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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE CITY OF LEWES and THE BOARD OF ADJUSTMENT OF THE CITY OF LEWES,	§	Nos. 348, 2018 and 349, 2018
	§	C O N S O L I D A T E D
Appellees Below, Appellants,	§	Court Below: Superior Court of the State of Delaware
v.	§	C.A. No. S17A-06-003
ERNEST M. NEPA and DEBORAH A. NEPA,	§	
Appellants Below, Appellees.	§	

APPELLANTS' JOINT OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This appeal presents a question of first impression before the Delaware Supreme Court upon which there is now a split among Superior Court decisions: may a local municipality enact standards for granting of an area variance which are more stringent than the standard set forth in Title 22, Section 327(a)(3) of the Delaware Code ("Section 327(a)(3)")[1] and the Delaware Supreme Court case of *Board of Adjustment v. Kwik-Check Realty, Inc.*[2]?

On February 17, 2017, Appellees, Ernest M. and Deborah A. Nepa (the "Nepas"), filed an application to the Board of Adjustment of the City of Lewes (the "Board") requesting three area variances for a residential property located in the City of Lewes (the "City").[3] On March 21, 2017 and April 18, 2017, the Board conducted hearings regarding the requested variances.[4] At the conclusion of the April 18th hearing, the Board voted unanimously to deny the Nepas' request. The Board concluded that the Nepas failed to establish an "exceptional practical difficulty" supporting the variances. The Board issued its written decision on May 31, 2017 (the "Decision").[5]

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[1] 22 *Del. C.* § 327(a)(3).
[2] 389 A.2d 1289, 989 (Del. 1978).
[3] Appendix at A-125-127.
[4] Appendix at A-5-112.
[5] Appendix at A-113-118.

The Nepas filed a Verified Petition for Certiorari and Appeal with the Delaware Superior Court on June 28, 2017, appealing the Board's decision.[6] After the parties submitted briefing on the appeal, the Superior Court requested additional submissions addressing: (1) whether Section 197-92 of the Municipal Code for the City of Lewes (the "Lewes Code") created a higher standard for granting an area variance than Section 327(a)(3); and (2) whether Title 22, Section 307 of the Delaware Code ("Section 307") allows the City to adopt an ordinance requiring a higher standard for an area variance than required by Section 327(a)(3).

On April 11, 2018, the Superior Court issued an opinion reversing the Board's decision. The Superior Court held that Subsections (B), (C), and (D) of Section 197-92 of the Lewes Code impose additional requirements for an area variance beyond those imposed under *Kwik Check*, and that these requirements are more burdensome than Section 327(a)(3) allows.

The Superior Court found four specific instances where Section 197-92 allegedly created a more stringent standard. First, the Superior Court found that Section 197-92(B)(1) created a "uniqueness" requirement for an area variance.[7] Second, the Superior Court ruled that Section 197-92(B)(3) changed the evidentiary standard from the simple preponderance allegedly required by *Kwik Check* to one requiring that the benefits of granting a variance substantially

[6] D.I. 1.
[7] *See* Exhibit "A" at p. 14.

outweigh any detriments to the applicant's neighbors.[8] Third, the Superior Court found that Section 197-92(C)(3) improperly requires the Board to consider whether the variance would "affect" (as opposed to "seriously affect") neighboring properties.[9] Fourth, the Superior Court found that Section 197-92(D)(2) prohibited non-conformity as the basis for granting an area variance while *Kwik Check* allegedly does not.[10] The Superior Court ruled that the City lacked legislative authority to enact each of these four alleged deviations from *Kwik Check.*

The Board and the City filed notices of appeal of the Superior Court's decision on May 9th and 10th, respectively.[11] On June 11, 2018, this Court dismissed both appeals as interlocutory on the basis that a Motion for Fees and Costs was pending before the Superior Court. On June 12, 2018, the Superior Court denied the Nepas' motion for fees and costs.

Both Appellants re-filed notices of appeal on July 10, 2018. The appeals were consolidated by Order of this Court on August 2, 2018.

This is the Joint Opening Brief of the Board and the City.

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[8] *Id.* at p. 15.
[9] *Id.* at pp. 15-16.
[10] *Id.* at pp. 16-17.
[11] C.A. Nos. 248, 2018 and 256, 2018.

SUMMARY OF ARGUMENT

I. The Superior Court erred in holding that the City may not enact more stringent standards for an area variance than is minimally required by 22 *Del. C.* § 327(a)(3), as interpreted by *Kwik Check* and its progeny. Both Title 22 and the Municipal Charter of the City of Lewes (the "Charter") are sources of legislative authority which permit the enactment of more stringent local standards for area variances. The Board is required to apply these more stringent standards pursuant to 22 *Del. C.* § 307.

II. Notwithstanding the above, the Superior Court erred when it determined that the local standards for area variances duly adopted by the City are more stringent than minimally required by 22 *Del. C.* § 327(a)(3), as interpreted by *Kwik Check* and its progeny.

STATEMENT OF FACTS

A. The Parties

1. The City is a political subdivision of the State of Delaware, responsible for promulgating zoning and land use ordinances.

2. The Board is a governmental body appointed by the City pursuant to 22 *Del. C.* §§ 321, *et seq.* and charged with conducting hearings regarding, in part, variance requests related to real property located in the City.

3. The Nepas are the owners of real property located at 116 Dewey Avenue, Lewes, Delaware, which is further identified on the Sussex County tax map as parcel number 3-35.8.11-142.00 (the "Property").

B. The Property

4. The Property is located within the R-4(H), Residential Medium-Density (Historic) zoning district, as described in Chapter 197 of the Lewes Code.

5. At the time of the Nepas' acquisition of the Property, it included a two and one-half story dwelling, of which a portion was one and one-half stories (the "Building"), with attached enclosed porches and a detached garage. The Property was legally non-conforming under the Lewes Code due to existing encroachments, which varied from approximately 4.6 feet to approximately 4.8 feet within the side yard setback.[12]

[12] *See* "Original Site Plan"; Appendix at A-119.

C. Renovations to the Property

6. The Nepas claimed to have purchased the Property for the express purpose of renovating the Property and the Building.[13] Following the completion of these renovations, the Nepas intend to sell the Property.[14]

7. The Nepas sought a building permit and approval from the City's Historic Preservation Commission (the "HPC") for the renovation. On July 7, 2015, the HPC conducted a hearing on the Nepas' request for exterior renovations to the Building.[15] The HPC approved the Nepas' request subject to the following conditions:

> Level house not to exceed 8" at the right front corner; use 5 ½" wood posts for the porch; install new roof; 6" reveal Hardiplank siding with smooth side out; Andersen Series A windows with historic sills, 2/2, true divided light, outside material is Fibrex; mahogany door; porch to resemble design of 519 Kings Highway.[16]

The Nepas did not appeal the HPC's decision. Notably, the Nepas **did not request** an increase to the size of the Building or otherwise seek to increase or alter the existing non-conforming dimensions of the Building.[17]

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[13] *See* Testimony of Ernest Nepa at April 18, 2017 Board of Adjustment hearing; Appendix, at A-35:7-19.
[14] *See id.* at A-53:18-20.
[15] *See* Excerpts from HPC Meeting Minutes July 7, 2015; Appendix at A-120-121.
[16] *See id.* at A-121.
[17] *See* E-mail from Elaine Simmerman, HPC Chair, dated March 18, 2017; Appendix at A-122.

8. After obtaining a building permit and HPC approval, the Nepas began renovating the Building.[18] The Nepas' renovation plans, as submitted to the HPC, included replacing the Building's roof, siding, windows, and porch, as well as squaring the Building.[19]

9. The Nepas' plans **did not include** expanding the size of the Building or constructing any additions to the Building. Indeed, the Nepas intended to maintain the Building's existing footprint.[20] Ernest Nepa testified at the April 18th Board hearing that "[m]y number one goal was to maintain the architectural integrity of the [Building]."[21] Mr. Nepa was also "very adamant" about "trying to keep the historical nature of the [Building]."[22]

10. During the renovation, the Nepas discovered damage to the Building as a result of puff beetles and fire.[23] In February 2016, a rain storm caused water damage, resulting in the back-roof collapsing.[24]

D. <u>The New Addition</u>

11. Subsequently, the Nepas resumed construction on the Building; however, in addition to repairing the storm damage, the Nepas independently, and **without**

[18] *See* Testimony of Ernest Nepa at April 21, 2017 Board of Adjustment hearing; Appendix at A-38:10-13.
[19] *See id.* at A-36:15-A-37:9.
[20] *See id.* at A-36:12-14.
[21] *See id.* at A-39:14-15.
[22] *See id.* at A-56:17-19.
[23] *See id.* at A-35:17-22; A-38:22-A-39:2.
[24] *See id.* at A-39: 2-8; A-41:12-23.

seeking permission or approval from any authority, chose to enlarge the Building, increase the Property's dimensional non-conformities, and exceed the parameters of the building permit.[25]

12. The Nepas converted a one and a half story portion of the Building into two stories, and constructed a new addition on the back of the Building totaling approximately 521 square feet.[26] These additions extended the approximately 4.8 foot side yard encroachment rearward approximately 14.8 feet, and created a new encroachment of approximately 4.3 feet into the required minimum ten-foot separation from the Property's detached garage.[27]

13. On March 22, 2016, Robin Davis, Assistant Building Official, conducted a site visit to review the status of construction and immediately issued a Stop-Work Order upon discovering that work was being performed outside the scope of the permit.[28]

E. Variance Request

14. Eleven months after the Stop-Work Order was issued, on February 17, 2017, the Nepas filed a request for three variances: (1) to verify and approve the construction of new additions that expand an existing nonconforming structure; (2)

[25] *See id.* at A-49:14-16.
[26] *See* Survey of the Property, dated July 23, 2016; Appendix at A-123; Testimony of Mr. Nepa; Appendix at A-43:9-A-46:9.
[27] *See id.*
[28] *See* "Building Official Statement" from March 21, 2017 minutes; Appendix at A-124.

to verify and approve the construction of new additions that encroach approximately 4.8 feet into the required minimum 8 foot side yard setback; and (3) to verify and approve the construction of a new addition that encroaches approximately 4.3 feet into the required minimum 10 foot separation from the nearest garage.[29]

F. Hearings Before the Board

15. On March 21st and April 18th, the Board conducted hearings on the Nepas' requests for variances. The March 21st hearing was continued at the Nepas' request. The majority of the Nepas' evidence and testimony was presented during the April hearing.

G. The Board's Decision

16. At the conclusion of the April 18th hearing, the Board deliberated and unanimously voted to deny the Nepas' requests.[30] In their deliberations, the Board members determined that the necessary factors for granting the requested area variances were not met, and that no exceptional practical difficulty was presented supporting the variances.

17. On May 31, 2017, the Board issued its written decision addressing each of the specific findings the Board is required to make in reviewing a variance

[29] *See* Appendix at A-125-127.
[30] *See* Transcript of April 21, 2017 Board of Adjustment hearing; Appendix A-101:21-A-110:12.

application.[31] The Board found that the Nepas had not provided sufficient evidence to support the requested variances.

[31] *See* Appendix at A-113-118.

ARGUMENT

II. THE SUPERIOR COURT ERRED IN HOLDING THAT THE CITY MAY NOT ENACT STANDARDS FOR AN AREA VARIANCE MORE STRINGENT THAN THOSE SET FORTH IN 22 *Del. C.* § 327(a)(3), AS INTERPRETED BY *KWIK CHECK* AND ITS PROGENY.

A. Question Presented.

May the City enact standards governing area variances which are more stringent than those set forth in Section 327(a)(3), as interpreted by *Kwik Check* and its progeny?[32]

B. Scope of Review.

In reviewing a decision of the Board, this Court applies the same standard applied by the Superior Court in reviewing the decision in the first instance.[33] Typically, the scope of this Court's review of a Board of Adjustment's decision is limited. Specifically, the Court "may only review 'the record to ascertain if the statutorily procedural mandates have been followed, that the decision is supported by substantial evidence and that it is not arbitrary, capricious or an abuse of discretion.'"[34]

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[32] *See* Exhibit "A" at pp. 20-22; Appellants preserved their right to appeal this issue in both their Joint Answering Brief (A-178-222) and Joint Response to the Court's December 13, 2017 Letter (A-252-273).

[33] *McLaughlin v. Bd. of Adjustment of New Castle Cty.*, 984 A.2d 1190, 1192 (Del. 2009).

[34] *Coker v. Kent Cty. Levy Ct.*, 2008 WL 5451337, at *7 (Del. Ch. Dec. 23, 2008) *(quoting Steen v. Cty. Council of Sussex Cty.*, 576 A.2d 642, 648 (Del. Ch. 1989)).

Where the Court is asked to review the application of the law to undisputed facts, the Court's review is plenary.[35] Further, the Court reviews issues of statutory construction and interpretation *de novo*.[36]

C. Merits of Argument.

The Superior Court erred when it held that portions of Section 197-92 of the Lewes Code are *ultra vires* and cannot be applied to area variance applications because those Code provisions impose a more stringent standard than *Kwik Check* and its progeny.[37] In fact, the City properly enacted Section 197-92 pursuant to two separate and valid grants of legislative authority: Title 22 and the Charter.[38] While the Superior Court correctly acknowledged that this Court previously held in *Board of Adjustment of Sussex County v. Verleysen* that the standard for area variances differs from *Kwik-Check* where the General Assembly imposes different requirements,[39] the Superior Court, without explanation, concluded that the City of Lewes cannot similarly impose different requirements for its local jurisdiction. Contrary to the Superior Court's decision, Section 327(a)(3) sets **minimum**

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[35] *Brittingham v. Bd. of Adjustment of Rehoboth Beach*, 2005 WL 170690, at *3 (Del. Super. Ct. Jan. 14, 2005).
[36] *Bay Surgical Servs. v. Swier*, 900 A.2d 646, 652 (Del. 2006).
[37] *See* Exhibit "A" at p. 22.
[38] An Act to Reincorporate the City of Lewes, 57 Del. Laws, C. 170 (1969).
[39] 36 A.3d 326, 331-32 (Del. 2012) (interpreting 9 *Del. C.* § 6917, which governs variances in unincorporated Sussex County, as imposing a stricter standard than that addressed in *Kwik Check*).

standards for an area variance and does not prohibit municipalities from enacting more stringent additional standards governing their local jurisdictions.

Moreover, the Superior Court incorrectly identified Section 307 as the source of legislative authority for the enactment of Section 197-92. As a "Conflict of Laws" provision, Section 307 merely requires that Section 197-92, as the more stringent ordinance (according to the Superior Court), controls the Board's decision in granting a variance. The Superior Court committed reversible error because it overlooked the primary direct source of legislative authority for the enactment of Section 197-92.

1. Section 197-92 Was Properly and Duly Enacted Pursuant to a Valid Grant of Legislative Authority, and is Therefore a Valid Code Provision.

The Superior Court held that "[t]he more stringent standard [for an area variance allegedly created by Section 197-92] is not allowed unless there is statutory authority granting such, as the municipality must conform with standards established by the General Assembly."[40] While the Superior Court is correct that there must be a valid source of legislative authority to uphold Section 197-92 of the Lewes Code, it erred when it determined that Appellants looked to Section 307 as the source of this authority.[41] Section 307 recognizes that municipalities may enact more stringent standards and requires that more stringent local ordinances

[40] Exhibit "A" at p. 20.
[41] 22 *Del. C.* § 307.

control when in conflict.[42] Section 307 does not, however, create the authority for enacting those more stringent ordinances, and Appellants never argued that it did. Instead, Appellants simply maintained that, consistent with Section 307, Section 197-92 controlled as the more stringent **duly adopted** local ordinance.

A. The Charter Authorizes the Enactment of Section 197-92.

The Delaware General Assembly plainly granted the City authority to regulate land use through the Charter.[43] Moreover, the Delaware General Assembly has granted the City, through the Charter, broad authority to enact policies and procedures that the General Assembly could have authorized specifically.[44] Like 9 *Del. C.* § 1101, which the Court of Chancery interpreted in *Salem Church (Delaware) Associates v. New Castle County* as granting New Castle County "great flexibility to discharge its functions, except as otherwise limited by the State's Constitution or its statutes", the Charter grants the City "great flexibility" to enact policies and procedures that do not conflict with the

[42] *See Dale v. Elsmere*, 1988 WL 40018, at *1-3 (Del. Super. Ct. Apr. 20, 1988); *Hellings v. City of Lewes Bd. of Adjustment*, 1998 WL 960710, at *4 (Del. Super. Ct. Dec. 31, 1998) (*rev'd on other grounds, Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Del. 1999)).

[43] *See* An Act to Reincorporate the City of Lewes, 57 Del. Laws, C. 170 (1969) (as amended), at Section 38; Appendix at A-146-147.

[44] *See id.* at Section 29.41; Appendix at A-145; *see also*, *Salem Church (Delaware) Assocs. V. New Castle Cty.*, 2006 WL 4782453, at n.44 (Del. Ch. Oct. 6, 2006); and *Jimmy's Grille of Dewey Beach, LLC v. Town of Dewey Beach*, 2013 WL 6667377, at *3-9 (Del. Ch. December 17, 2013) (holding that the Charter's broad grant of authority controlled unless limited by the Charter's language).

Delaware Constitution and statutes. Indeed, by its plain language, the Charter is not intended to be a "specific statutory grant[] of power":

> Not by way of limitation upon the power vested in the City Council to exercise all powers delegated by this Charter to the municipal corporation except as may expressly appear herein to the contrary, but, rather, by way of enumeration and for purposes of clarity, the City Council is vested by this Charter with the following powers. . . .[45]; and
>
> To make, adopt and establish all such ordinance, regulations, rules and by-laws, not contrary to the laws of this State and the United States, as the City Council may deem necessary to carry into effect any of the provisions of this Charter or any other law of the State relating generally to municipal corporations or which they may deem proper and necessary for the good government of the City . . . .[46]

The Superior Court ignored this broad grant of authority in the Charter when concluding that the City lacked authority to adopt Section 197-92.

B. Title 22, Chapter 3 Authorizes the Enactment of Section 197-92.

Legislative authority for the enactment of more stringent local standards for an area variance is also found in the plain language of several **other** sections of Title 22, Chapter 3. For example, Section 301, "Grant of Power," contains a broad grant of zoning power to municipalities.[47] Section 302 allows municipalities to

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[45] An Act to Reincorporate the City of Lewes, 57 Del. Laws, C. 170 (1969) (as amended), at Section 29; Appendix at A-139-145.
[46] *Id.* at Section 29.41; Appendix at A-145.
[47] *See* 22 Del. C. § 304; *see also Sussex Cty. v. DNREC*, 2011 WL 1225664, at *5 (Del. Super. Ct. Feb. 25, 2011) (noting that Delaware has granted counties and municipalities "broad authority to zone" through statutes, including Section 301, as

enact zoning districts, and Section 304 allows the legislative body of a municipality to "provide for the manner in which the regulations and restrictions . . . shall be enforced."[48] Therefore, the Superior Court erred in locating Title 22, Chapter 3's grant of authority in Section 307. The grant of authority exists in other provisions of the same Chapter, which, in addition to the Charter, authorize the enactment of Section 197-92. Therefore, both the Charter **and** Title 22, Chapter 3 of the Delaware Code are sources of legislative authority, and those provisions "should be construed together so that effect is given to every provision because there is no irreconcilable difference between them."[49]

In sum, the clear conclusion is that the City had the authority to adopt Section 197-92. More specifically, these sources of legislative authority confirm that the City was within its rights and obligations in regulating zoning within the City when it enacted Section 197-92, so long as its provisions are not contrary to the State's Constitution or its statutes.[50]

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the "General Assembly has ceded primary responsibility for land use control to county and municipal governments").

[48] 22 *Del. C.* § 302; 22 *Del. C.* § 304.

[49] *Hartman v. Buckson*, 467 A.2d 694, 698 (Del. Ch. 1983).

[50] *Salem Church*, 2006 WL 4782453, at n.44.

2. No Other Law Prohibits or Preempts the Valid Enactment of Section 197-92, and Therefore Its Adoption Was a Valid Exercise of the Powers Granted to the City.

In *Salem Church*,[51] the Court of Chancery held that New Castle County permissibly delegated appellate review functions to its Planning Board, even though the enabling statute - 9 *Del. C.* § 1304 - did not expressly delegate that power to the Planning Board.[52] Looking to the broad grant of legislative authority vested in the County by 9 *Del. C.* § 1101, the Court ruled that "nothing in [the enabling] statute, other statutes, or the Constitution prohibits the Planning Board from hearing administrative appeals."[53] Similarly, as noted above, the Charter grants the City the authority "[t]o make, adopt and establish all such ordinance [sic], regulations, rules and by-laws, not contrary to the laws of this State and the United States . . . ."[54] Notably, nothing in 22 *Del. C.* § 327, or any other law, prohibits a Board of Adjustment from considering additional factors before granting an area variance. Rather, it prohibits only the granting of a variance to an applicant who has failed to first meet **the minimum standards set forth in state law** (*i.e.,* a more lenient municipal law cannot preempt the State statute[55]). Therefore, even if the criteria contained Section 197-92 were construed as creating

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[51] *Id.*
[52] *Id.* at *4, n.44.
[53] *Id.* at *4.
[54] Charter at § 29.41.
[55] *See* Exhibit "A" at p. 21.

additional requirements for an area variance, those criteria are nevertheless permissible because they are not inconsistent with or preempted by Section 327.[56] In fact, Section 307 explicitly requires their application.[57]

The Superior Court squarely faced this question in a zoning context in *Jenney v. Durham*,[58] recognizing that New Castle County could create additional requirements for a variance through its Steep Slope Ordinance so long as the Steep Slope Ordinance was not applied in a manner that allowed a use variance that did not meet the minimum standard set forth in the state enabling statute. In other words, as the *Jenney* court noted, the list of permissible uses contained in the Steep Slope Ordinance could "not provide an alternative route to approval of a non-conforming use."[59] Rather, "[t]he requirements of the Ordinance become relevant to the Board's evaluation **only after the Board is satisfied that the applicant has met the statutory unnecessary hardship standard**."[60]

Thus, the Superior Court in *Jenney* correctly recognized that while a more lenient municipal law cannot preempt state law, a locally enacted more stringent ordinance, which is not otherwise prohibited by state law, is permissible. As such, Section 327(a)(3) does not allow the City to apply a **less restrictive** standard to

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[56] *See* 22 Del. C. § 327.
[57] *See id.* at § 307.
[58] 707 A. 2d 752 (Del. Super. Ct. 1997).
[59] *Id.* at 757, n.4.
[60] *Id.* (emphasis added).

area variances. However, the City can create **additional criteria** which the Board must consider so long as an applicant has met the minimum statutory requirements for an area variance. Like the Steep Slope Ordinance in *Jenney*, the requirements contained in Section 197-92 cannot "provide an alternative route to approval of a non-conforming use" if the minimum statutory requirements for an area variance have not been met.[61] Rather, "[t]he requirements of [Section 197-92] become relevant to the Board's evaluation only after the Board is satisfied that the applicant has met the statutory [exceptional practical difficulty] standard."[62] In this case, the Board, consistent with *Jenney* and Section 307, first considered whether the Nepas had met the requirements for an area variance under 22 *Del. C.* § 327(a)(3) and *Kwik-Check*, and determined that they had not done so.

The *Jenney* court further stated, "[t]he legislature has defined highly specific conditions under which the Board **may** grant a variance for a zoning provision."[63] It does not follow, however, that a Board **must** grant a variance in such an instance where, as here, duly enacted local ordinances create additional requirements that must be met once the specific conditions under which a Board **may** permissibly grant a variance have been satisfied.[64]

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[61] *Id.*
[62] *Id.*
[63] *Id.* at 756 (emphasis added).
[64] The Nepas' argument is also mooted by the fact that the Board found they did not even meet the minimum standards for an area variance.

This reality is reflected in widespread practice. In addition to New Castle County's Steep Slope Ordinance, nearly all Delaware municipalities require that Boards of Adjustment consider additional factors when granting variances from floodplain regulations.[65] In addition to these floodplain ordinances, which have been adopted by nearly every municipality, Dewey Beach requires that additional findings be made prior to the granting of a use variance.[66] Both the City and Sussex County prohibit use variances by ordinance altogether (even though 9 *Del. C.* § 6917 grants the Sussex County Board of Adjustment the authority to grant use variances).[67] Notably, the Superior Court recognized the fact that Sussex County Code does not authorize the granting of use variances (notwithstanding 9 *Del. C.* § 6917), and appeared unconcerned with this fact.[68]

Municipalities also vest in Boards of Adjustment additional functions and powers, so long as the local ordinances are not inconsistent with the enabling legislation. The City of Wilmington, for example, grants its Board of Adjustment

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[65] *See, e.g.*, Delaware City Municipal Code § 230-57(G)(1-5); Dewey Beach Municipal Code § 101-34(B)(1-11); Dover Municipal Code § 50-56(2)(a-k); Georgetown Municipal Code § 107-31(B)(1-11), (C); Lewes Municipal Code § 197-73(G)(2)(a-l); *Wilm. C.* § 48-594(2)(a-k).
[66] Dewey Beach Municipal Code § 185-68(B)(1-5).
[67] *See* Lewes Municipal Code § 197-92(D)(1) and Sussex County Code § 115-209(A)(1).
[68] *Riker v. Sussex Cty. Bd. of Adjustment*, 2015 WL 648531, at *2 (Del. Super. Ct. Feb. 2, 2015).

many powers of original jurisdiction not contained in the enabling statute.[69] The Wilmington Board of Adjustment is also vested with appellate review of the Commissioner of Licenses and Inspections' review of Historic Preservation Commission determinations.[70]

Section 197-92 is a valid statute enacted under the authority of the Charter and Title 22, Chapter 3 and, like the statutes under review in *Salem Church* and *Jenney* is not limited by any other State law or the State Constitution. No statute or case law prevents municipalities from creating additional criteria which must be evaluated before an applicant, who also meets the *Kwik Check* standard, may be granted a variance. Therefore, 22 *Del. C.* § 327(a)(3) acts only to set minimum standards which must be met before the Board may grant an area variance and does not prohibit the imposition of additional standards so long as those standards do not provide an alternative path to a variance which is less stringent than the standard articulated in *Kwik Check* and its progeny.

3. The Superior Court Misapplied 22 *Del. C.* § 307.

A. The Superior Court's Reading of 22 *Del. C.* § 307 Robs That Statute of Any Meaning and Creates an Absurd Result.

While the Superior Court erred in the first instance by placing the source of legislative authority for the enactment of Section 197-92 in Section 307, it further

[69] *Wilm. C.* § 48-73.
[70] *Wilm. C.* § 48-426(d).

erred by ignoring the plain, unambiguous meaning of Section 307 when it read the statute in a way that robs it of meaning and leads to an absurd result. "The rules of statutory construction are well settled. First, [the Court] must determine whether the statute under consideration is ambiguous . . . . If it is unambiguous, then [the Court] give[s] the words in the statute their plain meaning."[71] Furthermore, "[t]he golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[72] Finally, "words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible."[73]

Section 307 provides:

> Conflict with other laws.
>
> Wherever the regulations made under authority of this chapter require a greater width or size of yards or courts, or a lower height of building or less number of stories, or a greater percentage of lot to be left unoccupied, **or impose other higher standards than are required in any other statute or local ordinance or regulation**, the regulations

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[71] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).
[72] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).
[73] *Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010).

> made under authority of this chapter shall govern. **Wherever any other statute, local ordinance or regulation** requires a greater width or size of yards or courts, or a lower height of building or a less number of stories, or a greater percentage of lot to be left unoccupied, or **imposed other higher standards** than are required by the regulations made under authority of this chapter, such statute, local ordinance or regulation shall govern.[74]

Under its plain meaning, Section 307 recognizes that local governments can enact local zoning regulations to "impose other higher standards than are required in any other statute." Therefore, the Court in *Dale v. Elsmere* correctly found that the Town of Elsmere had authority to adopt the "unnecessary hardship test" for area variances.[75]

The Superior Court in this case began its analysis correctly, acknowledging that "[Section 307] requires that the more stringent law pertaining to a certain parcel's use be applied," and that that a more lenient local law cannot preempt a stricter state law.[76] However, the Superior Court misapplied what it termed the "limiting language" contained in Section 307 in two ways.

First, the Superior Court ignored **the entire second sentence** of Section 307 when it determined that only local regulations enacted pursuant to Title 22, Chapter 3 may impose higher standards. Section 307 mandates, first, that

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[74] 22 *Del. C.* § 307 (emphasis added).
[75] 1988 WL 40018, at *1-3; *Hellings*, 1998 WL 960710, at *4.
[76] Exhibit "A" at p. 20.

regulations adopted pursuant to Title 22, Chapter 3 imposing higher standards govern. The provision, however, goes on to add that any **other** local ordinance or regulation which imposes other higher standards than the regulations referenced in the first sentence of Section 307 governs.[77]

Under the plain meaning of Section 307, the strictest duly adopted ordinance or regulation governs. To hold otherwise is to ignore the plain meaning of Section 307 and render the entire second sentence of Section 307 as surplusage. The Superior Court looked to the first sentence of Section 307 to incorrectly determine that Section 307 applied only to regulations derived from Title 22, Chapter 3. But this approach ignored the far more expansive second sentence, which applies Section 307 to **any other** ordinance or regulation. Notably, Section 307 is not a grant of authority, but instead merely provides that the more stringent zoning regulation will control. If Section 197-92 was duly enacted (which it was), and if it is conflicts with another zoning regulation (here, the Superior Court concluded that it conflicted with Section 327(a)(3)), then Section 307 simply provides that the more stringent regulation controls. Since the Superior Court concluded that Section 197-92 was the more stringent regulation, the analysis should have concluded and Section 197-92 should have been applied.

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[77] 22 *Del. C.* § 307 (emphasis added).

The Superior Court's reasoning defies the plain meaning of Section 307, leads to an absurd result, robs Section 307 of any meaning, and makes the entire provision surplusage. Specifically, per the Superior Court's reasoning, Section 307 permits only local ordinances enacted pursuant to Title 22, Chapter 3 of the Delaware Code to impose higher local standards, but, at the same time, that any local ordinance which imposes a higher standard could not have been enacted pursuant to Title 22, Chapter 3 because it is not consistent with Section 327(a)(3).

If a local ordinance "which imposes a more stringent standard[] is *ultra vires* and cannot be applied"[78] because it necessarily could not have been enacted in accordance with Title 22, Chapter, 3, then Section 307, which the Court determined allows the imposition of higher standards only if they are enacted in accordance with Title 22, Chapter 3, has no relevance and no purpose. Under such an interpretation, Section 307 allows municipalities to enact more stringent standards only if the standards are not more stringent.[79] Therefore, this Court should reject the Superior Court's reading of 22 *Del. C.* § 307 and follow *Dale* and *Hellings*, which each correctly read Section 307 as recognizing the enactment of more stringent local standards.

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[78] Exhibit "A" at p. 22.

[79] Or, as Doc Daneeka explained to Capt. John Yossarian, a pilot is permitted to stop flying combat missions only if he continues to fly combat missions.

B. The Legislative History of 22 *Del. C.* § 307 Shows That It is Applicable to Both Zoning Regulations and Board of Adjustment Standards.

The legislative history of Section 307 clearly establishes that this provision regarding "Conflict With Other Laws" specifically applies to both the zoning regulations and Board of Adjustment standards and regulations. In 1934, when the State originally enacted the statutes now identified as 22 *Del. C.* §§ 307 and 327, they were Sections 10 and 8, respectively, of a single act, An Act Granting to Municipalities of Delaware Authority to Adopt Zoning Regulations. 39 Del. Laws. c. 22 (1934).[80] These statutes were later reorganized into their respective sections of Title 22 in conjunction with the recodification of the Delaware Code in 1953. Notwithstanding the statute's plain language, this legislative history evinces intent to apply the subject Conflict With Other Laws language to the entirety of the adopted legislation, including the standards governing Boards of Adjustment.[81] Thus, the *Dale* Court was within reason to conclude that Section 307 supports the ability of local jurisdictions to set higher standards for granting variances than the exceptional practical difficulty standard.

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[80] *See* Appendix at A-137-138.

[81] *See also*, 1 *Del. C.* § 305 ("The classification and organization of the titles, parts, chapters, subchapters, and sections of this Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference or presumption of a legislative construction shall be drawn therefrom.").

II. THE SUPERIOR COURT'S NARROW INTERPRETATION OF THE EXCEPTIONAL PRACTICAL DIFFICULTY STANDARD FOR AREA VARIANCES AS A SIMPLE BALANCING OF THE HARM TO THE APPLICANT VERSUS THE HARM TO THE NEIGHBORING PROPERTY OWNERS BASED EXCLUSIVELY UPON FOUR FACTORS IS CONTRARY TO ESTABLISHED PRECEDENT.

A. Question Presented

Whether the Superior Court erred in interpreting the standard for an area variance that was established in this Court's decision in *Kwik-Check*[82], later extended to municipalities through the Delaware General Assembly's adoption of identical statutory language in Title 22, Section 327(a)(3), and continually reinforced in subsequent decisions by Delaware courts?[83]

B. Scope of Review

In reviewing a decision of the Board, this Court applies the same standard applied by the Superior Court in reviewing the decision in the first instance.[84] Typically, the scope of this Court's review of a Board of Adjustment's decision is limited. Specifically, the Court "may only review 'the record to ascertain if the statutorily procedural mandates have been followed, that the decision is supported

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[82] 389 A.2d 1289.

[83] Exhibit "A" at p. 14; Appellants preserved their right to appeal this issue in both their Joint Answering Brief (A-178-222) and Joint Response to the Court's December 13, 2017 Letter (A-252-273).

[84] *McLaughlin*, 984 A.2d at 1192.

by substantial evidence and that it is not arbitrary, capricious or an abuse of discretion.'"[85]

Where the Court is asked to review the application of the law to undisputed facts, the Court's review is plenary.[86] Further, the Court reviews issues of statutory construction and interpretation *de novo*.[87]

C. Merits of Argument

In its April 11, 2018 decision, the Superior Court described the exceptional practical difficulty standard for area variances as a "weighing analysis" based upon the narrow consideration of four factors: (1) the nature of the zone in which the property lies; (2) the character of the immediate vicinity and the uses contained therein; (3) whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; and (4) whether, if the restriction is not removed, the restriction would create hardship for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.[88]

The Superior Court then reversed the Board's decision because the Board, consistent with Section 197-92 of the Lewes Code, considered factors and findings

[85] *Coker,* 2008 WL 5451337, at *7 *(quoting Steen,* 576 A.2d at 648).
[86] *Brittingham,* 2005 WL 170690, at * 3.
[87] *Swier,* 900 A.2d at 652.
[88] Exhibit "A" at pp. 2; 13-14.

that the Court concluded went beyond the four factors enumerated in the *Kwik-Check* decision.[89] Specifically, the Superior Court held that Section 197-92: (1) improperly obligated the Board to find that "[t]he variance relates to a specific parcel of land, and the hardship is not shared generally by other properties in the same zoning district and vicinity"[90]; (2) improperly obligated the Board to find that "[t]he benefits from granting the variance would **substantially outweigh** any detriment"[91] (as opposed to applying a simple preponderance of the evidence standard); (3) improperly obligated the Board to consider "[w]hether the restrictions, if lifted, would affect neighboring properties and uses"[92] (as opposed to **seriously affect** neighboring properties and uses); and (4) improperly prohibited the Board from granting a variance based upon a conclusion that the property is a nonconforming situation.[93]

While in *Kwik-Check* the Delaware Supreme Court identified four factors for a Board to consider when evaluating a request for an area variance, the *Kwik-Check* Court, Section 327(a)(3), and Delaware Courts interpreting area variance requests after *Kwik-Check*, did not limit a Board of Adjustment as narrowly as the Superior Court did here. Indeed, many considerations not expressly identified

[89] *Id.*
[90] *See* Lewes Municipal Code § 197-92(B)(1).
[91] *Id.* at § 197-92(B)(3) (emphasis added).
[92] *Id.* at § 197-92(C)(3).
[93] *Id. at §* 197-92(D)(2) (providing that, "[n]onconforming lots, structures, uses, or signs shall not be considered grounds for granting variances").

within the enumerated four factors, yet still consistent with the factors, have been evaluated by Boards of Adjustment and Delaware courts when determining area variances under the exceptional practical difficulty standard in the over forty-years since the *Kwik-Check* decision. Thus, the Superior Court's narrow interpretation of the exceptional practical difficulty standard for area variances is contrary to law and must be reversed.

1. Barring Additional Legal Factors Duly Enacted, The Legal Standard for Area Variances is a Combination of the Statutory Requirements Plainly Contained Within 22 *Del. C.* § 327(a)(3) and the Four-Factor Exceptional Practical Difficulty Analysis Articulated in *Kwik Check*.

Section 327(a)(3) of the Delaware Code provides, in pertinent part, that a Board of Adjustment may:

> Authorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to the owner of property so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, **provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map** . . . .[94]

[94] *See* 22 *Del. C.* § 327(a)(3) (emphasis added).

The Delaware Supreme Court, in considering this statutory language[95], articulated that an exceptional practical difficulty is "present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on neighboring properties if the variance is granted."[96] In applying this weighing analysis, the *Kwik-Check* Court articulated the following considerations:

> the nature of the zone in which the property lies, the character of the immediate vicinity and the uses contained therein; whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses; whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.[97]

By articulating the exceptional practical difficulty standard, the *Kwik-Check* Court, and subsequent Delaware courts considering requests for area variances, did not hold or otherwise imply that the statutory objectives plainly identified in Section 327(a)(3) were irrelevant to the analysis.

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[95] The Delaware General Assembly amended Section 327(a)(3) on July 1, 1985, after the *Kwik Check* decision was issued, to incorporate language identical to the statute evaluated in the *Kwik Check* case and, as a result, codified extension of the *Kwik Check* analysis to municipalities governed under Title 22.
[96] *Kwik Check*, 389 A.2d at 1291.
[97] *Id.*

To the contrary, under Delaware law, the statutory objectives of Section 327(a)(3) are "inherently fundamental to granting a variance."[98] Thus, a critical question in determining whether a variance may be granted is whether the variance could be granted without substantial detriment to the public good **and** without substantially impairing the intent and purpose of the Zoning Code.[99] If the answer to this question is "no", then the variance cannot be granted.

In addition, consideration of a request for an area variance **also** requires evaluation of the four-factor exceptional practical difficulty standard. But unlike the Superior Court, the *Kwik-Check* Court did not narrowly apply the exceptional practical difficulty factors. Indeed, the *Kwik-Check* Court also evaluated economic considerations, business competitiveness, and whether the dimensional change requested was minimal.[100] And in the four decades since the Court decided *Kwik-Check*, a multitude of courts throughout the State have interpreted and applied Section 327(a)(3) and *Kwik-Check* through consideration of a variety of different facts and considerations.

The Superior Court erred both in ignoring the required Section 327(a)(3) statutory question for variances when it interpreted the applicable standard as a simple weighing analysis based upon a preponderance of the evidence, and further

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[98] *See Holowka v. New Castle Cty. Bd. of Adjustment*, 2003 WL 21001026, at *4 (Del. Super. Ct. Apr. 15, 2003) (internal citations omitted).
[99] *See id.*
[100] *Kwik Check*, 389 A.2d at 1291.

in applying an impermissibly narrow interpretation of the exceptional practical difficulty standard.

2. Notwithstanding the City's Lawful Authority to Establish More Stringent Standards for Variances, as Addressed Herein, Section 197-92 is Consistent with the Standard for Area Variances When Considering the Required 22 *Del. C.* § 327(a)(3) Threshold Question for Variances and the Four-Factor Exceptional Practical Difficulty Standard.

Given the plain language of Section 327(a)(3) and the breadth of judicial authority on application of the exceptional practical difficulty standard for area variances, Section 197-92 of the Zoning Code essentially synthesizes, for the benefit of the public, critical components of the area variance analysis under Delaware law.

Apart from Section 197-92(D)(1), which is not applicable to the present case, Section 197-92 of the Lewes Code, by its plain language, is clearly rooted in Section 327(a)(3) and the considerations within *Kwik-Check* and its progeny. Indeed, Sections 197-92(B)(2), 197-92(B)(4), and 197-92(C)(1),(2), and (4) all track the language of Section 327(a)(3) and the *Kwik-Check* factors. And while Sections 197-92(B)(1), 197-92(B)(3), and 197-92(C)(3) do not incorporate identical language to Section 327(a)(3) and *Kwik-Check*, they are nevertheless rooted in the common law application of the Section 327(a)(3) statutory question and the four-factor exceptional practical difficulty standard.

A. Section 197-92(B)(1) of the Lewes Code is an Appropriate Codification of the 22 *Del. C.* § 327(a)(3) and *Kwik Check* Requirement That The Character of the Immediate Vicinity Be Considered.

Section 197-92(B)(1) provides that the Board must find that "[t]he variance relates to a specific parcel of land, and the hardship is not shared generally by other properties in the same zoning district and vicinity." The Superior Court concluded that this required finding goes beyond *Kwik-Check*. However, Delaware courts have historically applied this very consideration when evaluating whether an exceptional practical difficulty exists.[101]

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[101] *See Snyder v. New Castle Cty*., 135 A.3d 763 (Del. 2016) (finding that a board of adjustment appropriately addressed *Kwik-Check* factors in granting an area variance when the board found that the "unique conformation of the property [and] the unique relationship of the existing dwellings and outbuilding to one another and to the varied topography" and the "unique geometry of the proposed signalized intersection" created an exceptional practical difficulty); *Scalia v. Bd. of Adjustment*, 2002 WL 1788105, at *2 (Del. Super. Ct. Jul. 30, 2002) (affirming decision of board of adjustment in denying an area variance, which relied on an inspection of the property that "did not reveal any special condition or exceptional situation that distinguished the Appellant's property from others"); *New Castle Dev. Co., L.L.C. v. New Castle Cty. Bd. of Adjustment*, 1996 WL 659481, at *5 (Del. Super. Ct. Aug. 13, 1996) ("The exceptional [practical] difficulty 'must not only be peculiar to the applicant's property, but it must relate to the particular property of the applicant for which he seeks the variance.'") (*quoting Searles v. Darling*, 83 A.2d 96, 101 (Del. 1951)); *Julian v. Highlands Place Co.*, 1994 WL 233907, at *5 (Del. Super. Ct. May 10, 1994) ("Our courts have long recognized that 'exceptional practical difficulties' may include uniqueness.") (citations omitted); *Weaver v. New Castle Cty. Bd. of Adjustment*, 1991 WL 236963, at *1 (Del. Super. Ct. Oct. 28, 1991) (affirming Board of Adjustment denial of an area variance where board found that "applicant has not established there is something peculiar to the property which prevents him from meeting the requirements of the Zoning Code").

Given the above, Section 197-92(B)(1) is perhaps best considered as an application of the Section 327(a)(3) and the *Kwik-Check* consideration regarding the relevance of "the character of the immediate vicinity." If all lots contain the same "difficulty," then that purported difficulty would be "routine" rather than "exceptional" and thus not one which warrants a variance under Section 327(a)(3), *Kwik-Check*, and Delaware case law.[102] Restated, if all lots contain the same "difficulty", then a deviation would be out of character for the immediate vicinity.

B. Section 197-92(B)(3) of the Lewes Code is an Appropriate Codification of the 22 *Del.C.* § 327(a)(3) Requirement That a Variance Be Granted Without Substantial Detriment to the Public Good.

Section 197-92(B)(3) requires that the Board find that "[t]he benefits from granting the variance would substantially outweigh any detriment." The Superior Court's conclusion that Section 197-92(B)(3) was a more stringent standard than that required under *Kwik-Check* does not consider the entire area variance standard. Indeed, the area variance legal standard is **not a simple preponderance of the evidence standard** that is met whenever the required dimensional change is minimal and the harm to the applicant if the variance is denied is greater than the

[102] *Kwik-Check*, 389 A.2d at 1291; *cf. Searles*, 83 A.2d at 100-101 ("Further, we also conceive it to be necessary in a matter of this kind for the applicant to establish that the hardship on which he relies is some factor peculiar to his property. Otherwise, instead of the granting of a variance, obviously what is needed is legislative action; the zoning ordinance itself should be amended so as to provide the remedy needed by all persons similarly situated.").

probable effect on neighboring properties if the variance is granted, as the Superior Court concluded. Section 197-92(B)(3) recognizes that there are other critical components to the analysis beyond a simple balancing of the harm, as noted expressly within Section 327(a)(3) and as acknowledged in other Delaware case law.

Section 327(a)(3) and the *Kwik-Check* line of cases demand that a Board of Adjustment "weigh the applicant's interest against the public's interest **so that a variance 'will not give rise to an unacceptable threat of injury to [the] public health, safety, morals or welfare**.'"[103] More specifically, as noted previously, the plain language of Section 327(a)(3) imposes a necessary finding that a variance "may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map . . . ."[104]

Section 197-92(B)(3) recognizes that where granting a variance would result in substantial detriment to the public, the exceptional practical difficulty standard has not been met, even if there is a preponderance of evidence showing slightly more harm to the applicant.[105] Indeed, Section 197-92(B)(3) recognizes that where there is substantial detriment to the public, the benefits from granting the variance

[103] *Conway & Conway v. Zoning Bd. of Adjustment*, 1998 WL 283393, at *2-3 (Del. Super. Ct. February 20, 1998) (emphasis added).
[104] *See* 22 *Del. C.* § 327(a)(3).
[105] *See* Lewes Municipal Code § 197-92(B)(3).

inherently will not substantially outweigh the detriment, consistent with the considerations within the statutory standard.[106] Similarly, if the difficulty is "exceptional" and not "routine", "practical" and not "theoretical", and if the variance can be granted without substantial detriment to the public, then it is fair to conclude that the benefits of granting the variance will substantially outweigh any detriment, again, consistent with the statutory standard.

C. Section 197-92(C)(3) is an Appropriate Codification of the *Kwik Check* Expectation That a Board Consider the Impact of a Requested Variance on Neighboring Properties.

The Superior Court also concluded that Section 197-92(C)(3) improperly allowed the Board to consider a lesser "detriment" than required under *Kwik-Check*. Both Section 197-92(C)(3) and *Kwik-Check* instruct the Board to consider the effect of the requested variance on neighboring properties.[107] Neither Section 197-92(C)(3) nor *Kwik-Check* provide a *per se* requirement that a variance be denied if the effect is "serious". Instead, the effect on neighboring properties is simply a factor in the overall analysis. While it would be an error for the Board to deny a variance solely because the variance influenced neighboring properties and uses, it is not an error for the Board to consider the effect on neighboring properties and uses as part of the overall exceptional practical difficulty analysis,

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[106] *Id.*
[107] *Id.* at § 197-92(C)(3).

as required under Section 197-92(C)(3).[108] Section 197-92(C)(3) is therefore not *per se* inconsistent with *Kwik-Check*.

The Board's written decision makes clear that it did not improperly conclude that the variances must be denied simply because they would influence neighboring properties and uses. To the contrary, the Board evaluated the effect of the variances, as required by Section 197-92(C)(3), in the context of the *Kwik-Check* factors instructing consideration of whether that effect is "serious", and found as follows:

> An exceptional "practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on the neighboring properties if the variance is granted." When addressing an application for an area variance under Delaware law, four factors should be considered:
>
> [1] [T]he nature of the zone in which the property lies[;] [2] the character of the immediate vicinity and the uses contained therein[;] [3] whether, if the restriction upon the applicant's property were removed, such removal would seriously affect such neighboring property and uses, [and] [4] whether, if the restriction is not removed, the restriction would create [hardship] for the owner in relation to his efforts to make normal improvements in the character of that use of the property which is a permitted use under the use provisions of the ordinance.
>
> The Board concludes that the Applicants have not demonstrated an exceptional practical difficulty sufficient to warrant granting their request for variances to verify and approve the construction of additions as proposed during the March 21, 2017 and April 18, 2017

[108] *Id.*

hearings on this matter and as identified in the Applicants' submission and exhibits.

The Board examined the nature of the zone in which the property lies – Residential Medium-Density (Historic) – including a review of similarly situated historic properties along Dewey Avenue and concludes that the Applicants' request is not unique and would represent a deviation from the spirt and intent of the of the Zoning Code. Although the Property includes a nonconforming structure, per Section 197-92(D)(2) of the Zoning Code, that fact alone is not sufficient to support a request for variances. The Board struggled to identify other bases of support for the variances.

The Property is a standard lot, on a standard street, with a standard situation for this community; namely the renovation of a nonconforming historic structure. While the Board applauds the Applicants on what are clear improvements to a failing structure, the Board concludes that the additions went beyond what is reasonable. The Applicants bear the burden for articulating, and presenting evidence supporting the presence of, an exceptional practical difficulty.

During the hearing, much focus was placed on the aesthetic and structural improvements provided by the renovations. The Applicants also focused on a desire for a first floor bedroom and relied heavily on the support of their immediately adjacent neighbor. The Board agrees that the renovations represent an aesthetic and structural improvement. And the Board further acknowledges that the City of Lewes 2015 Comprehensive Plan ("Comprehensive Plan") supports providing more options for residents to age in place. However, aesthetic improvements and adjacent neighbor support **do not obviate the need to establish an exceptional practical difficulty supporting a request for variances**.

Regarding the exceptional practical difficulty standard, the Board does not find that the Property and circumstances necessitating the variances are unique. **Nor does the Board find that the variances can be granted without substantial detriment to the public good, and thus in weighing the impact, the Board cannot agree that the benefit in granting the variances substantially outweighs the**

> **detriment**. Indeed, the variances sought are significant, representing considerable encroachments and expansions. Lastly, the Board finds that there is not sufficient evidence supporting a deviation from the requirements of the Zoning Code, which requirements have not been challenged by the Applicants.[109]

The Board questioned Mr. Nepa regarding the character of the area during the hearing.[110] The Board also specifically asked the witness about the Nepas' need/basis for the addition.[111] And the Board heard testimony from Ms. Brenda Jones, an architectural designer in the City, on the detriment to the public good if the Board were to grant the variances.[112] The Board considered the effect to health and safety of neighboring properties if the variances were granted.[113] The Board also clearly considered the effect that granting the variances would have on the City's Comprehensive Plan.[114] The foregoing are just examples of the Board's numerous applications of the specific factors enumerated in 22 *Del. C.* § 327(a)(3) and *Kwik-Check*.

In addition, the Board also specifically addressed the elements derived from Section 327(a)(3), *Kwik-Check*, and Delaware case law that have been enumerated in Section 197-92, as required by the Code.[115] After careful consideration, the

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[109] Appendix at A-113-118 (citations omitted) (emphasis added).
[110] *See* Appendix at A-52:4-6.
[111] *See* Appendix at A-59:1-6.
[112] *See* Appendix at A-81:22-A-83:2.
[113] *See* Appendix at A-95:1-12.
[114] *See* Appendix at A-108:2-20.
[115] *See* Appendix at A-114, A-101:24-A-103:18, A-106:10-A-109:14.

Board correctly concluded that the Nepas failed to provide any evidence supportive of an exceptional practical difficulty and further failed to provide evidence enabling the Board to find that the specific elements of Section 197-92 had been met. Accordingly, the Board properly denied the Nepas' application.

D. Section 197-92(D)(2) of the Zoning Code is An Appropriate Codification of the 22 *Del.C.* § 327(a)(3) and *Kwik Check* Expectation That Requests for Area Variances Be Based Upon Application of the Legal Standard and Not Simply Upon a Structure's Existing Non-Conforming Status Alone.

Finally, contrary to the Superior Court's decision, Section 197-92(D)(2), does not exclude nonconforming situations from consideration for area variances.[116] Conversely, it merely makes clear that a nonconformity cannot, in and of itself, provide the basis for an area variance. That is, Section 197-92(D)(2) codifies an expectation of what should otherwise be clear under the law: to obtain an area variance, an applicant must establish that an exceptional practical difficulty, rather than a legal nonconformity, justifies the request. It is not sufficient in the absence of other evidence supporting an exceptional practical difficulty to simply argue, "my home is already nonconforming, so I should be allowed to further expand the nonconformity on that basis alone."

[116] *See* Lewes Municipal Code § 197-92(D)(2).

The Board can grant, and has previously granted, area variances in situations involving nonconforming structures.[117] In such previous cases, however, the nonconformity was not the basis for the exceptional practical difficulty and thus did not in any way prevent the Board from granting a variance under Section 197-92(D)(2). Instead, the basis for the variances was evidence evincing an exceptional practical difficulty. Notably, this practice, too, is consistent with the *Kwik-Check* line of cases.[118]

3. The Superior Court Erred in Not Adhering to the Legal Doctrine of *Stare Decisis*.

The Superior Court's decision ignores the plain language of Section 327(a)(3) and the body of judicial precedent interpreting the same, and instead relies upon a narrow reading of the *Kwik-Check* decision to support its conclusion that Section 197-92 is inconsistent with the exceptional practical difficulty

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[117] *See* Appendix at A-128-136; *see generally*, *Wood v. Parsons*, 1990 WL 63910, at *1 (Del. Super. Ct. Jan. 11, 1990) (holding that a "Court recognizes that a government body's practical interpretation of its own rules and regulations is entitled to great weight, unless the interpretation is 'unreasonable or unnatural'") (citations omitted).

[118] *See Rogers v. Bd. of Adjustment of City of Lewes*, 2001 WL 34083882 (Del. Super. Ct. Oct. 31, 2001) (finding that substantial evidence to support granting of an area variance was not provided, and applicants' legally nonconforming undersized lot alone was not a sufficient basis for finding an exceptional practical difficulty); *cf. Matarese v. Bd. of Adjustment of New Castle Cty.*, 1985 WL 188970, at *2 (Del. Super. Ct. Feb. 12, 1985) ("The existing violation of the zoning regulation is not justification for granting a variance which would permit that same violation," and "The proper focus is to look at the hardship that existed prior to the building of the stable. In other words, the Board must approach this part of the analysis as if the building does not exist.").

standard for area variances. In ignoring this precedent, the Superior Court's decision fails to adhere to the legal doctrine of *stare decisis* and must be reversed.

As this Court noted in *State v. Barnes*, "[w]hen a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation."[119] The *Barnes* Court further noted, "[t]he doctrine of *stare decisis* exists to protect the settled expectations of citizens because, '[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"[120]

Although certain provisions in Section 197-92 go beyond the Superior Court's narrow interpretation of the exceptional practical difficulty standard, those provisions are consistent with the settled expectations of citizens concerning the broader scope of the legal standard for area variances. This broader scope has remained unchanged by the Delaware General Assembly over the past several decades. And as this Court recognized, "[a] fundamental canon of statutory construction provides that '[t]he long time failure of [the legislature] to alter [a statute] after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one.'"[121]

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[119] 116 A.3d 883, 889 (Del. 2015).
[120] *Id.* (citations omitted).
[121] *Id.* at 892.

CONCLUSION

For the reasons above, the Superior Court's decision should be reversed.

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