity of an appellate court. The established law in Delaware states that "courts have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions. If a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such a literal interpretation could not have been intended by the legislature." Board of Adjustment v. Verleysen, 36 A.3d 326 (Del. 2012).
- i. By virtue of the approval of the conditional use, the provisions of Sussex County Code §115-172(H)(6) were made part of the approved conditional use. As such, small retail businesses intended primarily for occupants of the park area shall be permitted. As noted in Sussex County Code §115-4(A), the term "shall" means mandatory and not permissive.
- j. Sussex County Code §115-172(H)(6) has a clear meaning, the section is not ambiguous and the words of that section must be applied as written.
- k. Since Sussex County Code §115-172(H)(6) is unambiguous, the Board must consider whether the proposed liquor store is:
  - i. A small retail business;
  - ii. Intended primarily for occupants of the park area; and
  - iii. Is located in the park area;
- l. The proposed liquor store will consist of approximately 8% of the total floor area of the welcome center. The area for the proposed store is not large and is, thus, "small."
- m. The liquor store will have a similar use to the grocery store also located in the welcome center. Both stores will sell beverages but, because the liquor store will sell alcoholic beverages, it is required to be housed in a separate facility. Be that as it may, the actual use of the grocery and liquor stores are both retail in nature as they both market and sell goods.

- n. The liquor store will also be intended primarily for occupants of the park area. Though the store will be located in the public section of the welcome center and open to the general public, the liquor store will be used primarily for park patrons. The Appellant has similar parks in other jurisdictions which allow for the inclusion of alcohol sales within general stores located in the park. Delaware though has different alcoholic beverage sales rules and requires a separate facility. Much like the other businesses in the welcome center and similar general stores which sell alcohol at the Appellant's other campgrounds, the liquor store will be promoted and marketed primarily, though not exclusively, for the use of park patrons. Based on the evidence, the Board is convinced that the liquor store is not intended to be used primarily by the general public. Rather, the store is intended to be used primarily by park patrons.
- o. The proposed liquor store is located in the welcome center on the property which is clearly approved for use as a campground. It is clear that the liquor store will be in the park area.
- p. Based on the exhibits and testimony presented to the Board, the proposed liquor store is:
  - i. A small retail business;
  - ii. Intended primarily for occupants of the park area; and
  - iii. Is located in the park area
- q. That being said, the conditional use clearly states that the campground itself is only to be open from April 1<sup>st</sup> through the first Sunday in November at which time the campground will close for the winter season. Because the campground will be closed during that period of time, the liquor store would not be a permitted retail business on the Property during the period of time when the campground is closed.
- r. For the reasons stated above, the Board finds that Sussex County Code §115-172(H)(6) permits and authorizes a liquor store in a campground only during the period of time the campground is allowed to be open subject to its conditional use approval. Accordingly, the Director's decision is overturned in regards to the use of a liquor store from April 1 through the first Sunday in November. The Board otherwise affirms the Director's decision with respect to the Director's decision that the liquor store is not permitted from the first Monday after the first Sunday in November through March 31.

The Board overturned the decision of the Planning & Zoning Director in part.

#### Decision of the Board

Upon motion duly made and seconded, the decision of the Planning & Zoning Director was overturned in part. The Board Members in favor of the Motion were Mr. Dale Callaway, Mr. John Mills, and Mr. Norman Rickard. Mr. Jeff Hudson and Mr. Brent Workman voted against the Motion to overturn in part the decision of the Planning & Zoning Director.

BOARD OF ADJUSTMENT  
OF SUSSEX COUNTY

  
Dale Callaway  
Chairman

If the use is not established within one (1) year from the date below the application becomes void.

Date December 13, 2016