

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRIENDS OF THE H. FLETCHER	:	No. 445, 2013
BROWN MANSION, a Delaware	:	
unincorporated association,	:	
KRISTEN F. DiFERDINANDO,	:	
DANN J. GLADNICK, MITCHELL :	:	
GLASS, MICHAEL GUNSELMAN,	:	
JEFFREY T. KUSUMI, and	:	
CONSTANCE M. SMITH,	:	
	:	
Petitioners-Below	:	
Appellants,	:	Trial Court Below:
	:	Superior Court of the State
v.	:	of Delaware
	:	New Castle County
THE CITY OF WILMINGTON, a	:	C.A. No. N12A-05-006 RRC
municipal corporation of the	:	
State of Delaware, CITY OF	:	
WILMINGTON ZONING BOARD	:	
OF ADJUSTMENT, and	:	
INGLESIDE HOMES, INC., a	:	
Delaware non-profit corporation,	:	
	:	
Respondents.	:	

APPELLANTS' OPENING BRIEF

ABBOTT LAW FIRM

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Dated: October 7, 2013

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NATURE OF PROCEEDING

This appeal arises from a statutory *Certiorari* appeal of the grant of a Use Variance by the City of Wilmington Zoning Board of Adjustment (“ZBA”), which permitted a High Density Apartment Building use of lands zoned for Low Density Residential use. The Appellants are residents who live in close proximity to the Historic Brown Mansion and gardens at 1010 Broom Street and an organization formed to protect and preserve the mansion, outbuildings, and gardens.

The Use Variance was granted to Ingleside Homes, Inc. at the conclusion of a public hearing conducted on February 22, 2012. At the hearing, objections were presented by most of the Appellants and their counsel, including *inter alia*: 1) inconsistency with the Comprehensive Development Plan in violation of 22 Del. C. § 702(d); and 2) exacerbation of existing parking problems in contravention of City Code § 48-70(b). A written decision formally granting the Use Variance was issued on April 11, 2012.

An Appeal to Superior Court was initiated pursuant to the filing of a Verified Petition In *Certiorari* on May 9, 2012. On July 2, 2012, the ZBA handed up the record (the “Record”). And the parties subsequently submitted their briefs.

On July 26, 2013, the Superior Court issued an Opinion affirming the ZBA's grant of the Use Variance. This Appeal followed on August 23, 2013.

On August 23, 2013, the Clerk issued a notice establishing the brief schedule. This is the Appellants' Opening Brief on appeal.

SUMMARY OF ARGUMENT

- I. The High Density Residential Use Variance Is Invalid Under 22 *Del. C.* §702(d) On The Grounds That It Directly Conflicts With The Comprehensive Development Plan Designation Of The Property For Low Density Residential Use.
- II. The Use Variance Contravenes City Code § 47-70(b), Which Bars The Grant Of Any Variance Which Will Worsen Existing Parking Problems, Where The Record Establishes That Current Parking Deficiencies Will Be Exacerbated By The Apartment Project.

STATEMENT OF FACTS

A. The Parties, Property, And Comprehensive Plans

1. Appellants And The Historic Brown Mansion

Appellant Friends Of The H. Fletcher Brown Mansion (“Friends”) is a Delaware unincorporated non-profit association in accordance with Title 6, Chapter 19 of the Delaware Code, composed of numerous residents of the City of Wilmington who live near and adjacent to the historic H. Fletcher Brown Mansion and gardens located at 1010 N. Broom Street in Wilmington (the “Historic Brown Mansion”). A-8, A-9, and A-20. The individual Appellants are six (6) residents of North Broom Street, all of whom live either adjacent or close to the Historic Brown Mansion. A-10 at paras. 3-9 and A-20.

The Historic Brown Mansion site contains .89 acres of land improved with a 2½-story, 10,000 square foot building constructed in 1917, along with associated outbuildings and gardens (the “Property”). A-10 at para. 2. and *Friends Of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1056 (Del. 2011) (*en banc*) (hereinafter “Opinion”). It is situated in the City Neighborhood known as Cool Spring and is part of Cool Spring/Tilton Park City Historic District. *Id.* and A-24 and A-25. The Historic Brown Mansion and associated outbuildings, sculptures, and gardens are also a contributing component of an historic district designated by the United States Department of the Interior National Register of Historic Places. A-10 at para. 2.

2. City Government, The Developer & Demo Plans

Appellee The City of Wilmington (“City”) is a home rule municipality of the State of Delaware pursuant to the provisions of 22 *Del. C.* Ch. 8 and a 1979 Charter. A-11 at para. 10. The City is authorized to exercise zoning authority pursuant to delegation of power from the General Assembly contained in 22 *Del. C.* Chs. 3 and 7, and Chapter 48 of the Wilmington City Code (the “City Code”).¹ *Id.*

Appellee City of Wilmington Zoning Board of Adjustment (“ZBA”) is an agency of the City, which is created and empowered pursuant to the provisions of 22 *Del. C.* § 321 *et seq.*, City Code § 48-66 *et seq.*, and § 3-902 of the City’s 1979 Charter. A-11 at para. 11. The ZBA is composed of 3 members, all of whom are employees of the City. *See* Opinion at 1058. The ZBA’s application, notice and procedural requirements are set forth in City Code § 48-67.

Appellee Ingleside Homes, Inc. (“Ingleside”) is the fee title owner of the Historic Brown Mansion and the Use Variance applicant. A-11 at para. 12 and A-21. Ingleside is a non-profit Delaware corporation with offices located at 1005 North Franklin Street in Wilmington. A-38. Ingleside was established in 1971 as the Church Home Foundation, an affordable senior housing entity.

¹ Pertinent portions of the Wilmington City Zoning Code, Chapter 48, are contained at A-127 *et seq.*

A-39. It obtained ownership of the Property in 1974 for no consideration. A-40 to 41.

Ingleside proposes to demolish part of the Historic Brown Mansion and gardens and all of the historic outbuildings in order to develop a new 4-story, 30,000 square foot, 35-unit multi-family use apartment house on the single-family detached R-1 zoned Property (the “Apartment Building”). A-54 to 55. The Historic Brown Mansion served as a retirement home run by the Episcopal Church Home Foundation until 1971. A-52 and Opinion at 1056. Between 1971 and 2008, it was used for office purposes.² *Id.*

3. City Comprehensive Development Plans Designate
The Historic Brown Mansion For Low Density
Residential Use

The City adopted “A City-Wide Plan Of Land Use” pursuant to Resolution 03-059 on July 10, 2003. A-26. It is a component of the Comprehensive Development Plan for the City (“City-Wide Comp Plan”). *Id.* The City-Wide Comp Plan’s future land use plan map entitled “Generalized Future Land Use Plan” only designates Westside for “Residential” uses. A-37. The narrative instructs that “Neighborhood Comprehensive Plans include a more detailed analysis of land use and zoning.” A-36 (emphasis added). And

² City Code § 48-72 would have permitted Ingleside or a third party purchaser to obtain ZBA approval to use the Historic Brown Mansion as an office building.

Map B advises: “Refer to neighborhood plans for specific land use and zoning recommendations.” A-37.

A new Neighborhood Comprehensive Development Plan For The Westside was adopted by the City on December 17, 2009 (the “Westside Comp Plan”). A-97. Both narrative language and maps contained in the Westside Comp Plan provide that no change in the R-1 zoning is recommended for the Property. A-108 to 110 and A-126. Indeed, the Westside Comp Plan only recommends lower density and “down-zoning” uses and zoning changes. *Id.*

The Property is zoned R-1. A-11, A-20, and A-125. R-1 is a “Low Density Residential” use. Opinion at 1057 at n.5. The purpose of the R-1 zoning district is for: 1) “one-family detached dwellings”; 2) “to protect and maintain” areas so developed; and 3) to “enable the city to continue to provide a restricted type of environment which would otherwise be found only in suburban areas.” City Code § 48-131(a). The Apartment Building use is not permitted in an R-1 zone.

B. Ingleside’s Efforts To Build An Apartment Building On The Property: “If At First You Don’t Succeed...” And “If At Second You Don’t Succeed...”

1. The Abandoned Rezoning Attempt

In or about 2007, Ingleside pursued a rezoning for the Property from R-1 to R-5-B in order to build a 5-story apartment building (the “Apartment

Building Rezoning”). A-42, A-43, A-95, and A-11 at para. 13. The purpose of the R-5-B zoning district is “medium-density apartment houses.” *Id.* and City Code § 48-138(a).

The City’s Planning Department recommended that the Apartment Building Rezoning be denied because the Apartment Building Rezoning was directly contradictory to the Westside Comp Plan and would be inconsistent with the surrounding R-1 zoned single-family detached houses. A-43 and A-12 at paras. 15 and 16. Specifically, the Department opined that:

The change in land use requested for the site...would adversely impact the neighborhood by introducing a level of development density out of character with the majority of the surrounding residential area. (emphasis added). *Id.*

The Apartment Building Rezoning was later abandoned. A-329 and A-12 at para. 17.

2. The Ill-Fated Second Use Change Effort

In 2009, Ingleside shifted gears to try an end run around the zoning process by seeking a use variance from the ZBA. A-12 at para. 18 and Opinion at 1057. Ingleside filed an application with the ZBA on October 6, 2009 seeking a variance that would permit it to build a 4-story multi-family apartment building containing 35 units (the “Apartment Building”) in the Property’s R-1 single-family detached home zoning district (the “1st Use

Variance”). Opinion at 1058. Specifically, the application sought approval “to permit multi-family use in a R-1 zone.” *Id.*

Absent the Use Variance, Ingleside would have needed a zoning change for the Property to the R-5-A-1 zoning category in order to develop the Apartment Building. A-13 at para. 19 and Code § 48-137. The purpose of the R-5-A-1 zoning district is to allow “low to medium density apartment developments.” (emphasis added). *Id.*

The ZBA conducted a public hearing on Ingleside’s application for the 1st Use Variance on October 28, 2009 (the “1st ZBA Hearing”). Opinion at 1058 and A-13 at para. 20. The 1st Use Variance permitted Ingleside to: 1) demolish part of the Historic Brown Mansion and gardens, and all of the historic outbuildings; and 2) develop the Apartment Building project. A-13 at para. 20.

At the 1st ZBA Hearing, a representative of Leon Weiner & Associates, which was engaged by Ingleside to act as the project developer, made a project presentation: 1) 1,200 square feet of the 10,000 square foot Historic Brown Mansion would be demolished; 2) substantially all of the historic gardens would be eliminated; and 3) the new facility would house seniors aged 62 and up. A-318 and 319.

At the conclusion of the 1st ZBA Hearing, the ZBA voted to approve the Use Variance. Opinion at 1058. But on December 12, 2011, the Delaware Supreme Court issued the Opinion, which invalidated the 1st Use Variance on the basis that the ZBA was improperly composed.

C. Ingleside Hopes The Third Time Is The Charm; Variance #2

1. The Second Use Variance Mirrors The First & Ingleside Makes Important Admissions

On January 17, 2012, Ingleside filed yet another application seeking a use variance in order to utilize the Property for the High-Density Apartment Building (the “2nd Use Variance”). A-188 *et seq.* The 2nd Use Variance sought approval of exactly the same Apartment Building development as the 1st Use Variance: removal and demolition of outbuildings and garden areas, demolition of a portion of the 10,000 square foot historic Brown Mansion, and construction of a four-story apartment building containing 35 apartment units. A-54 and 55.

The ZBA conducted a hearing on the 2nd Use Variance application on February 22, 2012 (the “2nd ZBA Hearing”). A-50. At the 2nd ZBA Hearing, Ingleside President and CEO Larry Cessna testified that the Historic Brown Mansion was donated in 1953 to an entity which Ingleside is the successor to. A-51 and 52. In addition, he explained that the Historic Brown Mansion was used for over 20 years as a home for the aged, followed by more than 20 years of use until 2008 as Ingleside’s administrative offices. A-52. Finally, Mr.

Cessna confirmed that he had recently received an offer to purchase the Property for \$250,000. A-72.

2. Opponents Of The Second Use Variance Present Evidence Of Comp Plan Inconsistency & Exacerbation of Existing Parking Problems

Documents and testimony were submitted into the record by the Appellants and others in opposition to the 2nd Use Variance. Documents included a petition and dozens of letters in opposition and analysis of negative impacts on the Historic Brown Mansion and its gardens. A-195 to A-273.

Petitioner Dr. Mitchell Glass, a resident of 902 N. Broom Street, testified to the ZBA about his involvement with the preparation of the Westside Comp Plan, in particular the unanimous conclusion that development density in the Westside Area should be decreased. A-73. Counsel also summed up the evidence and law which established the inconsistency of the 2nd Use Variance with the Westside Comp Plan in violation of 22 *Del. C.* § 702(d). A-86 to A-88.

A number of individuals testified about: 1) the existing parking problems in the vicinity of the Historic Brown Mansion; and 2) the fact that current parking problems would be significantly worsened by the 35 unit Apartment Building. Emily Bowen, a high school senior at nearby Ursuline Academy, confirmed the “lack of available parking in proximity to the school.” A-76.

Ms. Bowen testified that the Padua Academy school located on Broom Street also overloaded the streets with parking, resulting in cars being improperly parked and regularly drawing tickets from the City. *Id.*

Petitioner Jeffrey Kusumi, a resident of 1110 N. Broom Street, testified that: 1) “[e]xisting parking problems are severe and extend over a 10 block area of the neighborhood”; 2) the Historic Brown Mansion is situated between Ursuline Academy and Padua Academy, causing significant parking congestion during weekdays; 3) numerous homes on Broom and Rodney Streets rely entirely on on-street parking; and 4) owners must often park several blocks away, or further in winter snow and ice conditions. A-79 to 80. In addition, Mr. Kusumi testified that the existing parking problems would be exacerbated because: 1) the 35 unit Apartment Building is intended for “senior independent living,” whose “residents will be significantly more mobile than the current residents of the Ingleside Retirement Apartments”; 2) standardized industry reference tables and consultations with engineers and independent living facility operators revealed a need for 28 to 63 parking spaces for the Apartment Building; 3) the City Code requires 35 off-street parking spaces for the Apartment Building; 4) the elderly population of the Apartment Building will likely request existing available parking spaces to be dedicated for handicapped parking under City Code § 37-228; and 5) the Apartment Building plan

proposed zero (0) off-street parking spaces. *Id.* Mr. Kusumi's testimony was buttressed by a detailed written analysis and supporting exhibits. *See A-274 et seq.*

Next, Regina Lafferty, a former resident of 900 N. Broom Street, testified regarding her parking concerns. A-82. She believed that existing, available on-street parking spaces would be lost as a result of them being dedicated for loading zones and pick-up/drop-off spots for the Apartment Building. *Id.* Ms. Lafferty concluded that "[i]f this project is committed to go forward it will overwhelm the existing parking in the area which is already inadequate." A-83 (emphasis added).

Further, Petitioner Catherine Gladnick, a resident at 1104 N. Broom Street, testified about parking problems from her perspective as both a community resident and an employee of her husband's in-home dental practice. A-83. She noted that she visually observes the parking situation all day long, and that "there is a serious parking problem." *Id.* Specifically, Ms. Gladnick described the demands on on-street parking imposed by the nearby schools during the day and at night for special functions and sports events. *Id.* She also noted that the 2-hour time limit on parking and parking ban on street cleaning days further impinge upon available spaces for her family, patrons of her husband's dental practice, and visitors to their home. *Id.* In conclusion, Ms.

Gladnick explained that a 35 unit apartment building would inevitably cause a worsening of the existing parking shortfall, creating a “living hell” in terms of parking. *Id.*

Counsel for the Friends testified that the ZBA is barred by City Code § 48-70(b) from approving any variance application where doing so would result in an exacerbation of existing parking problems. A-87. The Apartment Building Plan proposed zero (0) parking spaces, despite the mandatory requirement contained in the City Code for a minimum of 35 off-street parking spaces. *Id.* And the likelihood that existing on-street parking would be lost as a result of its limitation to handicapped, loading zone, and drop-off zone uses for the Apartment Building further cemented the inexorable conclusion that the existing parking shortage would be made worse, thereby prohibiting approval of the 2nd Use Variance. *Id.*

ARGUMENT

I. THE USE VARIANCE WAS INVALIDLY GRANTED; ITS HIGH DENSITY RESIDENTIAL DEVELOPMENT APPROVAL CONFLICTS WITH THE BINDING LOW DENSITY RESIDENTIAL DESIGNATION

A. Question Presented

Whether the High Density Residential Use Variance is invalid under 22 *Del. C.* §702(d) on the grounds that it directly conflicts with the comprehensive development plan designation of the Property for Low Density Residential use? The question was preserved at the 2nd ZBA Hearing (A-85 and 86), and in the Court-below at pages 15-23 of the Opening Brief (A-357 to 365) and pages 1 through 8 in the Reply Brief (A-379 to 386).

B. Standard and Scope of Review

The Supreme Court applies the same standard as the Superior Court in reviewing decisions of the ZBA. *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009). The Court reviews the record for substantial evidence to support the ZBA decision. *Id.* at 320. But the Superior Court's legal determinations are reviewed *de novo*. *Id.*

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla, but less than a preponderance. *Id.*

C. Argument

The 2nd Use Variance was improperly granted by the ZBA since it was barred by 22 *Del. C.* § 702(d), which requires that all land use decisions be made in strict conformance with municipal comprehensive development plans. The binding Westside Comp Plan only permits Low Density Residential Uses on the Property, not the High Density Residential Apartment Building. Consequently, the ZBA was legally prohibited from granting the Use Variance.

The Trial Court held that § 702(d) required the Use Variance be consistent with the Westside Comp Plan. *Friends* at *7-8.³ But it went on to conclude that general Westside Comp Plan objectives could override specific use designations for the Property. *Id.* at *11. This creates a split of authority between the Superior Court and the Court of Chancery, and it constitutes legal error.⁴

1. The General Assembly's Conditional Delegation Of Zoning Power To The City: Comp Plans Are Mandatory

Pursuant to Article II, § 25 of the Delaware Constitution and 22 *Del. C.* § 301, *et seq.*, the General Assembly has conditionally delegated its zoning

³ Citations to “*Friends* at __” herein are to *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2013 WL 4436607 Cooch, R.J. (Del. Super., July 26, 2013).

⁴ The Court of Chancery has consistently held that specific use designations for a property prevail over general plauditory goals contained in Comprehensive Development Plans.

authority to municipalities like the City. One condition to the municipal exercise of zoning powers, however, is that they be carried out in conformance with a comprehensive development plan.

Under 22 *Del. C.* § 303, all zoning regulations “shall be made in accordance with a comprehensive plan... .” (emphasis added). In turn, 22 *Del. C.* § 702(c) provides that “[t]he comprehensive plan shall be the basis for the development of zoning regulations as permitted pursuant to Chapter 3 of this Title.” (emphasis added). And 22 *Del. C.* § 702(d) dictates that “the comprehensive plan shall have the force of law and no development shall be permitted except as consistent with the plan.” (emphasis added). Therefore, the ZBA is legally forbidden from approving a use variance which permits development that is inconsistent with the Westside Comp Plan.

Indeed, the Court of Chancery has held that the requirement for a local jurisdiction to exercise zoning authority consistent with its comprehensive plan is a “fundamental feature” of the General Assembly’s delegation of zoning power. *Brohawn v. Town of Laurel*, 2009 WL 1449109, Chandler, C. (Del. Ch., May 13, 2009). And the Superior Court has held that “[d]evelopment must be consistent with the comprehensive plan and failure to stay consistent ‘is, of course, no mere technicality... .’” *Donnelly v. City of Dover*, 2011 WL 2086160, *4, Young, J. (Del. Super., April 20, 2011).

2. The Use Variance Violates The Westside
Comp Plan: The High Density Apartment
Building Conflicts With Comp Plan
Maps & Text

The Property is designated in the Westside Comp Plan maps as “R-1,” “One Family Detached Dwellings.” A-125 and 126. R-1 is a Low Density Residential Use. A-34 and 35. The High Density Apartment Building that Ingleside intends to develop on the Property qualifies as an “Apartment house” under City Code § 48-2(c): “a building arranged or intended to be occupied by 3 or more families living independently of each other.” Generally, a property must be zoned R-5A or R-5B in order to be developed with an apartment house. City Code §§ 48-136 to 138. R-5A and R-5B are High Density Residential zoning categories, not Low Density Residential ones. A-35.

The Westside Comp Plan does not include a map which expressly indicates it is intended to designate “future land use” in the Westside area of the City. A-97 *et seq.* But since the Westside Comp Plan was formally approved by both the City and the State under 29 *Del. C.* Ch.92, the Court should presume that it complies with the requirement of 22 *Del. C.* § 702(b) to include: 1) “a municipal development strategy setting forth the jurisdiction’s position on...the general uses of land within the community”; and 2) “policies, statements, goals, and planning components for public and private uses of land...” (emphasis added).

Westside Comp Plan “Map F” merely exhibits the “Current Zoning” of parcels located in the Westside Area. A-125. And “Map D” only shows current uses. A-124. But “Map 1” shows “Proposed Rezoning” of parcels in the Westside Area. A-126. Accordingly, Map 1 constitutes the City’s future land use plan for the Westside Area.

(a) Map D Does Not Have Any Bearing On
Plan Consistency

Map D of the Westside Comp Plan cannot constitute the future land use map as contemplated by 22 *Del. C.* § 702(b). No language contained on Map D or in the text of the Westside Comp Plan indicates any such intent. Instead, it is merely a map that recognizes reality: the Property is improved with a 10,000 square foot building and associated out-buildings which have in the past accommodated multi-family residential use. And at the time of the adoption of the Westside Comp Plan on December 17, 2009, the 1st Use Variance, permitting multi-family apartment use of the Property, was still legally valid (until overturned by the Opinion). Accordingly, Map D is irrelevant to the Westside Comp Plan consistency analysis.

(b) Map F Comes Into Play On The
Consistency Issue

Map F is one part of the future land use component of the Westside Comp Plan. It reflects a specific zoning program established by the City. Map

F designates the Property as R-1, which is expressly defined in the legend as “One Family Detached Dwellings.” A-125. Interestingly, Map F designates the neighboring parcel on which Ingleside operates its high-rise, multi-family apartment building as R-5B, which the legend indicates means “Apartment House Medium Density.” *Id.* But Map F alone does not tell the whole story.

(c) Map 1 Is The Specific “Future Land
Use” Map; The Text Confirms It _____

Municipal comprehensive plans consist of both text and maps. *Donnelly v. City of Dover, supra.* at *5, citing 22 *Del. C.* § 702(b). And both the textual language and map designations must be considered in *pari materia* to determine a project’s consistency with the comprehensive plan. *Id.*

The Westside Comp Plan map which establishes future land use designations for the Westside Area is Map 1, entitled “Proposed Rezoning.” A-126. It shows seven (7) separate areas that are recommended for zoning changes in the future. *Id.* Thus, the City’s strategy for “uses of land” as required by § 702(b) was embodied in Map 1.

Additionally, the Westside Comp Plan text explains that Map 1 constitutes the “land use and zoning recommendations for the Westside analysis area.” A-109. Of particular note is the specific statement that “residential density of selected areas within certain Westside neighborhoods be reduced to

lessen congestion and over the long term provide relief for crowded conditions resulting from residential conversions.” *Id.*

The Westside Comp Plan contains a lengthy narrative explanation of the areas that are proposed for rezoning, all of which were down-zonings. A-110 to 115. Area 1-A was just a block away from the Property, and the recommendation was for it to be down-zoned from R-5B Apartment House Medium Density to R-1 One Family Detached Dwellings. A-110 and A-126. And Area 1-B, which was also closely proximate to the Property, was recommended to be down-zoned from R-5B to R-3 One Family Rowhouses. A-111 and a-126.

The 2nd Use Variance directly conflicts with Map 1 and the Westside Comp Plan text. Rather than reducing density and allowing nothing more than One Family Detached Dwellings, it permits a significant increase in density in the form of the Multi-Family Apartment Building on the Property.

- (d) It Is Legally And Logically Impossible
For The Comp Plan To Have Intended
Higher Density Use Of The Property; It
Would Have Been Rezoned Instead

Finally, the conclusion that the Westside Comp Plan did not designate the Property for medium or high density residential use is supported by the fact that the Property has not been rezoned to a high density residential zoning category

since December 17, 2009. Under 22 *Del. C.* § 702(c), the City is required to “amend its official zoning map to rezone all lands within the municipality in accordance with the uses of lands provided for in the Comprehensive Development Plan” within 18 months of its adoption. So if the Westside Comp Plan designated the Property for rezoning, the City would have enacted the rezoning by no later than June 17, 2011. But the City did not rezone the Property. *A fortiori* the Property was not designated for a future higher density residential use; its R-1 Low Density Single Family use was intended to continue under the Westside Comp Plan.

If the Property was rezoned R-5B, then the High Density Residential Apartment Building would have been a use permitted as a matter of right. The fact that the City did not rely upon § 702(c) by rezoning the Property to a higher density residential zoning category between December 17, 2009 and June 17, 2011 constitutes a legal admission by the City that the Westside Comp Plan does not designate the Property for high density residential use.

The Court of Chancery has held that because, by statute, no development of property may occur which is inconsistent with a local jurisdiction’s Comprehensive Plan, land is effectively rezoned upon plan adoption where it is designated for a use different from its existing zoning category. *Farmers For Fairness v. Kent County Levy Court*, 2012 WL 295060, *3, Glasscock, V.C.

(Del. Ch., Jan. 27, 2012). This was the perfect “escape hatch” for the City and Ingleside. If the Westside Comp Plan truly designated the Property for High Density Residential use, then they could have gained “political cover” by proclaiming that § 702(c) *ipso jure* forced them to rezone. Because the City did not do so, however, it is evident that no change in the use designation of the Property was contained in the Westside Comp Plan.

3. Use Variances, Like Rezoning, Must Be
Consistent With Specific Comprehensive
Plan Designations, Not General Goals

The Supreme Court has held that “zoning” is the regulation of uses which may be made of property. *Del. Dep’t of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087, 1095 (Del. 2011). And as its name reflects, the Use Variance clearly affects the use that may be made of the Property.

The General Assembly has mandated that municipalities like the City follow their duly adopted comprehensive plans regarding all land use matters so that such plans have “teeth” under the law. Otherwise, the City could use the use variance process as a back door means of subverting the General Assembly’s intent. The exception would end up swallowing the rule whole.

The Court of Chancery has not hesitated to overturn land use approvals granted in contravention of specific use designations contained in municipal

comprehensive development plans. In *O'Neill v. Town of Middletown*, 2006 WL 205071, *36, Noble, V.C. (Del. Ch., Jan. 18, 2006), the Court of Chancery overturned a Commercial rezoning since it conflicted with the Town's comprehensive development plan text language indicating the land was intended for Industrial use. *33. In so doing, the Court relied upon its holding that where a comprehensive plan specifically establishes a policy, such specifics prevail over general plan goals. *O'Neill* at *32. The Trial Court, however, worshipped general Westside Comp Plan objectives over specific map and text content which established the Property should remain Low Density Residential. Thus, the Trial Court held contrary to *O'Neill*.

It is now well settled in Court of Chancery *jurisprudence* that a conflict between a zoning change and a specific use designation in a comprehensive plan is fatal to the approval. Indeed, the Court of Chancery has straightforwardly recognized that a commercial rezoning is invalid where the comprehensive plan designates the property for "Industrial/Low Density Residential." *Fields v. Kent County*, 2006 WL 345014, *3, Noble, V.C. (Del. Ch., Feb. 2, 2006). Similarly, the Westside Comp Plan designates the Property for Low Density Residential. So the High Density Residential Apartment Building contravenes § 702(d).

The Court of Chancery also invalidated the rezoning of property to a CB (Commercial Business) zoning category based on its conflict with the municipal comprehensive plan designation of the property for Mixed Use (Residential, Office, Commercial, etc.). *Brohawn v. Town of Laurel, supra.* at *5. The inconsistency between the Commercial Business zoning and the Mixed Use designation on the land use map contained in the municipal comprehensive plan was found by the Chancellor to be “obvious.” *Id.* (emphasis added).

So too is the High Density Use Variance in “obvious” conflict with the Westside Comp Plan designation of the Property for Low Density Residential use. The text of the Westside Comp Plan expressly provides that the Low Density Residential character of Broom Street and its environs should be at the lowest densities. The Apartment Building is in direct conflict. As a result, the 2nd Use Variance should be invalidated.

4. The Use Variance Directly Contravenes
22 Del. C. § 702

The requirement that land use decisions such as the Use Variance be consistent with the Westside Comp Plan is mandatory, not discretionary or directory. In 1998, the Delaware General Assembly completely rewrote 22 Del. C. § 702. 71 Del. Laws, c. 477. Therefore, municipal comprehensive plans had been mere recommendations. *O'Neill v. Town of Middletown, supra.* at

*27. But with the advent of the new § 702 in 1998, the General Assembly directed municipalities to abide by their comprehensive development plans, expressly providing that “the comprehensive plan shall have the force of law and no development shall be permitted except as consistent with the plan.” 22 *Del. C. § 702(d)* (emphasis added).

The High Density Residential Apartment Building use is clearly inconsistent with the “Low Density Residential” designation of the Property in the Westside Comp Plan. Indeed, three (3) intervening residential density categories separate “Low Density Residential” from “High Density Residential: 1) Medium Low Density ; 2) Medium Density; and 3) Medium High Density. A-35.

Where a comprehensive plan is sufficiently unambiguous and specific regarding a property’s use designation, it must prevail over any general policy goals. *O’Neill, supra.* at 33. The Westside Comp Plan specifically designates the Historic Brown Mansion for Low Density Residential use, not High Density. No City-Wide Comp Plan or Westside Comp Plan general goals may override that specific designation. Consequently, the 2nd ZBA Decision was legally infirm.

ARGUMENT

II. THE USE VARIANCE VIOLATES § 48-70; IT WILL WORSEN EXISTING PARKING PROBLEMS

A. Question Presented

Whether the Use Variance is invalid on the grounds that it contravenes City Code § 48-70(b), which bars the grant of any variance which will worsen existing Parking Problems, where the record evidence established that current Parking Problems will be Exacerbated by the Apartment Building? The question was preserved at the 2nd ZBA Hearing (A-85 and A-87), and in the Trial Court briefs (A-23 *et seq.* and A-386 *et seq.*).

B. Standard and Scope of Review

The Supreme Court applies the same standard as the Superior Court in reviewing decisions of the ZBA. *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009). The Court reviews the record for substantial evidence to support the ZBA decision. *Id.* at 320. But the Superior Court's legal determinations are reviewed *de novo*. *Id.*

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla, but less than a preponderance. *Id.*

C. Argument

Under City Code § 48-70(b), the ZBA is prohibited from granting a variance “in instances where to do so would...exacerbate existing parking problems... .” (emphasis added). Absent substantial evidence in the record to support a conclusion that any existing parking problems would not be worsened by the 2nd Use Variance, the ZBA was legally barred from granting approval.

The Trial Court held that the neighborhood area suffered from existing parking problems. *Friends* at *14. So that fact is now finally and conclusively established. But the Court also held that the testimony of 3 individuals supposedly constituted substantial evidence that the parking issues would not be worsened. Because their testimony was irrelevant and conclusory, however, it did not rise beyond the level of a mere scintilla of evidence. In addition, the Apartment Building’s degradation of the existing on-street parking shortage was also established as a matter of law; the City Code standard and lack of legally guaranteed off-street parking proved it.

1. Evidence Established Parking Problems Existed & They Will Be Exacerbated

At the ZBA Hearing, Petitioners Jeffrey Kusumi and Catherine Gladnick testified regarding existing parking problems in the community and why they would get worse due to the Apartment Building – *e.g.* 1) loss of regular parking to create new handicap, drop-off and loading zone dedicated spaces; 2) no off-

street parking for the Apartment Building; and 3) heightened parking demand of 35+ spaces from Apartment Building residents. Ursuline Academy student Emily Bowen and resident Regina Lafferty echoed these facts.

Written evidence regarding the existence of parking problems in the area near the Property was also submitted. In fact, Mr. Kusumi provided a detailed explanation and analysis of both the existing parking shortage and how it would be exacerbated by the Apartment Building project.

In contrast, no valid evidence was presented by Ingleside that: 1) there was not an existing parking problem in the community; or 2) the existing parking shortage would not be exacerbated by the Apartment Building. Consequently, the record evidence reveals that the 2nd Use Variance would cause a worsening of existing parking problems, thereby precluding approval.

2. The Plan Includes Zero (0) Parking Spaces, The Code Requires 35, And Parking Problems Will Inevitably Worsen

Code § 48-443(a) requires a minimum of one off-street space per family for new and converted apartment houses. Since the Apartment Building will be a 35 unit multi-family apartment house, 35 off-street parking spaces are required by the Code. The 35 space shortfall caused by the 2nd Use Variance will *per se* exacerbate the existing parking difficulties.

At the 2nd ZBA Hearing, testimony was presented by Glenn Brooks, a real estate developer at Leon Weiner Associates. A-53. His firm was hired to work with Ingleside regarding development of the Historic Brown Mansion. A-54. He confirmed that the Apartment Building plan did not propose the inclusion of any off-street parking spaces. A-57.

Ingleside argued that it would fill the 35 off-street parking space gap by allowing residents of the Apartment Building to utilize existing parking spaces on the adjacent high-rise apartment building site identified as 1005 N. Franklin Street (the “Ingleside Tower”). Mr. Brooks testified that the Ingleside Tower parking lot contained a total of 58 spaces. A-57. The Ingleside Tower contains a total of 208 apartments. A-79 and A-87.

Code § 48-443(a) requires that the R-5B zoned Ingleside Tower provide no less than 2 off-street parking spaces for each 3 families. Thus, the Ingleside Tower site is already non-conforming since it fails to provide the requisite 139 parking spaces ($[208 \text{ divided } \div 3] \times 2 = 139$, rounded up). Code § 48-443(c), however, does permit an elderly apartment house such as the Ingleside Tower to obtain approval from the ZBA to reduce its available parking to 1 space per 3 units. But that would still require a minimum of 70 parking spaces, leaving the Ingleside Tower site at least 12 spaces shy of what it legally needs. A-87.

Code § 48-443(b) permits an apartment house to provide off-street parking “on a separate lot...within 750 feet walking distance along the street from such premises,” Ingleside Tower parking spaces cannot be counted because that site has zero (0) spaces to spare for the Apartment Building’s usage. Regardless, no written parking easement agreement was presented to show that parking rights on the Ingleside Tower site were legally guaranteed.

The Ingleside Tower is owned by a separate entity: Ingleside Retirement Apartments, LLC. A-396. At the 2nd ZBA Hearing, Mr. Kusumi confirmed that “Ingleside has stated repeatedly that they would not enter into a binding written parking easement to supply parking.”⁵ A-79. And no written agreement was provided by Ingleside. Consequently, the use of parking spaces on the Ingleside Tower site is legally illusory.

Regardless of Code § 48-443, however, uncontradicted record evidence establishes that the Apartment Building will generate a need for dozens of additional parking spaces. No evidence was presented to show that dozens of off-street spaces will be available anywhere. So even assuming that the Apartment Building could prove its provision of zero (0) on-site parking spaces could somehow meet Code requirements, the undisputed factual record

⁵ Mr. Kusumi noted similarly in his written submission to the ZBA. A274.

establishes that existing on-street parking inadequacies in the area will be further exacerbated.

Code § 48-70(b) establishes a clear and unequivocal prohibition against the grant of any variance where it would “exacerbate existing parking problems.” The Record establishes that the ZBA’s grant of the 2nd Use Variance would worsen the current paucity of on-street parking. Accordingly, the Court should overturn the ZBA Decision.

3. Cessna And Banker’s Testimony Were Legally Irrelevant

The Trial Court relied upon the testimony of two (2) Ingleside witnesses, Larry Cessna (“Cessna”) and Glenn Brooks (“Brooks”), and area resident Ray Banker (“Banker”) to conclude that substantial evidence existed to support the ZBA’s conclusion that the Apartment Building would not worsen existing parking problems. *Friends* at *14. Their testimony, however, was not legally relevant to the issue of whether the current shortage of on-street parking would be exacerbated by the Apartment Building. Consequently, the testimony failed to rise above the level of a scintilla of evidence needed to constitute “substantial evidence.”

The testimony of Cessna and Brooks relied upon by the Trial Court was:
1) no parking problems were experienced by Ingleside in 2008 and before;

2) the Ingleside Tower has 58 spaces; 3) only 36 car owners are in the Ingleside Tower; 4) the Ingleside Tower has unused spaces; 5) only 2 new employees will be hired for the Apartment Building; and 6) new Apartment Building residents could park in the Ingleside Tower lot. *Friends* at *14. And it relied upon Banker's testimony that "he often observed 12 to 14 unused parking spaces" in the Ingleside Tower Lot. *Id.*

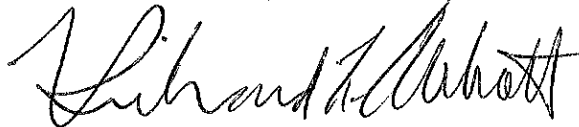
Because existing parking problems circa 2012 were found to exist by the Trial Court, the parking situation in 2008 and prior is of no relevance. And the other "facts" cited by the Trial Court are irrelevant as a matter of law since: 1) no legal agreement existed granting the Apartment Building the right to park on the separately owned Ingleside Tower site; 2) the Ingleside Tower site is already short of the 70 or more spaces it needs to comply with City Code; 3) the Apartment Building has zero (0) off-street parking spaces; and 4) dozens of parking spaces are needed as a legal and practical matter to accommodate the 35 unit Apartment Building. So parking on the adjacent parcel is no evidence at all; not even a scintilla. Accordingly, the Trial Court erred and reversal is appropriate.

CONCLUSION

Based on the foregoing, the Friends and individual Petitioners respectfully request that this Court reverse the 2nd ZBA Decision granting the 2nd Use Variance.

The 2nd Use Variance conflicts with the legally mandatory Westside Comp Plan in contravention of 22 *Del. C.* §702(d), by permitting a High Density Residential Apartment Building to be developed on the Property, which is designated for Low Density Residential use. In addition, the record is replete with evidence establishing that existing parking problems in the vicinity of the Property will be exacerbated by the 35 Unit Apartment Building, a fatal defect. And the mere scintilla of evidence on parking issues presented by Ingleside fell well short of "substantial evidence." Regardless, the City Code parking requirements establish a *per se* violation of § 48-70(b). Accordingly, reversal is warranted.

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