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IN THE SUPREME COURT

OF THE STATE OF DELAWARE

FRIENDS OF THE H. FLETCHER BROWN MANSION, et al.,	)	
Appellants,	)	
v.	)	C.A. No. 445, 2013
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,	)	Court Below: Superior Court of the State of Delaware New Castle County C.A. No. N12A-05-006 RRC
Appellees.	)	

RESPONDENTS-BELOW APPELLEES, CITY OF WILMINGTON ZONING BOARD OF ADJUSTMENT'S ANSWERING BRIEF

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Date: November 12, 2013

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NATURE OF THE PROCEEDINGS

This case has its origin in a hearing before the Wilmington Zoning Board of Adjustment ("ZBA") held on October 28, 2009.[1] The Board was acting on an application for three variances by Ingleside Homes, Inc. ("Ingleside"). Two of that variances were to allow the partial demolition and renovation of the H. Fletcher Brown Mansion ("Brown Mansion"), located at 1010 N. Broom Street in the City of Wilmington. The third variance was to permit multi-family use in an R-1 zone. The Board, by unanimous vote, granted all three variances. The ZBA issued an opinion memorializing its decision on December 16, 2009.

Friends of the H. Fletcher Brown Mansion, *et al*. ("Appellants") filed an appeal of this first decision with the Superior Court on January 14, 2010. On August 26, 2010, the Superior Court issued its first opinion affirming the ZBA's decision.

Appellants appealed the first Superior Court decision to the this Court on December 9, 2010. On December 12, 2011, this Court overturned the ZBA and the Superior Court on the ground that the ZBA was improperly constituted pursuant to Delaware state law. *See Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1061 (Del. 2011).

1. The date appearing on the transcript of (February 17, 2010) is incorrect; this is the date when the transcript was ordered. The Zoning Board of Adjustment met for the first time on October 28, 2009.

Ingleside appeared before the ZBA again on February 22, 2012, acting on an application for the same three variances as in 2009. The third variance, (hereinafter the "Use Variance") engendered the greatest opposition. The ZBA, by unanimous vote, granted all three variances. A written decision attesting to the same was issued on April 11, 2012

Appellants appealed the second decision to the Superior Court on May 9, 2012, challenging the granting of the Use Variance. On July 26, 2013, the Superior Court upheld the ZBA's decision. *See Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2013 Del. Super. LEXIS 306 (Del. Super. Ct. July 26, 2013).

On August 23, 2013, Appellants appealed the Superior Court decision to this Court. On October 7, 2013, Appellants filed their Opening Brief. Following is the City of Wilmington and City of Wilmington Zoning Board of Adjustment's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. THE SUPERIOR COURT CORRECTLY FOUND THAT THE USE VARIANCE IS CONSISTENT WITH THE WEST SIDE COMPREHENSIVE DEVELOPMENT PLAN AND DELAWARE LAW.

II. DENIED. THE SUPERIOR COURT PROPERLY HELD THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ZBA'S FINDING THAT PARKING WOULD NOT BE ADVERSELY AFFECTED BY THE VARIANCE.

STATEMENT OF FACTS

The ZBA held a hearing on February 22, 2012, to consider Ingleside's application for three variances to renovate Brown Mansion located at 1010 N. Broom Street, Wilmington Delaware. The ZBA was composed of Senior Assistant City Solicitor Mark Pilnick ("Pilnick"), sitting by designation of the City Solicitor, City Engineer David Blankenship ("Blankenship"), and mayoral designee Manfred Mader ("Mader"). A-50.

Lisa Goodman, Esquire ("Goodman") spoke on behalf of Ingleside. *Id.* Goodman first presented a procedural and legal history of Ingleside's application, which, in relevant part, follows: On October 21, 2009, the Design Review and Preservation Commission ("DRPC") approved a precursor to this project with some minor conditions. A-51. On October 28, 2009, Ingleside presented the plant to the ZBA, which was then composed of Pilnick, Blankenship and Mayor's designee Harold Lindsey. *Id.* At that time, the ZBA unanimously granted the variances which were the same variances then being sought. *Id.* On April 26, 2010, the Superior Court upheld the ZBA's first decision to grant the variances. *Id.* This Court, on December 12, 2011, reversed the Superior Court's decision based only on the composition of the ZBA. *Id.* There was no discussion regarding the merits of the case in the Delaware Supreme Court's decision. *Id.*

According to Goodman, on February 2, 2012, the Governor signed House Bill No. 241 which allowed the ZBA to be constituted by designees of the Mayor, the City Solicitor and the Chief Engineer of Public Works. *Id.* Goodman stated that because of House Bill No. 241, the Board was properly constituted at the February 22, 2012 meeting. *Id.*

After Goodman's initial presentation, she introduced Larry Cessna ("Cessna") President and CEO of Ingleside. A-51. Cessna stated Ingleside's mission was to provide affordable housing for low and moderate income seniors. *Id.* Cessna then gave a brief history of the Mansion. It was willed to Delaware Hospital by Florence Brown in 1953. *Id.* From the mid-1950s to 1971 the Mansion served as a nursing home. *Id.* Delaware Hospital later became known as the Episcopal Church Foundation in 1956. A-52. The Episcopal Church Foundation merged with the Church Home Foundation in the early 1970's and eventually became Ingleside. *Id.* From 1976 to late 2008, the Mansion served as the administrative building for the 15-story apartment building built adjacent to the Mansion. A-53-3.

Cessna then explained the problems associated with renovating the Brown Mansion. He stated in 2000 Ingleside began exploring option with the Mansion because it was in disrepair. A-53. Originally, Ingleside planned to renovate it and keep it for administrative offices. *Id.* Because of budget restrictions, Ingleside did not

have enough money to repair the roof, make HVAC modifications, perform abatement of environmental issues, and various other necessary repairs. *Id*. Ingleside considered other alternatives. However, due to the extensive renovations needed, and accompanying expense, Ingleside could not develop a feasible solution. *Id.* Ingleside decided to demolish the Mansion and build a 54-unit building for seniors with HUD 202 funds. *Id.* This met with great resistance from the community. *Id.* However, after rounds of meetings with neighbors and the help of Leon Wiener and Associates, a compromise was achieved, and the proposal was placed before the ZBA. *Id.*

Goodman next introduced Glen Brooks, ("Brooks"), a real estate developer at Leon Weiner Associates. *Id.* Leon Weiner & Associates specialized in affordable housing for both seniors and families. *Id.* Leon Weiner & Associates was hired by Ingleside in March, 2009 to facilitate the resolution of the proposed changes to the Mansion between Ingleside and the community. A-54. To facilitate this compromise, a working group was organized which consisted of neighborhood residents, elected officials and appointed officials, and Ingleside representatives. *Id.*

Brooks presented a color site plan showing the outline of the existing and proposed buildings. *Id.* The site is generally at the intersection of West 11th and Broom Streets. *Id.* Currently, there is a 15 story high rise to the east and adjacent to the Brown Mansion. *Id.* The Brown Mansion is 14,351 square feet. *Id.* The

compromise proposal stated that only 2,940 square feet or 20.49 percent of the Mansion would be torn down. *Id.* Therefore, the vast majority of the Mansion would be preserved and renovated. A-55. The plan called for an addition to the Brown Mansion, primarily fronting 11th Street, up to the existing garden. *Id.* The existing garden would not be replicated but several elements of the existing garden would be located in the green lawn space. *Id.* The addition would be roughly 39,000 square feet and would be the same height as the Mansion. *Id.*

According to Cessna, the goal of preserving the Mansion would be accomplished by extensive renovation of the Broom Street façade. *Id.* Doors and windows would be rehabbed, shutters and shutter hardware would be repaired, and the stucco and limestone entry would be cleaned. *Id.* All existing wood is to be repainted, and the clay tiles from the garage would be salvaged and used to repair the existing roof. *Id.* The new addition would have a stucco exterior with brick veneer accents. *Id.* The addition itself was designed to evoke images of the elements of the Mansion. *Id.*

Goodman asked Cessna about parking during the time Ingleside used the Mansion as administrative offices with 20 staff members. Cessna replied, "They parked on Broom Street and 11th Street, and there was never a problem with parking." A-57. Goodman then asked Brooks whether the existing parking lot serving the high

rise has a 58 car capacity, as one out of eight residents or units may own a car. A-57. To both questions he replied "that is correct." *Id.* He was also asked whether he had the opportunity to observe parking at various times, to which Brooks replied, "Yes." *Id.* Goodman asked if there was an excess capacity in the parking lot, and his reply was, "Yes." Cessna also agreed with Brooks' opinion. *Id*.

Goodman then introduced Lee Sparks ("Sparks") of Architect and Design Collaborative in Wilmington, who designed the architectural plans for the renovations to Brown Mansion. *Id*. Sparks identified the variances that are required in the plan, and explained to the ZBA how the design of the new structure related to the Mansion. A-58-9. The plan also received approval from DRPC. A-59. Sparks also confirmed that the height of the addition would match the height of the Mansion. A-59-60.

Goodman next introduced Rodney Robinson ("Robinson"), a landscape architect. A-61. Robinson prepared the landscape plans for the application and explained the plans for the gardens. *Id.* Robinson stated he was familiar with Charles Levitz, who was a landscape architect and civil engineer who designed gardens in the early part of the 20th century. A-61. Levitz's design relates to the remains of the original gardens at Brown Mansion. A-61-2. Ingleside plans to recreate a garden similar in scale and treatment on the south side of the new addition, including renovation of the existing pool and a small fountain with a sculptured piece. A-61-2.

At the conclusion of Robinson's testimony, Goodman summarized the standards that must be met for granting a use variance: 1) that the land cannot yield a reasonable return if used only for the purposed use; 2) the needs for the variance are due to unique circumstances; 3) the use will not alter the essential character of the locality; and 4) the use permitted on the land and under the existing zoning is economically unfeasible. A-62.

David Brody ("Brody"), a construction manager of the Wilson Construction Company, testified on the issue of the land realizing a reasonable return. A-63. Brody provides construction estimates, has been in the construction industry for 35 years, and over that time did approximately 3,000 estimates. *Id.* Brody opined that the construction cost to renovate Brown Mansion into a single family home was over $2.3 million. *Id.* Brody's estimate did not include other aspects of the renovations. A-64. Specifically, these additional costs included relocating all of the utilities constituting about 10% of the construction cost, and architectural fees that would increase the full job to approximately $3.5 million. *Id.*

Earl Timmons ("Timmons"), a real estate appraiser from C.B. Richard Ellis in Philadelphia, Pa., compiled an analysis based on existing sales in the area of comparable property. A-66. Timmons estimated Brown Mansion would sell for between $2.28 and $2.6 million. *Id.* He stated the highest selling house in the City in

the last three years sold for $1.54 million. A-69. Timmons stated that renovating Brown Mansion into a single family house would result in a negative return of 50 percent to 70 percent. A-70. Goodman also brought to the ZBA's attention that there was an offer made on the property that evening for $250,000 (A-72), although the mortgage on the property was $370,000. A-73.

The ZBA then opened the hearing to public comment. *Id.* Michael Glass of 902 N. Broom Street and an appellant in this case spoke first. Opposed the proposal for several reasons, including but not limited to, the variance would be in violation of the West Side Comprehensive Plan ("Comp Plan"), the area is already heavily impacted by social services, the need to preserve the area's residential space, and that the change in use from a low density to a high density residential area would adversely impact the neighborhood. *Id.* Mr. Glass opined that the proposal was tantamount to spot zoning which the City did not condone. A-74.

Robin Kusumi who lives at 1110 N. Broom Street with her husband, Jeffery Kusumi, an Appellant in this matter, spoke next. A-75. Ms. Kusumi noted that there were several reasons why she opposed the proposal. She stated that she and her husband moved to Cool Springs from Trolley Square due to the historic nature and the area's low density nature. *Id.* Ms. Kusumi believed that granting the proposal would have a negative impact on the property values and would forever change the character

of the neighborhood. *Id.* Emily Bowen, then a senior at Ursuline Academy school, stated she must rise early to get a parking space in that area. A-76.

Appellant Mr. Kusumi stated Ingleside's proposal does not have a provision for parking. A-79. He stated that the existing parking problems were severe and extended over a ten block area of the neighborhood. *Id.* He stated that Brown Mansion is uniquely situated between two high schools, Ursuline and Padua Academies, and that the area is significantly congested during the week days due to student parking. A-79-80.

Ray Banker, who lives directly across from Brown Mansion at the corner of North Broom and West 11th Streets, testified that he spoke on behalf of Mr. and Mrs. Dorman and Mr. and Mrs. Welch who are all neighbors and live in close vicinity to Brown Mansion. A-77. Meetings were held with elected officials, Ingleside, the Cool Spring Neighborhood Association and the impacted neighbors. *Id.* Through discussions about feasibility of the project and the impact on the surrounding areas, the proposed plan came about because many people in the neighborhood took the time to constructively work on a solution. *Id.* Mr. Banker stated this resolution took at least two years, through many drafts of plans until they arrived at consensus with one that was approved by all the regulatory bodies prior to the litigation. *Id.* As a group, they compromised to maintain some degree of the historic footprint of the Brown

Mansion, the shape, the size, the original façade and the surrounding garden. *Id.* They created something that would fit with the City's long term housing plan and create a look that supplemented the fabric of the neighborhood. *Id.* Banker also commented about parking. He stated that Ingleside's high-rise tower typically has 12-14 open spots and has asked for no additional parking in this area. He requested the ZBA vote to again approve the Ingleside project. A-77-8.

Clara Zahradnick, who lives at 1109 North Franklin Street, stated she lived on a block where most of the Ursuline Academy students park, and because she, like others who live on that street, have off-street parking, she sees no problem. She lent her support to the project. A-80.

Next to speak was Kevin Melloy, who lives at 200 Riverview Avenue in the Rockford Park Historic District. A-80. Melloy stated he was concerned that the project would put a huge burden on the community and it was changing an established residential historic district. A-80-1.

Dr. Dan James Gladnick, who lives at 1104 North Broom Street, and is an Appellant in this matter, presented a petition in opposition to the Ingleside proposal, allegedly containing over 100 signatures. A-81-2. Virginia Lafferty, who lives at 900 North Broom Street, stated if the project goes forward, it will overwhelm the existing parking area and she is opposed to the project. A-82-3. Kathy Gladnick, who lives at

1104 North Broom Street and is the wife of Appellant Dan Gladnick, voiced concerns about the parking and opposed the project. A-83-4.

Dana Robile, who lives at 1427 North Franklin Street and whose mother lives at Ingleside on Franklin Street, testified that Ingleside has won national awards for its organization, operations, and how it runs its facilities. A-84. She stated that there is a community need for a facility like this in the City of Wilmington. *Id.* Ms. Robile stated that the project would create construction jobs, would create jobs in the upkeep of a new building, and that it was very positive, especially in light of today's economy. *Id.* She also presented petitions in support of the project. *Id.* Constance Smith, who lives at 1004 North Broom Street, opposed Ingleside's application. A-84-5.

Richard Abbott, attorney for the Appellants in this matter, brought up several points to the ZBA. A-88. The two points relevant to the pending appeal were that the zoning variance is inconsistent with the Comp Plan, and that the variance would exacerbate existing parking problems. *Id.*

Wilmington City Council Members Bud Freel, Steven Martelli and Samuel Prado requested the Board support the application for the three variances. A-88-9. Chairman Pilnick then closed the public comment period and allowed the applicant to briefly address the concerns which had been expressed. A-89.

Goodman spoke for Ingleside, stating there was no evidence to contradict the cost to renovate the Mansion. A-90. Adaptive reuse was exactly what the National Trust and Preservation Delaware recommended for properties of this type. *Id*. The Delaware State Historical Preservation Office issued a letter to the ZBA finding no adverse effect from the proposed project. *Id.* Goodman concluded by noting that Ingleside has met the standard set forth for each of the variances. *Id.*

Chairman Pilnick then entered into the record a letter from Wilmington City Council member Loretta Walsh, who objected to Ingleside's proposal. *Id.* The ZBA voted 3-0 in favor of Ingleside's application. A-91-2.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THAT THE USE VARIANCE IS CONSISTENT WITH THE COMP PLAN AND DELAWARE LAW.

A. QUESTIONS PRESENTED

Denied. The Superior Court did not err in finding that the Use Variance was consistent with the Comp Plan and Delaware Law.

B. STANDARD OF REVIEW

This is an appeal from a *writ of certiorari* filed by the Appellants before the Delaware Superior Court. The standard of review on *certiorari* is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. A board's decision is not reviewed on the merits of the case but on the record to determine whether the lower tribunal exceeded jurisdiction, committed error of law, or proceeded irregularly. *Adjile, Inc., et al. v. City of Wilmington*, 2005 Del. LEXIS 192 at *4-5. The scope of review on appeal from a board of adjustment's decision is limited to correction of error of law and to determine whether or not substantial evidence existed on the record to support the board's finding of fact and conclusions of law. *Janaman v. New Castle County Bd. of Adjustment,* 364 A.2d 1241, 1242-3 (Del. Super 1976).

The scope of appellate review with respect to use variances is the same as that

applied at the Superior Court level. If the record before the administrative body shows that there was substantial evidence upon which the board could properly base its decision and it is free from legal error, the reviewing court must affirm the ruling. *Sawers v. New Castle Bd. of Adjustment,* 550 A.2d 35, 35 (Del. 1988). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *Lynch v. City of Rehoboth*, 894 A.2d 407, 407 (Del. 2006). Substantial evidence is more than a scintilla, but less than a preponderance. *Olney v. Cooch et al*., 425 A. 2d 610, 614 (Del. 1981).

C. MERITS OF THE ARGUMENT

l. That Brown Mansion is zoned R-1 does not prove that other use designations violate the West Side Comprehensive Plan.

Appellants' argument that Brown Mansion's R-1 zoning classification necessarily means that the Use Variance conflicts with the Comp Plan is unfounded for several reasons. First, Appellants argue that the City of Wilmington would have necessarily rezoned Brown Mansion if its current designated use did not comply with the Comp Plan. Appellants argue this necessarily means the R-1 designation complies with the Comp Plan which, in turn, necessarily means any other designated use does not comply with the Comp Plan. However, Appellants ignore the fact that more than one use designation is consistent with the Comp Plan. Failure to rezone the property

from R-1 to R-5B does not constitute a legal admission by the City that R-5B would not be consistent with the Comp Plan because both zone designations are consistent with the Comp Plan.

In making the above argument, Appellants also improperly conflate the City with the ZBA, which is an independent board of the City created by statute. The motives of the one cannot automatically be ascribed to the other. The actions of the one do not constitute an admission on the part of the other. As such, it is possible that an official with the City Planning Department did believe, as Appellants allege, that rezoning 1010 N. Broom St. would not be permitted under the Comp Plan. Even if this could be shown, it does not constitute an admission as a matter of law (if such a concept even exists) that the variance does not comply with the Comp Plan. The City's prior actions in this context are not relevant and should not guide the Court's analysis on this question in the way Appellants urge.

Next, Appellants' reliance on *Farmers for Fairness v. Kent County Levy Court,* 2012 Del. Ch. LEXIS 12 (Del. Ch. Jan. 27, 2012) ("*Farmers"*) to conclude that Brown Mansions would necessarily have been rezoned if the R-1 designation violated the Comp Plan misses the mark. *Farmers* addressed a county, rather than a municipal, zoning statute. By his own admission, Vice-Chancellor Glasscock in that case referred only to the land use *map* of a *county* when he determined that a change in the

comprehensive plan resulted in the automatic rezoning of any land whose zoning was not in comformity with that map. *Id.* at *9-10. The court in *Farmers* notes that, "the Delaware Code provides only that the land use map or map series have the force of law with respect to county plans, while a municipality's entire comprehensive plan carries the force of law." *Id.* at n. 39, *24 (internal quotations omitted) (citing *O'Neill v. Mayor & Council of Middletown,* 2006 Del. Ch. LEXIS 10 (Del. Ch. Ct. Jan.18, 2006) at *36). Because of this fundamental difference in the Delaware statutes governing land use—only maps have the force of law in a county while in a municipality the entire plan carries the force of law—it does not follow from *Farmers* that altering a municipal comprehensive plan results in an automatic rezoning as altering a map would in a county. A map, unlike a comprehensive plan, designates specific land for specific uses. Thus, it is illogical to conclude from *Farmers* that an automatic rezoning of Brown Mansion would occur under a comprehensive plan if a use were non-conforming.

2. The Use Variance does not violate the Comp Plan.

A variance is intended to strike a balance between serving the public's interest in regulating land use and protecting the landowner's interest in exercising his property rights. *C.C. Investors, LLC, et al,. v. Brown, et al.,* 977 A.2d 301, 318 (Del. 2009). A zoning board's decision to grant a land use variance must be upheld if there

is substantial evidence to support the following factors: 1) The zoning applicant's proposed use of a property will not adversely affect the character of the surrounding neighborhood; and 2) circumstances of exceptional practical difficulty would exist if the applicant was forced to use the property in accordance with the existing zoning designation. *See Mesa Communs. Group, LLC v. Kent County BOA*, 2000 Del. Super. LEXIS 417 at *23 (Del. Super. Oct. 3, 2000). Review of the record shows the ZBA had substantial evidence before it to grant Ingleside a use variance.

Furthermore, where strict application of a zoning ordinance would result in an unnecessary burden on a landowner, the grant of a variance serves as "an escape valve." *C.C. Investors*, 977 A. 2d at 318. A variance protects a landowner's rights from the unconstitutional application of zoning laws. Therefore, a board of adjustment should grant a variance from a zoning restriction if strict application of the law would amount to an unconstitutional taking. *Id.*

The Comp Plan provides for a variety of competing interests. In addition to categorizing the development patterns within the West Side, the Plan also projects where designated uses should congregate. The subject property is bordered to the southwest by properties designated as "Institutional" (Padua Academy), to the south by "Medium" and "High Density Residential," and on the east by property designated "High Density Residential." Brown Mansion will be combined with the parcel zoned

R-5 ("High Density Residential") immediately to the east as these properties are owned by the same party. They are physically connected and used for the same purposes.

More importantly, however, when the Comp Plan was revised in 2009, the parcel on which Brown Mansion sits was *reclassified* as "High Density Residential." A-124. The revision of Ingleside's project accommodates a reduced intensity of the development, houses low and middle income senior citizens, preserves most of a historic building and on-site gardens, and ends the lengthy vacancy of Brown Mansion. As the Superior Court correctly noted, these accomplishments fit perfectly with the explicitly stated goals of the Comp Plan and comply with the 2009 reclassification.

Viewing these goals in concert, Appellants' claim that the ZBA's approval is not in conformity with the Comp Plan rings hollow. What Appellants have ignored is the fact that the project advances City-wide goals of historic preservation, housing for those in need, and the proposed density, as set forth in the Comp Plan and the City-Wide Plan of Land Use. (IB-65-74; IB-80-85). The Use Variance is consistent with the goals of the City-Wide Plan and the Comp Plan, as the Superior Court below correctly found. As such, the Superior Court's opinion must be affirmed.

3. Even if he Use Variance did violate the Comp Plan, the ZBA would have been permitted to grant it pursuant to the powers vested in it by 22 *Del. C.* § 327(a)(3).

22 *Del. C.* § 327(a)(3) permits boards of adjustment to "[a]uthorize…variance[s] from *any* zoning ordinance, code or regulation." (emphasis added.) A comprehensive plan has the force of law. *See* 22 *Del. C.* § 702(d). 22 *Del. C.* § 702(b) defines "comprehensive plan" as a "strategy setting forth the jurisdiction's position on … general uses of land within the community," which must contain "policies, statements, goals and planning components for public and private uses of land." *Id.* 22 *Del. C.* § 702(c) requires a municipality to rezone any land whose designated use is inconsistent with a comprehensive plan. *Id.* A municipal comprehensive plan, then, is itself necessarily a zoning regulation because it has the force of law, it is defined as a strategy setting forth the jurisdiction's position on public and private uses of land, and a jurisdiction must rezone land whose designated use is inconsistent with the plan. As such, the ZBA has authority under 22 *Del. C.* § 327(a)(3) to grant a variance from the strictures of the Comp Plan so long as the other requirements of 22 *Del. C.* § 372(a)(3) have been met, which is to say in any situation where a use variance would be otherwise lawful.

Appellants correctly point out in their opening brief that the General Assembly completely rewrote 22 *Del. C.* § 702 in 1998, and thus it is a newer statute than § 327. "It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision." *Feleke v. State*, 620 A.2d 222, 226 n.8 (Del. 1993), citing *Green v. County Council of Sussex County*, 415 A.2d 481, 484 (Del. Ch. 1980). Given the text of § 327(a)(3), it is plain that the General Assembly did not have intend its revision of § 702(d) to prohibit use variances that conflict with a comprehensive plan. Yet Appellants now ask this Court to adopt a reading of § 702 which would place it directly in conflict with § 327(a)(3).

Furthermore, § 702(d) is itself a zoning statute just like a comprehensive plan. Section 327(a)(3), in granting boards of adjustment the power to vary *any* zoning law or regulation, does not distinguish between state and local law. Therefore, the ZBA has the power to grant a variance from both the Comp Plan and § 702(d). Appellants' reading would create one set of laws and regulations (the zoning map and code) which would be subject to variances, and another (comprehensive plans and maps) which would not be subject to any variance. Given that § 702(c) requires municipalities to amend their official zoning maps within 18 months to reflect the designated uses set

forth in a comprehensive plan, if this Court were to adopt Appellants' reading of § 702(d), § 327(a)(3) would be rendered a nullity because no variances to the newly adopted zoning designation would be permitted. As demonstrated by the volume of case law cited by Appellants, § 702(d) prohibits only re-zoning, *not* use variances, inconsistent with a comprehensive plan. Re-zonings are not use variances. Approvals for use variances are more specific, narrow and flexibly tailored to the needs of the community and to the defined use than rezoning. *Blake v. Sussex County Council*, 1997 Del. Ch. LEXIS 120 at *11 (Del. Ch. July 15, 1997). In no case cited by Appellants has a Delaware court overturned a zoning variance on the grounds that it is not consistent with a comprehensive plan. Therefore, even if the Use Variance did conflict with the Comp Plan (which it does not), it was well within the authority of the ZBA to provide relief from both City zoning regulations and the Comp Plan under 22 *Del. C.* § 327(a)(3).

II. THE SUPERIOR COURT PROPERLY HELD THAT SUBSTANTIAL EVIDENCE SUPPORTED THE ZBA'S FINDING THAT PARKING WOULD NOT BE ADVERSELY AFFECTED BY THE VARIANCE.

A. QUESTION PRESENTED

Denied. The Superior Court properly held that substantial evidence supported the ZBA's finding that a parking problem did not exist in the neighborhood, and that even if it did, the Use Variance would not exacerbate it.

B. STANDARD OF REVIEW

This is an appeal from a *writ of certiorari* filed by Appellants to the Delaware Superior Court. The standard of review on *certiorari* is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. A board's decision is not reviewed on the merits of the case, but on the record to determine whether the lower tribunal exceeded jurisdiction, committed error of law, or proceeded irregularly. *Adjile, Inc.*, 2005 Del. LEXIS 192 at *4-5. The scope of review on appeal from a board of adjustment's decision is limited to correction of error of law and to determine whether or not substantial evidence existed on the record to support the board's finding of fact and conclusions of law. *Janaman,* 364 A.2d at 1242-3.

The scope of review with respect to use variances is the same as that

applied at the Superior Court level. If the record before the administrative body shows that there was substantial evidence upon which the board or agency could properly base its decision and it is free from legal error, the reviewing court must sustain the ruling. *Sawers,* 550 A.2d at 35. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *Lynch,* 894 A.2d at 407. Substantial evidence is more than a scintilla but less than a preponderance. *Olney*, 425 A. 2d at 614.

C. MERITS OF THE ARGUMENT

l. No finding exists that there is a parking problem in the neighborhood.

1 *Wilm. C.* § 48-70(b) only prevents the ZBA from granting variances which would exacerbate an *existing* parking problem. *Id.* As such, in order to prevail before the trial court, Appellants needed to show that: 1) a parking problem exists; and 2) that the Use Variance granted to Ingleside exacerbates it.

Appellants erroneously assert that the Superior Court did not find that a parking problem exists in the neighborhood. The Superior Court only acknowledged that "much evidence indicates that the neighborhood has substantial parking problems." *Friends,* 2013 Del. Super. LEXIS at *43. Notwithstanding this, the Superior Court acknowledged that "[s]ome evidence supports Ingleside's claim that the neighborhood

has no real parking problems…." *Id.* Delaware law clearly allows the ZBA to weigh the evidence and conclude that a parking problem did not exist so long as substantial evidence supports that conclusion. *Barron v. Zoning Bd. of Adjustment of the City of Wilmington,* 1994 Del. Super. LEXIS 608 at *2 (Del. Super. Dec. 2, 1994). As the trial court was required to view the evidence in a light most favorable to the party prevailing before the ZBA (*Id.* at *4) it could not have held that a parking problem existed. Thus, the Trial Court correctly declined to do so. As Appellants have failed to show that a parking problem existed in the neighborhood when the evidence is viewed in a light most favorable to Ingleside, they necessarily fail to show that the ZBA violated 1 *Wilm. C.* § 48-70(b). Conversely, because substantial evidence in the record supports the conclusion that no parking problem existed, the decision of the ZBA and the Trial Court must be upheld.

2. Even if a parking problem did exist, substantial evidence supports the ZBA's conclusion that the Use Variance would not exacerbate it.

Assuming *arguendo* that substantial evidence did not exist supporting the ZBA's conclusion that a parking problem did not exist in the neighborhood surrounding the Brown Mansion, the Use Variance still does not violate 1 *Wilm. C.* § 48-70(b) because substantial evidence also exists in the record below that the Use Variance granted to Ingleside would not worsen parking problems.

As an initial matter, it is necessary to address some of the inaccuracies in Appellants' Opening Brief. Appellants incorrectly state that 1 *Wilm. C.* § 48-443(a) requires Ingleside to provide 35 off-street parking spaces, on a one per apartment unit basis, for the 35 apartments proposed for the Brown Mansion. However, because the lot in question is zoned R-1, this requirement does not apply. As the chart in 1 *Wilm. C.* § 48-443(a)(1) shows, there are no parking provisions required under the code for apartment buildings in an R-1 zone. Therefore, if § 48-443(a), is evidence of anything at all, it is that apartment buildings on R-1 lots do not require off street parking. As such, even if the Court were to give some deference to § 48-443(a) and use it as a source of guidance here, it would have to conclude that apartment buildings constructed in R-1 districts do not require off street parking.

More importantly, Delaware case law does not contemplate a "*per se*" evidentiary standard when conducting appellate review of zoning board decisions. To do so would violate the standard set forth by *Mellow v. Board of Adjustment*, 567 A. 2d 422 (Del. 1989) and its progeny that so long as substantial evidence supports a zoning board's decision, the court must uphold the decision.

The Superior Court correctly found that the collective testimony of Cessna, Brooks, and Banker constituted substantial evidence which supported the ZBA's conclusion that the Use Variance would not exacerbate existing parking problems. As

with the initial question of whether a parking problem existed in the first place, the Superior Court correctly deferred to the ZBA, "because it is for the agency, and not the [c]ourt, to weigh evidence and resolve conflicting testimony and issues of credibility." *Mellow*, 586 A. 2d at 954.

Substantial evidence, including evidence dating back to 2008, supported the ZBA's decision that a parking problem did not exist and that the Use Variance would not create or exacerbate one. Appellants repeat their argument that evidence dating from 2008 is no evidence at all. However, the Srial Court already addressed this argument in its decision. *Friends*, 2013 Del. Super. LEXIS at *38. As the Superior Court stated, Appellants' position in this regard boils down to an argument over the weight of the evidence submitted, which is beyond the scope of appellate review. *And see Mellow*, 586 A. 2d at 954; *Rehoboth Art League, Inc., v. Board of Adjustment of Henlopen Acres*, 991 A. 2d 1163, 1166 (Del. 2010).

The ZBA also appropriately chose to rely on ample record evidence of available parking on the adjoining lot that is to be combined with the Brown Mansion. The ZBA is free to give weight to the existence of adjacent parking in a lot owned by Ingleside because this, too, constitutes more than a scintilla of evidence that parking problems would not be worsened by the Use Variance. Finally, it is incorrect that as a matter of law dozens of parking spaces are needed for the 35 unit apartment building

as Appellants claim. With respect to the question of whether the ZBA's decision violated § 48-70(b) (which prohibits the granting of variances which would exacerbate an existing parking problem), Appellants effectively ask this Court to adopt a new standard of "*per se*" evidence and "evidence as a matter of law," which is inconsistent with how Delaware courts have conducted appellate review of factual record evidence which has already been weighed by a lower tribunal. Substantial evidence existed in the record below that there was no parking problem in the neighborhood in the first place, and that even if there was, the Use Variance would not exacerbate it. The ZBA chose to rely on that evidence in making its decision to grant the Use Variance and the Superior Court correctly deferred to the ZBA on this matter. As such, this Court should affirm the ZBA and the Superior Court's finding, because they are supported by substantial evidence.

CONCLUSION

Ultimately, "whether a variance should be granted depends on the circumstances of the particular case and the ZBA is in the best position to make such a determination. As long as its conclusion is the product of reason and logical deduction supported by substantial evidence on the record, any challenge thereto must fail." *Schramm v. New Castle County Board of Adjustment*, 1996 Del. Super. LEXIS 161, slip op. at *18, Toliver, J. (Apr. 24, 1996). In the instant case, the Superior Court correctly found there was substantial evidence to support the decision of the ZBA. Specifically, substantial evidence exists that the Use Variance does not violate the Comp Plan, and even if it did, the ZBA would still be permitted to grant the Use Variance if the other requirements were met. Additionally, substantial evidence exists in the record supports the conclusion that no parking problem exists in the neighborhood, and substantial evidence exists that even if a parking problem did exist, the Use Variance will not exacerbate it.

WHEREFORE, Respondents City of Wilmington and City of Wilmington Zoning Board of Adjustment respectfully requests that this Honorable Court deny the Appellants' appeal and affirm the decision of Superior Court.

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