SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COURT COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE (302) 255-0664

Richard L. Abbott, Esquire
Abbott Law Firm
724 Yorklyn Road, Suite 240
Hockessin, Delaware 19707
Attorney for Petitioners
Friends of the H. Fletcher Brown Mansion

Lisa B. Goodman, Esquire
John E. Tracey, Esquire
Young, Conaway, Stargatt & Taylor, LLP
1000 North King Street
Wilmington, Delaware 19801
Attorneys for Respondent
Ingleside Homes, Inc.

Martin C. Meltzer, Esquire
Assistant City Solicitor
City of Wilmington
Louis L. Redding City/County Building
800 North French Street, 9th Floor
Wilmington, Delaware 19801
Attorney for Respondents
City of Wilmington and
City of Wilmington Zoning Board of Adjustment

RE: Friends of the H. Fletcher Brown Mansion v. City of Wilmington, City of Wilmington Zoning Board of Adjustment, and Ingleside Homes, Inc.
C.A. No. N12A-05-006 RRC

Submitted: May 17, 2013
Decided: July 26, 2013

On Writ of Certiorari to the City of Wilmington Zoning Board of Adjustment
AFFIRMED.

Dear Counsel:

Respondent Ingleside Homes, Inc. asked Respondent City of Wilmington Zoning Board of Adjustment to permit development that would normally violate the Wilmington City Code. The Board allowed one use and two area variances. Petitioners Friends of the H. Fletcher Brown Mansion ask this Court to set aside the Board's decision because

1. when approving the variances, the Board lacked a quorum, and

2. insufficient evidence supports the Board's findings that

    a. the variance is consistent with the comprehensive plan,

    b. allowing the variance would not worsen existing parking problems, and

    c. the realty would not yield a reasonable return unless the Board allowed the variance.

Although the Board's decision is brief, it nonetheless promotes the Code's spirit; substantial evidence supports the Board's findings, and every member of the Board could join in the decision. For these reasons, the Board's decision is **AFFIRMED**.

I. FACTS

Although Harry Fletcher Brown was born elsewhere, he died a Delawarean.[1] He graduated from Harvard University with degrees in physics and chemistry, and by 1904, Mr. Brown had joined E. I. du Pont de Nemours and Company. In 1914, Mr. Brown built a house at 1010 North Broom Street in Wilmington, Delaware. The H. Fletcher Brown Mansion tops two stories and encloses 14,351 square feet. Charles Wellford Leavitt Jr., a well-known landscape architect, civil engineer, and urban planner, designed the home's gardens. Mr. Brown lived there with his wife, Florence, until he died in 1944.

[1] For a helpful biography of Mr. Brown, see Letter from Robin Kusumi to John R. Sheridan, City Solicitor, City of Wilmington (Feb. 20, 2012) (on file as R., Ex. 11 at 27).

When Mrs. Brown died in 1953, Delaware Hospital inherited the grounds, which the Browns asked the Hospital to use as a "Home for the Aged."[2] In 1971, the Hospital, as the Wilmington Medical Center, sold 1010 North Broom Street to Church Home Foundation, Inc.[3] And later, the Foundation became Respondent Ingleside Homes, Inc.[4]

Ingleside provides housing and help to low- and middle-income seniors.[5] Ingleside runs two homes: Ingleside Assisted Living Apartments on 1605 North Broom Street and Ingleside Retirement Apartments on 1005 North Franklin Street, which is next to 1010 North Broom Street.[6] An outdoor path and an enclosed hall join Ingleside Retirement Apartments and the H. Fletcher Brown Mansion.[7] Ingleside ran a "Home for the Aged" at 1010 North Broom Street through 1975.[8] Then, the Mansion housed Ingleside's offices from 1976 to 2008;[9] in late 2008, Ingleside vacated the Mansion because it was unsafe.[10]

Since 2000, Ingleside has weighed repurposing 1010 North Broom Street.[11] But Ingleside failed at first because Respondent City of Wilmington zoned the land as R-1,[12] which limited Ingleside's options:

> The R-1 district, one-family detached dwellings, is designed to protect and maintain those residential areas now developed primarily with one-family

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[2] Hr'g Tr. 2.

[3] Larry Cessna testified that Delaware Hospital eventually "became" Respondent Ingleside Homes, Inc. Hr'g Tr. 3. This is somewhat inaccurate—the Hospital became the Delaware Division of the Wilmington Medical Center, and the Center later became the Christiana Care Health System, one of the State's largest employers.

[4] Hr'g Tr. 3.

[5] Hr'g Tr. 2.

[6] Hr'g Tr. 2, 3.

[7] Hr'g Tr. 15–16.

[8] Hr'g Tr. 3.

[9] Hr'g Tr. 3.

[10] Hr'g Tr. 3, 4, 39.

[11] Hr'g Tr. 4.

[12] Hr'g Tr. 39.

> detached dwellings on relatively large lots and adjoining vacant areas likely to be developed for such purposes.[13]

In 2007, Ingleside and the Cool Spring/Tilton Neighborhood Association discussed how Ingleside should repurpose 1010 North Broom Street.[14] Ingleside preferred to demolish the H. Fletcher Brown Mansion and build a 54-unit apartment building.[15] Ingleside asked the City to rezone the land as R-5-B,[16] which would allow Ingleside to build the new structure:

> The R-5-B district, medium-density apartment houses, is designed to accommodate medium-density elevator apartment houses with ample light and air at medium or high rentals.[17]

The City's planning department advised the City to reject Ingleside's request because R-1 was the "most appropriate" district for 1010 North Broom Street.[18] The department noted that, if the City insisted on rezoning the land for Ingleside, R-5-A-1 was a "somewhat more compatible" designation, and it would still allow Ingleside to build an apartment building[19]—albeit one that is no taller than five stories:

> The R-5-A-1 district, low-medium density apartment houses, is designed primarily to permit low to medium density apartment developments contiguous to one-family districts and to include other residential and residentially compatible, institutional uses. . . . The density of uses in the district is controlled by the floor area ratio (FAR) and height of buildings is limited to five (5) stories as a matter of right.[20]

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[13] Wilm. C. §48-131(a).

[14] Hr'g Tr. 39.

[15] Hr'g Tr. 39.

[16] Hr'g Tr. 39.

[17] Wilm. C. §48-138(a).

[18] Friends' Opening Br., Ex. 11.

[19] Friends' Opening Br., Ex. 11.

[20] Wilm. C. §48-137(a).

Ingleside abandoned its request, and relations between it and the Association then worsened.[21]

In 2009, the City hired Leon N. Weiner & Associates to broker a deal between Ingleside and the Association.[22] And with Weiner & Associates' help, Ingleside drafted a new proposal:

1. Ingleside would demolish about 20 percent of the H. Fletcher Brown Mansion;

2. Ingleside would preserve and maintain the Mansion's gardens; and

3. Ingleside would join the Mansion and Ingleside Retirement Apartments with a new four-story, 35-unit apartment building.[23]

Although the Association opposed the new proposal,[24] Ingleside still asked the City to approve the proposal.

Ingleside asked

1. the City's Design Review and Preservation Commission to approve the proposal because 1010 North Broom Street is within the Cool Spring/Tilton Park City Historic District, and

2. Respondent City of Wilmington Zoning Board of Adjustment to allow three variances from Chapter 48 of the Wilmington City Code.[25]

On October 21, 2009, the Commission approved the proposal conditionally; the body conditioned its approval on whether the Board allowed the variances.[26]

[21] Hr'g Tr. 39.

[22] Hr'g Tr. 5, 39–40

[23] Hr'g Tr. 15–16

[24] R., Ex. 8.

[25] Hr'g Tr. 40

[26] R., Ex. 2 at 5–6.

And on October 29, 2009, the Board allowed the variances, though the Association vigorously opposed them.[27]

Petitioners Friends of the H. Fletcher Brown Mansion asked Superior Court to direct a writ of certiorari to the Board under Title 22, Section 328 of the Delaware Code.[28] Superior Court issued the writ and affirmed the Board's decision.[29] Friends appealed Superior Court's ruling; however, the Supreme Court reversed the ruling on December 12, 2011 and held that the Board's decision was void because the City did not compose the Board as Section 322(a) then required.[30] This judgment forced Ingleside to start fresh because Superior Court could not remand the case to the Board.[31]

In January of 2012, Ingleside asked the Board for variances from

1. Section 48-131 of the Wilmington City Code, which bars multi-family use of 1010 North Broom Street,

2. Section 48-151 of the Wilmington City Code, which sets the maximum height of any structure at 1010 North Broom Street as three stories, and

3. Section 48-156 of the Wilmington City Code, which sets the minimum width of 1010 North Broom Street's side yard as 15 feet.[32]

The Board scheduled a hearing for February 22, 2012.[33]

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[27] R., Ex. 2 at 9–10; Hr'g Tr. 40.

[28] *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2010 WL 5551334 (Del. Super. Aug. 26, 2010), *rev'd*, 34 A.3d 1055 (Del. 2011).

[29] *Friends*, 2010 WL 5551334.

[30] *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055 (Del. 2011).

[31] *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641, 1999 WL 624114, at *2 (Del. July 19, 1999).

[32] R., Ex. 1 at 2.

[33] R., Ex. 21.

The Board found "significant public support for [Ingleside's] request,"[34] although many neighbors, including Jeffrey T. Kusumi, opposed the request.[35] After Ingleside presented its case, the Board asked other attendees for comments.[36] Most attendees opposed Ingleside, but some, like Ray Banker, backed Ingleside.[37] After attendees finished, the Board voted.[38]

The Board allowed all three variances;[39] the Board issued a written decision on April 11, 2013.[40] Friends then asked the Court to direct another writ of certiorari to the Board,[41] which the Court did. The Court now reviews the Board's second decision.

II. STANDARD OF REVIEW

The Court must affirm a decision of a board of adjustment if

1. substantial evidence supports the board's findings of fact,[42]

2. the decision is free from errors of law,[43] and

3. the decision is not arbitrary, capricious, or unreasonable.[44]

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[34] *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013).

[35] Hr'g Tr. 24–40.

[36] Hr'g Tr. 24.

[37] Hr'g Tr. 24–40.

[38] Hr'g Tr. 41–43.

[39] Hr'g Tr. 41–43.

[40] *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013).

[41] Friends' Pet. (May 9, 2012).

[42] *Little Italy Neighborhood Ass'n v. City of Wilmington Zoning Bd. of Adjustment*, 2010 WL 2977989, at *2 (Del. Super. July 30, 2010) (quoting *Rehoboth Art League, Inc. v. Bd. of Adjustment of the Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010)).

[43] *Stingray Rock, LLC v. Bd. of Adjustment of the City of Rehoboth Beach*, 2013 WL 870662, at *1 (Del. Super. Feb. 28, 2013) (citing *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976)).

The evidence is "substantial" if a reasonable mind could conclude that the evidence is adequate to support the findings of fact.[45] The Court's inquiry is limited: the Court does not weigh the evidence, assess its credibility, or find facts[46] because the legislature has assigned those tasks to the board of adjustment.[47] In other words, the Court must respect the board's discretion.[48] But the Court is no mere spectator. The legislature has charged the Court with the duty to ensure that the board follows the law and acts reasonably.[49] The Court can discharge this duty only if the grounds on which the board acts are "clearly disclosed and adequately sustained,"[50] or else, the Court could inadvertently, yet still improperly, invade the

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[44] *Schmalhofer v. Bd. of Adjustment of the City of Newark*, 2000 WL 703510, at *2 (Del. Super. May 9, 2000) (citing *McQuail v. Shell Oil Co.*, 183 A.2d 572, 578 (Del. 1962) and *Mobil Oil Corp. v. Bd. of Adjustment of the Town of Newport*, 283 A.2d 837, 839 (Del. 1971)). That is, the Board's decision must be the result of an orderly and logical decision-making process. *Shortess v. New Castle County*, 2002 WL 388116, at *1 (Del. Super. Feb. 26, 2002) (quoting *Steelman v. State*, 2000 WL 972663, at *1 (Del. Super. May 30, 2000)).

[45] *Brittingham v. Bd. of Adjustment of the City of Rehoboth Beach*, 2005 WL 170690, at *3 (Del. Super. Jan. 14, 2005) (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) and *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *appeal dismissed*, 515 A.2d 397, 1986 WL 17452 (Del. 1986)).

[46] *Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment of the Town of Bethany*, 1998 WL 110057, at *1 (Del. Super. Jan. 23, 1998) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[47] *See Petrucelli v. New Castle County Bd. of Adjustment*, 1997 WL 817891, at *7 (Del. Super. Dec. 2, 1997) ("When testimony on a particular matter differs, 'it is the role of the Board, not this Court, to resolve conflicts in testimony and issues of credibility.' 'Whenever the factual issues are fairly debatable, the Board must make decisions about the weight and credibility of various evidence.'" (quoting *Mettler v. New Castle County Bd. of Adjustment*, 1991 WL 190488, at *2 (Del. Super. Aug. 21, 1991)) (citations omitted)).

[48] *See Badell's Auto Body, Inc. v. New Castle County Bd. of Adjustment*, 2002 WL 21028573, at *3 (Del. Super. Aug. 28, 2002) ("If the Board's decision is fairly debatable, the Court will defer to the discretion of the Board." (citing *Mettler*, 1991 WL 190488, at *2)).

[49] *See Cheswold Aggregates, LLC v. Bd. of Adjustment of the Town of Cheswold*, 2000 WL 33108801, at *4 (Del. Super. Nov. 1, 2000) ("[W]hen the Board's decision is not supported by substantial evidence or is contrary to the applicable law, it is the Court's duty to reverse the Board.").

[50] *Kollock v. Sussex County Board of Adjustment*, 526 A.2d 569, 574 (Del. Super. 1987) (quoting *State Farm Mut. Auto. Ins. Co. v. Hale*, 297 A.2d 416, 419 (Del. Ch. 1972)) (internal quotation marks omitted); *accord Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986) ("Unless [the County] Council [of Sussex County] creates a record or states on the record its reasons for a zoning change, a court is given no means by which it may review the Council's decision.").

board's province.[51] The board must therefore do more than recite statutory text or invoke a legal rule;[52] the record must allow the Court to identify the reasons for the board's decision and evaluate them.[53]

III. DISCUSSION

No government may take property arbitrarily, though property is not sacred. As President Theodore Roosevelt once stated, "every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."[54] But even if the public welfare justifies a rule generally, the public welfare might not justify every application of the rule; in other words, the rule might sometimes impose a burden so great that an exception is merited.[55] The Board has decided that 1010 North Broom Street merits an exception under Delaware law.[56] Friends must persuade this Court otherwise.[57] Friends contend that

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[51] *Chenery Corp.*, 318 U.S. at 94 (quoting *Phelps Dodge Corp. v. Nat'l Labor Relations Bd.*, 313 U.S. 177, 197 (1941)).

[52] *See Keith v. Dover City Cab. Co.*, 427 A.2d 896, 900 (Del. Super. 1981) ("Mere paraphrasing of the statutory language is insufficient because the Court must determine in all cases whether the [Industrial Accident] Board's findings are supported by substantial evidence.").

[53] *See New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989) (holding that the grounds for decision "must be clear from the record").

[54] Theodore Roosevelt, Jr., The New Nationalism (Aug. 31, 1910).

[55] In *Brown v. City of Wilmington Zoning Bd. of Adjustment*, the Court noted that a variance serves to avoid an unconstitutional burden:

> Variances serve as an "escape valve" when strict application of a particular zoning ordinance would result in an unnecessary burden upon a landowner. "The purpose of a variance is to protect [a] landowner's rights from the unconstitutional application of zoning law." A board of adjustment should grant a variance from a zoning restriction where "strict application would amount to an unconstitutional taking . . . ." The variance "is intended to strike a balance" between preserving the public's interest in regulating land use and protecting the landowner's interest in exercising his property rights free from unconstitutional deprivations by the government.

2008 WL 2943390, at *7 (Del. Super. July 21, 2008) (alterations and omissions in original) (citations and footnotes omitted), *rev'd sub nom. CCS Investors, LLC v. Brown*, 977 A.2d 301 (Del. 2009).

[56] *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013).

1. the Board lacked a quorum because two members of the Board did not appear to be impartial, and

2. substantial evidence does not support the Board's conclusions that

    a. the exception is consistent with the City's comprehensive plan,

    b. the development that the exception permits will not exacerbate existing parking problems, and

    c. 1010 North Broom Street could not yield a reasonable return unless the Board granted an exception.

The Court does not find Friends' claims to be persuasive.

A. The Board had a quorum because the Court presumes that each member of the Board acted fairly, impartially, and in good faith and Friends has failed to rebut the Court's presumption.

The City created the Board under recently amended Title 22, Section 322(a) of the Delaware Code.[58] The Board has three members:

1. The Commissioner of Public Works or an agent of the Commissioner,

2. The City Solicitor or an agent of the City Solicitor, and

3. The Mayor or an agent of the Mayor.[59]

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[57] *See Stingray Rock, LLC*, 2013 WL 870662, at *1 ("The burden of persuasion is on the party seeking to overturn a decision of [a] [b]oard [of adjustment] to show that the decision was arbitrary and unreasonable." (quoting *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 955–56 (Del. Super. 1988))).

[58] The legislature amended 22 *Del. C.* § 322(a) right after the Supreme Court decided *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055 (Del. 2011) and held that neither the City Solicitor nor the Commissioner of Public Works (then the Chief Engineer) could appoint an agent to sit on the Board.

Friends claim that two members of the Board could not take part in the hearing because a reasonable mind could doubt that the two were fair and impartial. Friends argue that the Board therefore lacked a quorum.[60] A member of the Board dismissed Friends' argument somewhat too quickly:

> In terms of some of the points made[,] I do feel just a brief need to weigh in on [the] aspect of propriety of the members. If I understand the logic correctly[,] there would be no Board of Adjustment. You have an appointee of the Mayor[,] and you have an appointee o[f] the City Solicitor[.] I should mention that that would only leave one person[,] and I guess [the City] wouldn't have a Board of Adjustment.[61]

The Board's conclusion is right—the Mayor's and the City Solicitor's agents could take part in the hearing—but the Board's reasoning is flawed for two reasons.

First, every City official, high or low, must follow the City's ethical rules.[62] Under them, an official may not decide a matter in a quasi-judicial proceeding if the official has an interest that might impair the official's judgment of the matter.[63] And under Delaware law, a proceeding must be fair and appear to be fair as well.[64] Thus no member of the Board may express a view, bias, or prejudice as to a matter before the Board hears it.[65] The Mayor, the City Solicitor, and the Commissioner of Public Works must also remain silent, whether they sit on the Board or not, because their agents are not independent. In other words, because a principal controls its agent,[66] a reasonable mind could conclude that the bias of a principal

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[59] 22 *Del. C.* § 322(a).

[60] Friends' Opening Br. 28–31. The Court notes that neither the Delaware Code nor the Wilmington City Code states how many members of the Board constitute a quorum. The Court declines to determine how many members of the Board constitute a quorum, although common sense suggests a number, because the Court concludes that no members should have recused themselves.

[61] Hr'g Tr. 42.

[62] The City's ethics rules apply to employees and officers, which the rules define broadly in Wilm. C. § 2-337.

[63] Wilm. C. § 2-341(a).

[64] *Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) (citing *Am. Cyanamid Co. v. Fed. Trade Comm'n*, 363 F.2d 757, 797 (6th Cir. 1966)).

[65] *Id.*

guides its agent. Imputed bias is a quirk of Section 322(a), which opens any appointed member to his master's whims.

Second, the City created the Board under Section 322(a), by choice, and not under subsection (b) or (d),[67] which would insulate the Board's members from improper influence. Under subsections (b) and (d),

1. the chief executive appoints the board of adjustment's members,

2. the legislature approves (or rejects) the chief executive's appointments,

3. the board's members would serve fixed terms (except the chairman under subsection (b)), and

4. the legislature can remove a member only for cause (at least under subsection (d)).[68]

In short, both subsections better protect the independence, and therefore integrity, of the quasi-judicial tribunal. But the City created the Board under subsection (a) and exposed the Board's members to greater extrajudicial influence. The City thus risked that, in some cases, ethical considerations would bar an agent from taking part in a hearing because the agent's principal stated a preconceived view publicly. In rare cases, principals could even rob the Board of a quorum.

Friends' claim has legal merit—the Mayor and the City Solicitor, masters of two members, can rob the Board of a quorum—yet the claim lacks a factual basis.

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[66] *See Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997) ("An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." (quoting *Sears Mortgage Corp. v. Rose*, 634 A.2d 74, 79 (N.J. 1993)) (internal quotation marks omitted)).

[67] The Town of South Bethany created its board of adjustment under subsection (b). *Compare* South Bethany C. § 145-56 *with* 22 *Del. C.* § 322(b). Both the Town of Elsmere and Delaware City created their boards of adjustment under subsection (d). *Compare* Elsmere C. § 225-40(A) *and* Del. City C. § 46-116 *with* 22 *Del. C.* § 322(d).

[68] 22 *Del. C.* § 322(b), (d).

The Mayor clearly supported Ingleside: in his letter sent to the U.S. Secretary of Housing and Urban Development and dated July 27, 2009,

1. the Mayor stated that the City supported Ingleside's application "to develop additional senior housing within the City," and

2. the Mayor claimed that Ingleside's project was "a worthy contribution to the inventory of affordable senior housing in [the City]."[69]

The Mayor publicly stated his views as to the matter before the Board's hearings on February 22, 2012 and October 6, 2009. In connection with that, the Supreme Court has noted:

> Public expressions regarding a pending proceeding, which may reasonably lead to the conclusion that a quasi-judicial officer has prejudged the issue as to which he is to sit in judgment, cannot be approved. Such expressions, like a conflict of interest, tend "to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist . . . ."[70]

But the comments did not address whether the Board would grant the variances. The Mayor confined his comments to the project's benefits, and the scope of his remarks is unremarkable because he was appropriately lobbying the U.S. government for money. In light of the presumption that officials act fairly, impartially and in good faith,[71] the Mayor's advocacy was innocent: he was only serving the City's best interests. And no evidence indicates that the City Solicitor or his agent prejudged the matter or helped Ingleside. Friends' assertion is pure

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[69] Letter from James M. Baker, Mayor, City of Wilmington, to Shaun Donovan, Sec'y, U.S. Dep't of Hous. and Urban Dev. (July 27, 2009) (on file as Friends' Opening Br. Ex. 18). The Court considers the letter under 22 *Del. C.* § 330. *See Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment of the Town of Bethany Beach*, 1998 WL 733788, at *5 (Del. Super. Sept. 18, 1998) (considering an affidavit although the Court did not hold or order an evidentiary hearing).

[70] *Acierno v. Folsom*, 337 A.2d 309, 316 (Del. 1975) (quoting *Johnson v. Planning Bd. of the City of Stamford*, 199 A.2d 690, 692 (Conn. 1964)).

[71] *Cheswold Aggregates, L.L.C. v. Town of Cheswold*, 1999 WL 743339, at *2 (Del. Super. July 2, 1999) (quoting *Phillips v. Bd. of Educ. of Smyrna Sch. Dist.*, 330 A.2d 151, 154 (Del. Super. 1974)).

speculation.[72] For these reasons, Friends' claim lacks a factual basis; all three members of the Board could take part in the hearing, and thus, the Board had a quorum.[73]

B. Substantial evidence supports the Board's decision to permit Ingleside to use 1010 North Broom Street in a way that would normally violate Section 48-131 of the Wilmington City Code under Section 48-70.

This Court rejects Friends' other claims and affirms the Board's decision to allow a use variance from Chapter 48 of the Wilmington City Code for 1010 North Broom Street because substantial evidence supports the Board's conclusions that

1. the variance is consistent with the City's comprehensive plan,

2. the Board's allowing the variance would not exacerbate existing parking problems, and

3. 1010 North Broom Street would not yield a reasonable return unless the Board allowed the variance.[74]

1. Substantial evidence supports the Board's conclusion that the use variance that permits Ingleside to build a four-story, 35-unit apartment building at 1010 North Broom Street is consistent with the City's comprehensive plan.

In Delaware, only the State has the inherent power to regulate land use,[75] although the State has vested its counties and its municipalities with the power.[76]

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[72] The Court will neither hold nor order an evidentiary hearing. There is no evidence that the City Solicitor or his agent breached the City's ethical rules.

[73] The Supreme Court reversed this Court's decision in *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2010 WL 5551334 (Del. Super. Aug. 26, 2010). *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055 (Del. 2011). No part of this Court's previous decision survived the Supreme Court's reversal.

[74] Friends challenge the substance of the Board's decision only on these three bases.

[75] *Del. Dep't of Natural Res. & Envtl. Control v. Sussex County*, 34 A.3d 1087, 1090 (Del. 2011) (citing *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989)).

As a municipality, the City may regulate land use within its corporate limits; but when using this authority, the City must follow the State's terms and conditions.[77] Under Delaware law, the City must prepare and adopt a comprehensive plan.[78] When preparing a plan, the City must work with nearby municipalities, New Castle County, and the State.[79] And because *ad hoc* growth can upset their expectations,[80] Title 22, Section 702(d) of the Delaware Code provides: "no development shall be permitted except as consistent with the plan."[81]

Section 702(d) is unambiguous, and the plain meaning of its text controls: the Section bars a municipality's board of adjustment from allowing a variance that permits development that contravenes the municipality's comprehensive plan.[82] But because substantial evidence supports the Board's finding that the use variance does not substantially impair the general purpose and intent of Chapter 48, substantial evidence also supports the conclusion that the variance is consistent with the City's comprehensive plan. The Court starts by construing Section 702(d).

When construing a statute, the Court may not flout the legislature's intent;[83] instead, the Court must ascertain the legislature's intent and then give effect to it.[84]

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[76] *Lynch v. City of Rehoboth Beach*, 894 A.2d 407, 2006 WL 568764, at *2 (Del. Mar. 7, 2006) (quoting *Lawson v. Sussex County Council*, 1995 WL 405733, at *4 (Del. Ch. June 14, 1995)).

[77] *See New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989) ("[I]t is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation.").

[78] *O'Neill v. Town of Middletown*, 2006 WL 205071, at *31 (Del. Ch. Jan. 18, 2006) (citing 22 *Del. C.* § 702).

[79] *See* 22 *Del. C.* § 702(b) ("The comprehensive planning process shall demonstrate coordination with other municipalities, the county and the State during plan preparation.").

[80] *See* Del. H.B. 396, 139th Gen. Assem. (1998) ("[The Act] also recognizes that unplanned and uncoordinated growth of municipalities can be detrimental to the long term goals of the state and the countries.").

[81] 22 *Del. C.* § 702(d).

[82] *Cf. Farmers for Fairness v. Kent County Levy Court*, 2012 WL 295060, at *5 (Del. Ch. Jan. 27, 2012) (stating that "[i]f a proposed development does not conform to [Kent County's] land use map," which has "legally binding effect" under 9 *Del. C.* §§ 4951(b) and 4959, "the County may not permit it to go forward." (quoting *Wilmington Trust Co.*, 385 A.2d at 1133)).

[83] *See Gen. Motors Corp. v. Burgess*, 646 A.2d 1186, 1192–93 (Del. 1988) ("[W]hen a statute is unambiguous and the legislature's intent is clear, a court is not free to substitute its judgment for that of the legislature.").

If a statute is unambiguous, then its text is conclusive of the legislature's intent,[85] and the plain meaning of the text controls.[86] In other words:

> [I]n interpreting a statute[,] a court should always turn first to one, cardinal canon [of construction] before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."[87]

But if a statute is ambiguous, then the Court must promote the statute's purpose.[88] Under Delaware law, a statute is ambiguous if

1. there is more than one reasonable interpretation of the statute, or

2. there is no reasonable interpretation of the statute.[89]

As always, the Court first determines whether the statute is ambiguous.[90]

The plain meaning of Section 702(d)'s text is clear:[91]

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[84] *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999) (citing *Streett v. State*, 669 A.2d 9, 12 (Del. 1995)).

[85] *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 68 (Del. 1993) (citing *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990)).

[86] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932–33 (Del. 2007) (quoting *Eliason*, 733 A.2d at 946).

[87] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

[88] *Eliason*, 733 A.2d at 946 (citing *E.I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d 436, 438 (Del. 1952) and *Hamilton v. State* 285 A.2d 807, 809 (Del. 1971)).

[89] *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001).

[90] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).

[91] To paraphrase Justice Hugo Black: The Court reads "no development shall be permitted" to mean no development shall be permitted. *See Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring). Of course, unlike the First Amendment, Section 702(d) provides an exception: ". . . except as consistent with the plan." 22 *Del. C.* § 702(d).

> After a comprehensive plan or portion thereof has been adopted by [a] municipality in accordance to [Title 22, Chapter 7], the comprehensive plan shall have the force of law and *no development shall be permitted except as consistent with the plan*.[92]

The legislature wrote the emphasized text—"no development shall be permitted except as consistent with the plan"—in the passive voice and omitted an object. The identity of the object or actor is thus irrelevant, as the Supreme Court has explained:

> The passive voice focuses on an event that occurs without respect to a specific actor . . . . It is whether something happened—not how or why it happened—that matters.[93]

In this light, who or what permits development and how development is permitted are immaterial under Section 702(d); the plain meaning of the Section's text voids any variance that permits development that contravenes a comprehensive plan.[94]

Further, this reading's results are neither absurd nor unreasonable, although Ingleside contends that the reading would nullify Section 327(a)(3) as the Board could nearly never grant a use variance.[95] Ingleside assumes that

1. a comprehensive plan and the rules that are adopted under it are coextensive, and

2. no variance may contravene a zoning map that is part of a comprehensive plan.

Both assumptions are incorrect. First, a zoning map only governs zoning and does not govern variances. In fact, a variance is an exception to a zoning designation.[96]

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[92] 22 *Del. C.* § 702(d) (emphasis added).

[93] *Dean v. United States*, 556 U.S. 568, 572 (2009) (citation omitted).

[94] *See* 8 McQuillin Municipal Corporations § 25:179.37 (3d ed. 2004) ("It is important to keep in mind several general principles when discussing 'practical difficulty' or 'unnecessary hardship.' . . . Second, it must be shown that the variance will not substantially affect the comprehensive zoning plan.").

[95] Ingleside's Answering Br. 16.

[96] Map 1currently governs the proper *zoning* of 1010 North Broom Street because only Map 1 is forward-looking and the other two maps only address then-current zoning and land use.

Second, a plan and the rules that are adopted under it are not coextensive; instead, the rules are merely one reasonable balance among the goals of the plan.

A comprehensive plan is like a constitution—a plan guides development, and rules implement the plan:

> A comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The plan is likened to a constitution for all future development within the governmental boundary.
>
> Zoning, on the other hand, is the means by which the comprehensive plan is implemented and involves the exercise of discretionary powers within limits imposed by the plan.[97]

Because "a large scale and long term plan . . . often cannot serve unyieldingly as [a] guide to detailed questions,"[98] a municipality adopts rules that answer these questions and close gaps. But 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.[99]

Under Section 327(a)(3), a board of adjustment may sometimes set aside a literal reading of zoning rules and thus protect their spirit, intent, and purpose:

> The board of adjustment may . . . [a]uthorize, 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

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[97] *Machado v. Musgrove*, 519 So. 2d 629, 631–32 (Fla. Dist. Ct. App. 1987) (citations omitted)

[98] *Lawson*, 1995 WL 405733, at *4.

[99] *See* Edward H Ziegler, Jr. & Gail Gudder, Rathkopf's The Law of Zoning and Planning § 58:1 (4th ed. 2006) ("The variance is a means of correcting the occasional inequities that are created by general zoning ordinances. It is a kind of 'escape hatch' or 'safety valve' of zoning administration." (quoting Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One but Himself to Blame*, 20 Urb. Law. 1, 3 (1988) and *Otto v. Steinhilber*, 24 N.E.2d 851, 852 (N.Y. 1939)).

> detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map . . . .[100]

First, the intent and purpose of zoning rules is to implement one reasonable balance among a comprehensive plan's various and often conflicting goals. Second, and more importantly, a plan embodies the rules' spirit—which comprises every possible reasonable balance among the plan's goals.[101] When enacting rules, a municipality chooses a reasonable balance, and under Section 327(a)(3), a board of adjustment may allow a variance, which alters the municipality's choice and strikes a new reasonable balance, albeit one not "substantially" different.[102]

When allowing a variance, a board of adjustment enjoys much discretion,[103] but as the Court of Chancery noted in *O'Neill v. Town of Middletown*,[104] the Court may enforce an unambiguous term in a comprehensive plan as a matter of law:

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[100] 22 *Del. C.* 327(a)(3).

[101] In many states, a comprehensive plan is not a separate or distinct document. Edward H Ziegler, Jr. & Joseph F. DiMento, Rathkopf's The Law of Zoning and Planning § 14:7 (4th ed. 2005); *see also Green v. County Council of Sussex County*¸508 A.2d 882, 889 (Del. Ch. 1986) ("The comprehensive plan with which zoning regulations must be in accordance, in order to satisfy the requirement of non-arbitrary action, does not necessarily refer to a written document or series of written documents distinct from the zoning ordinance."), *aff'd*, 516 A.2d 480 (Del. 1986). In these states, courts instead infer a plan from zoning rules. *See Green*, 508 A.2d at 889 ("[T]he plan may be discerned from a review of the regulatory language itself."). In 1962, but not today, Delaware was among these states, and in *McQuail v. Shell Oil Co.*, the Supreme Court held that "[t]he requirement that there be a plan is satisfied if the change of zoning classification bears some reasonable relation to the scheme of zoning adopted in the basic Zoning Code." 183 A.2d 572, 578 (Del. 1962). A plan is thus the spirit of zoning rules, and this relationship does not end just because local governments must now reduce their plans to writing under Delaware law.

[102] *See Harrington v. Town of Warner*, 872 A.2d 990, 994 (N.H. 2005) ("To establish unnecessary hardship for a use variance, an applicant must show that: . . . (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; . . . ." (citing *Simplex Techs., Inc. v. Town of Newington*, 766 A.2d 717 (N.H. 2001))).

[103] The Court of Chancery's rulings in *Blake v. Sussex County Council*, 1997 WL 525833 (Del. Ch. July 15, 1997) and *Hudson v. County Council of Sussex County*, 1988 WL 15802 (Del. Ch. Feb. 24, 1988) remain vital, although the legislature has since amended 22 *Del. C.* § 702. Every comprehensive plan has the "force of law." 22 *Del. C.* § 702(d), but a plan is not a statute. A municipality thus enjoys discretion when it interprets its own plan—much like a government body enjoys discretion when is interprets its own rules and regulations, see *Daniel D. Rappa, Inc. v. Engelhardt*, 256 A.2d 744, 746 (Del. 1969) ("The practical interpretation placed by a

> Notwithstanding the notion that comprehensive plans are viewed as long-term planning tools, there are instances when the comprehensive plan is "sufficiently unambiguous and specific with respect to a particular matter that it can be critically employed in judicial review of zoning decisions," regardless of such decisions' otherwise comportment with the plan's general statement of policy goals. When such circumstances arise, the Court must respect the legislature's affirmative command that comprehensive plans carry "the force of law" and proscribe development that is "fundamentally inconsistent with the basic thrust" of the comprehensive plan, as perceived through the specific pronouncements of plan policy."[105]

Absent an unambiguous term, the Court will respect a board of adjustment's conclusion that a variance strikes a reasonable balance among a comprehensive plan's goals if substantial evidence supports the conclusion.[106]

Substantial evidence supports the conclusion that the use variance that permits Ingleside to build a four-story, 35-unit apartment building at 1010 North Broom Street strikes a reasonable balance among the goals of the City's comprehensive plan. The goals of the plan are to

1. decrease density,

2. enhance property values,

3. improve transportation within the neighborhood and between the neighborhood and the rest of the City,

4. provide "world-class" healthcare,

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governmental body upon its own rules and regulations is entitled to great weight, unless it is so unreasonable or unnatural as to be a snare." (citing *W. Union Tel. Co. v. United States*, 217 F.2d 579, 581 (2d Cir. 1954))). This discretion also derives from a plan's ambiguity. The Court expects no plan to be precise, *O'Neill*, 2006 WL 205071, at *34; however, a plan sometimes provides a clear, specific answer, which the Court must enforce as a matter of law, as the Court of Chancery noted in *O'Neill v. Town of Middletown*, 2006 WL 205071 (Del. Ch. Jan. 18, 2006). The Court must otherwise uphold a municipality's reasonable interpretation of its own comprehensive plan, as the *Blake* and *Hudson* decisions teach.

[104] 2006 WL 205071 (Del. Ch. Jan. 18, 2006).

[105] *Id.* at 32 (quoting *Green*, 508 A.2d at 891 (Del. Ch. 1986)).

[106] *Id.* (quoting *Lawson*, 1995 WL 405733, at *4).

5. minimize vacancies,

6. transfer more property to social institutions, like group homes and schools,

7. attract many types of business, and

8. create "business corridors, livable communities[,] and open space."[107]

Friends argue that the use variance will increase the neighborhood's density.[108] Although Friends might well be right, the variance still strikes a reasonable balance among the plan's goals.

The City's comprehensive plan directs the City to reduce the neighborhood's density:

> It is recommended that the residential density of selected areas within certain West Side neighborhoods be reduced to lessen congestion and over the long term, provide relief for crowded conditions resulting from residential conversations[109]

But Friends ignores that the plan's plan:

> There are a number of ways to achieve this [goal] including through proposed rezoning; *vigilant attention by the community to requests for variances that go before the Zoning Board of Adjustment*; and *by following closely new or proposed development projects within the West Side*.[110]

As the plan urges, both the City and the community scrutinized Ingleside's project. In 2007, Ingleside asked the City to rezone 1010 North Broom Street as R-5-B,[111]

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[107] Neighborhood Comprehensive Development Plan for the West Side Analysis Area 2 (2003).

[108] Friends' Opening Br. 15–23.

[109] Neighborhood Comprehensive Development Plan for the West Side Analysis Area 13 (2003).

[110] Neighborhood Comprehensive Development Plan for the West Side Analysis Area 13 (2003) (emphasis added).

[111] Hr'g Tr. 39.

which would have allowed Ingleside to build a 54-unit apartment building;[112] however, the City resisted.[113] By 2009, Ingleside had abandoned this first project.[114] Then after Ingleside proposed a smaller, four-story, 35-unit apartment building, Friends opposed the proposal before the Board—twice—and appealed to the Supreme Court.[115] The City and the community, including Friends, have vetted the project and forced Ingleside to reduce the proposed density of the building. Although the variance will increase the area's density and thus stymie one goal, the process itself conformed to the plan, and the variance promotes other goals.

The use variance also serves other goals of the City's comprehensive plan. The goals of the variance are to

1. preserve most of the H. Fletcher Brown Mansion, which the community strongly demanded,

2. house low- and middle-income seniors,

3. end the vacancy of 1010 North Broom Street,

4. preserve significant open space.[116]

All these goals help further the plan's goals. Although the variance will increase the neighborhood's density, substantial evidence supports the Board's conclusion that the use variance strikes a reasonable balance among the goals of the City's comprehensive plan and thus is consistent with the plan.[117]

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[112] Wilm. C. §48-138(a).

[113] Hr'g Tr. 39.

[114] Hr'g Tr. 4, 39.

[115] *Friends*, 34 A.3d 1055; Friends' Pet. (May 9, 2012).

[116] *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013).

[117] The Board explicitly concluded that the variance would not "substantially impair[] the general purpose and intent of [Chapter 48 of the Wilmington City Code]." *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013). In the future, the Board should more clearly set forth that an approved variance is consistent with the City's comprehensive plan, so that conclusion is certainly "clearly disclosed and adequately sustained," see discussion *supra* Part II.

2. Substantial evidence supports the Board's conclusion that the Board's allowing the use variance that permits Ingleside to build a four-story, 35-unit apartment building at 1010 North Broom Street would not exacerbate existing parking problems.

Section 48-70(b) of the Wilmington City Code bars the Board from allowing a variance that would worsen existing parking problems:

> The zoning board of adjustment may . . . grant a variance . . . ; provided that such variance may not be granted in instances where to do so would . . . exacerbate existing parking problems . . . .[118]

Under Section 48-70(b), the Board first assesses *current* parking conditions and then determines whether allowing a variance would exacerbate those conditions. Although the Board is not assessing *past* parking conditions under the Section, evidence of past parking conditions is still relevant to the Board's actual inquiry; Friends assert otherwise.

Friends contend that "[o]nly current evidence of parking is . . . relevant."[119] In other words, Friends argue that evidence of *past* parking conditions does not tend to elucidate *current* parking conditions.[120] But the evidence is *clearly* relevant, although the evidence's probative value is suspect because the passage of time has allowed circumstances to change and thus weaken the logical connection between past and current conditions.[121] In short, Friends challenge the evidence's

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[118] Wilm. C. § 48-70(b).

[119] Friends' Reply Br. 9 (emphasis omitted).

[120] *See* D.R.E. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Although the Court invokes D.R.E. 401, the Court notes that "all the so-called technical rules of evidence" do not "constrain[]" the Board. *New Castle Dev. Co. v. New Castle County Bd. of Adjustment*, 1996 WL 659481, at *4 (Del. Super. Aug. 13, 1996) (citing *Barbour v. Unemployment Ins. Appeal Bd.*, 1990 WL 199514, at *6 (Del. Super. Oct. 26, 1990)).

[121] *See* 1 McCormick on Evidence § 185 (Kenneth S. Broun ed., 7th ed. 2013) ("Probative evidence often is said to have 'logical relevance,' while evidence lacking in substantial probative value may be condemned as 'speculative' or 'remote.' . . . Remoteness related not to the passage of time alone, but to the undermining of reasonable inferences due to the likelihood of supervening factors." (footnotes omitted)).

weight. Because the Court may not reweigh the evidence,[122] Friends' argument fails, and the Court is left to determine whether substantial evidence supports the Board's conclusion that allowing the variance would not "have an adverse impact with respect to parking."[123]

Parking spaces are scarce in cities. This is true throughout Wilmington and especially near 1010 North Broom Street. There was evidence that supports the claims that parking problems plague the neighborhood and allowing the variance would worsen them:

1. Under Section 48-443(a), Ingleside may not convert the H. Fletcher Brown Mansion into a four-story, 35-unit apartment building unless the building has at least 23 (if R-5-B equivalent) or 35 (if R-5-A-1 equivalent) off-street parking spaces.[124]

2. Jeffrey T. Kusumi, the owner of 1110 North Broom Street, testified that the neighborhood has a parking problem, which is worse in the winter when snow accumulates on the sides of the road, because

    a. Ursuline Academy's and Padua Academy's students park their cars throughout the neighbor, and

    b. many residents park at least one car on the street.[125]

3. Mr. Kusumi also estimated that a four-story, 35-unit apartment building that houses independent seniors needs between 28 and 63 parking spaces total.[126] Mr. Kusumi considered

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[122] *Rehoboth Art League, Inc.*, 991 A.2d at 1166 (citing *Groves v. Bd. of Adjustment of Sussex County*, 1987 WL 25469, at *1 (Del. Super. Nov. 10, 1987)).

[123] *City of Wilmington Zoning Board of Adjustment Decision*, Case No. 2.2.12, at 1 (Apr. 11, 2013).

[124] Wilm. C. § 48-443(a).

[125] Hr'g Tr. 30–31.

a. Section 5:21-4.14, Table 4.4 of the New Jersey Administrative Code,

b. the opinions of three civil engineers,

c. parking needs for similar buildings in New Jersey, Florida, and Maryland, and

d. how the residents of the new building differ from the residents of Ingleside's existing building at 1005 North Franklin Street.[127]

4. A student of Ursuline Academy testified that she leaves home at least two hours before class starts and that students often incur fines for parking too close to intersections because there is so little parking near the school, which is at 1106 Pennsylvania Avenue.[128]

5. Clara Zahradnik, the owner of 1109 North Franklin Street, testified that she bears the brunt of the neighborhood's parking problems, and she blamed them on Ursuline Academy's and Padua Academy's students. She also noted that the students should not rely on off-street parking. Ms. Zahradnik otherwise supported Ingleside before the Board.[129]

6. Regina Lafferty, the owner of 1305 West 8th Street, testified that parking spaces are scare in the neighborhood.[130]

7. Cathy Gladnick, the owner of 1104 North Broom Street, testified that she works at home and thus has witnessed the parking conditions, that she allows a few students of Ursuline Academy to park in her driveway, and that her Husband's

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[126] Hr'g Tr. 30–31; R., Ex. 18.

[127] Hr'g Tr. 30–31; R., Ex. 18.

[128] Hr'g Tr. 27–28.

[129] Hr'g Tr. 31.

[130] Hr'g Tr. 33–34.

patients often incur fines for parking illegally. She described the parking conditions as a "living hell."[131]

8. Susan Poole, the owner of 1005 North Broom Street, wrote a letter in which she stated that the neighborhood is congested at many times of the day and blamed local schools, churches, halfway homes, and apartment buildings.[132]

9. Debra A. Wirt, the owner of 908 North Broom Street, wrote an e-mail in which she stated that parking spaces are scarce, both during the day and during the night and that she fears that 35 or more independent seniors would aggravate the neighborhood's parking problems.[133]

10. Mary Gallagher, the owner of 1121 North Broom Street, wrote an e-mail in which she stated that current parking conditions are bad and she blamed Ursuline Academy's and Padua Academy's students and employees of the City who park in the neighborhood and walk to work.[134]

11. Nineteen other residents (22 residents total) signed a form letter that said, "I strongly oppose Ingleside's appeal for several reasons including, but not limited to . . . [a]dverse impact on this residential neighborhood through increased population density and traffic congestion."[135]

Some evidence supports Ingleside's claim that the neighborhood has no real parking problems, and substantial evidence supports the claim that allowing the variance would not exacerbate the neighborhood's existing parking problems:

1. Larry Cessna (the Chief Executive Officer of Ingleside) and Glenn Brooks (a Vice President of Leon N. Weiner &

[131] Hr'g Tr. 34–35.

[132] R., Ex. 11 at 19.

[133] R., Ex. 11 at 31.

[134] R., Ex. 11 at 32.

[135] R., Ex. 11.

Associates), testified that they did not think allowing the variance would worsen parking problems because

a. there were no parking problems when Ingleside used the H. Fletcher Brown Mansion for office space and about 20 employees needed to park their cars,

b. the apartment building at 1005 North Franklin Street has a parking lot with 58 parking spaces,

c. about 36 families in the 208-unit apartment building own a car,

d. the parking lot has many unused parking spaces (22 parking spaces if no employee uses one),

e. Ingleside only expects two new employees, and

f. residents of the new building could use the unused parking spaces.[136]

2. Ray Banker, who lives where North Broom Street and West 11th Street meet, testified that he often observed 12 to 14 unused parking spaces in the parking lot at 1005 North Franklin Street.[137]

Much evidence indicates that the neighborhood has parking problems; however, substantial evidence—Mr. Cessna's, Mr. Brooks', and Mr. Banker's testimony—supports the Board's finding that allowing the variance would not make them worse. Mr. Kusumi contradicted Mr. Cessna's, Mr. Brooks', and Mr. Banker's

[136] Hr'g Tr. 7–8. Whether allowing the variance would exacerbate existing parking problems is a paramount concern, although Ingleside argues that Wilm. C. §48-70(b) "authorizes the Board to grant requested variances subject to consideration of a number of enumerated factors, none of which carries more weight than the other," Ingleside's Answering Br. 17. The Section is clear: a "variance may not be granted in instances where to do so would . . . exacerbate existing parking problems . . . ." Wilm. C. §48-70(b).

[137] Hr'g Tr. 28–29.

testimony, but the Board preferred their testimony, which Delaware law allows.[138] The Court must thus respect the Board's conclusion.

3. Substantial evidence supports the Board's conclusion that 1010 North Broom Street would not yield a reasonable return unless the Board allowed the use variance that permits Ingleside to build a four-story, 35-unit apartment building.

The Board may allow land to be used in a way that would violate Chapter 48 of the Wilmington City Code only if the Chapter imposes an unnecessary hardship on the land's owner.[139] Chapter 48 imposes an unnecessary hardship on the owner only if:

1. if the land is used as Chapter 48 permits as a matter of right or conditionally, the land would not yield a reasonable return,

2. the condition from which the hardship arises is unique to the land,

3. the proposed, generally forbidden use would not alter the essential character of the neighborhood,

4. every use that Chapter 48 permits as a matter of right or conditionally is economically unfeasible.[140]

Friends only contend that insufficient evidence supports the Board's conclusion that 1010 North Broom Street could yield a reasonable return if the land is used as

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[138] *Barron v. Zoning Bd. of Adjustment of the City of Wilmington*, 1994 WL 711210, at *2 (Del. Super. Dec. 2, 1994).

[139] 22 *Del. C.* § 327(a)(3); Wilm. C. § 38-70(b).

[140] *Baker v. Connell*, 488 A.2d 1303, 1307 (Del. 1985). The first and fourth prongs are related, and the Court has analyzed them together. *See, e.g.*, *Jenney v. Durham*, 707 A.2d 752, 758 (Del. Super. 1997) ("As to the first prong and the jurisdictional prerequisite, there is no evidence of record that . . . ."), *aff'd*, 696 A.2d 396 (Del. 1997).

Section 48-131 permits as a matter of right or conditionally.[141] But the Court disagrees.

The evidence is clear—the H. Fletcher Brown Mansion is a positive and a negative for the 1010 North Broom Street area. That is, the Mansion is rundown, and a renovation would be expensive:

1. David Brody, a construction manager for Wilson Construction Company, testified that

    a. fixing the Mansion would cost more than 2.3 million dollars,

    b. disconnecting the Mansion from the apartment building at 1005 North Franklin Street and relocating the utilities would cost 827,000 dollars, and

    c. hiring an architect would cost about 300,000 dollars.[142]

2. Earl Timmons, a commercial real estate appraiser for and a vice president of CBRE, testified that

    a. he would fix the Mansion only if it would sell for ten percent more than how much fixing the Mansion would cost, and

    b. the Mansion, if fixed, would sell for (at most) between 2.28 and 2.6 million dollars, and

    c. no nearby house has sold for more than 1.54 million dollars.[143]

[141] Friends' Opening Br. 25–28.

[142] Hr'g Tr. 14–17.

[143] Hr'g Tr. 17–22.

3. Larry Cessna, the Chief Executive Officer of Ingleside, testified that

   a. Ingleside received an offer to buy 1010 North Broom Street for 255,000 dollars,

   b. Ingleside owes 370,000 dollars, which a mortgage on 1010 North Broom Street secures, and

   c. Ingleside considered every possible use of 1010 North Broom Street.[144]

The cost of fixing the Mansion alone could exceed its expected value. Although someone offered to pay 255,000 dollars for 1010 North Broom Street,[145] evidence indicates that the value of the property "as is" was one million dollars as of January 11, 2005.[146] Of course, Ingleside bears some blame for this problem because the Mansion deteriorated under Ingleside's ownership. But this fact does not change the circumstances: substantial evidence still supports the Board's conclusion that 1010 North Broom Street would not yield a reasonable return unless the Board allowed the use variance that permits Ingleside to build a four-story, 35-unit apartment building.

IV. CONCLUSION

The Board must act within certain constraints; it must follow both the law and rules with the force of law and base its findings on substantial evidence. Because the Board has respected these constraints, the Court must respect its own: the legislature has not entrusted the Court with the authority to disallow variances. For the reasons stated above, the Board's decision is **AFFIRMED**.

[144] Hr'g Tr. 23–24.

[145] Hr'g Tr. 23–24.

[146] R., Ex. 17 at 3.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary