

## LAND USE REGULATION

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### I. ZONING OVERVIEW

#### A. Zoning:

The division of a local body politic (normally city, town or county) by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put as well as their dimensions.

Black's Law Dictionary, 5th Ed. Zoning is premised upon the segregation of land uses. This concept originated in New York City around the turn of the century as a means of separating the lower class fabric markets from the upscale retailers of 5th Avenue. Today, standard enabling acts vest local government with broad authority to enact zoning ordinances to protect the health, safety, and welfare of its residents.

#### B. Euclidean Zoning:

Type of zoning based upon assigned districts and allowed uses therein. It envisions the specification of determined geographic areas separated according to zoning districts with the uses permitted in each district set forth in the ordinances. Thus, one could from the zoning map determine in what type of district a property is located and by reference to the district's restrictions what uses are permitted.

Black's Law "Dictionary, 5th Ed. The United States Supreme Court upheld local government's authority to zone as constitutional in the landmark case of Village of Euclid, Ohio v. Ambler Realty Co., 47 S.Ct. 114 (U.S. 1926). Segregating uses by enacting zoning regulations was thereafter termed "Euclidean" zoning. Essentially, Euclidean zoning makes it extremely difficult to mix dissimilar uses by segregating and buffering residential uses from the nuisances created by commercial uses.

#### C. Critique:

While effective at a time when the United States was rapidly industrializing, critics claim that Euclidean zoning has resulted in suburban sprawl: segregated communities of isolated populations accessible only by automobile. Lately there has been an effort to encourage "traditional" development patterns with high density housing, nearby commercial, and

pedestrian-friendly walkways. However, the consensus as reflected in the local media is that sprawl continues and grows increasingly acute.

**D. Authority granted by the State of Delaware:**

The authority for zoning is delegated by the State legislature to the counties and municipalities as follows:

- New Castle County, 9 Del. C. ch. 26
- Kent County, 9 Del. C. ch. 49
- Sussex County, 9 Del. C. ch. 69
- Municipalities, 22 Del. C. ch. 3

Home-Rule municipalities derive zoning authority from their charters.

**E. Common zoning terms:**

1. Permitted Use. "Use as of Right" or "By-Right": A use which is permitted in the particular zoning designation without any further approvals.

2. Accessory Use: A use which is typically found with a permitted use on the same parcel and is "accessory to" the permitted use; for example a gift shop might be considered an accessory use in a museum. In contrast, an ancillary use is the same thing as an accessory use, but the use is located on a neighboring, separate parcel of land.

3. Special Use: Depending on the zoning code, a use which is permitted only after a public hearing and review by a body (either a municipal or county Council, a Board of Adjustment, or a Planning Commission) which may or may not permit the use subject to certain conditions in its discretion.

4. Conditional Use: A use which is permitted only if certain objective criteria are satisfied (such as lot size, access from a collector street, neighboring uses, etc.). Typically, a conditional use will be permitted "as of right" if the conditions set forth in the zoning code are met. Note that the terms "special use" and "conditional use" are often used interchangeably.

5. Legal Non-Conforming Use: A use which is made of a property which does not comply with the current zoning code requirements but which is nonetheless legal because the use predates the zoning code restriction, i.e. an office use within a residentially zoned area. Once discontinued for a certain period, defined by the applicable code, the use is lost. In New Castle County, generally if more than 50% of the structure housing the legally nonconforming use is destroyed, the use cannot be restored by-right. In the City of Wilmington, the Code provides a method for having non-conformities officially confirmed to avoid ambiguities later as to when the use commenced.

6. Legal Non-Conforming Situation: Where the use is permitted, but the property is legally non-conforming because of failure to comply with dimensional requirements,

i.e. setbacks, minimum lot sizes, building height, parking, etc. like non-conforming uses, the non-conforming situation must have been legal under a prior code that changed.

7. Violation: Where either the use or dimensions of a property or its improvements neither comply with either current zoning laws nor constitute a legal non-conformity.

#### **F. Variances:**

Titles 9 and 22 of the Delaware Code require each county and municipality to have a board of adjustment to hear requests for variances and to decide other matters relating to zoning codes. There are two types of variances:

1. Use variance: sought when a property owner seeks to use her property in a way not permitted by the code. For a "use" variance, the standard is high: the Board considers whether the owner is suffering "unnecessary hardship" by examining the following factors:

- a. the property cannot yield a reasonable return when used for a permitted purpose;
- b. the plight of the owner is due to unique circumstances; and
- c. the proposed use will not alter the essential character of the locality.

Baker v. Connell, 488 A.2d 1303 (Del.Supr,1985); Homan v. Lynch, 147 A.2d 650, 654 (Del.Supr 1959). In New Castle County, the applicant must also secure approval by County Council after public hearing. Use variances are very rarely sought or granted in New Castle County; the City of Wilmington more commonly grants this type of relief. An alternative is to seek a rezoning of the property (see below).

2. Area variance: sought when a property owner seeks relief from some dimensional requirement of the code (e.g., lot size, setbacks, height, number of parking spaces, etc.). For an "area" variance, the test employed by the Board of Adjustment is what is known as the "exceptional practical difficulty" test, in which the Board considers:

- a. the nature of the zone in which the property lies;
- b. the character of the immediate vicinity and uses therein;
- c. the effect of variance on other properties if granted;
- d. the effect of not granting variance on the property owner; and
- e. whether there is an "exceptional practical difficulty" intent in the land.

Board of Adjustment v. Kwik-Check Realty, Inc., 389 A.2d 1289 (Del. Supr. 1978); Clear Channel Outdoor v. Sussex County Bd. of Adjustment, 2003 WL 22852147 (Del. Super.)

3. Beneficial use: An area of Board of Adjustment jurisdiction exclusive to New Castle County, sought when a property owner has been denied all or substantially all economically viable use of property through the application of the zoning code. The Board of Adjustment must determine that no "beneficial use" remains in a property and that some level of

relief is warranted to allow the owner some economically viable use. Those seeking this relief have most commonly had their property rendered valueless when the Federal Emergency Management Agency designated it as a flood plain.

4. Standard on Appeal: A Board of Adjustment decision may be appealed to Superior Court, by writ of certiorari, where it is heard on the record, although a party may seek to supplement the record. A Board decision will only be reversed where it is contrary to law or is not supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [It] is 'more than a scintilla but less than a preponderance'." Olney v. Cooch, Del.Supr., 425 A.2d 610, 614 (1981) (citations omitted).

**G. Rezoning.** Rezoning is the process whereby a property owner seeks to change the assigned zoning designation for land to a different designation from among those available under the local zoning code, which designation dictates allowed uses and dimensional requirements for the land.

1. Broad Legislative Discretion. The governing body (either the County Council or Town Council) is afforded broad discretion in determining whether or not to rezone property, and, so long as decision is not "arbitrary and capricious" it will be upheld. The three counties and the City of Wilmington all have Planning Commissions, which make recommendations to the legislative body hearing the rezoning (normally the City or County Council), often with the significant input of professional planners who work for the counties, or the zoning officer. The legislative body must state the reasons for its approval or denial on the record, so that a reviewing court has a record which it can review.

a. *Appeal*. There is no statute governing the challenge of a rezoning decision. Parties challenging a rezoning decision have always brought such actions in Chancery Court. New Castle County Council v. BC Dev. Assoc., 567 A.2d 1271 (Del. Supr., 1989). The arbitrary or capricious standard normally applies. The Court will not substitute its judgment for the judgment of the legislative body.

## **II. OVERVIEW OF SUBDIVISION/LAND DEVELOPMENT PROCESS.**

Each county or municipality in Delaware has authority to promulgate ordinances governing subdivision or land developments within their jurisdiction. (See, 9 Del. C. § 2601; § 4901; § 6902 and 22 Del. C. § 301). Subdivision is the creation of new parcels of land from a larger parcel. Note that merely dividing property into additional lots does not change the underlying zoning designation and allowed uses unless a rezoning is also sought. The levels of review and technical filings increase with the complexity of the proposed project. Each jurisdiction establishes its own review procedures. Plans are generally classified as site, resubdivision, minor, major, parking, utility or title subdivision.

**A. Site plan.** In New Castle County, a property owner must file a site plan to allow for a compliance review of all but the most nominal proposals (i.e. a land disturbance of less than 1,000 square feet). Existing site nonconformities may usually remain. Additional square footage must normally meet) all current Code requirements (i.e. setbacks, natural. resource protections),

with exceptions for certain extensions of existing commercial gross floor area and redevelopment plans for Brownfields and obsolete or vacant structures being at least 50% demolished. After administrative review, a building permit will be issued. In the City of Wilmington<sup>1</sup> the same proposal may be handled by the Zoning Officer's and Building Code Official's review of the building permit application.

**B. Resubdivision plan.** Typically required to make changes to an existing recorded plan where no new square footage or lots are being added. For example, the relocation of lot lines; establishment, relocation, elimination of easements; changes to parking, loading, access configurations; changes to storm water management areas, open space (absent a 'material design change'); and changes to notes or other data on recorded plan. After administrative review and approval, the plan will be recorded.

**C. Minor plan.** In most Delaware jurisdictions, minor plan review is required for plans having minimal impact on infrastructure. Minor plans are normally subject to administrative review only (with notable exceptions)<sup>2</sup> and are cheaper to prosecute. For example, in New Castle County, only a minor plan review is necessary for the subdivision of a parcel proposing no zoning changes so long as no new streets are proposed, if the plan proposes a residential subdivision comprised of less than 5 lots; or new or additional commercial square footage between 1,000 and 20,000 sq. ft. (with cumulative expansions up to 50,000 sq. ft. allowed on certain industrial properties). Environmental studies are usually required. Any new square footage and all parking must be in compliance with the current code. However, existing non-conformities may be subject only to proportional compliance. After administrative review and approval, the plan will be recorded. The City of Wilmington likewise only requires minor plan review when the plan involves less than 2.5 acres.

**D. Major plan.** In most local Delaware jurisdictions, plans having a greater impact on infrastructure require filing and approval of a major plan. In New Castle County this includes any plan proposing a new street, 5 or more residential lots, multi-family dwellings of more than 10 units, or new or additional square footage exceeding minor plan requirements. Infrastructure concurrency studies (i.e. environmental and traffic) are usually required. Like minors, any new square footage and all parking must be in compliance with the current code. However, New Castle County allows for existing non-conformities to be subject only to proportional compliance. The plan is subject to one or more public hearings, however, after the reviewing agency certifies that the plan meets all code requirements. The legislature's approval of the subdivision plan is ministerial if it complies with the Code. Acierno v. Folsom, Del. Supr., 337 A.2d 309, 311 (1975); *see also* Ashburn v. Kent Cty. Regional Planning Commission, 962 A.2d (Del. 2008).

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<sup>1</sup> The City of Wilmington is the process of re-writing their Subdivision Regulations. Therefore, the information contained in these materials regarding subdivision/land development within the City of Wilmington may no longer be accurate upon codification of the new Subdivision Regulations.

<sup>2</sup> Even minor plans might invoke the jurisdiction of boards or commissions external to the normal subdivision plan review process. For example, in the City of Wilmington and New Castle County, proposals involving demolitions of structures in historic districts require additional public hearings before separate boards.

**E. Title Subdivision Plan.** Generally filed for plans with the purpose of facilitating subdivision of office, commercial, or industrial development from single ownership to individual lots for the purpose of conveying title. Allows consideration of a unified site for planning purposes without establishing independent criteria such as setbacks, buffering, and open space for each lot. Maintenance organizations are usually required for areas designated for common use. Technically, this is different than submitting a property to the condominium form of ownership.

### **III. SUBDIVISION EXEMPTIONS FROM PLAN REVIEW**

**A. Agriculture subdivision.** The division of land for agricultural purposes into parcels of more than 10 acres not involving any new streets or easements of access can be done with the filing of a deed describing the new parcels by metes and bounds. 9 Del. C. § 3001(10). An affidavit stating that the owner intends to devote the land to agricultural purposes must be filed with the deed. For sample affidavit see UDC § 40.30.520.B.2.

**B. Subdivision by legal operation.** Divisions of property by testamentary or intestate provisions, or divisions of property upon court order, are exempt from plan review provisions. 9 Del. C. § 3001(10).

**C. Subdivision by public street.** Land can be subdivided by DelDOT's construction of a street through existing parcel(s). 9 Del. C. § 3001(10).

**Note:** although the lot may be legally created by one of the above mechanisms, it may not meet the minimum requirements for development to occur on the lot as set forth by the applicable code. The owner of such a nonconforming lot would be required to secure the appropriate variances prior to building on the lot.

**Note:** this Section of Title 9 only applies to New Castle County.

### **IV. PROCEDURE**

This section focuses on plan approval procedures in the three counties. Note that each county and incorporated area has different procedures, and each municipality also has its own adopted procedures. Addressing each municipality's process is impractical in these materials. Determine the proper municipal or county jurisdiction applicable to a parcel and make sure you have the most recent version of its zoning and subdivision code to determine how the approval procedures may vary from those described below.

#### **A. New Castle County.**

1. In General. Most plans involve only two plan submissions: an exploratory sketch plan and a final plan. Generally these plans are subject to an administrative review and approval, and do not require legislative approval. A major record plan also involves a two-step process including exploratory and final record plan, as well as final approval by County Council.

However, if a major plan meets all the technical criteria of the Code, County Council must approve the record plan after sending it back for no more than two technical reviews. Acierno v. Folsom, Del. Supr., 337 A.2d 309, 311 (1975); *see also* Ashburn v. Kent Cty. Regional Planning Commission, 2008 WL 5114981 (Del. 2008).

2. Pre-Application Sketch Plan Review/Conference. This meeting with planning staff is optional for minor subdivisions and land developments not involving rezonings, but is required for all rezoning requests and major residential subdivisions. However, requesting the meeting even if it is not required is strongly recommended to head off potential problems and save money on engineering costs. If a meeting is required, an Exploratory Sketch Plan will not be accepted unless the meeting was held within 6 months of the Exploratory Sketch Plan submission.

The purpose of the pre-application sketch plan review conference is to familiarize the applicant with principles of conservation design, departmental concerns and with the applicable provisions of the Uniform Development Code (“UDC”), as well as to allow the Department of Land Use (“Department”) to assess the application and to identify any service problems or concerns in conjunction with the applicant’s objectives and to identify any additional studies and/or information that may need to be provided before exploratory plan approval.

3. Exploratory Plan Review. The exploratory submission must be accompanied by any applicable deed restrictions, a narrative addressing comments from the pre-application meeting, wetland study, soils feasibility, or sewer certification and site capacity and concurrency calculations. Also, taxes have to be current for an application to be accepted. Failure to submit all required documentation could result in a rejection of the exploratory plan.

Upon notification to the applicant of a complete submission, the applicant shall submit the major plan or rezoning to the Office of State Planning for Preliminary Land Use Service (“PLUS”) review. UDC § 40.30.420. Technical Advisory Committee (“RPATAC”) provides technical support and makes recommendations where improvements are planned within a resource protection area. UDC § 40.30.430. For all major plans and plans with rezoning where the Department has not waived traffic analysis requirements, the applicant shall submit a traffic impact study.

The Department will issue an Exploratory Plan Initial Report discussing any special studies that may be necessary in order to advance the plan, including a traffic impact study, Parking Demands Needs Analysis (“PDNA”) or parking study, Resource Protection Area Advisory Committee input (if within an WRPA), Historic Review Board, etc. Any necessary variances will be identified and must be obtained prior to the plan advancing to the next stage. The Department will also identify any other concerns it may have relating to the plan submission. Once the Department determines the exploratory plan to be in general compliance and the PLUS report is issued, the plan may advance to next stage.

4. Joint Planning Board-Department of Land Use Hearing. Prior to the record plan submission, all major plans and rezonings must undergo a public hearing before the

Department and the Planning Board. The Planning Board serves in an advisory capacity in the subdivision process and makes a recommendation for County Council. (9 Del. C. § 1343); Table 40.30.110. Rezoning must go before County Council prior to securing final preliminary plan approval. UDC § 40.31.110. There is a ten (10) day advance posting requirement in advance of any public hearing UDC § 40.31.340(E).

5. Final Record Plan Approval. The record plan must be in strict conformity with the preliminary plan. UDC § 40.31.114. It is customary to submit check prints in advance of mylars to seek informal approval of the final record plan. For all major plans, the record plan shall be forwarded to County Council for its consent. County Council can table it no more than twice to question Code compliance. UDC § 40.31.114.C.

a. *Land Development Improvement Agreement*. The Land Development Improvement Agreement ("LDIA") contains four essential parts and is a prerequisite to all final record plan approvals, whether they be minor or major plans. UDC § 40.31.820. These parts consist of the Site Improvements (Part I), Sewer (Part II), Performance Guaranty (bond or letter of credit) (Part III), and General Provisions (Part IV). The LDIA is intended to insure that the Developer constructs all improvements, landscaping and infrastructure in accordance with plan requirements and the law and contains performance guaranties. It also contains the County's commitment to provide sewers.

b. *Other Legal Agreements*. In addition to the LDIA, the County will require the recordation of any necessary cross access, parking, stormwater management easements or the like prior to sending the plan to County Council for approval. It will also require the recordation of a declaration of restrictions with respect to any traffic mitigation proposed in connection with an LOS waiver and insertion of instrument numbers for all recorded instruments must be on the final plan. Any jurisdiction's approval regulations will contain procedures with the same purposes as those found in the UDC, but do not assume that the submission requirements or procedures will be identical.

## **B. KENT COUNTY**

1. **In General**. Major subdivisions are considered by Levy Court in a process not unlike New Castle County's process. (See Kent County, Del., Ch. 187, Subdivision and Development (Aug 8, 2003) ("Kent Code")).

### **2. Steps in the Process:**

- Preliminary conference with Planning Commission staff (state agency consultation also recommended).
- Sketch Plan submitted to Commission staff.
- Sketch Plan submitted to Regional Planning Commission (requirements in Appendix A of Subdivision Code).

- Commission staff reviews plan for conformity with Zoning Code, Comp Plan, refers plan to State Office of Planning Coordination and the Commission’s Development Advisory Committee (DAC) for recommendation and comment.
- Public hearing held by Commission which considers staff and DAC comments.
- Preliminary Plan which also explains provision of water, sewage disposal, streets, open space, landscaping and drainage.
- Final Plat submitted to Commission together with Letters of No Objection from the Delaware Department of Transportation, Fire Marshall and Kent Conservation District.
- Commission makes recommendation to Levy Court to approve, deny or approve with conditions.
- Levy Court determines plan conformance with County codes and regulations. If consistent, a resolution of approval is made. If inconsistent, applicant is informed of reasons within 10 days.
- Following resolution of approval, submit mylars for recording.

**C. SUSSEX COUNTY**

**1. In General.** Sussex County has the County Planning and Zoning Commission to consider subdivision plans, though certain minor plans can be administratively approved by the Planning and Zoning Director. (See Sussex County, Del., Ch. 99, Art. II(C), Code (Mar. 23, 1982) (“Sussex Subdivision Code”)).

**2. Steps in the Process:**

- Pre-application meetings with County Planning and Zoning Commission (“Commission”), County engineer, and state agencies.
- Submission of Sketch Plan may be required.
- Preliminary Plan submitted and reviewed by Commission staff for consistency with Comp Plan and Zoning Code.
- Commission conducts public hearing on preliminary plat.
- Following approval of preliminary plat, final submitted to Commission.

- Final plat is submitted to Commission for approval.
- Mylars are submitted to Commission staff for recording.

Note that these rough outlines do not offer a comprehensive picture of what can be a very complicated process.

## V. RULES APPLICABLE TO PLANS

**A. Plan expiration.** In New Castle County, plans may be subject to statutory expiration if the applicant/developer does not proceed to the next step in the process within a certain time (i.e. in New Castle County an applicant shall have thirty-six months from the date of the exploratory plan initial report to proceed to the record plan review stage). Time limitations on plans and on other land use applications are set forth at UDC Table 40.31.390. Three month extensions on time limitations may be granted by the General Manager. UDC § 40.31.390. After expiration, the plan must be resubmitted under rules and regulations then in effect. Subdivision variances (i.e. variances necessary for the creation of the lot) are usually subject to a two year expiration. Such variances are put to "use" (i.e. immune from expiration) once utilized in a subdivision plan submitted for review. For plans recorded after December 1, 1997, the plan sunsets after 5 years if development has not commenced. In Sussex, a plan approved after April 29, 1997 sunsets 5 years after the recordation date unless "substantial construction" has commenced (meaning rough grading of roadways, installation and maintenance of roadways, drainage and stormwater management facilities). Kent County also has 5 year sunsetting, unless construction has begun and continues toward completion.

**B. "Grandfathering".** Absent specific statutory language protecting subdivision plans in the process, two related common law concepts can provide an applicant/developer protection from subsequent changes in the subdivision regulations: "vested rights" and "equitable estoppel." The former is constitutionally based, giving constitutional protection to property rights acquired by the landowner. The latter is equitably based and precludes the government from enacting new land use regulations after giving certain approvals after a developer has made substantial expenditures in good faith reliance thereon.

## C. VESTED RIGHTS AND ESTOPPEL

Vested rights and equitable estoppel are different but related legal concepts which may entitle a property owner to a particular use or dimensional improvements notwithstanding a change in the subdivision requirements or the local government's attempt to deny a property owner's request for a development approval.

1. Vested Rights. The leading case on vested rights in Delaware was once Shelburne v. Roberts, Del. Supr. 224 A.2d 250, 24 (1966), which stated that until a property owner had a final permit and had made substantial expenditures, a subsequent change in zoning laws could operate to invalidate previously obtained development approvals. The Delaware

Supreme Court unanimously modified the Shelburn rule in The Village, L.L.C. v. Delaware Agricultural Lands Foundation, 808 A.2d 753 (Del. 2002) (en banc), holding that a property owner may establish vested rights through good faith reliance on existing standards. Id. at 757. In The Village, the plaintiff acquired property within the City of Dover with the intention of building a residential subdivision. In December 1997, the project received preliminary approval from the City Council. All that remained outstanding were the consents of several other agencies (i.e. street access, utilities hook-up, etc.). In the meantime, the owner of an adjacent farm learned of the project and sought additional buffering from it by creating an agricultural preservation district on its land under state law (creation of such a district would place an additional 10' bufferyard setback on all "new subdivisions" created on adjacent properties). The agriculture preservation district was approved and recorded in February 1998. Id.

The plaintiff brought suit against the City alleging that because he had expended over \$330,000 participating in the various processes leading up to the preliminary approvals, he should be treated as having a vested right, and his project should not be treated as a "new subdivision." In finding for the developer, the Supreme Court revised Delaware's existing "permit plus shovel in ground" test for vested rights status as articulated in Shellburne v. Roberts, 224 A.2d 250 (Del. 1966). The Court concluded that modern review processes, which are multilevel and multi-agency, require too much of developers to justify limiting the "vested rights" determination only to those who successfully get a final permit:

[i]n the final analysis, good faith reliance on existing standards is the test. In a given situation, the issuance, or non issuance, of a building permit may be evidence of reliance, or lack thereof. In cases, as here, where developers expend large sums of money on the pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities.

Id. at 758. While the building permit standard could apply if little else was required for approval, the Court recognized it is unfair when a developer spends thousands of dollars on a complicated development process only to be thwarted by an eleventh hour change in the law.

2. Equitable Estoppel. Equitable estoppel allows a land owner to prevent or "estop" a local government from denying a permit or approval where the landowner relied in good faith on the representations of the government in approving or appearing to approve a development application. The basic elements of equity estoppel are:

- i) good faith reliance;
- ii) upon an act or omission of government;
- iii) resulting in a substantial expense or change of position by the property owner;

- iv) such that an inequity would result from not allowing the property owner to use the land in the manner reasonably contemplated.

Eastern Shore Envtl., Inc. v. Kent County Dept. of Planning, Del. Ch., C.A. No. 1464-K, Jacobs, V.C. (Feb. 1, 2002) at 15. See also, Salem Church Assoc. v. New Castle County, 2006 WL 2873 745 (Del. Ch. Oct. 6, 2006) (dismissing equitable estoppel claim, but not vested rights claim where \$133,000 spent in reliance on exploratory sketch plan approval).

a. *Estoppel elements.* To establish an estoppel, it must appear that the party claiming the estoppel lacked knowledge and lacked the means of obtaining the knowledge of the facts in question, that he relied on the conduct of the party against whom the estoppel is claimed, and that he suffered a prejudicial change of position in consequence thereof. Wilson v. American Ins. Co., 209 A.2d 902, 904 (Del. 1965); DiSabatino v. New Castle County, 781 A.2d 687 (Del. 2001) (County's approval of subdivision of lot, despite note on plan prohibiting the same, and plaintiff's reliance thereon, equitably estopped County from later denying building permits).

b. *Estoppel rarely found.* Only in rare instances do Delaware courts estop local governments from applying subdivision or zoning ordinances. Relief is mostly limited to situations where the plaintiffs have either made permanent improvements or when there is no other economic use for the land. Acierno v. New Castle County, C.A. No. 92-385(SLR), Robinson, J. (D. Del. 2000) (expenditure of \$38,500 was deemed insufficient for equitable estoppel to apply); see also, Dragon Run Farms v. New Castle County, CIV.A. 00A-03 003 JOH, 00M-03-103-JOH, 2000 WL 33113804, (Del. Super. 2000) (County did not mislead landowner to believe the 12 month plan submission expiration time limit was tolled); Johnson County Planning Comm'n v. Tinkle, 748 N.E. 2d 417 (Ind. App. 2001) (no estoppel despite fact that County failed to enforce at-issue minimum lot area ordinance for over 20 years).

c. *No estoppel where government mistake.* Miller v. Board of Adjustment of Dewey Beach, 521 A.2d 642 (Del. Super. 1986) (building inspector not estopped from enforcing the zoning code where permit issued illegally, or issued in violation of the law, or issued under a mistake of fact, even though substantial expenditures made in reliance thereon); see also, Beiser v. Board of Adjustment of Town of Dewey Beach, CIV.A. No. 90A-JN6, 1991 WL 236966, (Del. Super. 1991) (no equitable estoppel against town for erroneous issuance of permit where landowner should have realized mistake).

d. *Honest Error Doctrine.* In City of Rehoboth Beach v. Shirl Ann Associates, CIV.A. 1552, 1993 WL 401876 (Del. Ch. 1993) a landowner in good faith secured permit to construct neon sign that was not permitted under zoning code. After the sign had already been constructed, the City sought to have it removed. The Court applied the minority rule rationale that, "at some point after having dealt with a building inspector in good faith, a landowner's interest in a property should become secure regardless of a permit's actual validity." Id. at 3. The doctrine applies only where "there are exceptional circumstances which make it highly inequitable or oppressive to enforce the regulations." Id. The Court permitted the sign to remain so long as it was not illuminated finding "[w]hat harm there is in allowing a sign which violates the City's zoning laws is. . . outweighed by the harm to defendant if it were forced to totally remove the sign." Id.

e. *Consideration of estoppel not within BOA's jurisdiction.* In Eastern Shore Envtl. Inc. v. Kent County Dep't of Planning, No. CIV.A. 1464-K, 2002 WL 244690, (Del.Ch. 2002), the County claimed plaintiff failed to exhaust administrative remedies by not first filing its equitable estoppel claim before the BOA. The Court held that the BOA did not have primary subject matter jurisdiction to entertain a claim that the County was equitably estopped from enforcing a zoning ordinance under specific circumstances. The statute setting forth BOA powers and duties did not mandate that an equitable claim, not involving interpretation of zoning ordinance, be resolved by the administrative process.

## VI. CAUSES OF ACTION IN CHALLENGING DENIAL OR GRANT OF SUBDIVISION PLAN.

**A. Exhaustion of Administrative Remedies.** If statutory remedies are provided for, they must be exhausted prior to an appeal being considered by a court of law or equity. Hundley v. O'Donnell, No. C.A. 16359, 1998 WL 842293, Steele, V.C. (Del.Ch. 1998). Article 30 of the UDC contains a detailed table (Table 40.30.110) setting forth the procedural responsibilities of the various boards, including appeal authority.

Unfortunately, not all Delaware zoning codes so clearly state the appellate jurisdiction of the various boards and legislative bodies in any city, town or county. While not all jurisdictions provide a clear means of appealing a decision made by a planner or zoning officer, New Castle County does, and the process works as follows:

1. During Review Process. One aggrieved with a final decision or interpretation of a decision-maker may appeal to the relevant board pursuant to the Table set forth in 30.110. § 40.31.510. Appeals may only be taken based upon a final decision, not a recommendation. Appeals must be filed within twenty (20) working days of the date of the written decision.

a. *Board of Adjustment:* hears appeals of zoning matters or errors alleged in any order, requirement, decision or determination made by an administrative officer or agency in the enforcement of any zoning ordinance, code, regulation or map. (See § 40.30.320A). See also 9 Del. C. § 1352(a)(1); 4917(1); 6917(1).

b. *Planning Board:* hears appeals from decisions relating to subdivisions. The Planning Board reviews and considers appeals from decisions relating to interpretations of subdivision regulations. (See Table 40.30.110).

c. *County Council* – Hears appeals from a denial of a beneficial use permit by the Board of Adjustment or appeal from a denial of a subdivision variance by the Planning Board. County Council may grant relief where it finds that the "strict application of the subdivision provisions of [the UDC] would cause an unjust result." See § 40.3L512B.

2. Standards: Generally speaking, appeals are to be based upon the record established before the official body rendering the initial decision. Grounds for an appeal include

that there was an error in interpretation (§ 40.31.512.A.I) or that the decision was not "a product of orderly and logical review of the evidence"; § 40.31.512.A.2.

3. Ashburn v. Kent Cty. Regional Planning Commission, 2008 WL 5114981 (Del. 2008) is a Delaware Supreme Court and is the leading case regarding appeals from denial of a subdivision approval. Ashburn appealed the decision of the Kent County Regional Planning Commission's denial of its application for subdivision approval. Even though Ashburn's plan conformed to all Kent County zoning and subdivision codes, the Commission denied the plan because of certain recommendations of other State agencies regarding probable impacts of the development. The Delaware Supreme Court held that the Commission acted contrary to law by denying a subdivision application that fully conformed to all applicable zoning and subdivision code provisions. However, the Court further stated that the Commission could place conditions on the approval for the purpose of mitigating the potential impacts pointed out by the state agencies. Since the magnitude and expense of the conditions imposed could become a back-door way of attempting to impede implementation of subdivision plans that must otherwise be approved pursuant to the rule articulated in Ashburn, future litigation on subdivision approvals could center on the law surrounding the permissibility of the particular development exactions imposed. As articulated in the U.S. Supreme Court case of Dolan v. Tigard, 512 U.S. 374 (1994), to pass constitutional muster, a development exaction must have a reasonable nexus with the proposed project; the impacts and exaction required must be closely related. Also, the degree of the exaction must be substantially proportional to the expected impact. In other words, Kent County cannot require Mr. Ashburn to put an American on Mars to obtain his approval; that exaction would not relate to the project at all and the cost would be wildly out of proportion with the expected impact of the project. This fact-driven analysis is sure to spawn litigation over the exactions sure to be imposed.

**B. Court of Law or Equity.** Absent a statutory provision providing for an appeal process from a decision made on a subdivision plan (i.e. developers in New Castle County<sup>3</sup>, anyone in Kent County<sup>4</sup>), anyone with standing can file a common law writ of certiorari.

1. Common Law Writ of Certiorari

a. *Review of judicial acts:* "[T]he writ of certiorari will issue 'to review acts which are judicial or quasi-judicial in nature, and does not lie to review acts which are administrative or legislative in nature'." Maryland and Olive Avenues Neighborhood Ass'n Inc. v. Mayor & City Comm'ns of City of Rehoboth Beach. CIV.A. 94A-10-001, 1995 WL

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<sup>3</sup> UDC § 40.31.510, Appeals. An applicant pursuing approval of a land use application who is aggrieved by a finding, decision, or interpretation of a decision maker made in response to review of such application may appeal such action to [the Planning Board, see Table 40.30.110].

<sup>4</sup> 9 Del. C. § 4818, Appeals from County Government Decisions. All decisions of the county government pursuant to applications made under this chapter are appealable to the Superior Court of Kent County; and when such appeal has been filed with the Prothonotary of Kent County, the Prothonotary shall give notice to the clerk of the peace of Kent County who shall transmit to the Prothonotary within 10 days the written decision of the county government, which decision shall set forth the legal and factual basis for the refusal of the county government to permit the recording of the plat in the manner requested.

654082, 7, (Del. Super. 1995) (citing Delaware Barrel & Drum Co. v. Mayor and Council of City of Wilmington, 175 A.2d 403, 404 (Del. Super. 1961)).

b. *No final judgment, no review*: certiorari review is appropriate when there is a final judgment and no statutory provision exists for review. Id. Under Delaware law, a writ of certiorari is essentially a common law writ; it "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." 1 Woolley, Delaware Practice § 896.

c. *On record*: review on certiorari differs from review on appeal in that certiorari is on the record, and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. Reise v. Board of Bldg. Appeals of the City of Newark, 746 A.2d 271, 274 (Del. Supr. 2000), citing In the Matter of Butler, 609 A.2d at 1081, 1082 (Del. Supr. 1992). The Court of Chancery will review an administrative decision only in those cases where the legal remedy is inadequate. Two South Corp. v. City of Wilmington, CIV.A. 9907, 1989 WL 76291 at 5\* (Del.Ch. 1989) (citation omitted).

d. *Standards*

1) *Legal Error*: To determine whether there have been legal errors in the subdivision process, the standard of review is whether the reviewing agency acted arbitrarily or capriciously, and whether substantial evidence exists to support the decision. Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc., No. CIV.A. 15656-NC, 1997 WL 525860, Steele, V.C. (Del.Ch. 1997) (discretion by County in performing parking calculation supported by substantial evidence). A decision could also be arbitrary and capricious due to disparate treatment of similarly situated applicants with no rational basis for the difference in treatment. See Village of Willowbrook v. Olech 528 U.S. 562, 564 (2000).

2) *Statute unconstitutional*: A challenge to the constitutionality of a statute under which jurisdiction was exercised by the lower tribunal is appropriate for certiorari review. Shoemaker v. State, 375 A.2d 431, 436 (Del. Supr. 1977); Goldberg v. City of Wilmington, 1992 WL 114074, Bifferato, J. (Del. Super. 1992).

3) *Amounts to a taking*: A "taking" may occur if a subdivision restriction "goes too far" in name of health, safety or welfare by unduly constraining constitutional property rights. However, the burden of proof is high: the regulation applied by the government must deny an owner almost all economically viable use of his land. Naegele Outdoor Advertising Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992). Such determination is made by weighing the factors identified in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978): (1) the "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment backed expectations," and (3) the "character of the governmental action."

2. *Writ of Mandamus*. A writ of mandamus is issuable in the exercise of sound judicial discretion by the Superior Court and is used to compel a public agency to perform a ministerial duty. The burden is high: a petitioner must show that she has a clear legal right to

the performance of that duty and has no other adequate remedy. Dragon Run Farms, Inc. v. New Castle County, 2000 WL 33113804, Herlihy, J. (Del. Super. 2000) (citation omitted). Because the subdivision process involves little to no 'ministerial duties' it is unlikely any petitioner would be successful in such claim. In Remedio v. City of Newark, 337 A.2d 317 (Del. Supr. 1975) the Delaware Supreme Court held that mandamus was not available to require the city council to approve a subdivision plan and issue a building permit as such matters were clearly quasi-judicial and not ministerial. See also, Leeds v. City of Delaware City, CIV.A. No. 88M-JL-12, 1990 WL 105038, (Del. Super. 1990).

3. 42 U.S.C. § 1983<sup>5</sup>

a. *In General.* Section 1983 of Title 42 of the United States Code protects against violations constitutional and federal statutory rights, including violations of the Equal Protection Clause and the Due Process Clause of the Constitution. Due Process Clause claims involve either substantive or procedural due process. It is a violation of substantive due process when the government denies or interferes with a property right for no legitimate reason (i.e. in an arbitrary or capricious manner). It is a violation of procedural due process when a property right deprivation takes place absent necessary procedural safeguards (i.e. fundamental fairness). Section 1983 claims can be pursued in State or Federal court. Kerns v. Dukes, 707 A.2d 363, 368 (Del. 1998). Claimants normally seek relief in the form of a declaratory judgment (Superior or Chancery) and/or an injunction (Chancery).

b. *Applicants/developers have protected property rights*

1) *Substantive Due Process:* The Third Circuit set a new standard for substantive due process violations in the land use context in 2003. The Court overturned earlier decisions that held that a municipal land use decision violates substantive due process if it was made for any reason "unrelated to the merits" or with any "improper motive." United Artists Theatre Circuit Inc. v. Township of Warrington, PA, 316 F.3d 392 (3rd Cir. Jan 14, 2003) (NO. 01-3533). Instead, the United Artists court held that a municipal land use decision would violate substantive due process "only when it shocks the conscience." Id. The "shocks the conscience" standard encompasses "only the most egregious official conduct." The Court reasoned that its decision prevents courts from being cast in the role of a "zoning board of appeals." Id. Since United Artists was decided, it has been somewhat limited. For example, The Third Circuit recently held in County Concrete Corporation v. Town of Roxbury, 442 F.3d 159, 169 (3d. Cir. 2006) (involving 12 year litigation over a subdivision plan to extend existing sand and gravel removal operations) that the "shocks the conscience" standard does not apply to facial challenges to ordinances because they are legislative in nature. According to the Roxbury decision, the "shocks the conscience" standard still applies to executive acts. The rational relationship standard applies to substantial due process claims involving legislative acts. Id. at 169. Recently a Delaware Court applied United Artists without distinguishing between the

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<sup>5</sup> Section 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

various government acts to which the standard appropriately or inappropriately may apply, though a discussion of whether county officials lobbying the state legislature to pass a bill which prevented the developer's plan from being approved should be evaluated under the "shocks the conscience" or "rational relationship" standard would have been interesting. Salem Church Assoc. v. New Castle County, 2006 WL 2873745 (Del. Ch. Oct. 6, 2006).

2) *Procedural Due Process*: Applicants are due procedural due process before their intended "use and enjoyment of property" is interfered with by zoning authorities. Goldberg v. City of Rehoboth Beach, 565 A.2d 936, 942 (Del. Super. 1989) (expectation of approval of subdivision request is property interest within scope of those interests protected by procedural due process); Acierno v. New Castle County, CIV.A. No. 93-579SLR, 1995 WL 704976, (D. Del.1995) (interference with applicant's right to build pursuant to recorded plan afforded procedural due process); Cardillo v. Council of South Bethany, CIV.A. Nos. 86A-N02, 86C-OC23 and 86M-OC8, 1991 WL 113632 (Del. Super. 1991) (plaintiffs' expectation of approval of their subdivision plan is a property interest protected by procedural due process).

A violation of procedural due process occurs when a person acting under color of state law deprives a person of a protected property interest, and that the state procedure for challenging the deprivation does not satisfy the requirements for procedural due process. Prosperi v. Scott, 2006 WL 2583754 at \*3 (W.D. Pa.). Importantly, Prosperi states that United Artists had no impact on the standard for procedural due process claims. Id. at \*3 n. 1.

3) *Equal Protection*. Similarly situated property owners are entitled to be treated similarly, but not identically in the land use process. The Equal Protection Clause of the 14<sup>th</sup> Amendment of the Constitution is one of the Constitutional rights Section 1983 protects.<sup>6</sup> Recently a 7.5 million jury verdict based on equal protection grounds was overturned by the Delaware Supreme Court. New Castle County v. Wilmington Hospitality, LLC, No. 24, 2008 (Del. Dec. 22, 2008). The Court decided that the developer did not demonstrate that it had been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id. at 8 (quoting Village, 528 U.S. 562, 564 (2000)). Rather, the developer did not act in good faith and had asked for different and more aggressive variances that its successor-in-title (the buyer of the same property; also, the other "comparator" offered by the developer had made an innocent mistake in overbuilding as per the record below). While Wilmington Hospitality does not involve denial of a subdivision plan (because none was ever submitted showing accurate field conditions and the improvements the developer proposed to mitigate a grossly non-conforming situation), the equal protection analysis would be the same had a subdivision plan been denied.

c. *Neighboring landowners: standing in 1983 claims:*

1) *Substantive*: Neighboring landowners cannot state a protectable property right with regard to use of nearby property for purposes of a substantive due process claim. MacNamara v. County Council of Sussex County, 738 F.Supp. 134, 141 (D. Del.)

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<sup>6</sup> "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.  
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aff'd, 922 F.2d 832 (3d. Cir. 1990) (“the court is unaware of any cases in which persons who merely own property in the neighborhood of a rezoned parcel have successfully claimed the deprivation of a constitutionally protected interest”); Dale v. Town of Elsmere, 702 A.2d 1219 (Del. Supr. 1997) (landowners' adjacent property ownership was insufficient to establish property interest worthy of substantive due process protection, as required to support their federal civil rights claim based on establishment of loading zone on street adjoining neighboring property); but see, Barry v. Town of Dewey Beach, 2006 WL 1668352 (Del Ch.) (holding town commissioners and various property owners had no interest distinctive from the rest of the public to challenge conditional use permit); cf. Regional Planning Comm’n of Kent County v. Board of Adjustment, 1990 WL 263562 (Del. Super.) (denying organization’s standing because it was not incorporated when zoning decision made).

2) *Standing Procedural Due Process 1983 Claims:*

a) Change of use: Owners of adjacent property can state a protectable property right with regard to the change-of-use of nearby property for purposes of a procedural due process claim. Delaware Courts have held that rezonings, and the grant of conditional use permits (deemed equivalent to a rezoning), must be adopted by ordinance<sup>7</sup> to provide adjacent landowners with procedural due process. Bay Colony. Ltd. v. County Council of Sussex County, 1984 WL 159381, (Del.Ch. 1984). In granting such applications, the legislature must provide its citizens with procedural due process, i.e., adequate notice of the matter to be decided and an opportunity to be heard. Citizens Coalition. Inc. v. County Council of Sussex County, 773 A.2d 1018, 1023 (Del.Ch. 2000); County Council of Sussex County v. Green, 516 A.2d 480, 481 (Del. Supr. 1986). The rationale being that when the neighbors purchased their homes, they had a reasonable expectation the adjacent land would be developed in conformity with its then current zoning designation. But see Barry, 2006 WL 1668332 at \*5 (distinguishing Citizens Coalition on basis that the parties did not dispute allegation that plaintiffs were deprived of a meaningful chance to review the adopted ordinance).

b) Subdivision plan approval: Subdivision plans, which involve uses permitted 'by right' (i.e. uses neighbors reasonably anticipated when they bought their land) need only be granted via resolution. Even though there are public hearings held for major plans, the consideration of public comment is limited to code-compliance concerns - if all the requirements of the Code have been met, the legislative body must approve the plan. There is no constitutional right for an individual to be heard on issues regarding the exercise of property rights of another, where the action contemplated will have only indirect effects upon the individual. Citizens for Smyrna-Clayton First v. Town of Smyrna, C.A. No. 1545-K, 2002 WL 31926613, (Del.Ch. 2002), aff'd, 818 A.2d 970 (Table), (Del. Supr. 2003) (holding Chancery did not abuse its discretion in concluding that interested parties failed to establish the necessary criteria for injunctive relief). Note that O’Neill v. Town of Middletown, 2006 WL 205071, at \*6 (Del.Ch. 2006) (finding citizens had standing), distinguishes Smyrna Citizens by noting that Smyrna Citizens involved a challenge to a site plan approval, where O’Neill involved a comprehensive plan consistency challenge.

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<sup>7</sup> Ordinances require a 15 day advance notice in the *News Journal* and are voted upon only after a public hearing. 9 Del. C. § 2607.

4. 42 U.S.C. § 1988(b): Attorney Fees. Pursuant to 42 U.S.C. § 1988(b): "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Where a court has decided a case in favor of the plaintiffs on state grounds and avoided reaching the merits of a Section 1983 claim, fees may nevertheless be awarded under Section 1988 if the "pleaded-but-undecided" claim meets the "substantiality" test of Hagans v. Lavine, 415 U.S. 528 (1974).