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IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRIENDS OF THE H. FLETCHER BROWN MANSION, a Delaware unincorporated association, KRISTEN F. DiFERDINANDO, DANN J. GLADNICK, MITCHELL GLASS, MICHAEL GUNSELMAN, JEFFREY T. KUSUMI, and CONSTANCE M. SMITH,	:	No. 445, 2013
Petitioners-Below Appellants,	:	Trial Court Below: Superior Court of the State of Delaware New Castle County C.A. No. N12A-05-006 RRC
v.	:	
THE CITY OF WILMINGTON, a 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' REPLY BRIEF

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ARGUMENT

I. THE SPLIT OF AUTHORITY ON APPLICATION OF COMPREHENSIVE DEVELOPMENT PLANS SHOULD BE RESOLVED IN FAVOR OF COURT OF CHANCERY *JURISPRUDENCE*

Appellees City of Wilmington ("City"), City of Wilmington Zoning Board of Adjustment ("ZBA"), and Ingleside Homes, Inc. ("Ingleside") continue to deny the obvious inconsistency between the Westside Comp Plan and the 2nd Use Variance. City AB at 16-23 and Ingleside AB at 11-23.[1] This is despite the existence of persuasive Court of Chancery decisional authority which holds that specific plan provisions supercede general goals for purposes of 22 *Del. C.* § 702(d) analysis. Instead, the City, the ZBA, and Ingleside rely upon outdated case law and general plan objectives. This Court should adopt the Court of Chancery's reasoning, and reject that of the Superior Court, in order to carry out the General Assembly's intent: to make comprehensive plans binding.

A. The Westside Comp Plan Provides That The Historic Brown Mansion Should Be Limited To Low Density Residential Uses, Not High Density Apartment Building Use

According to Court of Chancery decisional law, the applicable legal standard is consistency with specific provisions of the Westside Comp Plan.

[1] References herein to "City AB at __" are to the pages contained in "Respondents-Below Appellees City of Wilmington Zoning Board of Adjustment's Answering Brief," and references to "Ingleside AB at __" are to the "Answering Brief of Ingleside Homes, Inc."

That is the correct interpretation of 22 *Del. C.* § 702(d). The Trial Court's reliance upon general plan objectives is in conflict with well settled Court of Chancery *jurisprudence*. Thus, reversal is appropriate.

The Court of Chancery has interpreted § 702(d) as follows:

> Notwithstanding the notion that comprehensive plans are viewed as long-term planning tools, there are instances when the comprehensive plan is 'sufficiently unambiguous and specific with respect to a particular matter that it can be critically employed in judicial review of zoning decisions,' regardless of such decision's otherwise comportment with the plan's general statement of policy goals. When such circumstances arise, the Court must respect the legislature's affirmative command that comprehensive plans carry 'the force of law' and proscribe development that is 'fundamentally inconsistent with the basic thrust' of the comprehensive plan, as perceived through the specific pronouncements of plan policy. *O'Neill v. Town of Middletown*, 2006 WL 205071, *32, Noble, V.C. (Del. Ch., Jan. 18, 2006) (emphasis added).

Therefore, specific comprehensive plan provisions prevail over general goals. Indeed, the *O'Neill* court proceeded to invalidate a Commercial rezoning based on comprehensive plan text which described the area at issue as being intended for Industrial use. *O'Neill* at *37-38.

The Westside Comp Plan contains the very type of specific pronouncements of plan policy which *O'Neill* holds must predominate over general goals. In the Westside Comp Plan's "INTRODUCTION" subsection

entitled "Long Range Planning," it is provided that the recommendations will address the goals expressed in the "Mission Statement." A-99. In turn, the Mission Statement concludes that the Westside Comp Plan has been updated in a way that "[r]ecognizes the need for decreased density to be achieved." *Id.* (emphasis added). In Section III.A., which constitutes the specific "Land Use & Zoning Recommendations" for the Westside Analysis Area, the specific "Public Input Based Recommendation" calls for a reduction in residential density: "[o]ne of the goals for reducing the density of certain areas within the West Side is to make the area more livable and sustainable for residents by reducing the amount of traffic and parking congestion with various neighborhoods." A-109 (emphasis added).

Additionally, Westside Comp Plan Map 1, entitled "Proposed Rezoning" constitutes the City's future land use plan for the West Side area. A-126. This is expressly confirmed by the Westside Comp Plan text, which states that Map 1 and the text at pages 12 through 18 constitute the "land use and zoning recommendations for the West Side Analysis Area." A-109. Narrative language calls for the downzoning of numerous parcels, including two (2) residential parcels within close proximity to the Property on Broom Street. A-110 to 115. Indeed, the text contains the specific recommendation that "residential density of selected areas within certain West Side neighborhoods be

reduced…." A-109 (emphasis added). Consequently, the "thrust" of the Westside Comp Plan is to decrease residential density, not to increase density as the 2nd Use Variance would permit.

Map D in the Westside Comp Plan does not constitute a future land use designation for the Property. No Map D language or Westside Comp Plan narrative language so indicates. *See* A-124 and A-109 to 115. As its name indicates, Map D only reports the "Current Land Use" for the Property. The "High Density Residential" reference to the Property on Map D is merely a recognition of the 1st Use Variance's approval of the High Density Apartment Building, which was still in effect at the time of plan adoption on December 17, 2009 (later overturned in this Court's December 12, 2011 Opinion – 34 A.3d 1055).

The Trial Court's reliance upon general Westside Comp Plan goals to override the specific low density residential policy provisions effectively eviscerates the General Assembly's intent set forth in 22 *Del. C.* § 702(d). Rather than relying upon the specific maps and text of the Westside Comp Plan, the Court below looked to general objectives. One may frequently point to general comprehensive plan objectives to justify a development project which contravenes specific land use provisions or designations for a property. So the dislogic of the Trial Court's reasoning is obvious.

The Court of Chancery's interpretation of § 702(d), which concludes that specific comprehensive plan provisions must prevail over general objectives, is the only interpretive approach which carries out the Legislature's intent. And since Low Density Residential use is the specific thrust of the Westside Comp Plan, the High Density Apartment Building violates § 702(d). Accordingly, the 2nd Use Variance should be invalidated.

B. The New Argument Regarding 22 *Del. C.* § 327(a)(3) Cannot Be Asserted

The ZBA asserts for the first time in this litigation that it may grant a variance from the Westside Comp Plan so as to skirt around 22 *Del. C.* § 702(d)'s mandate that development approvals be consistent with comprehensive plans. City AB at 21-23. But this argument may not be presented on appeal since: 1) it was not raised in the Court below; and 2) it was not a basis of the Trial Court's decision.

Under Supreme Court Rule 8, parties are generally prohibited from raising an issue for the first time on appeal. In the Superior Court proceedings, the argument that the ZBA could ignore the requirement of § 702(d) pursuant to its power to grant variances was not directly raised. Therefore, the Court should not consider this argument for the first time on appeal.

Regardless, the argument that a variance may trump the mandatory comprehensive plan compliance requirement of § 702(d) is not on appeal. The Trial Court held that § 702(d) required the 2nd Use Variance to be consistent with the Westside Comp Plan. *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2013 WL 4436607, *7-8, Cooch, R.J. (Del. Super., July 26, 2013). No Cross-Appeal of the holding was brought. Consequently, the decision that use variances must be consistent with comprehensive development plans is now a final judgment.

Lastly, the ZBA ignores a well settled rule of statutory construction, which provides that in case of inconsistency between two statutes, the courts presume the General Assembly's intent is that the more specific, later-enacted statute limits the former statute. *Arnold v. State*, 49 A.3d 1180, 1184 (Del. 2012)(en Banc). So to the extent that § 702(d) conflicts with § 327(a)(3), the more specific, later-enacted § 702(d) must prevail.[2] As a result, the ZBA's argument fails.

[2] The two statutes may actually be read in harmony, as § 327(a)(3) does not expressly allow variances from comprehensive development plans.

C. Relying Upon General Westside Comp Plan Goals, Rather Than Specific Designations And Provisions, Would Create An Exception To The § 702(d) Rule That Would Swallow It Whole

The Court below held that general Westside Comp Plan objectives may be relied upon to override specific use and density provisions in conducting the consistency analysis under 22 *Del. C.* § 702(d). *Friends* at *11. The City, the ZBA, and Ingleside argue similarly. City AB at 19-20 and Ingleside AB at 14-18. But this proposition would render § 702(d) virtually meaningless. Thus, the posit is legally erroneous.

By enacting 22 *Del. C.* § 702(d) in 1998, the General Assembly expressly intended to give "teeth" to municipal comprehensive development plans. No longer were plans permitted to be mere "visions" with no binding legal effect. Instead, such plans were expressly intended by the Delaware Legislature to become legally mandatory guideposts for future land use decision-making.

In an effort to avoid the specific policy pronouncements in the Westside Comp Plan, Ingleside and the ZBA suggest that they may rely upon any general objectives contained within the four corners of the document. They argue that even if a plan contains specific language and map designations indicating that a parcel is intended for Low Density Residential use, that content may be ignored in favor of general goals which are advanced by the High Density Residential Apartment Building project. Taken to its logical extreme, this argument would

mean that specific comprehensive plan text and maps on Land Use and Zoning are mere surplusage, which may be ignored at the whim of a municipality when it wishes to advance some Housing, Transportation, Historic Preservation, or other general goals. This was not the General Assembly's intent; it would permit municipalities to ignore specific Land Use and Zoning provisions in their comprehensive plans, and thereby render § 702(d) toothless.

The "Current Zoning" map recognizes that the Property was zoned R-1 in December, 2009 when the Westside Comp Plan was adopted. The textual language specifically establishes that lower residential densities in the West Side Area are called for. But the Apartment Building is a High Density Residential use akin to uses permitted only in R-5 zoning categories. As a consequence, the 2nd Use Variance directly contravenes the Westside Comp Plan in violation of § 702(d).

ARGUMENT

II. THE 35 UNIT APARTMENT BUILDING WILL EXACERBATE EXISTING PARKING PROBLEMS IN VIOLATION OF CITY CODE § 48-70(b)

A. The Trial Court Did Conclude That Parking Problems Existed In The Vicinity

The City, the ZBA, and Ingleside contend that the Superior Court did not hold that parking problems existed in the neighborhood that the Property was situated in. City AB at 25-26 and Ingleside AB at 26. But in point of fact, the Court below concluded that substantial evidence existed to establish that parking problems in the area existed, and that only some evidence (*i.e.* a scintilla) was presented to the contrary. Consequently, the Appellees' position is without merit.

In 11 separate paragraphs, the Trial Court summarized the record evidence tending to establish that parking problems existed in the neighborhood. *Friends* at *12-13. The Trial Court also acknowledged that "[t]here was evidence that supports the claims that parking problems plague the neighborhood... ." *Friends* at *12. In contrast, the Court below found that only "[s]ome evidence supports Ingleside's claim that the neighborhood has no real

parking problems... ." *Id.* at *13. "Some evidence" is not "substantial evidence."[3]

Obviously, the Superior Court held that an insufficient amount of evidence regarding lack of parking problems was presented. Indeed, the Trial Court held that "[m]uch evidence indicates that the neighborhood has parking problems; however, substantial evidence...supports the Board's finding that allowing the variance would not make them worse." *Id.* at *14. Thus, existing parking problems were established by substantial evidence.

Neither the City, the ZBA, nor Ingleside filed a Cross-Appeal challenging the holding that parking problems existed in the neighborhood. And Supreme Court Rule 6 bars an appeal at this time. Accordingly, the decision that there were existing parking problems is now a final, non-appealable judgment.

B. Legally And Factually Insurmountable Evidence That Existing Parking Problems Would Be Exacerbated By The 2nd Use Variance Was Presented

The City, the ZBA, and Ingleside contend that the Court below properly concluded that existing parking problems would not be exacerbated based upon the sparse, conclusory, and irrelevant testimony of a few individuals. City AB

[3] The same sentence noted that "substantial evidence" supported a finding that existing parking problems would not be worsened.

at 27-28 and Ingleside AB at 28. They also contend that the lack of the requisite number of City Code required parking spaces was correctly ignored by the Superior Court on the grounds that Apartment Building residents could possibly park on potentially available spaces on adjacent land owned by an entity related to Ingleside. City AB at 27-29 and Ingleside AB at 27-29. Both of these positions, however, are without merit.

For starters, the testimony by Ingleside President Larry Cessna that 4 years earlier his office use of the Historic Brown Mansion did not experience any parking difficulties in the area is off base. *Friends* at *14. An office use is obviously different than the 35 unit Apartment Building use. In addition, the 2008 evidence is dated; it has no bearing on the parking situation circa 2012 (when the 2nd Use Variance was granted by the ZBA). Finally, Cessna's testimony is irrelevant since it only addresses the issue of whether there were existing parking problems, which was decided adverse to his contention.

Next, Ingleside witnesses gave testimony about the potential availability of parking spaces in a parking lot for the Ingleside Tower at 1005 North Franklin Street. *Friends* at *14. They testified that the 1005 North Franklin Street parking lot had 58 spaces, but that Ingleside Tower residents only had 36 cars. Because Mr. Brooks and Mr. Cessna did not testify about how many spaces were typically available in the lot, however, Mr. Banker's testimony that

it was usually only 12 to 14 was the only evidence in the record. *Id.* But 12 to 14 parking spaces could not possibly be sufficient to accommodate the 35 residents of the Apartment Building. Simple math dictates that the numbers do not jibe. There will in fact be a parking shortfall which will cause parked cars to spill out onto the neighboring streets, thereby exacerbating the existing parking shortage in the community.

Additionally, the record is devoid of any evidence that there is a legal or practical right of residents of the Apartment Building to park in the Ingleside Tower parking lot. Thus, such assertions are pure speculation and conjecture. They fall far short of even a scintilla of evidence. The paucity of evidence supporting the conclusion that existing parking problems would not be exacerbated is fatal to the 2nd Use Variance.

The 2nd Use Variance's violation of City Code § 48-70(b) is further established by the extensive evidence of parking problems and the Apartment Building's exacerbation of them presented at the 2nd ZBA Hearing. The Trial Court summarized the 11 separate items of supporting evidence, which lead to the inexorable conclusion that parking problems will be exacerbated. *Friends* at *12-13.

Finally, the 2nd Use Variance's violation of § 48-70(b) is established as a matter of law based on the legal insufficiency of parking pursuant to the City

Code. Section 48-443(a) of the City Code requires that the 35 unit Apartment Building provide a minimum of 35 off-street parking spaces. But the Apartment Building provides zero (0) off-street parking spaces. Consequently, it is a legal certainty that the Apartment Building will be far short of the legally established number of off-street spaces needed to avoid worsening the existing on-street parking shortage.

CONCLUSION

Based on the foregoing, the Appellants respectfully request that this Court reverse the Superior Court and invalidate the 2nd Use Variance. *First*, the High Density Residential Apartment Building is in direct conflict with the specific Low Density Residential policies and map designations contained in the Westside Comp Plan regarding the Property and its environs, in violation of 22 *Del. C.* § 702(d)'s consistency requirement. *Second*, the virtually uncontraverted record evidence establishes that existing parking problems in the neighborhood will be exacerbated by the Apartment Building permitted by the 2nd Use Variance; the 35 off-street parking space shortfall will obviously worsen the existing on-street parking shortage. Accordingly, the Trial Court decision should be reversed and the 2nd Use Variance vacated.

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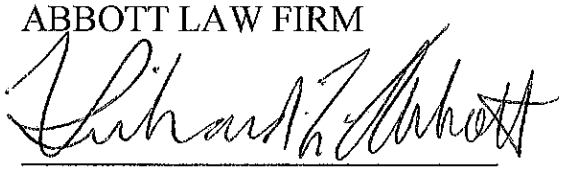

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