



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.                    )

**RESPONDENT, CITY OF REHOBOTH BEACH'S ANSWERING BRIEF  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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Dated: November 15, 2023

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## **PRELIMINARY STATEMENT**

Petitioner, 330 Hospitality Group, LLC, ("330 Hospitality Group") is an aggrieved property owner who, based upon some misguided perception of a private landowner's right to compel a municipality to rezone property, seeks a form of relief which has never been afforded in Delaware, *i.e.*, a court-ordered rezoning. 330 Hospitality Group seeks this relief upon a rezoning application (the "Rezoning Application") which received widespread public opposition and whose denial was recommended by the local planning and zoning commission.

The City of Rehoboth Beach's Board of Commissioners ("City") applied the appropriate factors under the City's zoning code and voted 5-2 to deny the application. Against its heavy burden to establish that the City's decision was arbitrary and capricious, 330 Hospitality Group has simply resorted to smears of those who opposed the application, characterizing such opposition as "bizarre"<sup>1</sup>, "border(ing) on the absurd"<sup>2</sup> and a "huge leap of faith."<sup>3</sup>.

Notwithstanding 330 Hospitality Group's aspersions, it remains well-settled that 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). Property owners do not self-designate their zoning classification or demand that

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<sup>1</sup> See, 330 Hospitality Group/s Opening Brief, (hereinafter, "Op. Br."), p. 10.

<sup>2</sup> Op. Br., p. 12.

<sup>3</sup> *Ibid.*

municipalities bend to their will on zoning decisions. Here, the City articulated its reasons for its decision and those reasons were both legitimate and based upon appropriate factors to be considered.

Under the circumstances, 330 Hospitality Group's effort to secure a novel, Court-ordered rezoning of its property should be denied.

## **NATURE AND STAGE OF PROCEEDINGS**

1. On or about May 13, 2022, 330 Hospitality Group filed a Complaint in the Court of Chancery challenging the denial of the Rezoning Application. 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) (*sic*).

2. The City (and a number of individuals named as defendants in the Complaint) thereafter filed a Motion to Dismiss Complaint under Chancery Court Rule 12(b)(6).

3. During oral argument on the motion, the Court of Chancery advised the parties that it would be dismissing Plaintiff’s Equitable Estoppel claim (Count III). The Court thereafter found that it lacked jurisdiction over the remaining claims and

that the appropriate process (given that this is an appeal from an adverse land use decision) would be a Petition for Writ of Certiorari under 10 Del. C. §562.<sup>4</sup>

4. 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.<sup>5</sup>

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<sup>4</sup>Attached as Exhibit “A” is a true and correct copy of the transcript of oral argument in the Court of Chancery from October 17, 2022.

<sup>5</sup> See, “Exhibit “A” at pg. 30, line 6-pg. 31, line 11.

5. On or about November 17, 2022, 330 Hospitality Group filed the underlying action as a “Complaint Upon Transfer” in Superior Court in Sussex County. (D.I. 1).

6. Rather than follow the Vice Chancellor’s admonition and file this action as a Petition for Writ of Certiorari, 330 Hospitality simply re-stated two causes of action dismissed by the Court of Chancery. Specifically, the Complaint Upon Transfer included the following causes of action:

- Violation of the Rehoboth City Code (Count I);
- Violation of 22 Del. C. §702(D), i.e., the Comprehensive Plan (Count II);

7. The City therefore filed a Motion to Dismiss the Complaint Upon Transfer (D.I. 5) and, after briefing and argument, this Court directed Plaintiff to file an Amended Complaint Upon Transfer so that this matter would proceed by *writ of certiorari*. (D.I. 15).

8. On May 16, 2023, 330 Hospitality Group filed its Amended Complaint as a Petition for Writ of Certiorari (D.I. 16).

9. On June 28, 2023, within 20 days of service of the writ, the City timely provided a copy of the record below to Petitioner’s Counsel, and subsequently the City provided a revised supplemental record below to the

Court after Counsel conferred on the documents to be contained within the record below. (D.I. 22).

10. On September 8, 2023, the parties stipulated to a briefing schedule (D.I. 28) which was approved by the Court on September 12, 2023. (D.I. 29).

11. This is the City's Answering Brief in Opposition to the Petitioner's Opening Brief.

### **STATEMENT OF FACTS**

1. According to the Amended Complaint Upon Transfer, 330 Hospitality Group is the owner of 330 Rehoboth Avenue in Rehoboth Beach, Delaware 19971 (the "Property"). (D.I. 16, ¶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).

2. 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). 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.

3. Following an August 9, 2019 meeting with the City of Rehoboth Beach Planning Commission ("Planning Commission"), 330 Hospitality Group decided that it would attempt to secure a rezoning of the Property rather than seek variances from the applicable zoning requirements. (*Id.* at ¶ 10). As reflected in the minutes from the August 9, 2019 meeting, almost a dozen different Rehoboth residents either e-mailed, wrote letters, or publicly commented in opposition to the Rezoning Application.<sup>6</sup>

4. Following a meeting on May 14, 2021, the initial rezoning application before the Planning Commission was put on hold 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).

5. Nevertheless, the significant public opposition to the Rezoning Application which had been raised two (2) years earlier in August, 2019, continued. Indeed, as reflected in the meeting minutes from May 14, 2021, dozens of Rehoboth residents wrote e-mails or letters opposing the Rezoning Application, including representatives of significant cohorts within Rehoboth – such as the Rehoboth Beach Homeowners' Association.

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<sup>6</sup> See, Meeting Minutes from August 9, 2019, at Rehoboth 00007-00008.

6. At the May 14, 2021 meeting, other residents of Rehoboth also spoke publicly in opposition to the Rezoning Application.<sup>7</sup> More Rehoboth residents followed suit, speaking publicly against the application and noting several concerns if the rezoning were permitted, including noise concerns, privacy issues, drainage problems, and conflicts with the Rehoboth Community Development Plan (“CDP”).<sup>8</sup>

7. On June 11, 2021, 330 Hospitality Group reappeared before the Planning Commission with an updated application and proposal with restrictive covenants, at which time the Planning Commission voted to delay consideration on the application. (D.I. 16, ¶15). Yet, consistent with the trend from inception of public comment on the topic, public outcry and opposition to the Rezoning Application once again surfaced at the June 11, 2021 meeting.<sup>9</sup>

8. On October 8, 2021, 330 Hospitality Group presented a revised rezoning plan with more restrictive covenants than prior applications. (D.I. 16, ¶16). On December 10, 2021, the Planning Commission voted to recommend denial of the application. (*Id.* at ¶17).

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<sup>7</sup> See, Meeting Minutes from May 14, 2021 at Rehoboth 00010-00011.

<sup>8</sup> *Id.* at Rehoboth 000013.

<sup>9</sup> See, Meeting Minutes from June 11, 2021 at Rehoboth 00016, where nine residents of Rehoboth sent e-mails or letters opposing the Rezoning Application.

9. On February 18, 2022, after the Planning Commission’s recommended denial, the first public hearing (the “First Hearing”) was held before the City’s Board of Commissioners.

10. At the First Hearing, Commissioner Gosset commented on historical changes in zoning in Rehoboth, noting that the trend in Rehoboth – that is, the significant decrease in commercial rezonings in recent years – demonstrated that Rehoboth residents desired to keep the residential character of the resort.<sup>10</sup>

11. Commissioner Gossett also explained that the Rezoning Application was inconsistent with the applicable Comprehensive Development Plan (“CDP”), including the CDP’s policy of avoiding the negative impact of commercial development on historically residential areas such as Rehoboth. Indeed, Commissioner Gossett believed the Rezoning Application represented the type of commercial project with a clearly adverse impact on the surrounding residential area.<sup>11</sup>

12. As Mayor Mills highlighted during the First Hearing, all seven letters timely received for consideration at the First Hearing disfavored the Rezoning Application. Importantly, in the estimate of those present at the First Hearing, since some of those opposition letters came from representatives speaking on behalf of

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<sup>10</sup> See, Transcript from the First Hearing on February 18, 2022, at pp. 32:11-33:2 on Rehoboth 00070.

<sup>11</sup> Id. at p. 33:3-15.

community associations, those letters represented opposition from potentially more than 900 different residents of Rehoboth.<sup>12</sup>

13. The wave of opposition to the Rezoning Application continued. One long-time Rehoboth resident noted that, when he purchased a residence near the Property, it was with the assumption that any developments in the future in that area would remain residential only, consistent with the residential character of the neighborhood.<sup>13</sup> In addition to never anticipating that the residential character of the neighborhood would change, this resident also voiced concern that the rezoning would result in decreased sunlight and increased noise in the area, exacerbating existing quality of life issues. Finally, concerns about surrounding properties being devalued if the re-zoning were permitted were also voiced at the First Hearing.<sup>14</sup>

14. As the First Hearing continued, more residents of Rehoboth came forward to speak in opposition to the Rezoning Application. One resident urged all present at the First Hearing to take Rehoboth's Tree City, USA membership seriously, in conjunction maintaining the residential character of Rehoboth. This resident also spoke about concerns that approving this Rezoning Application despite

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<sup>12</sup>*Id.* at p. 35:1-14 on Rehoboth 00071.

<sup>13</sup>*Id.* at p. 37:1-5.

<sup>14</sup>*Id.* at p. 37:18-23.

the significant public outcry from Rehoboth residents against it would open the floodgates and set a bad precedent for future re-zoning issues in Rehoboth.<sup>15</sup>

15. One resident spoke briefly to urge the City to deny the application,<sup>16</sup> whereas another resident opposed the application by highlighting that every single piece of correspondence provided to the Planning Commission disfavored the proposed rezoning of the Property.<sup>17</sup>

16. Emphasizing the volume of opposition received by the Planning Commission, this Rehoboth resident explained that a significant number of people represented to the Planning Commission that they purchased homes in Rehoboth based upon the current residential zoning character of the neighborhood.<sup>18</sup>

17. Recognizing how this Rezoning Application was unlike anything Rehoboth has ever accommodated in the past, near the conclusion of the First Hearing Commissioner Gosset and Rehoboth's attorney acknowledged that Rehoboth has never been a party to the type of restrictive covenants that would be required if the Rezoning Application were granted.<sup>19</sup>

18. A month later, on March 18, 2022, a second public hearing (the "Second Hearing") was held where the City's Board of Commissioners

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<sup>15</sup> *Id.* at p. 40:1-13 Rehoboth 00072.

<sup>16</sup> *Id.* at p. 40:19-20.

<sup>17</sup> *Id.* at p. 40:12-17.

<sup>18</sup> *Id.* at p. 42:21-25 on Rehoboth 00073.

<sup>19</sup> *Id.* at p. 50:13-25 on Rehoboth 00075.

ultimately voted 5-2 against the Rezoning Application. In explaining his vote against the application, Commissioner Sharp underscored a main theme from the First Hearing, i.e., the desire to maintain the residential character of Rehoboth, which was consistent with the CDP.<sup>20</sup>

19. Reiterating the importance of maintaining the residential character of Rehoboth as an “especially important” part of the consideration, Commissioner Lagre echoed Commissioner Sharp’s sentiments when voting against the application.<sup>21</sup>

20. The Commissioners’ collective concern for the welfare and quality of life issues surrounding the rezoning was also apparent throughout the voting process at the Second Hearing. Commissioner Gay cited the desire to avoid the negative impact of commercial development upon residential neighborhoods.<sup>22</sup> Commissioner Gay also believed that the Rezoning Application was inconsistent with the residential character of the surrounding area, and inconsistent with the CDP’s policy not to expand commercial zones by reducing residential zones.<sup>23</sup>

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<sup>20</sup> See, Transcript from the Second Hearing on March 18, 2022, at p. 36:18-23 on Rehoboth 00113.

<sup>21</sup>Id. at pp. 36: 24-37:1-2.

<sup>22</sup>Id. at pp. 37:23-25, 38:1-2 on Rehoboth 00113-00114.

<sup>23</sup>Id. at p. 38:1-14.

21. Commissioner Gosset voted against the Rezoning Application because it was not in conformity with the residential character of the surrounding neighborhood.<sup>24</sup>

22. In sum, it was articulated clearly and supported by evidence in the record that the proposed rezoning was inconsistent with the residential character of the neighborhood.

23. The City's Municipal Code provides:

The (City's zoning) regulations are made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.<sup>25</sup>

### **R-1 District**

A. Purpose. The R-1 District is designed *to protect and maintain those residential areas now developed primarily with single-family detached dwellings* and primarily on lots of at least 5,000 square feet.<sup>26</sup>

24. Thus, the reasons expressed for the denial of the application were not only articulated and based upon record evidence but also directly related to the factors to be considered when addressing zoning issues.

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<sup>24</sup>*Id.* at p. 38:16-21

<sup>25</sup> City of Rehoboth Municipal Code, §270-1(b).

<sup>26</sup> *Id.* at §270-11(a).

## **ARGUMENT**

### **I. MUNICIPALITIES HAVE BROAD ZONING AUTHORITY**

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).

It was with this authority that the City voted against 330 Hospitality Group's Rezoning Application.

330 Hospitality Group's challenge to the City's legitimate exercise of its discretion is based upon some misguided perception of a private landowner's right to compel a municipality to re-zone property. Research reveals no Delaware cases where a court has ever ordered a rezoning that has been denied by a municipality. Indeed, 330 Hospitality cites to no such cases in the Opening Brief because no such cases exist. The relief requested is therefore unprecedented in the history of Delaware jurisprudence.

Put differently, 330 Hospitality is unable to meet its significant burden to overcome the presumed validity of the City's decision, which burden requires 330 Hospitality to demonstrate that the City's decision was "clearly arbitrary and capricious." *Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council*, 1998 WL 671235, at \*5 (Del. Ch. 1998).

Delaware courts have made clear that appeals from zoning decisions are narrow in scope: the Court reviews the record to evaluate whether the rezoning decision was supported by record evidence and whether that decision is clearly arbitrary and

capricious. *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612 (Del. 1971). In fact, “the Court's limited role is even more circumscribed in an appeal like this, where the final decision in question was made by an elected, legislative body.” *Woznicki v. New Castle County*, 2003 Del. Super. LEXIS 232, \*6-7 (Del. Super. Ct. 2003).

“If the reasonableness of a zoning change if fairly debatable, the judgment of the Council must prevail, and the court will not substitute its judgment for Council's.” *Deskis v. County Council of Sussex County*, 2001 Del. Ch. LEXIS 146, \*12 (Del. Ch. 2001).

## **II. THE COMMISSIONERS' DECISION WAS SUPPORTED BY THE RECORD, PROPERLY ARTICULATED AND CODE-BASED**

### **A. The Decision Was Supported by The Record**

Delaware law is clear that it is not the role of the Court to engage in an analysis weighing the evidence presented to the Commissioners and the City. *Bayville Shore Development Corp. v. County Council of Sussex County*, 1992 WL 14957, at \*3 (Del. Ch. 1992); *see also Steen v. County Council of Sussex County*, 576 A.2d 642, 648 (Del. Ch. 1989) (finding that it is not the Court's function of the court to weigh conflicting testimony or to form its own judgment on the advisability of the legislative determination). Instead, the analysis involves a determination of whether the City's decision was supported by record evidence.

Here, the record below demonstrates that from the very outset, public opposition to the Rezoning Application was rampant. Nearly a thousand different representatives of Rehoboth indicated opposition to the Rezoning Application, while only a few individuals over the course of several years spoke out in favor of it. In addition, the City’s Planning Commission also recommended denial of the application. As the record shows, many of the residents who opposed the application cited the desire to maintain the residential character of the neighborhood – as did nearly every Commissioner while voting during the Second Hearing.

**B. The Commissioners Who Voted Against Rezoning Properly Articulated Their Reasons**

As a threshold matter, Delaware courts review the collectively articulated justifications of the Commissioners because the Commissioners individually need not articulate the reasons underlying their votes. *Blake v. Sussex County Council*, 1997 WL 525844 (Del. Ch. 1997). When viewed collectively, the Commissioners provided more than ample justification for their denial of the application.

Delaware courts seldom interfere with local municipalities’ land use decisions and “this Court can only interfere with the decisions of local zoning bodies when those agencies base their decisions solely on impermissible grounds.” *Coker Concrete v. Kent County Levy Court*, 2008 WL 5451337 (Del. Ch. 2008).

In *Kent County Levy Court*, although the rationale of the Commissioners following a vote came under scrutiny because the Court felt some Commissioners

expressed themselves in an off the cuff manner, there was substantial evidence of quality of life issues – such as decreased sunlight, increased noise and congestion, and the deterioration of the residential character of the quality of the neighborhood – which supported the Commissioners decisions, and all of which were part of the record below.

The same factors are present here. Under starkly similar facts, the Kent County Levy Court in *Coker* noted that the application was met with strong opposition and cited public welfare issues relating to the residential neighbors' quality of life that had been heavily discussed over the course of the Levy Court hearings. The same can be said from even a cursory review of the record below here, primarily the transcripts from the First and Second Hearing. From inception in 2019 until the eventual vote, a common theme at every meeting was public opposition and complaints about maintaining the residential character of the neighborhood.

Since the Commissioners collectively articulated their well-supported reasons for denying the Rezoning Application, including the repeated theme of public opposition and the desire to maintain the residential character of the neighborhood, this Court should not overturn the denial of the Rezoning Application.

### **C. The Reasons Were Code-Based**

The Rehoboth Code provides many purposes for its zoning provisions, including to “lessen congestion in the streets”; “to provide adequate light”; “to

prevent overcrowding of land” and “to avoid undue concentration of population.” Section 270-1(b) of the Rehoboth Code. Section 270-11 (a) of the Rehoboth Code also explains that residential districts are designed to protect and maintain those residential areas now developed **primarily with single-family detached dwellings** and primarily on lots of at least 5,000 square feet. *Id.*, emphasis added.

In this case, the City’s decisions were not only well articulated and based upon the record below, the Commissioners’ decision was also code-based. The record is replete with references from Rehoboth residents that the Rezoning Application would interfere with sunlight and unduly concentrate the population. To this end, nearly every Commissioner referenced the desire to maintain the residential character of Rehoboth as just one of many reasons for their denial of the Rezoning Application at the Second Hearing, consistent with the Rehoboth Code’s direction that these areas should be developed primarily with single-family dwellings.

### **CONCLUSION**

For the foregoing reasons, the City respectfully requests that this Court dismiss 330 Hospitality Group’s request for *writ of certiorari* relief.

Respectfully submitted,

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