

**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' REPLY BRIEF

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF NATURE OF PROCEEDINGS..... | 1 |
| ARGUMENT..... | 2 |
| I. IT IS CLEAR FROM THE FACE OF THE RECORD THAT THE BOARD FAILED TO CONSIDER THE UDC § 40.22.611K. ARGUMENT OR ARTICULATE ANY BASIS FOR A DECISION REGARDING IT | 2 |
| II. THE 2ND DECISION IS FOUNDED UPON AN ERROR OF LAW: 4 PARKING SPACES ARE NOT AVAILABLE DUE TO THE INABILITY TO COMPLY WITH THE UDC SHARED PARKING PROVISION | 5 |
| CONCLUSION..... | 9 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|-------------|
| <u>Cases</u> | |
| <i>395 Associates, LLC v. New Castle County</i> , 2006 WL 2021623, Jurden, J. (Del. Super., July 19, 2006) | 4, 5, 7 |
| <i>Reise v. Bd. of Bldg. Appeals of City of Newark</i> , 746 A.2d 271 (Del. 2000) | 4, 7 |
| <u>Other Authorities</u> | |
| I WOOLLEY ON DELAWARE PRACTICE, §§ 894 and 895..... | 2 |
| BOCA Code § 405.5 | 7 |
| Newark City Code § 32-10(a)(6.1) | 7 |
| Unified Development Code § 40.22.611K. | passim |

STATEMENT OF NATURE OF PROCEEDINGS

Petitioners' Opening Brief was filed on April 21, 2014. In it, the Blacks and Blackball presented two (2) arguments: 1) the Board failed to decide their UDC § 40.22.611K argument; and 2) the Board erred as a matter of law in failing to reverse based on the § 40.22.611K. argument.

On May 19, 2014, Respondents Gary and Adria Staffieri (the "Staffieris") filed an Answering Brief with the Court, which effectively incorporated by reference the content of their December 6, 2013 Answer. In their Answer and the 27 exhibits thereto, the Staffieris set forth a litany of irrelevant, non-record, and unfounded assertions under the guise of supposed facts. Notably, however, they failed to address either of the two (2) legal arguments presented by the Blacks and Blackball in this appeal.

On May 21, 2014, the New Castle County Department of Land Use ("Department") filed its Answering Brief, which by letter of the same date was joined in by Respondent New Castle County Board of License, Inspection, And Review (the "Board"). In the Department's brief, it responded to the Petitioners' two (2) arguments by asserting: 1) the general, conclusory decision of the Board somehow addressed Petitioners' argument; and 2) even if the Board failed to address the UDC § 40.22.611(k) argument, this Court lacked the power to conduct judicial review.

This is the Petitioners' Reply Brief on appeal.

ARGUMENT

STANDARD OF REVIEW: APPEAL

Proceedings conducted pursuant to a Writ of *Certiorari* are the same as those historically conducted on appeal pursuant to a Writ of Error. 1 WOOLLEY ON DELAWARE PRACTICE, §§ 894 and 895. “[A] writ of *certiorari* lies from the Superior Court to inferior tribunals to correct errors of law, to review proceedings not conducted according to law, and to restrain an excess of jurisdiction.” *Id.* at § 896. On *Certiorari*, “the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which error, if any, must appear, and...the court can hear no evidence *aliunde* to show jurisdiction or regularity or the want of it.” *Id.* at § 897.

I. IT IS CLEAR FROM THE FACE OF THE RECORD THAT THE BOARD FAILED TO CONSIDER THE UDC § 40.22.611K. ARGUMENT OR ARTICULATE ANY BASIS FOR A DECISION REGARDING IT

The Department suggests that the general, conclusory statements of the Board in the 2nd Decision created a sufficient record to enable this Court to conduct judicial review regarding the UDC § 40.22.611K. argument. DB at 4-6.¹ But the Department’s response is nothing more than *ipse dixit*, which does not constitute a rebuttal of the Petitioners’ appeal issue. Consequently, the Department’s argument is without merit and remand is therefore warranted.

The Department contends that the Board created a sufficient record to enable this Court to conduct judicial review based upon supposed “specific findings of fact and conclusions of law [contained] in its Decision.” DB at 5. The Decision excerpts relied upon for the allegation that “specific findings” are contained therein include the following:

¹ Citations herein to “DB at __” are to “Respondent New Castle County Department of Land Use’s Answering Brief” dated May 21, 2014.

1. “With respect to the first basis of 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 [Unified Development Code].” DB at 5.
2. “The Board will not substitute its own interpretation of the 1946 Deed[s] for that of the Court of Chancery in determining the scope of the Staffieris’ easements.” DB at 5-6.
3. “The Board unanimously finds that the Department’s decision to grant the Staffieris a Change of Use Certificate was not arbitrary or capricious.” DB at 6.

But all 3 of these excerpts are actually general, conclusory statements which contain no specific details of fact or law. No explanation of how 4 off-street parking spaces could be calculated to exist for the Change of Use is contained in the 3 sentences. Nor is there any reference to the “shared parking” requirements, or any analysis based thereon, under UDC § 40.22.611K. Instead, the Department illogically asserts, in effect, that: 1) the Court of Chancery Decision permits the Staffieris to park on the abutting parcel; and 2) *ipso fact* 1707 has 4 off-street parking spaces.

In order for the Board to have actually considered § 40.22.611K., it would have had to mention it and include some *de minimis* analysis of how it was satisfied. Since it did not, there is nothing in the record for this Court to review in order to make a determination as to whether the Board committed an error of law in affirming the issuance of the 2nd Permit. Indeed, the only record evidence on the subject supports the inexorable conclusion that there is not sufficient parking available on the Triplex Properties in order to count any parking spaces thereon toward

the Staffieris minimum 4 space requirement. As a result, this Court should remand to the Board so it may address UDC § 40.22.611K. shared parking issue.

The Department suggests that this Court should conclude that a sufficient Record exists for it to review despite the lack of any mention of the UDC § 40.22.611K. issue in the 2nd Decision. DB at 6. In effect, the Department argues that all the Board had to do was write a decision saying “appeal denied” or some similar conclusory, general statement in order to create a sufficient Record for this Court to review. Obviously, the County is wrong. It is evident that it is simply impossible to review the 2nd Decision regarding the UDC § 40.22.611K. issue since the Board does not mention the Code section or include any analysis or reasoning regarding that issue. Therefore, a remand is in order.

In *Reise v. Bd. of Bldg. Appeals of City of Newark*, 746 A.2d 271, 273 (Del. 2000), the Board failed to issue a written decision stating the reasons for its conclusions regarding an administrative permit revocation appeal. The Court reversed, in part, on the basis that a quasi-judicial tribunal must state the basis for its decision in order to allow for judicial review. *Reise* at 274. Similarly, the Board failed to state the reasons for its conclusion affirming the issuance of the 2nd Permit in the 2nd Decision. While the Board did at least issue a written decision, that document fails to set forth any rationale for the general conclusions that are stated therein. Thus, the Court is not able to conduct a review of the Board’s interpretation of UDC § 40.22.611K., and remand for the Board’s elucidation on this issue is necessary.

Finally, the Petitioners’ position is supported by this Court’s decision in *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, *9, Jurden, J. (Del. Super., July 19, 2006). In that case, the Court remanded a legal error issue raised before the County Board of License, Inspection, And Review because it failed to state the reasons for its decision. Specifically, the

Court held that it was “unable to determine from the record how the Board reached its conclusion that the Handrail Violation was timely and not barred by the statute of limitations.” Akin to the facts in the *395 Associates, LLC* case, the 2nd Decision in the case *sub judice* fails to set forth any discussion or explanation regarding the Petitioners’ argument that the 2nd Permit was unlawfully issued due to its contravention of the shared parking provisions of § 40.22.611K. As a consequence, the Court should remand the matter to the Board for consideration and decision of the Petitioners’ legal argument.

II. THE 2ND DECISION IS FOUNDED UPON AN ERROR OF LAW: 4 PARKING SPACES ARE NOT AVAILABLE DUE TO THE INABILITY TO COMPLY WITH THE UDC SHARED PARKING PROVISION

The Department fails to rebut the Petitioners’ argument that the Board committed legal error by failing to apply UDC § 40.22.611K. to conclude that 1707 lacked the requisite 4 off-street parking spaces. DB at 6-7. Instead, the Department submits that this Court lacks authority to review the Record to determine if the Board committed an error of law. DB at 6-7. Since that position is directly rebutted by binding case law precedent, however, it must fail. As a consequence, the un rebutted error of law argument presented by the Petitioners justifies reversal.

The Petitioners’ argument in this *Certiorari* appeal is that to the extent the Board concluded that 1707 had 4 off-street parking spaces available by virtue of the fact that parking spaces on the Triplex Properties could be utilized by the Staffieris by express easement rights, the Board erred as a matter of law since the shared parking requirements of UDC § 40.22.611K. could not be met under the circumstances. This does not, as the Department suggests, require the Court to review the facts or second guess the Board in terms of its fact findings. Instead, it asks this Court to do precisely what it is authorized to: review the Record to determine if the Board

committed an error of law. Indeed, the Department concedes that “legal error” is within the purview of this Court’s *Certiorari* review powers. DB at 7.

Because the question of whether sufficient shared parking existed on the Triplex Properties consistent with § 40.22.611K. was clearly presented to the Board based upon the face of the Record handed up to this Court in compliance with the Writ, the question of whether the Board properly applied that legal provision constitutes a question of law that this Court may review. It cannot be legitimately questioned that statutory interpretation constitutes a question of law. Nor can it be disputed that a Board misinterpretation of a legal provision constitutes an error of law that this Court is authorized upon *Certiorari* review to reverse.

The question of shared parking compliance under UDC § 40.22.611K. was squarely presented to the Board. And the calculation of available parking on the Triplex Properties pursuant to the shared parking provisions reveals that no parking spaces may be attributed to 1707 for UDC compliance purposes. Thus, 1707 is 3 spaces shy of the 4 needed to validly grant the 2nd Permit. Consequently, it is evident that the Board committed a legal error that constitutes grounds for reversal.

The Triplex Properties require a minimum of 21 off-street parking spaces for the uses and buildings on that site. But the Triplex Properties only have 7 spaces available, a 14 parking space shortfall). The Triplex Properties needed a surplus of 3 spaces for 1707 to be able to satisfy the off-street parking requirement. Since no parking spaces on the Triplex Properties are available to be counted toward the UDC parking requirements of 1707, however, the Board committed an error of law in affirming the Department’s issuance of the 2nd Permit (it was not UDC-compliant).

The error of law argument presented by the Blacks and Blackball is within the scope of *Certiorari* review based on the analogous holding in *Reise v. Bd. of Bldg. Appeals of City of Newark*, 746 A.2d 271 (Del. 2000). In that action, the Court noted that certain *Certiorari* petition allegations were “within the scope of review on *certiorari*: (i) Reise’s claim that the Board erred in allocating the burden of proof; (ii) Khan’s claim that the City of Newark failed to give proper notice; (iii) Khan’s claim that § 405.5 of the BOCA Code is unconstitutional and violates the specified state and federal statutes; (iv) Khan’s claim that § 32-10(a)(6.1) of the Newark City Code cannot form the basis for a permit revocation; (v) Khan’s claim that a permit may not be revoked after its normal expiration date; and (vi) Khan’s claim that the revocation of the rental permit violated specified sections of the Delaware Constitution.” *Reise* at 274.

Similarly, the Blacks and Blackball argue that the Board did not properly interpret UDC § 44.22.611K, regarding shared parking, which should have prohibited consideration of off-street parking available on the Triplex Properties for purposes of 1707’s satisfaction of the 4 off-street parking space minimum requirement. As in *Reise*, the Petitioners present a purely legal argument that challenges the Board’s interpretation of a local jurisdiction’s Code. As a result, the Department’s argument is off the mark, and reversal of the 2nd Decision is called for.

Finally, the Petitioners’ position is supported by this Court’s decision in *395 Associates, LLC v. New Castle County*, 2006 WL 2021623, *7, Jurden, J. (Del. Super., July 19, 2006). In that action, the Court reviewed the Record returned to determine if the Board proceeded contrary to law, noting that two legal defenses were properly stated in the Record based upon documentary submissions and the County Board of License, Inspection, And Review hearing

transcript.² Ultimately, however, this Court held that the Board erred as a matter of law in determining that a waiver of the defense of statute of limitations had occurred. *395 Associates, LLC* at *9. In the instant action, the Petitioners presented a purely legal issue of whether the 2nd Permit was lawfully issued given the lack of the 4 off-street parking spaces due to non-compliance with the shared parking requirements of UDC § 40.22.611K. Accordingly, reversal is warranted.

² The Court also noted that the legal argument was fully addressed pursuant to analysis and an explanation contained in the Board's written decision. Of course, the Board in the case *sub judice* failed to discuss the UDC § 40.22.611K. issue or provide any rationale for a rejection of that argument.

CONCLUSION

Based upon the foregoing, the Blacks and Blackball respectfully request that this Court reverse the Board and either: 1) remand for a Board determination of the UDC § 40.22.611K. compliance issue; or 2) enter an Order reversing the Board's decision and invalidating the 2nd Permit on the grounds that the shared parking requirements of § 40.22.611K. could not be met as a matter of law. The Board failed to discuss the § 40.22.611K. issue, and no evaluation or reasoning sufficient to enable this Court to review any decision on that Code provision is contained in the 2nd Decision. In addition, the uncontraverted Record evidence and the unrebutted legal argument on the § 40.22.611K. issue lead to the inexorable conclusion that the Board committed legal error by failing to invalidate the 2nd Permit since it contravened the off-street parking space requirements of the UDC. Indeed, the Department and the Board failed to even respond to the legal error argument, rendering it uncontested. Consequently, remand or reversal is appropriate.

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