

OLD TOWN HALL ASSOCIATES,
LLC,

V.

Respondent.

C.A. No. S25A-12-002 CAK

Respondent's Motion to Dismiss and Decision on the Merits

MEMORANDUM OPINION AND ORDER

Luke W. Mette, Esquire, and Gabriel E. Finamore, Esquire, Brockstedt Mandalas Federico LLC, 1413 Savannah Road, Suite 1, Lewes, DE 19958; Attorneys for Respondent.

KARSNITZ, R. J.

PROCEDURAL HISTORY

By letter dated October 16, 2024, the Building Official of the City of Seaford, Delaware (the “City”) informed a realtor agent for Old Town Hall Associates, LLC (“Petitioner”) that the use of property owned by Petitioner located at 105 N. Front Street, Seaford, Delaware 19973 and zoned C-3 (Riverfront Enterprise District) (the “Property”) as a medical addiction treatment facility was prohibited per sections 15-48c(a)(6) and 15-48c(c)(9) of the City Code as amended by Ordinance #2021-08.

On October 30, 2024, Petitioner filed a Use Variance Request with the City’s Board of Adjustment and Appeals (“Respondent”). Respondent is a governmental body authorized and appointed¹ to hear and decide, *inter alia*, both appeals from determinations from the City’s Building Official and requests for variances from the City’s Zoning Code. Respondent held a hearing on Petitioner’s Use Variance Request on December 11, 2024, and voted unanimously to deny the request. Respondent then issued a written Use Variance Denial decision, which stated that: (1) the Property had previously operated legally as a nonconforming use until late 2023, at which point the nonconforming use ceased; (2) the nonconforming use was abandoned if the Property was not operated as a nonconforming use for a period of six months; and (3) the fact that Petitioner’s tenant continued to pay rent after the nonconforming

¹ Pursuant to 22 *Del. C.* §§ 321 *et. seq.* and City Code Chapter 15 (Zoning), Article 8 (Board of Adjustment).

use had ceased did not change the fact that the nonconforming use had been abandoned, because the abandonment determination is based on the use of the Property, not the status of the lease.

On March 31, 2025, Petitioner filed its first petition² which asserted that that its nonconforming use had not been abandoned. On May 30, 2025, Respondent filed a motion to dismiss Petitioner's first petition. In its opening brief in that matter, Respondent argued that, under Section 15-99 of the Zoning Code, Petitioner's nonconforming use of the Property should be deemed abandoned since the nonconforming use had ceased for six months. Rather than engage Respondent on the merits of the first petition, Petitioner stipulated to stay the first petition and eventually dismissed it.

On June 12, 2025, Petitioner appealed to Respondent the underlying nonconforming use determination of the Building Official as set forth in the October 16, 2024, letter. Petitioner characterized its appeal as a request for a hearing to determine that nonconforming use was never abandoned and never lapsed. Respondent conducted a hearing on October 8, 2025. On November 5, 2025, Respondent voted to deny the appeal. On December 5, 2025, Respondent issued its written decision.

² This Court may take judicial notice of Petitioner's pleadings in the 2025 petition. *See* D.R.E. 201(d)(1)(C).

In its December 5, 2025 decision, Respondent found that (1) Petitioner, through its agent, received the October 16, 2024 letter on October 16, 2024; (2) Petitioner did not file its appeal until June 12, 2025; (3) Section 15-48c(a)(6) of the Zoning Code prohibits medical offices or clinics for the treatment of substance abuse or disbursements of medications for the treatment of substance abuse in the C-3 Riverfront Enterprise Zone; and (4) Section 15-99(b) of the Zoning Code provides that if a nonconforming use in the C-3 Riverfront Enterprise Zone ceases for six (6) months, it shall be deemed abandoned. Respondent then then held that: (1) the record clearly established that the nonconforming use was abandoned for an excess of six months; and (2) Petitioner's appeal was not filed in a timely fashion.

On December 30, 2025, Petitioner filed a Petition for Judicial Review for Writ of *Certiorari* and Order for Issuance of a Writ of *Certiorari* (the "Petition") with this Court, seeking judicial relief from the determinations by Respondent that Petitioner's nonconforming use of the Property had ceased by January 1, 2024, and had been abandoned by October 2024. On December 31, 2025, I issued a Writ of *Certiorari*. Pursuant to this Writ, on March 18, 2026, Respondent filed with the Court a complete, sworn and certified copy of the record of the proceedings before Respondent below, including a typewritten transcript of the hearings held on October 8, 2025, and November 5, 2025. On April 30, 2026, Respondent filed a Motion to

Dismiss.³ On May 29, 2026, Petitioner filed its Answering Brief.⁴ On June 22, 2026, Respondent filed its Reply Brief. I held oral argument on August 24, 2026. This is my finding on the Petition.

STANDARD OF REVIEW

A writ of *certiorari* is not the functional equivalent of an appeal.⁵ Rather, when conducting *certiorari* review of a board of adjustment decision,⁶ I review the board's decision for “the correction of errors of law” and to determine “whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law.”⁷ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁸ Additionally, substantial evidence is “a low standard to affirm, and a high standard to overturn.”⁹ “Unlike the preponderance of the evidence standard, substantial evidence does not require a finding of ‘the greater weight of the evidence’ for a particular party.”¹⁰

³ Pursuant to Super. Ct. Civ. R. 12(b)(6). At oral argument on August 24, 2026, the parties agreed that full briefing had been completed, and therefore my decision would be on the merits.

⁴ On August 18, 2026, Petitioner corrected a citation in its Answering Brief.

⁵ *Schweizer v. Board of Adjustment of City of Newark*, 980 A.2d 379, 383 (Del. 2009).

⁶ Pursuant to 22 Del. C. § 328.

⁷ *Markert v. Bd. of Adjustment of City of Rehoboth Beach*, 2022 WL 4478388, at *3 (Del. Super. Ct. Sept. 26, 2022) quoting *Dexter v. New Castle County Bd. of Adjustment*, 1996 WL 658861, at *2 (Del. Super. Sept. 17, 1996).

⁸ *Diamond Port Prop., LLC v. City of Wilmington Zoning Bd. Of Adjustment*, 2024 WL 5183693, at *3 quoting *Snyder v. New Castle Cty.*, 135 A.3d 763, 2 (Del. 2016).

⁹ *Markert*, 2022 WL 4478388, at *3 quoting *Dover Land Holdings, LLC v. Kent County Bd. of Adjustment*, 2016 WL 3951699 (Del. Super. July 15, 2016).

¹⁰ *Id.* quoting *Taylor v. State*, 748 A.2d 914 (Table) (Del. 2000).

On *certiorari* review, the Superior Court “will not weigh the evidence, determine questions of credibility, or make [its] own factual findings.”¹¹

Additionally, this Court has previously stated that:

“[i]t is well established that it is the role of the [board of adjustment], not this Court, to resolve conflicts in testimony and issues of credibility.¹² Whenever the factual issues are fairly debatable, it is the duty of the Board to formulate decisions about the weight and credibility of various evidence or testimony presented to the Board.¹³ The Court's responsibility is merely to determine if the evidence is legally adequate to support the agency's factual findings.¹⁴ If the agency or Board's decision is supported by substantial evidence, the Court must sustain the decision of the Board, even though it would have decided otherwise had it come before it in the first instance.¹⁵

On a *certiorari* petition, this Court's determination is limited to whether, on the face of the record, the board's decision below “[is] not contrary to the law [and is] supported by substantial evidence” and whether the board “committed no legal errors in reaching that decision.”¹⁶ A court will reverse a decision of a board of adjustment for an error of law only when the record affirmatively shows the board proceeded illegally or manifestly contrary to law.¹⁷

¹¹ *Diamond*, 2024 WL 5183693, at *2 quoting *Bd. of Adjustment of Sussex Cty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

¹² *Holowka v. New Castle Cnty. Bd. of Adjustment*, 2003 WL 21001026, at *3 (Del. Super. Apr. 15, 2003) citing *Mooney v. Benson Management Co.*, 451 A.2d 839, 841 (Del. Super. 1982), *rev'd on other grounds*, 466 A.2d 1209 (Del. 1983).

¹³ *Id.* citing *Mettler v. Board of Adjustment*, 1991 WL 190488, at *2 (Del. Super. Aug. 21, 1991).

¹⁴ *Id.* citing 29 Del. C. § 10142(d).

¹⁵ *Id.* citing *Mellow v. Bd. of Adjustment of New Castle Cnty.*, 565 A.2d 947 (Del. Super. 1988).

¹⁶ *Hoey v. City of Wilmington Zoning Bd. of Adjustment*, 2011 WL 7063243, at *3 (Del. Super. Dec. 9, 2011).

¹⁷ *Schweizer*, 980 A.2d at 383.

This standard of review applies whether the underlying decision of the board of adjustment is a variance decision or, as here, an appeal from a determination of a building official.¹⁸ On a *certiorari* petition, judicial review by this Court is, of course, limited to the board’s December 2025 decision below.¹⁹

Finally, on *certiorari* review, this Court’s review is limited to determining whether Respondent, in reaching its decision “(i) exceeded its jurisdiction; (ii) proceeded illegally or manifestly contrary to law; or (iii) proceeded irregularly.”²⁰ Petitioner here does not contend that Respondent exceeded its jurisdiction or proceeded irregularly. Rather, Petitioner here contends that Respondent acted illegally based on mistakes of law and fact.

PETITIONER’S GROUNDS FOR REVIEW

Petitioner asserts three grounds for review:

First, Petitioner contends that Respondent denied Petitioner procedural due process because the Building Official failed to provide Petitioner with adequate

¹⁸ See *MacDonald v. Bd. of Adjustment of Town of Dewey Beach*, 558 A.2d 1083 (Del. Super. 1989); See e.g. *Colburn v. Bd. of Adjustment of City of New Castle*, 2019 WL 4955788, at **1, 3-4 (Del. Super. Oct. 8, 2019) (applying the ‘free from legal error and substantial evidence standard’ to an appeal of a board of adjustment decision affirming a decision by a Building Official); see e.g. *John DiMondi Enters. LLC v. Bd. of Adjustment of City of New Castle*, 2024 WL 867088, at **1-2 (Del. Super. Feb. 29, 2024) (applying the ‘free from legal error and substantial evidence standard’ to an appeal of a board of adjustment decision granting various zoning variances).

¹⁹ 22 Del. C. § 328(b).

²⁰ *Diamond Port Prop., LLC v. City of Wilmington Zoning Bd. of Adjustment*, 2024 WL 5183693, at *2 (Del. Super. Dec. 20, 2024) quoting *Black v. New Castle Cnty. Bd. of License*, 117 A.3d 1027 (Del. 2015).

notice of the October 16, 2024, letter in which the Building Official found that Petitioner's nonconforming use had been abandoned, and of Petitioner's right to appeal such alleged finding of abandonment.

Second, Petitioner contends Respondent erred by finding Petitioner's nonconforming use appeal was untimely.

Third, with respect to Respondent's conclusion that Petitioner's nonconforming use had been abandoned, Petitioner contends that (a) Respondent misapplied the Zoning Code and applicable case law, (b) Respondent's conclusion was unsupported by substantial evidence, and (c) Respondent failed to meet its burden to prove abandonment.

The parties fully briefed and argued all three of these grounds. However, since the third ground – abandonment – is dispositive of this case, in the interest of judicial economy, I address the first two grounds perfunctorily. The parties agreed at oral argument on August 24, 2026, that Petitioner was given a hearing on the merits satisfying due process, and addressing its claims as to the abandonment issue.

ANALYSIS

The parties agree that, since October 2021, the Zoning Code has expressly prohibited the use of a clinic for the treatment of substance abuse in the zoning district where the Property is located. The parties further agree that the Zoning Code provides that a nonconforming use in this zoning district shall be deemed abandoned

where its use ceases for six months. However, the parties dispute whether the use of the Property has been abandoned. If Petitioner did not abandon the use, it would grandfather the nonconforming use. The parties agree that Petitioner or its legal tenants stopped any operation as a drug treatment facility in late 2023.

Section 15-48c(c) of the City’s Zoning Code currently prohibits various uses in the C-3 Riverfront Enterprise Zone, including “(9) Medical offices or clinics for the treatment of substance abuse or dispensing of medications for the treatment of substance abuse.” This prohibited use was enacted by the City Council of the City by way of October 2021 Ordinance (2021-08) amending the City Code. Public notice of the adoption of the amendment was published in a newspaper of general circulation on November 4, 2021.²¹

Section 15-99 of the City’s Zoning Code provides:

- (a) Any structure or use legally existing or authorized by a valid, unexpired building permit issued prior to the effective date of this Chapter may be continued although such structure and/or use does not conform to the provisions of this Chapter.
- (b) If a non-conforming use ceases for one (1) year, it shall be deemed to be abandoned and any subsequent use shall be in conformity with the provisions of this Chapter, unless the non-conforming use is in a C-3 Riverfront Enterprise Zone where if the use ceases for six (6) months, it shall be deemed to be abandoned and any

²¹ See D.R.E. 202.

subsequent use shall be in conformity with the provisions of the Section.

Section 15-99(c) of the City Code provides, in relevant part, that the existence and extent of a nonconforming use shall be a question of fact.

Under Delaware case law, abandonment of a nonconforming use can be found under either of two circumstances: “(1) where there is intent by the property owner to abandon the non-conforming use with an accompanying clear act, or failure to act, to demonstrate such an intent; or (2) abandonment is presumed where a property owner terminates a nonconforming use for a period in excess of the time specified in the zoning ordinance.”²² Delaware law does not require a finding that Petitioner intended to abandon its nonconforming use where, as here, Petitioner stopped any operations as a drug treatment facility for a period in excess of the time specified in the City’s Zoning Code.

The October 16, 2024, letter from the Seaford Building Official to Petitioner’s realtor does not bear the weight that Petitioner places on it. That letter does not even address whether the nonconforming use was ever abandoned or lapsed. It simply determines that Petitioner’s intended use was nonconforming, which is all the

²² *W & C Catts Fam. Ltd. P’ship v. Town of Dewey Beach*, 2018 WL 6264709 (Del. Super. Nov. 30, 2018); *See also Hamm v. City of Wilmington Zoning Bd. of Adjustment*, 2010 WL 547413 (Del. Super. Feb. 17, 2010) (stating “where a property owner terminates a nonconforming use for a period in excess of the lapse time specified in the zoning ordinance, abandonment is presumed.”).

Building Official was required to do.²³ Petitioner simply assumes that the Building Official presumed abandonment.

Substantial evidence in the record below demonstrates that the Building Official was aware that the Property was not being used as a substance abuse treatment clinic in October 2024. Substantial evidence in the record also supports Respondent's determination below that Petitioner's nonconforming use had been abandoned for more than the six-month period established by the Zoning Code.

Petitioner asserts that it did not intend to abandon its nonconforming use. But as a matter of law, and in view of the provisions of the Zoning Code, Petitioner's intent is irrelevant where, as here, Petitioner's nonconforming use ceased for more than the six-month period permitted by the Zoning Code. Cases cited by both Petitioner and Respondent make it clear that "abandonment is presumed where a property owner terminates a nonconforming use for a period in excess of the time specified in the zoning ordinance."²⁴ In my view, Respondent's determination that Petitioner abandoned its nonconforming use is supported by substantial evidence and is fully consistent with applicable law.

Petitioner makes an additional argument that evidence of continuous rent payments (by the tenant which had previously operated a drug treatment facility)

²³ Under Section 15.51.1(c) of the Zoning Code.

²⁴ *W & C Catts Fam. Ltd. P'ship*, 2018 WL 6264709, at *3; *Hamm*, 2010 WL 547413 at *4.

during the period of non-use negates the finding of abandonment. I find no basis for this in fact or law. Here, the restricted use is “medical offices or clinics for the treatment of substance abuse or disbursements of medications for the treatment of substance abuse.”²⁵ It is undisputed that the Property has not been used as a substance abuse treatment clinic since the end of December 2023. Petitioner states that its tenant continued to pay rent while the Property sat empty. However, the fact that Petitioner collected rent while the property sat empty is irrelevant as that activity does not demonstrate use as a substance abuse treatment clinic.²⁶ In Delaware cases where the Court found a nonconforming use to be abandoned due to its cessation for a period beyond that prescribed in the applicable zoning laws, the Court in each case based its decisions on whether the actual nonconforming use itself had resumed, not whether an indirectly associated financial activity like paying rent had occurred.²⁷

²⁵ Zoning Code § 15-48c(a)(6).

²⁶ See *W. & C. Catts Fam. Ltd. P'ship*, 2018 WL 6264709, at *4 (finding that even occasional or periodic resumption of the nonconforming use does not defeat abandonment where the nonconforming use activity has been discontinued for longer than the period prescribed by the zoning code, even if the owner intended to resume it); see also *W. & C. Catts Fam. Ltd. P'ship*, 2018 WL 6264709, at *5 (finding that where the actual nonconforming use activity has been discontinued for longer than the period prescribed by the zoning code, a board of adjustment may deem it abandoned notwithstanding the property owner's contrary intent).

²⁷ See, e.g., *Auditorium, Inc. v. Bd. of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 534-535 (1952) (finding a nonconforming use to be abandoned after an auditorium ceased presenting sporting exhibitions for a period of at least two years); *W & C Catts Fam. Ltd. P'ship v. Town of Dewey Beach*, 2018 WL 6264709, at *3-5 (Del. Super. Nov. 30, 2018) (finding a nonconforming use to be abandoned after a restaurant stopped cooking food outdoors for a period of at least one year); *Morgan v. Callaway*, 2003 WL 1387127, at *6 (Del. Super. Jan. 29, 2003) (finding a nonconforming use to be abandoned after a property ceased to be used to conduct commercial trucking operations for a period of at least two years).

Finally, Petitioner also asks me to examine the conduct of Respondent in light of the provisions of the Americans with Disability Act (“ADA”)²⁸, which provides:

Subject to the provision of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by such entity.

I have no doubt that one of the classes of people protected under the ADA are those people in recovery from opioid use disorder (“OUD”), or that it is illegal for any municipality to discriminate against such people.

However, Petitioner’s citations to the U.S. Department of Justice, Civil Rights Division, Notice and the U.S. Circuit Court zoning law cases²⁹ speak in terms of targeted discrimination against persons with OUD because of residents’ hostility toward such persons, or arbitrarily applying the Zoning Code differently to persons with OUD. In this case, there is no evidence in the record that Respondent applied the Zoning Code’s blanket prohibition on the use of properties as drug treatment facilities in an arbitrary or discriminatory manner. In

²⁸ 42 USC Section 12132.

²⁹ *New Directions Treatment Services v. City of Reading*, 490 F. 3rd 293 (3d Cir. 2007); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3rd 725 (9th Cir. 1999).

addition, I have no claims before me of an ADA violation in this case.

I have sympathy for the difficult situation in which Petitioner found itself. Due to circumstances beyond the control of Petitioner as owner of the Property, its tenant found itself unable to continue the use of the Property as a drug treatment facility. Nonetheless, in my view, Petitioner's definition of use to include payment of rent is too broad. Presumably the next argument would be that simply owning the Property qualifies as continuous use. Petitioner's definition of use would be so comprehensive as to make the abandonment language of the Zoning Code a nullity. In the face of the Zoning Code's clear language, I do not accept Petitioner's argument.

CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss the Petition is

GRANTED.

IT IS SO ORDERED.

/s/Craig A. Karsnitz
Craig A. Karsnitz

cc: Prothonotary