



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. )

**DEFENDANTS’ OPENING BRIEF IN SUPPORT OF MOTION TO  
DISMISS PLAINTIFF’S “COMPLAINT UPON TRANSFER” IN LIEU OF  
AN ANSWER PURSUANT TO DELAWARE SUPERIOR COURT RULE  
12(B)(6)**

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## **PRELIMINARY STATEMENT**

This action was originally filed in the Court of Chancery. After Plaintiff acknowledged that this action is an appeal from an adverse land use decision by a municipality whereby Plaintiff seeks to compel a municipality to rezone Plaintiff's property, the Court of Chancery found that it should be pursued as a remedial writ under 10 *Del. C.* §562 and allowed it to be transferred to the Superior Court for that limited purpose, *i.e.*, to be prosecuted as a remedial writ in the form of an appeal from an adverse land use decision.

Rather than follow the Court of Chancery's directive, Plaintiff merely refiled the case that had been dismissed in the Court of Chancery (minus the one equitable claim), replete with wholesale causes of action far beyond the narrow scope of a remedial writ. This motion seeks dismissal of those surplus claims in accordance with the Court of Chancery's directive.

## **BACKGROUND AND STATEMENT OF THE CASE**

Municipalities maintain the authority to regulate land use within their borders. *See generally, O'Neill v. Town of Middletown*, 2006 WL 205071 (Del. Ch. 2006). Consistent with that authority, the City of Rehoboth Beach (the "City") denied an application by the Plaintiff, 330 Hospitality Group, LLC, ("330 Hospitality Group") to re-zone property recently purchased by 330 Hospitality Group. Based upon some misguided perception of a private landowner's right to compel a municipality to re-zone property, 330 Hospitality Group thereafter filed

an action in Delaware’s Court of Chancery (the “Original Complaint”) against the City, the City's Planning Commission (the "Planning Commission"), the City's Board of Commissioners (the "Commissioners") and every individual Commissioner and Planning Commission member (the "Individual Parties") seeking multiple forms of relief, including injunctive relief and money damages (collectively, the City, the Planning Commission, the Commissioners and the Individual Parties are referred to as the “Original Defendants”).

Following briefing, the Court of Chancery dismissed 330 Hospitality Group’s claim for equitable estoppel in the Original Complaint, and found that it lacked jurisdiction to hear 330 Hospitality Group’s only remaining claim. That is, the Court of Chancery expressly found that 330 Hospitality Group’s only remaining potential avenue for relief for the allegations in the Original Complaint was via remedial writ to Delaware’s Superior Court pursuant to 10 Del. C. §562.

Rather than file this subsequent action as a remedial writ in Superior Court, as instructed by the Court of Chancery, 330 Hospitality Group filed the underlying “Complaint Upon Transfer” in Delaware’s Superior Court in Sussex County (the “Complaint Upon Transfer”).

Since the standard of review under a writ of *certiorari* is very limited, 330 Hospitality Group's Complaint Upon Transfer fails to state a claim upon which

relief can be granted pursuant to Superior Court Rule 12(b)(6) and should therefore be dismissed. While 330 Hospitality has recently demanded that the City, the Planning Commission and the Commissioners (collectively, the defendants in this Complaint Upon Transfer, who are referred to as the “Rehoboth Beach Parties”) Answer the “Complaint Upon Transfer” and the case proceed with discovery, such demands greatly exceed the limited scope of review under a writ of *certiorari*. Consequently, 330 Hospitality Group’s Complaint Upon Transfer should be dismissed for the failure to state a claim upon which relief can be granted.

#### **NATURE AND STAGE OF PROCEEDINGS**

On or about May 13, 2022, 330 Hospitality Group filed a Complaint (the “Original Complaint”) against the Original Defendants challenging the denial of a rezoning application filed by 330 Hospitality Group. Attached as “**Exhibit A**” is a true and correct copy of the Original Complaint. The Complaint stated causes of action for: Violation of the Rehoboth City Code (Count I), Violation of 22 Del. C. 702(D), *i.e.*, the Comprehensive Plan (Count II), Equitable Estoppel (Count III), Declaratory Judgment (Count IV), Injunctive Relief (Count V) and Damages (Count VI).

On or about October 17, 2022, the Court of Chancery entered an Order dismissing 330 Hospitality Group’s equitable estoppel claims with prejudice against

the Original Defendants. Attached as “**Exhibit B**” is a true and correct copy of the Court of Chancery’s Order dated October 17, 2022.

At oral argument on the Motion to Dismiss the Original Complaint, when ruling, the Court of Chancery made clear that 330 Hospitality Group’s only remaining claim would need to be pursued as a writ of *certiorari* under Section 562 of the Delaware Code. Attached as “**Exhibit C**” is a true and correct copy of the transcript from Oral Argument in the Court of Chancery from October 17, 2022.

Indeed, the Court explained:

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.

(emphasis added; *See* “**Exhibit C**” at pg. 30, line 6-pg. 31, line 11).

On or about November 17, 2022, 330 Hospitality Group filed the underlying action as a “Complaint Upon Transfer” in Superior Court in Sussex

County. Attached as “**Exhibit D**” is a true and correct copy of the Complaint Upon Transfer.

The Complaint Upon Transfer states causes of action for: Violation of the Rehoboth City Code (Count I) and Violation of 22 Del. C. 702(D), *i.e.*, the Comprehensive Plan (Count II). *See* “**Exhibit D**” at ¶ 21-38. In other words, in the Complaint Upon Transfer, 330 Hospitality Group simply re-stated two causes of action dismissed by the Court of Chancery.

This is the Rehoboth Beach Parties' Opening Brief in Support of their Motion to Dismiss the “Complaint Upon Transfer”.

### **STATEMENT OF FACTS**

According to the Complaint Upon Transfer, 330 Hospitality Group is the owner of 330 Rehoboth Avenue in Rehoboth Beach, Delaware 19971 (the “Property”). (“**Exhibit D**” at ¶3). The Property is split into two different zoning classifications — C1 for commercial use along Rehoboth Avenue, and R1 for residential use to the rear of the Property and along State Road. (*Id.* at ¶ 6). 330 Hospitality Group alleges that it hired professionals to evaluate re-purposing its use of the Property. (*Id.* at ¶ 18). That is, while the Property had been home to two well-known restaurants for a substantial time — the *Horse and Buggy*, and the *Seahorse* — 330 Hospitality Group desired to have a hotel and retail operation structure built on the Property, thereby re-purposing the use of the Property. (*Id.*



at ¶¶ 5, 8). In order to do so, 330 Hospitality Group would need to have the residential portion of the Property re-zoned or seek variances from Rehoboth's zoning regulations.

Following a meeting with the Planning Commission, 330 Hospitality Group attempted to re-zone the Property rather than seek variances from the applicable zoning requirements. (*Id.* at ¶ 10). 330 Hospitality Group avers that its initial application before the Planning Commission for the re-zoning was put on hold on May 14, 2021, in order for 330 Hospitality Group to take some measures to restrict the Property with covenants, and as such, a recommendation on the application was delayed. (*Id.* at ¶ 14). On June 11, 2021, 330 Hospitality Group re-appeared before the Planning Commission with an updated application and plan with proposed restrictive covenants, at which time the Planning Commission voted to delay consideration on the application. (“**Exhibit D**” at ¶15). On October 8, 2021, 330 Hospitality Group presented a revised re-zoning plan with more restrictive covenants than prior applications. (*Id.* at ¶16).

On December 10, 2021, the Planning Commission voted to recommend denial of 330 Hospitality Group's application. (*Id.* at ¶17). Thereafter, following a public hearing, the City's Board of Commissioners voted against 330 Hospitality Group's re-zoning application, with members citing the desire to

keep the residential character of the neighborhood as among the reasons for the denial. (*Id.* at ¶20).

The Original Complaint in the Court of Chancery and this Complaint Upon Transfer in Superior Court subsequently ensued.

### **QUESTION PRESENTED**

1. Whether 330 Hospitality Group's Complaint Upon Transfer should be dismissed for the failure to state a claim upon which relief can be granted pursuant to Superior Court Rule 12(b)(6)?

### **ARGUMENT**

#### **I. STANDARD OF REVIEW FOR RULE 12(B)(6) MOTION TO DISMISS**

Delaware has clear standards for granting a Rule 12(b)(6) Motion to Dismiss. Pursuant to Superior Court Rule 12(b)(6), dismissal of a Complaint is warranted if a Plaintiff, such as 330 Hospitality Group, would not be entitled to recovery based upon the allegations in the Complaint. *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

While this Court must accept well-pleaded allegations as true, it need not do so for conclusory allegations lacking a factual basis. “[T]he Court will not consider ‘conclusory allegations that lack specific supporting factual allegations’” nor “accept every strained interpretation of the allegations proposed by the plaintiff.” *Nieves v. All Star Title, Inc.*, 2010 WL 4227057, at \*4 (Del. Super. Ct. 2010). Said another way, neither inferences nor conclusions of fact unsupported by specific

factual allegations need be accepted as true by the Court. *Kohl's v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000). “That is, a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiffs' favor unless they are reasonable inferences.” *In re Lukens Inc. Shareholders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).

In order to survive a motion to dismiss pursuant to Superior Court Rule 12(b)(6), a Complaint must put a defendant on fair notice of the Plaintiff’s claims and the grounds upon which it rests. *Nieves* at 4. Further, a Complaint must allege particularized facts that support an inference which support the claims. *Blackmore Partners, L.P. v. Link Energy, LLC*, 864 A.2d 80, 85 (Del. Ch. 2004).

**II. THE COURT OF CHANCERY FOUND THAT 330 HOSPITALITY GROUP’S REMAINING CLAIM FROM THE ORIGINAL COMPLAINT COULD BE PURSUED AS A REMEDIAL WRIT UNDER SECTION 562 OF THE DELAWARE CODE**

In this instance, the Court of Chancery correctly found that 330 Hospitality Group’s only avenue of relief remaining after its’ ruling dismissing the Original Complaint was pursuant to a writ of *certiorari* to Delaware’s Superior Court pursuant to 10 Del. C. § 562. *See* “**Exhibit C**” at pg. 30, line 6-pg. 31, line 11. That is, to the extent that 330 Hospitality Group seeks an Order compelling the Rehoboth Beach Parties to re-zone 330 Hospitality Group’s Property, said Order can only be sought via remedial writ, rather than a Complaint stating causes of action.

Indeed, at oral argument on the Motion to Dismiss the Original Complaint, 330 Hospitality Group conceded (as the Court of Chancery also later pointed out) that this case is “in large measure, essentially an appeal of the legislative or the City’s decision not to rezone the Property.” See “**Exhibit C**” at pg. 9, lines 8-10. As a result, the Court of Chancery found that 330 Hospitality Group could only proceed with its claim as a remedial writ of *certiorari* to Delaware’s Superior Court pursuant to 10 Del. C. § 562

Delaware Courts have consistently found that the standard of review in a writ of *certiorari* is very limited. Under *certiorari* review, a court “may not weigh evidence or review the lower tribunal's factual findings.” *Black v. New Castle County Board of License*, 117 A.3d 1027, 1031 (Del. 2015). Nor may the court “consider the case on its merits.” *Id.* Instead, the Court may only examine the face of the record to determine whether the prior administrative body (1) “exceeded its jurisdiction,” (2) “proceeded illegally or manifestly contrary to law,” or (3) “proceeded irregularly.” *Id.*

Said another way, the standard of writ of *certiorari* is one where this Court has “no power to correct a mistake of fact[ ] or an erroneous conclusion from the facts, even though the interpretation given to the facts or the law by the governmental agency ... may have been erroneous.” *Handloff v. City Council of Newark*, 2006 WL 1601098 at \*7 (Del. Super. Ct. 2006). Instead, the review is “limited to errors which

appear on the face of the record and does not embrace an evaluation of the evidence considered by the inferior tribunal.” *Mason v. Bd. of Pension Trustees*, 468 A.2d 298, 299 (Del. Super. Ct. 1983).

These general principles were recently rearticulated by the Delaware Supreme Court, which held that a “writ of *certiorari* proceeding in the Superior Court [pursuant to 10 *Del. C.* § 562] is the appropriate cause of action for determining whether, on the face of the record, the Dover Planning Commission exceeded its powers or failed to conform to the requirements of law.” *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1106 (Del. 2003).

### **III. 330 HOSPITALITY GROUP’S “COMPLAINT UPON TRANSFER” SHOULD BE DISMISSED FOR THE FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(B)(6)**

Instead of following the Chancery Court’s guidance and pursuing this Superior Court action as a writ, 330 Hospitality Group just re-asserted all of the non-equitable claims that were dismissed by the Court of Chancery in the Original Complaint. *See* “**Exhibit D**” at ¶ 21-38. That was not what was intended by the Court of Chancery and this “Complaint upon Transfer” circumvents that ruling.

In sum, since 330 Hospitality Group’s only remaining avenue of relief is via remedial writ to the Superior Court under 10 *Del. C.* § 562, the Complaint Upon Transfer should be dismissed for the failure to state a claim upon which relief can be granted pursuant to Superior Court Rule 12(b)(6).

On the fact of the record of the Original Complaint filed in the Court of Chancery, which is this Court's scope of review for a remedial writ under 10 Del. C. § 562, the Rehoboth Beach Parties' decision to deny 330 Hospitality Group's re-zoning application was not, on the face of the record, an error of law or arbitrary and capricious. Arbitrary and capricious" has been defined as "action which is unreasonable or irrational, or ... which is unconsidered or which is willful and not the process of a winnowing or sifting process." *Handloff* at \*8.

In fact, as shown by 330 Hospitality Group's Complaint, the Rehoboth Beach Parties did have valid reasons for the denial of 330 Hospitality Group's application for re-zoning. See "**Exhibit D**" at ¶20 where 330 Hospitality Group acknowledges that members of the Rehoboth Beach Parties cited the desire to keep the residential character of the neighborhood as among the reasons for the commercial re-zoning denial.

A review of the Court of Chancery record, which is all that is encompassed pursuant to a remedial writ under 10 Del. C. § 562, demonstrates that the Rehoboth Beach Parties' denial was well within the scope of its powers, and thus, not "manifestly contrary to the law".

**CONCLUSION**

For the foregoing reasons, the Rehoboth Beach Parties respectfully request that this Court grants their Motion to Dismiss 330 Hospitality Group's Complaint Upon Transfer with prejudice.

Respectfully submitted,

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Dated: January 24, 2023

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  )  
  )  
                                  Defendants.        )

**CERTIFICATE OF SERVICE**

I, Daniel A. Griffith, Esquire, hereby certify that on this 25<sup>th</sup> day of January, 2023, the attached *Defendants’ Opening Brief in Support of 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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