IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

330 HOSPITALITY GROUP, LLC, a Delaware limited liability Company,	:	C.A. No.
Plaintiff,	:	
v.	:	
THE CITY OF REHOBOTH BEACH, a municipal corporation, THE BOARD OF COMMISSIONERS OF REHOBOTH BEACH, the governing body of The City of Rehoboth Beach, STAN MILLS, PATRICK GOSSETT, SUSAN GAY, JAY LAGREE, EDWARD CHRZANOWSKI, TONI SHARP, TIM BENNETT, in their official capacities as members of the Board of Commissioners of Rehoboth Beach, THE PLANNING COMMISSION OF REHOBOTH BEACH, MICHAEL BRYAN, BARRY COVINGTON, JIM ELLISON, JOHN DEWEY, JULIE DAVIS, MIKE STRANGE, NAN HUNTER, RACHEL MACHA, and STEPHEN KAUFMAN, in their official capacities as members of the Planning Commission of Rehoboth Beach.	:	
Defendants.	:	

VERIFIED COMPLAINT

COMES NOW Plaintiff, through Counsel, and complains of the Defendants as follows:

The Parties

1. Petitioner is 330 Hospitality Group, LLC, a Delaware limited liability company, ("330") with offices at 26412 Broadkill Road, Milton DE 19968.

2. The Defendants, all with offices at 229 Rehoboth Avenue, Rehoboth Beach, DE 19971, are as follows:

(a) The City of Rehoboth Beach, a municipal corporation of the State of Delaware, (the "City");

(b) the Board of Commissioners of Rehoboth Beach, the governing body of the City of Rehoboth Beach, (sometimes referred to as "City Commissioners");

(c) Stan Mills, in his capacity as the Mayor of the City of Rehoboth Beach and a member of the Board of Commissioners;

(d) Patrick Gossett, in his capacity as the Vice President of the City of Rehoboth Beach and a member of the Board of Commissioners;

(e) Susan Gay, in her capacity as a member of the Board of Commissioners;

(f) Jay Lagree, in his capacity as a member of the Board of Commissioners;

(g) Edward Chrzanowski, in his capacity as a member of the Board of Commissioners;

(h) Toni Sharp, in her capacity as a member of the Board of Commissioners;

(i) Tim Bennett, in his capacity as a member of the Board of Commissioners;

(j) The Planning Commission of the City of Rehoboth Beach, (the "Planning Commission");

(k) Michael Bryan, in his capacity as a member of The Planning Commission;

(l) Barry Covington, in his capacity as a member of The Planning Commission;

(m) Jim Ellison, in his capacity as a member of The Planning Commission;

(n) John Dewey, in his capacity as a member of The Planning Commission;

(o) Julie Davis, in her capacity as a member of The Planning Commission;

(p) Mike Strange, in his capacity as a member of The Planning Commission;

(q) Nan Hunter, in her capacity as a member of The Planning Commission;

(r) Rachel Macha, in her capacity as a member of The Planning Commission; and

(s) Stephen Kaufman, in his capacity as a member of The Planning Commission.

Jurisdiction

3. This Court is vested with subject matter jurisdiction over the claims asserted herein pursuant to Article IV, Section 10, of the *Delaware Constitution of 1897*, as amended, 10 *Del. C.* §341, 10 *Del. C.* §§6501-6502, and this Court's Equitable Cleanup Doctrine.

4. This Court has personal jurisdiction over each and every one of the Defendants for the reasons that (a) the Defendants are either (i) Delaware residents, or (ii) a Delaware municipal corporation or agency, division, official, or representative thereof and (b) the acts or occurrences which form the basis of the Plaintiff's claims occurred solely within the State of Delaware.

Factual Background

5. Plaintiff is the owner of real property with an address of 330 Rehoboth Avenue, comprising just over 42,000 square feet, and located at the southeast intersection of Rehoboth Avenue and State Road, and further identified as 334-14.17-139 on Sussex County Tax Maps.

6. Plaintiff includes two (2) members, Limitless Development Construction Consulting II, LLC ("LDCC"), whose principal is Don A. Lockwood, and Chain Street, LLC, whose principal is Bette Gallo. 330 purchased the property on January 12, 2021, from JJ Stein, III, Inc. ("Stein").

7. For many years, the subject property was the home of two well-known Rehoboth Beach restaurants - the *Horse and Buggy*, and then the *Seahorse*. The property was then utilized for additional restaurant and non-restaurant uses.

8. The property is split into two different zoning classifications. The portion located along Rehoboth Avenue, roughly 23,000 square feet, is zoned C-1 for commercial use. The portion located behind the commercial property, and entirely along State Road, approximately 19,400 square feet, is zoned R-1 for

residential use. During the operation of the restaurants and other subsequent uses, the actual commercial operations were located within a building or buildings along Rehoboth Avenue, and the residentially-zoned property was used for parking to support the commercial use. Changes to the City zoning code over the years created a situation in which parking on the R-1 parcel became a legal nonconforming use.

9. In 2018, the property was owned by a Delaware corporation known as JJ Stein, III, Inc. ("Stein"), which was the property owner at the time the *Seahorse* restaurant closed. Some years thereafter Stein leased the property, pursuant to a ninety-nine (99) year Lease, to LDCC.

10. Upon execution of the long-term Lease, LDCC hired engineers, surveyors, and other professionals to prepare plans to repurpose the building into a four-story structure with retail operations on the ground floor, and a three-story hotel above – uses permitted in a C-1 zone. The residentially-zoned area would continue to serve as parking, both at ground level, and below ground.

11. On December 7, 2018, LDCC, through counsel, requested a concept review for the property under Section 236-31 of the Rehoboth Beach City Code. One of the primary reasons Plaintiff sought that review was because of the split zoning, as described in more detail in the December 7, 2018, letter (Ex. A).

12. The Rehoboth Beach Planning Commission met on January 11, 2019 for what it termed a "sketch plan review". The Minutes from that meeting (Ex. B)

show that the City recognized the existing non-conformity created by the utilization of residentially-zoned property as a parking lot to serve and support a commercial building. The Planning Commission also recognized that two routes were possible for repurposing the property: (1) seeking a number of variances to allow for (among other things) the continued use of the residentially-zoned parcel for parking, as it would be expanded for below-ground parking, or (2) requesting that the R-1 parcel be rezoned to C-1 commercial which would appear to make development simpler. The consensus of the Planning Commission was to support the zoning change, thus eliminating the need for multiple variances and ultimately simplifying the process. From that point on, and in reliance upon the Planning Commission's recommendation, LDCC and then the Plaintiff pursued a rezoning of the residential property and did not proceed to request variances.

13. On June 17, 2019, LDCC formally requested a change of zone of the R-1 portion of the property (Ex. C).

14. The application went before the Planning Commission on August 9, 2019, after having been referred to it by the City Commissioners at their July 19, 2019, meeting. However, Stein, still the record title owner of the property, and Lessor under the long-term Lease, objected to the Commission's consideration because of then-pending litigation between Stein and LDCC, and which Stein suggested might result in the termination of the Lease. The Planning Commission voted to recommend that the application be delayed until the litigation, which it

couched in terms of "standing", had been resolved. Nothing in the City Code specifically prohibited the application from being reviewed and processed while the Stein-LDCC litigation proceeded (Ex. D).

15. By letter dated March 5, 2021, Plaintiff's counsel made the Planning Commission aware that the litigation had been resolved, and that the Applicant was now 330, and requested that the application be permitted to proceed (Ex. E).

16. The Application was placed on the agenda and considered by the Commission at its May 14, 2021, meeting. At that meeting 330 pointed out that there was no substantive change from the original concept plan presented to the Planning Commission in December of 2019. The Commission, however, began to focus its attention on the hotel depicted in the concept plan that had been submitted originally by LDCC, rather than the statutory considerations that are appropriate for a rezoning. Although City Attorney Glen Mandalas instructed the Commission that an actual use was not necessary for rezoning, and that limitations on the actual structures contemplated could be considered at a mandatory site plan review later in the process, he also suggested that the Applicant could "take some measure to restrict the property", so as to satisfy the concerns of the Commission. The Planning Commission therefore delayed any decision until the Applicant returned with restrictions (Ex. F).

17. The matter appeared on the Planning Commission Agenda again on June 11, 2021, to permit 330 to update the Commission and respond to the

questions raised previously by the Commission and the City attorney. The Plaintiff offered to record restrictions that created specific setbacks and effectively bound it to build a hotel on the commercial parcel. That was so despite the City attorney's admonition to the Commission that a zoning decision cannot be conditioned upon specific designs or plans. Rather, the Planning Commission again sought to view the application with "equity" in mind, something which it is without authority to do. Once again, the Planning Commission voted to delay consideration. And rather than provide any guidance for the restrictions it believed appropriate, the Planning Commission repeatedly left that task up to 330, only to express dissatisfaction with what it offered (Ex. G).

18. On October 8, 2021 the Planning Commission again considered the application. 330 presented revised and more restrictive covenants in an effort to placate the Commission. And despite the fact that the Planning Commission cannot restrict property as a condition to rezoning, it continued down that path by requesting a "better" set of restrictions. Further, despite having advised 330 that it preferred a rezoning of the R-1 parcel as opposed to a set of variances, it was apparent that the Planning Commission members now believed rezoning was not appropriate. The Minutes also reveal that a Planning Commission member from December 2018, Rick Perry, spoke against the application, as a private citizen, and without any disclosure of his obvious conflict, and without any recognition of that conflict by the Planning Commission (Ex. H).

19. On December 10, 2021, the Planning Commission considered, and finally voted on, the 330 application – 3 full years after the first presentation of the concept plan at which it urged 330 to pursue a rezoning of the R-1 parcel. At the meeting, 330 presented revised covenants to further restrict itself, in response to its discussions with the City Planner and City Attorney. Yet it was immediately apparent that the Planning Commission had no intention of recommending approval of the rezoning it had urged 330 to pursue, and after years of 330 attempting to hit the moving targets set up by the Planning Commission. Indeed, Commission member Nan Hunter alluded to that inequitable situation when she pointed out the "hoops and steps" 330 had been forced to navigate. By a 5-3 vote, the Planning Commission recommended that the City deny the application. It is noteworthy that only one member of the Planning Commission (Michael Strange) had been a member in December 2018 when the Planning Commission suggested rezoning the property (Ex. I).

20. The Rehoboth Beach Board of Commissioners held a public hearing on February 18, 2022. Plaintiff's counsel made a presentation consistent with the numerous presentations made to the Planning Commission, and consistent with the originally-filed proposal. The presentation also reminded the Commissioners that split zoning is disfavored both at law and as a zoning tool, and that a rezoning would allow for the interpretation of lot coverage requirements, floor area ratios, and height/bulk/area requirements to be more easily applied by the building

inspector than if a series of variances were to be required. It was also pointed out that the current Comprehensive Development Plan encourages the creative redevelopment of properties on Rehoboth Avenue. Further, the City was then in possession of a report from Thomas West, AICP, a planning consultant retained by the City of Rehoboth. The West report emphasized ways to safeguard the integrity of residential areas adjacent to commercial areas. Although the report indicates that a future Comprehensive Development Plan might offer refinements, it also recognized that a property owner could structure limitations to reduce such impacts. That was precisely what 330 had been proposing for a number of years. Those restrictions included establishing setbacks more common to residential property than commercial. In addition, whereas the last voluntary restriction proposed by the Plaintiff would guarantee retention of the hotel for 30 years, Plaintiff was willing to extend that to 50 years. That was, of course, an obligation voluntarily undertaken by 330 since rezonings cannot include conditions regarding use. Public comments also recognized the need to redevelop the property, which has not undergone any substantive repair or renovation for quite some time.

21. Further, in her comments, Commissioner Susan Gay began presenting evidence not in the record, indicating that she had been doing her own private research to undermine the application. Gay's comments clearly revealed a predisposition against the application, and it was notable that the City attorney cut off her presentation. During the hearing, the Board of Commissioners created

additional confusion by suggesting that the Plaintiff could redevelop the property without any variances for its planned underground parking garage. Because the City's building inspector (Matt Janis) was absent, the Board of Commissioners deferred any decision until he could provide additional information. It was also noteworthy that John Dewey, a current member of the Planning Commission who had voted to recommend denial of the application, was permitted to campaign against it before the Board of Commissioners, despite an obvious conflict.

22. The Commissioners continued the public hearing on March 18, 2022, and voted against the rezoning by a vote of 5-2. Early in the hearing the City attorney was asked to clarify the owner's self-imposed restrictions, and in doing so referred to them as "an insurance policy" that would serve to protect nearby residents from the residential property being rezoned. Yet Commissioners Sharp, Lagree, and Mills commented that they were rejecting the application in order to support the residential character of the "neighborhood". That neighborhood includes the long-existing commercial use, its supporting parking area, and (since 1983) the condominium known as Scarborough Village, which is actually zoned R-2, and which allows greater density than the R-1's single family dwelling density. Commissioner Gossett made a vague reference to the City Code, suggesting (without any specificity) that the rezoning would be inconsistent with the purpose of the zoning ordinance. Commissioner Gay repeatedly referenced conflicts with the 2020 Comprehensive Development Plan, which has not even

been brought before the Board of Commissioners for consideration, much less approved by the State of Delaware as required by law. She also suggested that the applicants should go before the Board of Adjustment with respect to the property, despite the fact that she was a member of the Planning Commission when it considered the application initially and recommended that the Plaintiff avoid those very same variances. The two Commissioners voting in favor of the application pointed out the obvious – the use of the R-1 parcel for parking would be the same use to which the property has been put for more than 50 years, and long before the neighboring Scarborough Village was created.

COUNT I – VIOLATION OF THE CITY CODE

23. Plaintiff restates and hereby incorporates each of the allegations set forth above.

24. The City's denial of the application arbitrarily and capriciously denied the Plaintiff a continued lawful use of the property, and a rezoning justified by the current Code and the actual use of the property for more than 50 years.

COUNT II – VIOLATION OF 22 *DEL. C.* §702(D)

25. Plaintiff restates and hereby incorporates each of the allegations set forth above.

26. The Defendants' denial of the application violates 22 *Del. C.* §702(d), which provides that the Comprehensive Plan shall have the force of law and that development must be consistent with that Plan. The City's denial of the

application, which was supported by the current Plan, was arbitrary, capricious, and null and void *ab initio.*

27. Further, the City's reliance on an as yet unapproved Comprehensive Development Plan as a basis for denial of the application was similarly arbitrary, capricious, and null and void *ab initio*.

COUNT III – EQUITABLE ESTOPPEL

28. Plaintiff restates and hereby incorporates each of the allegations set forth above.

29. From the beginning of the Plaintiff's application process, it was encouraged to proceed with a rezoning of the R-1 parcel, and to avoid having to go before the Board of Adjustment for numerous variances.

30. Plaintiff relied in good faith upon the advice and direction of the Planning Commission, and as a result continued with the rezoning application over a period of years, and refrained from seeking any variances from the Board of Adjustment on either a separate or parallel track.

31. At all times pertinent hereto, Plaintiff was paying a significant amount of interest on its purchase and acquisition loan from Community Bank, which could have been minimized had the Planning Commission not directed 330 into the rezoning process.

32. Plaintiff had no knowledge or warning that the City would completely disregard its prior recommendations to seek rezoning as opposed to variances, and had no means of discovering that underlying truth.

33. The Defendants' actions misled the Plaintiff into believing that the proper route was through the rezoning process, and has resulted in monetary losses to the Plaintiff, in an amount to be determined at trial.

COUNT IV – DECLARATORY JUDGMENT

34. Plaintiff restates and hereby incorporates each of the allegations set forth above.

35. This Court has the power and jurisdiction to declare the rights and status of the Plaintiff's application under the City's Zoning Code.

36. The entry of a declaratory judgment will terminate the controversy giving rise to this proceeding by settling and affording relief from the present uncertainty and insecurity with respect to the rights and status of the Plaintiff's application under the City's Zoning Code.

37. This controversy involves the legal rights of the parties hereto, whose interests are real and adverse.

38. This controversy is ripe for adjudication via declaratory judgment. The Defendants' denial of the Plaintiff's application is arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, and erroneous as a matter of law, for the following reasons, including but not limited to the following:

(a) the Defendants misrepresented material facts;

(b) the Defendants ignored and/or erroneously interpreted and applied the City Code and the approved Comprehensive Development Plan;

(c) the Defendants erroneously relied upon a draft Comprehensive Development Plan which has not yet been approved;

(d) the Defendants invoked *de novo*, non-specific standards for the application, and in doing so, exceeded the authority of the City Board of Commissioners to change the City Zoning Code;

(e) the City's denial of the application is contrary to the recommendations from the Planning Commission that the Plaintiff pursue rezoning for the R-1 parcel as opposed to proceeding immediately to seek variances from the Board of Adjustment, which added significant time to the process, and resulted in damages to the Plaintiff.

39. For all of the foregoing reasons, and others that may be discovered, the Plaintiff is entitled to a declaratory judgment that the Defendants' denial of the application is arbitrary, capricious, unsupported by substantial evidence, and erroneous as a matter of law.

COUNT V – INJUNCTIVE RELIEF

40. Plaintiff restates and hereby incorporates each of the allegations set forth above.

41. Injunctive relief is necessary and appropriate in order to safeguard the Plaintiff's property rights, as injunctive relief is an appropriate, and possibly the only remedy adequate to cure the Defendants' refusal to grant the Plaintiff's application.

42. The Plaintiff can establish a reasonable probability of success on the merits of its claims.

43. The Plaintiff will suffer irreparable harm absent permanent injunctive relief, as Plaintiff has embarked upon courses of development, undertaken substantial changes of position, made significant expenditures, and incurred extensive financial obligations in pursuit of its application, harm which cannot be fully or adequately remedied by monetary damages.

44. The balance of hardships as between the Plaintiff, on the one hand, and the Defendants on the other, weighs in favor of granting injunctive relief to the Plaintiff.

45. For all of the foregoing reasons, the Plaintiff is entitled to injunctive relief compelling the Defendants to approve the Plaintiff's application.

COUNT VI - DAMAGES

46. Plaintiff restates and hereby incorporates each of the allegations set forth above.

47. Defendants' actions as set forth above have caused monetary losses to the Plaintiff that cannot be recouped, even if the Court grants other relief, such as injunctive relief reversing the City's position.

48. Through the "Clean Up Doctrine", this Court has the jurisdiction and ability to enter a damage award in the event Plaintiff prevails.

49. Plaintiff requests judgment against the Defendants for such damages which the Court finds appropriate at trial.

WHEREFORE, Plaintiff respectfully prays that this Honorable Court issue an Order granting the following relief:

(a) declaring that the Defendants' denial of Plaintiff's application arbitrarily and capriciously deprives the Plaintiff of a lawful use of the property, pursuant to the City Code, and is in direct violation of the City Zoning Code;

(b) declaring the Defendants' denial of the application violated 22 *Del. C.* §702(d);

(c) declaring that Defendants' denial of the application deprived the Plaintiff of the opportunity for a fair and meaningful hearing before an objective and impartial tribunal, without adequate notice of all matters to be decided, and an opportunity to be heard thereon;

(d) awarding affirmative injunctive relief to the Plaintiff, by reversing the Defendants' denial of the application and granting affirmative approval of the same; or, alternatively, enjoining the Defendants from denying the Plaintiff's application and compelling the Defendants to instead approve the application, as permitted by the City Zoning Code;

(e) entering judgment in favor of the Plaintiff and against the Defendants for all direct and consequential damages suffered or incurred by the Plaintiff as a result of Defendants' actions, on all of the grounds set forth above, including but not limited to Defendants' abrogation of the Plaintiff's statutory and other property rights;

(f) entering judgment in favor of the Plaintiff and against the Defendants for all of its costs and attorney's fees incurred in the pursuit of this action, on all the grounds set forth above, including but not limited to the Defendants' abrogation of the Plaintiff's statutory and other property rights;

(g) granting such other and further relief as this Honorable Court may deem just and appropriate under the circumstances.

HUDSON, JONES, JAYWORK & FISHER, LLC

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DATED: May 12, 2022