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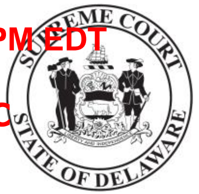

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

<u>APPELLEES' ANSWERING BRIEF</u>

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SWAYZE, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

COUNTERSTATEMENT OF FACTS 6

ARGUMENT 12

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE LEWES BOARD OF ADJUSTMENT EXCEEDED THE SCOPE OF ITS DELGATED AUTHORITY WHEN IT APPLIED HARSHER VARIANCE TESTS BEYOND THE SIMPLE BALANCING TEST OF 22 DEL. C. § 327(a)(3) AS INTERPRETED BY *KWIK-CHECK*. 12

A. Questions Presented 12

B. Scope of Review 12

C. Merits of Argument 13

1. The Lewes Board of Adjustment's authority to grant variances is limited to the provisions of 22 *Del. C.* § 327(a)(3) as interpreted by *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289. 13

2. Neither the City of Lewes Charter nor the express language of Chapter 3, Title 22 of the Delaware Code authorize the City or Board to apply more stringent requirements for granting an area variance than set by the General Assembly in § 327(a)(3). 19

a. The 1985 and 2008 amendments to § 327 demonstrate *Kwik-Check*'s conclusiveness and the limits of the City's authority. 19

b. Contrasting § 327(a)(3) with § 327(a)(2) (special exceptions) bolsters the Board's jurisdictional independence from the City as to grants of variances 23

c. Section 307 applies only to dimensional land use standards and does not permit or empower municipalities to dictate the legal standards for variances in contradiction of the Board's jurisdictional enabling statute. 24

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT CITY OF LEWES CODE § 197-92 IMPERMISSIBLY IMPOSED DIFFERENT AND MORE STRINGENT REQUIREMENTS THAN THE EXCEPTIONAL PRACTICAL DIFFICULTIES TEST, AND THE BOARD'S RELIANCE ON THE CODE IN DENYING THE NEPA AREA VARIANCE APPLICATION WAS ERROR. 29

A. Questions Presented 29

B. Scope of Review....29

C. Merits of Argument 30

1. Lewes Code § 197-92 rewrites the *Kwik-Check* analysis, morphing the straightforward exceptional practical difficulties balancing test with a confusing mixture of the harsher unnecessary hardship test reserved for use variances....30

a. Lewes Code § 197-92B(1). 32

b. Lewes Code § 197-92B(3). 33

c. Lewes Code § 197-92C(3). 34

d. Lewes Code § 197-92C(4). 34

e. Lewes Code § 197-92D(2). 36

2. The Superior Court correctly determined that the Board applied the improperly enhanced standards to deny the Nepa variance application in violation of 22 Del. C. § 327(a)(3) and *Kwik-Check*. 37

3. The Nepas demonstrated by substantial evidence an exceptional practical difficulty sufficient to support a variance under 22 *Del*. *C*. § 327(a)(3). 38

CONCLUSION 44

TABLE OF AUTHORITIES

Cases

Account v. Hilton Hotels Corp.,
780 A.2d 245 (Del. 2001) 18
Baker v. Connell,
488 A.2d 1303 (Del. 1985) 32
Bd. of Adjustment of New Castle Cnty. v. Henderson Union Assoc.,
374 A.2d 3 (Del. 1977) .... passim
Bd. of Adjustment of New Castle Cnty. v. Kwik-Check Realty, Inc.,
389 A.2d 1289 (Del. 1978) .... passim
Bd. of Adjustment of Sussex Cnty. v. Verleysen,
36 A.3d 326 (Del. 2012) .... passim
Bridgeville Rifle & Pistol Club v. Small,
2017 WL 6048843 (Del. 2017).................... 15, 16
Chase Alexa, LLC v. Kent Cnty. Levy Court,
991 A.2d 1148 (Del. 2010) 21
Dale v. Elsmere,
1988 WL 40018 (Del. Super. Ct. April 20, 1988) 26
Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926)....................26
Friends of the H. Fletcher Brown Mansion v. City of Wilmington,
2013 WL 4436607 (Del. Super. Ct. July 26, 2013) 26
Harvey v. City of Newark,
2010 WL 4240625 (Del. Ch. Oct. 20, 2010) 18
Hellings v. City of Lewes Bd. of Adjustment,
734 A.2d 641 (Table) (Del. 1999) 12, 13, 29, 30
In Re 244.5 Acres of Land,
808 A.2d 753 (Del. 2002) 26
In re Ceresini,
189 A. 443 (Del. Super. Ct. 1936) 26
Jenney v. Durham,
707 A.2d 752 (Del. Super. Ct. 1997) 21, 22
Mello v. Bd. of Adjustment,
565 A.2d 947 (Del. Super. Ct. 1976) 12, 29
Nepa v. Bd. of Adjustment of the City of Lewes,
2018 WL 1895699 (Del. Super. Ct. April 11, 2018) .... passim
New Castle Cnty. Council v. BC Dev. Assocs.,
567 A.2d 1271 (Del. 1989) 15, 16

Riker v. Sussex County Bd. of Adjustment,
2015 WL 648531 (Del. Super. Ct. 2015)..36
Salem Church Assocs. V. New Castle County,
2006 WL 4782453 (Del. Ch. Oct. 6, 2006) 27
Schadt, III v. Latchford,
843 A.2d 689 (Del. 2004) 19
Stingray Rock, LLC v. Board of Adjustment of the City of Rehoboth Beach,
2013 WL 870662 (Del. Super. Ct. 2013)..35

Statutes

22 *Del. C.* § 301 27
22 *Del. C.* § 303 23
22 *Del. C.* § 307 .... 24, 25
22 *Del. C.* § 321 .... 13, 23, 24
22 *Del. C.* § 323 23
22 *Del. C.* § 327 19
22 *Del. C.* § 327(a)(2) 23
22 *Del. C.* § 327(a)(3) .... passim

Other Authorities

65 *Del. Laws* Ch. 61, § 1..19
76 *Del. Laws* Ch. 371, § 1..20

NATURE OF PROCEEDINGS

The instant matter is a consolidation of appeals taken by the City of Lewes ("City") and the Lewes Board of Adjustment ("Board") from the Superior Court's July 5, 2018 Order reversing the Board's denial of the Petitioners', Ernest M. Nepa and Deborah A. Nepa (the "Nepas"), application for three area variances. This appeal follows the Superior Court's correct application of this Court's *Kwik-Check* decision, which interpreted the operative language of § 327(a)(3) and held that a board of adjustment must apply the "exceptional practical difficulties" test when an applicant seeks an area variance. The Superior Court also correctly found that the Board acted *ultra vires* when it required the Nepas to make a more burdensome showing than *Kwik-Check* and § 327(a)(3) allows, and that the Board reached its erroneous result in reliance on City of Lewes Code § 197-92, which encroached upon the Board's independent jurisdictional authority by improperly imposing additional requirements for area variance applications.

On February 17, 2017, the Nepas filed their application for the variances with the Board. The Nepa variance application was the subject of a full public hearing before the Board on April 18, 2017, when the Board took up the application, heard argument of the Nepas' legal counsel, received written and oral evidence, closed the record and then deliberated and announced a decision denying all area variances requested. The Board's written decision was filed on May 31, 2017.

On June 28, 2017, Petitioners filed a Verified Petition for Writ of Certiorari and Appeal pursuant to 22 *Del. C.* § 328 regarding the Board's denial of the variance applications seeking relief from the City's Municipal Code Requirements regarding the R-4(H) zoning district, in particular, the expansion of a legal non-conforming structure into the eight foot side yard setback code requirement. After receiving briefing from the parties, including responses to the Superior Court's December 12, 2017 letter requesting additional information, the Superior Court issued an Opinion and Order, dated April 11, 2018, reversing the Board's decision to deny the Nepa variance application. The Superior Court held that the Board committed several legal errors, specifically:

> [T]hat the Board (1) required a finding of "uniqueness" that is not required by *Kwik-Check*, (2) required a more stringent weighing test than does *Kwik-Check*, (3) permitted a lesser 'detriment' to neighboring properties than does *Kwik-Check*, and (4) eliminated the nonconforming nature of a property as being a reason for granting a variance, which *Kwik-Check* does not do.

Nepa v. Bd. of Adjustment of the City of Lewes, 2018 WL 1895699, *1 (Del. Super. Ct. April 11, 2018).

On July 9, 2018, the Board and the City each filed an appeal from the Superior Court's April 11, 2018 Order. *See* No. 348, 2018, at D.I. #1; No. 349, 2018, at D.I. #1. By Order dated August 2, 2018, this Court consolidated the appeals, and on August 24, 2018, the Board and the City filed their Joint Opening Brief, which was

later corrected and refiled on August 29, 2018. This is the Petitioners' Answering Brief.

SUMMARY OF ARGUMENT

I. Denied. The Lewes Board of Adjustment is bound by its jurisdictional enabling statute, 22 *Del. C.* § 327(a)(3), which supplies "both a foundation for the Board's power and a yardstick against which its discretion may be measured." *Bd. of Adjustment of New Castle Cnty. v. Henderson Union Assoc.*, 374 A.2d 3, 5 (Del. 1977). The legal standard established by the General Assembly under § 327(a)(3) for area variances is the exceptional practical difficulties test articulated in *Bd. of Adjustment of New Castle Cnty. v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978). The General Assembly did not delegate authority to the City of Lewes to alter the jurisdictional authority of the Board, and indeed the Board is not subservient to the City. The Superior Court correctly determined that the City of Lewes could not impose the harsher area variance standards set out in Lewes Code § 197-92.

II. Denied. The Superior Court correctly determined that Lewes Code § 197-92 improperly altered the *Kwik-Check* exceptional practical difficulties balancing test by imposing different and more stringent requirements incompatible with 22 *Del. C.* § 327(a)(3). The Board erroneously denied the Nepa area variance application and acted *ultra vires* when it relied on Lewes Code § 197-92, which eliminated the exceptional practical difficulty test in several sections, added a uniqueness test as

well as a non-conforming disqualifier, and by improperly advocated a hardship test even though hardship has no place in an area variance analysis.

COUNTERSTATEMENT OF FACTS

On February 17, 2017, the Nepas filed an application for three variances from the City of Lewes Zoning Code to (1) permit the expansion of an existing non-conforming structure vertically from an existing half story to a full second story (2) permit an addition that encroaches approximately 4.8 feet into the code required minimum eight foot side yard setback and (3) permit the construction of a rear addition that encroaches approximately 4.3 feet into the required minimum 10 foot distance from the nearest garage. A113. A full hearing on the application was held on April 18, 2017 before the Lewes Board of Adjustment. A113.

The Nepa property is located in the R-4(H) residential medium-density (historic) zoning district. A113. The Nepa structure was legally non-conforming due to its 4.6 to 4.8 foot encroachment into the eight foot side yard setback. A113. The Nepas commenced construction of the additions necessitating the requested variances after a storm and the discovery of a structural collapse of the home in 2016. A38-39. The additions included replacing a damaged 1.5 story portion of the existing structure with a full two stories and expanding to the rear of the existing structure following the existing historic side yard building line a distance of 14 feet and constructing a rear addition that is 4.3 feet into the required minimum ten foot distance from the nearest garage. A114; A42-46.

During the hearing, the Chair stated that the Nepa lot was not unique or strangely configured and was not considered a unique parcel. A29. The Chair discussed the question of self-imposed hardship created by the Nepas. A28. The Chair observed and commented to the Applicant: "So you are basically asking for forgiveness and permission retroactively." A73. The Chair questioned whether the hardship is not shared generally by other properties in the same zoning district and vicinity. A86. The Chair also stated again that the Nepa property was not unique as compared to other pieces of land on the same street. A87-88. The Board's legal counsel asked as the core issue what was the hardship that was necessitating the variance and what is the hardship that warrants an addition. A89. The Applicant's attorney pointed out that part of the purpose of the Nepa addition was to establish a first floor master bedroom and bedroom suite which coincide with the comments of local realtor, Lee Ann Wilkinson, that such renovations help encourage full time longtime residents and allows for practical functional living space on the first floor, which is supported by the Lewes Comprehensive Plan. A89-90; B3-4.

The Chair criticized the purpose of the first floor addition as merely a desire for increased financial gain to obtain "a higher sales price for the property, wouldn't it." A89. The Chair went on to observe that the old house had been without a first floor bedroom and bathroom for decades and was still livable and that condition was not an exceptional practical difficulty. A90. The Chair continued to state that "not

being able to have a bedroom on the first floor was not an exceptional practical difficulty." A91. When Applicant's counsel pointed out that the spirit of the code of what the City of Lewes is trying to encourage is aging in place first floor bedrooms, the Chair responded that it was "the sales market" that was encouraging first floor bedrooms and aging in place not the City of Lewes. A91. The Board's attorney corrected the Chair to point out that the City of Lewes Comprehensive Development Plan, as addressed in the letter of Lee Ann Wilkinson does confirm that a planning goal of the City of Lewes is allowing aging in place. A91-92. The Chair again stated that the property must be unique in order to pose an exceptional practical difficulty. A92. The Chair stated that because City officials denied a first floor master bedroom and bath, then the City official and therefore the City Zoning Code does not support such a renovation. A93.

The Board's attorney instructed the Board that a hardship must be found that is not shared by other properties. A99. The Board's attorney also instructed the Board in the concept of self-imposed hardship as a hardship created by the Applicant and that the Applicant must show that there is a "true hardship" which is the "focus of the Board." A100. The Chair advised the members of the Board that an existing non-conforming status cannot be used as a reason for a variance to extend a non-conforming structure. A100. The Board's attorney advised specifically that "a non-conforming situation" cannot be used as the "basis" for a variance. A101. The

Board's attorney again advised the Board that the balancing test included a showing of hardship by the Applicant. A101. Commission Member Vessella applied a hardship standard to the Nepa property in finding that it did not have a hardship that was not shared generally by other properties in the same zoning district and vicinity. A102. Commissioner Vessella also applied the unique situation test in finding that the Nepa property was not unique. A102. Commissioner Vessella also looked to the self-imposed hardship and motive of the Applicant by finding that the Applicant's construction of the addition without following the City Code would substantially impair the intent and purpose of the Comprehensive Plan of the City. A103. Commissioner Emery also found that the hardship was self-imposed by the Applicant's conduct of building first and requesting approval afterward. A104-05. The Chair again stated that the hardship was not shared by other properties in the same zoning district and vicinity and that the property was not unique. A106. The Chair also objected to the addition to a non-conforming structure as the basis for the variance. A107. The Chair also objected to the economic rationale for the requested variances to permit the first floor modernization with bathroom and bedroom as follows: "Just to make the more marketable, to make it more habitable, to make it more desirable is not an exceptional practical difficulty." A108. The Chair stated that the variances would impair the intent and purpose of the Comprehensive Plan by violating the spirit and intent of the Comprehensive Plan because the additions

violate the building codes which are memorialized in the Comprehensive Plan and "that those building codes are set to be sort of the soul that gives life to the Comprehensive Plan." A108. The Chair objected to granting the variance if its only purpose was to make the property "more livable." A109. The Chair did confirm that the quality of the work was excellent and that the quality improves the street in terms of the look. A109. During the application hearing and in the subsequent written decision of the Board, the term "hardship" is used nineteen times. A115-16; A28; A86; A89; A99-102; A106. The term "unique" is used over nine times. A117; A28-29; A87-88; A95; A106.

In the Board's written decision the Board recited as one of its specific required findings: "(1) The 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." A115. The Board also stated as a required finding the test of "(4) Whether the restriction would tend to create a hardship on the owner in relation to normal improvements." A115. The Board in its decision at page 4 stated as one factor to be followed "(4) Whether, if the restriction is not removed, the restriction would create a hardship for the owner in relation to normal improvements." A115-116. The Board also relied on Lewes Code § 197-92(D)(2) which provides that non-conforming situations shall not be considered grounds for granting a variance. A116. The Board applied a uniqueness test to find that the property and

circumstances necessitating the variances were not unique. A117. The Board applied a hardship test and found that the Applicant's situation was an entirely self-created hardship and also concluded the facts did not evidence a sufficient hardship to set aside the code based hurdles of the Lewes Code. A117. Finally, the Board did not find sufficient evidence after applying a hardship test that would prevent the Applicant from making normal improvements under the Code. A117.

The improvements the Nepas desired is shown in the photograph at B6, and the pre-existing conditions survey at A123. In "squaring up" the house, the Nepas used the existing Northeasterly foundation of the existing house as the guideline for the foundation for the new addition (the "historic side yard building line"). B5; B6. The new two story addition followed the historic side yard building line rearward 14 feet. A123 and B1.

Mr. Nepa testified that the renovated home was more architecturally and historically correct, based upon his prior renovation experience, than the before condition, which indeed was the goal he wanted and has achieved. A50. Removal of the side yard restriction would not seriously affect the most affected neighbor, Virginia Mitchell, by her own written and oral testimony. B2, A74-78.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE LEWES BOARD OF ADJUSTMENT EXCEEDED THE SCOPE OF ITS DELGATED AUTHORITY WHEN IT APPLIED HARSHER VARIANCE TESTS BEYOND THE SIMPLE BALANCING TEST OF 22 DEL. C. § 327(a)(3) AS INTERPRETED BY *KWIK-CHECK*.

A. Questions Presented

Whether the City of Lewes by municipal ordinance has authority to alter the Lewes Board of Adjustment's jurisdictional enabling statute set by the General Assembly and change the legal standard for granting area variances under 22 *Del. C.* § 327(a)(3) and *Kwik-Check*?

B. Scope of Review

This Court applies the same standard of review applicable to the Superior Court, and that review is limited to correcting errors of law and determining whether there is substantial evidence in the record to support the Board of Adjustment's decision. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012); *Mello v. Bd. of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1976). Errors of law are reviewed *de novo*. *Verleysen*, 36 A.3d at 239. If the Board has committed an error of law by applying the wrong legal standard, the reviewing court is not free to review the evidence and apply a different legal standard "because to do so would be to substitute its own judgment for that of the Board." *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Table), at *2 (Del. 1999). Instead, lacking the

power of remand, the reviewing court must reverse, which "vacates the Board's decision and the applicant may re-apply with the proceedings before the Board beginning anew." *Id.* at *3.

C. Merits of Argument

1. The Lewes Board of Adjustment's authority to grant variances is limited to the provisions of 22 *Del. C.* § 327(a)(3) as interpreted by *Board of Adjustment of New Castle County v. Kwik-Check Realty, Inc.*, 389 A.2d 1289.

The Lewes Board of Adjustment derives its authority and legal standards for granting variances exclusively from 22 *Del. C.* § 327(a)(3), and otherwise the Board has no separate or independent powers of its own. *See* 22 *Del. C.* § 321; *Bd of Adjustment of New Castle Cnty. v. Henderson Union Assoc.*, 374 A.2d 3, 4 (Del. 1977). Section 327 is the jurisdictional statute enabling municipal boards of adjustment, such as the Lewes Board, to grant area variances from local zoning ordinances that impose "exceptional practical difficulties" on property owners. *See* 22 *Del. C.* § 327(a)(3); *Bd. of Adjustment of New Castle Cnty. v. Kwik-Check Realty, Inc.*, 389 A.2d 1289, 1291 (Del. 1978). The relevant portion of § 327(a)(3) provides that a municipal 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.

22 *Del. C.* § 327(a)(3).

It is clear from this Court's *Kwik-Check* decision that when the General Assembly uses the flexible language found in 22 *Del. C.* § 327(a)(3) it intends for municipal boards of adjustment to apply the "exceptional practical difficulties" test to decide whether a property owner should be granted an area variance. *See Kwik-Check*, 389 A.2d at 1290-91. Interpreting statutory language identical to § 327(a)(3), the *Kwik-Check* Court articulated the exceptional practical difficulties standard as follows: "Such 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." *Kwik-Check*, 389 A.2d at 1291. A municipal board of adjustment conducting this straightforward balancing test considers the following 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 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." *Id.*

This Court has specifically acknowledged that boards of adjustment have very limited powers which are entirely delegated by statute directly from the General Assembly and they will be strictly held to the limits of that delegation. This Court stated in *Henderson Union* that "[t]he Board is duty-bound to address the 'difficulties' presented by the owner and determine whether they are 'practical' as distinguished from theoretical, 'exceptional' rather than routine,' ***because these statutory standards supply both a foundation for the Board's power and a yardstick against which its discretion may be measured."*** *Henderson Union*, 374 A.2d at 5 (emphasis added). This Court recently reaffirmed the limited scope of land use authority delegated by the General Assembly and the requirement that such authority cannot be unreasonably exceeded in *Bridgeville Rifle & Pistol Club v. Small*, 2017 WL 6048843, at *21 (Del. 2017). The *Bridgeville* majority observed that "it is blackletter law that 'administrative agencies . . . derive their powers and authority *solely* from the statute creating such agencies and which define their powers and authority." *Bridgeville*, 176 A.3d at *21 (emphasis original). In *Bridgeville*, this Court stamped its imprimatur of approval on its earlier decision of *New Castle Cnty. Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989) (a land use case) to confirm that "[I]t is axiomatic that delegated power may be

exercised only in accordance with the terms of its delegation." *Id.* at *21. *BC Dev. Assocs.* holds that even the *local* power to impose zoning and land use requirements is still limited by the enabling grant from the Legislature: "Thus, in the realm of rezoning, the power of Council is analogous to that of an administrative agency, since the fundamental power to regulate land use rests with the General Assembly." *BC Dev. Assocs.,* 567 A.2d at 1275. In *BC Dev. Assocs.* this Court further confirmed that "when the validity of a zoning regulation is judicially challenged the standard for review is *whether the action is in compliance with applicable statutes.*" *Id.* at 1276 (emphasis added). The Lewes Board of Adjustment violated *Henderson Union*, *BC Dev. Assocs*., and *Bridgeville* by applying stricter standards than are contained in its enabling statute, § 327(a)(3). "In short, the Board based its decision upon a power it does not have, and that is fatal to [it's decision]." *Henderson Union*, 374 A.2d at 3.

For all municipal boards of adjustment, including the Lewes Board, *Kwik-Check* is the binding and authoritative standard, and the only standard that can be applied to area variances and is *stare decisis* on this question until the General Assembly amends § 327(a)(3). This Court very clearly noted in *Board of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 330-331 (Del. 2012), that the General Assembly *can* permit Boards of Adjustment to deviate from the *Kwik-Check* balancing test only *after* the General Assembly has enacted such deviation by statute.

"The statute that governs proceedings before the Sussex County Board of Adjustment is materially different from the statute pertaining only to New Castle County that was at issue in *Kwik-Check*. In particular, the New Castle County statute does not *require* the Board of Adjustment to find that the "unnecessary hardship or exceptional practical difficulty has not been created by the appellant." *Verleysen*, 36 A.3d at 330-31 (emphasis original). The decision in *Verleysen* confirms that Boards of Adjustment are beholden in both their authority and how they decide area variances by the explicit language used by the General Assembly in their respective enabling Statutes. The *Verleysen* Court makes this point by contrasting § 327(a)(3) with the more demanding requirements enacted by the General Assembly governing area variances in unincorporated Sussex County, which is not limited solely to the *Kwik-Check* balancing test. *Id.*

The General Assembly has not modified the relevant text of § 327(a)(3) in the nearly forty years since the Supreme Court decided *Kwik-Check*, and the City raises no extraordinary reason why the simple balancing test for area variances explained in *Kwik-Check* should be set aside in this case. "Once a point of law has been settled by decision of this Court, 'it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside . . . and [it] should be followed except for urgent reasons and upon clear manifestation of error.' The need for stability and continuity in the law and respect for court precedent are the principles upon which

the doctrine of stare decisis is founded." *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (internal citation omitted). The doctrine of *stare decisis* is even more stringently applied to judicial statutory interpretations, because the General Assembly can always amend a statute if it disagrees with the Court's precedent: "Considerations of stare decisis have special force in the area of statutory interpretation, because unlike in the context of constitutional interpretation, the legislative power is implicated, and [the legislature] remains free to alter what we have done." *Harvey v. City of Newark*, 2010 WL 4240625, at *7 n.46 (Del. Ch. Oct. 20, 2010) (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 112 (1991) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989)).

In this case, the Lewes Board of Adjustment cannot apply the higher standards of Lewes Code § 197-92[1] to area variance applications because the General Assembly has not modified § 327(a)(3) to include those more stringent requirements (as it did for unincorporated Sussex County). The Court's final admonition in *Verleysen* also holds true in this case: "Until such time as the General Assembly amends the plain language of the statute, the Board of Adjustment and the courts must enforce it as written." *Verleysen*, 36 A.3d at 332. As written, Lewes must only apply the *Kwik-Check* simple balancing test.

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[1] *See* discussion *Part II*, *infra*.

2. Neither the City of Lewes Charter nor the express language of Chapter 3, Title 22 of the Delaware Code authorize the City or Board to apply more stringent requirements for granting an area variance than set by the General Assembly in § 327(a)(3).

The City's attempt to find local power to alter the General Assembly's established variance tests in the City's Charter or Chapter 3 of Title 22 is unpersuasive because the plain language of both statutes fails to support the City's argument. First, the City's Charter provisions at 29.41 and 38 merely authorize the City to adopt zoning ordinances (and not Board of Adjustment variance tests). City Charters are not specific grants of authority but limitations on the extent of municipal authority. *See Schadt, III v. Latchford,* 843 A.2d 689, 693-694 (Del. 2004). Second, the express language of Chapter 3 of Title 22 indicates that the General Assembly reserved unto itself as the sovereign the power to establish the extent of the jurisdiction of a Board of Adjustment and did not delegate that power to the local jurisdictions. *See* 22 *Del. C.* § 327.

a. The 1985 and 2008 amendments to § 327 demonstrate *Kwik-Check*'s conclusiveness and the limits of the City's authority.

The Superior Court below recognized that in 1985 the General Assembly reformed the language of § 327(a)(3) to match the "exceptional practical difficulties" language this Court interpreted in *Kwik-Check*. *See Nepa v. Bd. of Adjustment of the City of Lewes*, 2018 WL 1895699, at *4 (Del. Super. Ct. April 11, 2018); 65 *Del. Laws* Ch. 61, § 1. The 1985 Amendment did not impose any requirement that the

municipal boards of adjustment make any particular findings outside of considering the four factors outlined in *Kwik-Check*, although the General Assembly could have, and indeed had done for the Sussex County Board of Adjustment under 9 *Del. C.* § 6917. *See Verleyson*, 36 A.3d at 331-32. The 1985 Amendment of § 327(a)(3) codified *Kwik-Check* and thereby cemented the General Assembly's intention to have municipal boards of adjustment apply the flexible exceptional practical difficulties balancing test.

Recent proof of the lack of authority of the City to impose its own ordinances regulating the granting of variances is fully demonstrated by the General Assembly's 2008 Amendment to § 327(a)(3). The 2008 Amendment, 76 *Del. Laws* Ch. 371, § 1, permitted municipalities to empower a designated town official to administratively grant dimensional variances of not more than one foot without need to apply to the board of adjustment. In other words, until 2008, under the entirety of Chapter 3 of Title 22 and the existing municipal charter provisions no municipality had the jurisdictional authority to adopt an ordinance permitting a one-foot administrative dimensional variance. That minor delegation of authority to municipalities underscores the extent to which the General Assembly intended to reserve unto itself the exclusive authority to establish the jurisdictional powers of municipal boards of adjustment. If the City was already empowered before 2008 to modify the *Kwik-Check* exceptional practical difficulty test on its own and add other

constraints on the power of the Board to grant variances, then certainly the General Assembly's rather mundane provision would be entirely and completely superfluous. It is the bedrock principle of statutory construction that words in a statute are intended to have meaning and not construed as surplusage. *See Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). Applying *Chase Alexa*, the most reasonable analysis is that municipalities lacked the broad sweeping jurisdictional authority claimed by the City, and the 2008 Amendment is conclusive proof that the General Assembly retains complete control over the jurisdictional scope and standards of municipal boards of adjustment and more importantly limited the power of the local jurisdiction to interfere with its power through adoption of local ordinances.

The Superior Court in *Jenney v. Durham*, 707 A.2d 752 (Del. Super. Ct. 1997), confirms that the Board has independent jurisdictional authority granted by the General Assembly that cannot be watered down, side-stepped or superseded in whole or in part by ordinances enacted by local jurisdictions. In *Jenney*, the Superior Court attempted to set straight the "confusion about the reach of the Board's jurisdiction vis-à-vis county ordinances." *Id.* The court confirmed that the Board is beholden to its enabling statute, "which confers subject matter jurisdiction upon the Board and grants the Board its authority to act." *Id.* The court went on to explain that "[t]he Board has no jurisdiction to act outside the parameters of [its enabling

statute], and a New Castle County ordinance (such as the Steep Slope Ordinance) *does not supersede, side-step or otherwise substitute for the legislative jurisdictional prerequisites*." *Id.*

Contrary to the Board's and City's reading of *Jenney*, the Superior Court's discussion of the relevance of the Steep Slope Ordinance vis-à-vis the Board's authority cannot be read as approval for a municipality to adjust the legal standard by which a variance is granted, *see* Op. Br. at 18, especially considering the court's definitive statement that the Board has no authority to act outside the parameters of its enabling statute. *See Jenney*, 707 A.2d at 757 n.4. The court explained that the standards in the ordinance become relevant once the use is permitted, since it would be subject to the land grading standards applicable to all uses within the steep slope district, as "[t]hey are basic environmental guidelines which must be followed for any construction in a steep slope district." *See id.* But it is the enabling statute itself, and not the County zoning ordinance that determines the governing legal standard for obtaining the variance.

b. Contrasting § 327(a)(3) with § 327(a)(2) (special exceptions) bolsters the Board's jurisdictional independence from the City as to grants of variances.

Other proof of this separation of the jurisdictional authority of the Board of Adjustment from the local jurisdiction's zoning powers is found on the face of Chapter 3 of Title 22. The Chapter is divided into two subchapters and the Board of Adjustment provisions are entirely separate and identified as Subchapter 2 beginning with § 321. *See* 22 *Del. C.* § 321. For example, the power in § 303 to adopt regulations is clearly limited in Subchapter 1 to zoning standards. *See id.* § 303. The power delegated to the municipality under Subchapter 2 is limited to the establishment by the local jurisdiction of procedural rules of conduct for a board of adjustment under § 323 and some authority related to special exceptions, as discussed below. *Id.* § 323.

Perhaps the most important distinction and indication of a separation between the standards for variances established by statute and the role of substantive local ordinances is found in the difference between the provisions for granting special exceptions under § 327(a)(2) and granting variances under § 327(a)(3). It is only in the consideration of granting special exceptions where the General Assembly has authorized the Board to make a decision within the confines of a local ordinance: "(2) Hear and decide special exceptions to the terms of the ordinance *upon which the Board is required to pass under such ordinance*." 22 *Del. C.* § 327(a)(2)

(emphasis added). In the realm of granting a special exception only, the Board is expected to follow the tests and requirements set out in the local zoning ordinance which permits a special exception. *Id.* This interpretation finds support in § 321 regarding the creation and powers of the Board of Adjustment by the following provision: "the Board may, in appropriate cases and subject to appropriate conditions and safeguards make *special exceptions* to the terms of the ordinance in harmony with its general purpose and intent *and in accordance with general or specific rules therein contained*. 22 *Del. C.* § 321 (emphasis added). Reading § 321 together with § 327(a)(2) shows the complete distinction between the scope of both the Board and the City's jurisdiction regarding special exceptions from the very limited scope and jurisdiction of the Board in dealing with variances. *Id.*

In contrast to its special exception role, § 327(a)(3) contains absolutely no language making the Board subject to any requirements of any local ordinance when considering a variance. Indeed, the Board is not subservient to the City in this regard under the plain language of § 327(a)(3).

c. Section 307 applies only to dimensional land use standards and does not permit or empower municipalities to dictate the legal standards for variances in contradiction of the Board's jurisdictional enabling statute.

The Board and the City press an impermissibly expansive reading of 22 *Del. C.* § 307. By their interpretation, the Board is subservient to the City and its jurisdictional authority is subject to alteration by municipal ordinance,

notwithstanding the clearly established exceptional practical difficulties standard set by the General Assembly in the language of § 327(a)(3) and the limited contextual scope of § 307. Section 307 plainly relates only to land use building-type codes and regulations. It reads:

> **§ 307 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 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

22 *Del. C.* § 307. Indeed, § 307 can be read as the underlying *reason* that a separate § 327 was enacted in the first place, so the rigidity of the command of § 307 could be deviated from by an independent body. There is no sense of flexibility mentioned anywhere in § 307 and it cannot be reasonably read to provide any authority to a municipality, on its own, to create standards for variances from the strictness of its codes. Under §§ 301 and 303, a municipality may adopt zoning rules to implement its comprehensive land use plan, "[b]ut because rules apply generally and are thus inflexible, they can burden some land too much; the legislature thus adopted a 'safety

valve,' Section 327(a)(3), which allows a board of adjustment to ease this burden." *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2013 WL 4436607, at *10 (Del. Super. Ct. July 26, 2013). Independence is therefore crucial to the Board's function as a "safety valve". Section 327(a)(3) positions boards of adjustment as a counterweight to the inevitable rigidity of zoning laws by empowering a board to set aside a literal reading of the code and "strike[] a new reasonable balance" among the various and often conflicting goals in a municipality's comprehensive plan. *Id.* at *10-11. An expansive reading of § 307 that subordinates the Board to the City's code stymies the Board's "safety valve" function, impairing its independence and relegating it to an enforcement apparatus of the City.[2] Applying *Bridgeville*, there is no reasonable reading of § 307 that could empower the Zoning Commission of Lewes (or the City Council) to adopt area variance tests to be used by the Lewes Board of Adjustment. Such an over-broad reading exceeds the scope of the delegation of power under § 307. To the extent *Dale v. Elsmere*, 1988 WL 40018 (Del. Super. Ct. April 20, 1988) interprets § 307

[2] The "safety valve" relief the boards of adjustment provide to individual landowners is one of the few avenues of relief from unreasonable land use restrictions given the nearly insurmountable presumption of validity of the rational basis test. Unless the Court returns to the "necessity" test of *In re Ceresini*, 189 A. 443, 449 (Del. Super. Ct. 1936) and *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), only a board of adjustment hearing will allow landowners a means to modify an unnecessary, but still rational, land use restriction imposed by a municipality. This is particularly true given the limited protection that a vested rights finding offers under *In Re 244.5 Acres of Land*, 808 A.2d 753, 757-58 (Del. 2002).

as divesting the General Assembly exclusive authority over establishment of boards of adjustment and their jurisdictional purview, *Dale* is wrongly decided.

Section 307 must be read narrowly so as to only include "'the grant of power to do all that is *reasonably necessary* to execute that power or authority' and no more." *Bridgeville*, 176 A.3d at 21. The discussion of "higher" and "lower" standards in § 307 are reasonably limited by the provisions of §§ 301 and 303, which plainly relate to dimensional land use standards, not burdens of proof in seeking a departure from such standards before an independent Board of Adjustment. *See* 22 *Del. C.* § 301. Reading § 307 over-broadly to attempt to include the actual tests to be applied by the Board of Adjustment (a body not even mentioned in the entirety of these sections of the Code) would violate *Bridgeville*.

The "home rule" exception in *Salem Church Assocs. v. New Castle County*, 2006 WL 4782453 (Del. Ch. Oct. 6, 2006), permitting the New Castle County government to delegate some appellate functions to its planning board does not apply. The City of Lewes claims the power to modify the substantive grounds on which the Board may grant an area variance, but, unlike the General Assembly's silence on the planning board's capacity to take on administrative appeals, *see Salem Church*, 2006 WL 4782453, at n.44, the General Assembly squarely addressed the controlling legal standards municipal boards of adjustment must apply when granting an area variance. *See* 22 *Del. C.* § 327. The General Assembly also

expressly limited the City to staffing and supplying procedural rules for the Board, and did not provide the City authority to set out the standards for variances. *See id.* § 321. It is logical, and in fact necessary, for the General Assembly to set the Board apart from the City's legislative authority in order for the Board to discharge its intended function as a "safety valve"—any other arrangement would co-opt that function to the detriment of the public.

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT CITY OF LEWES CODE § 197-92 IMPERMISSIBLY IMPOSED DIFFERENT AND MORE STRINGENT REQUIREMENTS THAN THE EXCEPTIONAL PRACTICAL DIFFICULTIES TEST, AND THE BOARD'S RELIANCE ON THE CODE IN DENYING THE NEPA AREA VARIANCE APPLICATION WAS ERROR.

A. Questions Presented

Whether the Board committed legal error by denying the Nepa area variance application in reliance on City of Lewes Code § 197-92 when those provisions impose harsher requirements than the controlling exceptional practical difficulty test under 22 *Del*. *C*. § 327(a)(3) and *Kwik-Check*?

B. Scope of Review

This Court applies the same standard of review applicable to the Superior Court, and that review is limited to correcting errors of law and determining whether there is substantial evidence in the record to support the Board of Adjustment's decision. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012); *Mello v. Bd. of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1976). Errors of law are reviewed *de novo*. *Id*. If the Board has committed an error of law by applying the wrong legal standard, the reviewing court is not free to review the evidence and apply a different legal standard "because to do so would be to substitute its own judgment for that of the Board." *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641 (Table), at *2 (Del. 1999). Instead, lacking the power of remand, the

reviewing court must reverse, which "vacates the Board's decision and the applicant may re-apply with the proceedings before the Board beginning anew." *Id.* at *3.

C. Merits of Argument

1. Lewes Code § 197-92 rewrites the *Kwik-Check* analysis, morphing the straightforward exceptional practical difficulties balancing test with a confusing mixture of the harsher unnecessary hardship test reserved for use variances.

The Superior Court correctly found that the Lewes Board of Adjustment committed legal error when it relied on Lewes Code provisions that improperly altered the required *Kwik-Check* exceptional practical difficulties test by injecting confusing and contradictory additional requirements not found in the Board's enabling statute. *See Nepa*, 2018 WL 1895699, at *7-9. Under the express language of 22 *Del. C.* § 327(a)(3) and *Kwik-Check*, the Board was required to apply the flexible exceptional practical difficulty test to the Nepa area variance application and nothing more. *See Kwik-Check*, 389 A.2d at 1291; *Part I*, *supra*. The rationale for utilizing a relaxed standard for an area variance is also explained in *Kwik-Check*: "An area variance concerns only the practical difficulty in using the particular property for a permitted use" while a use variance changes the character of the zoned district "by permitting an otherwise proscribed use." *Id.*

The *Verleysen* Court confirmed that the *Kwik-Check* area variance analysis was a straightforward balancing test of whether the benefit to the applicant was greater than the harm to the neighboring properties. *Verleysen*, 36 A.3d at 331. In

Verleysen, this Court noted the material differences between legal standards set out for variances before the Sussex County Board of Adjustment in 9 *Del. C.* § 6917(3) and before the New Castle County Board of Adjustment in 9 *Del. C.* § 1313(a)(3), and it recognized the more demanding variance standards applicable to Sussex County variances, which required "uniqueness… or other physical conditions peculiar to the particular property"; "no possibility of development"; "no unnecessary hardship or practical difficulty created" by the applicant; the variance must be "the minimum variance" and "least modification" possible to afford relief. *Id.* at 330. This Court also acknowledged that the General Assembly created a much more flexible variance criteria for the New Castle County Board of Adjustment under 9 *Del. C.* § 1313(a)(3), which omits nearly all of the hurdles of § 6917(3)(a)-(e). *Id*. at 331. The *Verleysen* Court found that its more flexible *Kwik-Check* balancing test "presupposes that the governing statute does not preclude a variance upon particular findings by the Board [(e.g., 9 *Del. C.* § 6917(3)(a)-(e))], but rather contains flexible language like [9 *Del. C.* § 1313] applicable to the New Castle County Board." *Id.* at 331.

Since § 327(a)(3) is identical to the statute analyzed by this Court's *Kwik-Check* decision and *Verleysen,* these cases confirm that the Lewes Board must follow the flexible exceptional practical difficulty balancing test set out in *Kwik-Check*. The City's implementing ordinances significantly deviate from the simple balancing

test under *Kwik-Check* by eliminating the exceptional practical difficulty test in several sections, adding a uniqueness test as well as a non-conforming disqualifier, and by improperly advocating a hardship test even though hardship has no place in an area variance analysis. The Board and City's contention that Lewes Code § 197-92 is no different or more stringent than 22 *Del. C.* § 327(a)(3) and *Kwik-Check* is demonstrably wrong.

a. Lewes Code § 197-92B(1).

In Lewes Code § 197-92B(1) the City imposes upon the Board a codified "uniqueness" test, which is not a requirement of § 327(a)(3) or the *Kwik-Check* standard but instead is a component of the harsher "unnecessary hardship" test applicable to use variances. *See Baker v. Connell*, 488 A.2d 1303, 1307 (Del. 1985) (enumerating "unnecessary hardship" requirements). Lewes Code § 197-92B(1) reads, "The 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." Lewes C. § 197-92B(1). These provisions are not part of 22 *Del. C.* § 327(a)(3) or *Kwik-Check* and as such cannot be applied by the Lewes Board of Adjustment. It also appears that the Lewes Code provision derives from the Sussex County Board's more demanding enabling statute, which *Verleysen* confirmed is contrary to the flexible

Kwik-Check standard.[3] Certainly the flexibility of the exceptional practical difficulties test lends itself to a wide range of circumstances, including instances of exceptional practical difficulties owing to a property's unique configuration. *See Op. Br. at* 34 & n.101. However, imposing inflexible mandatory findings of uniqueness contradicts the less burdensome standard of § 327(a)(3), which does not preclude a variance upon particular findings. *See Verleysen*, 36 A.3d at 331.

b. Lewes Code § 197-92B(3).

In Lewes Code § 197-92B(3) the City skews the *Kwik-Check* balancing test by requiring the Board to find that "[t]he benefits from granting the variance *would substantially outweigh any detriment*," Lewes C. § 197-92B(3) (emphasis added), whereas the exceptional practical difficulties standard asks whether 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." *Kwik-Check* at 129. The City's "substantially outweigh any detriment" requirement is qualitatively more demanding

[3] Section 197-92B(1) is strikingly similar to the following provision of the Sussex County Board of Adjustment statutory enabling language at 9 *Del. C.* § 6917(3)(a): "That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship or exceptional practical difficulty is due to such conditions, and not to circumstances or conditions generally created by the provisions of the zoning ordinance or code in the neighborhood or district in which the property is located;" 9 *Del. C.* § 6917(3)(a). Indeed the Lewes Board of Adjustment appears to have conflated the Sussex County Board of Adjustment enabling language with its own.

than *Kwik-Check*'s balancing language, which only calls for "a simple preponderance standard". *Nepa*, 2018 WL 1895699, at *6. Again, the standard imposed is not found in either § 327(a)(3) or *Kwik-Check*.

c. Lewes Code § 197-92C(3).

In Lewes Code § 197-92C(3) the City further rewrites the *Kwik-Check* balancing equation as it requires the Board to consider "[w]hether the restrictions, if lifted, would *affect* neighboring properties and uses." Lewes C. § 197-92C(3) (emphasis added). *Kwik-Check*, by comparison, requires boards of adjustment to consider "whether, if the restriction upon the applicant's property were removed, such removal would *seriously affect* such neighboring property and uses . . . ." *Kwik-Check* at 1291 (emphasis added). The City's qualitative change from "would seriously affect" to "would affect" reweighs the *Kwik-Check* balancing in favor of denying an area variance. *See Nepa*, 2018 WL 1895699, at *6.

d. Lewes Code § 197-92C(4).

In Lewes Code § 197-92C(4), the City improperly edits the *Kwik-Check* analysis by requiring the Board to consider "[w]hether the restriction would tend to create a *hardship* on the owner in relation to normal improvements." City of Lewes C. 197-92C(4) (emphasis added). The relevant provision of the *Kwik-Check* exceptional practical difficulty test requires the Board to "take into consideration . . . whether, *if the restriction is not removed*, the restriction would

create unnecessary hardship [in use variances] or exceptional practical difficulty [in area variances] 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." *Kwik-Check*, 389 A.2d at 1291. (emphasis added). The City's version omits the crucial language "whether if the restriction is not removed" and replaces the exceptional practical difficulty standard with a hardship test. This rewording of *Kwik-Check* omits the crucial balancing test language and instead sets out a new and harsher provision indicative of the "unnecessary hardship" test reserved for use variances. *See Nepa*, 2018 WL 1895699, at *8. The City's edit undoes the entire *Kwik-Check* area variance decision in one sentence.

In *Stingray Rock, LLC v. Board of Adjustment of the City of Rehoboth Beach*, 2013 WL 870662, at *4 (Del. Super. Ct. 2013), the Superior Court held that a municipal Board of Adjustment's application of the hardship test to an area variance rather than the exceptional practical difficulty factors set out by the Supreme Court in *Kwik-Check* was legal error and required reversal of the Board's decision. The Nepa area variance application sought simply to expand the dimensions of a legally permitted use—residential use—and in no way contemplated a use variance or change in use that would activate any hardship test.

e. Lewes Code § 197-92D(2).

In Lewes Code § 197-92D(2) the City instructs the Board that "[n]onconforming lots, structures, uses, or signs shall not be considered grounds for granting variances." Lewes C. § 197-92D(2). Here the City excludes from the Board's consideration the nonconforming status of one's property as grounds for granting an area variance even though no such bar appears in either 22 *Del. C.* § 327(a)(3) or *Kwik-Check*, and despite the fact that, as the Superior Court pointed out, having a nonconforming structure often gives an applicant a good reason for obtaining a variance. *See Nepa*, 2018 WL 1895699, at *7. The ban imposed by § 197-92D(2) is nowhere to be found in 22 *Del. C.* § 327(a)(3) and contradicts the flexible criteria articulated in *Kwik-Check*'s exceptional practical difficulties test.[4]

These Lewes Code provisions in § 197-92, which impose a uniqueness test, a hardship test, a nonconformity disqualifier, and other improper edits and additions to the *Kwik-Check* analysis, all leave confusion over what happened to the exceptional practical difficulty test. *See Riker v. Sussex County Bd. of Adjustment*, 2015 WL 648531, at *3 (Del. Super. Ct. 2015).

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[4] This City of Lewes additional standard is simply a version of the second half of the County's confusing § 115-211(B)(1), which precludes variances based upon "circumstances or conditions generally created by the provisions, ordinance or code in the neighborhood or district in which the property is located." Sussex County Code § 115-211(B)(1); *See Riker v. Sussex County Bd. of Adjustment*, 2015 WL 648531, at *3 (Del. Super. Ct. 2015).

2. The Superior Court correctly determined that the Board applied the improperly enhanced standards to deny the Nepa variance application in violation of 22 Del. C. § 327(a)(3) and *Kwik-Check*.

Despite reciting the words "*Kwik-Check*" and "exceptional practical difficulty", both during the hearing and in the Board's written decision, the Board and its counsel improperly applied the hardship and uniqueness tests among others to this area variance contrary to all established Delaware law and 22 *Del. C.* § 327(a)(3). The Board went beyond § 327(a)(3) and applied the additional enhanced standards imposed by the Lewes Code, as is shown by the Board's written decision. The Board writes in its conclusion "that the Applicants have failed to satisfy the elements required under the exceptional practical difficulty standard *and the requirements set forth in the City of Lewes Code for a variance.*" A117 (emphasis added).

In its written decision, the Board concluded "that the Applicants' request is not unique and would represent deviation from the spir[i]t and intent of the Zoning Code," here applying the "uniqueness" test found in § 197-92B(1). A116. To the same effect, the Board regarded the Nepa property as having "a standard lot, on a standard street, with a standard situation for this community; namely the renovation of a nonconforming historic structure." A116. The Board further remarked that it "does not find that the Property and circumstances necessitating the variances are unique." A116. The Board expressly discounted the nonconforming status of the

Nepa property, in reliance on § 197-92D(2): "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." A116. The Board also summarized its more stringent weighing analysis, which Lewes Code imposes through § 197-92B(3) and -92C(3), stating, "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." A117.

The Board failed to apply the modern and less burdensome area variance exceptional practical difficulty test, its actual statutorily mandated standards under § 327(a)(3), and ignored the rationale set out by the Supreme Court in *Kwik-Check*, committing reversible legal error. By following § 197-92 in the Nepa area variance application, the Lewes Board of Adjustment exceeded its grant of statutory authority under 22 *Del. C.* § 327(a)(3) and indeed that provision of the Lewes municipal code is void *ab initio* and *ultra vires*. *See Part I*, *supra*. In short, the Board based its decision on powers it did not have. *See Henderson Union*, 374 A.2d 3, 3.

3. The Nepas demonstrated by substantial evidence an exceptional practical difficulty sufficient to support a variance under 22 *Del. C.* § 327(a)(3).

Hellings requires reversal of the Board's decision without analysis of the substantial evidence test given the legal errors argued *supra*. However, if only the

legal standards of § 327(a)(3) and *Kwik-Check* had been applied by the Lewes Board of Adjustment, without the additional *ultra vires* limitations of the nonconforming use bar, the uniqueness test and the various forms of hardship or unnecessary hardship inquiries improperly applied by the Board (and imposed by the City's flawed variance codification), the Nepas made a variance case based on substantial evidence proving exceptional practical difficulty based upon the record evidence.

The core test for the *Kwik-Check* analysis is its last test, part 4: "whether failure to remove 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.'" *Kwik-Check*, 389 A.2d at 1291. (emphasis added). The Nepas' intended use was legally permitted—residential—even though the main structure contained a non-conforming structure. The "normal improvement" the Nepas desired is plainly shown in the photograph at B6, and the pre-existing conditions survey at A123, which is achieved by (a) a vertical renovation of the existing one-half story into a full two story using the existing footprint and (b) continuing rearward with the full two stories with a rear addition that increased the depth of the pre-existing rear porch footprint from 10 feet deep to 14 feet deep and which "squared off" the width of the pre-existing rear porch footprint that did not currently extend to the full width of the existing house but

which stopped 4.4 feet short, such that the new addition added 4.4 feet to the width of the pre-existing rear porch footprint. B6; A123. This "squaring up" used the existing Northeasterly foundation of the existing house as the guideline for the foundation for the new addition (the "historic side yard building line"). B5; B6. The new two story addition followed the historic side yard building line rearward 14 feet. A123; B1. The Nepas' overall goal was to make "normal improvements" following the historic side yard building line of the existing house, using architecturally correct materials, design and rooflines that followed the Historic Preservation requirements as to aesthetics. A50; A46; B5; B6. As Mr. Nepa testified, the renovated home was more architecturally and historically correct, based upon his prior renovation experience, than the before condition, which indeed was the goal he wanted and has achieved. A50.

The impediment to the Nepas' "normal improvements" goal of an historically accurate expanded two story home comes from a combination of conflicting Lewes Code provisions which first, and foremost, classify the Nepa house as a "nonconforming structure" that cannot be enlarged and which at the same time classifies the Nepa house as a "contributing historic structure" that cannot be demolished. A84-86. These two pre-existing features which predate the Nepas' ownership, impede the "normal improvements" in the following ways: (1) the vertical two story conversion from the existing one and a half story configuration is

barred by the nonconforming historic side yard building line of the house and is illegal under the Code and (2) the intended rear yard two story addition that follows the historic side yard building line of the existing house is illegal under the Code for the same reason: following the existing historic side yard building line violates the modern code side yard setback distance of 8 feet. A29-30.

The "exceptional practical difficulty" of *Kwik-Check's* fourth factor created by the "failure to remove the [side yard setback] restriction" is evident in the possible solutions available to the Nepas to achieve their goal of making the "normal improvements" of converting a half second floor into a full second floor and expanding to two full floors to the rear without relief from the Code side yard setback. Those possible solutions are (1) demolish the existing house and build a new but historically accurate replica with the full second story additions entirely within the Code compliant side yard setbacks or (2) move the entire existing house out of the 8 foot side yard setback line and then make the changes to achieve the desired structure. Neither solution is "practical" because (1) demolition will not likely be permitted because the home is historic and demolition and building a replica house is expensive and (2) moving the entire house is prohibitively expensive and also subject to denial by the Historic Preservation Commission.

The remaining three *Kwik-Check* factors were also fully supported by the record evidence, particularly in the absence of the application of the *ultra vires*

standards used by the Board. First, the nature of the zone; the R-4(H) zone permits residential uses and permits the existence of, and protects against the alteration or demolition of, homes that already invade the modern 8 foot side yard setback, i.e., the many homes on Dewey Avenue and elsewhere in the same district that are closer than 8 feet to their property boundaries, all of which are legally protected with that configuration. *See* B7 (City of Lewes Zoning Code Chapter 197, Attachment 2, *Table of Dimensional Regulations*). The variance would be consistent with existing historic homes in the R-4(H) district. Second, the character and uses in the immediate vicinity; the immediate vicinity includes many homes with an historic architectural style in violation of the 8 foot side yard at distances comparable to that requested in the Nepa variance. A29. Third, removal of the restrictions effect on neighboring property; removal of the side yard restriction would not seriously affect the most affected neighbor, Virginia Mitchell, by her own written and oral testimony. B2 and A74-78. Given the numerous other historic homes on both Dewey Avenue and in the R-4(H) district with full second stories within deficient side yard setbacks at various depths from the front historic building setback line (all houses in the historic district may legally maintain the existing historic front yard setback line, known as the "EBL," rather than comply with the new construction front yard setback line of 15 feet), they could not logically be seriously affected in

any respect by the variance that simply extended an existing house vertically and rearward along the existing historic side yard setback line.[5] *See* B7.

[5] Below, the Superior Court commented on the reasonableness of the Nepas' variance request: "The Nepas' House is nonconforming because it was built in the sideyard setback, which setback did not exist when the Nepas' House was built. This is, in all likelihood, the problem that prevents the Nepas from expanding their House. The Nepas' lot is a normal size. The Nepas' House is a normal size. The Nepas' proposed expansion to their House is modest. But for the fact that the Board is precluded from considering the nonconforming nature of the Nepas' House, the Nepas could probably make a good argument for a variance." *Nepa*, 2018 WL 1895699, at *7.

CONCLUSION

The Superior Court correctly determined that the Lewes Board of Adjustment committed legal error when it exceeded its enabling statute and denied the Nepa variances by applying more stringent legal requirements than permitted under 22 *Del. C.* § 327(a)(3) and *Kwik-Check*. This Court should therefore AFFIRM the Superior Court and reverse the Board's denial pursuant to *Hellings*.

PARKOWSKI , GUERKE &
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