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August 30, 2023

RECEIVED

SEP 5 2023

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL

(CompPlan@dover.de)
Chairperson Kishor C. Sheth
Department of Planning and Community Development
15 Loockerman Plaza
Dover, DE 19901

CITY OF DOVER
PLANNING & INSPECTIONS

Re: Board of Adjustment Application Submitted July 19, 2023, relating to an appeal of Planning Commission Approval of Site Development Plan S-23-06

Dear Chairperson Sheth:

I respectfully disagree with Mr. Mandalas' assessment that the Board of Adjustment (hereinafter the "Board") lacks jurisdiction to hear Dr. Mishoe and the Apartments at Mishoe Cove's (hereinafter the "Mishoes") appeal of the approval of Development Plan S-23-06 (hereinafter the "Plan"). Please find Mr. Mandalas' August 16, 2023 letter attached as **Exhibit "A"**. The Board has the ability to hear and decide appeals where it is alleged by the appellant there is an error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning regulations. Dover Code, Appendix B, Art. 9, § 2.2. When the City of Dover Planning Commission (hereinafter the "Planning Commission") acts on a site plan, it acts not in a legislative capacity, but in a partial ministerial and partial quasi-judicial capacity. *East Lake Partners v. City of Dover Planning Com'n*, 655 A.2d

821, 825 (1994). Since the Planning Commission acts in a ministerial capacity, it qualifies as an administrative official within the purview of Dover Code, Appendix B, Art. 9, § 2.2.

Mr. Mandalas further argues that the decision made by the Planning Commission did not involve a zoning matter. Mr. Mandalas cites *Deibler v. Sea Gate Village*, to claim that a site plan decision is not akin to the adoption of a zoning ordinance. Mr. Mandalas' citation to *Deibler* is in reference to the plaintiff in that matter's argument that a majority of Commissioners was needed to approve a site plan. *Deibler v. Sea Gate Village*, LEXIS 493, at *6-7 (Del. Ch. Aug. 24, 1983). The Chancery Court noted that the town charter required the majority of all elected Commissioners to enact an ordinance and the plaintiff's argument was therefore predicated on a holding that a site plan approval had to be accomplished by ordinance. *Id.* at *7. The Chancery Court reasoned that a site plan approval was not akin to the adoption of an ordinance. *Id.*

The approval of the Plan in this matter is not akin to the adoption of a zoning ordinance, as the adoption of a zoning ordinance is a legislative act. If it were such a legislative act, then the Board would have no jurisdiction in this matter. However, the Board is an appointed agency of a legislative body and is empowered to hear and decide any appeal in which an error is alleged in any decision made in the enforcement of zoning regulations. The role of the Commission is to ensure site plans meet all criteria of the zoning ordinance and the Planning Commission must:

“[R]eview site development plans and require changes and conditions so that the end result, to the maximum extent possible, will achieve the general intent of the zoning ordinance which is in part “to provide for the orderly and desirable development and use of land” and to accomplish the specified six objectives, all of which involve on-site considerations.”

East Lake Partners v. City of Dover Planning Com'n, 655 A.2d 821, 824 (1994).

Such objectives include that when the Planning Commission considers acting upon a site development plan, it shall consider the “public health, safety and welfare, the comfort and convenience of the public in general and of the residents of the immediate neighborhood in particular.” Dover Code, Appendix B, Art. 10, § 2.2. The welfare of the residents in the immediate neighborhood would certainly be negatively impacted if the property owners in that neighborhood were to have their property rights infringed upon.

Furthermore, the Board shall not decide any appeal without first holding a public hearing. Dover Code, Appendix B, Art. 10, § 3.1. The provisions of the ordinance relating to the Board are strictly construed and an appellant shall not be denied the right to an appeal when they have substantially complied with the procedural requirements set forth in the ordinance. Dover Code, Appendix B, Art. 10, § 3.7. In order to avoid incurring advertising fees, as suggested by Mr. Mandalas, the Board would risk depriving the Mishoes of their due process rights, subsequently putting the City of Dover at risk of legal action from the Mishoes. Please find Mr. Mandalas’ August 29, 2023 email attached as **Exhibit “B”**. Such actions the Mishoes may be entitled to take include a subsequent appeal, request for a writ of mandamus, and a claim for the violation of the Mishoes’ civil rights.

The Mishoes also assert that they are entitled to a hearing before the Board itself, and a decision may not be unilaterally made by the chairperson of the Board, as Nick Rodriguez seemed to imply. Please find Mr. Rodriguez’s August 29, 2023 email attached as **Exhibit “C”**. Dover Code, Appendix B, Art. 10, § 3 does not provide that the chairperson or any Board member may unilaterally decide jurisdiction over an appeal. The

Mishoes assert that any unilateral action by the chairman of the Board is an *ultra vires* act and deprives them of their due process rights to a hearing before the Board under 22 Del. C. § 324 and Dover Code, Appendix B, Art. 10, § 3.1.

Additionally, the Mishoes question the involvement of Mr. Rodriguez. The challenge issued by the Mishoes is based upon conclusions reached by Mr. Rodriguez which are erroneous. The Planning Commission was advised by Mr. Rodriguez that the annexation of Raymond/Jason Street did not require the vote of the affected landowners. Such a position is contrary to Delaware law.

For the foregoing reasons, the Board has jurisdiction over the Mishoes' appeal of the Plan. Please contact me with any questions you may have.

Very truly yours,

/s/ John A. Sergovic, Jr., Esq.
John A. Sergovic, Jr., Esquire

JAS/tjf

cc: Mary Ellen Gray (via email/mgray@doover.de.us)
Nicholas H. Rodriguez, Esq. (via email/nrodriguez@schmittrod.com)
Nicholas G. Kondraschow, Esq. (via email/nick@rawlaw.com)
Glenn C. Mandalas, Esq. (via email/glenn@bmbde.com)
Brian T. Riggin, Esq. (via email/brian@parkway-law.com)
Dominic J. Balasico, Esq. (via email/dominic@parkway-law.com)
Dr. Wilma Mishoe (via email)
The Apartments at Mishoe Cove (via email)

EXHIBIT “A”



Glenn C. Mandalas, Esquire
(302) 645-2262
Glenn@bmbde.com

August 16, 2023

VIA ELECTRONIC MAIL & CERTIFIED MAIL

Chairperson Kishor C. Sheth
City of Dover Board of Adjustment
Department of Planning and Community Development
15 Loockerman Plaza
Dover, DE 19901
CompPlan@dover.de.us

**RE: Board of Adjustment Application Submitted July 19, 2023, relating to an
appeal of Planning Commission Approval of Site Development Plan S-23-06**

Dear Chairman Sheth:

My firm represents the City of Dover Planning Commission (the "Commission") in relation to the Commission's decision regarding Site Development Plan S-23-06. I am writing in response to the appeal to the City of Dover Board of Adjustment (the "Board") filed by Dr. Wilma Mishoe and the Apartments at Mishoe Cove, LLC (the "Appellants") contesting the Commission's approval of Site Development Plan S-23-06 (the "Appeal"). For the following reasons, the Board is clearly without jurisdiction to hear the Appeal, and as a result, we respectfully request that the Board dismiss this matter.

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. . . ."

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

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DOVER, DE | LEWES, DE | GEORGETOWN, DE | WILMINGTON, DE | BALTIMORE, MD

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. . . .

Here, Appellants rely upon Dover Code, Appendix B, Art. 9, § 2.2 for the contention that the Board has jurisdiction to hear the Appeal of the Commission. However, a site plan decision by the Planning Commission clearly is not a determination made by an administrative official. As a result, § 2.2 does not vest the Board with power to hear the Appeal.

Further, the decision being appealed is a site plan decision, which does not constitute zoning. *see Deibler v. Sea Gate Village*, 1983 WL 142507, at *3 (Del. Ch. Aug. 24, 1983) (holding in part that site plan approval is not akin to adoption of a zoning ordinance). Since the matter being appealed is not a zoning determination, the Board cannot hear it. *See Friends of Paladin v. New Castle Cnty. Bd. of Adjustment*, 931 A.2d 436 (Del. 2007).

“It 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.” *Dover Hist. Soc. v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1106 (Del. 2003). The Board has no authority under state law or the City Code to hear an appeal of a decision of a site plan decision by the Commission. As a result, we respectfully request that the Board summarily dismiss the Appeal.

Thank you for your time and consideration. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Glenn C. Mandalas, Esq.
Glenn C. Mandalas, Esquire

Enclosure

CC: Mary Ellen Gray
Nicholas H. Rodriguez, Esq.
Nicholas G. Kondraschow, Esq.
John A. Sergovic, Jr., Esq.
Tyler Friedman, Esq.
Dominic J. Balascio, Esq.
Brian T. Riffin, Esq.

EXHIBIT “B”

John Sergovic

From: Glenn Mandalas <glenn@bmbde.com>
Sent: Tuesday, August 29, 2023 10:28 AM
To: 'Nicholas Rodriguez'
Cc: John Sergovic; Tyler Friedman; Brian Riffin; Dominic Balascio; Alexander C. Burns; Nicholas Kondraschow
Subject: RE: Mishoe BOA Appeal (Site Development Plan S-23-06)
Attachments: Dover BOA Letter re Site Plan Appeal.pdf

Nick –

I am writing to follow up on the attached correspondence sent a couple weeks ago. In the correspondence we explain why the Board of Adjustment is without authority or jurisdiction to hear and decide the Mishoe appeal. The City will soon incur advertising costs for the BOA meeting if it is not rejected by Board Chairman Sheth. For the reasons identified in our correspondence, we encourage you to advise the Board Chairman that the Board is without the authority or jurisdiction to hear the appeal and that it should be rejected promptly without convening the Board.

Thanks --
Glenn

From: Glenn Mandalas
Sent: Wednesday, August 16, 2023 12:22 AM
To: 'Nicholas Rodriguez' <nrodriguez@schmittrod.com>
Cc: John Sergovic <john@sussexattorney.com>; Tyler Friedman <tyler@sussexattorney.com>; Brian Riffin <Brian@parkway-law.com>; Dominic Balascio <Dominic@parkway-law.com>; Alexander C. Burns <Alex@bmbfclaw.com>; Nicholas Kondraschow <nick@rawlaw.com>
Subject: Mishoe BOA Appeal (Site Development Plan S-23-06)

Nick—

Please see the attached correspondence.

Thanks—
Glenn



BAIRD
MANDAL
BROCKSTEDT
& FEDERICO, LLC

Glenn C. Mandalas
Partner

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EXHIBIT “C”

John Sergovic

From: Nicholas Rodriguez <nrodriguez@schmittrod.com>
Sent: Tuesday, August 29, 2023 1:15 PM
To: Glenn Mandalas
Cc: John Sergovic; Tyler Friedman; Brian Riffin; Dominic Balascio; Alexander C. Burns; Nicholas Kondraschow
Subject: Re: Mishoe BOA Appeal (Site Development Plan S-23-06)

Glenn, I will dictate a decision for K.C. Sheth to sign.

On Aug 29, 2023, at 10:28 AM, Glenn Mandalas <glenn@bmbde.com> wrote:

Nick –

I am writing to follow up on the attached correspondence sent a couple weeks ago. In the correspondence we explain why the Board of Adjustment is without authority or jurisdiction to hear and decide the Mishoe appeal. The City will soon incur advertising costs for the BOA meeting if it is not rejected by Board Chairman Sheth. For the reasons identified in our correspondence, we encourage you to advise the Board Chairman that the Board is without the authority or jurisdiction to hear the appeal and that it should be rejected promptly without convening the Board.

Thanks --
Glenn

From: Glenn Mandalas
Sent: Wednesday, August 16, 2023 12:22 AM
To: 'Nicholas Rodriguez' <nrodriguez@schmittrod.com>
Cc: John Sergovic <john@sussexattorney.com>; Tyler Friedman <tyler@sussexattorney.com>; Brian Riffin <Brian@parkway-law.com>; Dominic Balascio <Dominic@parkway-law.com>; Alexander C. Burns <Alex@bmbfclaw.com>; Nicholas Kondraschow <nick@rawlaw.com>
Subject: Mishoe BOA Appeal (Site Development Plan S-23-06)

Nick—

Please see the attached correspondence.

Thanks—
Glenn

<image001.jpg>

Glenn C. Mandalas
Partner

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<Dover BOA Letter re Site Plan Appeal.pdf>

Nicholas Rodriguez
nrodriguez@schmittrod.com