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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITIZENS AGAINST SOLAR POLLUTION, DONALD LEE GOLDSBOROUGH, TRUSTEE UNDER REVOCABLE TRUST AGREEMENT OF DONALD LEE GOLDBOROUGH DATED 12/22/10, and KELLIE ELAINE GOLDSBOROUGH, TRUSTEE UNDER REVOCABLE TRUST AGREEMENT OF KELLIE ELAINE GOLDSBOROUGH DATED 12/22/10, *Plaintiffs Below, Appellants*, v. KENT COUNTY, KENT COUNTY LEVY COURT, FPS CEDAR CREEK SOLAR LLC, THE PINEY CEDAR TRUST, JAMES C. KNOTTS, JR., CHERYL A. KNOTTS, DE LAND HOLDINGS 1 LLC, AMY PEOPLES, TRUSTEE OF THE PINEY CEDAR TRUST, and RICHARD A. PEOPLES, TRUSTEE OF THE PINEY CEDAR TRUST, *Defendants Below, Appellees*.	No. 210,2024 On Appeal from C.A. No. 2022-0287-NAC in the Court of Chancery of the State of Delaware On Appeal from C.A. No. N23C-03-196 VLM in the Superior Court of the State of Delaware, On Certiorari from the Kent County Levy Court's Conditional Approval of Application CS-21-09 FPS Cedar Creek Solar, LLC

APPELLANTS' OPENING BRIEF

Dated: July 12, 2024

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NATURE OF PROCEEDINGS

This case challenges the Kent County Levy Court's (the "Levy Court") approval of a conditional use application filed by Defendant below, Appellee FPS Cedar Creek Solar LLC ("FPS"), to construct a 528-acre solar power generation facility adjacent to property owned by Plaintiffs below, Appellants Donald and Kellie Goldsborough, who are among the members of Plaintiff below, Appellant Citizens Against Solar Pollution, a Delaware unincorporated nonprofit association (collectively, "Appellants").

The Levy Court's approval of the conditional use application was rife with procedural irregularities, inconsistent with the Kent County Comprehensive Plan (the "Comprehensive Plan") and the Kent County Zoning Code (the "Zoning Code"), and had the substantive outcome of permitting legislatively-protected and preserved farmland to be put to an industrial use which is entirely inconsistent with the aesthetics, applications, and uses in the surrounding rural area.

The procedural odyssey in this case began in March 2022 before the Court of Chancery, where Appellants sought (1) a preliminary injunction preventing FPS from commencing construction on the solar power plant; (2) a permanent injunction barring FPS from relying on the Levy Court's approval; and (3) a declaratory judgment regarding the legal infirmities of the Levy Court's approval. After the

parties had fully briefed cross-motions for summary judgment, the Court of Chancery ordered supplemental briefing regarding subject matter jurisdiction.

On February 24, 2023, the Court of Chancery entered an Order (attached as Exhibit A) adopting the reasoning of *Delta Eta Corporation v. City of Newark*, 2023 WL 2982180 (Del. Ch. Feb. 2, 2023), which held that "unless the claimant demonstrates otherwise, a writ of certiorari provides an adequate remedy at law to redress harm caused by a quasi-judicial decision denying a conditional use permit." Exhibit A at 3. Following *Delta Eta*, the Court of Chancery held that it lacked subject matter jurisdiction over this case, and dismissed the action without prejudice with leave to transfer the action to the Superior Court pursuant to 10 *Del. C*. § 1902. *Id.* at 6.

On March 21, 2023, Appellants filed their Amended Complaint in the Superior Court seeking a declaratory judgment and certiorari review. A- 1226. The Kent County Defendants (defined on page 11) moved to dismiss both counts of the Amended Complaint as untimely and improper.

On October 17, 2023, the Superior Court entered a Memorandum Opinion (attached as Exhibit B) dismissing Appellants' declaratory judgment count, but permitting the action to proceed as a petition for writ of certiorari.

After briefing on certiorari review, the Superior Court affirmed the Levy Court's approval of FPS' conditional use application on October 17, 2023. Exhibit C.

This is Appellants' Opening Brief in support of their appeal of:

(i) The Order dated February 24, 2023, issued by the Honorable Nathan A. Cook, Vice Chancellor, in Civil Action No. 2022-0287-NAC in the Court of Chancery of the State of Delaware (the "Court of Chancery Order," attached as Ex. A);

(ii) The Memorandum Opinion dated October 17, 2023, issued by the Honorable Vivian A. Medinilla, Judge, in Civil Action No. C.A. No. N23C-03-196 VLM in the Superior Court of the State of Delaware (the "Memorandum Opinion," attached as Ex. B), dismissing Appellants' declaratory judgment count; and

(iii) The Order dated May 7, 2024, issued by the Honorable Vivian A. Medinilla, Judge, in Civil Action No. C.A. No. N23C-03-196 VLM in the Superior Court of the State of Delaware (the "Superior Court Order," attached as Ex. C.).

Appellants timely appealed on May 18, 2024. *See* Supr. Ct. Dkt. 1 (Notice of Appeal).

For the reasons set forth herein, Appellants respectfully request that this Court reverse the decision set forth in the Court of Chancery Order and remand for further proceedings before that Court. Alternatively, Appellants request that the Court reverse the Memorandum Opinion dismissing Appellants' count for declaratory relief, and reverse the Superior Court Order affirming the Levy Court's approval of the conditional use permit, and remand for further proceedings.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery's decision that it lacked subject matter jurisdiction to review the Kent County Levy Court's issuance of a conditional use permit was erroneous. *Coker v. Kent County Levy Court*, 2008 WL 5451337 (Del. Ch. Dec. 23, 2008). A-1043 to A-1074; A-1104 to A-1132.

2. The Superior Court's dismissal of Appellants' Count I, seeking a declaratory judgment, is reversable error. *B.W. Electric, Inc. v. Gilliam-Johnson*, 2018 WL 3752497, at *8 (Del. Super. Aug. 3, 2018) (permitting parallel action seeking certiorari and declaratory relief to proceed). A-1347 to A-1354.

3. The Superior Court's affirmation of the Kent County Levy Court's issuance of a conditional use permit on certiorari review is reversible error. A-1818 to A-1858; A-2173 to A-2191.

STATEMENT OF FACTS

On or about October 9, 2021, FPS filed Application No. CS-21-09 FPS Cedar Creek Solar for a Conditional Use with Site Plan Approval (the "Application")[1] regarding a proposed solar power electric generation facility covering approximately 260 acres over three (3) parcels of land of approximately 528 total acres known as the Knott's Farm and the Piney Cedar Trust Farm (collectively, the "Property") in Kent County, Delaware. A-1228; A-1230.

Through their respective trusts, Plaintiffs Donald Lee and Kellie Elaine Goldsborough own 688 Lighthouse Road, Smyrna, Delaware 19977, which comprises roughly 342 acres (the "Goldsborough Property"). A-1227. Mr. and Mrs. Goldsborough are members of Citizens Against Solar Pollution ("CASP"), a Delaware unincorporated nonprofit association. *Id.* The Goldsborough Property is adjacent to the Property. A-1230; A-1630.

The Levy Court held a public hearing for the Application on December 21, 2021. A-1232. Following extensive public comment, Commissioner Masten moved to table the matter in order to introduce prepared public ordinances regarding solar power projects in Kent County, which was seconded by Commissioner Angel. A-1672.

Prior to the vote, Commissioner Buckson stated: "I need some kind of an

[1] D.I. 28, Ex. A. [put in appendix citations]

understanding that these ordinances aren't going to be held hostage because of the lawsuit." A-1673. The lawsuit to which Commissioner Buckson referred is *FPS Cedar Creek Solar LLC v. Kent County Levy Court*, C.A. No. 2021-0881-NAC (Del. Ch.), filed on October 13, 2021, in the Court of Chancery by FPS, in connection with the Levy Court's prior denial of its substantially similar conditional use application for a solar power generation facility on the Property.[2] This exchange demonstrates Commissioners Buckson and Masten believed that ordinances were required for the Levy Court's consideration of the Application, and that Commissioner Buckson was concerned that such ordinances may be "held hostage" by FPS's (still pending) litigation against the Levy Court.

The motion to table resulted in a 3-3 tie and the motion failed. A-1674. Immediately thereafter, Commissioner Masten moved to deny the Application, which Commissioner Angel seconded. A-1676. The motion to deny the Application failed pursuant to a tie vote of 3-3 with one member absent. *Id.* Commissioner Masten then moved to table a vote on the Application until a seventh Commissioner

[2] Although C.A. No. 2021-0881-NAC (Del. Ch.) is stayed, as of this writing it is still pending. The Verified Complaint in that matter seeks a permanent injunction enjoining the vote taken by the Levy Court on September 28, 2021, denying the application, and an order directing either that the prior application be granted, or that the Levy Court take a new vote. Verified Complaint, Oct. 13, 2021, *FPS Cedar Creek Solar LLC v. Kent County Levy Court*, C.A. No. 2021-0881-NAC (Del. Ch.). A-2221.

could be present. A-1677. The motion to table carried pursuant to a 5-1 vote. A-1678.

On January 25, 2022, the Levy Court held a combined business and committee meeting at which Commissioner Masten moved to lift the Application from the table for discussion, which Commissioner Sweeney seconded. A-1690. The motion passed 7-0. *Id.* After extensive discussion by the Commissioners, Commissioner Masten made a motion to deny the Application, which was seconded by Commissioner Angel. A-1692. The vote failed, resulting in three (3) ayes to deny the Application and four (4) nays. *Id.*

Commissioner Sweeney next moved to approve the Application. A-1692-93. Commenting on the Application and explaining the reasons for his vote in favor, Commissioner Buckson expressed that his vote was compelled by his understanding of the law, rather than based on the specifications of the Application and the mandates of the land use maps set forth in the Comprehensive Plan and the Zoning Code:

> I'm not asking you to accept my apologies, but I'm going to state it for the record. And moving forward, I hope that we can work out some agreements, which do just that *put these things in the right locations*. […] I believe that we have a situation tonight where given the existing land use laws that we have in place that we have to value each individual property owner's rights, on both sides and do the best we can to make a decision which is what I'm currently doing tonight, *at least in where I think I need to be. Not where I said I'd like to be. This is not where I'd like to be, this is where I think I have to be. This is where I know I have to be*. So those are my comments, those are my

> statements that go along with my vote to approve the application. Thank you.

A-1693 (emphasis added).

Commissioner Hall then stated:

> Before I vote, I do want to say, because I spoke to the Goldsboro's [*sic*] a couple of times, they raised some excellent points and for the entire community out there, I want to say that the concerns, issues, objections, thoughts should all be mirrored in a better policy than we have today. There's no doubt about it.

A-1693-94. Commissioner Hall echoed Commissioner Buckson's comments indicating that he felt his affirmative vote was not based on the specifics of the Application and the requirements of the Comprehensive Plan and Zoning Code, but rather, compelled by his understanding of the law: "[F]rom the lens of property rights and from looking at it the only stand that Levy Court has to deny this application would be is if they would not conform to the conditions, then I have to vote in favor of this, and that's the reasons why I am." A-1694.

Commissioner Howell commented: "I liked what Commissioner Buckson said about property rights, liked what Commissioner Hall said, quoting that decision from way back had a lot of wisdom to it, so I vote yes. And that's it." *Id.*

Commissioner Sweeney, the fourth affirmative vote, stated in relevant part:

> As you heard from Commissioner Hall, this was simply whether or not a solar farm is allowable by ordinance at this location or under conditional use and it is. *If we could classify solar farms as industrial*

> *it would have required a zoning change but my conclusion is that solar farms are not industrial*.

Id. (emphasis added). The vote thus passed, based on four qualified votes to approve the Application and three votes against. A-1694.

On January 26, 2022, the Levy Court issued a letter addressed to FPS, stating in relevant part:

> At its public hearing on January 25, 2022, the Levy Court of Kent County granted CONDITIONAL APPROVAL of application CS-21-09 FPS Cedar Creek Solar, LLC, a conditional use site plan for a Solar Installation located outside the Growth Zone Overlay District. This is based on Exhibit A - the RPC Recommendation Report dated December 21, 2021; Exhibit B - Public Hearing Testimony dated December 2, 2021; and the findings of fact that:
>
> a. The subject site is zoned AC (Agricultural Conservation) and §§205-48 and 205-329 permit public utilities as a conditional use.
>
> b. The location is appropriate and not in conflict with the Comprehensive Plan.
>
> c. The public health, safety and general welfare will not be adversely affected.
>
> d. The application in compliant with the Adequate Public Facilities Ordinance.

A-1616 (the "Written Decision").

Among other things, the Written Decision also notes that "[t]he final plan must be approved within 24 months of preliminary plan approval and construction shall commence within 18 months of final plan approval." A-1617. As of this writing, more than 24 months have passed since the Levy Court issued the Written Decision.

Appellants filed the initial complaint in this action on March 25, 2022 in the Court of Chancery. On May 2, 2022, Defendants FPS, DE Landholdings 1, LLC ("DE Landholdings," and collectively with FPS, the "Freepoint Defendants"), the Piney Cedar Trust, Amy Peoples, Trustee of the Piney Cedar Trust, and Richard A. Peoples, Trustee of the Piney Cedar Trust (collectively, "Piney Cedar"), and James C. Knotts Jr. and Cheryl A. Knotts (the "Knotts," collectively with the Freeport Defendants and Piney Cedar, the "Non-County Defendants") filed their answer.

The parties—including Defendants Kent County and the Kent County Levy Court (the "County Defendants") took discovery and briefed cross-motions for summary judgment in the Chancery Action.

On February 24, 2023, the Court of Chancery dismissed the case with leave to refile in the Superior Court pursuant to 10 *Del. C.* § 1902, after holding that a writ of certiorari provides an adequate remedy at law. Ex. A.

On March 21, 2023, Appellants transferred the case and filed the Amended Complaint in the Superior Court, asserting two counts: Count I seeking a declaratory judgment, and Count II seeking certiorari review. A-1226

On April 25, 2023, Defendants moved to dismiss. A-1281.

October 17, 2023, the Court entered its memorandum opinion granting Defendants' motions to dismiss the ruling, in relevant part, (i) that Plaintiffs' motion for certiorari was moot; (ii) granting Defendants' motion to dismiss Plaintiffs'

declaratory judgment count; and (iii) denying Defendants' motion to dismiss Plaintiffs' certiorari count. Ex. B. The Court based its denial of Defendants' motion to dismiss Count II (certiorari) on the discretionary directives of 10 *Del. C.* § 1902, and the Court of Chancery's decision to transfer. *Id.* at 29. The Court further ruled that Count II of the Complaint will be considered as a petition for writ of certiorari. *Id.* n.132.

On November 9, 2023, Plaintiffs' prior counsel was disbarred and compelled to withdraw from the case. Ex. C n.1.

On November 13, 2023, the County Defendants filed their Certification of the Record before the Levy Court (the "Certified Record"), comprising five exhibits: Exhibit A, October 9, 2021 Application CS-21-09 FPS Cedar Creek Solar, LLC; Exhibit B, a list of the docket entries before the Levy Court; Exhibit C, the January 26, 2022 written decision of the Levy Court granting conditional approval; Exhibit D, the meeting minutes for the Levy Court business meetings held on December 21, 2021 and January 25, 2022; and Exhibit E, excerpts from transcript of the January 25, 2022 proceedings. A-1596.

On November 21, 2023, the Court wrote to the parties indicating the Court's intent to "affirm the Levy Court's determination that approved the conditional use permit," and issue a ruling on the writ of certiorari once Appellants obtained new counsel. A-1771.

After briefing by the parties, the Superior Court conducted certiorari review and on May 7, 2024, affirmed the Kent County Levy Court's conditional approval of application CS-21-09 FPS Cedar Creek Solar, LLC (the "Conditional Approval").

ARGUMENT

I. THE COURT OF CHANCERY ERRONEOUSLY RULED THAT IT LACKED JURISDICTION OVER THIS ACTION.

Questions Presented

Whether the Court of Chancery has subject matter jurisdiction over challenges to conditional use permits such as the Conditional Approval in this case. A-1043 to A-1074; A-1104 to A-1132.

Standard and Scope of Review

Issues of subject matter jurisdiction involve questions of law that are reviewed *de novo*. *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935 (Del. 2007); *see also, Linn v. Delaware Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999) ("The standard and scope of review as to whether a court has subject matter jurisdiction requires this Court to review a question of law, that is reviewable *de novo.*").

Merits of the Argument

Until recently, land-use cases involving conditional use permits were routinely heard by the Court of Chancery. On this point, the Superior Court recently noted that "[i]n March of 2022 … Chancery was the undisputed forum for conditional use permit disputes that were headed for resolution by the courts." *Middlecap Associates LLC v. Town of Middletown*, 2023 WL 6848999, at *3 (Del. Super. Oct. 16, 2023) (citing *Moore v. Gravenor*, 1978 WL 22463 (Del. Ch. Mar. 7,

1978) (setting aside Sussex County Council's grant of a conditional use permit); *Sears v. Levy Court of Kent Cnty.*, 1986 WL 10085, at *1 (Del. Ch. Sept. 15, 1986) (affirming Kent County Levy Court denial of a conditional use permit); *Green v. Cnty. Council of Sussex Cnty.*, 1994 WL 469167 (Del. Ch. Aug. 11, 1994) (finding the Sussex County Council's grant of a conditional use was invalid); *Coker*, 2008 WL 5451337 (affirming Kent County Levy Court's denial of a conditional use permit)).

The practice of seeking redress in the Court of Chancery was so well-engrained that after the Levy Court denied the first conditional use application, the Freepoint Defendants filed a verified complaint seeking relief from the Court of Chancery. A-2221. The Freepoint Defendants cited three cases in support of equitable jurisdiction. A-2223 (citing *Reinbacher v. Conley*, 141 A.2d 453, 456 (Del. Ch. 1958) (reviewing rezoning plan promulgated by the Levy Court of New Castle County, and finding that "the action of the Levy Court may be enjoined and that mandamus in such event would not be an appropriate remedy"); *Gibson v. Sussex Cty. Council*, 877 A.2d 54 (Del. Ch. 2008) (reviewing denial of conditional use application); *Coker*, 2008 WL 5451337, at *13 (finding the Levy Court articulated a sufficient, non-arbitrary basis for denying a conditional use permit)).

Until the Court of Chancery's holding in *Delta Eta Corp*, no Delaware opinion directly held that when a board acts in a quasi-judicial capacity, the Court of

Chancery is divested of equitable jurisdiction solely based on the availability of a common law writ of certiorari in the Superior Court. *See Kroll v. City of Wilmington*, 2023 WL 6012795, at *11 (Del. Ch. Sept. 15, 2023) ("Even where the court has found itself devoid of subject matter jurisdiction because certiorari was available, it has avoided announcing a categorical rule to that effect and has always paid special attention to the relief sought by the plaintiff"). In a novel application of an ancient legal precept, decades of standard Delaware practice involving land use cases were discarded.

Following *Delta Eta*, the Court of Chancery below held that unless a claimant demonstrates otherwise, a writ of certiorari provides an adequate remedy at law to redress harm caused by a quasi-judicial decision denying a conditional use permit. Ex. A at 3. The distinction between when an administrative board acts in a "quasi-judicial" versus a legislative capacity has never before been the deciding factor in the assessment of the Court of Chancery's subject matter jurisdiction. The Court of Chancery found that the approval of the Application constitutes a quasi-judicial act on the part of the County Defendants, and that a writ of certiorari is capable of affording an adequate remedy at law. *Id*. at 4.

For the reasons herein, the Court of Chancery Order should be reversed.

A. A Well-Pleaded Request for Preliminary Injunction Vests the Court of Chancery with Equitable Jurisdiction.

The Court of Chancery has subject matter jurisdiction where a plaintiff states an equitable claim, where a plaintiff seeks equitable relief in the absence of an adequate remedy at law, or where the General Assembly has vested the Court of Chancery with jurisdiction by statute. *Kroll*, 2023 WL 6012795, at *3. Once subject matter jurisdiction is established as to a portion of a complaint, the court may assert jurisdiction over the other aspects of the complaint under the "clean-up doctrine." *Id.*

The injunctive relief sought by Appellants in Count I of the Verified Complaint arises from the harm posed by the Freepoint Defendants' reliance on the improvidently granted Conditional Approval to construct the solar power plant, analogous to the harm posed by a continuing trespass. A-65. *See Gordon v. Nat'l R.R. Passenger Corp.,* 1997 WL 298320, at *7 (Del. Ch. Mar. 19, 1997) (finding equitable jurisdiction due to continuing trespass in the context of a nuisance claim).

Specifically, the Verified Complaint alleged that: (1) absent intermediate injunctive relief the solar power facility could be constructed; and (2) postconstruction, no adequate remedy at law would be available. A-66. After construction, no remedy would exist against any of the Appellees.

Separately, the Verified Complaint sought a preliminary injunction to maintain the status quo until the Court of Chancery could decide the validity of the

Conditional Approval, and noted that without interim injunctive relief, the challenge to the Conditional Approval could be rendered moot. A-67. These requests for equitable relief established the Court of Chancery's subject matter jurisdiction.

B. The Capacity in Which the Levy Court Acts Should Have No Bearing on Equitable Subject Matter Jurisdiction.

In *Delta Eta*, the Court of Chancery held that "a quasi-judicial act carries out existing legislative policy, rather than making new policy. By contrast, an entity acts in a legislative capacity when it creates new laws, or effectively amends or repeals existing laws." *Delta Eta*, 2023 WL 2982180, at *11 (footnotes omitted). The *Delta Eta* court noted that the Delaware Supreme Court "has been unwavering in categorizing zoning decisions as legislative." *Id.* at 12 & n.105.

Delta Eta went on to outline the parameters of when a municipality acts in a quasi-judicial capacity:

> When the availability of the special use permit is circumscribed by ordinance, approving or denying a special use permit application is a quasi-judicial act. In granting such special uses, a municipality is not legislating: the legislative act occurred when the municipality selected those enumerated special uses and added any additional conditions on granting the permit. This is true even where the same entity passes the zoning ordinance and approves or denies the special use permit; an entity may act in a quasi-judicial capacity when taking certain action, and a legislative capacity when taking others.
>
> But if ordinances do not limit a particular special use by district or zone, such that the use is permitted it "in all zones indiscriminately," then the decision to allow or deny that special use is a legislative act. In *Bay Colony v. County Council of Sussex County*, this Court explained that granting such a permit effectively rezones property, and therefore

> should be treated like a legislative act. Later, *Gibson v. Sussex County Council* explained that this standard must be applied on a case-by-case basis, focusing on the particular special use at issue rather than whether a municipality's or county's zoning scheme provides for unrestricted special uses or any unrestricted special uses at all.

Delta Eta, 2023 WL 2982180, at *13 (citations omitted). Thus, challenges to Sussex County conditional use permits are presumptively legislative acts—which are subject to a plenary review on a stricter standard—whereas challenges to Kent County or New Castle County conditional use permits are presumptively quasi-judicial acts, for which common law certiorari review is the only available recourse.

In light of *Delta Eta*, the Court of Chancery has noted "there seems to be no clear rule for deciding whether certiorari presents an adequate remedy relative to injunctive relief." *Kroll*, 2023 WL 6012795, at *2. The fact that a party may have a remedy at law does not divest the Court of Chancery of jurisdiction; "[t]he question is whether the remedy available at law will accord the plaintiff full, fair, and complete relief." *El Paso Natural Gas Co. v. TransAmerican National Gas Corp*., 669 A.2d 36, 39 (Del. 1995).

The availability of a writ of certiorari does not eliminate the potential for equitable jurisdiction. In order for a remedy at law to be adequate, it "must be as practical to the ends of justice and to its prompt administration as the remedy in equity." *El Paso*, 669 A.2d at 39; *see also United BioSource LLC v. Bracket Hldg. Corp*., 2017 WL 2256618, at *4 (Del. Ch. May 23, 2017). The Court of Chancery

will exercise jurisdiction over an action seeking an injunction to prevent threatened injury where—as here—the legal remedy would be less complete and less effective than the equitable remedy. *El Paso*, 669 A.2d at 39-40.

C. Certiorari Review is Not an Adequate Remedy at Law.

Certiorari is not an adequate remedy at law. "Under principles of law well established in this State, certiorari involves a review of only such errors [that] appear on the face of the record being considered." *Castner v. State*, 311 A.2d 858, 858 (Del. 1973) (citations omitted).

> The writ of certiorari is a writ of error. The writ lies from the Superior Court to inferior tribunals, such as a county council, to review proceedings that determine legal rights and are capable of legal error. The writ exists to review only errors of law, not errors of fact. The review is confined to the record, and the Court must not re-decide the merits of the case."

Mell v. New Castle Cty., 2003 WL 1919331, at *8 (Del. Ch. Apr. 11, 2003) (citing 1 WOOLLEY, DELAWARE PRACTICE (1906) §§ 895–897 (1906)).

In light of the restrictive scope of certiorari review, the Superior Court "will 'not consider the merits of the case. It considers only those issues historically considered at common law; namely, whether the lower tribunal (1) committed errors of law, (2) exceeded its jurisdiction, or (3) proceeded irregularly.'" *Haden v. Bethany Beach Police Dep't*, 2014 WL 2964081, at *7 (Del. Super. June 30, 2014) (*quoting Maddrey v. Just. of the Peace Ct. 13*, 956 A.2d 1204, 1213 (Del. 2008)).

Certiorari is not the functional equivalent of an appeal, as the standard of review is "strictly limited," such that the Superior Court may not weigh evidence, review factual findings, or consider the case on its merits. *Black v. New Castle County Bd. of License, Inspection and Review*, 117 A.3d 1027, 1030-31 (Del. 2015). Evidence considered below is not part of the reviewable record on certiorari, nor may the transcript of the proceedings below be considered. *Id.* Certiorari review only includes consideration of whether (i) the lower tribunal exceeded its jurisdiction; (ii) the tribunal below acted illegally or manifestly contrary to law; or (iii) the lower tribunal proceeded irregularly. *Id.*

In contrast to the limited scope of certiorari review, the action before the Court of Chancery was a plenary proceeding at which discovery was taken and the parties had briefed cross motions for summary judgment. The record before the Court of Chancery included interrogatory responses, transcripts of the Levy Court's proceedings, and other evidence supporting numerous bases for invalidation of the Conditional Approval. A-476 to A-479.

In sum, because of the limited standard and scope of certiorari review, it does not provide an adequate remedy at law. The injunctive remedy sought by Appellants vested the Court of Chancery with equitable jurisdiction over this case. The Court should reverse the Court of Chancery Order and remand for further proceedings.

II. THE SUPERIOR COURT'S DISMISSAL OF APPELLANTS' DECLARATORY JUDGMENT COUNT IS REVERSABLE ERROR.

Question Presented

Whether the Superior Court erred by dismissing Count I of the Amended Complaint seeking a declaratory judgment. A-1347 to A-1354.

Standard and Scope of Review

The Delaware Supreme Court reviews trial court rulings granting motions to dismiss *de novo*. *In re GGP, Inc. Stockholder Litigation*, 283 A.3d 37, 54 (Del. 2022). When reviewing a ruling on a motion to dismiss, the Court (1) accepts all well pleaded factual allegations as true, (2) accepts even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draws all reasonable inferences in favor of the non-moving party, and (4) does not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *Id.*

Merits of the Argument

The Memorandum Opinion's dismissal of Appellants' declaratory judgment count should be reversed. Ex. B. The Memorandum Opinion devotes three sentences to dismissing the declaratory judgment count, concluding that because "the adequate legal remedy of a writ of *certiorari* is available here, the declaratory judgment claim is not." Ex. B. at 31. The Declaratory Judgment Act, 10 *Del. C.* § 6501 provides a broad remedy. Moreover, Declaratory relief and certiorari are not

mutually exclusive, and Delaware courts routinely hear challenges to conditional use approvals through declaratory judgment actions.

A. The Declaratory Judgment Act Provides a Broad Remedy.

The Declaratory Judgment Act provides that Delaware courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." 10 *Del. C.* § 6501. "The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree." *Id.* Further, 10 *Del. C.* § 6502 provides that: "[a]ny person ... whose rights, status or other legal relations are affected by a ... municipal ordinance ... may have determined any question of ... validity arising under the ... ordinance ... and obtain a declaration of rights, status or legal relations thereunder."

The Declaratory Judgment Act does not enumerate an exclusive list of controversies courts may consider. 10 *Del. C.* § 6505 ("The enumeration in §§ 6502, 6503 and 6504 of this title does not limit nor restrict the exercise of the general powers conferred in § 6501 of this title, in any proceeding where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty."). The Declaratory Judgment Act is broad: "[t]his chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and

insecurity with respect to rights, status and other legal relations; and is to be *liberally construed* and administered." 10 *Del. C.* § 6512 (emphasis added).

Appellants sought a declaratory judgment regarding the rights, status, and legal relations with respect to the improvident approval of the Application. The plain language of the Declaratory Judgment Act establishes that this case falls squarely within the actions that are appropriate for declaratory relief.

B. Appellants are Entitled to Declaratory Relief.

Appellants alleged, among other things, that the Levy Court failed to articulate valid legal bases to grant the Application and failed to explain how the legal standards were met. A-1233 to A-1245. A declaratory judgment claim was accordingly well-pled. Indeed, the Freepoint Defendants themselves sought declaratory relief against the Levy Court after the Levy Court denied the first conditional use application. A-2227.

Delaware courts routinely resolve disputes involving conditional use applications and zoning decisions through declaratory judgments. *See Salem Church (Delaware) Assocs. v. New Castle County,* 2006 WL 4782453, at *1 (Del. Ch. Oct. 6, 2006); *Eastern Shore Env't, Inc. v. Kent County Dep't of Planning*, 2002 WL 244690, at *1 (Del. Ch. Feb. 1, 2002); *O'Neill v. Town of Middletown*, 2006 WL 205071 (Del. Ch. Jan. 18, 2006); *O'Neill v. Town of Middletown*, 2006 WL 2041279 (Del. Ch. July 10, 2006). Similarly, declaratory relief was granted in a case

where a property owner sought a determination that its proposed convenience store was a permitted use under the town zoning code. *Norino Properties, LLC v. Mayor & Town Council of Town of Ocean View*, 2011 WL 1319563 (Del. Ch. Mar. 31, 2011).

C. Declaratory Relief and Certiorari Review are Not Mutually Exclusive.

"A writ of certiorari is an extraordinary remedy that is available only in limited circumstances and when no other adequate remedy is available." *In re: Fatir*, 935 A.2d 255 (Table), 2007 WL 2713263, *1 (Del. Sept. 19, 2007). At the same time, Delaware courts are empowered to render a declaratory judgment only when "[i]t provides a method for resolving a dispute where no other remedy exists." Ex. B. at 30-31 (citing *Brooks v. Lynch*, 150 A.3d 274, 2016 WL 5957674, at *2 (Del. Oct. 2016) (ORDER) and *Mason v. Board of Pension Trustees*, 468 A.2d 298, 300 (Del. Super. Ct.), *aff'd*, 473 A.2d 1258 (Del. 1983)). "Where there is no statutory provision for reviewing the action of an administrative board, declaratory relief is available for this purpose[.]" 22 Am. Jur. *Declaratory Judgments* § 80 (2023).

Declaratory relief and certiorari review, however, are not mutually exclusive. Requests for both certiorari review and declaratory relief may appear in the same petition and involve the same dispute. In *B.W. Electric, Inc. v. Gilliam-Johnson*, the Superior Court permitted a petition seeking a common law writ of certiorari as well as a declaratory judgment to proceed, noting that "Delaware courts have previously

allowed similarly situated parties to seek relief … pursuant to a writ of certiorari or an action for declaratory judgment." 2018 WL 3752497, at *8 (Del. Super. Aug. 3, 2018). *B.W. Electric* involved a challenge to the Delaware Department of Labor's (the "Department") application of Delaware's Prevailing Wage Law ("PWL"). *Id.* at *1. The Department had directed the lead contractor on a public works project to withhold payment to the petitioner (a subcontractor) as a result of the petitioner's purported violations of the PWL. *Id.* at *2. The *B.W. Electric* court denied respondent's motion to dismiss as to those aspects of the certiorari petition that largely pertained to the procedural deficiencies in the Department's actions in enforcing the PWL against the petitioner, and denied the motion as to the declaratory relief count seeking substantive relief, including the release of the withheld funds. *Id.* at *14.[3]

For the foregoing reasons, the Superior Court's dismissal of Appellants' declaratory judgment count was reversable error.

[3] The *B.W. Electric* court subsequently severed the portion of the original petition that sought a declaratory judgment, and on certiorari, reversed and remanded to the Secretary of the Department of Labor. *B.W. Electric, Inc. v. Gilliam-Johnson*, 2019 WL 1504366, at *7 & n. 11 (Del. Super. Apr. 4, 2019).

III. THE SUPERIOR COURT'S APPROVAL OF THE CONDITIONAL APPROVAL ON CERTIORARI IS REVERSIBLE ERROR.

Questions Presented

Whether the Superior Court erred by affirming the Application on certiorari review. A-1818 to A-1858; A-2173 to A-2191.

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review a question of law. *See Delaware Dept. of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1037, 1090 (Del. 2011).

Merits of the Argument[4]

On the limited review afforded by a common law writ of certiorari, the Superior Court concluded that the Levy Court created an adequate record and did not proceed illegally or manifestly contrary to law. Ex. C. at 15, 17, 22. The Superior Court Order should be reversed for the reasons below.

A. The Superior Court Erred in Holding that the Levy Court Created an Adequate Record for Review.

1. The Certified Record is Incomplete.

The Certified Record filed by the County Defendants is facially incomplete and provides an inadequate record for the Court to perform its review. *Christiana*

[4] The standard and limited of review on certiorari is set forth in Section I.C., above, at pages 20-21.

Town Center, LLC, 865 A.2d 521 (Table), 2004 WL 2921830, at *2 (Del. Dec. 16, 2004) ("A decision will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review").

a) The Maps and Plans Included with the Application are Illegible.

First, the maps and plans included with the Application are largely illegible. *See* A-1870 through A-1875. The Legend, Site Data, General Notes, and the majority of the text in the first map are entirely illegible. *Id*. The subsequent maps and plans are similarly illegible and cannot be reviewed. The Levy Court accordingly has not produced a record sufficient for the Court to perform the judicial review available on certiorari.

b) The Docket Does Not Include the Underlying Documents.

The Docket supplied by the County Defendants is simply a list of the docket entries before the Levy Court. A-1876 through A-1880. The Docket does not include the underlying documents, thus denying the Court the ability to perform its review.

Similarly, the Written Decision references enclosures that are not in the Docket—specifically, "RPC Recommendation Report dated 12/21/21" and "Public Hearing Testimony dated 12/2[1]/21." A-1883. These documents are expressly referenced on the first page of the Written Decision. A-1882. The Levy Court excluded the documents setting forth the bases for its approval from the Certified

Record, thus preventing the Court from assessing whether the Levy Court proceeded irregularly or manifestly contrary to law. *See, Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 64 n.37 (Del. 2014) ("… blinding the reviewing court to other parts of the record, as [Defendants] advocate[], might have the perverse effect of causing the invalidation of a vote simply because the rational basis for a vote had been made elsewhere in the process.").

Even if the record were to consist solely of the (i) Complaint, (ii) the Application, (iii) the Docket, and (iv) the Written Decision, the Levy Court did not create an adequate record to allow for certiorari review, because the Application includes illegible maps and plans, the Docket fails to include the underlying documents comprising the Docket, and the Written Decision omits the enclosures on which it expressly relies. "Reversal for irregularities of proceedings occurs 'if the lower tribunal failed to create an adequate record for review.'" *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1214 (Del. 2008) (quoting *Christiana Town Center., LLC*, 2004 WL 2921830, at *2 (quoting 1 1 WOOLLEY, DELAWARE PRACTICE (1906) § 939)); *see also*, *e.g.*, *Black v. Justice of the Peace Court 13*, 105 A.3d 392, 396 (Del. 2014) (reversing and remanding on certiorari where Justice of the Peace Court failed to create a reviewable record). The Superior Court Order should be reversed and remanded because the Certified Record is illegible and incomplete.

B. The Record Properly Includes the Minutes and Transcripts.

The County Defendants included the Minutes and excerpts of the Transcripts from the December 21, 2021 and January 25, 2022 proceedings before the Levy Court. A-1884 through A-2021. Although Appellees disclaim the Minutes and Transcripts as having been included merely "out of an abundance of caution,"[5] "the reviewing Court is bound by the record certified to it by the administrative agency and there is no power in the reviewing Court to amend the record[.]" *Petition of Shell Oil Co*., 57 Del. 572, 587 (Del. Super. 1964).

The Certified Record is incomplete and the Superior Court Order should be reversed on this basis.

C. The Written Decision Improperly Frames Conclusions of Law as Findings of Fact.

"[A] quasi-judicial tribunal must state the basis for its decision, in order to allow for judicial review." *Christiana Town Ctr., LLC*, 2004 WL 2921830, at *2. Unless the tribunal creates a record or states on the record the reasons for a zoning decision, "a court is given no means by which it may review the Council's decision." *Barley Mill, LLC*, 89 A. 3d at 61.

The Written Decision improperly frames its conclusions of law as findings of fact. First, the Written Decision provides that "[t]he subject site is zoned AC

[5] A-1795.

(Agricultural Conservation) and §§205-48 and 205-329 permit public utilities as a conditional use." A-1882. The Levy Court's unstated conclusion of law is that a solar power plant, such as that contemplated by the Application, constitutes a "public utility" as defined by the Kent County Zoning Code § 205-6. This implicit legal conclusion is reviewable on certiorari and is discussed below in Section F.

The Written Decision also asserts the legal conclusion that the "location is appropriate and not in conflict with the Comprehensive Plan." A-1882. To the contrary, as discussed below in Section E, the project contravenes the Comprehensive Plan, and the Levy Court acted beyond its authority in approving the Application.

The Written Decision goes on to state that "public health, safety and general welfare will not be adversely affected, and that the "application [is] compliant with the Adequate Public Facilities Ordinance." A-1882. Again, the Written Decision does not state the governing legal rubrics or identify the facts on which it relied in arriving at these conclusions.

These cursory and conclusory legal assertions are an inadequate record for the Court to determine whether the Levy Court properly exercised its power in conformity with the law. "Reversible procedural irregularity includes a tribunal's failure to create an 'adequate record' for judicial review." *Black*, 117 A.3d at 1031 (citing *Christiana Town Ctr., LLC*, 2004 WL 2921830, at *2); *see also, Matter of*

Butler, 609 A.2d 1080, 1083 (Del. 1992) (finding manifest error and vacating order where lower court adopted statutory language in conclusory fashion and failed to recite facts in support of its findings).

D. The Levy Court Was Required to Adopt a Written Ordinance.

In granting the Conditional Approval, the Levy Court was required to proceed via written ordinance. 9 *Del. C.* § 4110(h) ("All actions of the [Kent] [C]ounty government which shall have the force of law shall be by ordinance."); 9 *Del. C.* § 4110(i)(1) ("Every proposed ordinance shall be introduced in writing and in the form required for final adoption.").

The Levy Court did not adopt a written ordinance in connection with the Conditional Approval. Both Commissioner Masten and Commissioner Buckson understood that the Application should be approved, if at all, via written ordinance. A-1938 to A-1939. No written ordinance was adopted.

Conditional use permits have the force of law and must be accomplished via ordinance. *Bay Colony, Ltd. v. County Council of Sussex County*, 1984 WL 159381, at *3 (Del. Ch. Dec. 5, 1984) ("The fundamental change in use permitted by the issuance of a conditional use permit obviously has the force of law and therefore must be accomplished (if at all) by ordinance."). This rule is especially pertinent here, where the Conditional Approval purports to authorize a "Solar Installation" use pursuant to the Zoning Code.

> The words "force of law" and "effect of law" have been used interchangeably, and particularly where the action is by a legislative body. The words "force of law" or "effect of law" are synonymous with having a legally binding effect. ... Any action which directly affects personal liberty or private property or which affects personal or property rights or restrains or compels action of members of the public has the force or effect of law.

Steele v. Stevenson, 1990 WL 114218, at *3 (Del. Ch. Jul. 31, 1990) (quoting *Wilmington Trust Co. v. Caratello*, 385 A.2d 1131, 1133 (Del. Super. 1978)). The Conditional Approval certainly has a "legally binding effect" and affects the property rights of Appellants and the Non-County Defendants.

Appellants argued below that the Conditional Approval does *not* have the force of law, as the proceeding before the Levy Court was "quasi-judicial" and therefore "not akin to a rezoning (which is adopted by ordinance and is properly reviewed by the Chancery Court.)" A-1791. To the contrary, the Conditional Approval is a functional rezoning because as discussed below in Sections F and G, a solar power plant is not among the enumerated uses permitted by the Comprehensive Plan or the activities permitted in the Agricultural Conservation district via a conditional use permit. Zoning Code § 205-48 (enumerating conditional uses permitted in Agricultural Conservation District).[6]

[6] The solar power generation facility at issue could only be permitted as a conditional use under Zoning Code § 205-48 if it were to constitute a "public utilit[y] [or] public utility use[]."

Appellants advocate for a bright line distinction between legislative acts that require a written ordinance, such as a rezoning, and quasi-judicial acts, which involve an application of facts to existing law, such as the approval of a conditional use permit. This distinction—to the extent it exists—is without a difference, as the Conditional Approval of the solar power plant demonstrates that the Levy Court was essentially legislating from the bench, because it adopted and applied interpretations of the Comprehensive Plan and the Zoning Code beyond the existing legislation.

Delaware courts have overturned rezoning approvals that were not effectuated by written ordinance, as required by 9 *Del. C.* § 4110(h) or their Sussex County counterparts. *See, e.g.*, *Fields v. Kent County*, 2006 WL 345014, at *7 (Del. Ch. Feb. 2, 2006) (reversing Levy Court zoning decision for failure to adopt written ordinance per 9 *Del. C.* § 4110(h)); *Bay Colony*, 1984 WL 159381, at *2 (applying 9 *Del. C.* § 7002(l) (Sussex County counterpart to 9 *Del. C.* § 4110(h)) to invalidate conditional use approval of a camp ground); *Steen v. County Council of Sussex County*, 576 A.2d 642, 647-48 (Del. Ch. 1989) (reversing conditional use permit because "conditional uses in Sussex County are akin to rezonings" and "an applicant for a Conditional Use Permit in Sussex County must affirmatively show compliance with the prerequisite conditions contained in the Sussex County Zoning Ordinance for a Conditional Use Permit and must also establish that the grant of the Conditional Use Permit will be consistent with the factors mandated by 9 *Del. C.* § 6904(a)").

The conclusion that the Conditional Approval has the force of law and thus required a written ordinance is corroborated by the Conditional Approval's contravention of the Comprehensive Plan,[7] which has the "force of law" pursuant to 9 *Del. C.* § 4959(a).

E. The Conditional Approval is Inconsistent with the Kent County Comprehensive Plan, in Violation of 9 *Del. C.* § 4959(a) and Kent County Zoning Code § 205-251.

9 *Del. C.* § 4959(a) expressly provides that the land use maps that form part of the Comprehensive Plan have the force of law:

> After a comprehensive plan or element or portion thereof has been adopted by County Council or Levy Court in conformity with this subchapter, the land use map or map series forming part of the comprehensive plan as required by this subchapter *shall have the force of law*, and no development, as defined in this subchapter, shall be permitted except in conformity with the land use map or map series and with land development regulations enacted to implement the other elements of the adopted comprehensive plan.

9 *Del. C.* § 4959(a) (emphasis added).

"If proposed development does not conform to the land use map, the County may not permit it to go forward." *Farmers for Fairness v. Kent County Levy Court*, 2012 WL 295060, at *5 (Del. Ch. Jan. 27, 2012). "Land use maps have the force of law, and the County may not permit development of the Properties except in

[7] *Available at*: https://redclay.wra.udel.edu/wpplan/wp-content/Plans/Kent%20County/2018-Comprehensive-Plan-Adopted-9-11-18-Full-Document-with-Appendices_Revised%20w%20new%20FLU%20map.pdf (last viewed July 11, 2024).

conformity with the New Land Use Map." *Id.* at *7; *see also, Fields*, 2006 WL 345014, at *3 ("land use maps of the County's comprehensive plan (and any amendments thereto) are endowed with the force of law"); *O'Neill v. Town of Middletown*, 2006 WL 205071, at *38 (Del. Ch. Jan. 18, 2006) (granting summary judgment and declaring a New Castle County rezoning invalid due to inconsistency with comprehensive plan).

The land use map of the Comprehensive Plan shows that the Property is in the Agricultural Conservation District. Comp. Plan. at 7-6; Map 7B. The land use designation for the Poperty is "Low Density Residential," and the "Sample of Permitted Land Uses" is strictly limited to four permitted land uses: [a]griculture and supporting uses, single family detached residential, home based businesses; limited commercial uses." Comp. Plan at 7-6; Map 7B.

The solar power plant contemplated by the Application is not an enumerated use for property designed Low Density Residential. The Levy Court accordingly exceeded its authority and acted contrary to law by issuing the Conditional Approval.

The Property is also outside the Growth Zone Overlay, and situated in an area that is largely open land. "The County's primary interest outside the Growth Zone Overlay District is to preserve agricultural land and rural infrastructure, protect environmentally sensitive areas, and protect the water quality of the Delaware Bay

and Chesapeake Bay Watersheds." Comp. Plan at 7-11. The solar power generation facility does not serve these interests, and thus by issuing the Conditional Approval, the Levy Court exceeded its authority and acted contrary to law.

F. The Project Does Not Qualify as a "Public Utility" for Agricultural Conservation Purposes.

The Conditional Approval hinges on the unsupported conclusion that the solar power generation facility constitutes a "public utility." Although Zoning Code § 205-64 includes "[p]ublic utilities and public utility uses" among the conditional uses permitted in the Agricultural Residential District, the solar power generation facility does not fit the definition of a "public utility."

Zoning Code § 205-6 defines the term "public utility" as "[a]n organization supplying water, electricity, transportation, etc., to the public, operated by a private corporation under government regulation or by the government directly." The adverb "directly" modifies the verb "supplying." The proposed solar project does not fit the code definition of "public utility" because FPS does not supply electricity to the public directly (as does Delmarva Power or Delaware Electric Cooperative), but rather supplies electricity indirectly via intermediaries that may or may not satisfy the definition of "public utility." Moreover, FPS does not supply electricity "under government regulation," as it is not regulated by the Delaware State Public Service Commission.

Because the solar power generation facility does not fit the definition of a "public utility," it is not permitted in the Agricultural Conservation zone even as a conditional use. Because the solar power generation facility is not a conditional use expressly permitted in any zoning district, reference to the Standard Industrial Classification Manual ("SICM")[8] is required under the Zoning Code:

> Any use which is not specifically listed as a permitted or conditional use in any zoning district shall be identified within the Standard Industrial Classification Manual and placed within the proper zoning category. The proper zoning district shall be found by identifying the major use division in which the use is located and by placing the use in the district in which uses in the specific major use division are listed as permitted in that district."

Zoning Code § 205-15.C.

The SCIM description for "4911: Electric Services" comprises "Transportation, Communications, Electric, Gas, And Sanitary Services."[9] Zoning Code § 205-198.C expressly includes the category "Transportation, Communications, Electric, and Sanitary Services" as permitted or conditional uses only in the General Industrial District. Accordingly, the solar power plant contemplated by the Application is only permitted in the General Industrial District. The Levy Court exceeded its authority and acted manifestly contrary to law by issuing the Conditional Approval.

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[8] *Available at:* https://www.osha.gov/data/sic-manual (last visited Jul. 10, 2024).

[9] https://www.osha.gov/sic-manual/4911.

G. The Project Involves Impervious Cover in Excess of the 23% Limitation Permitted Under Zoning Code § 205-51.

Zoning Code § 205-51 provides that "[n]o more than 23% of each lot in an AC – Agricultural Conservation District shall be covered by man-made impervious surfaces." "Impervious" means "[n]ot permitting penetration or passage." Zoning Code § 205-06. The solar panels are man-made and impervious. Although the Zoning Code does not define "surfaces," the dictionary meaning is "the exterior or upper boundary of an object or body."[10]

The Property comprises approximately 528 acres, approximately 260 acres of which will be covered with the impenetrable surfaces of solar panels and structural framing. A-1231. More than half of the Property will be covered by the impenetrable surfaces of solar panels, in contravention of Zoning Code § 205-51. Neither the Kent County Code nor the Delaware State Code—nor any Delaware court—has addressed the proper way to calculate the impervious surface of solar panels. In the absence of such authority, the Levy Court exceeded its authority by approving a project that violates the Zoning Code.

Along similar lines, although the Written Decision implies that the Regional Planning Commission Report determined that the project is "not conflict with the Comprehensive Plan," and the Levy Court references that report in the Written

[10] https://www.merriam-webster.com/dictionary/surface.

Decision, there is nothing indicating that the Regional Planning Commission considered the issue, as the report itself is not included in the Certified Record produced by the Levy Court. A-1882 to A-1883. The Levy Court's reasoning is not part of the Certified Record, and is thus unavailable for the Court's review. The face of the record accordingly demonstrates that the Levy Court acted manifestly contrary to law and exceeded its authority in issuing the Conditional Approval.

H. The Levy Court Failed to Articulate Valid Grounds for Approval.

Conditional uses in Kent County are creatures of regulation adopted by the Levy Court under its general zoning authority. *See* 9 *Del. C.* § 4901. Unless the legislative body creates a record or states on the record its reasons for a zoning decision, "a court is given no means by which it may review the Council's decision." *Barley Mill, LLC*, 89 A. 3d at 61. Similarly, Rule 12.5 of the Levy Court Rules provides that the "Commissioners voting in the majority shall give specific reasons for their vote on any issue requiring a public hearing."

Zoning Code § 205-251 provides, in relevant part:

> A conditional use should be approved only if it is found that the location is appropriate and not in conflict with the Comprehensive Plan; that the public health, safety and general welfare will not be adversely affected; that adequate off-street parking facilities will be provided, and that necessary safeguards will be provided for the protection of surrounding property and persons and further, provided, that the additional standards of this article are complied with.

Zoning Code § 205-251 thus mandates to approve the Application, the Commissioners must have articulated reasons tied to facts supporting each of these criteria.

During the vote on January 25, 2022, the Minutes reflect that Commissioner Hall based his affirmative vote on his (mis)understanding of the holding in *Coker v. Kent County Levy Court*, 2008 WL 5451337 (Del. Ch. Dec. 23, 2008), concluding, in effect, that the only reason the Court of Chancery deferred to the Levy Court's denial of a conditional use permit was because the applicant in *Coker* refused to agree to the Regional Planning Commission's conditions for the property. A-1960. Commissioner Hall indicated his affirmative vote was compelled, rather than based on the specific facts of the Application before him: "[F]rom the lens of property rights and from looking at it the only stand that Levy Court has to deny this application would be is if they would not conform to the conditions, then I have to vote in favor of this, and that's the reasons why I am." A-1960.

Commissioner Buckson similarly based his affirmative vote on perceived compulsion, rather than on the specific facts of the Application:

> I believe that we have a situation tonight where given the existing land use laws that we have in place that we have to value each individual property owner's rights, on both sides and do the best we can to make a decision which is what I'm currently doing tonight, at least in where I think I need to be. Not where I said I'd like to be. This is not where I'd like to be, this is where I think I have to be. This is where I know I

> have to be. So those are my comments, those are my statements that go along with my vote to approve the application. Thank you.

A-1959.

Commissioner Howell simply stated "I liked what Commissioner Buckson said about property rights, liked what Commissioner Hall said, quoting that decision from way back had a lot of wisdom to it, so I vote yes. And that's it." A-1960.

Commissioner Sweeney, the fourth affirmative vote, stated in relevant part:

> As you heard from Commissioner Hall, this was simply whether or not a solar farm is allowable by ordinance at this location or under conditional use and it is. *If we could classify solar farms as industrial it would have required a zoning change but my conclusion is that solar farms are not industrial*.

Id. (emphasis added).

The Certified Record is accordingly devoid of any articulation of how the Commissioners concluded that their affirmative votes met the required findings of Zoning Code § 205-251, namely, that (1) the location is appropriate and not in conflict with the Comprehensive Plan; (2) the public health, safety and general welfare will not be adversely affected; (3) adequate off-street parking facilities will be provided, and (4) necessary safeguards will be provided for the protection of surrounding property and persons.

I. Plaintiffs Have Standing.

To demonstrate standing, Plaintiffs must demonstrate that they will sustain an "injury-in-fact" and that the interests sought to be protected are within the "zone of

interests" to be protected. *Dover Historical Society v. City of Dover Panning Commission*, 838 A.2d 1103, 1110 (Del. 2003).

The Goldsborough property is adjacent to the Property. A-1227; A-1896. The Goldsboroughs are nearby landowners and intended beneficiaries of the Comprehensive Plan, which designates the Property for Low Density Residential use on the Land Map.

Delaware courts recognize that the "aesthetic benefit" of zoning rules—in this case, Low Density Residential—constitutes a concrete and particularized interest that confers standing. *Id.* at 1114 (holding that association of residents of historic district had standing and enforceable right in the "aesthetic benefit" derived from historic district).

The Goldsboroughs are also members of CASP. A-1227. *Dover Historical Society*, 838 A.2d at 1114 (holding landowners within district faced "concrete and particularized" injury); *id.* at 1116 (holding organization had standing where members thereof had standing). Plaintiffs have a special interest in ensuring that their area of Kent County retains the rural, non-industrial character mandated by the Comprehensive Plan, and thus have standing.

CONCLUSION

For all the reasons stated herein, Appellants respectfully request that this Honorable Court reverse the Court of Chancery Order, the Memorandum Opinion, and the Superior Court Order in accordance with the arguments outlined in this appeal.

Dated: July 12, 2024

Respectfully Submitted,

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