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July 15, 2024

VIA ELECTRONIC MAIL

Chairperson Kishor C. Sheth
City of Dover Board of Adjustment
Department of Planning and Inspections
15 Loockerman Plaza
Dover, DE 19901

**RE: Board of Adjustment Application #V-24-03
Historical Society of Dover (Friends of Old Dover)**

Dear Chairman Sheth:

My firm represents the City of Dover Planning and Inspections Department (the “Planning Staff” or “Planning Department”) in relation to the above-referenced appeal filed by the Historical Society of Dover (“Appellants” or “Friends of Old Dover”) before the City of Dover Board of Adjustment (the “Board”).

For the following reasons, the Board is without jurisdiction to hear the Appeal, and as a result, we respectfully request that the Board dismiss this matter. Further, even if the Board had jurisdiction to hear the appeal, the zoning advisory opinion made by the Planning Department is correct and should be affirmed.

I. The Board is without jurisdiction to hear this appeal.

The issue before the Board

The Dover Code requires an applicant to obtain an Architectural Review Certificate prior to the demolition of any structures in the Historic District.¹ Earlier this year, the Historic Review Commission denied Architectural Review Certificates for the demolition of structures located at 148 and 150 S. Bradford Street. On appeal to the Planning Commission, the Planning Commission reversed the Historic District Commission, thereby permitting the issuance of Architectural Review Certificates so the demolition of the structures could proceed.

The Appellant's motivation to appeal to the Board is its dissatisfaction with the Dover Planning Commission's decision allowing the demolition of two structures in the Historic District.

A review of the Planning Commission's June 17, 2024 meeting confirms that during the meeting my client, Principal Planner Dawn Melson-Williams, offered that Staff's interpretation is that a public hearing would not be required for the Planning Commission to decide the matter. Consistent with that advice, the Planning Commission did not conduct a public hearing and consequently, the Appellant and its membership did not have an opportunity to address the Planning Commission during the proceedings.

Appellant's view is that it has been aggrieved by my client's interpretation that a public hearing was not required and therefore this Board should adjudicate the matter. The position of my client, the Dover Planning Staff, is that it merely made an interpretation of the Code that was advisory in nature, and the Planning Commission could have elected to conduct a public hearing regardless of my client's advisory opinion that a public hearing was not required. Therefore, the Planning Staff did not make a "decision" that could be appealed to this Board. Rather, Appellant should be appealing the decision by which it may be aggrieved—the decision of the Dover Planning Commission to permit the

¹ Dover C. Appendix B, Art. 10, § 3.2.

demolition. Such review is properly conducted through a writ of certiorari proceeding before the Superior Court of Delaware—not through this appeal to the Dover Board of Adjustment. Therefore, the Board lacks jurisdiction to consider this matter.

The applicable law

The Delaware General Assembly created municipal boards of adjustment pursuant to 22 Del. C. § 321. Delaware Code permits boards of adjustment to hear appeals in certain zoning matters. 22 Del. C. § 324 provides in relevant part:

§ 324 Appeals to board.

“Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. . . .” (underlining added)

Additionally, the Board’s powers and duties are specifically promulgated under Dover Code, Appendix B, Art. 9, § 2.2, which states in relevant part:

Appeal of administrative order, requirement, decision, or determination. The [Board] shall have the authority to hear and decide appeals where it is alleged there is any order, requirement, decision or determination made by an administrative official in the enforcement of the zoning ordinance. . . . (underlining added)

In *Mishoe v. City of Dover*, the Delaware Superior Court explained that “in relevant part, the statute and the City Code provisions permit an appeal to the BOA [Board of Adjustment] by any person aggrieved by any decision of an administrative officer.”² The Court further explained that “the DPC [Dover Planning Commission] is not an administrative officer of the City of Dover. It is

² *Mishoe v. City of Dover*, C.A. No. K23A-10-001 (Del. Super. April 18, 2024) (TRANSCRIPT). (underlining added). Attached as Exhibit A.

another public body.”³ Consequently, the Board of Adjustment lacks jurisdiction to hear an appeal from a decision of the Dover Planning Commission.

Additional support for this conclusion is provided in *Mishoe v. City of Dover*.⁴ There, the Delaware Superior Court opined that *Dover Historical Society v. City of Dover Planning Commission*⁵ and *East Lake Partners v. City of Dover Planning Commission*,⁶ both implicitly hold that the Superior Court—and not the Dover Board of Adjustment—has jurisdiction to review a Dover Planning Commission decision.⁷ In *Mishoe*, the Superior Court stated that the courts in *Dover Historical Society* and *East Lake Partners* answered the jurisdictional question “nearly as definitively as if the Court had held [directly] there was no jurisdiction for the BOA to hear an appeal from Dover’s Planning Commission.”⁸ Having made that determination, the *Mishoe* Court concluded “there was no right for an appeal between the DPC [Dover Planning Commission] and the BOA [Board of Adjustment]”.⁹ The Court further noted that in *Dover Historical Society v. Dover Planning Commission*, the Delaware Supreme Court declared it to be “well established that a writ of certiorari proceeding in the Superior Court is the appropriate cause of action for determining whether, on the face of the record, the City of Dover Planning Commission exceeded its powers or failed to conform to the requirements of law.”¹⁰ Having made those observations, the *Mishoe* Court held “the BOA [Board of Adjustment] did not commit an error of law when determining it had no jurisdiction to hear the appeal.”¹¹

³ *Id.* at 6.

⁴ C.A. No. K23A-10-001 (Del. Super. April 18, 2024) (TRANSCRIPT).

⁵ 838 A.2d 1103 (Del. 2003) (holding that that “it is well established” that the proper method for review of a City of Dover Planning Commission decision is via a writ of common law certiorari).

⁶ 655 A.2d 821, 822 (Del. Super.1994).

⁷ *Mishoe v. City of Dover*, C.A. No. K23A-10-001, at 4-5 (Del. Super. April 18, 2024) (TRANSCRIPT).

⁸ *Id.* at 4: 14-17.

⁹ *Id.* at 4:21-22 (Del. Super. April 18, 2024) (TRANSCRIPT).

¹⁰ *Id.* at 5:1-8 (Del. Super. April 18, 2024) (TRANSCRIPT).

¹¹ *Mishoe v. City of Dover*, C.A. No. K23A-10-001, at *3 (Del. Super. May 14, 2024) (ORDER). Attached as Exhibit B.

Applying the law to the current case

In the current case, the Appellant has mischaracterized its appeal as an appeal of Staff’s advisory interpretation that a public hearing would not be required for the Planning Commission to decide the matter. Consistent with Planning Staff’s advice, the Planning Commission did not conduct a public hearing and consequently, the Appellant and its membership did not have an opportunity to address the Planning Commission during the proceedings.

Appellant suggests it has been aggrieved by my client’s interpretation that a public hearing was not required and therefore this Board should adjudicate the matter.

The Appellant’s motivation to appeal to the Board is its dissatisfaction with the Dover Planning Commission’s decision allowing the issuance of Architectural Review Certificates so that two structures in the Historic District could be demolished. In doing so, the Planning Commission reversed the Historic District Commission’s refusal to permit the demolition. While my client’s interpretation is a symptom of what ails the Appellant, it is not the cause because the Planning Staff never made a final determination. Appellant’s *real* concern is the Dover Planning Commission’s final decision to issue Architectural Review Certificates permitting the demolition to proceed, and *that* is the “decision” that is appealable—not my client’s mere advisory opinion delivered in open session to the Planning Commission.

As noted, the Board of Adjustment has jurisdiction to hear appeals by any person aggrieved by any decision of an administrative officer.¹² The Superior Court has concluded that “the DPC [Dover Planning Commission] is not an administrative officer of the City of Dover. It is another public body.”¹³

¹² *Mishoe v. City of Dover*, C.A. No. K23A-10-001 (Del. Super. April 18, 2024) (TRANSCRIPT). (underlining added).

¹³ *Id.* at 6.

Consequently, the Board of Adjustment lacks jurisdiction to hear Friends of Old Dover's appeal from the decision of the Dover Planning Commission.

That conclusion also makes sense from a practical perspective. If every advisory opinion of an administrative official was reviewable by the Board, the Board would be susceptible to being inundated with an incredible number of appeals, and that cannot be the intention of the General Assembly.

Conclusion

Because the Planning Commission is not an administrative officer of the City of Dover, the Board of Adjustment is without jurisdiction to hear the Friends of Old Dover's appeal. Consequently, the appeal must be dismissed by the Board of Adjustment.

I. The Planning Staff's advisory opinion was correct.

Even if the Board had jurisdiction to hear the appeal, it must be denied because the Planning staff's advisory opinion was correct.

The issue

During the June 17 meeting of the Planning Commission, Ms. Dawn Melson-Williams rendered the Planning Staff's advice concerning whether the Planning Commission should or should not conduct a public hearing. The advisory opinion suggested a public hearing was not required. The Appellant disagrees.

As explained previously, the Planning Staff's position is that such advisory opinions are not final determinations of an administrative officer, and therefore such advisory opinions are not reviewable by the Board. However, even if the Board had jurisdiction hear this appeal, the advisory opinion rendered by the Planning Staff was correct.

The applicable law

To determine if the Planning Commission was required to conduct a public hearing in this instance, it will be necessary to interpret several statutes within Dover's City Code.

“The rules of statutory construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute.”¹⁴ If a statute is unambiguous, then its plain meaning controls.¹⁵ A statute is ambiguous if “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.”¹⁶ “The [legislative body] is presumed to have inserted every provision for some useful purpose and construction.”¹⁷ It cannot be “assum[ed] that an omission was the result of an oversight on the part of the [legislative body].”¹⁸

Appendix B of the Dover City Code contains the City's Zoning Ordinance. Article 10, titled Planning Commission, has five Sections. Section 3 is titled Historic district commission and architectural review. Subsection 3.2 of Section 3, titled Architectural review certification, provides the process to obtain an architectural review certificate, which is necessary to construct or demolish a structure in the Historic District.

The most relevant Subsections of Section 3 for purposes of the current appeal are Subsection 3.23 relating to the Historic District Commission, Subsection 3.24 relating to the Planning Commission, and Subsection 3.26 relating to both the Historic District Commission and the Planning Commission. More specifically:

¹⁴ *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010).

¹⁵ *Id.*

¹⁶ *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

¹⁷ *Gen. Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988).

¹⁸ *Id.*

(A) Subsection 3.23 is titled “Architectural review certification by the *historic district commission*.”¹⁹

(B) Subsection 3.24 is titled “Architectural review certification by the *planning commission*.”²⁰

(C) Subsection 3.26 is titled “Procedures for an architectural review by *the historic district commission and/or planning commission*.”²¹

The Historic District Commission Subsection (3.23) and the Planning Commission Subsection (3.24) require compliance with Subsection 3.26—the Subsection dealing with both the Historic District Commission and the Planning Commission. More precisely, Subsection 3.23(B), pertaining to the Historic District Commission, provides that “[a]ll applications to the historic district commission for architectural review certification shall be subject to the procedures set forth in subsection 3.26.” Likewise, Subsection 3.24(B), pertaining to the Planning Commission, provides that “[a]ll applications to the historic district commission for architectural review certification shall be subject to the procedures set forth in subsection 3.26.”

Concerning the public hearing requirement of Subsection 3.26, Subsection 3.26(C) provides “*Public hearing*. Prior to the review and action on an architectural review certification, *the historic district commission* shall hold a public hearing subject to the following public notification procedures...”²²

Subsection 3.26(C)(6) provides that “If the planning commission is reviewing a project in accordance with other sections of this article, then the public hearing notice on those applications must also give notice of architectural review certification.”

¹⁹ (Italics added).

²⁰ (Italics added).

²¹ (Italics added).

²² (Italics added).

Finally, Subsection 3.23(D) of Article 10 clarifies that “[a]n applicant may appeal the decision of the historic district commission to the planning commission, and such appeal shall be considered as an architectural review certification application to the planning commission and shall meet all of the requirements set forth in subsection 3.24 and subsection 3.26.”

Applying the law to the current case

The Appellant relies upon Subsection 3.23(D), requiring the Planning Commission to comply with Subsections 3.24 and 3.26, to conclude that the Planning Commission should have been advised by Planning Staff to conduct a public hearing.

Subsection 3.24 does not contain any public hearing provisions but, as noted, does require compliance with Subsection 3.26.

Subsection 3.26 does address a public hearing requirement. That Subsection has provisions that apply to both the Historic District Commission and the Planning Commission, and others that apply solely to the Historic District Commission, and others that apply solely to the Planning Commission. While Subsection 3.26(C) creates an absolute requirement that the Historic District Commission conducts a public hearing when it considers an architectural review certificate, nothing in Subsection 3.26(C)—or any other part of the entirety of Section 3—requires that the Planning Commission conduct a public hearing when it considers an appeal from a decision of the Historic District Commission.

The plain language of Subsection 3.26(C) provides “Prior to the review and action on an architectural review certification, *the historic district commission* shall hold a public hearing. . . .”²³ The provision is completely silent as to the Planning Commission, and under the principals of statutory construction, it cannot be

²³ (Italics added).

“assum[ed] that an omission was the result of an oversight on the part of the [legislative body].”²⁴

Subsection 3.26(C)(6) could be a distraction in this analysis and will be addressed briefly. That Subsection is in reference to activity that occurs outside of Section 3 where there is a public hearing requirement and provides that “If the planning commission is reviewing a project in accordance with other sections of this article, then the public hearing notice on those applications must also give notice of architectural review certification.” Simplified, if the Planning Commission is required to conduct a public hearing by some other Section of Article 10, such as a site development plan under Section 2, and an Architectural Review Certificate is required because the project is in the Historic District, the public hearing notice must provide that the Planning Commission will also be considering the Architectural Review Certificate. That Subsection however is completely irrelevant to the immediate analysis because no Section other than Section 3 is implicated here.

Conclusion

Appellants reliance upon Subsection 3.23(D) is misplaced, as it does not require the Planning Commission to conduct a public hearing when it considers an appeal from the Historic District Commission.

* * *

For the foregoing reasons, Friends of Old Dover’s appeal must be dismissed for lack of subject matter jurisdiction. Alternatively, Friends of Old Dover’s appeal must be rejected because the advisory opinion rendered by the Planning Staff was correct.

²⁴ *Gen. Motors Corp. v. Burgess*, 545 A.2d 1186, 1191 (Del. 1988).

Baird Mandalas Brockstedt
& Federico LLC
July 15, 2024
Page 11

We look forward to the Board's consideration of this matter on Wednesday,
July 17, 2024.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Glenn C. Mandalas', with a stylized, cursive script.

Glenn C. Mandalas, Esquire

CC: Ms. Dawn Melson-Williams, AICP, Principal Planner
Nicholas H. Rodriguez, Esq.

Enclosures

- A. *Mishoe v. City of Dover*, C.A. No. K23A-10-001 (Del. Super. April 18, 2024) (TRANSCRIPT).
- B. *Mishoe v. City of Dover*, C.A. No. K23A-10-001, at *3 (Del. Super. May 14, 2024) (ORDER).

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

-----)

WILMA MISHOE and THE)
APARTMENTS AT MISHOE COVE,)
L.L.C.,) C.A. No.: K23A-10-001

Appellants/Petitioners,)

vs.)

)

CITY OF DOVER MAYOR AND)
CITY COUNCIL, CITY OF DOVER)
BOARD OF ADJUSTMENT , PATEL)
COLLEGE PROPERTIES LLC, AND)
PATEL EXCESS COLLEGE)
ROAD LLC,,)

Appellees/Respondents.)

-----)

EXCERPT OF DECISION ON THE ORAL ARGUMENT

(Transcribed from FTR Recording)

Thursday, April 18, 2023
Kent County Courthouse
Dover, Delaware 19901

BEFORE:

THE HONORABLE JEFFREY J CLARK, Judge

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

APPEARANCES:

JOHN A. SERGOVIC, JR., ESQUIRE
appearing on behalf of Appellants/Petitioners

MAX B. WALTON, ESQUIRE
appearing on behalf of Appellees/Respondents

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 Thursday, April 18, 2024
2 1:30 p.m.
3 Courtroom No. 5

4 THE COURT: All right. Good afternoon.

5 Thank you for your patience.

6 All right. I'll read my decision at this
7 point.

8 The Mishoe Petitioners are correct in that
9 the BOA, as a public body, had the obligation to
10 conduct a public vote, after the full Board
11 considered the arguments both in support of and
12 opposition to, the DPC's motion to dismiss their
13 appeal. The public vote on a revised agenda merely
14 removing the notice matter from the agenda does not
15 satisfy public meeting requirements. The full BOA
16 should have considered the Petitioners' response in
17 opposition to the motion to dismiss and then held a
18 public vote.

19 Be that as it may, the Court's charge in
20 this case is to make a *de novo* review to determine if
21 the decision constitutes legal error on the basis of
22 jurisdiction. It would do nothing to properly
23 advance litigation in this case to remand the matter,
where, in the Court's view, there was a forgone

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 conclusion.

2 At the outset, two Delaware Court decisions
3 provide clear guidance in this matter. In *East Lake*
4 *Partners v. City of Dover Planning Commission*, the
5 Superior Court examined the decisions of the DPC for
6 legal error while specifically holding that the Court
7 had jurisdiction to review the DPC's actions pursuant
8 to common law writ of certiorari. While the Superior
9 Court did not granularly examine whether there was an
10 appeal right from the DPC's decision to Dover's Board
11 of Adjustment, the Superior Court's recognition that
12 it had jurisdiction to consider DPC's decision
13 regarding a site plan, and, in fact, its reversal of
14 that decision, answers the question nearly as
15 definitively as if the Court had held there was no
16 jurisdiction for the BOA to hear an appeal from
17 Dover's Planning Commission.

18 Namely, for the Superior Court to have
19 examined the matter pursuant to an extraordinary
20 writ, one of certiorari, it impliedly -- in addition
21 to impliedly, necessarily concluded that there was no
22 right for an appeal between the DPC and the BOA.

23 Likewise, the Delaware Supreme Court

1 observed in *Dover Historical Society v. City of Dover*
2 *Planning Commission* that -- and I quote, "It is well
3 established that a writ of certiorari proceeding in
4 the Superior Court is the appropriate cause of action
5 for determining whether, on the face of the record,
6 the City of Dover Planning Commission exceeded its
7 powers or failed to conform to the requirements of
8 law."

9 The Supreme Court decision in *Dover*
10 *Historical* together with the *East Lake Partners*
11 decision it cites and relies upon, again, while not
12 granularly deciding the issue presented by the Mishoe
13 Petitioners, involve the only two identified
14 decisions examining Dover Planning Commission
15 decisions. The Court examined both of those
16 decisions involving the same Delaware and City Code
17 provisions at issue under a mechanism that first
18 require there to be no right to appeal a DPC site
19 plan decision to the BOA. Again, that's both Courts
20 examined -- both of those decisions did examine the
21 same Delaware City Code provisions that are still in
22 effect.

23 Setting aside the guidance provided by those

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 two decisions, examining the BOA's statutory
2 jurisdiction provides for the same result. The BOA's
3 jurisdiction to hear an appeal is controlled by
4 statute, 22 Del.C. § 324, and Section 2.2 of Article
5 9 of the Dover City Code. In relevant part, the
6 statute and the City Code provisions permit an appeal
7 to the BOA by any person aggrieved by any decision of
8 an administrative officer.

9 Here, the DPC is not an administrative
10 officer of the City of Dover. It is another public
11 body. The common ordinary definition of officer and
12 official both denote a single person, not a group of
13 individuals assembled for decision-making purposes.
14 Granted, the singular to plural and plural to
15 singular referenced in Dover's City Code emphasized
16 by the Petitioners raises a reasonable point. To
17 rely upon that provision to recognize a right to
18 appeal a DPC discussion, however, would require the
19 Court to ignore that in every location throughout
20 Section 324 of Title 22 of the Delaware Code and
21 Section 2.2 of Article 9 of the Dover City Code where
22 there is a reference to administrative officer or
23 officials, there is the article "an" or "the." Both

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 denote clear legislative direction to apply the
2 signature which takes that catch-all provision out of
3 the equation.

4 Furthermore, if the singular vs. plural
5 argument were sufficient to get the Petitioners over
6 the hurdle by inserting the word "officers" or
7 "officials," that's in the plural sense, the result
8 is no different when progressing further into the
9 canons of statutory construction. Namely, elsewhere
10 within Section 324, and the corresponding City Code
11 section, the General Assembly and City Council
12 demonstrated their intent to consider officers or
13 officials pursuant to their common ordinary meaning,
14 but distinguishing them by distinguishing them from
15 departments, boards, or bureaus of the City.

16 As a result, the Court finds Mishoe
17 Petitioners' argument that they can appeal the
18 Planning Commission's decision because it as a body
19 is an administrative officer, that the Court finds
20 that unpersuasive based upon the clear language in
21 Section 324 Title 22.

22 Accordingly, although the full BOA should
23 have considered the matter and voted on it publicly,

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 in a manner other than by simply proving it's being
2 dropped off the agenda, the action taken attributed
3 to BOA through its Chairman was legally correct. An
4 administrative agency has no power to hear an appeal
5 absent a legislative enactment that grants it the
6 right to do so.

7 In this case, it would serve no purpose to
8 remand the matter where the result is a *fait*
9 *accompli*. While the BOA did not make a decision on
10 jurisdiction below, the result was, nevertheless,
11 correct on jurisdictional grounds. For that reason,
12 the Petitioners' appeal must be dismissed.

13 The Court would prefer in a case like this
14 to provide a decision such as this in writing and
15 normally would. Based on interested parties' health
16 concerns, some delay in bringing the matter to an
17 argument, and the Court's other commitments, the
18 Court provides the reasoning for its decision today
19 orally and hopes that it will help the parties.

20 Given the Court's conclusion that the BOA
21 was without jurisdiction to hear a DPC appeal, the
22 Court encourages the Petitioners to confer with the
23 parties in the other pending litigation to set the

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

1 remaining matters on an appropriate track for
2 decision.

3 If after the Petitioners confer with the
4 other parties and the parties cannot agree through
5 the filing of a stipulation or other mechanism
6 confirming their joint preference regarding the next
7 steps, the Mishoe Petitioners should write the Court
8 for an office conference so the Court can consider
9 everyone's positions about what comes next in this
10 multi-aspect litigation.

11 So, with that, thank you. The arguments
12 from both sides were helpful. The briefing was very
13 good on both sides. I appreciate it.

14 I hope everybody has a good rest of the day.
15 And thank you for --

16 MR. WALTON: Your Honor, do you need an
17 order from the parties or would you prefer --

18 THE COURT: Well, let the Court take care of
19 it. It's a one-line order.

20 Court's in recess.

21 (Whereupon, the proceedings in the
22 above-entitled matter were concluded.)
23

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

C E R T I F I C A T E

I, CHANDRA D. KING, an Official Court Reporter of the Superior Court of the State of Delaware, do hereby certify that the above and foregoing pages 1 to 10, to be a true and accurate transcript of the For the Record (FTR) electronically recorded proceeding therein indicated on April 18, 2024, as was stenographically reported by me and reduced to computer-aided transcript to the best of my ability, as the same remains of record in the Office of the Prothonotary in Kent County Courthouse, Dover, Delaware.

This certification shall be considered null and void if this transcript is disassembled or disseminated in any manner by any party without express authorization of the signatory below.

/s/ Chandra D. King
Chandra D. King, RPR

April 24, 2024
Date

CHANDRA D. KING, RPR
CHIEF COURT REPORTER

EXHIBIT B

1. Petitioners move for reargument regarding the Court’s decision to uphold the decision of the Dover Board of Adjustment (“BOA”). The BOA had summarily dismissed Petitioners attempt to appeal a decision by the Dover Planning Commission (“DPC”) to the BOA. In Petitioners’ motion, they contend that the Court misinterpreted the law on two bases. First, they maintain that the Court should disregard the Delaware Supreme Court’s recognition that a petition for a writ of certiorari in the Superior Court is *the proper mechanism* to challenge a DPC

decision.¹ To that end, they contend that the availability of certiorari review of a DPC decision by the Superior Court does not, by controlling implication, foreclose the availability of a Dover-internal administrative appeal from the DPC to the BOA. Second, the Petitioners repeat their argument that 22 *Del. C.* §324 (“Section 324”) and Article 9, §2.2 of the Dover City Code provided them a direct right of appeal from the DPC to the BOA.

2. In a Superior Court Civil Rule 59(e) motion for reargument, the movant must demonstrate that the Court has overlooked controlling precedent or a legal principle, or misapprehended the law or facts such as would have changed the underlying decision.² A motion for reargument is not intended to be a mechanism to permit a litigant to restate the same arguments that the Court already addressed and denied.

3. Here, the Petitioners provide no additional arguments or support for their position that the BOA should have entertained their appeal. In the Court’s bench decision, it explained in detail why the BOA’s decision to dismiss their appeal based upon lack of jurisdiction was the correct one under a *de novo* review.³ Namely, the Court explained that it has jurisdiction to hear an administrative appeal only when expressly authorized to do so by the General Assembly.⁴ Similarly, absent statutory, municipal charter, or municipal code authorization, there is no right to internally appeal a decision by one administrative agency to a higher administrative agency. The Petitioners (1) arguments seeking to distinguish the

¹ See *Dover Historical Society v. City of Dover Planning Commission*, 838 A.2d 1103, 1106 (Del. 2003) (recognizing that “[i]t is well established that a writ of certiorari proceeding in the Superior Court is the appropriate cause of action for determining whether, on the face of the record, the City of Dover Planning Commission exceeded its powers or failed to conform to the requirements of law”).

² *Kennedy v. Invacare Corp.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006).

³ D.I. 42.

⁴ *Schafer v. Kent County Department of Planning Services*, 2023 WL 3750390, at *3 (Del. Super. May 31, 2023).

Delaware Supreme Court authority that recognizes that the only right to challenge a DPC decision is by certiorari to the Superior Court, and their (2) contentions that Section 324 or Article 9, §2.2 of the Dover Code grant them the right to a direct appeal from the DPC to the BOA are unavailing. Under controlling statutory and decisional law, the Petitioners had no right to appeal an adverse decision of the DPC to the BOA for the reasons explained on the record on April 18, 2024.⁵

4. As a final note, the Petitioners have separately filed a corresponding petition for writ of certiorari in the Superior Court to challenge the DPC's decision.⁶ The parties in this current action, the parties in the certiorari action, and the parties in a third related action jointly requested the Court to first resolve this appeal. In summary, there is no statutory or municipal Code created right of appeal from the DPC to the BOA. The BOA did not commit an error of law when determining it had no jurisdiction to hear the appeal. As a result, the Court will set oral argument on the pending motion to dismiss the Petitioner's request for a writ of certiorari as soon as practical.

WHEREFORE, for the aforementioned reasons, Petitioners Wilma Mishoe, and the Apartments at Mishoe Cove, L.L.C.'s, motion for reargument is **DENIED**.

IT IS SO ORDERED.

/s/ Jeffrey J Clark
Resident Judge

cc: Counsel of Record

Counsel of Record in C.A. No. K23A-07-002 JJC (Via File & Serve)

Counsel of Record in C.A. No. K23C-12-014 JJC (Via File & Serve)

⁵ D.I. 42.

⁶ *Mishoe, et al. v. City of Dover Planning Com'n, et al.*, C.A. No. 23A-07-002 (Del. Super.).