

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

HENRY BLACK, MARY LOU BLACK, :
BLACKBALL PROPERTIES, LLC, :

Petitioners, :

v. :

C.A. No. N13A-08-012 FSS

NEW CASTLE COUNTY BOARD OF :
LICENSE, INSPECTION AND REVIEW :
NEW CASTLE COUNTY DEPARTMENT :
OF LAND USE, a department of the New :
Castle County government, and GARY :
STAFFIERI and ADRIA CHARLES :
STAFFIERI, :

CERTIORARI
NON-ARBITRATION CASE

Respondents. :

PETITIONERS' OPENING BRIEF

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STATEMENT OF NATURE OF PROCEEDINGS

This action was initiated pursuant to the filing of a Complaint *In Certiorari* on August 22, 2013 (“Complaint”). The Petitioners are: 1) Henry and Mary Lou Black, husband and wife (the “Blacks”), who own a commercially developed parcel at 1709 Concord Pike; and 2) Blackball Properties, LLC (“Blackball”), a Delaware limited liability company that owns a commercial building and land known as 1703 Concord Pike.

The Complaint challenges a July 23, 2013 decision (“Decision”) rendered by Respondent New Castle County Board of License, Inspection, and Review (“Board”). The Decision affirmed the issuance of a Change of Use Permit by Respondent New Castle County Department of Land Use (“Department”) to Respondents Gary Staffieri and Adria Charles Staffieri (the “Staffieris”), which enabled them to utilize property they own at 1707 Concord Pike to operate an auto detailing business.

On October 11, 2013, an Amended Complaint *In Certiorari* was filed by the Blacks and Blackball. The Court entered an Order granting a Writ of *Certiorari* on October 23, 2013. And the Board handed up the Record on appeal on January 17, 2014.

On March 20, 2014, the Court notified the parties of the briefing schedule for presentation of this *Certiorari* appeal. Pursuant to a subsequent Order of the Court, the briefing schedule was extended. This is the Opening Brief of the Blacks and Blackball.

STATEMENT OF FACTS

A. The Parties

Petitioners Henry Black and Mary Lou Black, husband and wife (the “Blacks”), are New Castle County, Delaware residents who own commercial real estate known as 1709 Concord Pike. VC at para. 1. and Record Tab 1 (R1).¹ Petitioner Blackball Properties, LLC (“Blackball”) is a Delaware limited liability company that owns the land and building designated as 1703 Concord Pike in New Castle County, Delaware. VC at para 2. and Record Tab 2 at Exhibit 11 (R120).

Respondent New Castle County Board of License, Inspection And Review (“Board”) is a Board of the New Castle County government created and empowered by 9 *Del. C.* § 1315 and §§ 2.05.103, 2.05.105, 6.11.003, and 12.08.006 of the New Castle County Code (“Code”). VC at para. 3. Respondent New Castle County Department of Land Use (“Department”) is an agency of the New Castle County (“County”) government created pursuant to the provisions of 9 *Del. C.* § 1301 and Code § 2.05.101. *Id.* at para. 4.

Respondents Gary Staffieri and Adria Charles Staffieri (the “Staffieris”), husband and wife, are the owners of property on which they operate a business, 202 Auto Spa, at 1707 Concord Pike, Wilmington, New Castle County, Delaware (the “Property”). VC at para. 5. and Record Tab 1 (R8-11). They live in Wallingford, Pennsylvania. Record Tab 1 (R6-8)

¹ References herein to: 1) “VC at para. __” are to the paragraphs of the Verified Complaint *In Certiorari*; 2) “Record Tab __” are to the Certified Record filed with the Court on January 17, 2014; and 3) “R__” are to the Bates Stamp page numbers on the bottom of the Record pages.

B. The First Change Of Use Application, Permit, Appeal, And Board Reversal

On August 16, 2011, the Department issued a Violation Notice to the Staffieris for, *inter alia*, lack of a Change of Use Permit in accordance with the Code (“Code”). VC Ex. A.² On September 15, 2011, the Staffieris filed an application with the Department for issuance of a Change of Use Permit (the “1st Application”) in order to remedy the Code violation. VC Ex. B.

The County denied the 1st Application on the grounds that the Property did not have the necessary four (4) parking spaces required by the Code for the new auto detailing/light auto service use proposed. Record Tab 2 at Ex. 12. (R132-33) and Ex. 13 (R137-38). The Staffieris proposed change in use from an office to a light auto service facility increased the minimum parking requirements from 3 to 4 under the Code. *Id.* And the Property did not have 4 Code compliant off-street parking spaces. *Id.*

The Staffieris begged the County Executive to get the Department to change its mind, but the County Solicitor ultimately advised them that the lack of the required four (4) off-street parking spaces prohibited the County from approving the 1st Application. VC Ex. C. Somehow, the Staffieris were ultimately able to convince the Department to change its position on the 1st Application; on July 27, 2012 a Change of Use Permit was issued by the Department to the Staffieris (the “1st Permit”). VC Ex. D. The Department’s theory was that despite the lack of more than one (1) Code compliant off-street parking space on the Property: 1) the Property was purportedly “grandfathered” for three (3) parking spaces based on its prior office use; and 2) a service bay inside the building on the Property could allegedly be counted as an additional, fourth parking space. VC at para. 13

² References to “VC Ex. __” are to the exhibits attached to the Verified Complaint *In Certiorari*.

The Blacks and Blackball appealed the Department's issuance of the 1st Permit to the Board (the "1st Appeal"). VC Ex. E. At the conclusion of the Board's hearing on the 1st Appeal, conducted on April 16, 2013, the Board reversed the Department's decision to issue the 1st Permit. VC Ex. F. The Board's written decision effectively revoking the 1st Permit was issued on May 9, 2013 (the "1st Board Decision"). *Id.*

C. The Second Change Of Use Permit, Appeal, And Board Decision

1. General Appeal Procedure & Points

On May 15, 2013, just 6 days after the 1st Board Decision, the Staffieris filed a new application for a Change of Use Permit in an effort to legalize the use of the Property for light auto service (*i.e.* auto detailing). VC Ex. G and Record Tab 1 (R6-7). And the Department quickly granted the Application (the "2nd Permit"). *Id.*

On May 23, 2013, the Blacks and Blackball appealed the Department's decision to issue the 2nd Permit to the Board (the "2nd Appeal"). VC Ex. H and Record Tab 1 (R1). A hearing on the 2nd Appeal was held by the Board on July 8, 2013 (the "2nd Hearing"). Record Tab 4. The Blacks and Blackball presented evidence and argument in support of their bases for appeal: 1) lack of 4 parking spaces, to-wit: only 1 space was on 1707 and no spaces on 1701-1705 Concord Pike could be counted toward the 4 space minimum; and 2) contravention of Code provisions regarding drainage. *Id.*

2. Specific Supporting Facts & Legal Argument On § 40.22.611K. Non-Compliance

In their appeal of the 2nd Permit, the Blacks and Blackball argued, *inter alia*, that 1707 could not meet the parking requirements of Code Chapter 40, the Unified Development Code ("UDC"), for operation of an auto detailing business which constitutes a legal prerequisite under Code §6.03.019B. Record Tab 1 (R1-2). Specifically, they argued the 1707 lacked the required

4 off-street parking spaces, only having 1 UDC compliant space. *Id.* In addition, they argued that 1707's right to park on the adjacent properties identified as 1701 through 1705 Concord Pike (the "Triplex Properties") could not provide the necessary 3 additional off-street parking spaces since "shared parking" was not available pursuant to UDC § 40.22.611K. *Id.* In reality, the 7 spaces striped on the Triplex Properties were inadequate to accommodate the three first floor commercial uses and three second story residential apartment units located in the buildings. *Id.*

In support of their appeal, the Blacks and Blackball submitted a set of exhibits at the 2nd Hearing. Record Tab 2. Exhibit 7 of this compilation was a survey of 1707 which superimposed the UDC required 9-foot wide by 18-foot deep off-street parking stall sizes in order to prove that only 1 legally sufficient space could be provided on 1707. *Id.* Exhibit 10 showed the 7 striped off-street parking spaces located on the Triplex Properties. *Id.* And Exhibits 12 and 13 included emails which confirmed the Department's prior denial of a Change of Use Permit for 1707 to be used as an auto detailing operation on the grounds that it lacked the required 4 parking spaces. *Id.*

At the 2nd Hearing, counsel for the Blacks and Blackball presented documentary evidence and an explanation of the purpose and context for the exhibits. Record Tab 4 at pp.5-14 (R147-56). Included in this explanation were the facts that: 1) 1707 could only accommodate 1 UDC compliant parking stall; 2) the need for about 20 parking spaces to legally accommodate the tenants and users of the buildings located on the Triplex Properties; 3) the lack of any analysis by the Department establishing that sufficient parking existed on the Triplex Properties to permit even 1 parking space to be allocated to 1707 under UDC § 40.22.611K.; and 4) the resulting lack of the 4 UDC compliant off-street parking spaces to support the issuance of the 2nd Permit. Record at Tab 4, pp. 8-12 (R150-56).

Additionally, testimony was presented by Raymond Buchta, one of the owners of Blackball. He testified that there is no ability to park in the rear of the Triplex Properties as a practical matter. Record Tab 4 at 32-33. There are no striped parking spaces and the rear of the property is used for loading/unloading which prevents vehicular parking due to maneuverability and circulation flow needs. *Id.* Additional evidence was presented regarding other physical impediments to parking behind the 3 buildings on the Triplex Properties: fire escapes, basement doors, and other protrusions which would physically bar parking vehicles close to the building. *Id.* at 55-56. And it was pointed out that even if one could park 3 or 4 vehicles in the rear, the requisite number of parking spaces required for the Triplex Properties would not be met, thereby precluding attribution of any spaces to 1707's use under UDC § 40.22.611K. *Id.*

D. The Board Ignored The UDC § 40.22.611K. Issue & Conclusorilly Affirmed

At the conclusion of the 2nd Hearing, the Board voted to uphold the Department's decision to issue the 2nd Permit. Record Tab 5. A written decision was issued by the Board on July 23, 2013 (the "2nd Decision"). Record Tab 5 and VC Ex. I. In it, the Board failed to articulate any basis for concluding that the 2nd Permit did not contravene UDC § 40.22.611K. Record Tab 4 at pp.70-73. Indeed, the Board merely concluded that the existence of a private easement right for 1707 to park on the Triplex Properties *ipso facto* established that off-street parking spaces existed for 1707's auto detailing business use. *Id.*

The 2nd Decision did not evaluate or decide the § 40.22.611K. legal argument presented by the Blacks and Blackball. Record Tab 5. Instead, it simply concluded that 1707's Court-established easement right to park on the Triplex Properties, standing alone, established the existence of sufficient parking to meet the UDC standard. *Id.* The Board erroneously failed to engage in any analysis or evaluation of § 40.22.611K.

STATEMENT OF QUESTIONS INVOLVED

- I. Whether The Board Addressed The UDC § 40.22.611K. Issue And Provided Adequate Reasons For Decision To Permit Judicial Review?

- II. Whether the Board Committed Legal Error By Failing To Properly Interpret And Apply UDC § 40.22.611K. Where No Evidence Supported A Finding That The Triplex Properties' Uses Had Sufficient Parking To Allocate Any "Extra" Spaces For 1707 To Show That 3 Spots Would Be Available For It?

ARGUMENT

The standard of review in this common law *Certiorari* action is to generally review the record for errors that appear therein. *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830, *2 (Del., Dec. 16, 2004)(Order); *domus GCK, JV/LLC v. New Castle County Dept. of Land Use*, 2010 WL 1427357, *1, Brady, J. (Del. Super., April 7, 2010). More specifically, the Court's review focuses on three issues: 1) whether the Board exceeded its jurisdiction; 2) whether the Board committed errors of law; and 3) whether the Board proceeded irregularly. *Maddrey v. Justice Of The Peace Court 13*, 956 A.2d 1204, 1213-14 (Del. 2008). The standard of review is not substantial evidence. *Christiana Town Center, LLC v. New Castle County, supra*.

Reversal based upon an error of law is appropriate where it appears the lower tribunal acted contrary to law. *Maddrey* at 1214. Irregularity in the proceedings is established where the lower tribunal failed to create an adequate record for judicial review. *Id.* The Court has the power to quash or affirm the proceedings and to remand. *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, *3, Jurden, J. (Del. Super., July 19, 2006).

In this *Certiorari* appeal, the two relevant standards are: 1) failure of the Board to state sufficient reasons for its decision to enable judicial review; and 2) error of law. Specifically, the Board failed to articulate any bases for denying the UDC §40.22.611K. non-compliance issue raised by the Blacks and Blackball and committed an error of law by failing to reverse the Department's issuance of the 2nd Permit based upon the inability to satisfy UDC § 40.22.611K.

I. THE BOARD FAILED TO ARTICULATE ANY GROUNDS FOR DENYING THE UDC § 40.22.611K. ARGUMENT; IT MAY NOT HAVE CONSIDERED IT

It is well established that the Board must state adequate bases for its decision in order to permit judicial review. *Christiana Town Center, LLC v. New Castle County*, 2004 WL 2921830. *2 (Del., Dec. 16, 2004)(Order). Where the Board fails to outline the reasons for its vote against an appellant's argument in its written opinion, reversal is warranted. *See Id.*

In the case at bar, the Board's sole rationale for denying the UDC § 40.22.611K. "shared parking" non-compliance argument presented by the Blacks and Blackball was the Court of Chancery decision holding that 1707 had a private easement to park on the Triplex Properties. Specifically, the Board's reasoning for not reversing based on the parking argument was:

1. "The Board is not persuaded by the Appellants' argument."
2. "With respect to the first basis for appeal, the lack of requisite parking spaces, the Board finds that the October 2012 decision by the Court of Chancery provides the property with access to the appropriate number of parking spaces required under the UDC."
3. "The Board will not substitute its own interpretation of the 1946 Deed for that of the Court of Chancery in determining the scope of the Staffieris' easement."
4. "Moreover, the Board specifically declines to contravene any portion of the Court's October 2012 Order."
5. "The Board unanimously finds that the Department's decision to grant the Staffieris a Change of Use Certificate was not arbitrary or capricious, nor did it represent an error as a matter of law." Record at Tab 5, pp.4 & 5 (R220-21).

The Board never indicated if or why it was rejecting the § 40.22.611K. argument presented by the Blacks and Blackball: despite the existence of the easement, there was not

enough parking on the Triplex Properties for uses in buildings on 1701-1705 Concord Pike for there to be any excess spaces that could be legally counted toward the 4 off-street parking space requirement.

The issue of the 2nd Permit's contravention of UDC "shared parking" requirements contained in § 40.22.611K. was squarely presented to the Board. It was expressly raised in the appeal filing which initiated the Board proceedings. Record Tab 1 (R1-2)("1707 may not rely upon the 'shared parking' on the Triplex Properties under UDC § 40.22.611K. since the 7 spaces are not adequate for the 3 first floor commercial uses and 3 second story apartment units on the Triplex Properties."). And it was presented to the Board at the hearing. Record Tab 4 at pp.11-12 (R153-154), pp.55-57 (R197-99), and p.70 (R212) (specifically citing § 40.22.611K. and arguing it was not complied with). Indeed, it is evident that the Board never addressed the appeal issue of whether sufficient parking existed on the Triplex Properties to attribute 3 parking spaces to 1707 (to satisfy the UDC minimum 4 off-street parking space requirement).

Because the Board never actually ruled upon the discreet "error of law" issue raised by the Blacks and Blackball, nothing is before this Court for it to review. No mention is made in the 2nd Decision about UDC §40.22.611K. or whether it was satisfied as a matter of law. Consequently, well settled principles of *Certiorari* law require that this Court reverse and remand the matter to the Board for it to decide and articulate its reasoning on the appeal argument that the 2nd Permit contravened the "shared parking" requirements of UDC § 40.22.611K.

II. THE BOARD COMMITTED LEGAL ERROR BY FAILING TO REVERSE THE DEPARTMENT'S ISSUANCE OF THE 2ND PERMIT DESPITE LACK OF 4 PARKING SPACES

It is uncontested that 1707 was required to have 4 off-street parking spaces in order for the 2nd Permit to be validly issued. Record Tab 1 (R1-2), Tab 2 at Exhibits 12 and 13 (R132 and 137-39), and Tab 4 at pp.3-4, 8-12, 22-23 (R145-46, 150-54 and 164-65). The uncontraverted record evidence also establishes that only one UDC compliant off-street parking space is available within 1707's boundaries. *Id.* and Record Tab 2 at Exhibits 7 (R106) and 8 (R108). It is also established that 1707 possesses the rights to park on the adjacent Triplex Properties by virtue of an express easement. *Staffieri v. Black*, Del. Ch., C.A. No. 7439-VCL (October 24, 2012), *aff'd*, *Black v. Staffieri*, 2014 WL 814122 (Del., Feb. 27, 2014)(Order). Therefore, the only question before this Court is whether there are 3 UDC compliant off-street parking spaces available for 1707's use on the Triplex Properties. If not, then reversal is necessary.

It is evident that 1707 cannot be allocated 3 parking spaces on the Triplex Properties under the law. UDC § 40.22.611K. permits a property to rely upon "shared parking" on a nearby or adjacent parcel. UDC § 40.22.611K. provides:

The parking spaces for separate buildings or uses may be combined in a single parking lot, provided that the number of parking spaces in the lot shall be equal to or greater than the sum of the parking spaces required for each building and use.

As a consequence, 1707 must have established that sufficient extra parking was actually available on the Triplex Properties in order to legally rely upon such spaces to meet its 4 off-street parking space requirement. The UDC demands real parking, not illusory "paper" spaces that are "double counted" and will not truly be available.

The uses of the buildings located on the Triplex Properties triggered the need for about 20 off-street parking spaces. Each of the three buildings (1701, 1703, and 1705 Concord Pike)

includes first floor commercial retail space and second story residential apartments. UDC § 40.03.522A. indicates that “Table 40.03.522 specifies the minimum number of parking spaces required for each use type.” And UDC Table 40.03.110C. contains some additional minimum parking requirements. Table 40.03.522 also provides that “[i]f several uses occupy a single parcel or building, the off-street parking...requirement shall be the additive total for all these parcel’s or building’s uses.”

UDC Table 40.03.522 contains the following relevant parking requirement: “general” type of “Commercial uses: Commercial Retail” - 4 parking spaces per 1,000 square feet of gross floor area.³ In addition, UDC Table 40.03.110C. contains the minimum parking requirement for Apartments: 2.25 spaces per unit. The 3 buildings on the Triplex Properties contain 1,000 square feet of 1st floor commercial space and 920 square feet of space on the second story. Record Tab 2 at Exhibit 11. Therefore, each of the buildings on the Triplex Properties requires 4 parking spaces for the first story commercial use and 3 spaces for each second story apartment use, for a total of 21 spaces.⁴

Only 7 striped parking spaces exist on the Triplex Properties; 14 less than what is needed. And evidence revealed that parking would be difficult to impossible as a practical matter in the 9 foot wide driveway and the area behind the buildings on the Triplex Properties. *Eg.* Record Tab 4 at pp.32-34 (R174-76)(no striped parking spaces, need for maneuvering and delivery space for vehicles, etc.) and 55-56 (R197-98)(no striped spaces, fire escapes, basement doors, fencing, etc.). Even assuming *arguendo* that 7 additional parking spaces could physically be squeezed

³ UDC § 40.03.522A. provides that “[w]hen the number of required off-street parking spaces results in a fractional space, the fractional space shall be counted as one (1) parking space.”

⁴ If the second floor space was counted as commercial retail use rather than as apartment units, then 3 more parking spots would be needed (for 24 total spaces required).

into the rear of the Triplex Properties, the uses in the Triplex Properties' buildings would still be at least 7 spots shy of their 21 space needs. Thus, no parking spaces may be dedicated for 1707 to rely upon under § 40.22.6121K., leaving it well short of the legally necessary 4 off-street spaces. Indeed, even assuming *arguendo* that 1707 only needed 1 space to be available on the Triplex Properties under UDC §40.22.611K. analysis, it could not show a single space could be counted toward its parking requirements.

Because it can be determined by accurate mathematical computation that there are no "extra" parking spaces which may be allocated for the use of 1707, the shared parking space requirements of UDC § 40.22.611K. cannot be met under the circumstances. Thus, it is obvious that the Department erred by granting the 2nd Permit. Legally, there must be an analysis that establishes sufficient extra spaces exist on the Triplex Properties in order for any of the parking spaces thereon to be counted toward the 4 off-street parking space minimum required for 1707 to validly receive a change of use approval. Because no analysis was presented to the Board and it is mathematically impossible for there to be 3 extra parking spaces available for 1707's use on the Triplex Properties, the Department erred as a matter of law and the Board erred in failing to overturn its issuance of the 2nd Permit.

CONCLUSION

Based upon the foregoing, the Blacks and Blackball respectfully request that this Court reverse the Board and either: 1) remand the matter for the Board to articulate sufficient reasons for its decision on the UDC § 40.22.611K. issue to allow for judicial review; or 2) enter an Order overturning the issuance of the 2nd Permit on the grounds that it contravenes applicable UDC off-street parking space standards. In the 2nd Decision, the Board failed to provide any bases whatsoever for denial of the argument by the Blacks and Blackball that the “shared parking” criteria under UDC § 40.22.611K. could not be met under the circumstances. In addition, the Board completely ignored the issue raised by the Blacks and Blackball regarding the lack of analysis and evidence supporting the proposition that “shared parking” on the Triplex Properties could be relied upon to provide for the additional 3 off-street parking spaces needed by 1707 to receive a valid 2nd Permit. No evidence was presented to establish that extra parking spaces beyond those needed by the uses on the Triplex Properties existed and uncontested evidence was presented showing no additional spaces were available to be allocated for § 40.22.611K. purposes. Accordingly, reversal of the decision is warranted based upon the Board’s: 1) oversight on the § 40.22.611K. issue; and 2) error of law in concluding that the UDC parking requirements were met despite all evidence indicating that § 40.22.611K. was not, and could not be, satisfied.

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