



**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,

Plaintiffs-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.

NO. 210, 2024

On Appeal from the Court of Chancery of the State of Delaware,
C.A. No. 2022-0287-NAC

On Appeal from the Superior Court for the State of Delaware,
C.A. No. N23C-03-196-VLM

**CROSS-APPELLANT KENT COUNTY'S REPLY BRIEF ON
CROSS-APPEAL**

CONNOLLY GALLAGHER LLP

Max B. Walton (Bar No. 3876)

Lisa R. Hatfield (Bar No. 4967)

Erica K. Sefton (Bar No. 6916)

267 East Main Street

Newark, Delaware 19711

(302) 757-7300

mwalton@connollygallagher.com

lhathfield@connollygallagher.com

esefton@connollygallagher.com

*Attorneys for Kent County Defendants-
Below, Appellees/Cross-Appellants*

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. IT WAS IMPERMISSIBLE FOR THE SUPERIOR COURT TO APPLY THE TRANSFER STATUTE AT ALL	3
II. THE SUPERIOR COURT MISAPPLIED THE TRANSFER STATUTE AND SHOULD BE REVERSED	7
CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Calloway v. Town of Greenwood</i> , 1999 WL 167732 (Del. Super. Feb. 3, 1999)	13
<i>Carney v. Qualls</i> , 514 A.2d 1126 (Del. Super. 1986)	13, 14
<i>Cave v. New Castle Cty. Council</i> , 850 A.2d 1128 (Del. Super. 2003), <i>aff'd</i> , 854 A.2d 1158 (Del. 2004).....	12
<i>CBS Foods v. Redd</i> , 1982 WL 533240 (Del. Super. Jan. 19, 1982).....	13
<i>Church of Universal Love & Music v. Fayette Cty.</i> , 2008 WL 4006690 (W.D. Pa. Aug. 26, 2008).....	12
<i>Citizens Against Solar Pol. v. Kent Cty.</i> , 2023 WL 6884688 (Del. Super. Oct. 17, 2023)	4, 13
<i>Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.</i> , 492 A.2d 1242 (Del. 1985).....	8
<i>Delta Eta Corp. v. City Council, City of Newark</i> , 2003 WL 1342476 (Del. Super. Mar. 19, 2003)	12, 13
<i>Delta Eta Corp. v. City Council of City of Newark</i> , 2005 WL 1654581 (Del. Super. Apr. 29, 2005).....	12, 13
<i>Delta Eta Corp. v. City of Newark</i> , 2023 WL 2982180 (Del. Ch. Feb. 2, 2023).....	4, 6, 13
<i>Dieman v. Sussex Cty.</i> , 1982 WL 149629 (Del. Ch. Aug. 25, 1982).....	11

<i>DiFrancesco v. Mayor & Town Council of Elsmere</i> , 2007 WL 1874761 (Del. Super. June 28, 2007), <i>aff'd sub nom.</i> <i>Mayor & Town Council of Town of Elsmere v. DiFrancesco</i> , 947 A.2d 1122 (Del. 2008).....	12
<i>Donnelly v. City of Dover</i> , 2011 WL 2086160 (Del. Super. Apr. 20, 2011).....	9
<i>Dotzel v. Ashbridge</i> , 438 F.3d 320 (3d Cir. 2006).....	12
<i>Dover Historical Soc. v. City of Dover Planning Comm'n</i> , 2004 WL 1790164 (Del. Super. July 30, 2004)	9
<i>Draper King Cole v. Malave</i> , 743 A.2d 672 (Del. 1999).....	9
<i>FMC Corp. v. Special Services Dept.</i> , 2017 WL 2378002 (Del. Super. May 31, 2017).....	3
<i>Gladney v. City of Wilmington</i> , 2011 WL 6016048 (Del. Ch. Nov. 30, 2011).....	11
<i>Handloff v. City Council of Newark</i> , 2006 WL 1601098 (Del. Super. June 8, 2006), <i>aff'd sub nom.</i> <i>Handloff v. City Council of City of Newark</i> , 935 A.2d 255 (Del. 2007).....	12
<i>In re Bass</i> , 612 A.2d 157, 1992 WL 183105 (Del. July 23, 1992).....	9
<i>In re Downes</i> , 571 A.2d 786, 1989 WL 160434 (Del. Dec. 12, 1989)	8
<i>In re Matter of Gunn</i> , 122 A.3d 1292 (Del. 2015).....	<i>passim</i>
<i>In re Petition of Fridge</i> , 604 A.2d 417, 1991 WL 247811 (Del. Nov. 20, 1991).....	3, 5, 8
<i>Kent Cty. v. Citizens Against Solar Pol.</i> , 312 A.3d 634, 2024 WL 107194 (Del. Jan. 10, 2024)	7

<i>Kostyshyn v. New Castle Cty. De. Dept. of Land Use,</i> 2022 WL 3695057 (Del. Super. Aug. 22, 2022)	3, 5
<i>KZ Forever, LLC v. City of Dover City Council,</i> 2016 WL 6651413 (Del. Super. Nov. 9, 2016)	12
<i>Luby v. Town of Smyrna,</i> 2001 WL 1729121 (Del. Super. Dec. 27, 2001), <i>aff'd</i> , 801 A.2d 10 (Del. 2002).....	13
<i>Mock v. Div. of State Police, Dept. of Safety and Homeland Security,</i> 2022 WL 1744439 (Del. Ch. May 31, 2022)	11
<i>Murphy v. State,</i> 632 A.2d 1150 (Del. 1993).....	5
<i>Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.,</i> 181 F.3d 403 (3d Cir. 1999)	12
<i>Toth v. State,</i> 725 A.2d 443, 1999 WL 66556 (Del. Feb. 4, 1999).....	5
Statutes	
10 <i>Del. C.</i> § 148.....	9
10 <i>Del. C.</i> § 1902.....	1, 13
Other Authorities	
2 <i>Am. Law Zoning</i> § 14:1 (5th ed. 2024)	12
8A <i>McQuillin Mun. Corp.</i> § 25:317 (3d ed. 2024).....	12
83 <i>Am.Jur.2d, Zoning and Planning</i> § 834 (2024).....	12
<i>Land Use Planning and Development Regulation Law</i> § 5:33 (3d ed. 2023).....	11
3 <i>Rathkopf's The Law of Zoning and Planning</i> § 61:45 (4th ed. 2024)	12
3 <i>Rathkopf's The Law of Zoning and Planning</i> § 61:47 (4th ed. 2024)	11

INTRODUCTION

CASP¹ filed its complaint in the wrong court (Chancery), seeking the wrong remedy (injunctive relief), fifty-eight (58) days after the Levy Court's conditional use permit decision. After dismissal of the Court of Chancery action for lack of jurisdiction, CASP sought to transfer the action and seek the appropriate remedy at law – a petition for common law certiorari review. Relating back to the initial date of filing in the Court of Chancery, CASP's certiorari petition was filed well beyond the 30-day limitation for bringing a certiorari action (it was 28 days too late). The Superior Court found that no exceptional circumstances were present to excuse the untimely filing. Nonetheless, the Superior Court allowed the case to proceed under the theory that the transfer statute, 10 *Del. C.* § 1902 (hereafter the "Transfer Statute") granted the Court discretion to excuse CASP's otherwise untimely filing of a petition for a writ of certiorari.

Despite CASP's protestations to the contrary, the Superior Court erred and its timeliness determination should be reversed for two important reasons. First, upon finding that no exceptional circumstances exist, the Superior Court should have dismissed the case as untimely because a writ of certiorari filed later than thirty days

¹ Cross-Appellees/Appellants are herein referred to as "CASP" and their Answering Brief on cross-appeal is referred to as "AB." As only the Kent County Defendants filed a cross-appeal, Cross-Appellants are herein referred to as "Kent County" and their Opening/Answering Brief on cross-appeal is referred to as "OB."

will be excused only under exceptional circumstances.² Second, the language of the Transfer Statute does not support a reading that would breathe new life into an otherwise time-barred petition.

² *In re Matter of Gunn*, 122 A.3d 1292, 1293 (Del. 2015) (emphasis supplied, citations and quotations omitted).

ARGUMENT

I. IT WAS IMPERMISSIBLE FOR THE SUPERIOR COURT TO APPLY THE TRANSFER STATUTE AT ALL

CASP's answering brief on cross-appeal glosses over the threshold case dispositive argument – specifically that the deadline for filing a common law certiorari petition may only be excused if exceptional circumstances are found. OB 47-48. This Court has established, unequivocally, when a petition for a common law writ of certiorari must be filed.

Generally, a petition for a writ of certiorari must be filed within the time [thirty days] set for direct appeals. Delaware courts have held that a writ of certiorari filed later than thirty days will be excused only under exceptional circumstances.³

This Court has also held that a “Petitioner’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 . . .”.⁴

The Superior Court below rejected CASP’s claim that exceptional circumstances were established sufficient to excuse CASP from failing to file within

³ *Id.*; see also *In re Petition of Fridge*, 604 A.2d 417 (Table), 1991 WL 247811, at *1 (Del. Nov. 20, 1991).

⁴ *Gunn*, 122 A.3d at 1293; *Kostyshyn v. New Castle Cty. De. Dept. of Land Use*, 2022 WL 3695057, at *4 (Del. Super. Aug. 22, 2022); *FMC Corp. v. Special Services Dept.*, 2017 WL 2378002, at *4 (Del. Super. May 31, 2017). Although CASP attempts to distinguish *Gunn* as an elections case (AB 28), *Kostyshyn* and *FMC Corp.* demonstrate that its holdings apply equally in the land use context.

the 30-day period – the time for which a common law certiorari action “must be filed.”⁵ The Superior Court held:

this Court could perhaps have determined the existence of exceptional circumstances if Plaintiffs had offered more than surprise and disagreement with the *Delta Eta* ruling as its non-articulated bases. But this Court is limited to Plaintiffs’ arguments as presented. And on this record, they are insufficient. . .⁶

Plaintiffs posit that a mere finding of “appropriate circumstances” would allow the Court to exercise its discretion to excuse their delay. Even if this were the correct standard, Plaintiffs’ selected caselaw does not support their argument that this Court has such authority. . .⁷

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. And the criticism of the *Delta Eta* ruling, without a substantive basis beyond mere disagreement with it, is also insufficient.⁸

Even CASP admits that Superior Court “rejected ‘extraordinary circumstances’ as a basis to expand the time period below” (AB 24) and CASP did not appeal that determination.⁹ Indeed, filing in the wrong court and initially

⁵ *Gunn*, 122 A.3d at 1293. It is undisputed that the initial action in the Court of Chancery was filed 58 days after the Levy Court made the determination at issue. *See Citizens Against Solar Pol. v. Kent Cty.*, 2023 WL 6884688, at *6 (Del. Super. Oct. 17, 2023) (“*Citizens II*”).

⁶ *Citizens II*, at *7.

⁷ *Id.* at *8.

⁸ *Id.* at *9.

⁹ To the extent CASP attempts to challenge the Superior Court’s holding regarding exceptional circumstances (*see* AB 25), it has waived that issue because

seeking the wrong remedy (as CASP did here) is not an exceptional circumstance.¹⁰ Because the Superior Court rejected the argument that exceptional circumstances exist to excuse the untimely filing of CASP's petition for certiorari, and because "a writ of certiorari filed later than thirty days will be excused only under exceptional circumstances,"¹¹ the Superior Court's resort to the Transfer Statute was improper. OB 47-48.¹² The 30-day period for filing can only be extended if exceptional circumstances are found. Therefore, it was impermissible for the Superior Court to use the Transfer Statute to extend or alter the 30-day deadline for the filing of a

CASP did not appeal that holding or raise it in its opening brief. *See Toth v. State*, 725 A.2d 443 (Table), 1999 WL 66556, at *1 (Del. Feb. 4, 1999) (holding that where the lower court denied defendants motion for a new trial and defendant did not appeal the denial, the claim was deemed waived on appeal); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.") (cleaned up).

¹⁰ *Gunn*, 122 A.3d at 1293 (finding 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*, 2022 WL 3695057, at *3 (holding that when "Appellant initially filed an action in the wrong court and sought the wrong remedy," the "Appellant's untimely Petition for Writ of Certiorari" was dismissed.).

¹¹ *Gunn*, 122 A.3d at 1293 (emphasis supplied, citations and quotations omitted); *see also Fridge*, 1991 WL 247811, at *1.

¹² Even under the Transfer Statute, the Superior Court is required (*e.g.*, "shall") to "entertain such applications in the proceeding as conform to law and to the rules and practice of the court...". The rules and practice of the Superior Court require dismissal of common law certiorari actions filed after the 30-day period expires, unless exceptional circumstances are found – but that is not what happened here. Permissively, the Court "may" by rule or special order "provide for amendments in pleadings and for all other matters concerning the course of procedure as justice may require." Because conforming to the law and practice of the Superior Court is mandatory, the *Gunn* standard must be followed.

certiorari action.¹³ The Superior Court’s decision should be reversed on this ground alone.

¹³ The fact that CASP first filed in Chancery and waited to seek certiorari review is irrelevant to the timeliness issue. *See Delta Eta Corp. v. City of Newark*, 2023 WL 2982180, at *14 n.127 (Del. Ch. Feb. 2, 2023).

II. THE SUPERIOR COURT MISAPPLIED THE TRANSFER STATUTE AND SHOULD BE REVERSED

Even if the Court reaches the propriety of using the Transfer Statute to excuse an untimely certiorari filing, the language of the Transfer Statute does not support allowing CASP's otherwise untimely petition to proceed. No Delaware Court has applied the language as was done here – a fact which CASP fails to acknowledge in its Answering Brief.¹⁴

Nor does CASP's answering brief address the significant flaw in the Superior Court's reasoning – specifically, that if CASP had initially filed a petition for writ of certiorari review in the correct court 58 days after the Levy Court's conditional use permit decision, that petition would be time-barred because no exceptional circumstances exist to extend the thirty-day deadline. OB 51. Under the Superior Court's reasoning, however, because CASP filed in the wrong court first, and transferred the case over to the Superior Court, the Transfer Statute can be used to excuse CASP's untimely certiorari filing. But the Transfer Statute was never designed to breathe new life into time-barred claims. Kent County submits that the better and more reasoned view is that filing in the wrong court, at the wrong time,

¹⁴ As this Court previously recognized when denying interlocutory review, “[t]he Superior Court applied [the Transfer Statute] in circumstances that do not appear to have been addressed by this Court.” *Kent Cty. v. Citizens Against Solar Pol.*, 312 A.3d 634 (Table), 2024 WL 107194, at *4 (Del. Jan. 10, 2024) (“*Citizens III*”).

and seeking the wrong remedy initially cannot be rewarded.¹⁵ The Superior Court’s application of the Transfer Statute, which functionally allows the Court to extend the initial deadline *beyond* the date of actual filing in the initial court (here, the Court of Chancery), is an unreasonable result which should be rejected.¹⁶

CASP’s answering brief makes two primary arguments concerning the Transfer Statute: (1) that because “no formal statute of limitations applies to create a jurisdictional bar to review” (AB 22-23), the “time for bringing the proceeding shall be deemed the time when it was brought in the first court” language found in the Transfer Statute (the “date of initial filing rule”) is inapplicable; and (2) that the “Transfer Statute’s liberal construction grants the Superior Court discretion to expand procedural deadlines.” AB 24. Both arguments should be rejected.

First, it is true that the time limitation for filing a writ of certiorari is established by analogy to appeal deadlines.¹⁷ This Court has held “to maintain timeliness . . . a petition for a writ of certiorari must be filed within the time set for

¹⁵ See, e.g., *supra* n.10.

¹⁶ See *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).

¹⁷ *Fridge*, 1991 WL 247811, at *1 (“there is no statutorily-imposed time period in which to seek review under a writ of certiorari . . .”); see also *In re Downes*, 571 A.2d 786 (Table), 1989 WL 160434, at *2 (Del. Dec. 12, 1989) (“Although there is no statutorily-imposed time period in which to seek review under a writ of certiorari, the Superior Court has ruled that the time for seeking such review should be analogous to the period governing direct appeals.” (internal citation omitted)).

direct appeals,”¹⁸ which is 30 days. CASP’s contention that the 30-day time period for certiorari is not a common law statute of limitation is incorrect. AB 22. It is well established that the statutory time period for perfecting appeals is 30 days¹⁹ – and, by analogy, that same period is applied by the Courts to certiorari review. That is plainly a common law statute of limitations within the purview of the Transfer Statute.²⁰ Under the Transfer Statute, courts may only allow a transferred case to relate back to the initial date of filing – and not before. Nothing in the Transfer Statute allows a reviewing court to transform an untimely certiorari filing into a timely one.

CASP’s other contentions should also be rejected because “the date of initial filing rule” should apply by analogy even if it is found that the 30-day rule is not a common law statute of limitations. Whether the 30-day time limitation imposed for certiorari review is deemed an appellate period,²¹ a proscriptive period, or a common law statute of limitation, it would be unreasonable to find that the “the date of initial

¹⁸ *In re Bass*, 612 A.2d 157 (Table), 1992 WL 183105, at *1 (Del. July 23, 1992).

¹⁹ *See* 10 *Del. C.* § 148.

²⁰ *See Dover Historical Soc. v. City of Dover Planning Comm’n*, 2004 WL 1790164, at *6 (Del. Super. July 30, 2004) (calling the certiorari time limitation a “thirty day statute of limitations period.”); *see also generally Donnelly v. City of Dover*, 2011 WL 2086160, at *1 (Del. Super. Apr. 20, 2011).

²¹ *Bass*, 1992 WL 183105, at *1. Further, “[t]he timely filing of an appeal is mandatory and jurisdictional . . . [and][t]he appellate jurisdiction of a court cannot be invoked or properly exercised unless an appeal is perfected within the time period fixed by law.” *Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999).

filing rule” in the Transfer Statute is inapplicable when no exceptional circumstances are present to extend the 30-day certiorari filing deadline. It would mean that the Superior Court has unfettered discretion, in the purported interest of justice, without a showing of exceptional circumstances, to allow pleadings to relate back to *before* the initial date of filing and otherwise allow a time-barred claim to proceed.

The legislative intent of the Transfer Statute is to allow relation back to the date of the *initial filing* and not to a date *before* the date of filing. An alternative result could allow all time-barred certiorari plaintiffs to avoid dismissal simply by filing in the wrong court and thereafter requesting a transfer, further and unnecessarily burdening our Courts. The time of bringing the proceeding should be deemed to be the time when it was brought in the first court whether the Transfer Statute is applied directly or by analogy to common law certiorari proceedings.

Second, CASP contends that a change in decisional law could be extraordinary circumstances, and that the “liberally construed” language of the Transfer Statute “provide[s] a basis to excuse any default.” AB 25. Not so. As discussed above, the Superior Court held there are no exceptional circumstances present to excuse the untimely filing here. That holding ends the inquiry – the time period can be expanded only if exceptional circumstances are present.²² Moreover,

²² *Gunn*, 122 A.3d at 1293. Again, CASP chose not to appeal or brief the exceptional circumstances determination by the Superior Court. Having waived its right to appeal that determination, CASP cannot use the Transfer Statute as a back

even if the Transfer Statute’s “liberally construed” and “interest of justice” language were applicable here, the Transfer Statute should not be construed to allow pleadings to relate back to a time before the initial filing.²³

Contrary to CASP’s references to the *Middlecap* decision (AB 24), decisional law was not altered when the Court of Chancery held that it lacked jurisdiction where certiorari is an adequate remedy at law to review a quasi-judicial decision of an elected body.²⁴ Numerous hornbook authorities confirm that special or conditional use permit decisions, like the one at issue here, are quasi-judicial.²⁵ Third Circuit

door to challenge the Superior Court’s finding of no exceptional circumstances. CASP waived any right to so challenge when it failed to appeal.

²³ CASP claims that Kent County has not suffered any prejudice. AB 27. This is incorrect. The prejudice is that Kent County has been required to engage in protracted litigation and briefing, at significant expense to the taxpayers, to defend an action that was time barred under the writ of certiorari filing deadlines from the outset.

²⁴ See *Mock v. Div. of State Police, Dept. of Safety and Homeland Security*, 2022 WL 1744439, at *9 (Del. Ch. May 31, 2022) (“The existence of an adequate legal remedy is enough to divest this Court of jurisdiction, even if the plaintiff is not ultimately successful in securing that remedy.”) (internal citations omitted); see also *Gladney v. City of Wilmington*, 2011 WL 6016048, at * 5 (Del. Ch. Nov. 30, 2011) (“[A] petition for a writ of certiorari...would provide [Plaintiff] with an adequate remedy at law. Therefore, this Court lacks subject matter jurisdiction over her Complaint in this action.”); *Dieman v. Sussex Cty.*, 1982 WL 149629, at *5 (Del. Ch. Aug. 25, 1982) (granting motion to dismiss where plaintiffs had an adequate remedy at law through certiorari).

²⁵ 3 *Rathkopf’s The Law of Zoning and Planning* § 61:47 (4th ed. 2024) (“For the purpose of judicial review, many if not most courts treat the decision of a local legislative body to grant or deny a special permit as a quasi-judicial act subject to court review on questions of law and abuse of discretion and substantial evidence review of reasons and findings.”); *Land Use Planning and Development Regulation Law* § 5:33 (3d ed. 2023) (“When the legislative body decides a matter ordinarily

authority is in accord.²⁶ There are also numerous pre-*Delta Eta* Delaware decisions demonstrating that the appropriate means for challenging the quasi-judicial decision of a municipal council is through writ of certiorari in the Superior Court.²⁷ Thus,

entrusted to a zoning board, it is exercising an adjudicatory function rather than a legislative function, so a writ of certiorari to it is appropriate”); 83 Am.Jur.2d, *Zoning and Planning* § 834 (2024) (“[A] ruling on a special use permit or conditional use permit is a quasi-judicial act while a grant or denial of a special use permit is adjudicatory in nature.”); *see also* 8A *McQuillin Mun. Corp.* § 25:317 (3d ed. 2024); 2 *Am. Law. Zoning* § 14:1 (5th ed. 2024); 3 *Rathkopf’s The Law of Zoning and Planning* § 61:45 (4th ed. 2024).

²⁶ *See Dotzel v. Ashbridge*, 438 F.3d 320, 326-27 (3d Cir. 2006) (holding that when an elected Planning Board “is required by statute to consider in its deliberations the land-use standards set out in the relevant zoning ordinance, and to explain its reasoning . . . [t]his procedure is quintessentially judicial.”); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 409 (3d Cir. 1999) (holding that the grant of a special exception is a quasi-judicial act); *Church of Universal Love & Music v. Fayette Cty.*, 2008 WL 4006690, at *16 (W.D. Pa. Aug. 26, 2008) (holding that a zoning exception is a judicial act rather than a legislative determination).

²⁷ *See, e.g., KZ Forever, LLC v. City of Dover City Council*, 2016 WL 6651413, at *5 (Del. Super. Nov. 9, 2016) (granting certiorari and reversing Council’s decision for irregular proceedings below); *DiFrancesco v. Mayor & Town Council of Elsmere*, 2007 WL 1874761, at *4 (Del. Super. June 28, 2007) (granting certiorari where Council’s rejection of minor subdivision plan found to be arbitrary), *aff’d sub nom. Mayor & Town Council of Town of Elsmere v. DiFrancesco*, 947 A.2d 1122 (Del. 2008); *Handloff v. City Council of Newark*, 2006 WL 1601098, at *12 (Del. Super. June 8, 2006) (denying certiorari where Council appropriately considered all the evidence in conditionally approving Petitioner’s project), *aff’d sub nom. Handloff v. City Council of City of Newark*, 935 A.2d 255 (Del. 2007); *Cave v. New Castle Cty. Council*, 850 A.2d 1128, 1133 (Del. Super. 2003) (dismissing certiorari where evidence supported finding that Council did not violate unified development code in approving major land development plan), *aff’d*, 854 A.2d 1158 (Del. 2004); *Delta Eta Corp. v. City Council of City of Newark*, 2005 WL 1654581, at *3 (Del. Super. Apr. 29, 2005) (holding Council’s restriction on the approval of major subdivision plan exceeded its authority); *Delta Eta Corp. v. City Council, City of Newark*, 2003 WL 1342476, at *4 (Del. Super. Mar. 19, 2003) (holding Council’s

contrary to CASP's contention (AB 27, 28), for decades it has been well established that quasi-judicial acts of legislative bodies are properly reviewed by the Superior Court via certiorari – and CASP's prior counsel simply got it wrong by filing in Chancery in this case and in the *Delta Eta* case.²⁸ Because there was no change in the applicable law, an attorney's attempt to circumvent the jurisdictional rules in an effort to obtain a more favorable standard of review²⁹ cannot be a basis for excusing CASP's untimely filing of the certiorari action under any test.

CASP's reliance on *Carney v. Qualls*,³⁰ (AB 25-26) is misplaced. In *Carney*, the plaintiff timely filed his appeal from the Family Court to the Supreme Court nineteen (19) days following the court's order. However, because the proper forum for his appeal was the Superior Court, the Supreme Court dismissed the matter with leave to transfer under 10 *Del. C.* § 1902. The Superior Court required an appeal

denial of major subdivision plan was improper); *Luby v. Town of Smyrna*, 2001 WL 1729121, at *3 (Del. Super. Dec. 27, 2001) (granting summary judgment for Town in certiorari review of constitutionality of demolition ordinance), *aff'd*, 801 A.2d 10 (Del. 2002); *Calloway v. Town of Greenwood*, 1999 WL 167732, at *4 (Del. Super. Feb. 3, 1999) (dismissing certiorari proceeding where Petitioner sought review of evidentiary issues beyond the scope of certiorari); *CBS Foods v. Redd*, 1982 WL 533240, at *3-4 (Del. Super. Jan. 19, 1982) (holding that special use permit decisions are quasi-judicial and are properly reviewed via certiorari).

²⁸ Delta Eta had previously challenged actions of Newark City Council via a writ of certiorari, but prior counsel for Delta Eta (and CASP) went (improperly) to the Court of Chancery in the latest cases. See *Delta Eta Corp. v. City Council of City of Newark*, 2005 WL 1654581; *Delta Eta Corp. v. City Council, City of Newark*, 2003 WL 1342476.

²⁹ *Citizens II*, at *8.

³⁰ 514 A.2d 1126 (Del. Super. 1986).

bond but, because the appeal was filed in the wrong court – a court which did not require a bond – the bond could not have been paid within the 30-day period for taking the appeal. In order to facilitate the transfer of the appeal, the Superior Court permitted the appeal bond to be posted and the case to proceed. However, unlike the instant matter, the plaintiff in *Carney* timely filed the underlying action, and the Superior Court’s “liberal construction of the transfer statute” excused the late posting of the appeal bond, not missing the original filing deadline. CASP does not (and cannot) point to any case in which a court has accepted a transfer, and heard the case on the merits, when the initial filing date in the original court was untimely.

The Superior Court’s decision, allowing the Transfer Statute to extend the time for an untimely certiorari petition, is not supported by applicable law and should be reversed. If the Superior Court is reversed on this issue, it is case dispositive, and the remainder of the appeal is moot.

CONCLUSION

Because no exceptional circumstances were found by the Superior Court, CASP's case is time barred. CASP'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...".³¹ CASP did not appeal the Superior Court's determination that no exceptional circumstances are present and thereby waived its right to challenge it.

In addition, the Superior Court should be reversed because the Transfer Statute is not a secondary mechanism to excuse untimely certiorari filings. Moreover, the Superior Court, in a novel reading, misinterpreted the Transfer Statute by excising "the date of initial filing rule." The Superior Court's invocation and interpretation of its discretion under the Transfer Statute should be reversed, and the case should be dismissed as time barred.

³¹ *Gunn*, 122 A.3d at 1293.

CONNOLLY GALLAGHER LLP

/s/ Max B. Walton

Max B. Walton (Bar No. 3876)

Lisa R. Hatfield (Bar No. 4967)

Erica K. Sefton (Bar No. 6916)

267 East Main Street

Newark, Delaware 19711

(302) 757-7300

mwalton@connollygallagher.com

lhathfield@connollygallagher.com

esefton@connollygallagher.com

Attorneys for Kent County

*Defendants-Below, Appellees/Cross-
Appellants*

Dated: October 10, 2024