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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITIZENS AGAINST SOLAR POLLUTION, a Delaware unincorporated nonprofit association, DONALD LEE GOLDSBOROUGH, TRUSTEE UNDER REVOCABLE TRUST AGREEMENT OF DONALD LEE GOLDSBOROUGH DATED 12/22/10, and KELLIE ELAINE GOLDSBOROUGH, TRUSTEE UNDER REVOCABLE TRUST AGREEMENT OF KELLIE ELAINE GOLDSBOROUGH DATED 12/22/10, *Plaintiff Below/Appellants*, v. KENT COUNTY, a political subdivision of the State of Delaware, KENT COUNTY LEVY COURT, the governing body of Kent County, FPS CEDAR CREEK SOLAR LLC, a Delaware limited liability company, and THE PINEY CEDAR TRUST, JAMES C. KNOTTS, JR., CHERYL A. KNOTTS, DE LAND HOLDINGS 1 LLC, a Delaware limited liability company, AMY PEOPLES, TRUSTEE OF THE PINEY CEDAR TRUST, and RICHARD A. PEOPLES, TRUSTEE OF THE PINEY CEDAR TRUST, *Defendants Below/Appellees.*	C.A. No.: 210,2024 On Certiorari from Kent County Levy Court's Conditional Approval of Application CS-21-09 FPS Cedar Creek Solar, LLC 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

APPELLEES' AMENDED ANSWERING BRIEF ON APPEAL AND KENT COUNTY'S OPENING BRIEF ON CROSS-APPEAL

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NATURE AND STAGE OF PROCEEDINGS

On January 25, 2022, appellee Kent County Levy Court granted conditional use approval to appellee FPS Cedar Creek Solar LLC ("Freepoint") for what is colloquially referred to as a "solar farm" – that is, farm fields arrayed with solar panels that produce electricity from sunlight. Such farms have virtually no impacts on surrounding properties. Solar farms do not generate dust, nor do they use fertilizers or pesticides. Moreover, due to voluntary commitments made by Freepoint, the solar panels will not be visible to neighboring properties, as a 100' buffer containing eight rows of trees in front of a stockade fence will be installed along the borders of the Freepoint farm.

The Levy Court approved the project after a very thorough public process. Freepoint submitted its application on October 12, 2021. Notice of the application was sent to all nearby property owners and a large sign announcing the application was posted on the Freepoint Property for all to see. The Kent County Department of Planning Services issued a written report recommending approval, subject to certain conditions. The Kent County Regional Planning Commission conducted a public hearing and recommended in favor of the application; and, finally, the Levy Court itself conducted its own lengthy public hearing and approved the project.

Citizens Against Solar Pollution, an unincorporated nonprofit association which did not appear at any public hearings, and two of its members who own a

property near the Freepoint farm (the two members together with the association as "CASP"), filed suit in the Court of Chancery challenging Kent County's approval of the project; but, the Chancery Court determined it lacked jurisdiction because an adequate remedy at law (certiorari review) was available in the Superior Court.[1]

Appellants then transferred the matter to the Superior Court seeking both review by writ of certiorari – and a declaratory judgment. In response, Freepoint and Kent County moved to dismiss the entire matter on the basis that (i) a declaratory judgment claim cannot be brought to review a lower tribunal's decision, and (ii) the claim for certiorari review was untimely because the original Chancery action was filed after the expiration of the 30-day common law statute of limitations applicable to certiorari actions. The Superior Court dismissed the declaratory judgment claim,[2] but did not dismiss the certiorari claim. The Superior Court found that while there were no exceptional circumstances justifying the extension of the 30-day filing deadline,[3] certiorari review could continue because the transfer statute, 10 *Del.C.* §1902, is to be liberally construed and Appellants would otherwise have no other

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1 *Citizens Against Solar Pol. v. Kent Cnty.*, 2023 WL 2199646, at *2 (Del.Ch. Feb. 24, 2023) (Exhibit 1) ("*Citizens I*").

2 *Citizens Against Solar Pol. v. Kent Cnty.*, 2023 WL 6884688, at *12 (Del. Super. Oct. 17, 2023) (Exhibit 2) ("*Citizens II*").

3 *Id.* at *9 ("The choice to seek a more favorable form of review in one court over the permissible review by another is not sufficient to qualify as an exceptional circumstance").

remedy available.[4] Interlocutory review of this portion of the Superior Court's ruling was denied.[5] Thereafter, the certiorari claim was briefed and the Superior Court upheld the Levy Court's decision granting the conditional use permit.[6]

CASP then appealed to this Court challenging (i) the Chancery Court's holding in *Citizens I* that it lacked jurisdiction, (ii) the Superior Court's dismissal of the declaratory judgment claim in *Citizens II*, and (iii) the Superior Court's upholding of the Levy Court in *Citizens III*. Kent County cross-appealed the Superior Court's decision in *Citizens II* allowing the certiorari claim to proceed. In addition, although the parties briefed the issue of standing below (Appellees contended that CASP lacks standing), the Superior Court did not address this issue. CASP addressed standing in its Opening Brief and Appellees respond here as part of their cross-appeal.

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4 *Id.* at 11; *but see Delta Eta Corp. v. City of Newark*, 2023 WL 2982180, at *14 n.127 (Del.Ch. Feb. 2, 2023) ("[t]hat Delta Eta waited to seek certiorari review such that it may now be unavailable is irrelevant for purposes of this decision [as to whether an adequate remedy at law exists]") (citing *In re Wife, K.*, 297 A.2d 424, 425 (Del.Ch. 1972) ("[I]f a litigant fails to avail himself of a remedy provided by law and is subsequently barred from pursuing that remedy because of his own lack of diligence, he cannot then rely on the absence of a remedy at law as a basis for equitable jurisdiction.")).

5 *See Kent Cnty. v. Citizens Against Solar Pol.*, 312 A.3d 634 (Table), 2024 WL 107194, at *1 (Del. Jan. 10, 2024).

6 *Citizens Against Solar Pol. v. Kent Cnty.*, 2024 WL 2022503, at *7 (Del.Super. May 7, 2024) (Exhibit 3) ("*Citizens III*").

SUMMARY OF THE ARGUMENT

In response to Appellants' Appeal:

1. Denied. Because the Levy Court was acting in an administrative/quasi-judicial capacity, and not in a legislative capacity (as is the case with rezonings), there was an adequate remedy at law (certiorari review in Superior Court) and Chancery Court therefore lacked jurisdiction.

2. Denied. The Superior Court properly dismissed Appellant's declaratory judgment claim because certiorari review was available.

3. Denied. The Superior Court properly upheld the Levy Court's grant of the conditional use permit, as the Levy Court did not exceed its jurisdiction, commit errors of law, or proceed irregularly.

On Appellees' Cross-Appeal:

1. Because Appellants did not bring their original action within 30 days of the grant of the permit, and because, as found by the Superior Court, there are no "exceptional circumstances" justifying an extension of the 30 days, Appellants' action should have been dismissed for lack of timeliness. The transfer statute, by its plain language, does not provide the Superior Court discretion to ignore an otherwise applicable filing deadline.

STATEMENT OF FACTS[7]

The State of Delaware is committed to renewable energy, including solar power. Delaware law now mandates that Delaware utilities must receive 40% of their energy from renewable sources, such as solar, by 2035, with at least 10% from solar power.[8] As of 2022, though, Delaware generated only roughly 4% of its electricity from solar.[9] In his "State of the State" address, Delaware's Governor again emphasized the State's commitment to cutting greenhouse gas emissions.[10]

Freepoint was among the first major utility-scale renewable energy companies that committed to Delaware to advance "home-based," renewable, alternative, clean power. On October 12, 2021, Freepoint submitted the application for its solar farm project.[11] The site is approximately 528.66 acres in size (the "Property"), with

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[7] Appellees recognize that, under certiorari review, the Court does not review factual determinations. These facts are included simply to provide context and background. Unless otherwise indicated all facts concerning the project are taken from the application, A-135 and related documents.

[8] *See* 26 *Del.C.* §§351-364; *see also* https://news.delaware.gov/2021/02/10/Governor-carney-signs-legislation-raising-renewable-portfolio-standard-rps/ (last visited July 30, 2024) (press release describing Governor's signature of the legislation creating the solar mandate).

[9] *See* www.eia.gov/state/analysis.php?sid=DE (last visited July 30, 2024).

[10] *See* https://governor.delaware.gov/wp-content/uploads/sites/24/2024/03/State-of-the-State.pdf (last visited July 30, 2024) at 12 ("We committed to cutting greenhouse gas emissions in half by 2030. And achieving net-zero emissions by 2050. This is critical for future generations.").

[11] Technically this was Freepoint's second conditional use application for this location. Freepoint's first application, was denied by a 4-3 vote of the Levy Court on September 28, 2021. To preserve its rights, Freepoint filed a lawsuit challenging that denial. However, on October 12, 2021, Freepoint filed a second application.

277.69 acres proposed for the installation of solar arrays. A 100-foot wide buffer, with 8 rows of trees (as compared to the 2 rows of trees required by Code) and then a stockade fence, will be maintained along the Property's perimeter, making it virtually impossible to see the solar farm itself from the road or nearby properties. Unlike other potential uses of the Property, which include agriculture and low-density residential housing, there will be virtually no impacts from the solar farm. There will be no dust. No pesticides. No traffic (other than an occasional car or two). No farm machinery. No noise. The solar panels will sit mute, aimed at the sun, with no need for daily maintenance or workforce.

On December 2, 2021, the County Planning Department issued its report recommending in favor of the application.[12] Later that day, the Regional Planning Commission ("RPC") conducted a lengthy public hearing, prior notice of which was published in the *Delaware State News.* Members of the public spoke both for and against the project.[13] The RPC then recommended in favor of the application.[14]

This new application addressed concerns raised regarding the first application, so that this project could move forward, rather than waste time litigating the earlier decision. The first lawsuit was stayed pending resolution of the second application.

[12] *See* 12/2/2021 Docket Entry at A-128. Although, except for the original application, the record on certiorari review does not include the actual documents and other submissions made, references to the docket for particular items (with the date for such item) are provided to demonstrate the regularity of the proceedings.

[13] *See* 12/2/2021 Docket Entry (newspaper legal notice), 12/2021 Docket Entry (public hearing minutes), A-127, 128.

[14] *See* 12/21/2021 Docket Entry (RPC Recommendation Rpt.), A-128, 284-291.

On December 21, 2021, the Levy Court conducted its own public hearing. As the hearing ran late into the night, one of the 7 Levy Court Commissioners left the meeting. The remaining Commissioners deadlocked, and so the application was tabled until a future meeting where all 7 members would be present.[15] On January 25, 2022, with all members present, the Levy Court voted to approve the application, 4-3.[16] The next day, the Levy Court issued its written decision confirming the grant of the conditional use (the "Decision").[17] The Decision recites the Levy Court's findings of fact and lists all of the various conditions imposed as part of the approval.

Although the Levy Court's Decision was issued on January 26, 2022, Appellants did not file suit until March 25, 2022.

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15 *See* 12/21/2021 Transcript, A-351-352.

16 *See* 1/25/2022 Transcript, A-364-371. Because the motion did not directly address the issue of whether certain waivers were granted, a supplemental motion was passed, 7-0, to clarify that none of the requested waivers were granted save one. A-369-371.

17 A-534-535. The Decision is properly part of the record for certiorari review.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOUND THAT IT LACKED SUBJECT MATTER JURISDICTION

A. Question Presented: Did the Chancery Court correctly conclude that it lacked jurisdiction over the quasi-judicial act of granting a conditional use permit when an adequate remedy at law was available via common law certiorari?

This question was raised below and addressed by the parties in their briefs.[18]

B. Standard of Review: Questions of subject-matter jurisdiction are reviewed *de novo*.

Whether a court has subject matter jurisdiction is a question of law that this Court reviews *de novo*.[19]

C. Merits.

The Court of Chancery is a court of limited equitable jurisdiction,[20] and the Appellants failed to meet their burden of establishing equitable jurisdiction.[21] "Where…a plaintiff seeks to ground jurisdiction solely on a request for equitable relief, the plaintiff must demonstrate that it has 'no adequate remedy at law[.]'"[22]

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18 *See* A-1015-42, 1078-1103.

19 *Imbragulio v. Unemployment Ins. Appeals Bd.*, 223 A.3d 875, 878 (Del. 2019).

20 *Citizens I,* at *2.

21 *Wilmington Fraternal Order of Police Lodge No. 1 v. Bostrom*, 1999 WL 39546, at *4 (Del.Ch. Jan. 22, 1999) ("The burden of establishing the Court's subject matter jurisdiction rests with the plaintiff").

22 *Id.* (citing *Kraft v. WisdomTree Invs., Inc*., 145 A.3d 969, 973 (Del.Ch. 2016)); *see also Qlarant, Inc. v. IP Commercialization Labs, LLC*, 2022 WL 211367, at *4 (Del.Ch. Jan. 25, 2022) (citations omitted).

Quasi-judicial acts, such as the Levy Court's grant of the conditional use permit here, are unquestionably reviewed via the common law writ of certiorari.[23] Certiorari "is both an adequate remedy at law and a remedy reserved to the exclusive jurisdiction of the Superior Court."[24] Applying these settled principles of Delaware law, Vice Chancellor Cook properly found that a writ of certiorari was an adequate remedy at law to address the relief sought by the Appellants.[25]

Despite the compelling rationale of the Vice-Chancellor's decision, Appellants offer three grounds for reversal, claiming: (1) a "well-pleaded" request for preliminary injunctive relief is sufficient to convey jurisdiction, (2) the capacity in which the Levy Court acted (quasi-judicial or legislative) has no bearing on the jurisdictional question, and (3) certiorari review is not an adequate remedy at law. None of these contentions has merit.

1. The mere request for equitable relief does not confer jurisdiction.

Appellants first claim that jurisdiction exists in Chancery because they sought preliminary and permanent injunctive relief. (OB 17). But jurisdiction in Chancery

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[23] *See, e.g., Dover Historical Soc'y v. City of Dover Planning Comm'n,* 838 A.2d 1103, 1106 (Del. 2003); *Wagner v. J & B. Contractors, LLC*, 279 A.3d 355, 2022 WL 2154773, at *2 (Del. June 15, 2022) (Table) ("The common law writ of certiorari lies to review acts that are judicial or quasi-judicial in nature.").

[24] *Gladney v. City of Wilmington,* 2011 WL 6016048, at *4 (Del.Ch. Nov. 30, 2011) (citing *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1212 (Del. 2008)).

[25] *Citizens I,* at *2-3.

is not obtained by merely stating a claim for injunctive relief no matter how "well pleaded." "[A]dequately alleging a basis for injunctive relief against a government agency, standing alone, is not enough to open the doors to" the Court of Chancery.[26] "If a realistic evaluation leads to the conclusion that an adequate [legal] remedy is available, [Chancery] . . . will not accept jurisdiction over the matter."[27] Simply put, the mere request for equitable relief does not require Chancery to exercise jurisdiction.[28] For equity jurisdiction to attach, there must be no adequate remedy at law.[29] And here, as the Chancery Court held, there is an adequate remedy at law – certiorari.

Because there is an adequate remedy at law, and no equitable jurisdiction attaches, there is no basis, as Appellants suggest (OB 17), for the Court of Chancery

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[26] *Kroll v. City of Wilmington,* 2023 WL 6012795, at *8 (Del.Ch. Sept. 15, 2023).

[27] *Maddrey*, 956 A.2d at 1207 ("[T]he Superior Court has original and exclusive jurisdiction amount trial courts under the Delaware Constitution to issue common law writs of certiorari to inferior tribunals[.]"); *see also Horsey v. American Finance, LLC*, 2024 WL 340927, at *2 (Del. Jan. 30, 2024).

[28] *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989, 997 (Del. 2004) ("The fact that a complaint contains a prayer for an equitable remedy, without more, does not conclude the jurisdictional analysis…the appropriate analysis requires a 'realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate'").

[29] *Delta Eta,* at *7; *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.,* 669 A.2d 36 (Del. 1995) ("The Delaware Court of Chancery…does not have jurisdiction over a controversy unless the plaintiff lacks an adequate remedy at law.").

to take jurisdiction of the certiorari claim under the clean-up doctrine. Indeed, to allow the Court of Chancery to do so would eviscerate certiorari review in the Superior Court—the court granted exclusive jurisdiction to issue the writ[30]—as every aggrieved person could avoid the limited nature of certiorari review by simply including a request for injunctive relief in a Court of Chancery complaint. This is not permitted under Delaware law.[31]

Appellants cite to *Kroll v. City of Wilmington*,[32] for the proposition that certiorari review is available in the Court of Chancery under the "clean-up doctrine." (OB 17). But that is not what *Kroll* holds. Rather, in *Kroll*, a City of Wilmington police officer was terminated for failure to satisfy the City's residency requirement. The officer sought reinstatement, and the Court concluded that certiorari review was not adequate to address the issues raised by the request for reinstatement. Thus, the Court found it had jurisdiction. Put another way, *Kroll* turned on the fact that certiorari review was not adequate under the facts and circumstances of that case.

Here, CASP sought injunctive relief to maintain the status quo and prevent Freepoint from beginning construction of its project during the certiorari review process. This is dupliciative of the relief provided by the writ making equitable

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30 *Maddrey*, 956 A.2d at 1207 ("the Superior Court has original and exclusive jurisdiction among trial courts under the Delaware Constitution to issue common law writs of certiorari to inferior tribunals"); *Gladney,* 2011 WL 6016048, at *4.

31 *Maddrey*, 956 A.2d at 1211-12.

32 2023 WL 6012795, at *3.

intervention unnecessary. The "commencement of a writ of certiorari proceeding operates to stay implementation of the decision under review,"[33] and the status quo is maintained until the Superior Court can fully review and adjudicate the pending writ.[34] Thus, contrary to Appellants' claims (OB 17) certiorari provides the equivalent of an automatic temporary injunction upon filing, and permanent injunctive relief where a petitioner is successful.

In sum, certiorari provides an automatic stay and merely requesting injunctive relief does not confer jurisdiction. Thus, the clean-up doctrine is of no assistance to Appellants. As Vice Chancellor Cook aptly stated, "…the writ remains adequate here. . . . Plaintiffs have an adequate remedy at law. So I lack jurisdiction over their claims."[35]

2. The quasi-judicial capacity in which the Levy Court acted means that certiorari review is available.

Appellants claim (OB 16-18) that the capacity in which the Levy Court acted should have no bearing on the question of jurisdiction – but, in fact, it makes all the difference. As the Court of Chancery held here, in *Delta Eta,*[36] and in *Middlecap*

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33 *Christiana Town Ctr. LLC v. New Castle Cnty.*, 2003 WL 1923656, at *1 (Del.Super. Apr. 22, 2003); 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts in the State of Delaware* §911, at 635-36 (1906).

34 *See Christiana Town Ctr., LLC v. New Castle Cty*., 2003 WL 22120857, at *1 (Del.Super. Sept. 10, 2003).

35 *Citizens I*, at *3.

36 *Delta Eta,* at *7.

Assoc., LLC v. Town of Middletown,[37] review of quasi-judicial decisions (such as the grant of a conditional use permit[38]) is only available through a writ of certiorari.[39] Conversely, legislative acts, such as zoning decisions, are properly heard in Chancery because a writ of certiorari will not lie to review *legislative* decisions[40]

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[37] 2023 WL 298193, at *1 (Del.Ch. Feb. 2, 2023).

[38] In addition to Delaware law, the weight of authority holds that the grant or denial of a conditional use permit is an administrative or quasi-judicial act. *See, e.g.,* 8 McQuillin Mun. Corp. §25:216 (3d ed. 2024) ("The granting of conditional use permits and variances are administrative or quasi-judicial acts."); 101A C.J.S., *Zoning and Land Planning* §376 ("the denial of a conditional use permit . . . may be viewed as a quasi-judicial decision . . ."); 3 *Rathkopf's The Law of Zoning and Planning* §61:12 (4th ed. 2024) ("the allowance of the use on a particular parcel is . . . considered an administrative act implementing the previous legislative act."); *Kings Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 WL 1177097, at *3 (Ark. Mar. 31, 2011) ("a conditional-use application requires an application of the facts to the existing provisions of the Ordinance, and a judgment on whether the conditional use should be granted under the existing ordinance provisions" and holding there was "no legislative act" in the decision on the conditional use); *People v. Village of Lisle*, 781 N.E.2d 223, 234 (Ill. 2002) ("municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition."); *Kletschka v. Le Sueur Cty. Bd. of Comm'rs,* 277 N.W.2d 404, 405 (Minn. 1979) ("the governing body, in considering an application for a conditional use permit pursuant to a zoning ordinance, acts in a quasi-judicial capacity . . .").

[39] *See Delta Eta,* at *11-12; *Del. Barrel & Drum Co. v. Mayor & Council of City of Wilm.*, 175 A.2d 403, 404 (Del.Super. 1961); *see also Luby v. Town of Smyrna,* 2001 WL 1729121, at *1 (Del.Super. Dec. 27, 2001), *aff'd,* 801 A.2d 10 (Del. 2002) (Table).

[40] *See Del. Barrel & Drum*, 175 A.2d at 404; *but see 330 Hospitality Group, LLC v. City of Rehoboth*, 2024 WL 3520448, at *4-5 (Del.Super. July 23, 2024). In *330 Hospitality*, the Chancery Court found a lack of jurisdiction where the rezoning of a single parcel was challenged, and so authorized transfer to the Superior Court for certiorari review. In finding lack of jurisdiction, though, the Chancery Court did not consider the legislative/quasi-judicial distinction. The Superior Court, applying a certiorari standard of review, ultimately remanded for lack of an adequate record.

This has been Delaware law since, at least, 1982.[41] Because the Levy Court was acting in a quasi-judicial capacity, review by writ of certiorari was available; and, because certiorari review has been held to be an adequate remedy at law, Chancery lacks jurisdiction.

Quasi-judicial decisions are exclusively reviewed by the Superior Court on certiorari.[42] The Court of Chancery here and in *Delta Eta* and in *Middlecap* got it right – properly finding that where a legislative body is merely applying the existing code standards to the case before it—a quasi-judicial act—certiorari is an available and adequate remedy.[43]

3. Certiorari is an adequate remedy at law

Appellants also claim that Chancery has jurisdiction because certiorari is not adequate. (OB 21). Specifically, they argue that the limited scope of certiorari review is the reason that certiorari does not provide an adequate remedy at law. They

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In any event, the *330 Hospitality* case has no application here, since the Levy Court's Decision is unquestionably quasi-judicial and therefore subject to certiorari review.

41 *CBS Foods v. Redd*, 1982 WL 533240, at *3 (Del.Super. Jan. 19, 1982).

42 *See supra* n. 23, 38, 39. The Superior Court regularly reviews quasi-judicial actions of legislative bodies on certiorari. *Kroll,* 2023 WL 6012795, at *10 ("Going back to at least the early 20th century, the Superior Court has used writs of certiorari to review decisions not only of inferior tribunals, but also of administrative officials and local legislatures"); *see KZ Forever, LLC v. City of Dover City Council*, 2016 WL 6651413, at *5 (Del.Super. Nov. 9, 2016); *DiFrancesco v. Mayor & Town Council of Elsmere*, 2007 WL 1874761, at *4 (Del.Super. June 28, 2007), *aff'd* 947 A.2d 1122 (Del. 2008); *Handloff v. City Council of Newark*, 2006 WL 1601098, at *12 (Del.Super. June 8, 2006), *aff'd*, 935 A.2d 255 (Del. 2007).

43 *Delta Eta,* at *14-15.

cite to *Black v. New Castle County Bd. of License, Inspection and Review*[44] for the proposition that "the Superior Court may not weigh evidence, review factual findings, or consider the case on the merits."[45] But while true that the Superior Court's review is limited, this does not make the remedy inadequate.

"[I]n order to be 'adequate', [a remedy] must be available as a matter of right, be full, fair and complete, and be as practical to the ends of justice and to prompt administration as the remedy in equity."[46] The Court of Chancery, noting that the Appellants actually sought reversal of the conditional use approval and stay of the approval through injunctive relief, correctly found that the remedy at law (certiorari) is adequate.[47]

Appellants' argument, boiled down to its essence, is that they want greater judicial review than certiorari provides, but that argument is misplaced here. Appellants cannot forum shop and seek relief in the Court of Chancery simply to obtain a more favorable standard of review.[48] To do so would render the writ of certiorari a nullity. Moreover, the test is not whether the standard of review is more

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44 117 A.3d 1027, 1030-31 (Del. 2015)

45 *Id*.

46 *Clark v. Teeven Holding Co., Inc.*, 625 A.2d 869, 881 (Del. Ch. 1992).

47 *Citizens I*, at *2, 3.

48 Appellants contend that Court of Chancery review of a land use decision should be a plenary proceeding which includes discovery. (OB 21). Not so. Review of a legislative land use determination by the Court of Chancery is "on the record" only. *Delta Eta*, at *15, n. 131.

(or less) stringent, the test is whether the remedy at law can provide full, fair, and complete *relief* – and certiorari review of a quasi-judicial conditional use decision does just that.

As *Black* confirms, a petition for writ of certiorari is not a substitute for a direct appeal which must be authorized by the General Assembly.[49]

> [Plaintiffs] seek a writ of certiorari because the General Assembly has decided that no right of direct appeal should exist from the Board under the APA or a similar statute. In cases like these, it is always tempting for a court, including our own, to stray from the disciplined contours governing a petition for a writ. But to do so undermines the General Assembly's authority to determine which administrative agencies are subject to direct appeal and which are not.[50]

As the General Assembly has not granted any direct appeal rights, Appellants are entitled only to certiorari review, and the Court of Chancery's determination that it lacked jurisdiction should be affirmed.

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49 *Black,* 117 A.3d at 1029.

50 *Id.* at 1032.

II. THE SUPERIOR COURT'S DISMISSAL OF THE DECLARATORY JUDGMENT COUNT SHOULD BE AFFIRMED

A. Question Presented: Did the Superior Court correctly dismiss the declaratory judgment claim seeking review of an administrative decision where certiorari review is available?

Dismissal of the declaratory judgment claim as impermissible for review of administrative decisions was briefed by the parties in the Superior Court.[51]

B. Standard of Review: Grants of dismissal are reviewed *de novo.*

Review of the Superior Court's decision to grant a motion to dismiss pursuant to Superior Court Rule 12(b)(6) is a question of law that this court reviews *de novo*.[52]

C. Merits.

The Superior Court correctly held that "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.'"[53] Indeed, where there is another available remedy, such as certiorari in the instant matter, a declaratory judgment claim is unavailable.[54] Despite this, Appellants assert that the broad language of the Declaratory Judgment Act operates to allow a court to consider a request for a declaratory judgment regarding approval a quasi-judicial conditional use permit application (OB 24) regardless of the type of controversy (OB 23) or the availability

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51 *See* A-1286, 1347.

52 *Geico General Ins. Co. v. Green*, 308 A.3d 132, 140 (Del. 2022).

53 *Citizens II*, at *12 (citing *Brooks v. Lynch*, 150 A.3d 274, 2016 WL 5957674, at *2 (Del. Oct. 13, 2016) (Table) (internal citation omitted)).

54 *Id.*

of a writ of certiorari. Appellants' contentions should be rejected as they are contrary to Delaware law.

1. Declaratory judgment is not available to challenge administrative or quasi-judicial decisions.

As discussed above, the Levy Court acted in a quasi-judicial capacity when making its decision upon the conditional use permit application. It is hornbook law that "[d]eclaratory judgments may not be used as a substitute for the review of decisions of boards or administrative officials exercising judicial or quasi-judicial powers."[55] Delaware law is in accord.[56] Because the decision to grant or deny a conditional use permit application is a quasi-judicial one, subject to certiorari review, the Superior Court correctly held that a declaratory judgment remedy is unavailable.

In addition, where, as here, statutory law does "not provide for judicial review of the agency's decision,"[57] allowing a declaratory judgment claim would effectively (and impermissibly) permit *de novo* review where the General Assembly did not intend such review to be available.[58] Allowing the pursuit of declaratory judgment

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55 22 Am. Jur. *Declaratory Judgments* §80 (2023).

56 *See, e.g., Sheridan v. Bd. of Adj. of City of New Castle*, 2006 WL 2382800, at *n.3 (Del.Super. Aug. 18, 2006) (citing *Mason,* 486 A.2d at 298).

57 *Siegfried v. State Dept. of Nat. Resources and Envtl. Control*, 1985 WL 165730, at *2 (Del.Ch. July 24, 1985) (citing *Mason,* 486 A.2d at 298).

58 *Jardel Co., Inc. v. Carroll,* 1990 WL 18296, at *2 (Del.Super. Feb. 26, 1990) ("[t]o permit Jardel to avail itself of a declaratory judgment remedy would afford it

where the General Assembly only intended to allow the limited review of certiorari would allow petitioners to circumvent the requirement that the court only review the record and not weigh evidence or make factual findings[59] by merely by including a prayer for declaratory judgment. If that were the case, the limitations on certiorari review and the applicable time for review of such decisions would be rendered meaningless. Appellants' contrary argument should be rejected.

2. Declaratory judgments are not available when duplicative of certiorari claims.

It is also well settled that where relief under certiorari review and under a declaratory judgment are duplicative, the declaratory judgment claim must be dismissed.[60] Here, Appellant sought duplicative rulings, i.e. certiorari review to reverse the conditional use permit approval as well as declaratory relief to invalidate

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a *de novo* determination contrary to the intent of the General Assembly as expressed in the City of Dover Charter.").

[59] *Christiana Town Ctr. v. New Castle Cnty.*, 2003 WL 21314499, at *2 (Del.Super. June 6, 2003) (internal citations omitted).

[60] *Lehman Brothers Holdings, Inc. v. Kee and Sweetwater,* 268 A.3d 178, 198 (Del. 2021); *see also Abbott v. Del. State Pub. Intgy. Comm.,* 206 A.3d 260, 2019 WL 937184, at *3 (Del. Feb. 25, 2109) (Table); *Sweetwater Point, LLC v. Kee*, 2020 WL 6561567, at *12 (Del.Super. Nov. 5, 2020), *aff'd*, 268 A.3d 178, 184 (Del. 2021) ("Where a declaratory judgment claim is completely duplicative of the affirmative counts of the complaint, it must be dismissed.") (internal citations omitted); *see also Blue Cube Spinco LLC v. Dow Chemical Co.*, 2021 WL 4453460, at *15 (Del.Super. Sept. 29, 2021) ("…to survive dismissal, a declaratory count must be "distinct' from the affirmative counts in the complaint such that a decision on the affirmative counts would not resolve the declaratory count.") (internal citations omitted).

the approval.[61] Because the declaratory judgment claim is duplicative and not a distinct cause of action, it was properly dismissed.

3. Delaware case law does not support bringing a claim for declaratory relief when certiorari review is available.

Appellants' contention that "Delaware courts routinely resolve disputes involving conditional use applications and zoning decisions through declaratory judgment" (OB 24) is simply not true. Although Appellants cite five Court of Chancery decisions in support of the contention, none of these cases involve review of a conditional use permit application; and, in fact, none involve review of a quasi-judicial decision. Rather, two sought review of a rezoning – a classic legislative decision.[62] One involved a claim for equitable estoppel.[63] One sought to enjoin enforcement of a recently-enacted state law to an already-pending subdivision plan,[64] and one sought judicial construction of a certain provision in a zoning code.[65]

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61 A-1246-47.

62 *O'Neill v. Town of Middletown*, 2006 WL 205071 (Del.Ch. Jan. 18, 2006) and *O'Neill v. Town of Middletown*, 2006 WL 2041279 (Del.Ch. July 10, 2006).

63 *Eastern Shore Envt'l, Inc. v. Kent Co. Dep't of Planning*, 2002 WL 244690 (Del.Ch. Feb. 1, 2002) (equitable estoppel and declaratory judgment claims arising from County's advice to property owner not subject to dismissal).

64 *Salem Church (Delaware) Assocs. v. New Castle Cnty.*, 2006 WL 4782453 (Del.Ch. Oct. 6, 2006) (dismissing takings claim, due process claims, and equitable estoppel claim, but allowing vested rights claim to continue).

65 *Norino Properties LLC v. Mayor & Town Council of Town of Ocean View*, 2011 WL 1319563 (Del.Ch. March 31, 2011) (declaring that the permitted use in the Town's zoning code of a "convenience store" included sale of gasoline).

Finally, Appellants cite *B.W. Electric, Inc. v. Gilliam-Johnson*[66] for the proposition that at least one Delaware court has allowed certiorari review to proceed simultaneously with a declaratory judgment action, but the case is easily distinguishable. In the *B.W. Electric* case, the petitioner sought certiorari review of a decision by the Delaware Secretary of Labor *and* sought a series of declaratory judgments regarding other issues and claims.[67] Unsurprisingly, the Court allowed the declaratory judgment claims to continue – because they involved matters separate and apart from the certiorari review of the Secretary's action.

Here, the Appellants' declaratory judgment claim is nothing more than another means of challenging the Levy Court's grant of the conditional use permit, and so it was properly dismissed because, as the Superior Court explained, it does not provide "a method for resolving a dispute where no other remedy exists."[68]

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66 2018 WL 3752497 (Del.Super. Aug. 3, 2018).

67 In addition to review of the Secretary of Labor's decision regarding whether B.W. Electric had violated Delaware prevailing wage requirements, B.W. Electric sought a declaration that the Department of Labor's regulations violated state law and/or were unconstitutional and that the Department had misclassified a class of workers.

68 *Citizens II*, at *12 (citations omitted).

III. THE SUPERIOR COURT CORRECTLY UPHELD THE LEVY COURT'S GRANT OF CONDITIONAL USE APPROVAL.

A. Question Presented: Did the Superior Court correctly uphold the Levy Court's grant of conditional use approval?

The parties briefed this issues before the Superior Court.[69]

B. Standard of Review: The Superior Court's decision will only be reversed for legal error.

Certiorari review by the Superior Court is quite narrow. "[R]eview 'is limited to errors which appear on the face of the record and does not embrace an evaluation of the evidence considered by the inferior tribunal.'"[70] When this Court, in turn, reviews the Superior Court decision, it does so for legal error.[71] Stated differently, a decision by the Superior Court applying certiorari review will only be reversed where the Superior Court committed legal error.

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69 *See* A-1818, 2024.

70 *Maddrey,* 956 A.2d at 1216. This Court has further explained that:

> Review on certiorari is not the same as review on appeal because review on certiorari is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. The reviewing court does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly. . . . A decision will be reversed for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has "proceeded illegally or manifestly contrary to law."

Christiana Town Center, LLC v. New Castle Cnty., 865 A.2d 521 (Table); 2004 WL 2921830, at *1 (Del. Dec. 16, 2004) (citations omitted).

71 *Black,* 117 A.3d at 1029.

This Court reviews legal questions *de novo*. In order for a decision on certiorari review to be reversed for legal error, the legal error must be plain on the face of the record:

> Historically, a petition for a writ of certiorari has not allowed a reviewing court to consider the full record before the first tribunal or to conduct a plenary review of whether the tribunal committed an error of law. Only if an error of law is manifest on the face of the limited record is certiorari appropriate, because the writ exists to ensure that the tribunal is proceeding regularly and attempting to do its job within its legal authority.[72]

Thus, to the extent that Appellants' arguments concerning legal error are not evident from the limited record provided for certiorari review, such arguments – even if they might be correct (and they are not) – would not be subject to certiorari review and would not be grounds to reverse the Levy Court's decision.

C. Merits.

1. The Certified Record is Complete.

Appellants begin their challenge to the Levy Court Decision with the claim that the record provided by the Levy Court is incomplete for three reasons: (i) certain plans included in the record are illegible, (ii) the individual items listed in the docket entries are not included, and (iii) the written decision does not enclose the various documents upon which it relies. None of these contentions have merit.

It is well-settled that the record for certiorari review is "limited to the

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[72] *Id*. at 1032.

complaint initiating the proceeding, the answer or response (if required), and the docket entries,"[73] as the purpose of a writ of certiorari is "to permit a higher court to review the conduct of a lower tribunal of record."[74] The court does not review the case on the merits, and therefore "[e]vidence received in the inferior court is not part of the record to be reviewed."[75] With this background, it is easy to see why Appellants' claims fail and the Superior Court was correct.

First, to the extent Appellants complain that plans submitted with the record are illegible, this argument is petty and wrong. Large land use drawings and plans simply cannot be reduced to 8½" by 11" size for electronic filing and remain fully legible. If Appellants had wanted a larger copy, all they needed to do was ask.[76]

Second, to the extent Appellants complain that all of the documents listed in the docket entries must be included in the record, this argument is contrary to Delaware law and certiorari review. Docket entries are just that – entries. It would make no sense to include copies of all of the documents listed in the docket entries because the court does not review the underlying documents. In fact, "[i]t is settled in this jurisdiction that the evidence before the lower tribunal is not a proper part of

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73 *Black*, 117 A.3d at 1031.

74 *Christiana Town Ctr.,* 2004 WL 2921830, at *2; *see also Donnelly v. City of Dover*, 2011 WL 2086160, at *4 (Del.Super. June 30, 2014).

75 *B.W. Electric,* 2019 WL 1504366, at *3; *see also Black,* 117 A.3d at 1031 (citing *Du Pont v. Family Ct. for New Castle Cnty*., 153 A.2d 189, 194 (Del. 1959)).

76 The full-sized plans were available for review prior to the public hearings below and are still available now. *See also* D.R.E. 1006.

the record in a common law certiorari proceeding."[77] "[T]he Court may not comb through any transcripts, or any other form of evidence . . . in an effort to contradict . . . findings [of the tribunal]."[78] "Instead, the review is 'limited to errors which appear on the face of the record and does not embrace an evaluation of the evidence considered by the inferior tribunal.'"[79] "When conducting a review of the lower tribunal, this Court may not 'look behind the face of the record[.]'"[80] The record contains the docket entries – which is all that is required.

Third, to the extent Appellants complain that the record is incomplete because the Levy Court's Written Decision and the Record do not include various documents cited and relied upon by the Levy Court in its Written Decision (*e.g.*, the RPC's Recommendation Report), such complaints are also in contravention of Delaware law and the standard of review. Lower tribunals routinely rely upon written submissions and other documents submitted to them, and those submissions are listed in the docket entries – but those items are not properly included in the Record. The fact that the Levy Court may have referenced various items listed in the docket does not mean those particular items must be included in the record, and Appellants

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77 *Rodenhiser v. Dept. of Public Safety,* 137 A.2d 392, 394 (Del.Super. 1957).

78 *Haden v. Bethany Beach Police Dept.*, 2014 WL 2964081, at *7 (Del.Super. June 30, 2014) (citing *Maddrey*, 956 A.2d at 1214).

79 *Handloff,* 2006 WL 2052685, at *2 (citations omitted).

80 *Dorsey v. AKA Mgt.,* 2023 WL 4996696, at *2 (Del.Super. July 18, 2023) (citing *Maddrey*, 956 A.2d at 1215).

have cited no cases involving certiorari review so holding.[81] The Superior Court's decision that the record is complete is correct.

2. Inclusion of the minutes and transcripts does not mean that a court is able to consider them on certiorari review.

Beyond complaints about the adequacy of the record, Appellants also argue that the County's inclusion in the record of the minutes and excerpts from the transcripts of the public hearings means this Court may consider those minutes and transcript excerpts. According to Appellants, once the Levy Court included those items and certified the record, it was bound by such certification and could not argue that included items could not be considered. (OB 30). But such inclusion does not change the scope of this Court's review.[82] This Court simply does not review the

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[81] Appellants' do cite to *Barley Mill, LLC v. Save Our Cnty., Inc.*, 89 A.3d 51 (Del. 2014), but that case challenged a rezoning – which is a legislative act, subject to broader review than *certiorari*. *See supra* pp. 12-14. But even *Barley Mill* does not hold that *every* document referenced in the proceeding before the administrative body must be included in the record. In any event, *Barley Mill* is irrelevant here.

[82] In *Middlecap Assoc. LLC v. Town of Middletown*, 2024 WL 3385825, at *3 (Del.Super. July 11, 2024), a Superior Court decision issued after Appellants filed their Opening Brief, the Superior Court observed that it would only consider that portion of the transcript filed with the record where the Council members stated the reason for their votes, explaining: "While the entire transcript is outside the scope of review in a *certiorari* proceeding, the transcript reflects the votes of the council members and their reasoning for doing so. That record begins at page 40 and ends at page 42." So too here. The minutes of the Levy Court's meeting (which include the summaries of the individual Levy Court member's statements in support of their decision) were included in the record only as further evidence of the Levy Court's decision, and not for the purpose of expanding the review applicable on *certiorari*

facts or underlying evidence. This challenge to the adequacy of the record was also properly rejected.

3. The Levy Court's written decision does not "improperly frame" conclusions of law as findings of fact, and the Levy Court has provided a clear written decision explaining its reasoning.

Appellants claim the Levy Court's written decision "improperly frames its conclusions of law as findings of fact." (OB 30). But such a generalized statement is no basis to find legal error. If Appellants believe that there are erroneous conclusions of law, they must demonstrate those specific erroneous conclusions of law, and this they do not do.

To be fair, in this part of their brief, Appellants do list four items which they claim constitute erroneous conclusions of law. Two of the items (regarding the definition of "public utility," and consistency with the County Comprehensive Plan) are dealt with in separate sections of their brief (and Appellees will respond to those arguments in separate sections of this brief). The other two allegedly unsupported conclusions of law (*i.e.,* that the permit will not adversely affect public health, safety, and welfare, and that the application is consistent with the County's Adequate Public Facilities Ordinance) are mentioned, but not addressed further by the Appellants.

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so as to allow this Court to review the underlying evidence presented to the Levy Court.

As to the County's Adequate Public Facilities Ordinance, public utilities (which include private entities), such as that here, are exempt from the ordinance.[83] As to the finding that the conditional use will not adversely affect public health, safety, or welfare, that is not a legal question, but a factual finding, and therefore not subject to review on certiorari. Even so, the Levy Court heard extensive testimony about the operation of the solar farm, and its lack of noise, dust, pesticides, and traffic, as well as the extensive landscape buffer (8 rows of trees and a fence). A bond is required to cover the cost of decommissioning the Property and returning it to agricultural use. And, while the Appellants may not like the idea of a solar farm in their vicinity, they do not allege any adverse impacts in their Opening Brief. There is no reason to reverse the Levy Court's Decision regarding its factual determination that the project will not adversely affect public health, safety, or welfare.

4. Because the Levy Court was acting in a quasi-judicial capacity, and not in a legislative capacity, no written ordinance was required.

Title 9 requires, in part, that all actions by the Levy Court having "the force of law" shall be by ordinance, and that all ordinances be adopted in writing.[84] Here, the Levy Court did not formally adopt a written ordinance, and so, Appellants' claim (OB 32), the grant of the conditional use permit is therefore invalid. But, in making

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83 Kent County Code, §§187-90.2(D)(4), 205-6.

84 9 *Del.C.* §§4110(h), (i)(1).

this argument, Appellants fail to appreciate the distinction between legislative acts, which have the "force of law," and administrative/quasi-judicial acts, which merely apply existing standards in a statute or regulation to a submitted application.

When a council acts on a zoning change, such as amending the zoning map (*i.e.*, a rezoning),[85] it is acting in a legislative capacity because it takes action that has the force of law. By contrast, when a body considers a conditional use permit, it is generally acting in a quasi-judicial, rather than a legislative, capacity.[86] Such action is quasi-judicial because the body is applying the requirements of an existing ordinance to a specific application. After reviewing the application, the body either grants or denies the applicant "the right to one of the enumerated list of uses or activities which are allowed only by individual permit."[87] But, in a jurisdiction such as Kent County, there is no change in the zoning map, nor is there any legislative action of general applicability. Rather, Kent County allows certain enumerated uses (such as Public Utility Uses in the AC district) via conditional use permits.

Here, the Chancery Court correctly found that the Levy Court acted in a quasi-judicial capacity.[88] Because the Levy Court was acting in a quasi-judicial capacity,

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85 *Willdel Realty, Inc. v. New Castle Cnty.,* 281 A.2d 612, 614 (Del. 1971); *Lynch v. City of Rehoboth,* 2005 WL 2000774, at *3 (Del.Ch. Aug. 16, 2005), *aff'd*, 894 A.2d 407 (Del. 2006); *Delta Eta,* at *12.

86 *See supra* n. 38 and cases cited therein.

87 8 McQuillin Mun. Corp. §25:216; *see also supra* pp. 12-14.

88 *Citizens I,* at *2 ("Plaintiffs seek reversal of the Levy Court's quasi-judicial decision granting Freepoint a conditional use permit.").

and not in a legislative capacity, no ordinance was required. Thus, when Appellants claim that "Conditional use permits have the force of law and must be accomplished via ordinance," (OB 32) their claim is overly broad, misplaced, and relies upon a line of cases, arising out of, and unique to, Sussex County, which do not apply here.[89] Moreover, in the *Delta Eta* case, decided shortly before the Chancery Court's *Freepoint* decision, the Court rejected the application of the Sussex County line of cases to the City of Newark's conditional use process, noting that Sussex County's wide-ranging conditional use statutory authority causes a functional rezoning[90] – something not present in Newark or in Kent County.

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[89] In *Bay Colony, Ltd. v. County Council of Sussex Cnty.*, 1984 WL 159381 (Del.Ch. Dec. 5, 1984), the Chancery Court held that the Sussex County conditional use process, because tantamount to a rezoning, needed to follow the County's rezoning process, which requires action by ordinance. However, in doing so, the Court made clear that its decision did not "necessarily apply to grants of conditional uses by other governmental bodies which do not utilize the conditional use process in the same manner as the Sussex County Council." *Id.* at *6; *compare CBS Foods v. Redd*, 1983 WL 533240, at *3 (when applying ordinance standards to special use permit application, City Council acts in a quasi-judicial capacity not a legislative one); *see also Smith v. City of Papillion,* 705 N.W.2d 584, 594 (Neb. 2005) ("The crucial test for determining that which is legislative (ordinance) from that which is administrative or executive (resolution) is whether the action taken was one making a law, or one executing or administering a law already in existence."); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*, 836 N.E.2d 529, 533 (Ohio 2005) ("The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence").

[90] *Delta Eta*, 2023 WL 2982180, at *18.

Ultimately, the rule is straightforward. Where a governmental body acts as in a legislative capacity, such as a rezoning or an amendment to its zoning code, it must act by ordinance. But, where the body is acting in a quasi-judicial capacity, as here, in determining whether to grant a permit based on existing standards already set forth in its Code, no ordinance is required. Quasi-judicial decisions do not require an ordinance.

5. The Conditional Use Approval *is* consistent with the County Comprehensive Plan and Appellants' challenges to factual determinations are not subject to review by certiorari.

Appellants quote Delaware law that a county's comprehensive plan, "shall have the force of law, and no development . . . 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." (OB 35).[91] From this, Appellants argue that because the Freepoint Property has a low-density residential classification on Map 7B of the County's comprehensive plan, the approved public utility use (the solar farm) is invalid for inconsistency with that map. (OB 35-36). This argument is wrong for at least three reasons.

First, whether the conditional use/solar farm is consistent with the

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91 *Citing* 9 *Del.C.* §4959(a).

comprehensive plan or not is a question of fact, not subject to review on certiorari. "[I]t is not the function of the appellate court to review factual findings on certiorari review" and "[on certiorari review,] the reviewing court 'may not weigh evidence or review the lower tribunal's factual findings.'"[92]

Second, there is absolutely no prohibition in either Map 7B (the future land use map) or the text of the County's comprehensive plan which forbids a public utility use from being constructed in an area designated low density residential. Appellants ignore *Cain v. Sussex County Council*[93] and earlier cases which teach that "a comprehensive plan is a 'planning document' and it is unreasonable to 'interpret a planning document as one would interpret a statute or regulation.'"[94] "Trade-offs between the various goals of managing development are contemplated by, and therefore consistent with, the [Comprehensive] Plan."[95] In order to show an inconsistency between a comprehensive plan and a land use action or decision, the Appellants "must show that the [decision] does not serve the goals of the plan in that it fails to strike a reasonable balance between these various goals."[96] With this understanding, then, the Levy Court's action cannot be said to contradict the County's comprehensive plan; rather, the action strikes a reasonable balance

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92 *See Handloff,* 2006 WL 2052685, at *3; *Black*, 117 A.3d at 1031.
93 2020 WL 2122775, at *1 (Del.Ch. May 4, 2020).
94 *Id.* at *8 (citations omitted).
95 *Id.*
96 *Id.*

between various goals. That the Appellants might disagree with that balance, or balance things differently, does not mean that the Levy Court's action was improper – only that Appellants would have decided differently (again, a fact determination not subject to review).

Finally, Courts have soundly rejected similar claims that a comprehensive plan designation wholly overrides explicit provisions in the zoning code.[97]

6. Freepoint is a "Public Utility" for purposes of the Kent County Code.

Appellants acknowledge that "public utilities and public utility uses" are "among the conditional uses permitted in the Agricultural Residential District [by the Kent County Code]." (OB 37). However, Appellants argue that Freepoint is not a "public utility" under the Code[98] because it does not "supply electricity to the public directly (as does Delmarva Power or Delaware Electric Cooperative)" or "supply electricity 'under government regulation.'" (OB 37). Appellants are in error

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[97] *Barn Hill Preserve v. Bd. of Adj. of Town of Ocean View,* 2019 WL 2301991, at *3 (Del.Super. May 29, 2019) ("[b]y approving a Wildlife Educational Center as a permissible use with the granting of a special exception, the legislative body of the Town determined that such use, and the placement of such use in the Town's commercial districts, conform to the Comprehensive Plan."); *see also Pike Creek Servs., LLC v. New Castle Cnty.*, 259 A.3d 724 (Del. 2021) (Table); 2021 WL 3437984, at *5 (Del. Aug. 5, 2021) (adoption of comprehensive plan did not repeal, change, or modify zoning code provisions applicable to the property).

[98] *Id.* The County Code defines a "Public Utility" as: "An organization supplying water, electricity, transportation, etc., to the public, operated by a private corporation under government regulation or by the government directly." Kent County Code, §205-6.

on both these factual points – but, more critically, Appellants failed to raise this "Public Utility" argument before the Levy Court and it is therefore deemed waived.[99]

However, even if the public utility argument had been raised below, and even if the *factual* determination could be reviewed on certiorari,[100] it would still fail. Freepoint does indeed enter into transactions with private companies, such as Amazon, which is a member of the public, to supply them power directly.[101] Moreover, Freepoint is "under government regulation" – Freepoint cannot provide power to the "grid" without the approval of the Federal Energy Regulatory Commission.[102] Thus, even if these facts were reviewable on certiorari, Appellants' argument still fails.

Two fundamental principles of statutory interpretation also support the Levy Court's action. First, as the drafter/adopter of its code, Kent County is to be shown

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[99] *See, e.g., KZ Forever,* 2016 WL 6651413, at *4 (arguments not raised below are waived on certiorari review); *Handloff,* 2006 WL 2052685 at *1 n. 5 (same).

[100] *Christiana Town Ctr.,* 2004 WL 2921830, at *2 ("reviewing court may not weigh the evidence").

[101] *See* A-2126 (newspaper article discussing Amazon's agreement to purchase power from the Freepoint farm) and A-2130 (Amazon press release announcing latest renewable energy projects, including Delaware). These documents were provided to the Superior Court solely to rebut factual issues not raised by Appellants before the Levy Court.

[102] *See*, *e.g.*, A-2134 (FERC letter approving Freepoint's interconnection to the grid). FERC's letter constitutes a public document, and therefore the Court may take judicial notice of it. *See* D.R.E. 201(b)(2); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *12 (Del.Ch. Sept. 1, 1992).

great deference in the interpretation and application of its code.[103] Further, and more importantly, to the extent there is ambiguity or lack of clarity, zoning provisions are interpreted in favor of property owners such as Freepoint.[104]

Finally, the County's past practice supports its actions. On May 26, 2020, the Levy Court granted conditional use approval to Freepoint for a 205-acre solar farm on land zoned AR (Agricultural Residential) – which, like the project here, is outside the growth zone.[105] That same night, the Levy Court approved another solar farm, 34 acres in size, on land zoned AR on the western side of the County.[106] Thus, it is clear that the Levy Court considers companies which generate solar power to be public utilities – otherwise all such approvals could never have been granted.

7. The project does not exceed the impervious coverage limitations of the Code.

In another argument not raised before the Levy Court, Appellants claim that the Levy Court erred because "[m]ore than half of the Property will be covered by

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103 *See, e.g., Christiana Town Ctr. v. New Castle Cnty.,* 958 A.2d 389, 2009 WL 4301299, at *3 (Del. Dec. 1, 2009) (Table); *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 562 (Del.Ch. 1991).

104 *Jack Lingo Asset Management, LLC v. Bd. of Adj. of Rehoboth Beach*, 282 A.3d 29, 34 (Del. 2022); *Dewey Beach Enterprises, Inc. v. Bd. of Adj. of Town of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010); *Chase Alexa, LLC v. Kent County Levy Court,* 991 A.2d 1148, 1152 (Del. 2010); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

105 *See* A-2143, 2152-2157 (5/26/2020 Levy Court minutes at pp. 10-15). These minutes are public records of which the Court may take judicial notice. *Wheelabrator,* 1992 WL 212595, at *12.

106 See A-2143, 2148-2152 (5/26/2020 Levy Court minutes at pp. 6-10).

impenetrable surfaces of solar panels" when the applicable County Code provisions only permit 23% impervious coverage. (OB 39). They point out that, of the 528 acres comprising the solar farm, approximately 260 acres will be "covered" with solar panels. Although "impervious" is defined in the County Code as "[n]ot permitting penetration or passage,"[107] the term "impervious coverage" is not. Regardless, Appellants' arguments regarding impervious coverage fail.

To begin, as with the "public utility" argument, this impervious coverage claim was not raised before the Levy Court and is therefore waived.[108] Moreover, the argument can be ignored because Appellants are questioning facts (the amount of impervious coverage) – and facts are not subject to certiorari review.[109]

However, even if not waived and even if subject to review (despite being a factual question), Appellants' argument still fails because equating impervious coverage to the entire area devoted to the solar panels is wrong as a matter of fact and law. Solar panels do not rest flat on the ground. They do not create an impenetrable barrier which prevents water from draining into the soil underneath (as is the case with a parking lot, sidewalk, or building). Rather, solar panels are mounted on support poles, raised above the surface, at an angle, with gaps between

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107 Kent County Code, §205-6.
108 *See supra* n. 99.
109 *See supra* pp. 34-35.

the panels, thereby allowing water to reach the surface and drain into the soil.[110]

The County and its professional planners extensively reviewed Freepoint's application and never raised impervious coverage as an issue.[111] *No one at the public hearing raised this issue*. Even if there was any doubt, zoning codes are interpreted in favor of property owners such as Freepoint.[112] Moreover, as the drafter of its Code, the County's interpretation and application of the impervious coverage limitation is entitled to deference.[113] Finally, Delaware's neighboring states of New Jersey and Maryland have both made clear that solar panels are not counted towards impervious coverage limitations.[114] Appellants are simply wrong on this issue – an issue they never raised before the Levy Court because it has no merit in fact or law.

8. The Levy Court Commissioners properly stated their reasons for approval.

Appellants conclude their arguments for reversal with the claim that the Levy

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110 *See* A-481-486, 2168 (enlarged portion of site plan appears at A-2168).

111 The plans submitted with the application indicate impervious coverage of 16%. No one questioned this calculation at the public hearings.

112 *Jack Lingo*, 282 A.3d at 34.

113 *See supra* n. 103

114 *See* N.J. Admin. Code 7:7-13.3(c) ("A solar panel is not counted toward the impervious cover limit for a site. However, the base or foundation of the solar panel, plate, canopy, or array shall be counted toward the impervious cover on the site"); MD Code Ann. §4-210(c) ("For the purposes of issuing a permit or variance relating to zoning, construction, or stormwater for a project to install a solar panel, any calculation relating to the impervious surface of the project required by the State or local governing authority issuing the permit or variance may include only the foundation or base supporting the solar panel").

Court did not articulate valid reasons for approval. (OB 40-42). However, they err in several respects. First, they cite a case involving a rezoning, which is a legislative decision, *Barley Mill, LLC v. Save Our County, Inc*. On a challenge to a rezoning, the standard for review is different[115] and the *Barley Mill* case is not applicable here. This is a case on certiorari, and, on certiorari, "[t]he reviewing court does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly."[116]

Second, the Appellants cherry-pick statements from some of the Commissioners, and ignore the Levy Court's written decision entirely. They also fail to quote Commissioner Sweeney's actual motion to approve the application:

> Move to approve Application CS-21-09 FPS Cedar Creek Solar *based on Regional Planning Committee recommendation of approval, staff recommendation of approval*, as well as the applicant has self-imposed conditions that meet many of the issues that were brought up during the previous two meetings we have had with the previous application, as well as this one, in order to increase the buffer of vegetation around the property, reduction of the original acreage for use, the agreement to maintain funds to restore the land back to the original state after the life of the panels is over, and agreeing to work with Delaware agencies to allow hunting on the unused area of the property.[117]

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115 Rezonings are legislative acts and reviewed by the Court of Chancery as compared to the Superior Court. As explained *Barley Mill*: "[A] rezoning ordinance is usually presumed to be valid unless clearly shown to be arbitrary and capricious because it is not reasonably related to the public health, safety, or welfare." 89 A.3d at 61.

116 *Christiana Town Ctr.,* 2004 WL 2921830, at *2.

117 A-366-67 (emphasis supplied).

The language of the motion is important because everyone who voted for the motion, in doing so, incorporated and acknowledged the reasons set forth in the motion for approving the application. Of course, each of the four Commissioners who voted in favor also said more; but, by voting in favor of the motion, the Commissioners also adopted the motion's detailed reasoning, and there is no need to consider the additional comments made by the Commissioners.[118] The Levy Court's written

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[118] To the extent that Appellants criticize Commissioner Hall, Op.Br. at 41, claiming that he "misunderstood" an earlier Chancery Court decision, *Coker v. Kent Cnty. Levy Ct.,* 2008 WL 5451337, at *1 (Del.Ch. Dec. 23, 2008), some further response is necessary, as Hall demonstrated an excellent understanding of the case. Commissioner Hall began his comments in support of Commissioner Sweeney's motion by stating that: "I looked for every reason to deny this that I could." A-368. He then went on to say that:

> I went back to . . . *Coker versus Kent County Levy Court*, and the judge found for Kent County in that decision, because it denied an application because the applicant would not agree to the conditions set on the property. But that is not what's going on here. They have agreed to everything that Levy Court has asked and a little bit more. And so, from the lens of the property rights, and from looking at it that 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.

Id. In understanding Commissioner Hall's comments, it is important to recognize what the *Coker* Court said, as the Commissioner indicated he relied on that case:

> If the applicant meets the statutory prerequisites required for obtaining a conditional use, a rebuttable presumption favoring approval arises, *and the burden falls to the Levy Court to articulate a non-arbitrary reason for denying the application*.

decision, issued the day after the vote, further sets forth the reasons for approval.

After quoting snippets of the statements made by the Commissioners (and ignoring the written decision), Appellants claim the record is "devoid of any articulation of how the Commissioners concluded that [the application met the legal standards]." (OB 42). But, again, even if such were true (it is not), Appellants misunderstand the scope and limits of certiorari review. As this Court has stated:

> [t]he reviewing court does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly.[119]

Here, there has been no suggestion that the Levy Court exceeded its jurisdiction. There has been no suggestion that the Levy Court "proceeded irregularly." Indeed, the Levy Court conducted a public hearing. It received favorable recommendations from the Planning Department and the Regional Planning Commission. It imposed additional conditions on the approval (for example, 8 rows of trees) beyond what the County Code requires. The process was full and robust.

In a final attempt to find legal error, Appellants claim that the record is

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Coker, at *7 (emphasis supplied). When Hall's comments are read in conjunction with the *Coker* decision, he showed a deep appreciation for the legal standards. *Coker* instructs the Levy Court that if an applicant meets the statutory prerequisites, the applicant is entitled to approval, *unless* there is a non-arbitrary reason for denial. Commissioner Hall began his remarks by saying that he couldn't find a reason to deny. In the absence of a non-arbitrary reason to deny, denial would have been in contravention of *Coker's* command. Commissioner Hall clearly understood the law and that guided his vote.

[119] *Christiana Town Ctr.,* 2004 WL 2921830, at *2.

"devoid of how the Commissioners concluded that their affirmative votes met the required findings [required by the zoning code for conditional use approval]." (OB 42). For example, Appellants complain that the Levy Court did not explain how it determined that the location is appropriate and not in conflict with the comprehensive plan and that the public health, safety and general welfare would not be adversely affected.[120] But these are factual determinations not reviewed on certiorari. Even if subject to review, Appellees would observe that the applicable zoning allows the solar farm as a conditional use,[121] and, as already observed, a solar farm does not produce dust, nor does it use pesticides and fertilizers – solar farms, in fact, have less impacts than traditional farming. The Appellants complain that adequate off-street parking facilities were not addressed,[122] but the short answer is that the County Zoning Code requires no parking spots for this use – there are no daily employees.[123] No one, not the County Planning Department, the Regional

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120 *Id.*

121 *See, e.g., Gibson v. Sussex Cnty. Council*, 877 A.2d 54, 69 (Del.Ch. 2005) (by authorizing certain uses as conditional uses in certain areas of the County, County Council has already determined that such uses are appropriate for those areas).

122 *Id.*

123 Because there are no buildings or permanent employees on the site, there is no parking requirement. However, the site will contain numerous internal lanes and turnaround areas at the end of those lanes to allow vehicles to traverse the site, and park as and where occasionally needed. The Planning Department and the RPC both recommended in favor of the application, and *no one* at the public hearings – including Appellants – said anything about parking, as it is irrelevant to this approval. A finding regarding an irrelevant fact is unnecessary. To the extent

Planning Commission, the Levy Court, or *any* speakers at the public hearings, questioned the need for parking spaces. In short, the Levy Court addressed all of the required factors. Moreover, the Levy Court also imposed a number of conditions (extensive buffering, a bond for decommissioning the site at the end of its useful life, etc.[124]) to further protect the surrounding properties and area.

9. The Appellants lack standing to bring their claims.

It is a fundamental rule that, in order to bring suit, a person must have standing. And, a plaintiff only has standing when "plaintiff's interest in the controversy [is] distinguishable from the interest shared by other members of a class or the public in general."[125] Here – and this is really no surprise given that the Freepoint solar farm will have less impact on the surrounding community than other permitted uses, including traditional farming – the Appellants have not alleged any adverse impacts from the solar farm.

The parties briefed the issue of standing in the Chancery and Superior Courts,[126] and Appellants have further briefed the issue in their Opening Brief (OB 44), but the Superior Court did not address the issue of standing. Presumably the Court assumed standing for purposes of its certiorari review, and having upheld the

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Appellants now want to suggest parking is somehow inadequate, they never did so before the Levy Court, thereby waiving the right to do so now.

124 *See* Levy Court's Jan. 26, 2022 Written Decision, A-728-29.

125 *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

126 A- 680, 806, 1855, 2055-57.

Levy Court's action on such review, found it did not have to address standing.[127] Regardless, because Appellants have briefed this issue to this Court, and because Appellees continue to believe that Appellants lack standing, Appellees respond to Appellant's arguments concerning standing here.[128] However, if this Court otherwise upholds the Chancery and Superior Court decisions under review, it need not address standing directly.

In their Opening Brief, as they argued below, Appellants make two claims for standing. First, they note that they own property "adjacent to" the proposed solar farm (OB 43) as if this fact alone grants standing – but mere adjacency is insufficient to confer standing under Delaware law.[129]

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[127] In this regard, the Superior Court's actions are not without precedent. Delaware courts have, on occasion, assumed standing. *See, e.g., State ex rel. Dupont v. Ingram*, 293 A.2d 289, 290 (Del. 1972) ("We assume, without deciding, the standing of the plaintiffs to pursue the nature and extent of relief here sought"); *Glassco v. County Council of Sussex County*, 1993 WL 50287 (Del.Ch. Feb. 19, 1993) (in upholding County's rezoning, Court assumed standing of plaintiffs to challenge the rezoning).

[128] Questions of standing are reviewed *de novo*. *Albence v. Mennella*, ___ A.3d ___, 2024 WL 3209116, at *4 (Del. June 28, 2024).

[129] *See John DiMondi Ent., Inc. v. Board of Adj. of the City of New Castle*, 2024 WL 867088, at *3 (Del.Super. Feb. 29, 2024) ("Merely alleging close proximity to the Project . . . does not demonstrate that [appellant] suffered concrete and particularized harm" sufficient to confer standing, and does not distinguish appellant's interests from those of the general public); *see also Citizens For Smyrna-Clayton First v. Town of Smyrna*, 2002 WL 31926613, at *1 (Del.Ch. Dec. 24, 2002), *aff'd*, 818 A.2d 970; 2003 WL 1440163, at *1 (Del. Mar. 18, 2003) (Table) (adjoining and nearby property owners lacked standing because they could not "establish an interest distinguishable from the other residents and property owners of the Town."); 82 Am.Jur.2d, *Zoning and Planning* §344 (same).

Second, Appellants claim that they are "intended beneficiaries" of the County's Comprehensive Plan and therefore "have a special interest in ensuring that their area of Kent County retains the rural, non-industrial character mandated by the Comprehensive Plan." (OB 43). In support of this second claim, Appellants cite to *Dover Historical Society*[130] where this Court held that "the landowner/residents in the Historic District of Dover have an enforceable right in the 'aesthetic benefit' derived from the Historic District as a whole." In reaching this conclusion, though, this Court relied upon the very purpose of the Dover Historic District, which, as stated in the Dover Code, is to:

> preserve and enhance that unique character and value of the older portion of Dover as an area of special charm and interest. It is particularly intended that the regulations prevent, in the Historic District, any change of conditions that would be deemed to be a disfigurement or degradation of the present unique visual and architectural qualities of the district.[131]

But the standing of Historic District residents to enforce the special rules applicable in their district cannot be construed as granting standing to *any* resident in *any* zoning district to challenge *any* decision about that resident's district. As Appellants concede (OB 42), they must still show they will sustain an "injury-in-fact" and that the interest sought to be protected is within the "zone of interests" to be protected.

Appellants claim an "aesthetic benefit" in the "rural" character of the area

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130 838 A.2d at 1114.

131 *Id.* at 1108 (quoting the Dover Code).

around them (OB 43); yet the fact remains that the County Code specifically permits Freepoint's proposed solar farm as a conditional use in the zoning district. To the extent that Appellants suggest the solar farm is inappropriate *for their district*, or will change the rural character of their district, the Levy Court already decided otherwise when it set forth the conditional uses permitted therein, *including* public utility uses.[132] Unlike Dover's Historic District (where the Dover Code itself recited the district was intended to "prevent . . . any change of conditions that would be deemed to be a disfigurement or degradation of the present unique visual and architectural qualities of the district"), there is no indication here that the County intended any aesthetic benefits for the residents of AC and AR zoning districts. Thus, the Goldsboroughs lack standing.

And, because the Goldsboroughs lack standing, CASP lacks standing. "[A]n association [only] has standing to bring suit on behalf of its members when . . . its members would otherwise have standing to sue in their own right."[133]

If Appellants lack standing, that finding would be case dispositive. However, if the Court finds the Chancery and Superior Courts otherwise acted properly, standing could be presumed for purposes of this review.

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132 *See Gibson*, 877 A.2d at 69 (by authorizing certain uses as conditional uses in certain areas of the County, County Council has already determined that such uses are appropriate for those areas).

133 *Dover Historical,* 838 A.2d at 1115.

CROSS-APPEAL ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT THE DISCRETIONARY PROVISIONS OF THE TRANSFER STATUTE PERMIT THE COURT TO EXERCISE JURISDICTION OVER APPELLANTS' OTHERWISE *UNTIMELY* PETITION FOR WRIT OF CERTIORARI

A. Question Presented: Did the Superior Court err in holding that the "liberally construed" language in 10 *Del.C.* §1902 (the "Transfer Statute,") provided the Court with the discretion to ignore the untimely filing in the Court of Chancery?

This question was raised below.[134]

B. Standard of Review: Statutory interpretation is reviewed *de novo.*

The Superior Court's interpretation of 10 *Del.C.* §1902 is a question of law that is reviewed *de novo*.[135]

C. Merits.

The Superior Court correctly ruled that, consistent with this Court's holding in *In re Matter of Gunn*,[136] filing in the wrong court seeking the wrong remedy does not extend the 30-day time period for filing a petition for certiorari.[137] Noting that

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134 *See* A-1570-82.

135 *West v. Access Control Related Ent., LLC*, 296 A.3d 378, 384 (Del. 2023).

136 *In re Matter of Gunn*, 122 A.3d 1292 (Del. 2015).

137 *Citizens II*, at *9 ("The choice to seek a more favorable form of review in one court over the permissible review by another court is not sufficient to qualify as an exceptional circumstance"); s*ee also Gunn*, 122 A.3d at 1293 (a party's "unilateral decision to pursue an improper course of litigation is not an exceptional circumstance that excuses the delay in filing the Petition for a writ of certiorari."); *see also Kostyshyn v. New Castle Cnty. Del. Dep't of Land Use*, 2022 WL 3695057, at *3 (Del.Super. Aug. 22, 2022).

it is "undisputed that Plaintiffs filed their first challenge fifty-eight days after the Levy Court made its determination to grant the conditional use permit,"[138] and rejecting Appellants' argument that Court of Chancery's decision in *Delta Eta* "upended the universe of zoning jurisprudence,"[139] the Superior Court correctly found that the "choice to seek a more favorable forum of review in one court over the permissible review by another is not sufficient to qualify as an exceptional circumstance."[140] The Superior Court's analysis should have ended with that finding as there are no other avenues to extend the filing deadline and a finding of no exceptional circumstances is dispositive.

Yet notwithstanding the lack of exceptional circumstances, the Superior Court nevertheless went on to hold that the transfer statute provides the Court a separate means to extend the 30-day certiorari deadline (or, presumably, any deadline).[141] But the Superior Court erred in this regard because nothing in the transfer statute

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138 *Citizens II*, at *6.

139 *Id.*, at *9.

140 *Id.* Appellants have not appealed this determination by the Superior Court (*i.e.*, that there are no exceptional circumstances justifying extension of the 30-day period) and so that determination is the law of the case. Appellees note that in *Middlecap Assoc., LLC v. Town of Middletown,* 2023 WL 6848999, at *4 (Del.Super. Oct. 16, 2023), the Superior Court found exceptional circumstances justifying an extension to the 30-day statute of limitations otherwise applicable to certiorari review where plaintiffs sought review of the denial of a conditional use permit and filed its lawsuit in wrong court 33 days after the denial. However, exceptional circumstances are determined on a case by case basis and Appellants have not challenged that holding herein.

141 *Citizens II*, at *11-12.

grants the Superior Court authority to extend any filing deadlines. If Appellants' filing was untimely when first filed in Chancery, it was untimely when transferred to the Superior Court, and nothing in the transfer statute transforms an untimely filing into a timely one.

1. The plain language of the Transfer Statute states that: "[f]or purposes of laches or any statute of limitations, the time of bringing the proceeding shall be deemed to be the time when it was bought in the first court;" there is no authority to extend or enlarge filing deadlines.

The Superior Court's holding that the discretionary provisions of the Transfer Statute allow the court to review an otherwise time-barred claim[142] is in error. Specifically, the Superior Court interpreted the 'liberally construed' language of the statute to provide the Court discretion to review a claim of certiorari where Plaintiff would be left without a remedy,[143] even where the lack of a remedy stemmed from Appellants' failure to timely file its complaint. The plain language of the transfer statute does not support such an interpretation and the Superior Court's decision should be reversed.

It is axiomatic that "[t]he primary goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[144] Intent is determined by the plain

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142 A-1567-68.

143 A-1568.

144 *Acadia Brandywine Town Ctr., LLC v. New Castle Cnty.*, 879 A.2d 923, 927 (Del. 2005) (citing cases).

language of the statute, and absent ambiguity, "there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'"[145]

The transfer statute plainly and clearly states the General Assembly's intent. First, the statute states that: "[n]o action suit or other proceeding brought in any court of this State shall be dismissed ***solely*** on the ground that ***such court*** is without jurisdiction of the subject matter, either in the original proceeding or on appeal."[146] Notably, the statute does not state that an action *shall* be heard by the transferee court if that court also determines that the matter was untimely filed, as the Superior Court did in the instant matter. Rather, the statute makes clear that "[f]or purposes of laches or any statute of limitations, the time of bringing the proceeding ***shall*** be deemed to be the time when it was bought in the first court."[147] The plain language and the inclusion of the word "shall" leave no room for doubt—the date of filing for purposes of any timely filing analysis is the date the original complaint was filed in the original court. The Superior Court simply erred when it found the transfer statute granted the Court the authority to allow the untimely complaint to continue.

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145 *PHL Variable Ins. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011).

146 10 *Del.C*. §1902 (emphasis added).

147 *Id.* (emphasis added).

2. That the Transfer Statute is to be "liberally construed to permit and facilitate transfers" does not provide discretion to permit circumvention of settled timely filing requirements.

"Courts have 'no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions."[148] Thus, the Superior Court's finding that language in the transfer statute directing that it be "liberally construed to permit and facilitate transfers of proceedings between the courts of this State in the interests of justice,"[149] permitted the Superior Court to circumvent this Court's holding in *Gunn* and ignore the mandatory provision that the date of filing *shall be* the date of filing the original action, is flawed.

"The golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[150] The Superior Court's statutory interpretation of the breadth of its ability to 'liberally construe' the transfer statute violates this golden rule. It is unreasonable to find that a transferee court may use its discretion to proceed to hear

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148 *Bd. of Adj. of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 331 (Del. 2012) (citing *Leatherbury v. Greenspun,* 939 A.2d 1284, 1292 (Del. 2007)(citations omitted)).

149 A-1567-68.

150 *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.,* 492 A.2d 1242, 1247 (Del. 1985). Indeed, ambiguity of a statute "may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature." *Id*. at 1246.

a matter on the merits where the transferee court finds that it lacks jurisdiction due to the expiration of a common law statute of limitations or similar prescriptive period prior to the original filing. To do so would be to eviscerate filing deadlines and open the door for all time-barred plaintiffs to avoid dismissal simply by filing in the wrong court and thereafter requesting a transfer. This is the very point of the transfer statute's instruction that: "the time of bringing the proceeding shall be deemed to be the time when it was bought in the first court."

Under the Superior Court's holding, if the matter was initially filed in the Superior Court, the case would be time barred. But, because the matter was initially filed in the wrong court (Chancery) and sought the wrong remedy (injunctive relief), the transfer statute applies, which purportedly (under the Superior Court's construction of the transfer statute) allows the Superior Court to exercise discretion to extend the filing deadline. This is an unreasonable result. The Superior Court's interpretation of the transfer statute should therefore be rejected.[151]

[151] If the Court reverses the Superior Court on this issue, it is case dispositive because the underlying action was not timely filed.

CONCLUSION

Kent County conducted a thorough and robust review of Freepoint's solar farm application. There were two well-attended public hearings, and Appellants do not complain about the public process or any lack of notice. The bottom line is that they simply don't want a solar farm in their backyard.

But the solar farm will be surrounded by a 100-foot buffer, with eight rows of trees and a stockade fence. Unlike traditional farming, there will be no pesticides, no fertilizers, no dust. Appellants identify no harms other than alluding to an alleged loss of rural character – except that the extensive trees and buffering greatly minimize, if not outright eliminate, that concern. Appellants offer nothing else. Ultimately, this is nothing more than a classic case of "not in my backyard."

The Chancery Court was correct to find no jurisdiction because the Levy Court was acting in a quasi-judicial capacity. The Superior Court was correct to dismiss the Declaratory Judgment claim because *certiorari* review was available. And, as to the merits of the *certiorari* claim, Superior Court was correct to uphold the Levy Court's grant of the conditional use approval. Appellants have shown no legal error or other basis for reversal, indeed, they lack standing to pursue the claim.

On cross-appeal, the Superior Court erred when it found that the Transfer Statute allowed the Court to consider the *certiorari* claim notwithstanding the fact it was otherwise untimely. Indeed, the Superior Court itself observed that: "The choice

to seek a more favorable form of review in one court over the permissible review by another is not sufficient to qualify as an exceptional circumstance." If the action was untimely when first filed in Chancery, then it was untimely when transferred to the Superior Court. "[I]f a litigant fails to avail himself of a remedy provided by law and is subsequently barred from pursuing that remedy because of his own lack of diligence, he cannot then rely on the absence of a remedy at law as a basis for equitable jurisdiction."[152]

[152] *In Re Wife, K,* 297 A.2d at 425.

Respectfully submitted,

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