IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SHAWN R. BRANTON, Appellant vs. ZONING HEARING BOARD OF NIPPENOSE TOWNSHIP, Appellee and NIPPENOSE TOWNSHIP, Intervenor	:	CV-22-00342

OPINION AND ORDER

AND NOW, this 28th day of December 2022, the Court hereby issues the following OPINION and ORDER concerning Appellant Shawn R. Branton's Land Use Appeal, filed April 1, 2022. Appellant appeals from the March 11, 2022 Opinion and Order of Appellee, the Nippenose Township Zoning Hearing Board.

FACTUAL AND PROCEDURAL BACKGROUND

A. Addition and Application for Zoning Hearing

Appellant owns a house situated on approximately 218 acres of residential land (the "Property") in Nippenose Township (the "Township"). In 2017, Appellant hired Stocum's Construction ("Stocum's") to build a 12 foot by 40 foot addition to the house (the "Addition"). Neither Appellant nor Stocum's obtained permits prior to the construction of the Addition; Appellant does not dispute that he was required to do so.

On September 16, 2021, Victor Marquardt ("Marquardt"), an inspector for Code Inspections, Inc., which performs zoning inspections for the Township, conducted a site visit to assess whether Appellant's Property and Addition were in compliance with the Nippenose Township Floodplain Ordinance, Ordinance No. 2016-79 (the "Ordinance"). On September 23, 2021, Marquardt issued an Inspection Report (the "Inspection Report") finding seven violations, including that "[t]he single story addition on the southeast, and southwest sides of the home was constructed below the Regulatory Flood Elevation" and "[t]he fixtures in the new bathroom are below the Base Flood Elevation."[1] Marquardt's report also advised Appellant that "Zoning and building permits are also required for this project."

On October 22, 2021, Buddy Schenck ("Schenck"), Professional Engineer for Mid-Penn Engineering, a civil engineer who became "involved [with] spearheading the compliance [and] remedies" at the Property in February 2021,[2] responded to the Inspection Report. With regard to the elevation violation, Schenck indicated his understanding that "a residential addition may not have to be elevated if it does not meet the criteria of a 'substantial improvement'" under the Ordinance, and stated that Appellant would obtain an appraisal to establish whether the Addition met the definition of a "substantial improvement."[3] Schenck also noted that around the time

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[1] The "elevation violation" and the "bathroom fixtures violation" are, respectively, the first and fifth of the seven violations that Marquardt noted. Appellant does not contest the need to remediate the other five violations.

[2] January 6, 2022 Hearing, N.T. 31:20-23.

[3] Section 9.02(35) of the Ordinance defines a "substantial improvement" as "any reconstruction, rehabilitation, addition, or other improvement of a structure, of which the cost

Appellant was constructing the Addition, Appellant removed two separate buildings from his property with a larger "displacement area" than the Addition. Thus, Schenck suggested, the total area of buildings on Appellant's property below the base flood elevation ("BFE")[4] is lower than it was prior to 2017. Regarding the bathroom fixtures violation, Schenck indicated his position that because "[t]he fixtures in the bathroom are considered secondary components of the plumbing system" they are permitted to be located below the BFE.

On October 29, 2021, Marquardt wrote back to Schenck, advising him that the Township's determination that the Ordinance required the Addition to be constructed above the BFE was based not on a conclusion that the Addition was a "substantial improvement" but rather a "new construction." Marquardt further indicated that the "Ordinance does not refer to bathroom fixtures as secondary components" and therefore they need to be elevated above the BFE. Marquardt indicated that if Appellant disagreed with these determinations, he would need to either appeal them or apply for a variance.

On November 9, 2021, Appellant filed an Application for Zoning Hearing, seeking "an interpretation of permit requirements" and ultimately a permit or, in the alternative, a variance in light of the Township's refusal to retroactively issue a permit for the Addition due to the elevation violation and the bathroom fixtures

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equals or exceeds fifty (50) percent of the market value of the structure before the 'start of construction' of the improvement."

[4] The Ordinance defines the "base flood elevation" as "the elevation shown on the Flood Insurance Rate Map… that indicates the water surface elevation resulting from a flood that has a 1-percent or greater chance of being equaled or exceeded in any given year."

violation. Appellant indicated that he "does not seek any change of use... but only to correct construction defects in order to meet FEMA[5] requirements." Upon receipt of the Application for Zoning Hearing, Appellee initially scheduled a public hearing for December 14, 2021, which was continued to January 6, 2022.

B. Hearing and Zoning Hearing Board Decision

1. Testimony and Evidence

On January 6, 2022, Appellee held a public hearing on Appellant's request for a permit or variance. Marquardt commenced the hearing by briefly explaining his reasons for denying Appellant's permit application based on what he believed were violations of the Ordinance. Next, counsel for Appellant and the Township stipulated that Richard Drzewiecki, an appraiser for Real Estate Appraisal and Marketing Associates, conducted an appraisal of the house on Appellant's Property and if called as a witness would testify that "the home before the [Addition] had a value in [Drzewiecki's] professional opinion of $118,000, [and] after the [construction of the Addition] it had a value of $165,000 and, thus, that the improvements increased the value of the home from $118,000 to $165,000."[6]

Next, Appellant called William Bradfield ("Bradfield"), the National Flood Insurance Program Coordinator for PEMA. Bradfield explained that he "oversee[s] the program that looks at floodplain management in compliance with... state and

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[5] FEMA, the Federal Emergency Management Agency, and PEMA, the Pennsylvania Emergency Management Agency, each issue flood safety regulations and conduct floodplain management.

[6] January 6, 2022 Hearing, N.T. 9:16-10:4.

federal law."[7] Bradfield explained that FEMA defines "new construction" for floodplain management purposes as "a structure for which the start of construction commenced on or after the effective date of a floodplain management regulation adopted by a community."[8] He further explained that this definition "includes all subsequent improvements of structures."[9] Bradfield testified that if an improvement to an existing structure is a "substantial improvement," the "entire structure needs to be bought into compliance," and therefore the entire structure is essentially treated as a new building for floodplain regulation purposes.[10] Bradfield explained that if an improvement is not a "substantial improvement," however, some floodplain regulation work would be required but the owner "would… not necessarily [have to] do anything to the existing structure."[11]

On cross-examination, Bradfield agreed that FEMA regulations set "minimum requirements [for floodplain management] at the federal level and states and local municipalities are encouraged to adopt higher standards and those would take precedence."[12] Bradfield noted that the typical definition for a "structure" for floodplain regulation purposes is "a structure with two [rigid] walls and an attached roof."[13] Bradfield was not certain that an addition that was "structurally connected" to an existing structure would constitute a "separate structure" under FEMA

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[7] January 6, 2022 Hearing, N.T. 13:12-16.
[8] January 6, 2022 Hearing, N.T. 16:14-17.
[9] January 6, 2022 Hearing, N.T. 16:17-18, 17:4.
[10] January 6, 2022 Hearing, N.T. 19:17-20:4.
[11] January 6, 2022 Hearing, N.T. 20:21-24.
[12] January 6, 2022 Hearing, N.T. 24:4-9.
[13] January 6, 2022 Hearing, N.T. 25:25-26:2.

guidelines, but suggested that a township's definition of a "separate structure" in that manner would take precedence over FEMA guidelines.[14]

Next, Appellant called Buddy Schenck, who testified regarding his involvement with the Addition and his assessment of the Addition's compliance with the Ordinance as reflected in his October 22, 2021 letter to Marquardt. In particular, Schenck explained that in his professional opinion "new construction" necessarily refers to a "new stand alone structure [and] [c]ertainly not an addition... [which] falls under the definition of an improvement."[15] Schenck explained that because the house sits approximately five feet below the BFE, it would be impossible – or at least prohibitively impractical – to construct an addition to the house that sits above the BFE.[16] Schenck reiterated his position that bathroom fixtures such as sinks and toilets are permitted to be below the BFE, explaining that this accords with FEMA guidance.[17] Schenck acknowledged that the Addition requires significant mediation to become compliant with floodplain regulations, and explained the preliminary plans to remediate the issues raised by Marquardt, other than the elevation violation and the bathroom fixtures violation.[18]

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[14] January 6, 2022 Hearing, N.T. 26:21-24.
[15] January 6, 2022 Hearing, N.T. 36:18-22. On cross-examination, Schenck agreed that if the Ordinance defined "new construction" to include projects like the Addition, then the Addition would have to comply with the Ordinance's elevation requirements. Schenck believed, however, that the Ordinance does not define "new construction" in such a manner.
[16] January 6, 2022 Hearing, N.T. 37:16-38:2.
[17] January 6, 2022 Hearing, N.T. 39:11-18.
[18] January 6, 2022 Hearing, N.T. 53 through 62.

Next, Appellant testified. Appellant explained that one portion of the pre-existing house was built in the 1830s, and another portion was built in 1889. Appellant testified that in 2017 or 2018 he removed two buildings – a shed and an old "summer kitchen" – from the Property after a tornado damaged them. Appellant testified that he paid Stocum's $57,456 to complete the Addition, including renovations to the house.

Following the conclusion of Appellant's testimony, Appellee adjourned the hearing and scheduled its conclusion for January 26, 2022. On that date, Victor Marquardt testified first. He explained that because he determined that the Addition was "new construction," the Ordinance required its lowest floor to be at least 18 inches above the BFE.[19] He based this conclusion on his determination that the Addition was both a "structure" and a "building" under the Ordinance.[20] Marquardt testified that the bathroom fixtures issue arose not out of potential damage to the toilets or sinks themselves, but out of concerns "that they will allow flood waters through the drain into the sanitary sewer system, which is a violation of the floodplain ordinance."[21]

On cross-examination, Marquardt agreed that FEMA regulations would not require the Addition to be elevated, but maintained that the Township's Ordinance

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[19] January 26, 2022 Hearing, N.T. 16:20-17:7.
[20] January 26, 2022 Hearing, N.T. 17:17-18:20. The Ordinance defines a "structure" as "a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home." The Ordinance defines a "building" as "a combination of materials to form a permanent structure having walls and a roof. Included shall be all manufactured homes and trailers to be used for human habitation."
[21] January 26, 2022 Hearing, N.T. 20:16-21:9.

contained higher standards than those imposed by FEMA.[22] Marquardt acknowledged that FEMA defines an "addition" as "an improvement that increases the square footage of a structure," and thus FEMA appears to treat "additions" as separate from "structures.[23] Marquardt stated that the Ordinance does not define "addition," and therefore the Ordinance does not forbid a finding that "an addition is... a new structure."[24] Marquardt acknowledged that in April 2016, PEMA published a "model ordinance"[25] that included a subsection explicitly authorizing townships to require elevation of certain projects not otherwise required to be built above the BFE ("Section H"); Marquardt agreed that the Township did not include this section in the Ordinance, which was enacted on May 31, 2016.[26] Marquardt reiterated that he did not believe the Addition was a "substantial improvement" under the Ordinance.[27]

On redirect, Marquardt agreed that although the cost of the Addition was less than half of the value of the house before the addition, it is possible that the Addition could have been more expensive had Appellant obtained permits and completed the Addition in a manner compliant with the Ordinance.[28] Upon questioning by counsel

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[22] January 26, 2022 Hearing, N.T. 26:23-27:17.
[23] January 26, 2022 Hearing, N.T. 31:12-32:13.
[24] January 26, 2022 Hearing, N.T. 38:18-39:8.
[25] *See note 50, infra.*
[26] January 26, 2022 Hearing, N.T. 43:10-44:19. The model ordinance was initially described as created by FEMA, but Todd Pysher later testified that the model ordinance was created and distributed by PEMA to implement both federal and Pennsylvania floodplain management requirements.
[27] January 26, 2022 Hearing, N.T. 45:5-10.
[28] January 26, 2022 Hearing, N.T. 58:24-60:12.

for the Zoning Hearing Board, Marquardt indicated that it is typically the property owner's burden to present documentation prior to obtaining permits to establish that a proposed project is not a substantial improvement.[29]

Finally, the Township called Todd Pysher, the Township's engineer. He explained that after reviewing the documentation from the Addition, he agreed with Marquardt that the Addition is "new construction."[30] Pysher testified that like Marquardt, he reached this conclusion because he views the addition as both a "structure" – by virtue of its walls and roof – and a "building" because it is a permanent structure.[31] Pysher agreed that the Township had not included Section H in its May 31, 2016 Ordinance, but explained that pursuant to law[32] the Township and other Pennsylvania municipalities had started drafting floodplain ordinances approximately six months earlier, before PEMA promulgated the model ordinance including the optional Section H.[33]

2. Arguments before the Zoning Hearing Board

At the conclusion of testimony, counsel for the Township summarized its position that the Addition is new construction based on the definition in the Ordinance. The Township further asked the Board to require Appellant to demonstrate that the Addition would not have been a substantial improvement had it

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[29] January 26, 2022 Hearing, N.T. 66:20-67:13.
[30] January 26, 2022 Hearing, N.T. 75:7-11.
[31] January 26, 2022 Hearing, N.T. 80:19-81:24.
[32] Pysher explained that new Pennsylvania floodplain maps took effect on June 2, 2016, and that townships were required to adopt floodplain ordinances prior to that date. January 26, 2022 Hearing, N.T. 92:13-21.
[33] January 26, 2022 Hearing, N.T. 92:4-93:25.

complied with the Ordinance from the outset. The Township asserted that Appellant had presented no testimony to support the grant of a variance. The Township anticipated that because compliance with the Ordinance would require the already-built Addition to be demolished, Appellant was likely to assert that compliance would constitute an "exceptional hardship" entitling him to a variance, but argued that this is an improper framing of the issue. Rather, the Township argued, the question of whether compliance with the Ordinance would constitute an exceptional hardship must be evaluated as things stood prior to construction; because it would not have been an exceptional hardship for Appellant to construct an addition that was compliant with the Ordinance *ab initio*, the Township contended, a variance would be improper. The Township acknowledged that its position would render the significant amount of money spent by Appellant essentially wasted, but argued that a different outcome would allow residents to routinely ignore permitting and zoning requirements to build illegal structures, and then keep those structures by virtue of the fact that they had spent money to construct them, thereby creating a perverse incentive to violate zoning laws. The Township further asserted that there is no "good and sufficient cause" for granting a variance, further precluding such a grant here.

Counsel for Appellant first argued that Appellant had already been punished under the mechanism for noncompliance with permitting and zoning requirements, as he had been fined over $15,000 for constructing the Addition without a permit. Appellant next disputed the Township's position that the Ordinance imposed higher

standards than those required by FEMA and PEMA. Noting that the language in the Ordinance is materially identical to FEMA and PEMA model ordinances, Appellant asserted that the parties' agreement that FEMA and PEMA would not require the Addition to be elevated precludes a contrary reading of the substantially similar Ordinance. Counsel noted that PEMA's "model ordinance," promulgated more than a month prior to the adoption of the Ordinance, included an option section that could have explicitly incorporated the "higher standard" the Township proposes into the Ordinance. The Township's decision not to adopt Section H in the Ordinance, Appellant contended, is appropriately construed as a rejection of the interpretation they now advance.

3. Zoning Hearing Board Decision

On March 11, 2022, Appellee issued an Opinion and Order concerning Appellant's application for a permit or variance. Appellee determined that the Addition was both a "building" and "structure" for purposes of the Ordinance, and is therefore "new construction" as defined by the Ordinance. Appellee additionally "question[ed]... whether the [Addition] is truly not a substantial improvement as it is certainly a reasonable inference from the facts before [Appellee] that the [Addition] could be in fact a substantial improvement," but did not explicitly find that the Addition was a substantial improvement. Appellee further found that Appellant had not met his burden to establish the grant of a variance, because he "created his own hardship," would "likely have to significantly modify or deconstruct the [Addition] anyway" to rectify the Ordinance violations he did not dispute, and had not shown

that the variances he sought "represent[ed] the least modification necessary to provide relief."

INSTANT APPEAL

A. Notice of Appeal

On April 1, 2022, Appellant filed the Notice of Land Use Appeal presently before the Court, contending that Appellee's findings of fact and conclusions of law are not supported by the evidence and testimony presented, and that Appellee's factual conclusions are inconsistent with applicable law. Appellant makes essentially two arguments. First, Appellant argues that Appellee's determination evidences prejudice against Appellant in that it is designed to punish him for failing to comply with permitting requirements. Appellant contends that Appellee's Opinion and Order indicates that it did not fairly consider Appellant's arguments or testimony but rejected it in its entirety because the matter "could have been resolved prior to the construction of the addition in question." Second, Appellant argues that Appellee's interpretation of the term "new construction" as used in the Ordinance is inconsistent with FEMA and PEMA guidance and the language of the Ordinance itself. Appellant faults Appellee for deferring to the legal conclusions of Marquardt and Pysher, who are not experts in the law.

The Township intervened as of right as an interested party on April 13, 2022

B. Motion for Hearing

On April 5, 2022, Appellant filed a Motion for Hearing on Appointment of Expert in Connection with Land Use Appeal, requesting that the Court hold an

evidentiary hearing to take additional evidence concerning the proper legal interpretation of the Ordinance and the terms at issue. Appellee and the Township opposed this Motion, arguing that it was an attempt to change the standard of review from deferential to *de novo*.[34] The Court denied Appellant's request to present additional evidence, and the parties submitted the complete record from the hearing below.

C. Parties' Arguments

Appellant's argument concerning his appeal is consistent with that made before Appellee below. Appellant cites case law stating that "[i]n interpreting provisions of a zoning ordinance, undefined terms must be given their plain, ordinary meaning, and any doubt must be resolved in favor of the landowner and the least restrictive use of the land."[35] Appellant argues that Appellee erred when it determined that the Addition was "new construction" under the Ordinance. Appellant vociferously disagrees with Appellee's conclusion that it was improper for Appellant to attempt to utilize the model ordinance and FEMA definition of "addition" in construing the meaning of the Ordinance, arguing that such materials are

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[34] When a trial court does not take new evidence following a zoning hearing review, it – and any reviewing court – "reviews the decision of the zoning hearing board to determine whether the board committed an error of law or a manifest abuse of discretion." *Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn*, 838 A.2d 819, 825 (Pa. Cmwlth. 2003). However, "[w]here the trial court took any additional evidence on the merits... it must determine the case *de novo*, making its own findings of fact based on the record made before the board as supplemented by the additional evidence." *Id.* Any reviewing court must then determine whether the trial court, rather than the zoning hearing board, committed an error of law or abuse of discretion. *Id.*

[35] Appellant cites *Kissell v. Ferguson Township Zoning Hearing Bd.*, 729 A.2d 194, 197 (Pa. Cmwlth. 1999).

necessary and appropriate tools of statutory construction. Appellant characterizes Appellee's conclusion as a refusal to consider any guidance on the meaning of the Ordinance other than Marquardt's personal interpretation, and argues that Appellee's blatant refusal to engage in the interpretation of the Ordinance requires reversal or remand. Ultimately, Appellant acknowledges that "townships are entitled to adopt more stringent [floodplain management] requirements" than those promulgated by FEMA and PEMA, but "[t]he simple fact of the matter is that Nippenose Township chose not to do so."

Appellee argues that Appellant's position relies on his belief concerning what "could have been or should have been in the Ordinance," but that Appellee correctly resolved the issue "based upon the language that was actually in the Ordinance." Appellee points out that the Court's standard of review is deferential, as courts "may not substitute [their own] interpretation of the evidence for that of" zoning hearing boards and must give "great weight" and "deference" to a zoning hearing board's interpretation of its own ordinance. Appellee further notes that the Court must accept its credibility determinations, and is bound by evidentiary findings supported by evidence of record. Appellee argues that "there is no ambiguity at issue in this case and there is no genuine doubt as to the meaning of the provisions of the [Ordinance]," and therefore there is no need to resort to tools of statutory construction or consult background materials such as FEMA and PEMA guidance. Appellee states that its conclusion was not based on any animus or prejudice against Appellant, explaining the reasons it included certain facts in its findings of

fact. Ultimately, Appellee argues that the outside materials that Appellant presented are irrelevant to the interpretation of the Ordinance, because the plain language of the Ordinance supports Appellee's interpretation of the term "new construction."

The Township's argument concerning the appeal mirrors its argument before Appellee, highlighting that townships are permitted to impose zoning standards that are more stringent than those required by FEMA or PEMA. The Township argues that its interpretation of the Ordinance is the most natural interpretation of its plain language, and that FEMA's definition of "addition" is not incorporated into the Ordinance and therefore cannot be used to cast doubt upon its meaning. The Township further argues that because the cost of remedial measures will almost certainly put the total cost of the Addition above half of the house's pre-Addition value, it is reasonable to conclude that the Addition will ultimately constitute a "substantial improvement" requiring not just the Addition but the entire house to comply with floodplain measures.

ANALYSIS

A. Applicable Law

As noted above, because the Court has taken no new evidence in this case, the standard of review of Appellee's determination is for an abuse of discretion or error of law.[36] When interpreting the meaning of municipal ordinances (including zoning ordinances), normal rules of statutory construction apply, and the "primary

[36] *Mitchell*, 838 A.2d at 825.

objective… is to determine the intent of the legislative body that enacted the ordinance."[37] The plain language of the ordinance "generally provides the best indication of legislative intent," and "[w]here the words in an ordinance are free from all ambiguity, the letter of the ordinance may not be disregarded under the pretext of pursuing its spirit."[38] When a court is "confronted with interpreting undefined terms in an ordinance," it must "construe words and phrases in a sensible manner, utilize the rules of grammar and apply their common and approved usage, and give undefined terms their plain, ordinary meaning."[39] Courts may "consult definitions in statutes, regulations or the dictionary for guidance" in construing undefined terms, "although such definitions are not controlling."[40] Particular words and phrases in an ordinance should be "construe[d]… with regard to context and the language of the entire ordinance, if possible."[41] It is well-established that "[a]n ordinance must be construed to give effect to all its provisions."[42]

Generally, "where doubt exists as to the intended meaning of the language written and enacted by the governing body… the language of a zoning ordinance should be interpreted, in favor of the landowner and against any implied extension of restrictions on the use of one's property."[43] This presumption does not apply,

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[37] *THW Group, LLC v. Zoning Bd. of Adjustment*, 86 A.3d 330, 336 (Pa. Cmwlth. 2014).
[38] *Id.*
[39] *Adams Outdoor Advertising, LP v. Zoning Hearing Bd. of Smithfield Tp.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006).
[40] *Id.*
[41] *McMahon v. Kingston Tp. Bd. of Supervisors*, 771 A.2d 96, 99-100 (Pa. Cmwlth. 2001).
[42] *Id.* at 99.
[43] *Id.* at 484.

however, when "the words of the zoning ordinance are clear and free from ambiguity."[44] Additionally, "it is well-settled that some deference must be given to the interpretation of an ordinance by the entity that is charged with administering the ordinance and that courts cannot substitute judicial discretion for administrative discretion."[45]

B. Issues Presented

The parties' disagreement in this case is almost solely confined to Appellee's conclusions of law, as the relevant facts are undisputed. The primary question is whether Appellee committed an abuse of discretion or error of law when it endorsed the Township's determination that the Addition constituted "new construction" under the Ordinance. Appellant contends that Appellee's conclusion was incorrect as a matter of law, and also that it reached that conclusion through a biased process prejudiced against Appellant.

C. Language of the Ordinance and Secondary Sources

Section 5.02(A)(1) of the Ordinance states that "[i]n AE... Zones,[46] any new construction or substantial improvement shall have the lowest floor (including basement) elevated up to, or above, the Regulatory Flood Elevation." All parties agree that the lowest floor of the Addition is situated approximately 14 inches below the first floor of the house, which is itself approximately five feet below the BFE.

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[44] *Id.*
[45] *Callowhill Neighborhood Ass'n v. City of Philadelphia Zoning Bd. of Adjustment*, 118 A.3d 1214, 1226 (Pa. Cmwlth. 2015).
[46] The parties agree that Appellant's house is in an AE Zone for floodplain management purposes.

Thus, the parties agree that if the Addition is a "new construction or substantial improvement," it was constructed at least six feet below its required elevation.

The Ordinance defines "new construction" as:

> "structures for which the start of construction commenced on or after June 2, 2016 and includes any subsequent improvements to such structures. Any construction started after April 15, 1980 and before June 2, 2016 is subject to the ordinance in effect at the time the permit was issued, provided the start of construction was within 180 days of permit issuance."[47]

The definition of "new construction" refers to "structures," which is a defined term in the Ordinance. The Ordinance defines a "structure" as:

> "a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home."[48]

The definition of "structure" refers in turn to "buildings," which is also a defined term under the Ordinance. The Ordinance defines a "building" as:

> "a combination of materials to form a permanent structure having walls and a roof. Including shall be all manufactured homes and trailers to be used for human habitation."[49]

Appellant, noting that the term "addition" is not defined in the Ordinance, contends that the definition of "addition" found in FEMA's online glossary is relevant, a contention which Appellee and the Township vigorously dispute. That definition is:

> "An addition is an improvement that increases the square footage of a structure[]. These include lateral additions added to the side or rear of a structure, vertical additions added on top of a structure and enclosures added underneath a structure. [National Flood Insurance Program] regulations for new construction apply to an addition that is considered to be a substantial improvement to a structure. Some

[47] Ordinance, Section 9.02(23).
[48] Ordinance, Section 9.02(32).
[49] Ordinance, Section 9.02(6).

states and communities require that all additions, regardless of their size, meet those requirements."

Additionally, Appellant introduced what the parties have referred to as a "model ordinance"[50] promulgated by Pennsylvania's Department of Community and Economic Development in April of 2016, approximately one month prior to the Township's enactment of the Ordinance.[51] That document contains a Section 7.02(H), marked "OPTIONAL," which reads:

> "Any modification, alteration, reconstruction, or improvement of any kind to an existing structure, to an extent or amount of less than fifty (50) percent of its market value, shall be elevated and/or floodproofed to the greatest extent possible."

Although the Township's Ordinance does not include the optional Section 7.02(H), it does include subsections A through D under Section 7.02, regarding "Improvements."[52] Section 7.02 of the Ordinance reads, in its entirety:

> "The following provisions shall apply whenever any improvement is made to an existing structure located within any Identified Floodplain Area:
>
> A. No expansion or enlargement of an existing structure shall be allowed within any Floodway Area/District that would

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[50] The document actually states: "These provisions are not 'model' floodplain management regulations. With few exceptions, they have been prepared only with the intention of meeting the minimum requirements of Section 60.3(d) of the National Flood Insurance Program and the Pennsylvania Flood Plain Management Act. They do not contain everything necessary or desirable for good floodplain management.... [T]his is a technical assistance 'tool' and therefore verbatim adoption of this language does not guarantee compliance. This ordinance does still need to be modified to reflect the individual municipality's needs."

[51] The full title of the "model ordinance" is "Suggested Provisions – Meeting the Minimum Requirements of the National Flood Insurance Program and the Pennsylvania Flood Plain Management Act (1978-166) Section 60.3(d)."

[52] The Ordinance does not define the term "improvement."

cause any increase in BFE.

B. No expansion or enlargement of an existing structure shall be allowed within AE Area/District without floodway that would, together with all other existing and anticipated development, increase the BFE more than one (1) foot at any point.

C. Any modification, alteration, reconstruction, or improvement of any kind to an existing structure to an extent or amount of fifty (50) percent or more of its market value, shall constitute a substantial improvement and shall be undertaken only in full compliance with the provisions of this Ordinance.

D. The above activity shall also address the requirements of the 34 PA Code, as amended and the 2009 IBC and the 2009 IRC or most recent revision thereof adopted by the State of Pennsylvania."

D. Meaning of Ordinance

The Township has interpreted the Ordinance to include any addition to an already-built home under the definition of "new construction," arguing that the plain language of the Ordinance compels this interpretation. The Court disagrees, and finds that the Ordinance is ambiguous as to whether the Addition is "new construction." The definition of "new construction" depends on the definition of "structure" and "building." Although the Ordinance defines these terms, neither definition indicates whether they apply not only to stand-alone construction but also to projects that expand existing houses or buildings. Thus, the Court must consult background principles of interpretation to resolve this ambiguity.[53]

[53] Additionally, the definitions of "structure" and "building" are circular, leading to further ambiguity – the Ordinance defines a "structure" as a certain type of building, and a "building" as a combination of materials that forms a certain type of structure.

The application of these background principles suggests that "structure" and "building" do not refer to projects that merely expand existing structures or buildings. There are at least four reasons this is so.

First, in resolving ambiguous meaning, the Court must construe words and phrases in their commonsense, natural manner. In everyday usage, a pre-existing house is both a single "structure" and a single "building." After a construction project that adds rooms onto a house, the typical understanding of the (expanded) house is that it is still a single structure and a single building, though one that is larger than it was before. Because there is a single structure both before and after the expansion, it is unnatural to say that the expansion by itself is "a structure"; rather, it is a new part of a structure that is itself not new.

Second, Courts may resolve ambiguity by consulting "statutes, regulations or the dictionary for guidance." Here, the parties agree that FEMA and PEMA regulations do not treat projects such as the Addition as "new construction."

Third, provisions of ordinances must be construed "with regard to context and the language of the entire ordinance," so as to "give effect to all its provisions." In addition to the relevant definitions and Section 5 governing technical requirements in flood zones, the Ordinance also contains Section 7.02, governing "Improvements." Subsections 7.02(A) and (B) recognize a category of "expansion[s] or enlargement[s] of an existing structure." Subsection 7.02(C) similarly states that "[a]ny modification, alteration, reconstruction, or improvement of any kind to an existing structure" must comply with the Ordinance if it is a substantial improvement.

By imposing unique requirements on expansions, enlargements, or improvements of existing structures, the Ordinance implicitly draws a distinction between projects that result in a new structure and projects that make an existing structure bigger or better.[54]

Fourth, if there is ambiguity in a zoning ordinance, it should typically be interpreted in favor of the landowner. Here, there is no countervailing concern that the Addition will exacerbate flooding beyond what occurred prior to Appellant commencing work on the Property, as the parties do not dispute that he removed buildings with square footage greater than the Addition.

Appellee and the Township both note that the Township's interpretation of the Ordinance is entitled to deference, and that municipalities are free to impose stricter standards than those mandated as a floor by FEMA and PEMA. In order to claim that the Ordinance imposes more stringent requirements than FEMA and PEMA, however, the Township must be able to point to some difference between the standards promulgated by FEMA and PEMA and the standards in the Ordinance.

The Court agrees, however, with Appellant that although "townships are entitled to adopt more stringent [floodplain management] requirements" than those promulgated by FEMA and PEMA, "[t]he simple fact of the matter is that Nippenose Township chose not to do so." As noted above, the words in the Ordinance are the same as those FEMA and PEMA interpret to *not* include the Addition in "new

[54] This distinction is consistent with FEMA's definition of "addition."

construction."[55] PEMA clearly anticipated that some municipalities would have good reason to require *all* improvements, and not just "substantial improvements," to comply with floodplain regulations.[56] It is equally clear, however, that PEMA did not believe the language in the "model ordinance," which is materially identical to the language in Nippenose Township's Ordinance, was sufficient to impose this requirement. Rather, PEMA promulgated an *optional* provision, Section 7.02(H), which municipalities could adopt in order to impose that additional requirement. If PEMA believed a municipality could read an ordinance *without* the language of Section 7.02(H) to require all improvements to satisfy floodplain requirements, then its inclusion of Section 7.02(H) in the "model ordinance" would be superfluous.

It is possible to argue that any one of these considerations in isolation is insufficient to override the Township's interpretation of the Ordinance. However, there are many factors weighing against that interpretation. The most salient is the inability of the Township to point to any *difference* or *affirmative action* it has taken to explain how the Ordinance's language means something different from identical

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[55] Appellee and the Township argue that there is nothing in the record to suggest that the Township considered the "model ordinance" when drafting its own Ordinance. The Court does not believe it is compelled to feign credulity and pretend that the Township independently arrived at language identical to PEMA's simply because Appellant did not call a Township Supervisor to testify. Even so, the Court need not analyze whether the Township intentionally incorporated PEMA's proposed language along with PEMA's understanding of its meaning; it is enough to observe that PEMA views the language in the Ordinance – whatever its provenance – as insufficient to support the Township's interpretation of its floodplain requirements.

[56] As noted above, PEMA strongly encouraged municipalities to add language to their floodplain ordinances beyond the minimum standards suggested by PEMA. *See note 50, supra.*

language in FEMA and PEMA sources. The countervailing factors favoring Appellee and the Township – namely, the deference owed to reasonable interpretations of the ordinance and the ability of municipalities to impose higher standards than FEMA and PEMA – are insufficient to save the Township's reading. For these reasons, the Court finds that Appellee committed an error of law when it found that the Addition was "new construction" under the Ordinance.

E. Remaining Issues

As discussed above, although Appellee indicated that it "question[ed]... whether the addition in question is truly not a substantial improvement," it did not ultimately find that the Addition was a "substantial improvement" under the Ordinance, and no witness testified that it was.

Regarding the bathroom fixtures violation, Section 5.03(C)(3), which applies to "all construction and development proposed within any identified floodplain area,' requires that:

> "No part of any on-site waste disposal system shall be located within any identified floodplain area except in strict compliance with all State and local regulations for such systems. If any such system is permitted, it shall be located so as to avoid impairment to it, or contamination from it, during a flood."

Marquardt testified that this requirement did not implicate the physical integrity of the porcelain toilets and sinks, but rather the potential for such fixtures located below the BFE to permit floodwaters to enter the sanitary sewage system.

He further explained that there are "means of putting facilities below the base flood elevation… that won't allow flood waters."[57]

This provision applies to "all construction" – not just "new construction" – within the floodplain, and thus applies to the Addition. The Court finds that the Township may insist on remedial measures, such as those described by Marquardt, that will prevent floodwaters from entering the sanitary sewer system.

Finally, because the Court has determined that Appellee committed an error of law regarding the elevation violation and is clearly entitled to demand remediation of the bathroom fixtures violation, the Court need not address Appellant's contention that the hearing process was unfair or prejudicial. Appellee clearly explained the reasons for its determination, and this Court's determination that some of those reasons were in error and some of them were justified resolves the issues.

[57] January 26, 2022 Hearing, N.T. 20:16-21:9.

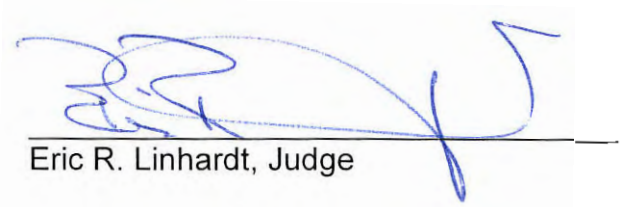
ORDER

For the foregoing reasons, the Court concludes that the Nippenose Township Zoning Hearing Board committed an error of law when it found that the Addition constituted "new construction" under Nippenose Township Floodplain Ordinance No. 2016-79. Accordingly, the Court finds that Appellant is not required to elevate the Addition above the BFE in accordance with Article V of the Ordinance.

The Court finds that in addition to the remedial measures Appellant has already agreed to, the Township may require Appellant to undertake remedial measures with regard to the bathroom fixtures in the Addition to ensure that they wil not permit floodwater to enter the sanitary sewer system.

IT IS SO ORDERED this 28th day of December 2022.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr
cc: Fred A. Holland, Esq.
J. Michael Wiley, Esq.
Scott T. Williams, Esq.
Gary Weber, Esq. (Lycoming Reporter)