



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

330 HOSPITALITY GROUP, LLC, )  
)  
Plaintiff, ) C.A. No.: S22C-11-016 RHR  
)  
v. )  
)  
THE CITY OF REHOBOTH BEACH, )  
et al. )  
)  
Defendants. )

**REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS’ MOTION TO  
DISMISS PLAINTIFF’S “COMPLAINT UPON TRANSFER”**

**WHITEFORD TAYLOR & PRESTON LLC**

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Dated: February 28, 2023

## **LEGAL ARGUMENT**

Plaintiff's *Answering Brief in Opposition to Defendants' Motion to Dismiss* ("Answering Brief") misconprehends both the Court of Chancery's dismissal of the Complaint and Defendants' Motion to Dismiss. The Court of Chancery dismissed the case because the appropriate avenue for Plaintiff's challenge to the denial of its land use application is a writ of certiorari in the Superior Court. Upon that dismissal, it was expected that Plaintiff would follow that directive and pursue the writ in this Court.

Defendant's Motion to Dismiss is based upon the fact that, instead of following the Court of Chancery's directive, Plaintiff simply re-asserted all of the causes of action *at law* that were previously brought in the Court of Chancery, ignoring not only the Vice Chancellor's admonition but even the body of case law that it cites in the Answering Brief.

### ***A. Plaintiff's Challenge to the Denial of its Rezoning Application Should Have Been by Writ of Certiorari***

The resounding message, both from Vice Chancellor Will in this action and by the cases cited by Plaintiff in the Answering Brief, is that challenges to land use decisions such as this must be pursued in the Superior Court *by way of Writs of Certiorari*. Indeed, Vice Chancellor Will could not have been clearer:

Counsel acknowledged today that this was effectively an appeal of a land use decision. What the plaintiff is asking for is for this Court to overturn the board of commissioners,

**which is better sought through a writ of certiorari that this Court lacks the ability to issue.**

**Rather, the Superior Court of this state may issue remedial writs, pursuant to Section 562 of the Delaware Code "[a]bsent an aggrieved party's statutory right to appeal an adverse decision of an 'interior tribunal.'" See *Handloff v. City Council of Newark*, which is 2006 WL 1601098 at page 7 which is from the Delaware Superior Court in 2006.**

**The Delaware Superior Court hears such matters by way of a writ of certiorari as to whether a city council has conformed to the requirements of law or whether it has instead acted arbitrarily or capriciously, which is precisely what the plaintiff alleges here. See the Handloff decision that I just cited, and see also *Hoey v. City of Wilmington Zoning Board of Adjustment*, 2011 WL 7063243.**

**And if, after reviewing the record, the Superior Court determines that the city council acted arbitrarily or capriciously, then it can issue appropriate relief.** If it can't, we can revisit whether this Court would need to step in to issue injunctive relief, which is similar to what happened in the Ocean Bay Mart case that we've heard about today.<sup>1</sup>

Given the clarity of this determination, it was expected that Plaintiff would promptly pursue this action by way of a remedial writ of certiorari under the statute referenced by the Vice Chancellor: 10 *Del. C.* §562. It was not until Plaintiff ignored the Vice Chancellor's directive and then refused informal efforts to recast the Complaint that the Motion to Dismiss was filed.

***B. Because a Writ of Certiorari is the Appropriate Avenue for Plaintiff's Claims, the Remaining Causes of Action Must Be Dismissed***

It is axiomatic that a writ of certiorari is only cognizable where there is no adequate remedy at law. Indeed, that principle is made clear in the very authority cited in the Answering Brief, *Delta Eta Corp. v. City of Newark*, 2023 Del. Ch. LEXIS 36 (Del. Ch. Feb. 2, 2023). In *Delta Eta*, Vice Chancellor Zurn

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<sup>1</sup> See, Exhibit "C" to Defendants' Motion to Dismiss.

made clear that prerogative writs “are capable of affording complete and adequate relief to a petitioner.” *Id.* at \*26, quoting *Family Court v. Department of Labor & Industrial Relations*, 320 A.2d 777, 780 (Del. Ch. 1974).

Here, notwithstanding that Vice Chancellor Will referred Plaintiff to this Court for the purpose of pursuing a prerogative writ (which affords “complete and adequate relief to a petitioner”) Plaintiff’s “Complaint Upon Transfer” includes surplus claims for: Violation of the Rehoboth City Code (Count I) and Violation of 22 *Del. C.* §702(D), i.e., the Comprehensive Plan (Count II).<sup>2</sup> In other words, in the Complaint Upon Transfer, Plaintiff simply re-stated two causes of action dismissed by the Court of Chancery.

Since the writ of certiorari which Plaintiff was supposed to file provides “complete and adequate relief” these surplus claims must be dismissed.

***C. Plaintiff’s Answering Brief Misconstrues the Motion to Dismiss***

Plaintiff’s Answering brief is a response to an argument that was not raised. Specifically, the Answering Brief characterizes the Motion to Dismiss as based upon some argument that this action should have first been filed in the Superior Court, not the Court of Chancery. That is certainly true, but it is not germane to the Motion to Dismiss. The Motion to Dismiss is based upon

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<sup>2</sup> *See*, Opening Brief, Exhibit “D”.

Plaintiff's non-compliance with Vice Chancellor Will's directive and assertion of claims beyond the writ of certiorari.

### **CONCLUSION**

For the foregoing reasons, it is respectfully requested that this Honorable Court grant Defendants' Motion to Dismiss Plaintiff's Complaint Upon Transfer with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Daniel A. Griffith, Esquire, hereby certify that on this 28<sup>th</sup> day of February, 2023, the attached *Defendants’ Reply Brief in Further Support of Defendants’ Motion to Dismiss Plaintiff’s Complaint Pursuant to Superior Court Rule 12(b)(6)* was served the following Counsel of record via File & Serve Xpress:

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