



IN THE
Supreme Court of the State of Delaware

FRIENDS OF THE H. FLETCHER BROWN MANSION, A DELAWARE
UNINCORPORATED ASSOCIATION, KRISTEN F. DIFERDINANDO, DANN J.
GLADNICK, MITCHELL GLASS, MICHAEL GUNSELMAN, JEFFREY T.
KUSUMI, AND CONSTANCE M. SMITH
Petitioners-Below, Appellants,

v.

THE CITY OF WILMINGTON, A MUNICIPAL CORPORATION OF THE STATE OF
DELAWARE, CITY OF WILMINGTON ZONING BOARD OF ADJUSTMENT,
AND INGLESIDE HOMES, INC., A DELAWARE NON-PROFIT CORPORATION,
Respondents-Below, Appellees

No. 445, 2013

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, NEW
CASTLE COUNTY, C.A. NO. N12A-05-006 RRC

ANSWERING BRIEF OF INGLESIDE HOMES, INC.

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NOVEMBER 12, 2013

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NATURE OF PROCEEDINGS

This appeal adds yet another chapter to the ongoing saga surrounding Ingleside Homes, Inc.'s ("Ingleside" or "Respondent") attempt to renovate the H. Fletcher Brown Mansion (the "Brown Mansion") for integration into the services it provides to low income seniors at the Ingleside Retirement Apartments. This matter was first vetted by the City of Wilmington Zoning Board of Adjustment (the "Board") in 2009 where three variances were requested and granted to Ingleside for the proposed renovations. That decision was affirmed by the Superior Court in a decision dated August 26, 2010, however, the decision was reversed by this Court in an Opinion dated December 12, 2011, on the basis that the Board was improperly constituted in violation of 22 *Del.C.* §322(a).

The General Assembly, by amendment to 22 *Del.C.* §322(a), corrected the flaw highlighted by this Court's Opinion and, following such amendment, Ingleside reapplied to the Board for similar relief. The Board considered the application on February 22, 2012 and again unanimously approved the request. This decision was affirmed by the Superior Court in a decision dated July 26, 2013. Petitioners filed a timely appeal and, pursuant to a briefing schedule issued by this Court, filed their Opening Brief on October 7, 2013. This, then, is Respondent, Ingleside's, Answering Brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly concluded that the issuance of a use variance to Ingleside for purposes of converting the Brown Mansion into thirty-five (35) age-restricted dwelling units did not violate the applicable City of Wilmington Comprehensive Development Plan(s).

2. Denied. Substantial evidence supported the Board's decision that the grant of a use variance to Ingleside would not exacerbate existing parking problems in contravention of City of Wilmington Code §48-70(b).

STATEMENT OF FACTS

This appeal stems from a set of land use approvals granted to Ingleside, a not-for-profit entity providing housing and other services to low income seniors, for the purpose of constructing a four-story¹, 35-unit residential building on the site of the Brown Mansion in the City of Wilmington. (A-51-52)² The facility will provide for retirement living, healthcare and community outreach to a vastly underserved population of the City (as well as the State). (A-39) Indeed, a recent study prepared by the Delaware State Housing Authority determined that over 1,100 housing units identified as “affordable” in Delaware are at risk of expiring, while another 500 units are in need of substantial renovation. (A-318) Ingleside is well aware of the need for such services as it presently operates the 15-floor, 208-unit Ingleside Retirement Apartments next door. (A-39)

The Brown Mansion Parcel, the subject of this appeal, is located at 1010 N. Broom Street in the City of Wilmington. The Brown Mansion is a large, over 14,350 square foot structure that dates back to approximately 1917. (A-21, 54) The parcel, which has been owned by Ingleside or its predecessor-in-interest since 1954, has generally been used as a convalescent home or related services, although its primary function, until it was mothballed in 2008, was as an office for Ingleside. (A-51-53) The Brown Mansion is physically connected to the Ingleside Retirement Apartments through walkways and an enclosed, passageway (the “Connect-

¹ The building is actually the height of a three-story building per the City of Wilmington Code, however, because the building is classified as a residence, the basement must be counted as a floor (A-55, 59)

² Citations to the Petitioners’ Appendix are denoted by “A” followed by a page number.

or”), which is also located in the area of a generator and an air handler that serves the Ingleside Retirement Apartments. (A-64-65) As the Connector contains, among other things, an emergency generator, chillers, coolers and major mechanical and electrical systems (both for permanent and temporary power), the testimony before the Board indicated that it would cost over \$820,000 to disconnect these two buildings and the systems that they share in order to permit the buildings to function independent of each other. *Id.*

While, for the last two decades, the primary function of the Brown Mansion has been as offices for Ingleside, the primary mission of Ingleside remains the provision of residential services to low and moderate income seniors. (A-39) As such, Ingleside has been exploring methods to renovate and reuse the Brown Mansion for purposes consistent with this mission. (A-53) Because the condition of the nearly 100-year old structure has deteriorated over time, however, this plan necessitates either the demolition or renovation of this large structure. *Id.* Indeed, the initial plans for this structure called for the property to be rezoned to a district consistent with the adjacent Ingleside Retirement Apartments (R-5B), the demolition of the Brown Mansion and the construction of a 54-unit residential building. (A-53, 88-89) This proposal, however, was met with resistance from the City and significant opposition from some neighbors and, therefore, never proceeded to a vote before the Planning Commission or City Council. *Id.* The City’s resistance was rooted, at least in part, in concerns about what could occur on the property if a rezoning was approved but the pending proposal ultimately not pursued to comple-

tion. (A-43)³ The decision not to proceed with the rezoning, a more far-reaching land use approval (if granted), still left open the question of how to deal with this large structure squarely on Ingleside's plate.

Given the deterioration of the Brown Mansion, which had been boarded up and closed due to its age and condition, Ingleside, its neighbors and the City formed a working group (the "Working Group") to continue to explore different options for the Brown Mansion.⁴ (A-88-89; IB-46-54)⁵ As multiple studies determined that it was highly unlikely that the building could be renovated and used as a single family home, the Working Group explored other options focused on preserving as much of the original structure as possible while using the building and/or the property in a manner consistent with the historic mission of Ingleside. *Id.* In formulating a resolution, the Working Group balanced the neighbors' desire for a low impact use that preserved the existing building and gardens with Ingleside's goal of providing affordable housing to the elderly. *Id.*

The plan that was placed ultimately before the Board reflected the product of these negotiations. Most importantly, from the community's standpoint, the demolition of the Brown Mansion was drastically scaled back (only 2,940 of the 14,250 square feet is to be demolished, for code and safety reasons, thus preserving over

³ This recommendation is interesting as it is couched in the alternative. That is, while it suggests that the Department believes that the rezoning would be inappropriate, it also provides that should the Planning Commission agree that rezoning is appropriate, a rezoning to R-5-1A category would be more appropriate as it caps building height at 5 stories. (A-43) The current proposal calls for a 4-story building. (A-50-51)

⁴ The Working Group contained at least one member of the individual Petitioners (Jeffrey Kusumi) participating in this action. (IB-46, 52, 97)

⁵ Citations to Ingleside's Appendix are denoted by "IB" followed by a page number.

80% of the structure⁶) and the onsite gardens are to be restored. (A-44-51, 54-56; IB-96) In addition, the number of proposed rental units was significantly reduced (from 54 to 35). (A-53-55, 88-89) From Ingleside's perspective, this compromise permits it to continue to fulfill its mission to provide affordable housing for seniors on a property that already houses a similar use. Indeed, as part of the proposal being reviewed by the City, the Brown Mansion Parcel is to be combined (with the dividing property line to be eliminated) with the parcel that contains the Ingleside Retirement Apartments. (A-44, 51; IB-92)

In order to secure approval of this plan, Ingleside was compelled to take two separate paths. Because the Brown Mansion Parcel lies within an historic district, Ingleside was required to obtain approval for its proposed construction from the Design Review and Preservation Commission ("DRPC"), a body tasked with reviewing and approving applications to construct or alter buildings in the historic areas of Wilmington. The proposal was first endorsed by the State Historic Preservation Office. (IB-62) Following this, the DRPC reviewed, considered and approved Ingleside's proposal. (IB-55-58)

In addition to the approval of the DRPC, Ingleside also requested three variances from the Board to permit the project to move forward. These variances were identical to those reviewed and approved by the Board in 2009. (A-318-334) Two of these variances, both in 2009 and at the 2012 hearing, a request to modify the

⁶ The portion of the building to be demolished has been an issue in this matter as the Petitioners have continued to misstate the extent of demolition to outside audiences. Indeed, as a letter offered by the Petitioners from the National Trust indicates, it has been advised, presumably by the Petitioners, that the demolition exceeds 50% of the existing structure, something that is patently untrue (and has been untrue since 2009). (IB-59-61)

side yard requirement and a request to permit a four story structure (under the terms of the City of Wilmington Code) on the property, engendered little debate and were not the subject of either appeal. (A-58-60, 319-321) It was the third variance, the variance to permit a multi-family use in an R-1 zoning district⁷, that engendered the most debate at the 2009 Board hearing, a trend that continued with the 2012 hearing.

At the February 22, 2012 Board hearing, Ingleside, through its representatives and experts, made a presentation regarding its proposal. (A-50-73) This presentation included testimony regarding the history of the Brown Mansion, the need for the proposed use, the inability to use the structure for a single family residence, the history of the discussions with the neighbors, the need for the requested variances and the lack of impact on the surrounding neighbors. *Id.* Additional testimony focused on the lack of impact the proposed use would have on area parking coupled with the neighbors' previously expressed desire not to replace the green space on the property, which is to be reconstructed as gardens, with a parking lot. (A-55-57) The testimony on the issue of parking (from Ingleside and its representatives) focused on several topics. Glenn Brooks covered the discussions that occurred before the Working Group with regard to parking. He testified that while some members wanted Ingleside to solve neighborhood concerns with regard to parking associated with neighborhood schools, others wanted to avoid off-street parking in favor of preserving/recreating on-site gardens. (A-54) Larry Cessna

⁷ The R-1 zone, pursuant to §48-131 of the City of Wilmington Code, permits the construction and use of buildings for a variety of purposes, ranging from single family detached housing to schools, churches, fire houses and group homes. (A-159-162)

testified that both during the Working Group discussions (A-56) as well as around the time of the 2012 hearing (A-57) there was ample excess parking capacity on the Ingleside Retirement Apartments site. Mr. Brooks echoed this testimony, noting that, around the time of the 2012 hearing, there were, on average, 22 excess parking spaces on the Ingleside Retirement Apartments lot. (A-57) Current surveys indicated that many of these spots went unused. *Id.*

Ingleside concluded its presentation with testimony from its landscape architect regarding the efforts being employed to reestablish gardens formerly on the premises (A-61-62; IB-96) and testimony from Ingleside and its experts on the difficulties and cost associated with decoupling the Brown Mansion from the Ingleside Retirement Apartments. (A-63-72) Finally, Ingleside presented evidence addressing the financial aspects associated with the renovation of the structure and the feasibility of using the structure for a permitted use under R-1 zoning. *Id.*

Following the conclusion of testimony by Ingleside, the Board opened the floor to anyone who wished to testify in favor of or against the application. Several area residents, including the president of the Cool Spring/Tilton Neighborhood Association, testified in support of the Application. (A-77-78, 80, 84, 88-89; IB-97-103) Their support included discussion regarding the prior community meetings, the goal of preserving as much of the existing structure as possible, the available parking⁸, the need for this use and the compromises made by Ingleside in its

⁸ Ray Banker testified for himself (and others) that, in his observation, the Ingleside Retirement Apartments lot has 12-14 excess spaces on a daily basis. (A-77-78; IB-99-101) Moreover, he confirmed the desire of many neighbors not to sacrifice green space for unnecessary off-street parking. (IB-100-01)

meetings with residents. *Id.* Several area residents testified in opposition to the proposal, raising issues with density, the perceived parking problems in the area, the size of the renovated structure, and the prevalence of social programs in their neighborhood. (A-73, 77, 79-88) Much of the testimony from both sides mirrored that presented to the Board in 2009. (A-326-333) Finally, in addition to the testimony referenced above, letters, both in support of and opposed to the application, were received by the Board.⁹

The Board, by a 3-0 vote, approved the request of Ingleside for the three variances required for this project. (A-90-92) Its oral decision provided several reasons for its decision, reasons memorialized in the Board's April 11, 2012 written decision. (A-18-19) The Petitioner filed a timely appeal from that decision which was addressed by the Superior Court in its July 26, 2013 decision. In addition to ruling in the Respondent's favor with regard to the standards applicable to the award of a use variance and the ethics of the Board members considering this application (two issues not pursued on appeal), the Superior Court found that the requested use variance did not run afoul of the applicable Comprehensive Plan(s) that govern development in the City of Wilmington.¹⁰ The Court also concluded that substantial evidence supported the Board's decision that a grant of a use variance would not exacerbate any parking difficulties in this neighborhood (to the ex-

⁹ In its decision on this matter, the Board specifically discounted a petition submitted by the opposition to this request as being worded in such a way that it invited nothing but opposition to this request. (A-91)

¹⁰ Citation to the Superior Court's opinion below in this Answering Brief reference the Slip Opinion attached as an Exhibit to Petitioner's Opening Brief (as revised), filed on October 14, 2013 (Transaction ID No. 54379507) and are denoted by "Op." followed by a page number.

tent such shortages existed). It is from these latter two determinations that the Petitioners appeal.

ARGUMENT

I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE GRANT OF A USE VARIANCE DID NOT CONFLICT WITH THE APPLICABLE COMPREHENSIVE DEVELOPMENT PLAN(S) FOR THE CITY OF WILMINGTON

A. Question Presented

Denied. The Superior Court did not err in concluding that the use variance granted to Ingleside was consistent with the applicable Comprehensive Development Plan(s) for the City of Wilmington.

B. Standard Of Review

In reviewing the decision of the Board, this Court applies the same standard as that applied by the Superior Court in its review of the decision. *Rehoboth Art League, Inc. v. Board of Adjustment of the Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010). Thus, in reviewing whether the Board's grant of a use variance complied with the Comprehensive Development Plan, this Court reviews the Board's findings under the substantial evidence test. "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lynch v. The City of Rehoboth Beach*, 894 A.2d 407, 2006 Del. LEXIS 115 at *13 (Del. 2006). The Court does "not weigh evidence, resolve questions of credibility or make [its] own factual findings." *Id.* The Superior Court's legal conclusions are reviewed *de novo*. *CCS Investors, LLC v. Brown*, 977 A.2d 301, 320 (Del. 2009).

C. Merits Of The Argument

The Petitioners continue to argue that this use variance violates 22 *Del.C.*

§702(d) as, in their opinion, the proposed use is inconsistent with the Westside Comprehensive Development Plan, dated October, 2009 (the “Westside Plan”). The Petitioner’s argument, which has not changed throughout the course of this matter, points to the designation of the Brown Mansion Parcel as R-1 in the 2009 Westside Plan and argues that this alone mandates that no use, other than low density residential, is compatible with this designation. This oversimplification continues to miss the mark with regard to the relationship between the relevant comprehensive planning documents and the Brown Mansion Parcel.

Delaware law has long recognized that a “comprehensive development plan is not a precise delineation of appropriate land uses. It is a general statement of policies, objectives and standards and a projection of appropriate patterns of future development.” *Hudson v. County Council of Sussex County*, 1988 Del. Ch. LEXIS 25 at **9-10, (Del. Ch. Feb. 24, 1988). To that end, such plans “are intended as large scale and long term planning documents and therefore cannot ... serve unyielding as guide[s] to detailed questions of zoning designations.” *O’Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10 at *156, (Del. Ch. Jan. 18, 2006) (citations omitted). Recognizing such plans often contain numerous and, at times, conflicting goals, the *O’Neill* Court noted that a challenge to a zoning action as a violation of the comprehensive plan must be “reviewed with an eye toward flexibility”, so long as such flexibility does not render the plan a nullity. *Id.* As such, the Petitioners must demonstrate that the actions of the Board, assuming such action was constrained in the manner suggested by the Petitioners, “fails to strike a reasonable balance between the plan’s various goals.” *Id.* at *157.

In the West Side of Wilmington, development is directed pursuant to zoning decisions taken in accordance with two comprehensive plans. The first (and broadest) of these plans is the City-Wide Plan of Land Use (“CWPLU”) (adopted in 2003). (A-26) This document, which complies with the requirements of 22 *Del.C.* §702 and was reviewed by the State prior to adoption (IB-75-76)¹¹, provides the overall development desires for the City as a whole, including an overview of the City’s goals with regard to what it desires to accomplish through future development proposals. As noted above, these goals address a wide variety of topics and can, at times, conflict with each other. *O’Neill*, 2006 Del. Ch. LEXIS 10 at *156. The CWPLU is further supplemented by the various neighborhood plans, which provide for a more targeted overview of development desires for more localized areas. The Westside Plan is one such plan. As with the CWPLU, the Westside Plan, which is not reviewed by the State in accordance with 22 *Del.C.* §702, contains a mix of aspirational desires with regard to future development as well as a series of maps which, save for Map 1, reflect the status of development in the Westside at the time that the Westside Plan was approved. (A-121-26)

In challenging the Court’s conclusion that the pending proposal does not violate these planning documents, Petitioners have consistently ignored the text of

¹¹While the Petitioners continue to ignore the provisions of the CWPLU, the CWPLU is the only City of Wilmington comprehensive plan that is reviewed by the Office of State Planning in accordance with 22 *Del.C.* §702(f). Contrary to the Petitioners’ assertion (OB at 18), the Westside Plan is not vetted by the State in accordance with 22 *Del.C.* §702(f). Indeed, the CWPLU provides that neighborhood plans are submitted to the State only after approval by Council so that they are included in the State’s files. (IB-76) The Office of State Planning does not review and approve such plans for compliance with State requirements prior to their approval by the City. *Id.*

the plan(s) themselves and focus almost exclusively on the zoning designation for the Brown Mansion Parcel as R-1 in Map F within the Westside Plan. (A-125) This narrow focus, however, ignores not only the text of these documents; it also ignores the maps themselves. This is critical as, unlike County comprehensive plans, for which the future land use map (or map series) alone have the force of law, *see, e.g.* 9 *Del.C.* §2659(a), the entirety of a municipal comprehensive plan has the force of law.¹² To that end, proposed development must be “consistent” with the plan text as well as its maps. 22 *Del.C.* §702(d).¹³ Thus, the Court, in reviewing a development proposal, must review the proposal against the entirety of the plan as opposed to just the future land use map series.

As anticipated by the *O'Neill* Court, 2006 Del. Ch. LEXIS 10 at *156, the text of both the CWPLU and the Westside Plan contain a number of goals, many of which are met by the proposal advanced by Ingleside. As noted by Ingleside in its briefs (and the Court in its Opinion), the CWPLU has among its many goals for future development within the City’s boundaries increasing the provision of services for the elderly as well as the preservation of historic structures within the City, both goals advanced by this application. (IB-65-74; Op. at 20-23) The Westside Plan further supplements these goals by encouraging the preservation of historic structures (including the Brown Mansion), addressing parking concerns (with a fo-

¹² Courts in Delaware considering similar challenges to zoning decisions have repeatedly reminded those challenging the decision that the entirety of a municipal Comprehensive Plan is considered – such consideration is not confined to the maps alone. *O'Neill, supra*; *Donnelly v. The City of Dover*, 2011 Del. Super. LEXIS 212, *15-16, (Del. Super. Apr. 20, 2011); *Farmers for Fairness v. The Kent County Levy Court*, 2012 Del. Ch. LEXIS 12, *24, (Del. Ch. Jan. 27, 2012).

¹³ “Consistent” is far from the “strict conformity” argued for by Petitioners. (OB at 16)

cus on seasonal festivals and commercial business, both of which can create short-term parking problems), encouraging the minimization of vacant properties, and controlling residential density. (IB-80-85; Op. at 20-23) As the Court below noted, additional goals included the supporting the City's social institutions as well as preserving open space. (Op. at 20-23) All of these goals are advanced by the pending plan.

The Petitioners, however, ignore these goal's, dismissing them as "general" objectives "worshipped" by the Superior Court. (OB at 24)¹⁴ Instead, their sole focus remains on the maps that are part of the Westside Plan as support for their argument that the proposed development is inconsistent with the Comprehensive Plan. The problem with this argument is that none of these maps support their position.

The starting point is the Current Land Use Map (Map D). (A-124) This map identifies the property as a "High Density" residential use. This specific text should end the inquiry as the text as well as the map makes it clear that a "High Density" residential use is appropriate for the Brown Mansion Parcel. Indeed, it is only if one ignores this map that the Petitioners argument can proceed, which is exactly what Petitioners attempt to do. However, they cannot have it both ways. They cannot argue that "strict conformity" is required (OB-16) then ask the Court to ignore the very language to which a property owner is to conform. The Westside Plan clearly and unambiguously provides that a "High Density" residential use is appropriate for this parcel, and there is no qualifying language within

¹⁴ Citations to the Petitioners Opening Brief are denoted by "OB" followed by a page number.

that document to suggest that this classification was contingent upon other factors. On this basis alone, the Board's decision should be sustained.

Beyond this, the two other maps cited by the Petitioners fail to support their argument; indeed, they support the position of Ingleside. Map F, as it is labeled, does nothing more than identify the current zoning for each parcel in the Westside. (A-125) This Map identifies this property as zoned R-1. However, this classification does not limit the property to a particular use. In addition to the uses, beyond single family residential, permitted by this classification (more intense uses, such as schools, group homes, churches) (A-159-62), the R-1 designation does not prohibit the award of a use variance, a statutorily permitted remedy available to a property owner (regardless of which zoning district its property lies). 22 *Del.C.* §327; City of Wilmington Code §48-70 (A-151-52); *CCS Investors, LLC*, 977 A.2d at 316. Indeed, a use variance can present a far more attractive land use option as it allows for targeted relief (without a change in the underlying zoning) when the appropriate standards have been satisfied.¹⁵ See, e.g., *Blake v. Sussex County Council*, 1997 Del. Ch. LEXIS 120, (Del. Ch. July 15, 1997). It is far more limiting than a rezoning which would permit any use permissible under the new zoning classification to occur on the property. *Id.*

Map 1, the penultimate map according to Petitioners, is equally unpersuasive. This Map, which is identified in the Westside Plan as a "Future Rezoning Map" (A-126), serves no purpose beyond identifying those parcels for which it has

¹⁵ The Petitioners arguments on appeal do not include a challenge to the Board's conclusion that the use variance it granted satisfied the four-part "unnecessary hardship" analysis, as articulated in *CCS Investors, LLC*, 977 A.2d at 316, applicable to such a request.

been suggested that a change in zoning classification may be appropriate. The description of the areas identified on Map 1 within the text of the Westside Plan further buttresses Ingleside's arguments. The Westside Plan provides that "[i]t is recommended that the residential density of *selected areas* within certain West Side neighborhoods be reduced to lessen congestion..." (A-109) (emphasis added). The fact that Brown Mansion Parcel has not been "selected" supports Ingleside's argument and is consistent with how the City has treated this Parcel from the beginning. The City had previously expressed its desire to avoid rezoning the Brown Mansion Parcel as to do so would open it up to a much larger array of uses (particularly given the cascading nature of the City's zoning code¹⁶). (A-43) The fact that the property is identified in one map as "High Density Residential" (A-123) and in a second map as retaining its R-1 zoning category (A-124) is entirely consistent with both the Westside Plan and the use variance process as a use variance does not, by definition, alter the underlying zoning of the property. *Hanley v. City of Wilmington Board of Adjustment*, 2000 Del. Super. LEXIS 262 at **9-10, (Del. Super. Aug. 3, 2000); *Blake, supra*.

The Petitioners argument that the City must alter its zoning maps if this use is to be permitted continues to confuse the land use tools of "use variance" and "rezoning". Map 1 would only need to be amended if a rezoning was sought for and awarded to the Brown Mansion Parcel, which it was not. A use variance, as

¹⁶ The City of Wilmington Code generally permits uses in more restrictive zoning classifications to also occur in less restrictive classifications. Thus, for instance, the R-5-B zoning district cited by the Petitioners permits all uses available under R-4 zoning (City of Wilmington Code §48-138(c) (A-173)) and R-4 permits any use available in R-3 (City of Wilmington Code §48-135(c) (A-168)).

discussed above, is a permissible zoning tool under state and municipal law and does not change the zoning of the property – it is a variance from what zoning would otherwise permit. *Id.* If the zoning of the property does not change, there is no need to add the property to a “future rezoning map”.¹⁷ Moreover, as the Current Land Use Map (Map D) presently shows that the property is being used for a “High Density Residential”, there is no alteration necessary to that map as well. In short, none of the maps relied upon by Petitioners requires a change based on this approval.

Ingleside, as expressed in its Briefs below, suggested that, were Petitioners’ arguments to be accepted, a use variance as an available remedy may become extinct as, by its nature, it introduces something into an area that, by underlying zoning, is otherwise unpermitted. *CCS Investors, LLC*, 977 A.2d at 316. The Superior Court analyzed this argument, assessing the balance between the Comprehensive Plans and a use variance in its opinion. A comprehensive plan, as the Court noted, is the overarching, forward-looking document that a city adopts to direct growth and development within its borders. (Op. at 15-20) Pursuant to 22 *Del.C.* §702(d), once adopted, all zoning actions within municipal borders must be *consistent* (but not necessarily in strict conformity) with the approved plan. A use variance, indeed, all variances, are statutorily permitted “escape valves” available to a property owner when the literal terms of the local zoning code create an exceptional practical difficulty or unnecessary hardship on the owner’s use and enjoyment of the

¹⁷ As the Westside Plan notes, the properties identified in Map 1 were those for which a rezoning was proposed. (IB-85) Thus, unless the Brown Mansion Parcel was to be rezoned, it would not be identified on that Map.

property. *CCS Investors, LLC*, 977 A.2d at 318; 22 Del. C. §327. Thus, particularly in such cases where the Comprehensive Plan does not unambiguously establish a particular use for a property¹⁸, the Board, in keeping with its statutory mandate, may exercise its authority to grant a variance. (Op. at 19-20)

In that vein, the grant of a use variance is akin to the conditional use approval awarded in *Blake, supra*. In rejecting a comprehensive plan challenge to the grant of a conditional use approval, the Court noted that there are “good and sound reasons” for applying a project specific tool, such as a conditional use, as opposed to a rezoning. *Blake*, 1997 Del. Ch. LEXIS 120 at *11. Conditional use approvals are more limiting in their breadth, can be “specifically and flexibly tailored” to suit the needs of the community, and are typically limited to a specific, defined use. *Id.* at **11-12. A rezoning, as the *Blake* Court noted, allows the property to be used for any use permitted by the new zoning classification. *Id.* at *11. The Court concluded by noting “it must be remembered that land use and regulation is not an exact science. The innumerable factors involved and the interplay of those factors does not allow for a static approach to zoning. As such, it cannot be said that employment of the conditional use clause as a means to approve a proposed use more particularly described in another of the use districts is *per se* unreasonable or arbitrary.” *Id.* at *12.

Like a conditional use, the use variance permits a use not permitted by right within the zoning district to occur following a public hearing and a conclusion by

¹⁸ Compare, *O'Neill*, 2006 Del. Ch. LEXIS 10 at **5-10, 162-63 (no clear designation of use) with *Brohawn v. Town of Laurel*, 2009 Del. Ch. LEXIS 82 at *19-21 (Del. Ch. May 13, 2009) (specific use identified).

the Board that the statutory standards have been addressed. *Baker v. Connell*, 488 A.2d 1303, 1307-08 (Del. 1985); *CCS Investors, LLC*. Crucial to the analysis for the present matter, however, a use variance, if approved, *does not change the zoning classification* of the property but instead allows a specific, identified use to occur. If that use is terminated, a new use may not (unlike with a rezoning) simply locate on the property and commence operation. It is, in essence, a limited, parcel-specific zoning tool that exists under state law to address issues that arise where a property owner is stymied in its pursuit of a reasonable return for its property by the provisions of the zoning code.

In rejecting the Petitioners' arguments, the Superior Court relied upon established case law embracing the role of the variance in zoning matters. "Where strict application of a zoning ordinance would result in an unnecessary burden on the landowner ... the grant of a variance serves as an escape valve." *CCS Investors, LLC*, 977 A2d at 318. The governing statute, 22 *Del.C.* §327(a)(3), authorizes the Board to grant a use variance where "owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances ... will result in unnecessary hardship ... to the owner" of an affected property. *See also, Board of Adjustment of New Castle County v. Kwik-Check Realty*, 389 A.2d 1289, 1291 (Del. 1978). Use variances are permitted despite acknowledgement that such approvals change "the character of the zoned district by permitting an otherwise proscribed use." *Hanley*, 2000 Del. Super. LEXIS 262 at *9. That is because it is clear that a zoning code cannot anticipate every potential problem that can occur on each property within the municipality until a problem is identified, but, when identified,

where it is in the public interest and the required legal standard is met, such relief is appropriate. *See, e.g., Hanley, supra.*

Such a change, however, does not necessarily bring the property out of conformance with the approved comprehensive plan. *See, e.g., Blake, supra.* This is particularly true where, as here, the plan is less than clear with regard to the specific use for the property, the same fate outlined in *O'Neill*. Despite this, the Petitioners repeatedly (and forcefully) argue that the maps in the Westside Plan should have been amended within 18 months of the approval of this variance in accordance with 22 *Del.C.* §702(c).¹⁹ This argument, again, fails to appreciate the relationship between a rezoning and a use variance. As noted above, while a rezoning, as its name suggests, alters the underlying zoning category of the property, a use variance maintains the status quo with regard to zoning. Thus, there is no need to amend a map that solely addresses the future zoning classifications of specified properties where there has been no intention expressed to change the zoning of the Brown Mansion Parcel.²⁰ Indeed, the municipal body has indicated (here) that it preferred the zoning of the property not be changed. (A-43) Instead, after consideration of the facts under the appropriate legal standard, the Board concluded that a

¹⁹ As the Westside Plan is not reviewed by the Office of State Planning in accordance with 22 *Del.C.* §702(f), it is debatable whether a change in use of a property within the Westside requires a further change to a plan not otherwise governed by the §702 process.

²⁰ For the Petitioners' arguments to be accepted on this point (in this case) would suggest that a use variance is no longer permissible in the City of Wilmington, despite its authorization under the State and City Codes. Indeed, Petitioners argue that compliance with the "future land use" goals of the West Side can only be accomplished through rezoning despite the City's expressed desire that the Brown Mansion Parcel not be rezoned. Given that a use variance does not alter underlying zoning, such "compliance", as argued by Petitioners, could never be represented on the "Proposed Rezoning Map" (Map 1), the Petitioners self-proclaimed "future land use plan". (OB at 19)

particular *use* was appropriate for this property but that no change in the underlying zoning was warranted. Such a decision both accounts for the dilemma confronting the property owner while guarding against the Brown Mansion Parcel being opened up to any use permitted under a more intense zoning classification.²¹

Finally, the Petitioner's assert, at the outset of their argument, that the decision of the court below created "a split of authority between the Superior Court and the Court of Chancery, and it constitutes legal error". (OB at 16) They make this claim because they find fault with the Superior Court's conclusion that, on the one hand, 22 *Del.C.* §702(d) requires development to be consistent with the Comprehensive Plan yet, in their opinion, the Court's decision also held that the "general Westside Comp Plan objectives could override specific use designations for the Property" in violation of established case law. (OB at 16) The problem with this argument, as with many of the arguments offered by Petitioners, is that it is not supported by actual text of the Court's Opinion.

The Court specifically concluded that 22 *Del.C.* §702(d) prohibited the grant of a variance where to do so "contravenes" the Comprehensive Plan. (Op. at 15). The Court then concluded, however, consistent with this requirement, that "substantial evidence" supports the conclusion that the use variance was also "consistent with the City's comprehensive plan." (Op at 15) Far from creating a "split in authority" as the Petitioners suggest, it proceeds in the fashion sanctioned by

²¹ Indeed, the Petitioners' argument would suggest that *any* use of the property that is not low density residential would be prohibited on the property even if such use *complied* with the underlying R-1 zoning. Thus, by Petitioners logic, a fire house, school (of which there are several in the area) or a church, all of which are permitted by R-1 zoning (A-159-61), would nevertheless not be permitted to occur unless the Comp Plan was also amended.

O'Neill, Blake, Donnelly and Farmers for Fairness, supra., namely, it considered the entirety of the Comprehensive Plan(s) as opposed to just the maps (as it would seem Petitioner would prefer). Contrary to Petitioners assertions, there is no specific use designated for the Brown Mansion Parcel (other than High Density Residential on the Current Land Use Map). The other maps referenced by Petitioners, the Current Zoning Map and the Proposed Rezoning Map, do nothing more to identify existing and desired zoning categories, zoning categories that capture a variety of uses. Neither map speaks to altering the future use of the property. Thus, the “split in authority” referenced by the Petitioners is nonexistent – it is merely their disagreement with the ultimate conclusion reached by the Court below.

In the end, the only use designation for the Brown Mansion Parcel in the Westside Plan was as “High Density Residential” (A-124), something not contradicted by this variance. No specific mention of a use for this property is found anywhere else in the Plan. As such, resort is had to the text of this Plan for guidance as to what is permissible for the Brown Mansion Parcel. As the Court below noted, the governing Comprehensive Plans provided for a myriad of different goals, many of which were satisfied by this application and thus concluded the proposal satisfied the requirements of 22 *Del.C.* §702. Substantial evidence supports this conclusion.

II. THE COURT BELOW CORRECTLY CONCLUDED THAT THE GRANT OF THIS USE VARIANCE WOULD NOT EXACERBATE EXISTING PARKING PROBLEMS IN VIOLATION OF §48-70.

A. Question Presented

Denied. The Superior Court did not err in concluding that the use variance granted to Ingleside complied with §48-70 of the City of Wilmington Code.

B. Standard Of Review

In reviewing the decision of the Board, this Court applies the same standard as that applied by the Superior Court in its review of the decision. *Rehoboth Art League, Inc.*, 991 A.2d at 1166. Thus, in reviewing the decision of the Superior Court that the Board's grant of a use variance did not contravene the requirements of City of Wilmington Code §48-70, this Court reviews the Board's findings under the substantial evidence test. "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lynch*, 894 A.2d 407, 2006 Del. LEXIS 115 at *13. The Court does "not weigh evidence, resolve questions of credibility or make [its] own factual findings." *Id.* The Superior Court's legal conclusions are reviewed *de novo*. *CCS Investors, LLC*, 977 A.2d at 320.

C. Merits Of The Argument

In this Court, as before the Superior Court, the Petitioners point to those testifying in support of their position to the exclusion (or utter dismissal) of the testimony of those testifying on behalf of Ingleside to argue that no evidence supports the Board's (and the Superior Court's) conclusion that the proposed renovations to the Brown Mansion would not exacerbate existing parking problems in the neigh-

borhood. (OB at 28-33) As the Superior Court correctly pointed out, however, the Petitioner's arguments primarily attack the weight of the evidence before it, something that the Board is tasked with resolving. *Rehoboth Art League, Inc.*, 991 A.2d at 1166. (Op at 23-24) The Board determined that the evidence supported the conclusion that 35 senior living apartments would not exacerbate existing parking problems (if any), a position affirmed by the Superior Court. Substantial evidence supports this conclusion.

In reviewing the decision of the Board, "if the decision is supported by substantial evidence, the Court must sustain the decision of the Board, even though it would have decided otherwise had it come before it in the first instance. This is because it is for the agency, and not the Court, to weigh evidence and resolve conflicting testimony and issues of credibility." *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. 1988). Substantial evidence equates to "more than a scintilla but less than a preponderance," and the burden of persuasion is on the Petitioners as it is they who are seeking to overturn the Board's decision. *Id.* at 954-55. This Court should "not disturb a decision [of the Board] simply because a different view of the same evidence could be taken given the totality of the circumstances surrounding the application." *Council of Civic Associations of Brandywine Hundred v. New Castle County Board of Adjustment*, 1995 Del. Super. LEXIS 494 at *23 (Nov. 17, 1995); *aff'd.*, 682 A.2d 675 (Del. 1996) (ORDER).

In arguing for reversal, the Petitioners focus on the lack of any written agreement authorizing those using the new facilities to park vehicles on the Ingle-side Retirement Apartment lot (OB at 30-31). In addition, the Petitioners assert

that the testimony of those speaking in favor of Ingleside was “irrelevant and conclusory” and that the undisputed evidence suggests that the new units will exacerbate the existing parking concerns. (A-29-30, 32-33) Neither of these positions, however, supports reversal of the Board’s decision.

At the outset, the Petitioners assert that the Superior Court conclusively determined that the West Side suffered from existing parking problems (OB at 28). This citation, however, does not go as far as Petitioners claim. Indeed, the Court cited to testimony to *support* an argument that parking problems existed, however, it ultimately determined that substantial evidence supported the conclusion of the Board that, to the extent such parking problems existed, these problems were not exacerbated by the proposal. (Op. at 26-28) In reaching this conclusion, the Court never held that such problems did, in fact, exist.

The evidence presented by Ingleside (and those in support of Ingleside) conclusively established that, to the extent there were any existing parking concerns in the area, those concerns did not result from Ingleside’s operation. No one testifying in opposition claimed that Ingleside’s operation adversely impacted local parking needs, nor did they produce evidence to suggest that the Ingleside Retirement Apartments did not have excess parking. Indeed, the testimony before the Board suggested just the opposite. (A-56-57, 77-78, IB-100-01)

The evidence confirmed that the average age of the existing residents is 85, that very few people residing in the Ingleside Retirement Apartment’s owned cars, and that on most (if not all) occasions, there is **substantial** excess parking available in the lot serving the Ingleside Retirement Apartments. *Id.* The evidence also

demonstrated that only two additional employees were necessary to serve the new units and that these employees, plus the new residents of the proposed facility, would be amply served by the available spaces within the Ingleside Retirement Apartment lot. (A-56-57)

In challenging the availability of the existing lot for the new units, the Petitioners repeatedly point to the fact that no “easement agreement” was produced to confirm the availability of such parking for the residents of the new units. While they focus on their belief that the owners of the properties are different (despite the physical connection of the two buildings), their argument fails for the most basic of reasons, namely that the parcel line between the Brown Mansion Parcel and the Ingleside Retirement Apartments Parcel is to be eliminated. (A-44-45, 51; IB-92-93) Thus, the two parcels, which are already physically linked by the Connector, will be combined into one tax parcel. *Id.*

In challenging the testimony of those speaking in favor of the project as “illusory” or “conclusory”, the Petitioners continue their tact of treating their testimony as “conclusive” to the exclusion of all other testimony. A review of the record, as the Superior Court noted, however, confirms the fallacy of this position. The neighbors’ position on existing parking demands was well documented. This matter was vetted by the Board on two occasions and at each hearing, people on both sides of the matter offered their opinions with regard to the existing parking situation and the impact of the 35 additional units. Those testifying against the proposal included students at area schools (but not residents of the neighborhood),

those operating businesses in the area and some residents in the neighborhood.²² (A-76, 79-80, 82-83) Their testimony suggested that their concerns were driven by uses other than Ingleside, *id.*, a position consistent with the observation in the Westside Plan, which suggested that temporary parking demands in this area are the result of “seasonal festivals” and “neighborhood events”. (IB-82) Those testifying in support of the application, on the other hand, provided evidence regarding the impact (or lack thereof) of the current use and its relationship with the proposed use, the availability of off street parking in the area and the current lack of parking difficulties in the area. (A-56-57, 77-79, 319, 330; IB-100-01)²³ The Board, after evaluating this testimony, concluded that the evidence supported Ingleside’s position that these 35 units would not exacerbate parking concerns. That decision was supported by substantial evidence and, as such, should not be overturned.

Finally, the Petitioners resort to an analysis of the parking requirements they believe are required of this structure. The problem with this analysis, however, is that these requirements were not before the Board for consideration as no request for relief from the parking requirements was before it for a vote.²⁴ The Board of Adjustment, pursuant to 22 *Del.C.* §327(a), considers either appeals from the deci-

²² Of course, some of the Petitioners were the principals behind a supposed “offer” to purchase the Brown Mansion Parcel (A-72). Previously, member(s) of this same group represented that they were interested in bringing a school to occupy the Brown Mansion. *Id.* This relationship is ironic given that, based on the testimony of those opposed to this matter, schools are a leading cause of the complaints regarding parking. (A-76-77, 79-80, 83)

²³ Data on this point was not limited to the time prior to the 2009 Board hearing but also included current surveys of the parking lot. (A-57, 77)

²⁴ Petitioners’ counsel acknowledged this fact, pointing out to the Board that no such variance was before the Board for its consideration on February 22.

sion of an administrative official or a variance from the provisions of the zoning code. As outlined previously, there were only three matters before the Board for its consideration and none of these was a parking variance. Thus, while the Petitioners may have their opinions with regard to what is or is not required by the Code of the City of Wilmington for parking, as no variance request was before the Board for off-street parking (if any) required for the new units (A-89-90), the Petitioners interpretation with regard to what they believe the Code requires in the way of off-street parking, while interesting, is irrelevant. Moreover, evidence regarding parking requirements in other jurisdictions has no bearing on the impact that the current proposal would have on area streets.

Finally, these arguments are disingenuous, at best, when many residents, including some of the Petitioners, lobbied Ingleside to refrain from providing off-street parking spaces in favor of the restoration of the gardens on the Brown Mansion Parcel. (A-54, 78, 89, 330; IB-98-101) Ingleside accommodated this request in its design only to now be attacked for following this suggested path. Petitioners cannot have it both ways. The Superior Court correctly noted that evidence on both sides of this issue was before the Board. In such instances, it is not the job of the Court to substitute its opinion for that of the Board. *Mellow v. Board of Adjustment*, 565 A.2d at 954. Instead, it reviews the record to determine if substantial evidence, defined as more than a scintilla but less than a preponderance, supports the Board's decision. *Id.* Here, such evidence supports the Board's conclusion that the addition of 35 units for low-income seniors would not adversely impact the current parking needs of this community. That decision should be affirmed.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the decision of the court below and direct entry of judgment in favor of Defendants.

Respectfully submitted,

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Dated: November 12, 2013

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