

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

RICHARD HANDLOFF & )  
H. GIBBONS YOUNG, )

Petitioners, )

v. )

CITY COUNCIL OF CITY OF )  
NEWARK, DELAWARE, )  
consisting of VANCE A. FUNK, III, )  
PAUL J. POMEROY, JERRY )  
CLIFTON, KARL F. KALBACHER, )  
DAVID J. ATHEY, FRANK J. )  
OSBORNE, and KEVIN J. VONCK, )

Respondents. )

C.A. No. 05A-07-003 RRC

Submitted: March 8, 2006

Decided: June 8, 2006

On Petition of Richard Handloff and H. Gibbons Young for Judicial Review by  
Writ of Certiorari of a Decision of the Newark City Council.

**PETITION DENIED; DECISION AFFIRMED.**

**MEMORANDUM OPINION**

Richard H. Cross, Esquire (argued) and Erica N. Finnegan, Esquire, Cross &  
Simon, LLC, Wilmington, Delaware, Attorneys for Petitioners.

Roger A. Akin, Esquire, City Solicitor, City of Newark, Newark, Delaware,  
Attorney for Respondents.

COOCH, J.

## I. INTRODUCTION

Before this Court is a request for judicial review by writ of certiorari filed by Petitioners Richard Handloff and H. Gibbons Young (“Petitioners”) after Respondents City Council of the City of Newark, et al., (“Respondents” or “City Council”)<sup>1</sup> denied Petitioners’ application for a subdivision and a parking waiver for a proposed apartment development at 108 East Main Street in Newark, Delaware. The issue is whether, under writ of certiorari review pursuant to 10 *Del. C.* § 562, Respondents’ denial of Petitioner’s application was “manifestly contrary to law,” and whether Respondents “exceeded their powers” as a matter of law by conditioning approval of the development on Petitioners’ deeding certain land to the City of Newark.

The Court finds the denial of Petitioners’ proposed subdivision and parking waiver application was not “manifestly contrary to law” because (1) it is clear on the face of the record that the City Council considered relevant factors such as parking and bulk and height restrictions when it requested a reduction in the size of the project, and (2) City Council did not “exceed its powers” when it exercised its discretion in its denial of a parking waiver, regardless of other parking

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<sup>1</sup> The City Council is the legislative body that governs the City of Newark. *See* Charter of the City of Newark § 401. The body’s elected members at the time of this controversy were Vance A. Funk, III (the Mayor), Paul J. Pomeroy, Jerry Clifton, Karl F. Kalbacher, David J. Athey, Frank J. Osborne and Kevin J. Vonck. The Mayor is a member of the Council pursuant to § 310 of the Newark City Charter, which provides that the “mayor shall preside at meetings of the council and shall have a full voice and vote in the proceedings thereof.”

waiver decisions the City Council had made in the past. Moreover, this Court finds that Respondents did not exceed the scope of their powers as a matter of Delaware law by conditioning approval of the project on Petitioners' willingness to deed over their land to the City because the condition was reasonably related to the public welfare. For all of these reasons, Petitioners' petition for judicial review by writ of certiorari is **DENIED** and the decision of the Newark City Council is **AFFIRMED**.

## **II. FACTS<sup>2</sup>**

### **A. Background**

On April 1, 2004, Petitioners applied to the City of Newark Planning Department for the approval of a major subdivision and parking waiver at 108 East Main Street in Newark.<sup>3</sup> Petitioners wanted to develop a two-story apartment building with 15 apartments over part of the existing CVS Pharmacy building.<sup>4</sup> The property at issue was classified "BB," or central business district, in

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<sup>2</sup> The length of the "facts" section of this opinion is due, in large part, to this Court's desire to set forth the relevant factual background, especially in connection with Petitioners' assertion that Respondents "exceeded their powers." However, given the limited review under a common law writ of certiorari, had this legal issue not been part of the appeal, a shorter recitation of the facts would have sufficed.

<sup>3</sup> Record ("R."), Ex. B at 1.

<sup>4</sup> *Id.*

accordance with the Newark Municipal Code.<sup>5</sup> Petitioners’ proposed use of an apartment complex is classified as a “major subdivision,” because it involves division of the property into six or more units.<sup>6</sup> The applicable rules under which the process of subdivision development is regulated are found in the Subdivision Regulations of the Newark Municipal Code. Specifically, in accordance with the various planning policies that “guid[e] the subdivision through the regulations and procedures that follow for property within the corporate limits of the city[,]” the developer must demonstrate, among others, that “[a]ll streets and circulation patterns on subdivision plans shall provide for safe, efficient and convenient movement of vehicular and pedestrian traffic, and adequate parking.”<sup>7</sup>

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<sup>5</sup> Newark Municipal Code, *Zoning*, § 32-18 (listing apartments “in conjunction with any nonresidential uses permitted in this district, except of ground floor locations[,]” subject to certain provisions, as acceptable uses within a BB district).

<sup>6</sup> See Newark Municipal Code, *Subdivisions*, § 27-18(d), which defines “major subdivision”:

The division of any residentially zoned parcel of land into six or more lots upon which building can occur; all multifamily developments of six or more units regardless of the number and size of lots; all commercial, business, or industrial developments with two or more lots; any commercial, business, or industrial single lot development containing a building or building of 20,000 or more square feet of total gross floor area on undeveloped and not previously approved subdivision parcels; and any development requiring new streets or other public improvements, shall be classified as major subdivisions.

<sup>7</sup> *Id.* at § 27-3(e).

In that vein, the City Council promulgated an ordinance to deal specifically with off-street parking.<sup>8</sup> Under that ordinance, the developer of a “[d]welling, garden apartment, duplex, high-rise apartment or group housing” must provide “[t]wo off-street parking spaces per dwelling unit.”<sup>9</sup> However, under § 32-45(b)(1) of the ordinance, “[t]he off-street parking standards in Section 32-45(a) may be reduced or waved [sic] for any permitted use in BB, Section 32-18, requiring a certificate of occupancy, with approval of the planning commission.” That section of the ordinance is the basis for Petitioners’ initial request for the 100% parking waiver for 15 apartments. When determining whether an application warrants approval of a parking waiver, the planning commission shall consider:

- (a) Whether the applicant has demonstrated that the proposed use does not conflict with the purposes of the comprehensive development plan of the city;
- (b) Whether the applicant has demonstrated that the proposed use conforms to and is in harmony with the character and development pattern of the central business district;
- (c) Whether the applicant has demonstrated that the proposed use is not highway oriented in character or significantly dependent on automobile or truck traffic as a primary means of conducting business.
- (d) If the proposed use will not adversely affect the health or safety of persons residing or working in the vicinity, will be detrimental to the public welfare, or injurious to property or improvements in the vicinity.
- (e) The planning commission may also consider the availability of off-street parking facilities, the availability of nearby adjacent public parking facilities (within 500 feet) that may be shared by the applicant, and an existing proposed use...

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<sup>8</sup> See Newark Municipal Code, *Off-Street Parking and Loading Requirements*, § 32-45 (imposing a “minimum off-street parking requirement” for “[a]ll uses permitted under this zoning chapter”).

<sup>9</sup> *Id.* at § 32-45(a).

- (f) The planning commission shall consider the advice and recommendation of the planning director.<sup>10</sup>

After holding a hearing on the proposed parking waiver, the planning commission “shall approve, approve with conditions, or disapprove the application.”<sup>11</sup> Finally, in the event that an application is approved, the developer “shall be required to pay to the city a fee in lieu of the required spaces.”<sup>12</sup>

It was under that legal framework that Petitioners submitted their application for the “major subdivision” and parking waiver. The starting point for all such applications in Newark is the Planning Department, which received Petitioners’ “Application for Subdivision/Development Approval” on April 1, 2004.<sup>13</sup> The Planning Department then circulated, as was the normal procedure, the application to City staff members experienced in these matters (called the Subdivision Advisory Committee) and ultimately produced a report based on comments from those staff members regarding the proposed project.

The report demonstrated that Petitioners sought approval of a two-story apartment building with 15 apartments and a 100% parking waiver.<sup>14</sup> The report calculated that the payment required in lieu of parking for the 100% parking

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<sup>10</sup> *Id.* at § 32-45(b)(2).

<sup>11</sup> *Id.* at § 32-45(b)(4).

<sup>12</sup> *Id.* at § 32-45(b)(9).

<sup>13</sup> R., Ex. A.

<sup>14</sup> R., Ex. B at 1, 3.

waiver, which in this case totals 30 spaces (2 spaces times 15 apartments), would total \$40,839.50.<sup>15</sup> The report also noted the growing traffic concerns as a result of the proliferation of new apartment buildings coupled with the relative paucity of off-street parking in the central business district.<sup>16</sup> As a result of those concerns, the Planning Department recommended that the Planning Commission approve a 100% parking waiver but only a one-story addition with ten apartments, instead of the two-story addition with fifteen apartments.<sup>17</sup> The report also recommended

as a condition of approval, that the land to the rear of the existing building, currently used by the City as Parking Lot #3, should be transferred to the City for permanent use as part of the parking facility. In light of this land donation recommendation, the [Subdivision Advisory] Committee[, which assisted the Planning Department in producing the report,] also recommends that the ‘payment in lieu of spaces’ fee of approximately \$41,000 ... should be waived.<sup>18</sup>

Apparently, “[d]evelopers and land owners in Newark are often requested to make such accommodations in conjunction with development proposals in order to partially alleviate deficiencies in off-street parking stock which may be exacerbated by further development.”<sup>19</sup> After the report was completed, the matter was placed on the agenda of the Newark Planning Commission.

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 7 (“The Police Department is concerned about the proposed 30-space parking waiver. The Department believes that a waiver for off-street parking of this magnitude for this use could cause significant hardship in the already congested downtown area.”).

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> Resp’ts’. Br. in Opp. 9.

## **B. Planning Commission Hearing Of June 1, 2004.**

On June 1, 2004, the Planning Commission held a hearing to discuss the proposal and to hear testimony as well as any public comments about the development.<sup>20</sup> At the hearing, in response to a question from a Commissioner regarding setting back parts of the proposed upper floor additions, or effectively reducing the number of apartments, the architect for Petitioners' project said, "Yes, I gave it some consideration, and my client's desire was to put the maximum number of units possible. It's simply an economic decision."<sup>21</sup> One citizen also expressed concern over the possibility of 60 new vehicles being introduced to the central business district and the limited availability of off-street parking to accommodate such a possible influx of traffic.<sup>22</sup> After deliberation, the Planning Commission voted 5-1 to accept the recommendation set forth by the Planning Department, which was to approve a 100% parking waiver for a one-story addition and 10 apartments, instead of the two-story addition with 15 apartments, for which Petitioners initially applied.<sup>23</sup>

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<sup>20</sup> See R., Ex. C (Transcript of Planning Commission Meeting on June 1, 2004).

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.* at 14-15.

### **C. Newark City Council Hearing Of March 14, 2005.**

On June 2, 2004, a memorandum was circulated to the Mayor and to City Council members describing the results of the Planning Commission's June 1, 2004, hearing on Petitioners' proposed development. The matter was then placed on the City Council agenda and it was noticed for the City Council meeting scheduled for March 14, 2005. At that hearing, concerns were once again raised about Petitioners' proposal of 2 stories and 15 apartments, with a 100% parking waiver, coupled with the serious parking problems in Newark.<sup>24</sup> In response to those concerns, counsel for Petitioners proposed a "deed restriction that all residential tenants be notified in writing that no off-street parking would be available for their use."<sup>25</sup> Counsel for Petitioners remarked that the deed restriction was recommended by the Planning Commission as a prerequisite to approval of a 100% parking waiver.<sup>26</sup> The discussion also touched on other problems, such as security issues as well as an open common walkway.<sup>27</sup> One other subject that was raised was the option of deeding the land to the City in

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<sup>24</sup> R., Ex. I at 10 (Transcript of City Council Hearing on March 14, 2005).

<sup>25</sup> *Id.* at 9 ("[T]he intended use for the apartments was for students who won't have cars." *Id.*).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7.

exchange for waiving the payment in lieu of spaces requirement.<sup>28</sup> Counsel for Petitioners stated that Petitioners were only willing to lease the property in perpetuity to the City, not to deed that land to the City.<sup>29</sup> In response to the various concerns raised by the City Council, counsel for Petitioners requested that the proposal be tabled so that the issues could be addressed in a new design of the building.<sup>30</sup> That request was granted by the City Council and the proposal was tabled.

#### **D. Newark City Council Hearing Of June 27, 2005.**

At the City Council hearing on June 27, 2005, Petitioners' proposal was once again considered. When asked about the parking issue that had been raised previously by the Police Department, counsel for Petitioners once again stressed the importance of the clause in all proposed leases in the new building that would advise all tenants that they were prohibited from using the off-street parking next to the building.<sup>31</sup> One member of Council responded by citing the off-street parking problems in Newark and added that "developers were asking them to

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<sup>28</sup> *Id.* (“[Newark Planning Director:] Council may choose that the applicant correspond to what has been done in certain instances downtown and that was to dedicate to the City a small piece of property on the site they own currently used for leased parking or use the payment in lieu of spaces provision.”).

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 14.

<sup>31</sup> R., Ex. I at 5 (Transcript of City Council Hearing on June 27, 2005) (“[Counsel for Petitioners] expected [the] development to be primarily student housing and [Petitioners] did not anticipate all students bringing their cars.” *Id.* at 5-6.).

approve a 30-space parking waiver but they weren't willing to give the City anything to provide Council with the flexibility to work within this process.”<sup>32</sup>

Counsel for Petitioners reiterated that, in regards to the deeding of the land, Petitioners would agree to “lease in perpetuity and to sell on comparable terms if the City wanted to purchase the land.”<sup>33</sup>

Another member of Council also highlighted concerns about the potential use of cars by the tenants and the concomitant addition to existing parking problems.<sup>34</sup> Another member of Council said that, in light of the twenty spaces that were being rented by Petitioners to the City, he “would like to see a one-story addition with 10 units and then grant a 20-space waiver because theoretically the developer met the Code even though the spaces were rented to the City.”<sup>35</sup>

Counsel for Petitioner reiterated that “history showed that a large number of parking waivers have been granted[]” and that if “Council was concerned about parking waivers and when they should be granted, that was a policy matter that Council needed to address, but [Council] should not take it out on [Petitioners] since other petitions have been granted.”<sup>36</sup> A member of Council then replied that

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<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.*

the “purpose of the waiver was to give Council the flexibility to say a certain waiver was a good fit here but not necessarily a good fit in another location.”<sup>37</sup>

The Councilmember once again described the discretion and flexibility required in order for the approval of the parking waiver requested in this case:

[T]here was a parking situation that was well documented at the last meeting [on March 14, 2005] and what the City suggested was by providing the parking waiver and the donation of land, at some point in the future the City might have the ability to create other options that would be for the greater good. In the absence of such, the applicant was asking for the full waiver and [this Councilmember] was reluctant to support the project in that regard and saw no flexibility in the applicant’s position. The applicant wanted maximum build out, 15 four-bedroom units, a parking waiver, but wasn’t willing to provide anything to the City to address the parking situation. [A Councilman] reiterated that the students would want to bring their cars. He asked the applicant what Council was suppose[d] to do because there was a ‘give and take’ but he saw no giving from the applicant.<sup>38</sup>

At that point the floor was open to the public for comments, after which time the members of Council made more remarks. One member of Council stated that he “opposed the waiver because it was a real hardship to have an apartment building like this with no parking, nor did he see where there was any public parking close by.”<sup>39</sup> Another member of Council said that he would “approve 10 units with a parking waiver of 20 spaces[,]” but that he could not support the request petitioners were making.<sup>40</sup> As to the deeding of the land to the City, that

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

same member of Council also stated that it was like saying “give us the land and we’ll give you all your parking waiver and to me that is almost like blood money.”<sup>41</sup> The Mayor said he had “no problem with the [two stories and] 15 units if the applicant was willing to donate the land behind the building to the City.”<sup>42</sup> Counsel for Petitioners responded that “there was not a willingness to give the property to the City in order to obtain a parking waiver for the project.”<sup>43</sup> The Mayor acknowledged that Petitioners were “correct in that the City had no right to require them to give the land. What he was trying to do was build a consensus on Council to get the project approved.”<sup>44</sup> After that exchange, the City Council voted and Petitioners application was denied by a vote of 6 to 1. Then, on July 27, 2005, Petitioners filed this Petition for Judicial Review by Writ of Certiorari.

### **III. CONTENTIONS OF THE PARTIES**

#### **A. Petitioners’ Contentions**

Petitioners set forth two principal grounds in support of their request for writ of certiorari. First, Petitioners argue that the denial of their application for a 100% parking waiver was “arbitrary and capricious” because “Petitioners met all

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

of the criteria set forth for receipt of a parking waiver.”<sup>45</sup> Petitioners also argue that City Council had “granted waivers to similar developments in the past” and a failure to do so in this case “demonstrates that the City Council is not uniformly applying its policies and procedures.”<sup>46</sup> Petitioners also assert that the “parking was clearly not a major issue until the City Council decided to take advantage of the opportunity to coerce Petitioners into giving the land that is owned by the Petitioners.”<sup>47</sup>

Second, Petitioners claim that Respondents “exceeded [their] authority by conditioning approval of the Petitioners’ application on the Petitioners’ willingness to deed over its property interest in certain adjacent land to the City.”<sup>48</sup> Specifically, Petitioners argue that “[n]othing in the City Charter, the Zoning Code, or the regulations adopted thereunder, gives the City Council authority to demand that applicants exchange other land owned by them for a parking waiver[.]”<sup>49</sup> and that such a request “bears no reasonable relationship to the City’s zoning authority, or even to the City’s purported goal of increasing parking availability in the

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<sup>45</sup> Pet’rs.’ Op. Br. 11.

<sup>46</sup> *Id.* at 11-12. *See also* Pet’rs.’ Reply Br. 7.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> Pet’rs.’ Op. Br. 15.

<sup>49</sup> Pet’rs.’ Reply Br. 11.

downtown area...”<sup>50</sup> Petitioners argue that City Council, despite waiving the payment in lieu of spaces, exceeded its authority by “attempting to do by coercion what it cannot do by law – effect a taking of the Petitioners’ land, without any concrete plans to use the land to benefit the residents of the City ..., and without any analysis of whether the fee waiver would even constitute adequate consideration for the land.”<sup>51</sup>

In support of their claim, Petitioners reference certain statements made by City Council members that acknowledge that the City has no right to ask for the exchange of land for a parking waiver and that any such exchange is “blood money.”<sup>52</sup>

### **B. Respondents’ Contentions.**<sup>53</sup>

In response to Petitioners’ first point, Respondents argue that the decision to not grant the 100% parking waiver was not “arbitrary and capricious” but instead was a valid exercise of Respondents’ “discretion to grant such waivers[,

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<sup>50</sup> Pet’rs.’ Op. Br. 15.

<sup>51</sup> Pet’rs.’ Reply Br. 11-13.

<sup>52</sup> *Id.* (citing R., Ex. H at 9, 10). Attached to Petitioners’ Reply Brief is a December 3, 2005, article from The News Journal referring to the “blood money” comment. However, as that article was submitted after the close of the record, it will not be considered by the Court. *Beatty v. New Castle County Bd. of Adjustment*, 1996 WL 111152 (Del. Super.).

<sup>53</sup> Attached to Respondents’ Brief in Opposition is an affidavit by Roy H. Lopata, Newark Planning Director. However, as that affidavit was submitted after the close of the record, it will not be considered by the Court. *Beatty v. New Castle County Bd. of Adjustment*, 1996 WL 111152 (Del. Super.).

which] is vested in the Newark Planning Commission and City Council. That a waiver was granted in one case does not mean that it should be granted in another, distinct case.”<sup>54</sup> Respondents further claim that the decision to deny the parking waiver and the subdivision application was not “arbitrary and capricious” but rather was “based on a rational sifting of facts pertinent to the circumstances which now face a municipality pressed hard for dwindling off-street parking facilities.”<sup>55</sup> Moreover, Respondents argue that there was substantial evidence for the denial of the off-street parking waiver.<sup>56</sup> While Petitioners claim that all of the criteria of Newark Zoning Code § 32-45(b) were satisfied,<sup>57</sup> Respondents allege that “[n]either the Planning Commission nor the City Council agreed” that the appropriate criteria was met in this case.<sup>58</sup> Specifically, Respondents assert that not only could the proposed use “potentially introduce 60 ungaraged motor vehicles in the central business district[,]” but that both the Planning Commission and the City Council found that the “welfare of the downtown community would be adversely affected by the anticipated influx of a large number of vehicle-

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<sup>54</sup> Resp’ts.’ Br. in Opp. 19.

<sup>55</sup> *Id.* at 22.

<sup>56</sup> *Id.* at 23, 25.

<sup>57</sup> Pet’rs.’ Op. Br. 10-11.

<sup>58</sup> Resp’ts.’ Br. in Opp. 23.

dependent tenants.”<sup>59</sup> Respondents also point out that “[even] if the Court were to view the facts differently, it is not the function of a reviewing court to substitute its judgment for that of City officials charged with making such determinations.”<sup>60</sup>

Second, as to Petitioners’ allegation the City Council exceeded its authority by conditioning approval on the deeding over of the adjacent land to the city, Respondents argue that the statements of City Council members that are cited by Petitioners were either taken out of context or mistaken as to the facts of the situation. Respondents allege that the Mayor’s “remark was a final reminder that there may have been some flexibility in Council if the petitioners were willing to demonstrate an appreciation of the parking concerns which had been voiced on numerous occasions during the planning process.”<sup>61</sup> As for the “blood money” remark, Respondents claim that the Councilmember’s statement did not “accurately characterize the accommodation which the City was seeking from [P]etitioners, and the consideration which would flow from the City to them.”<sup>62</sup> As to the legality of City Council’s actions, Respondents argue that the decision for

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<sup>59</sup> *Id.* at 23-24.

<sup>60</sup> *Id.* at 25-26.

<sup>61</sup> *Id.* at 30.

<sup>62</sup> *Id.* (“[The Councilmember] had apparently misunderstood that real value in the form of forgiveness of a \$41,000 ‘cash in lieu of spaces’ fee would be exchanged for the land.” *Id.* at 14-15.).

the deeding of land as well as for the parking waiver was “squarely within the four corners of its Zoning Code” and otherwise authorized by law.<sup>63</sup>

### III. DISCUSSION

#### A. Standard of Review

Absent an aggrieved party’s statutory right to appeal an adverse decision of an “inferior tribunal,” the Superior Court has the authority to issue a common law writ of certiorari.<sup>64</sup> Petitioners’ ability to seek a common law writ of certiorari for this Court to review the Newark City Council’s denial of Petitioners’ application for a major subdivision derives from 10 *Del. C.* § 562.<sup>65</sup> “As a broad general rule, a writ of certiorari lies from the Superior Court to inferior tribunals, to correct errors of law, to review proceedings not conducted according to law, and to restrain an excess of jurisdiction.”<sup>66</sup> Errors of law occur where the record shows

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<sup>63</sup> *Id.*

<sup>64</sup> *See Reise v. Bd. of Bldg. Appeals of City of Newark*, 746 A.2d 271, 273 (Del. 2000) (holding that Superior Court has subject matter jurisdiction over common law certiorari proceedings where appeal was taken from Newark Board of Building Appeals, from which there is no statutory right of appeal).

<sup>65</sup> “The Superior Court may frame and issue all remedial writs, including writs of habeas corpus and certiorari, or other process, necessary for bringing the actions in that Court to trial and for carrying the judgments of the Court into execution.” *See also* Pet’rs.’ Pet. for Judicial Review by Writ of Certiorari 1 (invoking 10 *Del. C.* § 562 as the basis for the Petition for Writ of Certiorari).

<sup>66</sup> 1 Victor B. Woolley, *Woolley Practice in Civil Actions* § 896 (1906). *See also Shoemaker v. State*, 375 A.2d 431, 437 (Del. 1977) (holding that where defendant does not have a right of appeal a conviction to the Superior Court, “justice requires that the proceeding be reviewable at least under the common law writ of certiorari”).

that the lower tribunal has “proceeded illegally or manifestly contrary to law.”<sup>67</sup> A decision will be reversed as not being conducted according to law if there is an irregularity in the proceedings normally required to create a proper record.<sup>68</sup> Finally, a decision will be reversed for excess of jurisdiction “where the evidence of jurisdiction is not spread upon the record.”<sup>69</sup>

Moreover, Petitioners must demonstrate that two other requirements are met. First, the judgment below must be final, and, second, there must be no other means of appeal available.<sup>70</sup> Here, there is no dispute that the decision of the Newark City Council was final and that Petitioners only means of appeal was through common law writ of certiorari, pursuant to 10 *Del. C.* § 562.

Under the standard for common law writ of certiorari, the Court has “no power to correct a mistake of fact[] or an erroneous conclusion from the facts, even though the interpretation given to the facts or the law by the governmental agency

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<sup>67</sup> *Id.* at § 939.

<sup>68</sup> *Id.* at § 923.

<sup>69</sup> *Id.* at § 921.

<sup>70</sup> *Capitol Credit Services, Inc. v. Justice of the Peace Court ex rel. Sussex County Court, No. 17, 2000 WL 1611125, \*2* (Del. Super.) (holding that common law writ of certiorari was not appropriate because (1) a “Notice of Failure to Serve Complaint” did not constitute a final judgment and (2) petitioner could have also moved for default judgment).

... may have been erroneous.”<sup>71</sup> Instead, the review is “limited to errors which appear on the face of the record and does not embrace an evaluation of the evidence considered by the inferior tribunal.”<sup>72</sup>

These general principles were recently rearticulated by the Delaware Supreme Court, which held that a “writ of certiorari proceeding in the Superior Court [pursuant to 10 *Del. C.* § 562] is the appropriate cause of action for determining whether, on the face of the record, the Dover Planning Commission exceeded its powers or failed to conform to the requirements of law.”<sup>73</sup> The Supreme Court, in a subsequent case, also stated that “[r]eview on certiorari is not the same as review on appeal because review on certiorari may not *weigh evidence* or review the lower tribunal’s factual findings.”<sup>74</sup> “The reviewing court [of a

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<sup>71</sup> *Capano Investments v. Levenberg*, 1988 WL 139892, \*2 (Del. Super.) (holding, upon writ of certiorari, that a panel’s incorrect interpretation does not constitute an action in excess of the panel’s jurisdiction), *aff’d*, 564 A.2d 1130 (Del. 1989).

<sup>72</sup> *Mason v. Bd. of Pension Trustees*, 468 A.2d 298, 299 (Del. Super. Ct. 1983) (holding that writ of certiorari was not appropriate where petitioner sought a review of the Board of Pension Trustee’s evaluation of the evidence the Board had before it), *aff’d*, 473 A.2d 1258 (Del. 1983). *See also* Woolley at § 897.

<sup>73</sup> *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1106 (Del. 2003) (reversing Superior Court’s dismissal of petitioners request for common law writ of certiorari, under 10 *Del. C.* § 562, on lack of standing grounds) (citing *East Lake Partners v. City of Dover Planning Comm’n*, 655 A.2d 821, 822 (Del. Super. Ct. 1994); 10 *Del. C.* § 562). *See also* *Christiana Town Center, LLC, v. New Castle County*, 2004 WL 2921830 (Del. Supr.) (affirming Superior Court’s denial of petition for common law writ of certiorari). *See also* *Capitol Credit*, 2000 WL 1611125, \*2; *Behr v. State*, 1995 WL 268256, \*1 (Del. Super.) (holding that common law writ of certiorari was appropriate as petitioner, who was fined less than \$100 for the offense, did not have a constitutional right to appeal).

common law writ of certiorari] does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly.”<sup>75</sup>

Petitioners assert that the standard of review is whether the Newark City Council exceeded its powers or whether the decision was arbitrary and capricious.<sup>76</sup> Respondents argue that the appropriate standard of review is whether the decision of the City Council is supported by substantial evidence and that the certiorari process in this Court requires a determination of whether the Council’s decision was arbitrary and capricious.<sup>77</sup> However, as there is no statutory basis for appeal here, the substantial evidence standard is not the applicable standard under which common law certiorari is reviewed. *Janaman v. New Castle County Bd. of Adjustment*, a leading case cited by Respondents, involved a statutory certiorari appeal to the Superior Court from the New Castle County Board of Adjustment.<sup>78</sup> It is not readily apparent from the case law why appeals by writ of certiorari from a

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<sup>74</sup> *Christiana Town Center*, at \* 2 (citing *Reise*, 746 A.2d, at 274) (emphasis added).

<sup>75</sup> *Id.* (citing, *Woolley*, at § 896).

<sup>76</sup> Pet’rs.’ Op. Br. 8-9.

<sup>77</sup> Resp’ts.’ Br. in Opp. 16.

<sup>78</sup> *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241 (Del. Super. Ct.) (granting a motion to set aside decision of the New Castle County Board of Adjustment pursuant to a petition for writ of certiorari as the decision was not based on substantial evidence); 9 *Del. C.* § 1353(b) (current version at 9 *Del. C.* § 1314(b) (1998)) (“Upon presentation of the petition [alleging illegality of Board of Adjustment decision], the [Superior] Court may allow a writ of certiorari directed to the Board of Adjustment, to review the decision of the Board...”).

decision of the Board of Adjustment require a standard of review different than that of the standard of review for the common law writ of certiorari embodied in 10 *Del. C.* § 562, but the Delaware Supreme Court has held that there is a difference.<sup>79</sup>

The correct standard of review under § 562 has not always been correctly stated in cases that do not involve statutory appeals from Board of Adjustment decisions. A prime example is the case originally cited by Petitioners for the appropriate standard: *East Lake Partners v. City of Dover Planning Comm'n.*<sup>80</sup> The *East Lake* court, at first, cited the correct standard.<sup>81</sup> However, after a recitation of the facts and the law, and stating that the “the Planning Commission does not act in a legislative capacity but acts partly in a ministerial and partly in a quasi-judicial capacity[,]” the *East Lake* court incorporated “substantial evidence”

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<sup>79</sup> *Cooch's Bridge Civic Ass'n v. Pencader Corp.*, 254 A.2d 608, 609-10 n.4 (Del. 1969) (comparing the substantial evidence standard for review of Board of Adjustment decisions to the “rule in common law certiorari proceedings that the evidence before the lower tribunal is not a proper part of the record sent up for review”). *See also Citizens for Smyrna-Clayton First v. Town of Smyrna*, 2002 WL 31926613, \*15 (Del. Ch.) (distinguishing petitioners common law remedy of writ of certiorari from statutory remedy for appeal of zoning violations through the Board of Adjustment). *Cf. Concord Hotel Mgmt. v. Marriott Corp.*, 1989 WL 167403, \*2 n.1 (Del. Super.) (“It appears that judicial review of [New Castle County] Board [of Adjustment] decisions is handled like appeals from other administrative agencies. Any former distinction regarding appeal versus certiorari in the method of review of Board decisions is blurred.”), *rev'd on other grounds*, 1990 WL 109878 (Del. Supr.) (holding that Board of Adjustment’s decision should have been affirmed as it was supported by substantial evidence).

<sup>80</sup> 655 A.2d 821 (Del. Super. Ct. 1994) (reversing planning commission’s denial of approval of a site plan upon petition for writ of certiorari (apparently based on 10 *Del. C.* § 562) because the commission lacked authority to do so).

<sup>81</sup> *Id.* at 822 (“The Superior Court has jurisdiction to review the Planning Commission’s actions for the purpose of determining whether, on the face of the record, it exceeded its powers or failed to conform to the requirements of the law.”).

into the standard for a writ of certiorari pursuant to 10 *Del. C.* § 562.<sup>82</sup> Some cases appear to have interchanged the standard of review upon a petition for common law writ of certiorari with the standard of review upon appeal, including “certiorari” under 9 *Del. C.* § 1314(b).<sup>83</sup> Although the *East Lake* court ultimately concluded that the planning commission exceeded its authority in rejecting the site plan at issue there, its reliance on *Janaman* and the substantial evidence standard generally reserved for appeals of Board of Adjustment decisions does not appear correct.

The Superior Court in *Dover Historical Soc’y* noted this distinction when it held:

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<sup>82</sup> *Id.* at 825 (“Therefore, the standard of review on *appeal* is not whether the Commission’s action was fairly debatable, as with a legislative action, but whether there is *substantial evidence* to support the Planning Commission’s findings and whether the Planning Commission exceeded its powers as a matter of law.”) (emphasis added) (citing *Janaman*, 364 A.2d, at 1242 (“[S]cope of review on appeals from a Board of Adjustment decision is limited to correction of errors of law and to determining whether or not substantial evidence exists on the record to support the Board’s findings of fact and conclusions of law”), *aff’d*, 379 A.2d 1118 (Del. 1977)).

<sup>83</sup> *See, e.g., East Lake*, 655 A.2d 821; *Cave v. New Castle County Council*, 850 A.2d 1128, 1132 (Del. Super. Ct. 2004) (holding that under a writ of certiorari brought to review a decision by New Castle County Council, which was acting ministerially, the “only issue is whether there is substantial evidence to support the Council’s conclusion[.]”) (citing *Janaman*, 364 A.2d, at 1242); *Delta Eta Corp. v. City Council of City of Newark*, 2003 WL 1342476, \*2 (Del. Super.) (“The standard of review for this Court to impose for this writ of certiorari [pursuant to 10 *Del. C.* § 562] is ‘whether there is substantial evidence to support the [Council’s] findings of fact and whether the [Council] exceeded its powers as a matter of law.’”) (citing *Janaman*, 364 A.2d, at 1242); *Citizens for Smyrna-Clayton First*, at \*4 (applying “substantial evidence” and “arbitrary and capricious” standards of review, in a suit for injunctive relief, to determine whether plaintiffs’ would be successful on the merits of a common law writ of certiorari, which plaintiffs chose to forego in lieu of seeking an injunction) (citing *East Lake*, at 823).

[S]ubstantial evidence which weighs the evidence to determine that there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion or such that there is a preponderance or ‘more than a scintilla’ of evidence on the record as a whole is the incorrect standard of review under a writ of certiorari.<sup>84</sup>

Moreover, the Delaware Supreme Court in the *Christiana Town Center* case held that it was not reversible error for the trial court to have referred to the “substantial evidence” standard articulated in *Janaman* in a common law writ of certiorari proceeding, thus further demonstrating the distinction between the standard of review when there is a statutory remedy available and the standard of review under the common law writ of certiorari.<sup>85</sup>

Here, Petitioners did not have a statutory right of appeal from a decision of the Newark City Council. Therefore, this Court will determine whether, on the face of the record, the Newark City Council “exceeded its powers or failed to conform to the requirements of the law.”<sup>86</sup>

**B. The Newark City Council’s Decision To Deny Petitioners’ Major Subdivision Proposal Was Not, On The Face Of The Record, An Error of Law Or Arbitrary Or Capricious.**

As indicated above, a decision by the City Council that does not conform to the requirements of the law will be reversed. Another way to state that standard,

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<sup>84</sup> *Dover Historical Soc’y v. City of Dover Panning Comm’n*, 2004 WL 1790164, \*6 (Del. Super.) (involving a common law writ of certiorari brought pursuant to 10 *Del. C.* § 562), *appeal dismissed*, 2004 WL 2743561 (Del. Supr.).

<sup>85</sup> *Christiana Town Center*, 2004 WL 2921830, \* 2.

<sup>86</sup> This Court, thus, need not decide the issue of whether the decision of the Newark City Council was otherwise supported by substantial evidence.

as argued by both parties, is that the decision should be overturned if it is “arbitrary and capricious.”<sup>87</sup> “Arbitrary and capricious” has been defined as “action which is unreasonable or irrational, or ... which is unconsidered or which is willful and not the process of a winnowing or sifting process.”<sup>88</sup> This Court finds that, on the face of the record, the City Council’s denial of Petitioners’ parking waiver was not “manifestly contrary to law” or arbitrary and capricious and will not be overturned.

The present record demonstrates that the City Council’s denial was well within the scope of its powers, and, thus, not “manifestly contrary to law,” because the record shows that Petitioners’ 100% parking waiver for a project with 15 apartments did not satisfy the criteria in § 32-45. First, as to § 32-45(b)(2)(c), the record reflects that Petitioners’ project will be “significantly dependent on automobile or truck traffic” because there is evidence that the tenants, although prohibited in their lease, may potentially bring their cars. This fear was raised and discussed by the City Council as one of the grounds for denial of Petitioners’ application.

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<sup>87</sup> *Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.*, 1997 WL 525860, \*6 (Del. Ch.) (“The standard of review in determining whether the zoning action of local government is appropriate is whether the zoning authority has acted in a manner that can be characterized as arbitrary and capricious.”).

<sup>88</sup> *Willdel Realty, Inc., v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. 1970) (held that a rezoning was not arbitrary and capricious where there was “full exploration of facts by the Department of Planning, there was a spirited public hearing by the Council itself, and there was an abundance of technical data before the Council when it acted”).

Second, as to both §§ 32-45(b)(2)(d) and (e), which, in this case, are intertwined, the record reveals that the granting of the parking waiver would have adversely affected the public welfare. The record indicates that the proposed project will introduce 15 apartments to the central business district and will potentially increase traffic. The record also is replete with evidence that shows that off-street parking is limited in Newark and that any large influx of traffic that would accompany a new apartment complex coupled with a 100% parking waiver would increase the amount of traffic in the central business district. It appears clear on the record that Petitioners' proposed project will "adversely affect the health or safety of persons residing or working in the vicinity [or] will be detrimental to the public welfare."

City Council's rejection of Petitioners' claim that the increased traffic problem will be solved with a proposed prohibition built into the lease that would purportedly prohibit the use of the off-street parking by the tenants was supported by the record. Even if the process described by Petitioners, where tenants would be evicted if they used the off-street parking, as such actions would be in violation of the lease, could be implemented and enforced, the interim time period in which the tenant had a car while residing in the building but before the tenant could be evicted would adversely affect the public welfare by adding to the traffic problem in downtown Newark. Such a solution to an increased traffic problem did not

satisfy the concerns raised by the City Council; therefore, it was not “manifestly contrary to law” that the City Council exercised its discretion under § 32-45 to deny Petitioners’ 100% parking waiver on the possibility of increased traffic and the inadequacy, in the collective mind of the City Council, of Petitioners’ proposed solution.

Finally, § 32-45(b)(2)(f), which allows the Planning Commission to consider the recommendation of the Planning Director, militated in favor of denial of the parking waiver as the record shows that the Planning Director recommended against the granting of a 100% parking waiver for a 15 apartment project.

Further, Respondents refusal to grant the parking waiver despite prior grants in the past is not an error of law. The relevant ordinance provides that the requirement that a developer provide off-street parking “*may* be reduced or waved [sic] for any permitted use in BB ... with the approval of the planning commission.”<sup>89</sup> Thus, the decision of the City Council, which was made in reliance on the recommendation of the Planning Commission, is completely discretionary. The fact that other, in some cases larger, parking waivers were granted for similar developments is not dispositive. Under the law, therefore, the City Council has discretion to approve or deny a parking waiver depending on the circumstances. This is an important power vested in City Council because if the prior grant of a parking waiver turns out to have been ill-advised, then the

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<sup>89</sup> § 32-45(b)(1) (emphasis added).

increased traffic problems caused by the prior waiver can be remedied in the future by denying a parking waiver that would otherwise meet the criteria of § 32-45(b)(2).

Finally, the decision of the City Council to deny Petitioners' application was not arbitrary and capricious; the City Council appropriately considered all of the evidence before it of the parking problems in Newark, especially the report prepared by the Police Department that was referenced in the Planning Department's initial report and the testimony of the public. The City Council engaged in a reasonable and rational process of hearing the testimony and "sifting" through the myriad facts and came to the conclusion that, for the Petitioners' proposal to be approved, the project would have to be scaled down to one extra floor and only 10 apartments. The refusal to grant a 100% parking waiver for 15 apartments was not "manifestly contrary to law" nor was it "arbitrary and capricious" and will not be reversed.

**C. The Newark City Council Did Not Exceed Its Authority When It Conditioned Approval Of Petitioners' Project On An Agreement That Petitioners Would Deed Over Their Land.**

Generally, a municipality has "no inherent police power to zone property except as the legislature may delegate such power to it."<sup>90</sup> The power given to municipalities is the authority to impose conditions on development

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<sup>90</sup> *Boozer v. Johnson*, 98 A.2d 76, 77 (Del. Ch. 1953).

[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.<sup>91</sup>

As stated above, the Charter of the City of Newark expressly provides that “[a]ll powers of the city shall be vested in the council...”<sup>92</sup> Because this authority is given to the municipalities by the General Assembly, the City Council’s conduct must be consistent with § 301. If the City Council “exceeded its powers or failed to conform to the requirements of law[.]” by not consistently following the mandate of § 301, then, under the common law writ of certiorari procedure, the decision of the Newark City Council would have to be reversed.

Petitioners claim that conditioning approval of the project on the Petitioners’ deeding their land adjacent to the property to the City was beyond the scope of the authority given to the City and the City Council. In support of their argument, Petitioners rely on *Delta Eta Corp. v. City Council of the City of Newark*.<sup>93</sup> There, the court held that the City Council exceeded its authority by conditioning approval of a project on the imposition of a restriction on the legal consumption of alcohol.<sup>94</sup> However, the *Delta Eta* case is factually

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<sup>91</sup> 10 *Del. C.* § 301.

<sup>92</sup> Charter of the City of Newark § 401.

<sup>93</sup> 2005 WL 1654581 (Del. Super.).

distinguishable. The restriction in *Delta Eta* dealt with behavior, i.e., legal consumption of alcohol, which the Court found was outside of the plain language of § 301 and thus, beyond the City Council’s delegated powers. Here, the City Council’s denial of Petitioners’ project was based, in part, on the increased parking problems that would adversely affect the “health, safety, morals or the general welfare of the community.” It was also based on the City Council’s ability in § 301 to “regulate and restrict the height, number of stories and size of buildings and other structures...” The decision to deny Petitioners proposal for 15 apartments and 2 stories and a 100% parking waiver was well within the strictures of § 301 and, thus, City council did not “exceed its powers.”

Petitioners also rely on *East Lake Partners* for the proposition that the City Council cannot reject a proposed development that conforms to the zoning ordinances on the basis that it would adversely affect the general neighborhood.<sup>95</sup> *East Lake* states that “[t]o hold otherwise would subject a purchaser of land zoned for a specific use to the future whim and caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of the land not specified anywhere in the ordinance.”<sup>96</sup> However, *East Lake* is also distinguishable from the instant case. The condition proposed by the City Council, that Petitioners deed

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<sup>94</sup> *Id.* at \* 3.

<sup>95</sup> 655 A.2d 821.

<sup>96</sup> *Id.* at 826.

over their land in exchange for the parking waiver and waiver of the payment in lieu of spaces, is not an ad hoc requirement; rather, as stated above, it was a natural part of the flexible negotiating process used in the City Council to further approval of a development that would be beneficial to both the City and the developer.

A more helpful and illustrative case is *Stephen C. Glenn, Inc. v. Sussex County Council*.<sup>97</sup> Although the *Glenn* case specifically involved the granting of a special use or conditional use permit, it nonetheless stands for a fundamental principle of zoning law. According to *Glenn*,

[m]any other courts have held that the zoning authority may impose special conditions or restrictions as a prerequisite to the grant of a conditional use permit, even if the special condition being imposed is not specifically permitted in the enabling legislation, if the special conditions are reasonable, in that they bear a reasonable relation to the public health, safety and welfare and they directly relate to the granted use.<sup>98</sup>

Moreover, the “reasonableness of site-specific conditions can only be determined in the context of the specific fact situation involved in the particular case in question. Generally, any condition imposed must be rationally related to addressing, in the public interest, some potential land use impact of the particular

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<sup>97</sup> 532 A.2d 80 (Del. Ch. 1987) (holding that imposing a special condition for the erection of a chain link fence when considering whether to grant a conditional use permit for expansion of a mobile home park may be lawful if reasonably necessary but remanding because the reasons for the special condition were not clear from the record), *reargument denied*, 1987 WL 16034 (Del. Ch.).

<sup>98</sup> *Id.* at 82. See also 3 Edward H. Zeigler, Jr., *Rathkopf’s The Law of Zoning and Planning* § 60:10 (“ Site-specific zoning conditions must be reasonable; they must be capable of being justified in terms of their relation to the public health, safety, and general welfare as related to land use concepts.”)

use or development in question.”<sup>99</sup> Using those basic doctrines, the condition that City Council placed as a prerequisite to the approval of Petitioners’ application (that Petitioners deed over their land to the City) was valid and the City Council did not exceed its authority. Although the condition is not expressly permitted in § 301, it has a “reasonable relation to the public health, safety and welfare” in that it directly alleviates one of the main issues that City Council had with the project: the parking. That relation has been made clear on the face of the record by the numerous comments by the City Council surrounding the parking problem in downtown Newark, which, according to the City Council, would be increased by a 100% parking waiver attached to the property. The condition also directly relates to the Petitioners’ proposed use because the new apartment building will likely bring an increase in traffic, which, according to the City Council, the proposed land deed would alleviate.

Petitioners also rely on certain statements made at the City Council meeting of June 27, 2005, that (1) referred to the fact that the City did not have any legal right to require Petitioners to deed the adjacent land to the city and (2) referred to the deeding over of that land in exchange for the parking waiver as “blood money.” First, it is apparent on the record that the City has asked for such exchanges in the past. Such an exchange is illustrative of the flexible negotiating process that is sometimes necessary to approve a development proposal. Thus, the

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<sup>99</sup> *Rathkopf’s*, at 60:10.

proposed exchange did not exceed the authority of the City Council. Second, it is also clear that the exchange of the land was done in consideration of the payment made in lieu of spaces; thus, Petitioners would not have to pay almost \$41,000 and still would receive the parking waiver in exchange for the deed to the land. This Court cannot know what was meant by the member of Council's "blood money" remark, but the Council's actions were lawful. Had the exchange taken place, Petitioners would have gotten value in exchange for the land in the form of the waiver of the payment in lieu of spaces.

#### **IV. CONCLUSION**

For the foregoing reasons, Petitioners' Petition for Judicial Review by Writ of Certiorari is **DENIED** and the decision of the Newark City Council is **AFFIRMED**.

**IT IS SO ORDERED.**

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Richard R. Cooch, J.

oc: Prothonotary