

City Council arbitrarily and capriciously denied their application. Second, Appellants contend that the City Council exceeded its authority in conditioning approval of the application on the Appellants' willingness to convey certain land to the city. Finally, Appellants contend that the Superior Court applied the wrong standard of review. We find no merit to Appellants' arguments and affirm.

(2) Appellants applied to the City of Newark for approval of a major subdivision of 108 E. Main Street. Specifically, the Appellants sought approval for a two-story addition containing fifteen apartment units as a modification of an existing retail building. Appellants also filed for a waiver of the parking space requirements for the proposed units.

(3) In response to the applications, City staff prepared a report which expressed concerns and recommendations to the City Council. The report cited “[g]rowing traffic concerns as a result of the proliferation of new apartment buildings coupled with the paucity of off-street parking in the central business district”. The City staff “recommended that the Planning Commission approve a 100% parking waiver but only a one-story addition with ten apartments, instead of the two-story addition with fifteen apartments.”¹ They also recommended that Appellants make certain concessions, specifically:

¹ *Handloff v. City Council of City of Newark*, Del. Super., C.A. No. 05A-07-003, at 7 (June 8, 2006).

[a]s a condition of approval, that the land to the rear of the existing building, currently [owned by the Appellants but] used by the City as Parking Lot # 3, should be transferred to the City for permanent use as part of the parking facility. In light of this land donation recommendation, the Committee also recommends that the ‘payment in lieu of spaces’ fee of approximately \$41,000 . . . should be waived.²

The Planning Commission held a hearing on the application and voted 5-1 to approve the staff recommendations.

(4) The matter was placed on the City Council agenda and a hearing was scheduled. At that hearing, the Appellants proposed a “deed restriction that all residential tenants be notified in writing that no off-street parking would be available for their use.” The Appellants also notified the City Council that although they were unwilling to convey the adjacent parking lot to the City, they were willing to lease it to the City in perpetuity. In response to these and other unresolved issues,³ the City Council continued the matter.

(5) When the City Council reconsidered Appellants’ proposal, one member of the Council indicated that “[the Appellants] were asking them to approve a 30-space parking waiver but they weren’t willing to give the City anything to provide Council with the flexibility to work within this process.” The

² Appellants own 31 parking spaces in the lot adjacent to the proposed construction, but currently lease them to the City of Newark for use as public parking.

³ The March 14, 2005 hearing “also touched on other problems, such as security issues as well as an open common walkway.”

Appellants argued that “history showed that a large number of parking waivers have been granted” and that if “Council was concerned about parking waivers and when they should be granted, that was a policy matter that Council needed to address, but [Council] should not take it out on [Appellants] since other petitions have been granted.” The City Council denied the Appellants’ application by a vote of six-to-one.

(6) On June 30, 2005 the City Secretary “officially advised” Appellants in writing that “on June 27, 2005, City Council denied your application for the major subdivision, Olde Towne Apartments, located at 108 East Main Street.” Appellants filed a Petition for Judicial Review by Writ of Certiorari in the Superior Court. The Superior Court affirmed the City’s decision and this appeal followed.

(7) “In Delaware the writ of certiorari is . . . a writ which retains the essential characteristics of the writ at common law.”⁴ “The purpose of the writ is to permit a higher court to review the conduct of a lower tribunal of record,” but “review on certiorari is on the record and the reviewing court may not weigh evidence or review the lower tribunal’s factual findings.”⁵ As a result, a reviewing court “considers the record to determine whether the lower tribunal exceeded its

⁴ *Rash v. Allen*, 76 A. 370, 374 (Del. 1910).

⁵ *Christiana Town Center, LLC v. New Castle County*, 865 A.2d 521 (Del. 2004) (TABLE).

jurisdiction, committed errors of law, or proceeded irregularly [or] . . . manifestly contrary to law.”⁶

(8) Appellants first contend that the City Council’s denial of their application for a parking waiver was arbitrary and capricious. Specifically, the Appellants rely on the fact that the City Council has, in recent years, granted similar parking waivers in the central business district.

(9) The record shows that the Planning Department applied the factors set forth in the Newark Municipal Code and concluded that only a partial variance should be allowed.⁷ The Appellants responded that they were not interested in a partial variance because adding one floor would not be “economically feasible.” Although the Appellants contend that the facts support

⁶ *Id.*

⁷ When determining whether a parking waiver should be granted, the planning commission shall consider:

Whether the applicant has demonstrated that the proposed use does not conflict with the purposes of the comprehensive development plan of the city; whether the applicant has demonstrated that the proposed use conforms to and is in harmony with the character and development pattern of the central business district; whether the applicant has demonstrated that the proposed use is not highway oriented in character or significantly dependent on automobiles or truck traffic as a primary means of conducting business; if the proposed use will not adversely affect the health or safety of persons residing or working in the vicinity, will be detrimental to the public welfare, or injurious to property or improvements in the vicinity; the planning commission may also consider the availability of off-street parking facilities, the availability of nearby adjacent public parking facilities (within 500 feet) that may be shared by the applicant, and an existing proposed use . . . and; the planning commission shall consider the advice and recommendation of the planning director.

Newark Municipal Code, Off-Street Parking and Loading Requirements, § 32-45(b)(2).

a finding in their favor, it is not the function of a reviewing court to re-weigh the facts. Furthermore, the fact that some parking waivers may have been granted in the past does not, in and of itself, make the City Council's decision in this case manifestly contrary to law. Here, the City Council simply denied Appellants application for this major subdivision after due consideration of the insufficient parking facilities for the proposed project. We find no merit to Appellants' claim that the City Council acted arbitrarily or capriciously.

(10) Appellants next argue that the City Council exceeded its authority when it conditioned its approval on the Appellants' willingness to deed adjacent land to the City. We need not consider the validity of a condition of this kind because Appellant's argument that the City Council imposed it is unsupported by the record. Although the Planning Commission recommended that a partial variance be granted with the condition, the Appellants applied for a 100% parking waiver on a fifteen unit building. The City Council voted 6 to 1 against granting that application. While the record does show some discussion of a conveyance of the adjoining property which the City already leased, the City Council did not vote to approve the requested variance conditioned upon a conveyance. We decline to

issue an impermissible advisory opinion on the validity of a condition which the City Council discussed but did not impose.⁸

(11) The Appellants' final contention is that the Superior Court applied the wrong standard of review. Specifically, the Appellants claim that "[t]he Superior Court failed to review any of the facts in the record, which demonstrates . . . that the land deed demanded by the City Council would not in any way alleviate the parking concerns or provide the City with the means to address increased parking requirements" This claim is without merit because it is not the function of the appellate court to review factual findings on certiorari review.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

⁸ See *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479-80 (Del. 1989).