June 2022 Update: New Section to Chapter 5
A Citizen's Guide to Environmental Advocacy in Delaware
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The Guide is a project of IBF's Austin Moyer Chin Citizens Advocacy Program
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5-8 ZONING/LAND DEVELOPMENT DECISION APPEALS

Because Zoning and Land Use decisions involve complicated topics and different sets of regulations, it can be difficult to determine where appeals of various decisions should be brought. This section seeks to provide some clarity.

A place to start sorting out the options is to return to the distinction drawn between Zoning and Development drawn at the beginning of this Chapter: Zoning decisions are about the application of the Zoning Ordinance, while Development decisions are about the application of the Development Ordinance.

5-8.1: Appeals of Development Decisions

The appellate process for Development decisions (primarily involving decisions concerning subdivisions) is relatively simple and straightforward.

In Sussex County, Planning Commission approvals of preliminary or final plats can be appealed to the County Council within 30 days. Sussex County Code § 99-39. In Kent County, a person "aggrieved by a finding, decision, or recommendation" of the Regional Planning commission can request the opportunity to appear before the Planning Commission to present additional relevant information to the commission and request reconsideration or can appeal the finding, decision, or recommendation to the Levy Court within 30 days. Kent County Code § 187-85(A). Decisions by Sussex County Council or the Kent County Levy Court can be appealed to the Superior Court within 30 days. *See* Sussex County Code § 99-39(C); Kent County Code § 187-85(C). New Castle County assigns appeals of various subdivision features pursuant to the Table of Procedural Responsibilities found in New Castle County Code § 40.30.110. Appeals to the internal Boards or County Council as well as appeals to the Superior Court must be taken within 20 days of the final written decision. New Castle County Code § 40.31.510.

5-8.2: Appeals of Zoning Decisions

By contrast, appeals of Zoning decisions are more complex because of the variety of different zoning decisions that can be made.

In Sussex County, "any person aggrieved or by any officer, department, board or bureau of the county affected by any decision of the Director" of Planning and Zoning may appeal the decision to the Board of Adjustment. County Code § 115-208(B). One of the grounds for appeal can be "where it is alleged that there is an error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter." County Code § 115-209(A).[1] The effect of the appeal to the Board is a stay of "all proceedings in furtherance of the action appealed from" (though the stay can be avoided if the Director of Planning and Zoning certifies that that stay would cause "imminent peril to life or property," § 115-208(B)). The Board also has power to hear requests for special use exceptions, § 115-210, and variances. § 115-211. Kent County has similar provisions.[2] New Castle County's Unified Development Code assigns appeals of Limited Use, Zoning Permits, and Interpretive Zoning to the Board of Adjustment. *See* New Castle County Code § 40.30.110 Table of Procedural Responsibilities. Generally, you must bring the appeal within twenty (20) days of the written decision date. 9 *Del. C.* §1352(a)(1); 4917(1); 6917(1). In any appeal, you should always name the property owner as one of the parties to the appeal. *See Hackett v. Bd. of Adjustment*, 794 A.2d 596, 598 (Del. 2002).

Knowing and following these procedures is critical because, under Delaware law, all statutorily provided for remedies must be exhausted before any appeal from a zoning decision may be heard by an appellate court, *Hundley v. O'Donnell*, No. C.A. 16359, 1998 WL 842293, Steele, V.C. (Del.Ch. 1998).

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[1] Section 209 recognizes other grounds for Board jurisdiction, but those are generally related to claims a landowner would bring (versus claims a citizen might bring).

[2] *See* Kent County Code §§ 205-399(A) (granting Board of Adjustment power to "hear and decide appeals where it is alleged by the appellant there is an error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning regulations"); 205-400(A)(1) (granting right to appeal to Board "from the decision of any administrative officer or agency made by the administration or enforcement of the provisions of this chapter"); 205-400(A)(2) (creating stay with imminent peril exception); and 205-400(B) (governing Board's power to grant variances).

While it is generally contrary to law for an approving body to deny an application that wholly conforms with zoning and subdivision requirements (as applicable), the governing body is entitled to place conditions on such a ministerial approval, provided those conditions are reasonably related to the proposed use or project. *Ashburn v. Kent County Regional Planning Commission*, 2008 WL 5114981 (Del. 2008; *Dolan v. Tigard*, 512 U.S. 374 (1994).

Boards of adjustment may take up a variety of topics on appeal. However, three of the most common appeals to – and from – boards of adjustment relate to (i) special exceptions, (ii) variances, and (iii) non-conforming uses.

Special Exceptions.

Preservation of the true character of a given neighborhood or area is a fundamental policy in zoning. So-called "accessory uses" are uses which are customarily incident to a main use, which are permitted (and articulated expressly) via zoning regulations. An "exception" (in modern usage, a "Special Exception") is not a departure from the zoning code, and thus is not a variance. Rather, special exceptions are by-right uses of the land, which arise where "the law itself has foreseen the possibility that a departure from its provisions may be desirable if certain specified facts or circumstances are found to exist, while a variance involves an overriding of the law itself . . . ." *In re Hickman,* 108 A.2d 667 (Del. 1954). Boards of adjustment may be involved in appeals (and in some cases direct decisions, depending on local law) determining whether the circumstances permitting a given exception have been satisfactorily met, and the interpretation of the permitted use as articulated in the relevant regulation.

Special exceptions may also be referred to as "conditional uses." They involve uses which are "in compliance with, rather than in variance of" relevant zoning regulations. *Steen v. County Council of Sussex County,* 576 A.2d 642 (Del. Ch. 1989). Where an applicant for a special exception meets the statutory requirements for the requested use, a rebuttable presumption arises in favor of permitting the use. *Id.* Denials of special exceptions must be facially responsive to the factors/conditions set forth in the applicable regulations in order to survive judicial review, with the reasons for any denial articulable by substantial evidence in the record of the decision. *Id.* "Substantial evidence has been defined to mean, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Substantial evidence is 'more than a scintilla but less than a preponderance . . . .'" *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (internal quotations omitted).

In the context of special exceptions, it is imperative to keep in mind that the conditions and legal standards applicable to variances (as discussed below) "have no application to 'special exceptions' to the terms of the ordinance mentioned in the statute." 83 Am. Jur. 2d Zoning and Planning §708. In other words, special exceptions require evaluation of the specific statute, while variances require showing of either an exceptional practical difficulty or unnecessary hardship, which standards have been developed at common law.

Variances.

In contrast with special exceptions, variances seek an exception to a prohibited use inconsistent with the basic character of the zone. *Baker v. Connell*, 488 A.2d 1303 (Del. 1985). The board of adjustment may grant variances in specific instances where doing so will not be contrary to public interest and where "owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done." *Id.* Public interest (i.e. in the neighboring properties) is the board's "paramount consideration" when evaluating an application for a variance, and even an *alleged* hardship requires that the board observe the spirit of the challenged zoning ordinance and does substantial justice. *Id.*

There are two types of variances that come before and issue from boards of adjustment: use variances and area variances. A **use variance** fundamentally changes how the property is used; an **area variance** relaxes zoning or building limitations on the property, but does not alter how it may be used. *Wagner v. J&B Contractors, LLC*, 2021 WL 3829200 (Del. Super. 2021).

Applicants for a use variance carry the heavy burden of showing **unnecessary hardship**. The unnecessary hardship legal standard is to be applied both by the board, as well as any reviewing court, and requires that the applicant show that: (i) the land cannot yield a reasonable return if only used as permitted by zoning regulations, (ii) the need for the variance is due to the unique circumstances of the land and not general conditions in the neighborhood which reflect *the unreasonableness of the ordinance*, and (iii) the use sought will not alter the essential character of the locality. *Baker v. Connell.* Applicants must show

monetary proof that all permitted uses are unfeasible – mere economic advantage or disadvantage alone is insufficient to meet the unnecessary hardship standard, and merely maximizing the return on property alone is never justification for a variance. *Id.* Desired, needed, or *justified* changes in zoning lie with the legislature, and are no grounds for the grant of a use variance. *Id.* Where a predecessor in interest would be *voluntarily* precluded from a use which would require the grant of a variance, by their own action or consent, a successor in interest may face a similar disqualification. *Id.* Prior knowledge (or lack thereof) of zoning restrictions is a non-dispositive factor that may be considered by the board (and reviewing court) in determining whether or not a hardship exists.

In contrast, applications for area variances are subject to review under the "exceptional practical difficulty" legal standard. *Kwik-Check Realty Co. v. Board of Adjustment,* 369 A.2d 694 (Del. Super. 1977), *Board of Adjustment v. Kwik-Check Realty, Inc.,* 389 A.2d 1289. Unlike an unnecessary hardship, economic considerations alone may be sufficient to demonstrate an exceptional practical difficulty: "The inability to improve one's business, or to stay competitive as a result of area limitations may be a legitimate 'exceptional practical difficulty' that would justify a grant of a variance . . . where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probably effect on neighboring properties if the variance is granted."

Under the *Kwik-Check* line of cases, the factors to be considered in the grant of an area variance are: (i) the nature of the zone within which the property is situated; (ii) the character of the immediate vicinity and uses contained therein; (iii) whether the removal of the restriction would seriously affect the neighboring properties and uses; and (iv) whether the failure to remove the restriction would have a tendency to create a hardship to the owner in efforts to make normal improvements in the character of the otherwise permitted uses. Public welfare is still a cognizant consideration by the Board in determining whether to grant an area variance but cannot be the sole conclusive reason for denying such an application. The third factor listed above is evaluated in the context of the "uses, health, safety, and welfare" of the neighboring properties. *Mesa Communs. Group, L.L.C. v. Kent County Bd. Of Adjustment*, 2000 WL 33110109 (Del. Super. 2000). Likewise, if an applicant seeks multiple like-kind variances at multiple locations, as was the case in *Kwik-Check*, each location at which a variance is sought must be considered separately on its own merits.

Where a board of adjustment finds that a proposed plan (e.g. subdivision application) is otherwise consistent with the purposes underlying any statutory

restrictions, sufficient evidence exists to support BOA's determination that grant of a variance is requested to avoid an exceptional practical difficulty. *Wagner v. J&B Contractors, LLC*.

Non-Conforming Uses.

Non-conforming uses constitute uses of land which are in violation of, but predate, current zoning ordinances. These uses, which are by-right uses due to their existence prior to the adoption of zoning ordinances, would ordinarily be prohibited, regulated, or restricted. These uses often come under board of adjustment scrutiny when the applicant/property owner seeks to expand, extend, enlarge, or change the nature of the non-conforming use. As a general rule, ordinances relating to non-conforming uses seek to gradually eliminate the otherwise illegal use, rather than allow its expansion or alteration.

If a zoning ordinance reasonably restricts or limits a specific use of property and the ordinance is reasonably related to the general welfare of the community, it is not susceptible to constitutional challenge. *Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d 355 (Del. 1984). Ordinances providing for the amortization of non-conforming uses are tested for a substantial relation to the public health, safety, morals, or general welfare, such that they are not 'clearly arbitrary and unreasonable.'" *Id.*

Zoning ordinances seek, by their nature, to restrict rather than increase non-conforming uses and to secure their gradual elimination. *New Castle County v. Harvey*, 315 A.2d 616 (Del. Super. 1974). Provisions for the continuation of a non-conforming use should be strictly construed, while those limiting a non-conforming use should be liberally construed. *Id.* The basic notion of a non-conforming use precludes a change to a use which is not a continuation of the one which existed on the effective date of the ordinance. *Id.* A new or substituted use differing in quality or character from the non-conforming use is prohibited unless the zoning ordinance otherwise provides. *Id.* Non-conforming use exceptions must be interpreted so as to guarantee that zoning will not take from an owner property rights which he already legally possessed. This includes normal growth and extension of that which the owner already legally possessed. *Id.* However, the owner of a non-conforming use should not be permitted to continue a use by means of terminating his original, protected business endeavor and entering into a completely new and different enterprise in which he had no interest, stake or investment at the time the zoning took effect. *Id.*

It is important to note, however, that the right to continue a non-conforming use, once lawfully established and not abandoned, runs with the land and is not confined to the particular person who was the owner or operator at the time the right became vested as a non-conforming use. *Kirkwood Motors, Inc. v. Board of Adjustment of New Castle County*, 2000 WL 710085 (Del. Super. 2000). Abandonment of a non-conforming use is evaluated by the facts and circumstances of each case. *Morgan v. Callaway*, 2003 WL 1387127 (Del. Super. 2002). Abandonment requires "more than a mere temporary suspension of the use and requires the concurrence of an intention on the part of the owner to abandon or relinquish the use with an overt act, or failure to act, showing the consummation of that intention. *Id.*

5-8.3: Superior Court Review. Extraordinary Writs.

In some cases, decisions can be appealed directly to the Superior Court. When that is not possible, you can try to get the Superior Court involved via an extraordinary writ. The two main writs are the writ of *certiorari* and the writ of *mandamus*.

Once statutory appeals have been exhausted (or, in other circumstances, where no statutory appellate pathway has been provided), any party with standing may pursue a common law writ of *certiorari* through Delaware's appellate courts. The common law writ of *certiorari* may be employed "to review acts which are judicial or quasi-judicial in nature, and does not have to lie to review acts which are administrative or legislative in nature." *Delaware Barrel & Drum Co. v. Mayor and Council of City of Wilmington*, 175 A.2d 403, 404 (Del. Super. 1961). The writ of *certiorari* has been employed to test a lower tribunal's authority. *Schwander v. Feeney's*, 29 A.2d 369 (Del. Super. 1942); Woolley, *Delaware Practice*, § 894. (1906). Review is generally confined to jurisdictional matters, errors of law or irregularity in the proceedings that appear on the face of the record. *Goldstein v. City of Wilmington*, 598 A.2d 149 (Del. Super. 1991)

Again, appeals via *certiorari* are only available in the case of a final judgment "from the Superior Court to inferior tribunals, to correct errors of law, to review proceedings not conducted according to law, and to restrain an excess of jurisdiction." Woolley, *Delaware Practice* §896. *Certiorari* review is strictly "on the record" and the reviewing tribunal cannot weigh evidence or factual findings. *In the Matter of Butler*, 609 A.2d 1081, 1082 (Del. Supr. 1992). In other words, *certiorari* review does not encompass a review of the *sufficiency* of any particular piece of evidence, and it is the lower tribunal's record which is reviewed, and not

the evidence employed in generating that record. *Du Pont v. Family Court*, 153 A.2d 189 (Del. Super. 1959); *Castner v. State*, 311 A.2d 858 (Del. Super. 1973).

In *certiorari* proceedings, the reviewing court may reverse or affirm, in whole or in part, or modify, the decisions of a board of adjustment. The court will look to whether the deciding body (e.g. Board of Adjustment, City Council, etc.) (a) acted arbitrarily or capriciously, and/or (b) whether substantial evidence exists on the record to support the decision. *Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.*, 1997 WL 525860 (Del. Ch. 1997). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [It] is 'more than a scintilla but less than a preponderance.'" *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981). Let's repeat that, because it is worth repeating: board of adjustment decisions will be reviewed by Superior Court to determine whether **substantial evidence on the record** exists to enable the board to evaluate the factors under the relevant legal standard and arrive at its decision. The court will generally not, however, evaluate the substantive determinations made by the board – only whether it may have rationally arrived at its conclusion without otherwise contravening the relevant statutory scheme. In a rare, unusual case, the reviewing court may consider evidence outside the record where it is necessary to complete or explain an otherwise incomplete or doubtful record. Woolley, *Delaware Practice,* § 898.

Disparate treatment of similarly situated applications without a rational basis for that differential treatment is also an avenue to meeting the arbitrary and capricious standard. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Constitutional challenges to statutes which lower tribunals relied upon is yet another avenue to *certiorari* review. *Goldberg v. City of Wilmington*, 1992 WL 114074 (Del. Super. 1992). This includes where statutory restrictions amount to a taking of property, though the burden for proving a taking is elevated to a showing that the relevant regulation denied an owner substantially all economically viable uses of the relevant land, considering the "economic impact of the regulation on the claimant . . . [the] extent to which the regulation has interfered with distinct investment backed expectations . . . [and the] character of the governmental action." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Procedurally, 10 *Del. C.* § 562 states as follows:

> The Superior Court may frame and issue all remedial writs, including writs of habeas corpus and certiorari, or other process, necessary for bringing the actions in that Court to trial and for carrying the

> judgments of the Court into execution. All writs shall be granted of course and shall be in such form and returnable at such time as may be prescribed by the rules of the Court, or otherwise as the particular case may require.

A writ proceeding is commenced by the filing of a petition or complaint. The petitioner must serve all parties to the proceeding below – in a land use matter, this may include an administrative or quasi-judicial board (e.g. board of adjustment), a landowner, a permit holder, the mayor and city council, a developer, an investor, etc. Failure to properly name and serve all parties may result, fatally, in a complaint not eligible for amendment under Superior Court Rule of Civil Procedure 15. Importantly, dismissal of such a complaint for failure to name indispensable parties, by order of court under Rule 41, operates as an adjudication on the merits of the case – meaning that refiling the matter with all parties properly named, may be barred by the doctrine of *res judicata*. Petitions for *certiorari* will be subject either to a statutory appeal timeline, or a more flexible common law timeline, generally benchmarked at 30 days from the issuance of the relevant written decision. *Dover Historical Soc. v. City of Dover Planning Comm'n*, 2005 WL 1950795 (Del. Super. Ct. June 20, 2005), aff'd sub nom. *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006) The common law 30-day deadline for filing is not a jurisdictional requirement, whereas statutory deadlines area, opening failure to meet statutory deadlines to dismissal by Rule 12(b).

Once the petition/complaint for *certiorari* has issued from Superior Court, the respondent will have 20 days from service (or 40 days if no service is affected) to file a certified copy of the record, per Rule 5. Rule 12(aa1) allows, once the record has been certified and filed with the court, for the petitioner to file for exceptions to or diminution of the record, if applicable, to further limit the breadth of the court's review, within 10 days. Following these opening volleys, there are no hard and fast scheduling rules for resolving the *certiorari* filing. Rather, the court will issue a scheduling order, allowing for briefing and argument, as appropriate.

As an alternative to *certiorari* review, petitioners may seek a writ of *mandamus* from Superior Court to compel action by a board of adjustment (or in some cases, an administrative official) in the performance of a ministerial duty (e.g. approving a plan or use where all requirements have clearly been met). To obtain *mandamus* relief, the petitioner must show (i) a clear legal right to the performance of the ministerial, and therefore non-discretionary, duty and (ii) no

other adequate remedy. *Dragon Run Farms, Inc. v. New Castle County*, 2000 WL 33113804 (Del. Super. 2000). As a result, decisions such as approval of subdivision applications, adoption of zoning ordinances, and grants of variances, non-conforming uses, and special exceptions, would not generally be appropriate for review by *mandamus* because the decision sought is not merely ministerial (or non-discretionary). *Remedio v. City of Newark*, 337 A.2d 317 (Del. 1975); Wooley, *Delaware Practice*, §1655. As a result, mandamus provides only narrow relief (often along the lines of forcing an official who has failed to perform the ministerial, non-discretionary duty to perform the duty).

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