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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

# APPELLANTS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

Dated: September 25, 2024

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## PRELIMINARY STATEMENT[1]

This appeal arises out of the Levy Court's ill-considered approval of a utility-scale solar power project on legislatively-protected and preserved farmland, involves various murky and dispositive procedural questions, to include Appellees' effort to curtail Delaware property owners' ability to seek judicial review of improvident land use decisions by their local tribunals.

Although Appellees argue that the Levy Court's approval of the conditional use application approving the solar power plant at issue (a "quasi-judicial act") was the manifestation of policy decisions memorialized in the Zoning Code (the adoption of which was a "legislative act") (AG 45), after approving the solar project, the Levy Court soon changed tack and entered a moratorium on large-scale solar power projects in Kent County[2] and adopted ordinances limiting their construction[3] in deference to the subsequent public outcry against such massive solar powerplants.

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[1] Capitalized terms have the meanings ascribed to them in the Appellants' Opening Brief (the "Opening Brief" or "OB"). References to Appellees' Amended Answering Brief On Appeal and Kent County's Opening Brief on Cross-Appeal appear as "AB-_."

[2] *See* https://www.delawarepublic.org/politics-government/2022-12-21/kent-county-levy-court-places-moratorium-on-utilities-scale-wind-farms (last visited Sept. 21, 2024).

[3] *See* Kent County Code §§ 205-60, 205-73 (*available at:* https://www.kentcountyde.gov/Doing-Business-with-Kent-County/Development-Resources/Zoning/Zoning-Document-Library/Administrative-Applications-Requiring-Neighbor-Notification) (last visited Sept. 21, 2024).

After convincing the Court of Chancery that it lacked equitable jurisdiction due to the availability of certiorari in the Superior Court (a point which Appellants do not concede), Appellees now argue that Appellants lack standing to seek even certiorari (AB 42-45) and that Appellants' certiorari petition was time-barred. AB 46-53. Appellees are not only wrong—their reasoning, if adopted, would have the result that Delaware property owners would have no access to judicial review of "quasi-judicial acts" granting conditional uses to a neighboring property, regardless of the use's inconsistency with local ordinances. This is not the intent of the Kent County Zoning Code, which requires applicants to provide notice of conditional use applications to neighboring property owners—thus acknowledging their special interest in the use of adjacent properties—nor can it be reconciled with Appellees' arguments below and on appeal that certiorari provides an adequate remedy at law.

For the reasons set forth herein and in the Opening Brief, the Court should reverse the Court of Chancery Order (finding that it lacked subject matter jurisdiction), the Memorandum Opinion (dismissing Appellants' declaratory judgment count), and the Superior Court Order (affirming the Levy Court's approval of the solar power plant's conditional use permit), and remand for further proceedings consistent therewith. On the Cross-Appeal, the Court should affirm the Memorandum Opinion's denial of Cross-Appellants' motion to dismiss the certiorari count as untimely.

## SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

1. The Superior Court's holding that that the statutory mandate that the transfer statute, 10 *Del. C.* § 1902, "shall be liberally construed" grants discretion to hear a petition for writ of certiorari filed more than thirty days after the entry of the decision underlying the petition is correct and should be affirmed.

## ARGUMENT

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

The Court of Chancery's jurisdiction was not in question when this case was commenced. "In March of 2022 […] Chancery was the undisputed forum for conditional use permit disputes that were headed for resolution by the courts." *Middlecap Associates LLC v. Town of Middletown*, 2023 WL 6848999, at *3 (Del. Super. Oct. 16, 2023) (collecting cases). In October 2021, the Freepoint Defendants themselves filed a verified complaint seeking relief from the Court of Chancery after the Levy Court denied the first conditional use application. A-2221.

The Freepoint Defendants now join the Levy Court and assert that the law is clear that "review of quasi-judicial decisions (such as the grant of a conditional use permit) is only available through a writ of certiorari," whereas "legislative acts, such as zoning decisions, are properly heard in Chancery because a writ of certiorari will not lie to review *legislative* decisions." AB 13 (footnotes omitted; emphasis in original). Although Appellees now claim that "[t]his has been Delaware law since, at least, 1982" (AB at 14), this statement is belied by the fact this case proceeded through discovery, dispositive briefing on the merits, and oral argument on cross-motions for summary judgment before the Court of Chancery *sua sponte* questioned its subject matter jurisdiction. A-1011-14.

The Court of Chancery has subject matter jurisdiction where a plaintiff states an equitable claim, where a plaintiff seeks equitable relief in the absence of an adequate remedy at law, or where the General Assembly has vested the Court of Chancery with jurisdiction by statute. *Kroll v. City of Wilmington*, 2023 WL 6012795, at *3 (Del. Ch. Sept. 15, 2023).

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

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

Separately, the Verified Complaint sought a preliminary injunction to maintain the status quo until the Court of Chancery could decide the validity of the Conditional Approval, and noted that without interim injunctive relief, the challenge to the Conditional Approval could be rendered moot. A-67. These requests for equitable relief established the Court of Chancery's subject matter jurisdiction.

Prior to the *Delta Eta* decision, the Court of Chancery rarely discussed the distinction between legislative and quasi-judicial acts and its implications for equitable subject matter jurisdiction. *See Delta Eta Corp. v. City of Newark*, 2023 WL 2982180, at *11 (Del. Ch. Feb. 2, 2023) ("a quasi-judicial act carries out existing legislative policy, rather than making new policy. By contrast, an entity acts in a legislative capacity when it creates new laws, or effectively amends or repeals existing laws.") (footnotes omitted).

For one prime example, the Court of Chancery's opinion in *Sears v. Levy Court of Kent County* reviewed the denial of a conditional use permit, but alternately refers to the permit application as a "zoning change" and "rezoning request." 1986 WL 10085, at *1 (Del. Ch. Sept. 15, 1986). The underlying Chancery action in *Sears* was filed on December 17, 1974, and involved "several years of discovery." *Id*. Despite more than ten years of litigation, neither the parties nor the Court of Chancery apparently addressed the capacity in which the Levy Court acted when it denied the conditional use permit, or otherwise questioned the Court of Chancery's subject matter jurisdiction to hear the dispute.

Not only was it a surprise to find out that experienced land-use practitioners and the courts had been doing it wrong for years, the "legislative" versus "quasi-judicial" dichotomy also creates the odd result that because conditional use decisions rendered in Sussex County are legislative (because Sussex County's ordinances do

not limit conditional uses by district or zone) they are subject to equitable review in the Court of Chancery, whereas conditional use decisions rendered by New Castle and Kent Counties are quasi-judicial (because those counties circumscribe conditional use permits by ordinance) and thus the only remedy is certiorari review in the Superior Court. *See Delta Eta*, at *13 (outlining the difference between quasi-judicial and legislative acts).

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

The availability of a common law writ of certiorari should not eliminate the potential for equitable jurisdiction. In order for a remedy at law to be adequate, it "must be as practical to the ends of justice and to its prompt administration as the remedy in equity." *El Paso*, 669 A.2d at 39; *see also United BioSource LLC v. Bracket Hldg. Corp*., 2017 WL 2256618, at *4 (Del. Ch. May 23, 2017). That is not the case here. Certiorari's limited review does not permit a court to consider the underlying merits. The Court of Chancery will exercise jurisdiction over an action

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

**A. Certiorari Review is Not an Adequate Remedy at Law.**

Although Appellees argue that a common law writ of certiorari provides "the equivalent of an automatic temporary injunction upon filing, and permanent injunctive relief where a petitioner is successful" (AB 12), this is not entirely true, as permanent injunctive relief is not available on certiorari. The court merely "has the power to quash or affirm the proceedings, and to remand." *Breasure v. Swartzentruber*, 1988 WL 116422, at *1 (Del. Super. Ct. Oct. 7, 1988) (cleaned up).

Certiorari is essentially just a review to "look at the regularity of the proceedings." *395 Assoc., LLC v. New Castle County*, 2006 WL 2021623, at *3 (Del. Super. Ct. Jul. 19, 2006). Certiorari does not permit the reviewing court to address the underlying merits or otherwise address the substance of the decision under review. *Id.* Although the writ exists to review errors of law, Delaware decisions on certiorari routinely only address whether the tribunal below created a record for its decision and applied facts to existing law in doing so. *See Mell v. New Castle Cty.*, 2003 WL 1919331, at *8 (Del. Ch. Apr. 11, 2003) ("The writ exists to review only errors of law, not errors of fact. The review is confined to the record,

and the Court must not re-decide the merits of the case") (citing 1 WOOLLEY, DELAWARE PRACTICE (1906) §§ 895–897 (1906)).

In contrast to the limited scope of certiorari review, the action before the Court of Chancery permitted the parties and the Court to substantively address the merits of the case. The limited standard and scope of certiorari review does not provide an adequate remedy at law. The injunctive remedy sought by Appellants vested the Court of Chancery with equitable jurisdiction over this case. The Court should reverse the Court of Chancery Order and remand for further proceedings.

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

The Declaratory Judgment Act is broad: "[t]his chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be *liberally construed* and administered." 10 *Del. C.* § 6512 (emphasis added). Appellants sought a declaratory judgment regarding the rights, status, and legal relations with respect to the improvident approval of the conditional use application. The plain language of the Declaratory Judgment Act establishes that this case falls squarely within the actions that are appropriate for declaratory relief.

Although Appellees cite a noted treatise for the proposition that it is "hornbook law that '[d]eclaratory judgments [generally] may not be used as a substitute for the review of decisions of boards or administrative officials exercising judicial or quasi-judicial powers" (AB 18), Appellees omit the pertinent passage that "[w]here there is no statutory provision for reviewing the action of an administrative board,"—as is the case here—"declaratory relief is available for this purpose, but if an appeal from the action of an administrative body is provided by statute, remedy by declaratory judgment will be denied." 22A Am. Jur. 2d *Declaratory Judgments* § 80 (2024). Because there is no statutory right to appeal decisions of the Levy Court, the Memorandum Opinion should be reversed and the declaratory judgment count should stand.

The case law cited by Appellees on this point is similarly distinguishable. The holding in *Jardel Co., Inc. v. Carroll* (AB 18) was based on the fact that the petitioner had not exhausted its administrative remedies in challenging a tax assessment. 1990 WL 18296, at *2 (Del. Super. Ct. Feb. 26, 1990). In *Sheridan v. Board of Adj. of City of New Castle* (AB-18), the petitioner brought a certiorari action to review a building permit, but failed to join the legal owners of the property, who were indispensable parties. 2006 WL 2382800, at *2. Despite "appealing" the approval of the building permit, the petitioner then moved for a declaratory judgment that the building permit was null and void. *Id.* ("If, as Sheridan now claims, the decision is null and void […], it would have made no sense for her to have appealed the Board's ruling. That specious claim cannot be used to excuse the failure to join indispensable parties; Sheridan cannot have it both ways."). Similarly, the plaintiff in *Christiana Town Center v. New Castle County* failed to exhaust administrative remedies. 2003 WL 21314499, at *4-5 (Del. Ch. Jun. 6, 2003).

### A. The declaratory judgment count is not duplicative of the certiorari claim.

Although it is true that a declaratory judgment claim that is completely duplicative of the affirmative counts of a complaint should be dismissed, resolution of the certiorari count would not, and did not, resolve the declaratory judgment count. Certiorari is an exceedingly limited review that does not afford the full relief available in a declaratory judgment. Indeed, the Superior Court Order deemed

Appellants' arguments on certiorari "improper for this Court's consideration" and "an improper deep dive[.]" Superior Court Order, at 19, 21. Declaratory relief, by contrast, would have permitted the Superior Court to consider those arguments.

For the foregoing reasons and the reasons set forth in the Opening Brief, the Superior Court's dismissal of Appellants' declaratory judgment count was reversable error.

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

Although Appellees assert that Appellants failed to raise the arguments that the solar power plant does not constitute a "public utility" under the Zoning Code or comply with the "impervious coverage" limitations before the Levy Court and thus waived those arguments (AB 34, 36), this argument is undercut because Appellees separately argue that the transcript before the Levy Court and the content of any documents relied on by the Levy Court are not to be considered by a reviewing court on certiorari. *See* AB at 23-27. Appellees cannot have it both ways and argue for a limited record that does *not* include the documents or transcripts of the proceedings below, while simultaneously pointing to that limited record as evidence of a purported waiver.

Nor should the Court defer to the Levy Court in the interpretation and application of the Zoning Code in light of the United States Supreme Court's recent rejection of *Chevron* doctrine. *See Loper Bright Enterprises, v. Raimondo*, 144 S. Ct. 2244, 2258-60 (2024) (overturning *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and holding that courts need not defer to an agency's interpretation of ambiguous statutes).

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

Solar power generation plants are not an enumerated conditional use in the AC zoning district. The Conditional Approval thus hinges on the Levy Court's unsupported conclusion that the solar power generation facility constitutes a "public utility." Although Zoning Code § 205-64 includes "[p]ublic utilities and public utility uses" among the conditional uses permitted in the Agricultural Residential District, the solar power generation facility does not fit the definition of a "public utility."

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

Accordingly, the solar power plant contemplated by the conditional use application is only permitted in the General Industrial District. The Levy Court exceeded its authority and acted manifestly contrary to law by issuing the Conditional Approval.

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

Zoning Code § 205-51 provides that "[n]o more than 23% of each lot in an AC – Agricultural Conservation District shall be covered by man-made impervious surfaces." "Impervious" means "[n]ot permitting penetration or passage." Zoning Code § 205-06. The solar panels are man-made and impervious. Although the Zoning Code does not define "surfaces," the dictionary meaning is "the exterior or upper boundary of an object or body."[4]

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

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

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

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

**C. The Levy Court Failed to Articulate Valid Grounds for Approval.**

Conditional uses in Kent County are creatures of regulation adopted by the Levy Court under its general zoning authority. *See* 9 *Del. C.* § 4901. Rule 12.5 of the Levy Court Rules provides that the "Commissioners voting in the majority shall give specific reasons for their vote on any issue requiring a public hearing."

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

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

Zoning Code § 205-251 thus mandates to approve the Application, the Commissioners must have articulated reasons tied to facts supporting each of these criteria. Appellees do not dispute this.

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

### C. Plaintiffs Have Standing.

Appellees acknowledge that the Superior Court did not address the issue of standing, and cite various cases where the Superior Court assumed standing to pursue the relief sought. *See* AB-43. Despite their earlier adversarial posture, the County Appellees and the Freepoint Defendants have teamed up on this issue and seek to have this Court divest Appellants and all Delaware property owners from standing to challenge municipal land use decisions. Appellees' argument against Appellants' standing to bring their certiorari petition would have the result that Delaware property owners would have no recourse where a municipal or county board approves a dubious conditional use permit granted to a neighboring property. AB 42-45. Appellees' argument would divest Delawareans even from the limited review offered by a common law writ of certiorari—a result that directly cuts against Appellees' arguments that certiorari is the sole remedy available to review such

quasi-judicial acts. *See* AB 8-16. The Court should not reward Appellees' overreach.

Appellees also make light of Appellants' interest in preserving the rural character of their zoning district, asserting that "[t]o 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." AB 45 (emphasis in original). As an initial matter, as argued above, the enumerated conditional uses in the AC zoning district do *not* expressly include utility-scale solar power plants. But more importantly, this assertion ignores the Levy Court's vote in December 2022 to impose a moratorium on future utility-scale solar power generation plants.[5] And since then, the County has limited solar power generation to facilities no larger than fifty acres, requiring a special application for projects contemplating such a "Community Energy Generating Facility," and listing various conditions for approval. *See* Kent County Code §§ 205-60, 205-73.[6]

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[5] *See* https://www.delawarepublic.org/politics-government/2022-12-21/kent-county-levy-court-places-moratorium-on-utilities-scale-wind-farms (last visited Sept. 21, 2024).

[6] *Available at:* https://www.kentcountyde.gov/Doing-Business-with-Kent-County/Development-Resources/Zoning/Zoning-Document-Library/Administrative-Applications-Requiring-Neighbor-Notification (last visited Sept. 21, 2024).

Zoning Code Section 205-60 defines "Community Energy Generating Facility" as:

> A renewable-energy-generating facility, no larger than 50 acres in size, that serves multiple customers who share the output of the generator, which may be located either as a standalone facility or behind-the-meter of a participating owner or customer. The facility shall be interconnected to the distribution system and operated in parallel with an electric distribution company's transmission and distribution facilities.

Zoning Code Section 205-73 lists various conditions on such Community Energy Generating Facilities, to include:

> (1) The footprint of the solar array, as defined as the by the outer limit of the panels and exclusive of buffers, shall be no larger than 50 acres in size.
>
> (2) No more than one community solar energy facility shall be permitted on a parcel. All separate parcels in existence on September 27, 2022, shall be considered original parcels. Future subdivision of an original parcel shall not enable the development of additional community solar energy facilities.
>
> (3) No more than 1,600 aggregate acres shall be dedicated to community solar energy-generating facilities in the AC (Agricultural Conservation) and AR (Agricultural Residential) Districts combined. This provision shall apply to all community solar energy-generating facilities submitted for review after the effective date of this subsection.
>
> (4) Facility location and siting shall be in accordance with the requirements of Title 26, Public Utilities, of the Delaware Administrative Code, 3001 (Rules for Certification and Regulation of Electric Suppliers), as amended.

The list includes eleven additional requirements, to include notification by certified mail to "all property owners within 200 feet of the limits of the subject

property." *Id.* By adopting this notice requirement, the Levy Court expressly recognizes that adjacent property owners have a special interest in their neighbors' use of their land for solar power plants. The inclusion of this requirement is the Levy Court's concession that such adjacent property owners have standing to challenge such applications.

Along identical lines, the conditional use application at issue here provides that "[a]pplicant will notify all property owners within 200 feet of the boundaries of the subject site(s) by certified mail at least 10 days prior to a first hearing," thus recognizing that those property owners have a particularized interest that confers standing. A-1867. Although it does not appear in the certified record, the Goldsboroughs received that mailed notice, and were visited by representatives of the Freepoint Defendants to discuss the application. A copy of the certified mail receipt to Mr. Goldsborough is included in certification of record filed with the Court of Chancery. A-179. This notification to the Goldsboro, as required by the Levy Court's application form, should be deemed Appellees' concession that those property owners have standing to challenge the application. A-1878.

Appellees' argument that Appellants lack standing should be rejected for these reasons and the reasons set forth in the Opening Brief.

## ARGUMENT ON CROSS-APPEAL

## IV. THE SUPERIOR COURT CORRECTLY HELD THAT THE DISCRETIONARY MANDATE OF THE TRANSFER STATUTE PERMITTED THE COURT TO HEAR APPELLANTS' PETITION FOR WRIT OF CERTIORARI.

### A. Question Presented.

Did the Superior Court correctly hold that 10 *Del. C.* § 1902's mandate that "[t]his section shall be liberally construed to permit and facilitate transfers of proceedings between the courts of this State in the interests of justice," confers discretion to hear Appellants' petition for writ of certiorari? Yes. This question was raised below by Cross-Appellants. A-1570-82.

### B. Standard and Scope of Review.

The Superior Court's application of 10 *Del. C.* § 1902 is a question of statutory interpretation which is reviewed *de novo*. *West v. Access Control Related Enterprises, LLC*, 296 A.3d 378, 384 (Del. 2023).

### C. Merits.

The Superior Court's holding that that the statutory mandate that the transfer statute, 10 *Del. C.* § 1902, "shall be liberally construed" grants discretion to hear a petition for writ of certiorari filed more than thirty days after the entry of the decision underlying the petition is correct and should be affirmed. A-1566-68.

### 1. The time period for filing a petition for writ of certiorari is not a statute of limitations.

Cross-Appellants' argument is based on the transfer statute's language that "[f]or the purpose of laches or of any statute of limitations, the time of bringing the proceeding shall be deemed to be the time when it was brought in the first court." AB 49 (quoting 10 *Del. C.* § 1902, emphasis omitted).

Contrary to Cross-Appellants' unstated premise that the thirty-day time limit for seeking a writ of certiorari imposes a jurisdictional bar to any action commenced outside of that timeframe (*see* AB 49), that timeframe is not a statute of limitations. *In re Petition of Fridge*, 604 A.2d 417 (Table), 1991 WL 247811, at *1 (Del. Nov. 20, 1991) ("[T]here is no statutorily-imposed time period in which to seek review under a writ of certiorari[.]"). Rather, the time period "is *analogous* to the thirty-day period governing direct appeals, […] subject to the discretionary power of the Court to excuse default in appropriate circumstances." *Id.* (emphasis added).

Unlike a statute of limitations, the filing period "was adopted in exercise of Superior Court's common law power to regulate certiorari proceedings," and "is not jurisdictional but is subject to the discretionary power of the court to excuse defaults in appropriate circumstances." *Elcorta, Inc. v. Summit Aviation, Inc.*, 5287 A.2d 1199, 1201 (Del. Super. Ct. 1987). Cross-Appellants' implicit premise that decisional law imposing a thirty-day time limit for seeking a writ of certiorari constitutes a *statute* of limitations is simply incorrect, as decisional law is by

definition not statutory law.[7] No formal statute of limitations applies to create a jurisdictional bar to certiorari review.

Separately, Cross-Appellants do not argue that laches applies to bar Appellants' claims, and any such argument should be deemed waived. Del. Supr. Ct. R. 14(c)(i) ("Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief."); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

Because the thirty-day time limit to file a petition for a common law writ of certiorari arises under decisional law and is subject to the discretionary power of the court to excuse defaults in appropriate circumstances, the Superior Court's decision below is consistent with the express language of 10 *Del. C.* § 1902 and should be affirmed.

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[7] Cross-Appellants characterize the time limit as a "common law statute of limitations." AB 51. Appellants have identified four Delaware opinions that use the phrase "common law statute of limitations," only one of which uses the phrase to denote the time period to file a petition for a common law writ of certiorari. *See Donnelly v. City of Dover*, 2011 WL 2086160, at *1 (Del. Super. Ct. Apr. 20, 2011) (referencing earlier order denying respondents' motion to dismiss premised "on the grounds that the thirty day common law statute of limitations for filing a Petition ran"); *see also*, *Burkhart v. Genworth Financial, Inc.*, 250 A.3d 842, 858 (Del. Ch. 2020) ("The parties agree that laches, rather than a common law statute of limitations paradigm, is the appropriate orientation by which to assess the timeliness of Plaintiffs' dividend claims."); *Saunders-Gomez v. Rutledge Maintenance Corp.*, 2017 WL 1277682, at *5 (Del. Super. Ct. Apr. 3, 2017) (applying twenty-year common law statute of limitations for instruments under seal); *Clarkson v. Goldstein*, 2007 WL 914635, at *4 (Del. Super. Ct. Feb. 28, 2007) (same).

### 2. The Transfer Statute's liberal construction grants the Superior Court discretion to expand procedural deadlines.

Consistent with the conclusion that the timeframe to file a petition for a common law writ of certiorari is not a statute of limitations, the Superior Court has noted that "[w]hile thirty days is 'generally' the time within which to seek a writ of certiorari, that requirement is not set in stone." *Middlecap Assoc., LLC v. Town of Middletown*, 2023 WL 6848999, at *3 (Del. Super. Oct. 16, 2023) (citing *In the Matter of Gunn*, 122 A.3d 1292, 1293 (Del. 2015)).

Although the Memorandum Opinion rejected "extraordinary circumstances" as a basis to expand the time period below, in *Middlecap Associates*, entered the day before Memorandum Opinion, the Superior Court found that the Court of Chancery's series of holdings that it lacked subject matter jurisdiction over challenges to conditional use decisions constitute "extraordinary circumstances" that warrant extension of the time period. *Middlecap Assoc., LLC*, 2023 WL 6848999, at *3-4 (noting that "[w]e can see from the decided cases that ambiguity in procedural rules is a prime area for application of exceptional circumstances," and collecting cases).

Even if the Court of Chancery's denial of equitable jurisdiction does not, standing alone, constitute "extraordinary circumstances," the transfer statute's directive that it is to be "liberally construed […] in the interests of justice" supports

the Superior Court's exercise of discretion to expand procedural time limits on a case-by-case basis. 10 *Del. C.* § 1902. *See Fridge*, *supra*, 1991 WL 247811, at *1 (holding that the time for filing a petition for a writ of certiorari is "subject to the discretionary power of the Court to excuse default in appropriate circumstances.").

Under either the "extraordinary circumstances" rubric or the "liberally construed" language of 10 *Del. C.* § 1902, the circumstances provide a basis to excuse any default. Delaware has a strong preference for deciding cases on the merits rather than on procedural grounds. *See Bernice's Educational School Age Center, Inc. v. Cooper*, 2013 WL 601097, at *3 (Del. Comm. Pl. Feb. 18, 2013) (discussing and collecting cases). This preference is reflected in the liberal construction of the transfer statue. In *Carney v. Qualls*, the Superior Court applied 10 *Del. C.* § 1902 in a similar situation arising from an appeal of a Family Court decision. 514 A.2d 1126 (Del. Super. Ct. 1986). Carney appealed the Family Court decision to the Delaware Supreme Court; Qualls then moved to dismiss on the grounds that the Superior Court was the proper venue and that the Supreme Court lacked subject matter jurisdiction. *Id.* at 1127. The Supreme Court granted Qualls' motion to dismiss, but granted Carney leave to transfer under 10 *Del. C.* § 1902. *Id.* Carney promptly moved the Family Court to set an appeal bond, filed the bond, and filed his election of transfer to the Superior Court. *Id.* Before the Superior Court, Qualls then moved to dismiss on the grounds that posting an appeal bond within

thirty days of the entry of the decision to be reviewed is a jurisdictional prerequisite, and because more than thirty days had passed before Carney posted the bond, Qualls argued that the Superior Court lacked subject matter jurisdiction to hear the case. *Id.*

The Superior Court stated that "[t]his argument, if correct, would emasculate 10 *Del. C.* § 1902 as it relates to appeals." *Id.* The Superior Court construed 10 *Del. C.* § 1902 liberally to deem Carney's appeal bond to have been filed within the statutory appeal period. *Id* at 1128. "To hold otherwise would require parties to attempt simultaneous appeals to preserve their rights in areas where subject matter jurisdiction for appeal is not clear. This is the just result sought to be avoided by 10 *Del. C.* § 1902." *Id.*

This case should be considered in a similar manner. Appellants did not initially file this case in the Court of Chancery for the purpose of evading the time limit on filing a petition for certiorari, but rather, out of an honest understanding of the process to seek judicial review of a conditional use permit. *See* Memorandum Opinion at 19 ("Plaintiffs' counsel, for good reason, may have always believed this a proper course. This Court has a sympathetic ear to the Bar that practices in this area and some understanding of its previous filing practices."). Certiorari review is largely limited to a review of the process before the tribunal below, and is a remedy of last resort in the absence of a statutory right of appeal. Cross-Appellants suggestion that Appellants seek 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" (AB 51) is both overwrought and misses the mark. Cross-Appellants do not argue, nor could they, that Appellants engaged in gamesmanship or otherwise misused the transfer statute in order to bring an untimely certiorari action. Rather, Cross-Appellants advocate for a procedural default that would remove even certiorari as a remedy in this case, under circumstances where many experienced Delaware land-use practitioners—to include the Freepoint Defendants themselves (*see* A-2221-28)—understood that injunctive and declaratory relief in the Court of Chancery was the correct procedural path.

In a similar vein, Cross-Appellants have not, and cannot, identify any cognizable prejudice arising from the Superior Court's denial of their motion to dismiss the certiorari count. Cross-Appellants were active participants in the proceeding before the Court of Chancery, prosecuted that case through cross-motions for summary judgment with actual notice of Appellants' factual and legal contentions, and based their argument that the Court of Chancery lacked subject matter jurisdiction on the availability of certiorari in the Superior Court. *See* A-1026-35; A-1084-1103. Similar to the appellee in *Carney v. Qualls*, Cross-Appellants successfully moved to dismiss in one court on subject matter jurisdiction grounds, and now seek to reverse another court based on a procedural timeliness argument. 514 A.2d 1126. The Memorandum Opinion echoes *Carney*'s reasoning:

> The procedural history reflects that from the first pleading when Defendants filed their Answer to the Verified Complaint—and throughout the life of the Chancery Action—they insisted dismissal was warranted because Plaintiffs had an adequate remedy at law.
>
> In the final stages of that litigation, Defendants succeeded in persuading that Court that the remedy existed and convinced that Court to summarily dismiss the Chancery Action for lack of subject matter jurisdiction. Upon taking its decisional action, the Court of Chancery contemplated that an adequate remedy exists here. Accordingly, justice requires that this transferee court exercise its discretion and consider the matter. To be persuaded otherwise would leave Plaintiffs without a remedy in either court, violating both the spirit of § 1902 and the Court of Chancery's intent when it ended the Chancery Action.

Memorandum Opinion at 29-30. The Superior Court's decision correctly applies 10 *Del. C.* § 1902's remedial purposes and liberal construction and should be affirmed.

Separately, although Cross-Appellants rely heavily on *In the Matter of Gunn*, 122 A.3d 1292 (Del. 2015), that case is factually and procedurally distinguishable from this case. The petitioner in *Gunn* sought to challenge the results of a county-wide general election recount after nearly seven months (*id.* at 1293), whereas Appellants acted with alacrity and sought relief in the Court of Chancery fifty-eight days after the entry of the conditional use permit. In *Gunn*, "the Petitioner initially filed an action in the wrong court and sought the wrong remedy, *even though the proper course of perfecting a challenge to the Board of Canvass' certification was well-established*." *Id*. (emphasis added). In stark contrast, as discussed throughout, the proper course of perfecting a challenge to a conditional use permit was *not* well-established, but was—and remains—an open question. *See Middlecap Assocs.,*

*LLC*, 2023 WL 6848999, at *3 & n.18; *Kroll*, 2023 WL 6012795, at *11 ("The apparent availability of certiorari and injunctive relief as dueling review mechanisms of last resort for administrative decisions raises a complicated jurisdictional analysis for the Court of Chancery."). Contrary to Cross-Appellants' assertions, the Memorandum Opinion does not "circumvent this Court's holding in *Gunn*" or ignore the mandatory statutory provisions of 10 *Del. C.* § 1902 by denying the motion to dismiss. AB 50.

The Superior Court's holding that that the statutory mandate that the transfer statute, 10 *Del. C.* § 1902, "shall be liberally construed" grants discretion to hear a petition for writ of certiorari filed more than thirty days after the entry of the decision underlying the petition is correct and should be affirmed.

## CONCLUSION

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

As to the Cross-Appeal, Appellants respectfully request that this Honorable Court affirm the Memorandum Opinion for the reasons stated herein.

Dated: September 25, 2024

Respectfully Submitted,

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