

BEFORE THE NEW CASTLE COUNTY

BOARD OF LICENSE, INSPECTION, AND REVIEW

HENRY BLACK, MARY LOU BLACK, :  
and BLACKBALL PROPERTIES, LLC :  
: :  
Appellants, :  
: :  
v. : Application #2012-0555  
: :  
NEW CASTLE COUNTY DEPARTMENT :  
OF LAND USE, :  
: :  
Appellees. :

**APPELLANTS ANSWERING BRIEF IN SUPPORT OF LIRB JURISDICTION  
REGARDING APPEAL OF BUILDING CODE PERMIT ISSUANCE**

I. Argument

A. The Board Has Jurisdiction Over The Appeal Of The Change Of  
Use Permit

In an attempt to prevent Appellants Henry Black, Mary Lou Black and Blackball Properties, LLC (the “Blacks and Blackball”) from having their “day in court” on the merits of their claims, the Department of Land Use (“Department”) argues that License, Inspection, And Review Board (“Board”) lacks jurisdiction to hear appeals from persons aggrieved by the issuance of a permit granted pursuant to Chapter 6 of the County Code, the Building Code. The Department’s position is a flight of fancy. It is abundantly clear that this Board exists to hear appeals regarding permits and inspections. Consequently, the Board should reject the Department’s argument.

1. Jurisdiction Is Easily Established: the Appeal Grieves  
Issuance Of A County License

The Board’s jurisdiction is established by the General Assembly in Title 9, § 1315 of the Delaware Code, which provides the Board with jurisdiction to hear an appeal from “any person

aggrieved by the issuance...of any County license... .” The Department has not challenged the fact that the Blacks and Blackball constitute persons aggrieved by the issuance of the Change of Use Permit. Accordingly, the sole question before the Board is whether the appeal challenges the issuance of a County license.

It is crystal clear that this appeal contests the issuance of a County license. The General Assembly has defined the term “license” as “any permit required by statute, ordinance, or regulation to be obtained from any County Officer, Department, or Board as a prerequisite to engaging in any activity or having possession of or using any property.” 9 Del. C. § 1302(1). Thus, a “license” includes a permit required by the County Code to be obtained from the Department to use land or operate a business thereon.

The Change of Use Permit on appeal is a permit required for the owners of 1707 Concord Pike to use their property for a light auto service use – *i.e.* engage in an auto detailing business. This fits squarely within the definition of the term “license.” As a result, the Board is vested with jurisdiction to entertain the appeal without any scintilla of doubt.

2. The Board Must Act In Conformance With Its State Delegated Authority; The County Code Matters Not

The General Assembly has provided that the County may only establish this Board if the County vests the Board with the jurisdiction provided for in State statute. Therefore, consideration of County Code provisions regarding jurisdiction is entirely irrelevant.

If the County were to establish jurisdiction more limited than that set by the General Assembly, it would be an unenforceable *Ultra Vires* act. The Delaware Supreme Court has previously held that “it is axiomatic that delegated power may only be exercised in accordance with the terms of its delegation.” *New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1275 (Del. 1989) (emphasis added). Thus, the New Castle County government

must exercise power delegated to it by the General Assembly in conformance with the legislative mandate. *Id.* Therefore, the Board should ignore the County Code, and decide the issue of jurisdiction solely based upon the scope established by the Legislature under § 1315, Title 9 of the Delaware Code.

3. The Plain Meaning Of § 1315 Supports Appellants' Position

Contrary to the Department's assertion, the General Assembly did not limit the Board's jurisdiction to the Building Code, or to any other Code. Department Brief at 4-5.<sup>1</sup> If the Legislature had intended that the Board should only hear appeals under the Building Code, Property Maintenance Code, and Drainage Code, then it would have said so in § 1315. Absent the inclusion of limiting language, it is clear beyond *peradventure* that this Board has jurisdiction over all appeals challenging the issuance of a County license, regardless of the Code(s) at issue.

The Department's argument that this Board lacks jurisdiction to consider appeals which involve an alleged error of law under the UDC fails to cite any statutory or case law authority for the proposition. Instead, the Department believes that this Board should simply do whatever it says because it is the government, and "it says so." But the Board should follow the law as written, not as the Department imagines it.

Delaware Courts follow the "plain meaning rule" of statutory construction, which provides that in the absence of ambiguity the language of the statute is conclusive of the General Assembly's intent. *Turnbull v. Fink*, 668 A.2d 1370, 1378 (Del. 1995). The literal meaning of words contained in the text of a statute must be relied upon. *Id.*

The Department has conceded that the operative statutory provision granting jurisdiction to this Board is contained at 9 *Del. C.* § 1315. Department Brief at 2 and 4. And the Department

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<sup>1</sup> References to "Department Brief at \_\_\_" are to pages in the Department's Memorandum dated September 26, 2012.

also admits that the Board must act in accordance with the State enabling statute. *Id.* Under § 1315, the Board possesses jurisdiction over appeals from persons aggrieved by the issuance of any County license. Consequently, it is evident that this Board has jurisdiction to hear the appeal filed by the Blacks and Blackball: an appeal of the issuance of a “County license” – *i.e.* the County Change of Use Permit.

If the General Assembly had intended to limit this Board’s jurisdiction to “building, constructions, and life safety codes” as the Department suggests, then the legislature would have put that limitation in § 1315 of Title 9. *See* Department Brief at 4. It did not. Instead, the General Assembly granted this Board jurisdiction to consider the appeal of the issuance of any County license. Any means all. Not some, or a few, but all. Accordingly, it cannot legitimately be questioned that this Board possesses jurisdiction to hear the appeal by the Blacks and Blackball challenging the Department’s issuance of the Change of Use Permit.

B. The Planning Board Has No State Code Created Appellate Jurisdiction, And It Has No Jurisdiction To Hear This Appeal

The Department erroneously suggests that the New Castle County Planning Board has Delaware Code established jurisdiction to hear appeals regarding UDC subdivision matters. Not so. In fact, this is a figment of the Department’s imagination.

The Planning Board is created pursuant to 9 *Del. C.* § 1303. Its functions are set forth by the General Assembly in 9 *Del. C.* § 1304: 1) consult with the Department General Manger regarding functions of the Department; and 2) review proposed Comprehensive Development Plans, zoning changes, or subdivision regulations, and then make a recommendation to County Council regarding the same. The Planning Board is not vested with any appellate jurisdiction by the Delaware Code. Consequently, it is impossible for the General Assembly to have intended

any matters that it vested this Board with exclusive jurisdiction over to be heard instead by the Planning Board.

County Council has the power to grant appellate jurisdiction regarding subdivision matters to the Planning Board under the UDC, as long as it does not conflict with the State Code. Based upon the hierarchy of law, which establishes that State law trumps any conflicting County law, Title 9, § 1315 of the Delaware Code must prevail over any County legislative enactment. Indeed, the principle of Pre-Emption requires a County law covering the same field as a State law to give way where there is a conflict between the two. *Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005) (where a conflict exists between a State statute and a local Ordinance, the statute must prevail).

The Board has jurisdiction over all appeals that the Legislature has provided for, regardless of what County Council and the County Code might say. Accordingly, the Department's reference to the Planning Board is a total red herring.

C. The Board Of Adjustment Lacks Jurisdiction Over This Appeal As Well, Thereby Establishing With Certainty That This Board Must Have Jurisdiction

The pre-eminent legal authority regarding jurisdiction of County Boards is the Delaware Code. And the only appellate jurisdiction granted to the New Castle County Board of Adjustment therein is for “[a]ppeals in zoning matters where error is 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.” 9 *Del. C.* § 1313(a)(1) (emphasis added). Breaking that provision down, jurisdiction is only vested in the Board of Adjustment where there is: 1) a zoning matter; 2) alleged error in an order, requirement, decision, or determination; 3) made by an administrative officer/agency; and 4) in the

enforcement of any zoning provision. Because there is no order/requirement/decision/determination and no “enforcement” of a zoning provision, the Department’s argument must fail.

The Change of Use Permit is not accompanied by any “order, requirement, decision, or determination.” It is a standard, short-form document which authorizes the change in use of 1707 Concord Pike from its traditional Office use to a Light Auto Service use (*i.e.* auto detailing). No narrative explanation is contained in the Change of Use Permit which describes any reasoning for its issuance. And the Department has not provided any written explanation of its rationale for granting the Change of Use Permit. Thus, there is no written document upon which to base an appeal to the Board of Adjustment.

The Change of Use Permit issued by the Building Code Official is a grant of approval pursuant to the Building Code for the property owner to change the use of the property from an Office Use to a Light Auto Service Use. A Change of Use Permit is required by the Building Code at § 6.03.019B. In contrast, “Enforcement” of UDC zoning provisions is governed by § 40.31.920. The Change of Use Permit appealed to this Board does not involve the “enforcement” of zoning provisions. Therefore, the Board of Adjustment lacks jurisdiction to hear this appeal.

The Board of Adjustment’s jurisdiction to hear appeals is narrow and limited. In contrast, this Board’s appellate jurisdiction is broad and wide. By requiring the matter be zoning in nature, the subject of a formal written decision, and involving the enforcement of a zoning provision, the General Assembly provided the Board of Adjustment with jurisdiction over only a small species: formal zoning enforcement actions. In contrast, the General Assembly granted this Board wide latitude: appeals by persons aggrieved by the grant or impingement upon any legally required permit affecting modification, use, or possession of property.

Nowhere in 9 Del. C. § 1315 did the Legislature indicate that this Board's jurisdiction was limited to any particular County Code Chapters. If the appeal contests the issuance of a permit, regardless of the Code Chapter, this Board is the correct place to go. As a result, the Department's position that the Board of Adjustment may have jurisdiction over the appeal by the Blacks and Blackball is meritless.

D. Citation To *Friends of Paladin* Is Inapt, And The Proposition That Administrative Appellate Review Is Unavailable Is Pure Folly

The Department's citation to *Friends of Paladin v. New Castle County Bd. Of Adjustment*, 2007 WL 2085399 (Del., July 23, 2007) (Order) is off the mark. That case involved a determination of whether a formal, written Department decision concluding that a wall could not be demolished on the grounds that it was of historic significance was a zoning decision or a subdivision decision. The case did not involve the issuance of any County license, over which this Board would have had jurisdiction. And of course the decision did not involve a question of whether the Board of Adjustment, Planning Board, or this Board possessed jurisdiction. As a consequence, the *Friends of Paladin* decision has no bearing on the outcome of the jurisdictional issue before this Board.

Finally, the Department's position that the only avenue of relief available to the Blacks and Blackball is a direct Court challenge is nonsensical. The General Assembly created this Board to provide an administrative appeal mechanism for persons aggrieved by permitting and inspection actions taken by the Department. The Department's position that a challenge to its issuance of a permit may only be appealed directly to Court would mean that this Board lacks jurisdiction to hear any permit matters at all, effectively limiting the Board to considering inspection matters. For example, an applicant denied a building permit due to violation of the "Clean Hands Ordinance" contained at UDC § 40.31.901D., would under the Department's

theory be precluded from coming to this Board to challenge the permit denial (since it involved an interpretation of the UDC).


Obviously, there are frequently permit actions taken by the Department pursuant to Chapter 6, the Building Code, which involve the application of other Chapters of the County Code, including the UDC. But the General Assembly granted this Board unfettered jurisdiction over all permit related appeals. Accordingly, the Department's argument that appellate review is only available in the Courts simply does not hold water.

## II. Conclusion

Based on the foregoing, the Board should have no problem concluding that it is vested with jurisdiction to hear the appeal. The Department has no leg to stand on. Its arguments ignore the clear and plain language granting this Board jurisdiction over permit appeals pursuant to delegation of power by the Delaware General Assembly. Instead, the Department argues that it may magically divest this Board of jurisdiction based solely on its hocus-pocus incantation of conclusory and unsupported contentions. Such an absurd reading of the law should be rejected.

This Board possesses jurisdiction over an appeal challenging the issuance of a permit regarding the use of land. So says the Delaware General Assembly, and no one may differ with it under the law. Consequently, this Board should follow the clear mandate from the Legislature and exercise jurisdiction over the appeal.

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Attorneys for Appellants

Dated: October 15, 2012



931 A.2d 436, 2007 WL 2085399 (Del.Supr.)  
 (Table, Text in WESTLAW), Unpublished Disposition  
 (Cite as: 931 A.2d 436, 2007 WL 2085399 (Del.Supr.))

**C**  
 (The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.  
 FRIENDS OF PALADIN, an unincorporated association, Roy V. Jackson, John Severin, and Marie Sims,  
 Plaintiffs Below, Appellants,

v.

NEW CASTLE COUNTY BOARD OF ADJUSTMENT and Edgewood Village, L.L.C., a Delaware limited liability company, Defendants Below, Appellees.

No. 591, 2006.

Submitted: May 9, 2007.

Decided: July 23, 2007.

**Background:** Citizens sought review of decision of the Superior Court, New Castle County, upholding jurisdiction of county board of adjustment to hear appeal from decision of county department of land use denying property owner's application to develop property.

**Holding:** The Supreme Court, Henry Dupont Ridgely, J., held that decision applying zoning regulation was a zoning decision over which board of adjustment had jurisdiction.

Affirmed.

West Headnotes

Zoning and Planning 414 ↪ 1433

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certificates, or Approvals

414k1431 Administrative Review

414k1433 k. Nature and form of remedy and jurisdiction. Most Cited Cases

(Formerly 414k441)

Decision of county department of land use, applying zoning regulation to deny property owner's

application to develop property, was a zoning decision, rather than a subdivision decision, and thus county board of adjustment had jurisdiction to hear appeal. 9 Del. C. § 1313(a)(1).

Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 05A-08-009.

Before STEELE, Chief Justice, JACOBS, and RIDGELY, Justices.

### ORDER

HENRY duPONT RIDGELY, Justice.

\*1 This 23rd day of July 2007, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) Appellants Friends of Paladin, Roy V. Jackson, John Severin, and Marie Sims (collectively referred to as "Friends of Paladin") appeal the Superior Court's decision upholding the jurisdiction of the New Castle County Board of Adjustment ("Board of Adjustment").<sup>FN1</sup> Appellee Edgewood Village, L.L.C. ("Edgewood") sought the approval of the New Castle County Department of Land Use ("Department of Land Use") to develop property adjacent to a residential complex called the Paladin Club. After the Department of Land Use denied its application, Edgewood appealed to the Board of Adjustment. The Board of Adjustment ultimately ruled in favor of Edgewood. Friends of Paladin contends on appeal, as it did before both the Board of Adjustment and the Superior Court, that the Board of Adjustment did not have jurisdiction to hear the appeal because the appeal did not concern zoning matters. They argue that the appeal should have been taken to the Planning Board. We find no merit to their arguments and affirm.

<sup>FN1</sup> This matter was before the Superior Court on certiorari review. Although the Superior Court "denied" Friends of Paladin's petition for certiorari, it is clear from the Superior Court docket (Docket Entry No. 2.) that the writ was issued and the record was sent from the Board of Adjustment to the Superior Court. "There can be no doubt that the writ of certiorari as known in this state

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was a common-law writ, issued from a superior court, directed to one of inferior jurisdiction, and commanding the latter to certify and return to the former the record in the particular case." *Rash v. Allen*, 76 A. 370, 374 (Del.Super.1910). The appeal before us does not challenge the issuance of the writ but the decision of the Superior Court to affirm the Board of Adjustment's determination that it had jurisdiction over Edgewood's appeal.

(2) Edgewood owns real property adjacent to a residential condominium complex called the Paladin Club. Edgewood seeks to develop its property and build a townhome community. On Edgewood's property, however, lies an old stone wall. A group of condominium owners and various other neighbors joined together and formed Friends of Paladin, an unincorporated association. Friends of Paladin was created for the specific purpose of opposing the development of Edgewood's property. The historic significance of the old stone wall was raised to stop the project.

(3) Edgewood filed a Subdivision Land Development application and an Exploratory Record Major Land Development Plan (collectively, "the Plans"). The Plans called for removal of 850 feet of the stone wall. The review process proceeded as follows: The Plans were sent to Department of Land Use Planner Michael Bennett and Engineer Stacey McNatt for review. They, in turn, forwarded the matter to the Department's Historic Preservation Section ("HPS"). HPS forwarded the Plans to the Historic Review Board ("HRB"), after opining that the wall did not meet the criteria for historic zoning. After a hearing, the HRB recommended that the Plans be rejected because the wall was of historic significance.

(4) Despite the HRB's recommendation, Bennett and McNatt reached a different conclusion. They determined, as did HPS, that the wall did not qualify as a historic resource under the New Castle County Unified Development Code ("UDC"). A New Castle County Councilman protested the determination in a letter to Charles Baker, the General Manager for the Department of Land Use. Counsel for Edgewood also wrote to Baker, seeking confirmation that it could remove the wall. In February 2005, Baker decided by letter that the wall could not be removed because it

was of historic significance. In that letter, Baker stated, "[t]his is a final decision of the Department of Land Use. Please see UDC § 40.31.500 for rights of appeal of the *Planning Board* if so desired."

\*2 (5) Edgewood appealed the Department of Land Use decision. Instead of following the suggestion in Baker's February 2005 letter that the right of appeal was to the Planning Board, Edgewood filed its appeal with the Board of Adjustment. Edgewood did so after its counsel conferred with counsel for the Department of Land Use on the proper venue for the appeal. The Board of Adjustment held a hearing in July 2005. Notwithstanding Friends of Paladin's jurisdictional challenge, the Board of Adjustment proceeded with the hearing, applied the criteria of the UDC, and ultimately concluded that the Department's decision was not supported by the evidence. In August 2005, Friends of Paladin filed a Verified Petition for Writ of Certiorari in the Superior Court, in which Friends of Paladin claimed that the Board of Adjustment lacked jurisdiction over the matter.

(6) The Superior Court rejected Friends of Paladin's argument, finding that the Board of Adjustment had jurisdiction because the Department of Land Use had made a *zoning*, and not a *subdivision*, decision. The Superior Court denied Friends of Paladin's motion for reargument and this appeal followed.

(7) The Board of Adjustment is empowered to hear appeals in zoning matters under State <sup>FN2</sup> and County law.<sup>FN3</sup> The Planning Board is empowered to hear appeals in subdivision matters.<sup>FN4</sup> The issue in this appeal is whether Edgewood appealed a zoning decision or a subdivision decision. If the decision of the Department of Land Use was a zoning matter, the Board of Adjustment acted within its jurisdiction. If the Department of Land Use made a subdivision decision, the Board of Adjustment lacked jurisdiction to hear the appeal. We agree with the Superior Court that the statutory scheme demonstrates the Department of Land Use made a zoning decision and therefore, the Board of Adjustment had jurisdiction to hear Edgewood's appeal.

<sup>FN2.</sup> 9 Del. C. § 1313(a)(1) ("The Board of Adjustment shall be entitled to hear and decide: (1) Appeals in zoning matters where error is alleged in any order, requirement, decision or determination made by an ad-

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ministrative officer or agency in the enforcement of any zoning ordinance, code regulation or map....”).

FN3. UDC § 40.30.320 (“The Board of Adjustment, consisting of seven (7) members, shall be empowered to hear and decide all of the following: A. *Appeals in zoning matters* where error is 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.*”) (emphasis added).

FN4. UDC § 40.30.310.

(8) Friends of Paladin relies upon *Arbour Park Civic Ass'n, Inc. v. Bd. of Adjustment of the City of Newark*.<sup>FN5</sup> Their reliance is misplaced. In *Arbour Park*, the issue was, as stated by the Superior Court, “whether or not the Board of Adjustment, created to hear zoning appeals, has jurisdiction to hear an appeal from an order of the City Manager, calling for bids for the construction of sidewalks in Arbour Park....”<sup>FN6</sup> Sidewalks were regulated by Chapter 12 of the Newark Code. There is nothing in the opinion to suggest that Chapter 12 was designated by the Newark Code as a “Zoning Regulation.” Indeed, as the trial judge in that case explained, “[t]he argument of appellant, that the Board of Adjustment does have jurisdiction to entertain the appeal, has merit only if the subdivision regulations are, in fact, a zoning matter.”<sup>FN7</sup> Here, Article 15 is specifically designated as a “Zoning Regulation.”

FN5. 1969 WL 99824 (Del.Super.).

FN6. *Id.* at \*2

FN7. *Id.*

(9) The terms “Zoning regulations” and “Subdivision regulations” are defined in Section 40.33.300 of the UDC. More specifically, “Zoning regulations” is defined in “Articles 1-15, 30-33,” and “Subdivision regulations” is defined in “Articles 1, 20-27 and 30-33 of this Chapter.” The criteria within Article 15, a zoning regulation, were used in this case as the principal basis to determine whether the stone wall was of historical significance.<sup>FN8</sup> The application of a zoning

regulation is a zoning matter. Because the application of the criteria under Article 15 was at issue, the decision of the Department of Land Use to deny the development plan because the stone wall is historic, was a zoning matter.

FN8. UDC § 40.15.110.

\*3 Therefore, the Superior Court correctly concluded that the Board of Adjustment had jurisdiction over Edgewood's appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

Del.Supr.,2007.

Friends of Paladin v. New Castle County Bd. of Adjustment  
 931 A.2d 436, 2007 WL 2085399 (Del.Supr.)

END OF DOCUMENT

**CERTIFICATE OF SERVICE**

I, Richard L. Abbott, Esquire, hereby certify that on this 15<sup>th</sup> day of October, 2012, I had caused a copy of the foregoing **Appellant's Opening Brief In Support Of LIRB Jurisdiction Regarding Building Code Permit Issuance** to be served via electronic mail and U.S. First Class Mail on the below-listed individual:

Julie M. Sebring, Esquire  
New Castle County Office of Law  
87 Read's Way  
New Castle, DE 19720

James A. Edwards, Esquire  
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A handwritten signature in cursive script, appearing to read "Richard L. Abbott", written over a horizontal line.

Richard L. Abbott, Esquire (I.D. #2712)