IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

330 HOSPITALITY GROUP, LLC, a Delaware limited liability Company,	:	C.A. No. S22C-11-016 RHR
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, and THE PLANNING COMMISSION OF REHOBOTH BEACH,	:	
Defendants.	:	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF RELIEF

HUDSON, JONES, JAYWORK & FISHER, LLC

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Dated: October 16, 2023

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STATEMENT OF NATURE OF PROCEEDINGS

After the City of Rehoboth Beach, Delaware, denied the application of Plaintiff 330 Hospitality Group, LLC ("330" or "Applicant") to rezone property within the City, 330 sought relief in the Court of Chancery in Civil Action No. 2022-0424-LWW. In a Bench Decision on October 17, 2022, Vice Chancellor Will dismissed the case, subject to Plaintiff's right to transfer to the Superior Court under 10 *Del. C.* §1902. The dismissal, based upon lack of subject matter jurisdiction, was part of a growing trend on the part of the Court of Chancery to eliminate appeals from municipal and county zoning decisions from its docket.

330 elected the transfer option and filed a "Complaint on Transfer" in this Court on November 17, 2022. Defendants filed a Motion to Dismiss, and after briefing and argument the Court directed from the bench that Plaintiff amend its Complaint so as to reflect that the action would proceed by way of a *Writ of Certiorari* (May 1, 2023 at DI-15). An Amended Complaint was filed on May 16, 2023 (DI-16). The *Writ of Certiorari* was issued and served on the City on June 8, 2023, and Defendants filed an Answer on June 20 (DI-18). Although the *Writ* required filing and service of the record within 20 days, the City's record was not filed until August 22, 2023.

The parties stipulated to a Briefing Schedule which was approved by the Court. This is the Plaintiff's Opening Brief in support of its requested relief.

References to the record will be to the numbered documents filed by the City. Plaintiff arranged for the preparation of transcripts of the two hearings before the City Board of Commissioners, which have also been filed with the Court. They were also included in the City's. For ease of use, references to the record filed by the City of Rehoboth appear as "(R-__)". The transcripts of the February 18, 2022 transcript appear as "(F-__; R-__"), and references to the March 18, 2022 transcript appear as "(M-__; R-__)".

STATEMENT OF FACTS

The Plaintiff is 330 Hospitality Group LLC ("330"). It is comprised of Limitless Development Construction Consulting II, LLC ("LDCC"), and Chain Street LLC. Local builder and developer Don Lockwood is the owner and principal of LDCC. Bette Gallo, with a long career in real estate sales in the Lewes/Rehoboth area, is an owner/principal of Chain Street.

The property at issue carries an address of 330 Rehoboth Avenue, Rehoboth Beach, Delaware, and is assigned Tax Map No. 334-14.17-139 by Sussex County. It is considered a single parcel by Rehoboth Beach, although it technically includes multiple lots as originally laid out on early maps of the City of Rehoboth Beach (M-15; 108). But the property is unique in that it has been assigned a "split zoning" classification. The portion of the property fronting primarily on Rehoboth Avenue (roughly 23,000 square feet) is zoned C-1 commercial, and the portion fronting entirely on State Street (roughly 19,400 square feet) is zoned R-1 residential.[1]

Most people are familiar with the location of the property and the landmark *Seahorse Restaurant* that was operated on the property for many years. Those with more experience recall the *Horse and Buggy Restaurant* before that. Several different businesses operated on the property after the *Seahorse* closed, but

[1] See generally the Planning Commission Minutes for January 11, 2019 (R-1-5).

common to all was that no one ever used the residential property for that purpose – it was always used as a parking lot for individuals patronizing the businesses. As a result, parking on the R-1 property became a legal nonconforming use, and it remains such today (R-136).

LDCC entered into a long-term lease with former property owner JJ Stein, III, Inc., in 2018, and began planning to repurpose the existing building into a three-story hotel set above retail shops, all uses permitted in the C-1 Zone.[2] Although most of the parking to serve the hotel would be in an underground garage below the hotel itself, the R-1 portion would continue to include limited parking and the entrance to the underground garage.

Section 236-31 of the Rehoboth Beach Code permits what is often referred to as a "sketch plan review," or "concept review," in order to gain insight as to how the project might be received, and more importantly, in this instance, to consider options relating to the split zoning. The purpose of a concept review is to allow for certain "feedback" before a property owner or other applicant commits to the expenditure of time and money (R-2).[3] 330 sought such a review.

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[2] A chart that City Planning Consultant Thomas West included in his August 30, 2022, Report, includes a listing of permitted uses (R-133).

[3] The Delaware Courts look favorably at the use of concept reviews in the City of Rehoboth. See *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2021 Del. Ch. LEXIS 240 (October 13, 2021).

At the concept meeting of the Defendant Planning Commission (sometimes referred to as the "PC" or the "Commission") on January 11, 2019 (R-1-5), the Commission recognized two routes available for the applicant: (1) seeking a number of variances from the Board of Adjustment to allow for (among other things) the continued use of the residential parcel for parking, or (2) rezoning the R-1 parcel to C-1, which would make development simpler. The consensus of the Planning Commission was to support the zoning change, thus eliminating the need for multiple variances and additional hearings (R-4).

That made perfect sense, and LDCC began moving in that direction. A "formal" request to change the R-1 to C-1 was filed on June 17, 2019.[4] During that same time, disagreements arose between Stein and LDCC resulting in litigation, and also prompting Stein to object to the rezoning request. Although there is some question as to whether Stein even had the right to object under the terms of the long-term lease, the Planning Commission declined to consider the application until the litigation was resolved. That was so despite the fact that nothing in the City Code prohibited the application from proceeding.

By early 2021 the litigation had been resolved, and the property had been transferred to 330 as part of that resolution. By letter dated March 5, 2021

[4] There was nothing terribly formal about the application, as the City required only a letter request (R-56-59).

Plaintiff's counsel made the Commission aware of that, and asked that the application proceed (R- 60-61).

From that point on, the Planning Commission proceeded at something of a snail's pace. Its first meeting was on May 14, 2021, at which time 330 pointed out that there were no substantive changes from the original concept plan that the Planning Commission had viewed favorably. But despite the fact that rezonings do not require any identification or stipulation as to the actual future use of the property, the Commission, no doubt responding to individual comments at public hearings, began to focus entirely on the hotel. The City attorney pointed out to the Commission that details involving structures would be considered at mandatory site plan reviews later in the process (R-13). Nevertheless, recognizing the Commission's propensity to stray from its assigned task, he also suggested that the applicant could take measures to restrict the property voluntarily. The Commission declined to act, waiting instead for the applicant to propose restrictions (R-13).

At the next meeting on June 11, 2021, 330 offered to record restrictions that would create setbacks normally associated with residential properties (in contrast to 100% lot coverage often permitted with a commercial use), and to commit to the hotel on the commercial property that it had proposed from the outset. Although the Planning Commission did not state any specific objections to the application or

the restrictions developed by 330, the Commission appeared generally unhappy and declined again to take any action (R-15-19).

The application was on the Commission's agenda again on October 8, 2021, at which time 330 presented even more restrictive covenants, despite having received no guidance from the Commission as to what it was seeking. But the Commission requested a "better" set of restrictions, and for the first time began suggesting that rezoning might not be appropriate (R-21). Thomas West, a certified planner hired by the City of Rehoboth, also appeared at the hearing and presented a report that he had prepared with respect to the project (R-131-137). West mentioned in his report that he had met with the applicant's attorney and the City attorney to assist in drafting restrictions.

By that time, there had been changes in personnel on the Planning Commission, such that new members were apparently not aware of (or ignored) the recommendation their predecessors had made at the sketch plan review. Notably, one individual named Rick Perry, who had been a member of the Planning Commission at that time, spoke against the application, failing to disclose the fact that he had been a member of the Commission at the previous hearings (R-21).

It was not until December 10, 2021, that the Planning Commission finally took a vote on a recommendation in connection with the application – three full years after presentation of the concept plan. At that meeting 330 presented even

more restrictive covenants (R-25). Commission member Nan Hunter alluded to the inequitable treatment of 330, pointing out the "hoops and steps" 330 had been forced to navigate (R-26). But for all of its encouragement at the initial concept review that 330 proceed with a rezoning application, the Planning Commission recommended denial by a 5-3 vote. At that time, only one member of the Commission (Michael Strange) had also been a member in January 2019 when the Commission sent 330 on its way toward rezoning (R-24-28).

The Rehoboth Beach Board of Commissioners, the body assigned the task of making a final determination, held a public hearing on February 18, 2022. There 330's counsel, David Hutt, Esquire, made a presentation consistent with the numerous presentations made previously to the Planning Commission, and consistent with the originally-filed proposal. Among other things, he pointed out the history of the property (F-13-14; R-65-66), the breakdown of residential/commercial split (F-17; R-66), the nonconforming parking situation (F-18; R-67), and a reference to the fact that split zoning is generally disfavored at law and as a land use concept (F-19; R-67). In connection with the split zoning, he referred the Commissioners to a report prepared and submitted by its former building inspector that pointed out the difficulties that would have resulted had the application been directed to the Board of Adjustment for variances.

Mr. Hutt referenced the still-existing 2010 Comprehensive Development Plan, and specifically its encouragement to minimize nonconforming properties like the R-1 parcel, its emphasis on the renewal of properties at the western end of Rehoboth Avenue near the 330 property, and the Plan's suggestion that "creative redevelopment" of properties along Rehoboth Avenue be encouraged (F-21; R-67).

Mr. Hutt also referred to the report that had been submitted to the Planning Commission earlier by City Planner West, and which addressed head-on the conflict that had been generated by the Planning Commission's focus on the actual use of the building on the C-1 parcel, as opposed to the rezoning of the R-1 property. The report, which followed meetings with both Mr. Hutt and the City attorney, resulted in a series of restrictions that would maintain the integrity of adjacent residential neighborhoods. Those restrictions included certain "benefitted parties", namely owners of adjacent residential properties, who would have the ability, along with the City, to enforce the restrictions and whose consent would be necessary should any modification be contemplated (F-24-27; R-68-69). Those restrictions included a vertical construction limitation, and reduced setbacks more akin to residential properties – far from the "zero lot line" which typically accompanies commercial properties (F-25-26; R-68-69).

Commissioners were then given an opportunity to ask questions before any public comment. Commissioners Bennett and Gossett became somewhat fixated

on the bizarre and completely irrelevant question of whether or not the residential and commercial portions were being taxed differently (F-29; R-69, F-30; R-70). Although it was later disclosed that Rehoboth uses a single tax rate (and does not distinguish between residential and commercial properties), it was never clear as to just why Gossett proceeded down such a curious path (M-11-15; R-107-108).

Instead of asking questions, Commissioner Susan Gay (a member of the Planning Commission in January 2019) began what would be more accurately described as "introducing evidence," even "sharing her screen" during the Zoom hearing in order to make a point with demonstrative evidence that prior rezonings in the City of Rehoboth going back to 2006 were essentially "down zones" from commercial to residential uses (F-31-34; R-70-71). Other than to justify a rather blatant predisposition against the application, it is unclear (and it was never stated by Gay), just how the information that was not part of the record was at all relevant. Indeed, City attorney Mandalas attempted to bring a halt to the presentation by reminding Gay that this was the point in the hearing for the Commissioners to ask questions, and for the public to chime in (F-33; R-70).

Commissioner Gossett apparently had questions relating to the Planning Commission's recommendation, but as Mayor Mills observed, the Planning Commission had not sent a representative to the hearing (F-34; R-71). Mayor Mills and Susan Gay then engaged in a discussion (again, not questioning the

applicant) as to letters that had been submitted in opposition (F-34-35; R-71). In fact, he asked Gay (who is apparently a resident of the nearby Country Club Estates) how many members her owners' association had, to which Gay replied "about 300" (F-35; R-71). Mills similarly referenced a letter from the Rehoboth Beach Homeowners Association, which he guessed had between 500 and 600 members (F-35; R-71). But there was no mention of the content of the letters, much less any verification as to how many of the members of the respective organizations shared the position their Boards had taken. Nor was it made known if Gay had taken any part in her HOA communicating with the City.[5]

The meeting was then opened to public comment. Carol Everhart, representing the Chamber of Commerce, expressed support for redevelopment and revitalization of the property (F-36; R-71). An individual identified as Mr. Srivastava, an owner in the adjacent Scarborough Village townhouse community, objected, first pointing out that he and his wife had purchased their unit in 1983 (F-36; R-71). Of course, by that time, the R-1 portion of the property was already being used for parking, and had been for many years. It is unclear as to why he believed that any change would automatically result in single family homes, but he did mention his expectation that such homes would have "appropriate setbacks"

[5] The City did not include any of the letters as part of the record filed in response to the *Writ of Certorari*. As a result, the content of the letters cannot serve as the basis for any of the Commissioners' findings or conclusions.

and would be two stories high. But his real concern was not for the use of the R-1 portion, and he did not seem to grasp that nothing taller than grade level parking would be continued. Instead, he referenced a hotel that would block the sun, and other issues such as noise from restaurants, drainage problems, an unstable fence, trash, and odors which he felt would devalue his property (F-36-38; R-71-72). Of course, he offered not one single bit of evidence to support his suspicions, and the fact of the matter is that all of his objections were to the hotel planned for the commercial portion of the property, which had nothing to do with the rezoning of the R-1 property.

Suzanne Goode testified against the application, but with reasons that bordered on the absurd (F-38-40). She began by pointing out that the City's most recent budget included a reduced allocation for legal fees. She appeared to bemoan any negotiation between zoning applicants and City officials, instead encouraging the City to just deny the application in an effort to save on legal fees. And despite the fact that Mr. Mandalas assured the City Commissioners that the restrictive covenants that had been negotiated would have meaning, Goode somehow came to her own conclusion that "…promises like that [the restrictive covenants] are worth about nothing…" (F-39; R-71). Finally, she suggested that the City take the "Tree City USA membership" seriously, whatever that is, and without any explanation as to how that impacted the zoning.

Walter Brittingham followed by expressing an opinion that the zoning should stay as it is now, apparently based on a concern that "so many changes…can happen", but without suggesting what the changes might be, how they would affect the property, and also ignoring guarantees that would be put into place (F-40; R-72).

John Dewey, a member of the Planning Commission in the fall of 2021 that reviewed the 330 application, subsequently made a lengthy statement in opposition to the application (F-41-43; R-72-73). He mentioned that he and a partner had previously owned a property facing the former Walls Apartments, and recounted their experience co-existing and working together with commercial property owners. But despite that favorable co-existence, his comments focused on his belief that the existing zoning and maps could only have meaning if they were maintained. And although he pointed to 330's option to apply for variances, he was a member of the Planning Commission that had recommended against that route, not offering any explanation as to how variances would actually prove to be a better option for anyone.

There were a number of questions posed to the City attorney. In the first instance, Mr. Mandalas confirmed the legal nonconforming use status of the R-1 property (F-46; R-74). Commissioner Chrzanowski questioned Mr. Mandalas about Susan Gay's obvious predisposition regarding the application, wondering

aloud if she should recuse herself from any further consideration (F-49; R-74). With respect to the restrictive covenants, and in response to a question from Commissioner Gossett, Mr. Mandalas confirmed that the restrictions would run with the land, and would thereby bind the property to the benefit of other parties (F-51; R-75). Prior to any vote being taken, a question arose as to an implication from the prior building inspector's comments, and the issue as to whether, with the R-1 parcel scheduled to be continued for parking only, any relief was necessary. In order to get the opinion of the current building inspector, who was not present at the hearing, the City Commissioners decided to defer any consideration (F-54-56; R-76). Commissioner Gossett also added his request that a representative of the Planning Commission appear to respond to whatever questions he had (F-52; R-75).

The hearing resumed on March 18, not for any additional evidence, but for deliberation and voting. As the City attorney pointed out,

> "And so really, at this stage, the Commissioners are going to debate and deliberate what they've heard and make a decision based upon certain criteria that they've been through before, you know, character of the neighborhood and those sorts of criteria. But, really, at this point, the discussion is all up here. To the extent you have questions that we can't find on the record someplace, if they are very discreet record issues, we could probably look to the town – city planner or somebody to see if they can point us to that record evidence. But this isn't the opportunity to get new evidence coming in." (Emphasis added) (M-10; R-107).

Commissioner Bennett then renewed the crusade regarding the tax treatment of the property.[6] Mr. Mandalas explained that there was one tax rate, and that although there are several lots as originally plotted, the City considers the property as one parcel (M-15; R-108). Commissioner Gossett then asked how one parcel can have split zoning (M-16; R-108), which is almost incredible after the subject had been thoroughly discussed at the prior hearing.

Mr. Mandalas also addressed the issue of whether the parking on the R-1 parcel could be preserved without a rezoning – the question that had been raised near the end of the February hearing. He clarified that after speaking with the building officials, the residential portion would have to be brought into compliance if the commercial portion is redeveloped (M-20; R-109). In addition, he explained that the recorded restrictions would operate as an "insurance policy" with respect to representations made by the applicant as to increased setbacks, guaranteeing a hotel on the property, and commitments regarding continued parking on the R-1 parcel (M-23; R-110).

But despite the City attorney's introduction to the hearing, Gossett, like Gay at the February hearing, began a recitation of apparently independent research that he had done after the February hearing regarding prior rezonings, and claiming that they have all been from commercial to residential, which should serve as a

[6] The Mayor even commented that no one had provided any insight into what the question regarding taxes was intended to accomplish (M-13; R-107).

precedent (M-30; R-112). Adding to that, an "unidentified speaker"[7] did the same thing, apparently having researched a 2015 rezoning for the Bellmore Hotel in Rehoboth. He or she concluded that because the application was withdrawn, there must have been no interest on the part of the City to rezone the property from residential to commercial (M-32-34; R-112-113). Once again, new evidence, combined with supposition on the part of a Commissioner, was placed in the record, with the obvious hope and expectation that it would be considered by the other commissioners, and contrary to the City attorney's statement. And, at no point was the applicant given an opportunity to address and rebut the new evidence, which included a huge leap of faith not supported by any existing record evidence. Indeed, the City attorney had indicated at the outset that the purpose of this meeting was for deliberation by Commissioners on the record already created (M-10; R-107).

The Mayor thereupon called for a motion. The motion was made in the affirmative (to grant the application to rezone) and seconded, after which Commissioners spoke and attempted to justify their individual votes. It is noteworthy that Commissioner Gay once again went beyond the evidence and limitations on the record by claiming that an as-yet unapproved revision of the

[7] It is presumed that this is a Commissioner, as the discussion at that point was between Commissioners.

Comprehensive Development Plan supported denial of the application.[8] By a vote of 5-2, the motion, and hence the rezoning application, was denied (M-34-40; R-113-114). This action followed.

[8] She referred to it as "the upcoming new CDP", or the "2020 plan" (M-37-38; R-113-114).

ARGUMENT

I. THE APPLICANT SATISFIED THE REQUIREMENTS OF THE CITY CODE SO AS TO JUSTIFY THE REZONING.

A. The Gateway to the City

The unique zoning of the property, stemming from its historic uses, in and of itself compels rezoning. As noted, split zoning is disfavored both in law and as a zoning tool. That assumption was never in dispute. See generally 1 Rathkopf, *The Law of Zoning and Planning*, §10:27 (4th ed.).

Rehoboth Avenue, of course, is the main entrance into Rehoboth Beach and is dominated by commercial properties. The City zoning map shows all properties along the Avenue zoned for commercial use, and anyone who has been in Rehoboth Beach in the last century can confirm that (R-133).

The past use of the property created a legal nonconforming use. But those are not favored either, as the goal of zoning is that at some point all nonconforming uses will be eliminated, and all properties will be brought into conformity. *Kc2 v. Town of Middletown*, 1999 Del. Super. LEXIS 257 (February 5, 1999). If the existing structure continued to be utilized with parking on the R-1 parcel, the result would be a continuation of the nonconformity. Redevelopment of the unsightly existing building will trigger the end of the nonconformity (M-19; R-109).

There is also no question that the Comprehensive Development Plan favors the redevelopment of the 330 property. It is located in the area referred to by the CDP as the "Gateway" to Rehoboth Beach, thus emphasizing the importance of the area as the point where most residents and visitors alike get their first impression of the City (R-132). What kind of impression is being created with an old building in need of rebuild, especially to those old enough to remember the *Seahorse* in its glory?

The importance is even more pronounced when recognizing that the property sits at the intersection of the two main entrances to the City – Rehoboth Avenue and State Street. Although the CDP specifically points out the successful renewal in the first two blocks closest to the Boardwalk, there is no question that properties near 330 are similarly being improved, as evidenced by recent efforts at the *Cultured Pearl*, *Dogfish Head*, and others (F-21; R-67). The CDP specifically encourages the City to support and assist with upgrading properties (F-21; R-67). The applicant, consistent with the CDP, presented a golden opportunity to the Commissioners to have enhanced the appearance of the City landscape, indeed, the Gateway to the City.

B. The City hires a planning consultant

During the course of proceedings (and before the Planning Commission voted), the City retained Thomas West, AICP (American Institute of Certified

Planners), as a planning consultant. On August 30, 2021, Mr. West submitted a comprehensive report to the Planning Commission, which included a review of the City's current Comprehensive Development Plan approved in 2010 (R-131-137).

The West report pointed out that the portion of the property zoned C-1 would permit structures with a maximum height of 42', or roughly 4 stories, and potentially cover 100% of the lot (R-136). It also confirmed the status of the R-1 portion as a legal nonconforming use, recognizing that redevelopment as a hotel with an underground parking garage as planned could be a preferable use (R-136).

Note, too, that Section 270-11 of the City Code reads as follows:

> "R-1 District-Purpose. The R-1 District is designated to protect and maintain those residential areas <u>now developed</u> primarily with single-family detached dwellings and primarily on lots of at least 5,000 square feet" [emphasis added].

Thus, retaining an R-1 classification is not supported by the statutorily-defined purpose of the district. The R-1 portion of the property has not been developed, and at less than 20,000 square feet could accommodate no more than 4 separate lots at most, if it were approved for subdivision. In addition, this is not a small area surrounded on all sides by other residential areas. It is immediately adjacent to the commercial district, and has a history of serving a commercial use.

The report also recognized that rezoning the R-1 portion to C-1 appeared consistent with policies encouraging revitalization in corridor and gateway areas,

but that it did have the potential to exacerbate concerns related to residential areas (R-136). West pointed out that the CDP authorized a method for alleviating potential stress upon residential areas, which he referred to as "refinements". Although the City lacks a legal basis for restricting uses, West recognized that an option was available to obtain assurances from 330 that it would limit possible adverse impacts. With that in mind 330 consulted with the City attorney and Mr. West and developed a series of restrictive covenants it was prepared to put into place limiting the height of any structures on the R-1 portion, and creating setbacks more akin to those in residentially-zoned areas, and substantially less than the permitted "zero lot line" generally available for commercial properties (R-136-137).

Mr. West appeared virtually at the Planning Commission's October 2021 meeting and, according to the minutes, provided a summary of his report (R-20). He did the same thing at the Planning Commission meeting in December (R-24) and added that since the October meeting he had met with the City attorney and the applicant's attorney to craft the restrictions. In every aspect of the application, the West report favors rezoning the R-1 portion to C-1. Yet not one member of the Planning Commission ever mentioned the report, much less made any effort to rebut any of the conclusions.

The same thing occurred before the City Commissioners. Not one Commissioner attempted to distinguish the specific conclusions and recommendations of the City's own planner from their own generalized findings and opinions. Indeed, had the City approved the rezoning and cited the West report as the basis, the decision would be almost impossible to rebut.

C. The Plaintiff met the statutory requirements for a rezoning

330 met every applicable purpose and goal of the Rehoboth Beach Zoning Codes. There were no issues raised as to public health, safety, or morals, and thus the only applicable purpose remaining under Section 270-1(A) was the undefined "general welfare". As to 270-1(B), there were several issues raised, all of which were favorably addressed by the applicant and/or the City Planner. Central to the analysis is that only the R-1 portion of the property was the subject of the ordinance. A significant portion of the underlying proceedings (particularly from opponents) focused on the hotel planned for the C-1 portion – a use already permitted by the City Code, and which the City attorney advised would be examined at later site plan reviews (R-13)[9]. The remaining factors in 270-1(B) will be addressed as they appear.

[9] By way of example, one objector, identified as Mr. Srivastava, objected to the loss of sunlight from a hotel. That was the only reference to the obligation to provide adequate light and air, and was clearly irrelevant (F-37-38; R-71-72).

1. Lessening congestion in the streets

What the application requests is a reasonable rezoning from R-1 to C-1 in order to allow for an entrance to underground parking, most of which will be located beneath the hotel. It is hard to imagine a more effective way of reducing congestion in the streets than 330 having its own underground parking garage on site. Beyond the obvious, there was no testimony or other evidence suggesting that the applicant had failed to meet that purpose.

2. Prevent overcrowding of land

By planning an underground parking garage, the applicant will be able to locate all required onsite parking at a convenient location, and without the vehicles being visible or being heard. The fact that most of the vehicles will be underground, the appearance at any given moment will be little different than it has been for many years.

3. Facilitating the adequate provision of transportation

If the goal is to get cars off the streets of the City of Rehoboth, there is no better solution than a parking garage. Hotels in the City are generally destinations, and given the location of the property, it is likely that once parked, the cars will remain in the garage until the end of the rental.

4. The character of the district and its peculiar suitability for particular uses

Although there were a number of comments expressing concern with protecting the integrity of nearby residential areas, what appears to have been lost is that the property at 330 Rehoboth Avenue is also entitled to protection. In fact, the character of 330 Rehoboth Avenue was established long before the creation of nearby residential areas – such as Scarborough Village, which raised objections. The need to improve the property was not in dispute, and nothing about rezoning the R-1 portion (with the assurance that it would be severely restricted), threatens the integrity of any surrounding property.

5. Encouraging the most appropriate use of land

The fact that a hotel is identified in the City Code as a permitted use in the commercial area confirms that plan as appropriate, and objections focusing on the hotel are irrelevant. Rezoning the R-1 portion to commercial, but with recorded stipulations that limit use of the property, confirms the present use of the property as the most appropriate, and does nothing more than continue uses which have been in place for many years.

II. THE REASONS GIVEN BY THE COMMISSIONERS TO SUPPORT THEIR DENIAL OF THE REZONING APPLICATION ARE NOT SUPPORTED BY A RECORD OF SUBSTANTIAL EVIDENCE, AND ARE OTHERWISE ARBITRARY AND CAPRICIOUS.

A county or municipal body's determination that a rezoning application does not comport with its Code is presumed correct, and the contesting applicant bears the burden of demonstrating that the decision is arbitrary and capricious. *Gibson v. Sussex County Council*, 877 A.2d 54, 66 (Del. Ch. 2005). But the presumption in favor of the government's decision only arises if that decision is supported by a record of substantial evidence sufficient to support the decision. *Id*.

The Courts of this state have for years been refining the way in which zoning decisions are reviewed. It is now generally accepted that a zoning authority must create a record, or state on the record the reasons for its decision in terms that address the factors to be taken into account under the applicable statute. *Tidewater Utilities Inc. v. Sussex County Council*, 1986 Del. Ch. LEXIS 455 (September 17, 1986) citing *Tate v. Miles,* 503 A.2d 187, 191 (Del. Supr. 1986).

The Court in *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 131 (July 10, 2006) analyzed the various paths a zoning authority might follow to comply with those requirements. The Court initially pointed out that the ordinance authorizing a rezoning may itself contain sufficient reasons. Here, however, the ordinance and motion as phrased by the Rehoboth Beach Commissioners was to

approve the rezoning application. Because the Commissioners voted against the resolution, the language within the ordinance is not supportive.

The second path, and one which is not particularly favored, is for the zoning authority to simply rely upon the record to justify its decision. The Courts caution that the record must prove to be an adequate substitute for a more formal explanation. If several possible explanations for a given decision appear on the record, the reviewing Court must not be left to speculate as to which evidential basis the zoning authority favored. *O'Neill, at* *15.

The third path, and the one more frequently chosen, is for the members to articulate the reasons for their respective votes. In that regard, at the time of the vote in this case, the City attorney cautioned the Commissioners that Courts will not "scour the record" to seek out their reasons (M-35; R-113). The Commissioners thereupon set out their reasons, which, compared to the record, are woefully inadequate, insufficient, contrary to the record, and in many instances irrelevant. Those reasons fall into several categories, and will be reviewed in that fashion.

A. Maintenance of the status quo

In her vote against the application, Commissioner Sharp reasoned that the restrictions of the R-1 Zoning should apply, and zoning maps should be able to be counted on (M-36; R-113). Commissioners Lagree, Gay, and Mills adopted that

finding as well. But that reasoning begs the question, because the same Code establishing the R-1 Zoning includes provisions for changing it so long as the change is consistent with stated goals and other statutory factors. And there was no dispute that the unique split zoning was problematic.

Sharp's rationale appears to be based in large measure on the comments of John Dewey, who related that his due diligence before purchasing his property nearby included a review of City zoning maps. He expressed a belief that because individuals look at the area in which they are purchasing property, the City should essentially maintain the status quo. If Dewey's suggestion were ever adopted, no property could ever be rezoned.

Dewey also recognized that the Board of Adjustment offered a different opportunity for 330 to obtain the relief it sought, and encouraged it to go in that direction, despite the fact that the Planning Commission on which he served had previously discounted that route as a viable option. His suggestion made no sense whatsoever. If 330 obtains rezoning approval to continue to use the R-1 for parking, or obtains a variance leading to the same result, there is no practical difference. Dewey's comments similarly fail to admit the obvious – regardless of how 330 proceeds, its goal to use the R-1 property for parking has been in full view for many years (and started well before Dewey purchased his property).

B. Recognizing the character of the neighborhood

In her comments, again reiterated by Lagree, Sharpe also referenced a need to "support our residential character". It is unclear as to just what that means, since, as explained above, Rehoboth Beach obviously has a vibrant commercial character as well. And, she failed to address why the restrictions that had been negotiated with the assistance of the City Planner and City attorney would not serve that purpose.

In his decision in the *Gibson* case former Vice Chancellor Strine viewed opinions as to the character of property with great suspicion. He noted, for example, that without an objective benchmark against which an *ad hoc* "character" judgment could be measured, a finding based upon character would be the "essence of arbitrary" (877 A.2d at 76). Without appropriate bounds, "out of character review" could become a capricious license to deny property owners their legitimate rights (877 A.2d at 75).

That is precisely what happened here. Not one witness testified, and not one piece of evidence documented, that rezoning the R-1 parcel while at the same time restricting it to parking-related intentions – the same use to which the property has been put for years – will adversely affect the character of surrounding areas. It is

nothing more than another way to urge maintenance of the status quo, and a misguided attempt to prevent a hotel which is not even at issue.

C. Adherence to the Comprehensive Development Plan

As noted previously Commissioner Gay made numerous references during the deliberations (and after the record was closed) to a draft of a Comprehensive Development Plan update which had not yet been approved by the City, or by the State of Delaware.[10] As such, that draft, unlike the approved 2010 Plan that was still in effect at the time, did not carry the force of law. Gay went beyond her individual research and made references to the unapproved Plan in her remarks supporting her vote (M-37-38; R-113-114). Reliance upon a 2020 draft was improper, and the essence of capriciousness, and cannot be used as a reason to deny the 330 application.

D. Alleged negative impact on residential areas

Several commissioners, including Gay and Mills, asserted that rezoning the R-1 parcel would negatively impact abutting residential properties. Mills added that the negative impact would include light, air and noise impacts (M-39; R-114). But none of the commissioners explained just how that would occur if the R-1 property was rezoned. To be clear, the only reference to light was the testimony of

[10] Section 702 of Title 22, *Delaware Code*, requires municipalities to adopt (and periodically update) a comprehensive development plan. There is no dispute that the 2010 plan was the last one officially adopted by the City.

a Mr. Srivastava, whose complaints appear to be focused on the proposed hotel building, which in the first instance he claims will block the sun (F-37; R-71). But the hotel would be located on the portion of the property already zoned commercial, and has nothing to do with rezoning. 330 has the right to build a hotel because it is a permitted use in the commercial district. The R-1 portion will still have a modest amount of ground-level parking (but nothing taller), and an entrance to the underground garage which will not block anything.

The same individual complained about increased noise once a "hotel with restaurants and whatever" are built (F-37; R-71). But once again, the commercial property is not at issue. And a restaurant located within the hotel (if one is built) would certainly be consistent with the long-term history of the property. Scarborough Village owners have been spoiled by the fact that the property has not been fully utilized for some years. But if they truly investigated the surrounding area before purchasing their condominiums, they should have anticipated that the property would not be unused indefinitely.

Surprisingly, Mayor Mills included in his reasons for denial the observation that providing underground parking on the residential portion should <u>not</u> be offensive to the neighbors (M-39; R-114). That, of course, is precisely what was before the City, and it is difficult to imagine how Mills could have voted to deny the application having made that observation. The applicant offered restrictions

which would have guaranteed the use of the R-1 property for underground parking, which the City attorney even characterized as "an insurance policy" (M-22-23; R-110). Mills' suggestion that 330 could get the same relief from the Board of Adjustment was a weak effort to come up with a reason to deny the application. The Commissioners could have effectively restricted the use of the R-1 portion by approving the rezoning with the restrictions the City had negotiated with the applicant. But suggesting that the Board of Adjustment would do the same thing was pure speculation, and not suitable as a finding of fact or conclusion of law.

III. THE CITY FAILED TO AFFORD 330 A FAIR HEARING.

It is axiomatic that a litigant is entitled to an impartial hearing before an agency or public body that is not biased against it. *Quaker Hill Place v. Seville*, 523 A.2d 947 (Del. Super. 1987). That is buttressed by the further principle that any tribunal permitted by law to hear and decide cases not only must be unbiased, but must also avoid any appearance of bias. *Id.* Reversal is almost a certainty where any of those precepts are ignored. *Id*. 330 contends that the City violated those principles in several ways, and as such denied it a fair hearing requiring judicial reversal.

A. Rezoning decisions are held to strict standards

Initially, it should be pointed out that for more than 40 years Delaware Courts have applied stricter standards to actions by what are typically considered "legislative bodies" when they make quasi-judicial decisions. Whereas legislative decisions generally set policy, are forward looking, and affect a broad range of people, actions that are specific to a single or a few landowners are generally viewed as quasi-judicial. See for example *CBS Foods, Inc. v. Redd*, 1982 Del. Super. LEXIS 823 (January 19, 1982), which required "constitutional safeguards" when a legislative body acts quasi-judicially. The Delaware Supreme Court introduced quasi-judicial decision-making safeguards into zoning actions in *Tate v. Miles*, *supra.*:

> "In *Tate v. Miles*, the Supreme Court held that the action of the Sussex County Council in approving zoning changes will be deemed arbitrary and capricious, unless the Council creates a record, or states on the record, its reasons for the zoning change in terms that address the factors to be taken into account under the applicable statute". *Tidewater Utilities Inc. v. Sussex County*, *supra.* at *3-4.

Some states consider all rezonings quasi-judicial and therefore subject to all, or essentially all, of the due process constraints of quasi-judicial decision-making. See, for example, *Fasano v. Board of County Commissioners*, 507 P.2d 23, 27 (Or. Supr. 1973); *Neuberger v. City of Portland*, 607 P.2d 722 (Or. Supr. 1980). Delaware has taken a more realistic approach. In *Lawson v. Sussex County Council*, 1995 Del. Ch. LEXIS 81, at *20-21 (June 14, 1995), the Court of Chancery summed up the Delaware approach by saying:

> "The zoning process itself has been characterized by our Supreme Court as a 'legislative function'… Nevertheless, in certain of its aspects the process has been said to be quasi-judicial as well… the quasi-judicial characterization represents an acknowledgment that, unlike general legislative activity that ordinarily is directed towards general law-making, rezonings are particularistic or *ad hoc* determinations that will affect a property owner and neighbors more or less intensely while affecting other citizens far less so. Thus the quasi-judicial characterization recognizes that those with a special interest should be accorded special rights such as a right to be heard or to present evidence or institute legal proceedings challenging the rezoning."

The City's treatment of the 330 application must be viewed in this light.

B. Certain specific aspects of the hearing before the City of Rehoboth Beach deprived 330 of a fair hearing

Commissioner Susan Gay unquestionably evidenced a personal bias against the application. In furtherance of an effort to support her preconceived view, she undertook her own research into the records of previous zoning cases in Rehoboth Beach and found "a lot of interesting information" (F-31-32; R-70). Rather than keeping the information to herself, though, Gay went on to share that information with her fellow Commissioners. This was not information presented to the Commission by individual participants or objectors, or by the City's own staff (i.e., Thomas West, the City's retained planning consultant). It was, rather, a member of the tribunal impermissibly providing new evidence outside the record without notice to the applicant. See *State v. Public Employment Relations Board*, 2011 Del. Super. LEXIS 128 (March 29, 2011).[11]

Gay's presentation was anything but neutral. She referenced three rezonings over the past 18-19 years in which properties within the City were essentially "downzoned" from commercial to residential, which she characterized as "a pretty stark picture as to what the city's desires are" (F-32; R-70). She proceeded to advance her belief that the Commissioners' efforts should be focused on avoiding

[11] It is improper for an administrative agency to base a decision on information outside the record without notice to the parties.

negative impacts of commercial development on residential neighborhoods (F-33; R-70).

The City solicitor then attempted to cut her off before she could complete her presentation, indicating that the purpose of the meeting was for the Commissioners to ask questions of the applicant and then hear from the public – in other words, allow a record to be established by others (F-33; R-70). Then she would be able to draw conclusions from the record. But even after that admonition, Gay acknowledged that her research was intended for others, who might not be aware of the prior rezonings and the "City's desires" (F-34; R-71).[12]

Gay's predisposition to vote the "City line" was not lost on fellow Commissioner Edward Chrzanowski, who pointed out Gay's bias and inquired of the City attorney whether she should recuse herself (F-49; R-74). Although he cut off some of Gay's presentation, the City solicitor suggested that it was acceptable for a Commissioner to present evidence (F-49; R-74). Had he called attention to the impropriety of Gay's evidence and recommended she recuse herself, the vote might have been saved.[13]

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[12] There was no opportunity for anyone to verify whether or not the three "down zonings" referenced by Gay were, in fact, all of the rezonings undertaken by the City of Rehoboth during that time, whether she was accurately reporting the facts, etc. That, of course, is the reason for the requirement of advance notice.

[13] See *J.L.B. Corp. v. Delaware Alcoholic Beverage Control Commission*, 1985 Del. Super. LEXIS 1204 (June 7, 1985), in which the Court upheld a vote by the Delaware ABC despite a Commissioner's personal knowledge of certain extrinsic

The prejudice of a Commissioner is legal bias, which disqualifies an adjudicator. *J.L.B. Corp. v. Delaware Alcoholic Beverage Control Commission*, *supra.* And the fact that eliminating the prejudicial vote would not have changed the outcome from a numerical standpoint, eliminating Gay's vote does not mean her bias had no effect on the results. As the Supreme Court pointed out in *Sullivan v. Mayor of Elsmere*, 23 A.3d 128 (Del. Supr. 2011):

> "The prevailing perspective is that the bias of one member of a multi-member adjudicatory tribunal taints the entire tribunal's decision and deprives the party subject to the tribunal's judgment of due process. This is true whether or not that biased member's vote is necessary to the judgment." 23 A.3d at 136.

Here, Gay's research and comments clearly persuaded at least two other Commissioners to vote against the rezoning. In his remarks, Commissioner Gossett referred to the same commercial to residential down zonings as creating a "precedent" (M-30; R-112). And an "unidentified speaker" (presumably a Commissioner) did the same thing (M-32-33; R-112).

In addition, when 330 made its various appearances before the Planning Commission, one of the members was John Dewey. Despite suggesting he was not speaking as a Planning Commission member, he was permitted to testify against

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facts, and his having questioned the licensee in a hostile manner which revealed bias and prejudgment, but only after the Commissioner recused himself and did not participate in the deliberations or decision.

the 330 application before the City Commissioners. Dewey had a clear conflict, or at least created the appearance of one (F-41-43; R-72-73).

Dewey went one step further than Gay, publicly expressing his opposition despite the fact that he was part of another City tribunal charged with review and oversight, and making himself an actual adversary. Dewey should have remained on the sidelines or precluded from taking a position on the 330 application. See *Rehoboth Art League, Inc. v. Board of Adjustment*, 991 A.2d 1163 (Del. Supr. 2010).

The public comments from Gay, Gossett, and the unidentified Commissioner, and to a lesser extent, from Dewey, were improper in that those comments established legal bias, thereby irreparably tainting the proceeding before the City Commissioners.[14] As former Justice Moore (sitting by designation) noted in *Quaker Hill*, an impartial hearing effectively mandates a reversal. There is no other appropriate result in the instant case.

[14] Conflicts of interest tainted the proceedings from the outset. At the October 2021 public hearing before the Planning Commission, Rick Perry, a member of the PC as early as the concept review in 2019, testified against the application (R-21). None of the members of the Planning Commission or the Board of Commissioners seemed to have any appreciation of conflicts of interest or their obligation to provide the applicant with a fair hearing.

IV. THE COURT SHOULD REVERSE THE CITY'S DECISION

It is 330's position that given the factual and procedural record, the City's denial of the rezoning application must be reversed. Not only is there no substantial evidence to support the decision, there is no evidence at all. In addition, the numerous conflicts of interest and bias exhibited by several decision-makers amounts to arbitrary and capricious action, supporting reversal.

But that reversal should not include a remand. Courts have held that if a remand would be pointless, as when only one outcome is proper, it is not necessary. The same is true if the outcome would be the same after remand. *Sanchez v. Valencia Holding Co., LLC*, 201 Cal. App. 4th 74 (Nov. 23, 2011); *Friends of McMillan Park v. D.C. Zoning Commission*, 211 A.3d 139 (D.C. App. 2019); *Bio-Med Applications of District of Columbia v. Bd. of Appeals*, 829 A.2d 208 (D.C. App. 2003). As the Supreme Court has clarified, Courts are not required to remand in futility. *Apt. & Office Building Association of Metropolitan Washington v. Public Service Commission of the District of Columbia*, 129 A.3d 925 (D.C. App. 2016).

Remand is also unnecessary if it is not the most practical solution. *Waters v. Statewide Maintenance*, 2006 Del. Super. LEXIS 31 (Jan. 11, 2006). This is not a situation in which a defect in the record needs to be corrected, as in *State Farm Mutual Automobile Ins. Co. v. Hale*, 297 A.2d 416 (Del. Ch. 1972). Nor would the

Court looking for a "more technically precise opinion" as in *State v. Williams*, 2023 Del. Super. LEXIS 357 (July 26, 2023). To remand in this instance would be to reward the City for four years of leading 330 through a series of unnecessary and tainted obstacles, only to have the rug pulled out from beneath its feet.

With its refusal to even acknowledge the report of its City Planner which explained how the application met Code requirements, by ignoring its attorneys' admonitions throughout the process, and by essentially acting as Prosecutor and Jury, the City of Rehoboth has shown the type of indifference to its obligations that requires a reversal and an Order that the rezoning be granted.[15] Justice requires nothing less.

[15] *See Husbands v. Shahan*, 2002 Del. Super. LEXIS 540 (Feb. 27, 2002), in which the Court concluded that a defendant's drivers license should be reinstated where DMV had delayed in producing a transcript for over three and a half years.

CONCLUSION

For the reasons set forth herein, the Decision of the City of Rehoboth Beach denying the rezoning application filed by 330 Hospitality Group LLC should be reversed, and the City directed to grant the rezoning.

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