

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

**M. Jane Brady**  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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April 7, 2010

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**RE: domus GCK, JV/LLC v. New Castle County Department of Land Use  
Upon Appellant's Petition for a Writ of Certiorari  
CA. No. 09A-06-009 (MJB)**

Dear Counsel:

Before the Court is a *Writ of Certiorari*, filed by domus GCK JV/LLC ("domus"), seeking review of the County's Department of Land Use's ("Department") decision to assess fines for permit violations, outlined in correspondence of February 25, 2009, which was affirmed by the New Castle County Board of License, Inspection and Review ("Board"). The Court addresses several issues and requests supplemental submissions as to another.

**FACTS**

Domus contracted to build eight units in the Wilmington, Delaware, community of Rosegate and was issued permits to do so. Those permits had expiration dates. On November 17, 2008, the Department sent a violation notice to domus for various violations of *New Castle Code*, Chapter 6, the County's Building Code, and, within that document, gave notice of a Rule to Show Cause Hearing, to be held on December 11, 2008. The hearing was conducted, and on December 17, 2008, Vincent Kowal, Hearing Officer for the Department, issued a written decision memorializing the hearing and directing domus to complete construction on lot numbers 21 and 23 Rose Lane within 120 days of the letter, and to submit and obtain approval for a plan of action for lots number 9, 11, 13, 15, 17, and 19 Rose Lane, not later than January 30, 2009. Further, in the December 17, 2008 decision, domus was informed that "[f]ailure to achieve either

benchmark data above will result in penalty of \$100.00 per day being assessed and review for remedial action will begin.”<sup>1</sup>

Although domus did not appeal from the decision of the Department, on January 9, 2009, correspondence was sent challenging the alleged violations which were heard at the Rule to Show Cause hearing on December 11, 2008. The record does not indicate that a plan for the lots other than 21 and 23 was submitted.

When those benchmarks relevant to the lots other than 21 and 23 were determined not to have been met, the Department, on February 25, 2009, sent domus a letter assessing fines and asserting its right to commence remedial action on the subject site. This letter specifically indicated that domus was not in compliance with the decision dated December 17, 2008 in that domus failed to submit and obtain approval for a plan of action for the specified lot numbers. On March 5, 2009, domus appealed the sanctions imposed in the February 25, 2009 letter to the Board, which held a hearing on April 1, 2009. The Board issued an opinion on May 14, 2009, finding that the February 25, 2009 letter to domus assessing fines for Code violations was not arbitrary and capricious, nor was it an error of law. Domus filed an appeal on *certiorari* to this Court.

### **STANDARD OF REVIEW**

This Court reviews this matter as a petition for *certiorari*.<sup>2</sup> A review under *certiorari* differs from a review on appeal. “The Court’s review on *certiorari* involves a review only of errors that appear on the face of the record.”<sup>3</sup> “*Certiorari* review differs from appellate review in that an appeal ‘brings up the case on its merits,’ while a *writ* brings the matter before a reviewing court to ‘look at the regularity of the proceedings.’”<sup>4</sup> A decision will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review.”<sup>5</sup> Finally, the burden is on the party challenging the decision to prove it was arbitrary and unreasonable.<sup>6</sup>

### **PARTIES’ CONTENTIONS**

Domus asserts that the decision of the Department should be overturned because its procedural due process rights were violated and the Department

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<sup>1</sup> New Castle County Code Official Rule to Show Cause Hr’g Decision at 2, December 17, 2008.

<sup>2</sup> While domus appears to claim, in its Reply Brief, that there is a different standard for common law *certiorari* review than for statutory *certiorari* review, they cite no case law on the issue. This Court adopts the generally accepted premise that “Under Delaware law, a writ of *certiorari* is essentially a common law writ.” *Goldberg v. City of Wilmington*, 1992 WL 114074 at\*1 (Del. Super.)

<sup>3</sup> *395 Associates, LLC v. New Castle County*, 2006 WL2021623 at \*2 (Del. Super. Ct.)

<sup>4</sup> *Id.* at \*4.

<sup>5</sup> *Christiana Town Center, LLC v. New Castle County*, 2004 WL2921830 at \*2, citing Wooley, Delaware Practice, Volume 1, Section 923.

<sup>6</sup> *Christiana Town Center, LLC v. New Castle County*, 2004 WL 1551457 at\*2.

erred as a matter of law. According to domus, the hearing held on December 11, 2008 was not an “official” hearing; but was, rather, “a meet and confer.”<sup>7</sup> Since there was no official hearing, they argue, the Board was required to rule that their due process rights had been violated and that the Department should provide domus with another, or an official, hearing. Domus also contends that the Board committed an error of law finding that the February 25, 2009 fines and remedial actions were not arbitrary and capricious.

In opposition, the Department argues that this Court lacks jurisdiction over this petition as domus failed to name the Board, an indispensable party, in its petition. The Department also argues that domus was provided due process and whether the December 11, 2008 hearing was an “official” hearing is a factual question outside of this Court’s scope of review, but rather lies within the personal and subject matter jurisdiction of the Board.

## **ANALYSIS**

### **A. Scope of Review**

This Court must address a preliminary issue before it can consider domus’s substantive arguments on review. This Court must address the Department’s claim that this Court lacks jurisdiction to review the Board’s decision. According to the Department, this Court is without jurisdiction to hear the *writ* because domus failed to name the Board in its petition, and the Board is an indispensable party.<sup>8</sup> As the Board’s decision is the subject of the present petition, this Court finds that the Board is an interested party.

Pursuant to Superior Court Rule 19(a), a person who claims an interest relating to the subject of the action, and is so situated that the disposition of the action in the person’s absence may impair or impede the person’s ability to protect that interest, shall be joined as a party in an action.<sup>9</sup> It is well settled that all parties to an appeal who would be directly affected by an appellate ruling should be made parties to the review proceeding.<sup>10</sup> However, Rule 19(b) provides that “the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.” As a matter of fairness, appeals should, where possible and where the other side has not been prejudiced, be decided on the merits and not disposed of on technical grounds.

The Superior Court addressed this issue in *Hackett*.<sup>11</sup> In that case, the Appellant failed to designate a property owner in the caption of the *certiorari*

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<sup>7</sup> Appellant’s Opening Br. 10.

<sup>8</sup> Super. Ct. Civ. R. 41(f).

<sup>9</sup> Super. Ct. Civ. R. 19(a)(2)(i).

<sup>10</sup> *State Personnel Comm’n v. Howard*, 420 A.2d 135, 137 (Del. 1980).

<sup>11</sup> *Hackett v. Board of Adjustment*, 794 A.2d 596 (Del. 2002).

petition. The Court determined that a property owner is an indispensable party, whose interests are impacted by a ruling of a board of adjustment. Here, however, the Department is noticed, and while, perhaps, the Board is the properly named party, there is no prejudice to the Department in this matter, whether the Department or Board is named. The County is the indispensable party, and they are participating in the proceedings.<sup>12</sup> Given the preference this Court has for the resolution of matters on the merits, rather than technical issues,<sup>13</sup> the matter will be considered, in the Court's discretion, to have the proper parties before it.

## **B. Procedural Due Process: Was There a Hearing?**

Domus contends that it was deprived of due process of law guaranteed by the Fourteenth Amendment.<sup>14</sup> It asserts that its rights were abridged when the Department failed to provide notice and an opportunity to be heard in a formal Rule to Show Cause Hearing on domus's proposed plan of action.

In Delaware, due process requires that a notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings.<sup>15</sup> Due process requirements are satisfied if the party proceeded against understood the issue and was afforded a full opportunity to justify its conduct.<sup>16</sup> *Goldberg* identifies elements of due process which may be required in a given situation, including notice of government action, hearing before a neutral arbiter, opportunity to make an oral presentation and to present evidence, opportunity to question witnesses, the right to be represented by counsel, and a decision based on the record.<sup>17</sup> Generally, the Court in reviewing a matter on *certiorari*, will not review the transcript of the proceedings below.<sup>18</sup> However, where, as here, domus contends that what occurred was not a hearing, the Court will review the transcript to determine if proper procedures were followed in that proceeding.

The transcript clearly indicates that a hearing occurred. The Hearing Officer introduced himself as such, explained the matter was being recorded, and explained the procedures which would be followed during the proceeding.<sup>19</sup> He further explained the appeals process.<sup>20</sup> Finally, a formal, written decision was issued.

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<sup>12</sup> domus, in its Opening Brief, calls this proceeding an appeal from the Board's decision. It does not, however, name the Board in their caption, and their challenge is to the Department's decision.

<sup>13</sup> See *Howard*, *infra*.

<sup>14</sup> U.S. CONST. Amend. XI. (" . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

<sup>15</sup> *J.L.B. Corp. v. Delaware A.B.C.C.*, Del. Super., C.A. No. 83A-NO-13, at 4, Ridgely, J. (June 7, 1985).

<sup>16</sup> *Id.*

<sup>17</sup> *Goldberg v. Rehobeth Beach*, 565 A.2d 936, 942 (Del. Supr. 1989).

<sup>18</sup> *Green v Sussex County*, 668A.2d 770, 773, *aff'd* 1995 WL 466586 (Del. Supr.) "...[the] transcript of the evidence below is not part of the reviewable record...the Court cannot examine the transcript in order to evaluate the adequacy of the evidence which supports the conclusion rendered below."

<sup>19</sup> Rule to Show Cause Hearing Tr. 2, December 11, 2008.

<sup>20</sup> *Id.*

Domus appears to rely on a statement near the end of the hearing to claim that no hearing took place. Near the end of the record of the hearing, Mr. Daye, a representative of domus and Mr. Jea Street, a representative of the community, engaged in a conversation. Mr. Daye felt that the intent and sincerity of domus in the construction endeavor was being challenged and began to relate his and his family's history in the area. The Hearing Officer interrupted and said that if they wanted to have a conversation, he wanted to end the recording, at which time he further stated, in an apparent attempt to mollify Mr. Daye, "Because they had applied for their permit extension and the Department chose not to grant it because they wanted to have this meeting it's considered a meeting and not a strict someone who is in violation that doesn't care about it."<sup>21</sup> This Court does not find that that statement eliminated the entirety of the nature of what preceded it or changed what occurred. The fact that the hearing was conducted with collegiality is not inappropriate or uncommon in this state.

For the aforementioned reasons, this Court finds that the hearing was properly called and held.

**C. Was the February 25, 2009 letter supported by the record?**

The next issue is whether the sanctions imposed by the Department for the failure to comply with the rulings in that hearing is properly supported by the record. The Court has reviewed the record to determine if there were any irregularities or illegalities that might affect the validity of the sanctions imposed. Upon reviewing the record and submissions in this matter, it occurred to the Court that domus may be contending that it is entitled to a Rule to Show Cause Hearing regarding the matter of compliance with the previous hearing's order. Little comment and no authority, however, addressed that issue in the submissions. Therefore, the Court directs the parties to engage in the following briefing schedule to assist the Court in determining this specific issue, taking the Court's ruling regarding the December 11 proceeding into account:

domus's Opening Brief	April 30, 2010
County's Answering Brief	May 14, 2010
domus's Reply Brief	May 28, 2010

**IT IS SO ORDERED.**

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/s/  
**M. Jane Brady**  
Superior Court Judge

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<sup>21</sup> Rule to Show Cause Hearing Tr. 26-27, December 11, 2008.