



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MIDDLECAP ASSOCIATES, LLC,) No. 48, 2026
)
Plaintiff Below, Appellant,) UPON APPEAL FROM THE
) SUPERIOR COURT OF THE
v.) STATE OF DELAWARE IN
) C.A. NO. N23C-03-181 CEB,
THE TOWN OF MIDDLETOWN, a) VIA TRANSFER FROM THE
municipal corporation of the State of) COURT OF CHANCERY OF THE
Delaware, and THE TOWN OF) STATE OF DELAWARE IN
MIDDLETOWN TOWN COUNCIL, the) C.A. NO. 2022-0234-MTZ
governing body of the Town of Middletown,)
)
Defendants Below, Appellees.)

CORRECTED APPELLANT'S OPENING BRIEF ON APPEAL

**BROCKSTEDT MANDALAS FEDERICO,
LLC**

BY: 

John W. Paradee, Esquire (#2767)

Mark A. Denney, Jr., Esquire (#5156)

6 South State Street

Dover, Delaware 19901

(302) 677-0061

Attorneys for Plaintiff-Below Appellant

Middlecap Associates, LLC

Dated: April 20, 2026

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	iv
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	5
STATEMENT OF FACTS.....	6
ARGUMENT	17
I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN DISMISSING PLAINTIFF’S ACTION FOR LACK OF JURISDICTION, BECAUSE CERTIORARI REVIEW IN SUPERIOR COURT CANNOT POSSIBLY AFFORD AN ADEQUATE REMEDY FOR PLAINTIFF’S CLAIMS.....	17
QUESTION PRESENTED	17
SCOPE OF REVIEW.....	17
MERITS OF ARGUMENT	17
II. THE SUPERIOR COURT’S DISMISSAL OF PLAINTIFF’S SECOND AMENDED COMPLAINT CONSTITUTES AN ERROR OF LAW BECAUSE, EVEN UNDER THE LIMITED STANDARD FOR CERTIORARI REVIEW, DEFENDANTS’ DENIAL OF PLAINTIFF’S APPLICATION CANNOT WITHSTAND SCRUTINY.....	31
QUESTION PRESENTED	31
SCOPE OF REVIEW.....	31
MERITS OF ARGUMENT	31
CONCLUSION	42

EXHIBIT A – 1-30-26 MEMORANDUM OPINION (N23C-03-181-CEB)

EXHIBIT B – 7-11-25 OPINION (N23C-03-181-CEB)

EXHIBIT C – 2-2-23 ORDER GRANTING MOTION TO DISMISS (2022-0234-MTZ)

TABLE OF CITATIONS

Cases

<i>Candlewood Timber Group, LLC v. Pan American Energy, LLC</i> , 859 A.2d 989 (Del. 2004).....	17
<i>Chavin v. H. H. Rosin & Co.</i> , 246 A.2d 921 (Del. 1968)	17
<i>Citizens Against Solar Pollution v. Kent County</i> , 2024 WL 2022503 (Del. Super. May 7, 2024).....	25
<i>Coker v. Kent County Levy Court</i> , 2008 WL 5451337 (Del. Ch. Dec. 23, 2008).....	26
<i>Delle Donne & Associates, LLP v. Millar Elevator Service Co.</i> , 840 A.2d 1244 (Del. 2004).....	31
<i>Delta Eta Corporation v. City of Newark</i> , 2023 WL 2982180 (Del. Ch. Feb. 2, 2023).....	18, 22, 26
<i>DuPont v. DuPont</i> , 85 A.2d 724 (Del. 1951).....	21
<i>Florida Power & Light Co. v. City of Dania</i> , 761 So.2d 1089 (Fla. 2000)	26
<i>Gibson v. Sussex County Council</i> , 877 A.2d 54 (Del. Ch. 2005).....	26, 30, 32, 41, 42
<i>Hillsboro Energy, LLC v. Secure Energy, Inc.</i> , 2008 WL 4561227 (Del. Ch. Oct. 3, 2008).....	21
<i>Imbragulio v. Unemployment Ins. Appeals Board</i> , 223 A.3d 875 (Del. 2019).....	17
<i>In re COVID-Related Restrictions on Religious Services</i> , 326 A.3d 626 (Del. 2024).....	17
<i>Jubilee Carolina, LLC v. Town of North Carolina</i> , 834 S.E.2d 665 (N.C. Ct. App. 2019)	26

<i>Marine v. State</i> , 607 A.2d 1185 (Del. 1992).....	17
<i>Middlecap Assoc., LLC v. Middletown</i> , 2023 WL 2981893 (Del. Ch. Feb. 2, 2023).....	1
<i>Middlecap Assoc., LLC v. Middletown</i> , 2023 WL 6848999 (Del. Super. Oct. 16, 2023)	2
<i>Middlecap Assoc., LLC v. Middletown</i> , 2024 WL 3385825 (Del. Super. July 11, 2024).....	2, 9, 29, 33, 36
<i>Middlecap Assoc., LLC v. Middletown</i> , 2026 WL 253093 (Del. Super. Jan. 30, 2026).....	3
<i>New Castle County Council v. BC Development Associates</i> , 567 A.2d 1271 (Del. 1989).....	24
<i>O’Neill v. Town of Middletown</i> , 2006 WL 205071 (Del. Ch. Jan. 18, 2006).....	41
<i>Steen v. County Council of Sussex County</i> , 576 A.2d 642 (Del. Ch. 1989).....	24
<i>Tate v. Miles</i> , 503 A.2d 187 (Del. 1986).....	24
<i>Tony Ashburn & Son, Inc. v. Kent County Regional Planning Commission</i> , 962 A.2d 235 (Del. 2008).....	21
<i>Willdel Realty, Inc. v. New Castle County</i> , 281 A.2d 612 (Del. 1971).....	24

Rules, Statutes, and other Authority

10 <i>Del. C.</i> § 1902.....	1
22 <i>Del. C.</i> § 702(d).....	23
Town Code Section 4.B.(2)(c)	27
Town Code Section 4.I.(2)(c).....	9, 27
Town Code Section 10.A.(1)(a)	<i>passim</i>

Town Code Section 12.A.	23
<i>Rathkopf's The Law of Zoning and Planning</i> § 61:47 (4 th ed. 2005).....	26

NATURE OF PROCEEDINGS

This action commenced in the Court of Chancery on March 11, 2022, when Middlecap Associates, LLC (“Plaintiff”) filed a Verified Petition against the Town of Middletown, the Town Council, and each of the individual members of Council (collectively, “Defendants”), seeking (1) a declaration that Defendants’ denial of Plaintiff’s application for conditional use approval (“Application”) was arbitrary, capricious, and otherwise illegal, for a variety of reasons, and (2) an award of affirmative injunctive relief, reversing Defendants’ denial of the Application and granting approval of same, or, in the alternative, enjoining denial of the Application and compelling Defendants to instead approve same. (A-1-24).

On May 11, 2022, Defendants filed a Motion to Dismiss for lack of jurisdiction. Following briefing, on February 2, 2023, the Court of Chancery granted Defendants’ Motion to Dismiss Plaintiff’s Petition, “subject to being transferred to the Superior Court under 10 *Del. C.* § 1902.”¹ On February 22, 2023, Plaintiff filed an Election of Transfer, pursuant to 10 *Del. C.* § 1902, and on March 20, 2023, Plaintiff filed its Verified Petition in Superior Court.²

On March 23, 2023, prior to the filing of any responsive pleading by Defendants, Plaintiff filed an Amended Verified Complaint in Superior Court (the

¹ *Middlecap Assoc., LLC v. Middletown*, 2023 WL 2981893 (Del. Ch. Feb. 2, 2023).

² The Superior Court accepted transfer of the case by Order dated March 26, 2023.

“Amended Complaint”), striking its prayer for injunctive relief and asserting in lieu thereof a claim for writ of *certiorari* review. (A-25-50).

On May 1, 2023 – after arguing in the Court of Chancery that equity lacked jurisdiction because an adequate remedy at law *was* available, via writ of *certiorari* review in Superior Court – Defendants filed a Motion to Dismiss Plaintiff’s Amended Complaint, arguing that *certiorari* review *was not* available in Superior Court. On October 16, 2023, following briefing on Defendants’ Motion, the Superior Court dismissed the individual Council members as party Defendants, but otherwise denied Defendants’ Motion.³

The parties subsequently briefed the claims asserted by Plaintiffs’ Amended Complaint on their merits. On July 11, 2024, the Superior Court issued an Opinion voiding the Council’s February 7, 2022 denial of Plaintiff’s Application, on grounds that “this record is not sustainable because it fails to articulate a record of reasons sufficient for judicial review.”⁴ By its ruling, however, the Court did not conclude that Plaintiff is entitled to a conditional use permit – rather, the Court indicated that “the rights and duties of the parties remain where they were.”⁵

³ *Middlecap Assoc., LLC v. Middletown*, 2023 WL 6848999 (Del. Super. Oct. 16, 2023).

⁴ *Middlecap Assoc., LLC v. Middletown*, 2024 WL 3385825 at *5 (Del. Super. July 11, 2024).

⁵ *Id.* at *6.

On November 4, 2024, the Town Council conducted a second hearing upon Plaintiff's Application and again denied the Application. On December 23, 2024, Plaintiff filed a Second Amended Complaint with the Superior Court, appealing from Defendants' second denial of Plaintiff's Application. (A-51-83). On February 3, 2024, Defendants moved to dismiss Plaintiff's Second Amended Complaint, again on technicality.⁶ During oral argument on July 1, 2025, the Superior Court reserved decision on Defendants' Motion to Dismiss, as well as Plaintiff's subsequently filed Motion for Leave to File a Second Amended Complaint, and instructed the parties to brief the merits of Plaintiff's challenge to Defendants' second denial of Plaintiff's Application. Defendants certified a number of documents as constituting the record below, but omitted a number of critical documents from the record.⁷

On January 30, 2026, following briefing and oral argument upon the merits of Plaintiff's Second Amended Complaint, the Superior Court issued a Memorandum Opinion affirming Defendants' second denial of Plaintiff's Application and dismissing Plaintiff's Second Amended Complaint.⁸

⁶ Defendants' February 3, 2024 Motion to Dismiss was Defendants' *third* Motion to Dismiss this controversy without addressing the merits of Plaintiff's claims – this time, seeking dismissal on grounds that Plaintiff failed to request leave before moving to amend its original Complaint. While Plaintiff contended that no such leave was required, Plaintiff nevertheless promptly filed a Motion for Leave to file its Second Amended Complaint on February 4, 2024.

⁷ See Exs. "I" through "K" to Plaintiff's Second Amended Complaint. (A-84-554).

⁸ *Middlecap Assoc., LLC v. Middletown*, 2026 WL 253093 (Del. Super. Jan. 30, 2026).

Plaintiff filed a Notice of Appeal with this Honorable Court on February 4, 2026. This is Plaintiff's Opening Brief on appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery's initial determination to dismiss Plaintiff's action was erroneous as a matter of law, in as much as writ of *certiorari* review in Superior Court cannot possibly afford an adequate remedy for Plaintiff's claims.

2. Even under the severely limited standard for writ of *certiorari* review, Defendants' denial of Plaintiff's Application cannot survive scrutiny.

STATEMENT OF FACTS

Plaintiff does hereby incorporate by reference all of the factual allegations set forth in (a) Plaintiff's original Verified Petition filed in the Court of Chancery on March 11, 2022 (A-1-24), (b) Plaintiff's Verified Petition filed in the Superior Court on March 20, 2023, as amended by Plaintiff's Amended Verified Complaint filed in the Superior Court on March 23, 2023 (A-25-50), and (c) Plaintiff's Second Amended Verified Complaint ("SAC") filed in the Superior Court on December 23, 2024 (A-51-83), including the use of terms defined therein. The key facts are as follows:

Plaintiff is the owner of certain real property located at 10 Dove Run Centre Drive, within the territorial limits of the Town, comprising 15.10+/- acres of lands and premises on the north side of Middletown Odessa Road (State Route 299), more particularly identified as Tax Parcel #23-025.00-084 (the "Property"). (§ 6, SAC; A-56). The Property is zoned for C-3 (Commercial) use. (§ 6, SAC; A-56).

On or about October 26, 2021, Plaintiff filed an application with the Town seeking conditional use approval to construct eight garden apartment buildings on the Property, each comprised of 24 units, for a total of 192 garden apartments, together with approval of a Preliminary Major Land Development Plan delineating the layout ("Application"). (Ex. A, SAC; A-555-558).

On November 18, 2021, the Town's Planning & Zoning Commission ("Commission") conducted a hearing upon the Application. (Ex. B, SAC; A-559-565). Mark Russo of VanDemark & Lynch Engineers ("Mr. Russo") presented the Application, noting that the apartment buildings would be "similar to the apartments recently completed at Westown" (a project for which the Town had recently approved 264 garden apartment units in the C-3 Zoning District). Mr. Russo explained that (a) the development would tie into the existing water, storm sewer, and sanitary sewer systems, (b) landscaping would meet or exceed Town requirements, (c) the Application "will reduce the impervious coverage versus the previously approved shopping center and parking lots by about 2 acres", and (d) the Application "will also reduce the number of vehicle trips versus a shopping center use." (A-561-563).

Following Mr. Russo's presentation, Sarah Coakley ("Ms. Coakley"), a Principal Planner with the Delaware Department of Transportation ("DelDOT"), explained that the Property was part of the Eastown Transportation Improvement District. Ms. Coakley discussed a number of improvements which DelDOT was planning for the Route 299 corridor and indicated that, "from a traffic standpoint, DelDOT does not have any objections" to the Application. Ms. Coakley further stated that "DelDOT does not have any concerns with the apartments", as ***"[t]he apartments will generate approximately 1/3 of the traffic compared to the***

previously approved shopping center [emphasis added].” (A-562). At the conclusion of its November 18, 2021 hearing, the Commission tabled the Application. (A-563).

On December 16, 2021, the Commission revisited the Application. (Ex. C, SAC; A-566-571). Mr. Russo again made a presentation in favor, noting that the Application “will reduce the number of vehicle trips versus a shopping center buildout.” (A-569). At the conclusion of its December 16, 2021 hearing, the Commission voted 6-1 to recommend denial of the Application. (A-570).

The Town Council Holds a Hearing and Denies Plaintiff’s Application

On February 7, 2022, the Town Council conducted a public hearing upon the Application. (Ex. E, SAC; A-572-616). Ultimately, the members of Town Council voted to deny the Application for two reasons: (1) some Council members believed a previously-approved plan to develop the Property as a shopping center should remain unchanged, and (2) some Council members believed, without specifying why, that the Application was “in conflict with the comprehensive plan.” (A-613-614).

On July 11, 2024, the Superior Court voided the Town Council's February 7, 2022 denial of Plaintiff's Application, stating that "this record is not sustainable because it fails to articulate a record of reasons sufficient for judicial review."⁹

Following Reversal by the Superior Court, the Town Council Holds a Second Hearing and Denies Plaintiff's Application a Second Time

On November 4, 2024, the Town Council conducted a second public hearing upon Plaintiff's Application. (Ex. I, SAC; A-84-160).¹⁰ After a brief introduction by Mayor Branner, counsel for Plaintiff made a presentation in favor of the Application, utilizing a Presentation Notebook and Power Point presentation submitted for the record. (A-87-102, 162-542).

As explained during the presentation by counsel for Plaintiff: (a) the garden apartments proposed by the Application "would be very similar to the apartments that you see at Westown now" (which the Town Council had approved in November of 2017); (b) garden apartments are permitted as a conditional use in the C-3 Zoning District, under Section 4.I.(2)(c) of the Town Code; (c) the Application satisfies all requirements under Town Zoning Code Section 10.A.(1)(a), in as much as the

⁹ *Middlecap Assoc., LLC v. Middletown*, 2024 WL 3385825 at *5 (Del. Super. July 11, 2024).

¹⁰ See Ex. I, SAC [NOTE: The transcript provided by Defendants in their certification of the record below contains numerous typographical errors; therefore, all citations to the transcript of the Town Council's November 4, 2024 hearing below shall be to the more accurate transcript which is attached as Ex. I to Plaintiff's SAC]. (A-84-160).

garden apartments proposed by the Application “will not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use”; “will not be detrimental to the public welfare or injurious to property or improvements in the neighborhood”; and “will not conflict with the general purposes of the Town’s Comprehensive Plan or related Town planning or development policies”; (d) DelDOT has indicated that traffic will not be an issue, in as much as DelDOT has recently completed extensive improvements in the immediate vicinity, along Route 299 and, critically, DelDOT estimates that the traffic volume generated by garden apartments at Dove Run would be approximately one-third (1/3) the traffic volume that would be generated if the Property were to be developed as a shopping center; (e) the Town has previously granted *every* other request ever presented to the Town for conditional use approval of garden apartments in the C-3 Zoning District, namely: The Parkway at South Ridge (360 units), Westtown Apartments (264 units), Middletown Crossing (144 units), and Celebration Court (80 units), all of which establish decisional case precedents for permitting garden apartments in the C-3 Zoning District¹¹; and (f) based upon Delaware case law precedent, it would be arbitrary and capricious for the Town to deny Plaintiff’s Application for a conditional use permit. (A-87-102, 162-542).

¹¹ Upon information and belief, the Town has *never* denied any conditional use application for garden apartments in the C-3 zoning district, other than Plaintiff’s Application.

Following Plaintiff's presentation, Mayor Branner entertained a motion to approve the Application, made by Councilman Royston and seconded by Councilman Blythe. (A-103). Mayor Branner then delivered a soliloquy tracing the history of development on the east side of the Town – contending that, in 2002, the owner of the subject property had somehow made an infinite “promise” to the Town that the property would never be developed for anything other than a shopping center, based upon a prior site plan approval found nowhere in the record then before the Town (“the fact that [a site plan] was recorded in 2002, that is what we believe is a promise”). (A-105-107). Mayor Branner then argued, without providing any supporting evidence whatsoever, that *everything* “approved after this” on the east side of Town was somehow approved, developed, and constructed in reliance upon this supposed prerequisite “promise” that the subject property would never be developed for anything other than a shopping center. (A-105-107). In particular, Mayor Branner suggested – again, without providing any supporting evidence of record – that the Christiana Care Emergency Center, the Brick Mill Elementary School, the Brick Mill Early Childhood Center, Jaimie's Way single family homes, Encompass Health, CVS, Wawa, the Middletown Police Station, and Willow Grove Mill were *all* part of some “master plan” predicated upon a supposed “promise” that the subject property would *never* be developed as anything other than a shopping center. (A-107-109). Notably, however, the record of Defendants' November 4,

2024 hearing upon the Application is utterly devoid of any objective evidence whatsoever to substantiate the Mayor's contention that the eastern side of Middletown was developed in accordance with a "master plan" premised upon a "promise" supposedly made by Plaintiff more than 22 years earlier.

Following the Mayor's remarks, Councilman Craig Sherman alleged that "A month ago, your engineer sat here in this room and said that this recorded plan that we have would not change" – a contention echoed by Mayor Branner, yet plainly refuted by the record. (A-110-121). After a lengthy debate about the implications of the subdivision plan, Mayor Branner opened the floor to public comment. (A-121).

Comments from the public centered upon concerns regarding traffic, crime, safety, and/or impacts upon the environment and schools, none of which were substantiated by any objective evidence and all of which constituted purely speculative conjecture. (A-121-153).

At the conclusion of public comment, Mayor Branner called for a vote upon the prior-made motion to approve the Application. (A-153). Mr. Thomas voted to deny the Application, stating "I believe this will adversely affect the health and safety of persons in the Brick Mill and Dove Run area because of the increased flow of traffic as well as the safety of the residents of Dove Run." (A-153-154). Mr. Sherman also voted to deny the Application, stating, "It's my belief that this plan

will add both traffic and safety concerns, both in the neighboring developments and the existing shopping center. It also conflicts with the town's previous planning and development of the surrounding areas since the original plan was first recorded."

(A-154). Mr. Orr likewise voted to deny the Application, stating:

I believe that the proposed garden apartments will adversely impact the health and wellbeing of the people working and living in the adjoining neighborhoods. Having less commercial opportunities for current residents will cause additional travel time to obtain the goods and services that they may need or require. Additionally, this project – this proposed project will also be in conflict with the general purpose and spirit of the town's comprehensive plan that has been in place for and followed for many years. The development design with the current zoning is to provide services and retail environments and employment opportunities for local residents. This proposed conditional use request does not meet these guidelines and, hence, I would feel that it would be detrimental to local residents. (A-154-155).

Mr. Chas also voted to deny the Application, stating:

The 192 apartments also is going to create pedestrian traffic and that pedestrian traffic getting to and from elementary schools, early childhood center, and high school. Currently, there is high school students that even park over in that area and have to get across. I think that during the times where children are traveling to and from, I think that puts an extra volume that is – it only takes one person to get hurt as a result of this. And that's my concern. I just don't want to – I don't want to put anybody at risk there. I can say this is not the right conditional use for this area. And so, for those reasons as well as the safety, I vote no. (A-155-156).

Mr. Blythe also voted to deny the Application because:

[T]he plan will adversely affect the health and safety of persons residing and working in the neighborhood of the proposed use. It will increase the flow of traffic through the shopping center and the Dove Run community during peak hours, and quitting at the intersection of

Middletown High School, which already has a significant pedestrian traffic level. It's also in conflict with the general purpose of the comprehensive plan and the related planning and development policies, because for the last 20 years, all of the approved in the surrounding area have been with the assumption that this parcel would be for commercial use. (A-156-157).

Mr. Royston likewise voted to deny the Application, stating:

Garden apartments will adversely affect the health and safety of persons residing and working in the neighborhood of the proposed use. The roads and public services will be negatively impacted by the proposed addition of a 192-unit apartment complex. Adding high-density housing will increase traffic congestion in the area and place additional burdens on EMS and fire companies that will not be present with the commercial center. The apartments will exit via Dove Run neighborhood to an already congested Brick Mill Road during peak hours, causing more safety concerns in a neighborhood and for the schools. Second, the addition of 192 apartment conflicts with the town's comprehensive plan. Many residents moved to the area for a sense of community and with the understanding that the property would be a commercial center. The town's planning and development goals have been approved over the past 20 years, as was explained earlier, with the understanding that this property will be a shopping center. Had the town known during the 20-year period that the property would be developed as an apartment complex, the town would have acquired more commercial use in the area, more traffic and safety components to this and the other developments." (A-157-158).

Mayor Branner then announced that, "With that, the motion to grant approval for the conditional use for the apartment complex at Dove Run is defeated by a unanimous vote of six to nothing," whereupon the room erupted in loud applause and yelling. (A-158).

On November 5, 2024, Plaintiff submitted correspondence to Mayor Branner correcting certain misunderstandings or misapprehensions of fact regarding

Plaintiff's Application which came to light during the Town Council's November 4, 2024 public hearing. (Ex. K, SAC; A-543-554). First, contrary to the suggestions made by Mayor Branner and Councilman Sherman during the November 4, 2024 hearing, "no representation or commitment was ever made by any representative of the [Plaintiff] to the effect that the [Plaintiff] had decided to forego (or would agree to forego) its ongoing efforts to develop Lot B for garden apartments", merely by virtue of Plaintiff's submission of a revised subdivision plan separating Lot B from Lot A comprising the subject property. To the contrary, as made clear by Note #41 on the revised subdivision plan, "An application for Conditional Use approval to allow Garden Apartments in the C-3 Zoning District for Dove Run Centre – Lot B is currently pending before the Town of Middletown." (A-544-545). Second, and contrary to the naked speculation offered by Councilmen Thomas, Sherman, Chas, Blythe, and Royston, it is indisputable that development of the subject property as garden apartments would result in *less than one-third (1/3) the amount of traffic* that would be generated if the subject property were developed as a shopping center, regardless the time of day or differing traffic patterns, and particularly so during the busiest hours of the day. This conclusion was confirmed by DelDOT during the November 18, 2021 meeting of the Town's Planning & Zoning Commission, noting that development of the subject property for a 110,000 SF shopping center "would generate 206 a.m. peak hour trips and 579 p.m. peak hour trips, while "traffic

generation based on 192 apartment units is expected to generate 83 p.m. peak hour trips (the busiest 2 hours of the day). DelDOT does not have any concerns with the apartments.” (A-545-554).

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN DISMISSING PLAINTIFF'S ACTION FOR LACK OF JURISDICTION, BECAUSE CERTIORARI REVIEW IN SUPERIOR COURT CANNOT POSSIBLY AFFORD AN ADEQUATE REMEDY FOR PLAINTIFF'S CLAIMS.

Question Presented

Did the Court of Chancery err as a matter of law in dismissing Plaintiff's Complaint for lack of jurisdiction?¹²

Scope of Review

On appeal from a decision of the Court of Chancery, this Honorable Court reviews questions of jurisdiction *de novo*.¹³

Merits of Argument

Plaintiff respectfully submits that the Court of Chancery's initial determination to dismiss Plaintiff's Complaint was erroneous as a matter of law, for the reasons that (a) when considering Plaintiff's Application, the Town Council was

¹² This question was raised below at ¶ 22, n. 12 of Plaintiff's Second Amended Complaint (A-93); at p. 5, n. 6 of Plaintiff's October 29, 2025 Reply Brief in Superior Court; and during oral argument in Superior Court on December 1, 2025. In any event, questions of jurisdiction may be raised at any stage of the proceedings. *Marine v. State*, 607 A.2d 1185, 1200 n.7 (Del. 1992); *Chavin v. H. H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968).

¹³ *In re COVID-Related Restrictions on Religious Services*, 326 A.3d 626, 638 (Del. 2024); *Imbragulio v. Unemployment Ins. Appeals Board*, 223 A.3d 875, 878 (Del. 2019); *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

acting in a legislative or quasi-legislative capacity, and (b) mere *certiorari* review in Superior Court cannot possibly afford an adequate remedy for Plaintiff's claims.

Introduction: Nature of the Controversy

This case presents an opportunity for the Delaware Supreme Court to calm the waters of land use jurisprudence in the State of Delaware, following the Court of Chancery's tsunami decision in *Delta Eta*¹⁴, which, for the first time ever, declined to accept jurisdiction over an appeal from denial of a conditional use on the basis that writ of *certiorari* review in the Superior Court provides an adequate remedy at law, thereby precluding jurisdiction in equity. At its essence, this controversy turns upon the nature of conditional use applications, the type of discretion which a local government's legislative body applies when evaluating such applications, and the standard by which a court reviews the lower tribunal's determinations. When evaluating a conditional use application, is the legislative body acting in a legislative-discretionary capacity (for which *certiorari* review is inappropriate and unavailable), or is the body acting in a quasi-judicial capacity (for which *certiorari* review may prove adequate)? And regardless what label may be attached to the function performed by the legislative body when evaluating a conditional use application, what standard should a court apply upon review – a limited and highly-

¹⁴ *Delta Eta Corporation v. City of Newark*, 2023 WL 2982180 (Del. Ch. Feb. 2, 2023).

deferential *certiorari* standard (which considers only whether the lower tribunal exceeded its jurisdiction, committed an error of law, or proceeded irregularly), or a less deferential “arbitrary and capricious” standard (which considers whether the legislative body’s findings are supported by substantial evidence of record)? In the case at bar, Plaintiff respectfully submits that (a) the Town Council was acting in a legislative-discretionary or quasi-legislative capacity, and therefore, *certiorari* review is inappropriate, and (b) in any event, under the facts of this case, *certiorari* review is inadequate, because the Town Council was applying the same type of legislative discretion when deciding Plaintiff’s Application as the Town applies when implementing a zoning change. For these reasons, Plaintiff contends, the Court of Chancery should have retained jurisdiction and reviewed the Town Council’s denial of Plaintiff’s Application under the traditional “arbitrary and capricious” standard historically applied by the Court of Chancery.

The case at bar does not come to this Honorable Court in a vacuum, but rather, with the benefit of certain bedrock principles long championed by this Court in the context of private property rights. First and foremost, because the common law favors the free use of property, and because zoning regulations are in derogation of the common law, courts have historically applied an “arbitrary and capricious” standard when reviewing zoning changes, requiring the council’s decision to be supported by substantial evidence and free from legal error. This is still a somewhat

generous standard, because in terms of determining whether there is “substantial” evidence to support the decision, the court will generally defer to the legislative body so long as there is more than a scintilla of evidence to support the decision. Importantly, though, a legislative body is not free to render zoning determinations *without support in the record* – or worse, *contrary to the evidence* – by, for example, concluding that the proposed zoning change will result in more traffic, when, in fact, all record evidence points to the opposite conclusion. There is still plenty of room for legislative discretion, but at least there is some protection from wholly fabricated or unsubstantiated reasons, erroneous reasons, or mob rule.

Conversely, when it comes to subdivision plans and site plans, *certiorari* review is appropriate. This is because there is virtually no legislative discretion associated with such plans.¹⁵ Zoning and subdivision codes set forth a myriad of requirements which a plan must satisfy or exceed, and if the plan satisfies those requirements, it is entitled to approval. If a plan that complies with the requirements is nevertheless rejected, then legal error has occurred. The courts have allowed “reasonable conditions” designed to lessen the adverse impact on surrounding properties as part of a plan approval, but the bottom line is that a conforming plan

¹⁵ Indeed, in most jurisdictions, subdivision and site plan applications are reviewed and approved by the jurisdiction’s planning commission – an appointed, quasi-judicial body – not the jurisdiction’s duly-elected legislative body.

must be approved.¹⁶ Thus, a disgruntled landowner is not entitled to review in Chancery for a subdivision or site plan denial because, at least in theory, *certiorari* review should be adequate. Yet *certiorari* review is clearly not appropriate for zoning changes, when the only limit on legislative discretion is that it be supported by “substantial evidence”. Almost all zoning changes will be upheld, but at least property owners are protected from mere whim and caprice. After all, private property rights should be governed by the rule of law, not the rule of mobs.

The Court of Chancery Had Jurisdiction To Hear Plaintiff’s Claims
“Ubi jus ibi remedium”¹⁷

The Court of Chancery acquires subject matter jurisdiction over a case “in only three ways: (1) the invocation of an equitable right; (2) the request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.”¹⁸ Here, the Court of Chancery had subject-matter jurisdiction because Plaintiff requested an equitable remedy and, for reasons explained below, there is no adequate remedy at law.

¹⁶ *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Commission*, 962 A.2d 235, 240-242 (Del. 2008).

¹⁷ “Where there is a right (or a wrong), there is a remedy.” *See DuPont v. DuPont*, 85 A.2d 724, 733 n.20 (Del. 1951) (the maxim that “equity will suffer no right to be without a remedy” . . . “is the fundamental source of all general equity jurisdiction.”).

¹⁸ *Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 WL 4561227 at *1 (Del. Ch. Oct. 3, 2008).

Like its decision in *Delta Eta*¹⁹, the Court of Chancery’s decision below is premised upon the conclusions that (1) the Town Council, when evaluating a conditional use application under Section 10.A.(1)(a) of the Town Code, is acting in a quasi-judicial capacity, and (2) because a quasi-judicial act is reviewable by writ of *certiorari* in Superior Court, the Court of Chancery was without jurisdiction to entertain Petitioner’s Complaint.

Plaintiff respectfully submits that (1) when considering Plaintiff’s Application in the instant case, the Town Council was acting in a legislative or “quasi-legislative” capacity, rather than in a quasi-judicial capacity, and therefore, the Town Council’s conclusions ought to be subjected to the “arbitrary and capricious” standard of review, and (2) regardless what label is attached to the Town Council’s function when it considered Plaintiff’s Application in the instant case, writ of *certiorari* review in Superior Court does not provide an adequate remedy for the wrong here suffered by Plaintiff. For these reasons, the Court of Chancery should have retained jurisdiction and reviewed the Town Council’s denial of Plaintiff’s Application using a traditional “arbitrary and capricious” analysis, which would have required the Town Council’s determination to be supported by substantial evidence.

¹⁹ *Delta Eta, supra*.

The Town Council Was Acting In A Legislative Or “Quasi-Legislative” Capacity, Rather Than A Quasi-Judicial Capacity.

When assessing whether Plaintiff’s Application for conditional use approval met the requirements of Town Code Section 10.A.(1)(a), the Town Council was exercising the very same legislative discretion it employs when considering amendments to the Town’s zoning regulations. That is, determining whether Plaintiff’s Application would “affect adversely the health or safety of persons residing or working in the neighborhood”, “be detrimental to the public welfare”, or “be in conflict with the general purposes of the Comprehensive Plan”, under Section 10.A.(1)(a) of the Town Code,²⁰ requires the Council to utilize the same legislative judgment it applies when evaluating whether a rezoning application is consistent with the Town’s Comprehensive Plan, as required by 22 *Del. C.* § 702(d), or when determining to “amend, supplement, change, modify, or repeal the zoning regulations, restrictions and boundaries” under Town Code Section 12.A.²¹

The criteria set forth in Section 10.A.(1)(a) of the Town Code are not objective fact-based standards which can be satisfied without the exercise of judgment (e.g., whether acreage and setback requirements are met). Instead, the criteria set forth in Section 10.A.(1)(a) are the same sort of subjective standards which the Town Council applies when exercising its legislative discretion to determine whether any

²⁰ See Town Code, p. 82. (A-700).

²¹ See Town Code, p. 88. (A-706).

particular use of a property is appropriate given its location and zoning classification. Delaware jurisprudence has consistently held that these types of zoning determinations are legislative decisions, subject to judicial review for rational decision-making under an “arbitrary and capricious” standard.²²

As has been observed, a conditional use “is not truly an exception to a zoning ordinance, but is a use in compliance with, rather than in variance of, the ordinance and is allowable when the prerequisite facts and conditions specified in the ordinance are found to exist.”²³ Where, however, the only criteria specified in the ordinance for a conditional use approval are, essentially, the same subjective standards applicable to zoning changes, then judicial review of a conditional use decision should follow the same legal standard as judicial review of a zoning decision. Stated another way, if the legislative body has reserved unto itself the decision to grant or deny conditional uses under the same standards as are applicable to zoning changes, then the only way to provide a fair and adequate review of the former is to apply the same legal standard of review as courts apply for the latter. In other words, just

²² See *New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1275 (Del. 1989) (“When Council considers a zoning ordinance, it is acting in a legislative capacity...[z]oning regulations that are not reasonably related to one of these enumerated purposes may be set aside as arbitrary and capricious”); *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986) (“zoning is a legislative function and a rezoning ordinance is usually presumed to be valid unless clearly shown to be arbitrary and capricious”), citing *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971).

²³ *Steen v. County Council of Sussex County*, 576 A.2d 642, 646 (Del. Ch. 1989).

labeling a use “conditional” does not automatically mean that a determination to grant or deny the use is a quasi-judicial exercise – if consideration of the ordinance criteria for approval or denial of the conditional use entails a purely subjective (legislative discretionary) exercise, akin to a zoning decision, rather than a more neutral and fact-based (quasi-judicial) assessment of primarily objective conditions,²⁴ then judicial review of the conditional use determination should follow the same standard of review as applied for a legislative discretionary zoning decision. Otherwise, the risk of abuse is readily apparent – a council could base its decision not only on conclusions not supported by the record, but also (as here) on conclusions that are actually *contrary to the record* – and yet, the law would afford no remedy, because a writ of *certiorari* does not allow even a cursory review of the record.

Alternatively, even if the Town Council’s review of a conditional use application is considered quasi-judicial, the vast majority of jurisdictions typically review the determination of a conditional use application, as *Delta Eta*

²⁴ The instant case is distinguishable from *Citizens Against Solar Pollution v. Kent County*, 2024 WL 2022503 (Del. Super. May 7, 2024), where the application entailed a “conditional use *with site plan approval*”, requiring the applicant to satisfy not only conformity with the County’s Comprehensive Plan but also compliance with the Adequate Public Facilities Ordinances and a number of specific, ordinance-based site plan requirements relating to, *inter alia*, a ditch buffer, a reclamation plan, decommissioning surety, a soil study, ground cover, signage, and landscape buffers, all of which implicated quasi-judicial consideration.

acknowledged,²⁵ under the same standard which, prior to *Delta Eta*, had been followed by the Court of Chancery for decades – in cases like *Gibson*²⁶ and *Coker*²⁷ – by employing an “arbitrary and capricious” analysis to ascertain whether the reasons and findings are supported by substantial evidence.²⁸

Because *certiorari* review will not allow the Superior Court to review the record of the Town Council’s decision, to ascertain whether the decision is supported by substantial evidence of record and otherwise free of arbitrary and capricious determination, *certiorari* review is an inadequate remedy here.

²⁵ *Delta Eta, supra*, at *13, n. 109.

²⁶ *Gibson v. Sussex County Council*, 877 A.2d 54 (Del. Ch. 2005).

²⁷ *Coker v. Kent County Levy Court*, 2008 WL 5451337 (Del. Ch. Dec. 23, 2008).

²⁸ See Rathkopf’s *The Law of Zoning and Planning* § 61:47 (4th ed. 2005) (“Where there are no standards, or only standards related in general terms to the purposes of zoning, in the ordinance, the only limitation upon the legislative body in approving or rejecting an application for a conditional use is that it shall not have acted capriciously, or discriminatorily...For the purpose of judicial review, many if not most courts treat the decision of a local legislative body to grant or deny a special permit as a quasi-judicial act **subject to court review on questions of law and abuse of discretion and substantial evidence review of reasons and findings** [emphasis added].”). See, e.g., *Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla. 2000), wherein the Florida Supreme Court stated that courts reviewing appeals from applicants for special exceptions “must review the record and determine *inter alia* whether the agency decision is supported by competent substantial evidence.” See also *Jubilee Carolina, LLC v. Town of North Carolina*, 834 S.E.2d 665, 669-670 (N.C. Ct. App. 2019) (“when sufficiency of the evidence is challenged or when a decision by a city council denying a [conditional use permit] is alleged to have been arbitrary or capricious, the reviewing court must employ the whole record test” which “requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence.”)

***Writ Of Certiorari Review Is Not An Adequate Remedy For
Denial Of A Conditional Use Application Under The Town Of Middletown Code***

Plaintiff respectfully submits that because *certiorari* review is so strictly limited in scope, a writ of *certiorari* does not afford Plaintiff an adequate remedy in the case at bar.

The criteria for Town Council review and consideration of a conditional use application under Section 10.A.(1)(a) of the Town Code are extremely vague, ambiguous, and subjective – to-wit, the Town Council must find that “the use will not: (i) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use; (ii) be detrimental to the public welfare or injurious to property or improvements in the neighborhood; and (iii) be in conflict with the general purposes of the Comprehensive Plan or related Town planning or development policies.”²⁹ These criteria are so nebulous and imprecise that it is impossible to determine whether or not the standards set forth therein are satisfied without reviewing the record below and questioning whether the Town Council’s conclusions are supported by evidence within that record – an inquiry which mere *certiorari* review will not sanction. Stated another way, how can a reviewing court

²⁹ Compare, e.g., Section 4.B.(2)(c) of the Town Code (A-634), which specifies eight different **objective** requirements for “professional occupation” as a conditional use in the Single Family Residential (R-1B) Zoning District, with Section 4.I.(2)(c) of the Town Code (A-661), which contains **zero** objective requirements for “garden apartments” in the C-3 Zoning District.

determine if a proposed conditional use will “affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use”, or be “detrimental to the public welfare or injurious to property or improvements in the neighborhood”, without checking the record below for evidence of these purported adverse effects? And how can any good faith review be made of the Town Council’s conclusion that Plaintiff’s Application is “in conflict with the general purposes of the Comprehensive Plan or related Town planning or development policies”, without searching for citations within the record to specific “purpose” language from the Comprehensive Plan or specific “planning or development policies”, tied to facts which support that conclusion? In order to be certain that the criteria set forth in Section 10.A.(1)(a) of the Town Code are satisfied, a reviewing court must necessarily examine the record below and locate factual evidence within that record, cited by Council members in support of their determinations, tied to the criteria set forth in Section 10.A.(1)(a). Under the exceedingly narrow scope of *certiorari* review, which precludes an exercise as basic as reading a transcript of the proceedings, this is simply impossible.

As the Superior Court recognized in its voidance of the Town’s first denial of Plaintiff’s Application, simply reciting the legal standard in a formulaic, perfunctory, and conclusory fashion – without the articulation of factual findings and the integration of record facts to support a stated rationale – “provides the Court

no guidance in attempting to review the Council’s decision.”³⁰ “[S]ome connection of the facts as found by the council person and the legal standard being applied is essential to ensure that the quasi-judicial decision was made with fidelity to the law.”³¹ That did not happen in the case at bar.

During both of the two the Town Council hearings below, Plaintiff made a *prima facie* showing that Plaintiff’s Application for conditional use approval satisfied the criteria set forth in Section 10.A.(1)(a) of the Town Code. (A-574-590, A-87-102). At that point, the burden should have shifted to the Town Council to articulate non-arbitrary reasons for denying Plaintiff’s Application – and, absent a record of substantial evidence sufficient to support its conclusions, the Town Council’s denial of Plaintiff’s Application must be seen as arbitrary and capricious.

The Town Council offered only two reasons for its second denial of Plaintiff’s Application: (a) a supposed “promise” that the property would never be developed for anything other than a shopping center, based upon a prior site plan approval found nowhere in the record then before the Town, and (b) a concern that development of the Property would result in an increase in traffic, despite the undisputed fact of record that development of the subject property for garden apartments would result in *1/3 less traffic* than a shopping center use. (A-153-158).

³⁰ *Middlecap Assoc., LLC v. Middletown*, 2024 WL 3385825 at *4 (Del. Super. July 11, 2024).

³¹ *Id.* at *5.

Due to the extremely narrow scope of *certiorari* review, the Superior Court below was unduly constrained from performing the type of analysis which Vice Chancellor Strine undertook in *Gibson*. Plaintiff respectfully submits that the Court of Chancery erred as a matter of law by failing to follow *Gibson* and the decades of case law precedent which preceded it, by holding that writ of *certiorari* review in Superior Court would provide Plaintiff with an adequate remedy at law. Instead, the Court of Chancery should have followed *Gibson* and conducted a review of the Town Council's denial of Plaintiff's Application utilizing the same "arbitrary and capricious" analysis which the Court of Chancery has historically done for all conditional use applications in the past. Plaintiff therefore prays that this Honorable Court remand this matter back to the Court of Chancery, with instructions to review the Town Council's denial of Plaintiff's Application under the same "arbitrary and capricious" standard enunciated in *Gibson* and other case law precedent.

II. THE SUPERIOR COURT’S DISMISSAL OF PLAINTIFF’S SECOND AMENDED COMPLAINT CONSTITUTES AN ERROR OF LAW BECAUSE, EVEN UNDER THE LIMITED STANDARD FOR CERTIORARI REVIEW, DEFENDANTS’ DENIAL OF PLAINTIFF’S APPLICATION CANNOT WITHSTAND SCRUTINY.

Question Presented

Did the Superior Court err as a matter of law by dismissing Plaintiff’s Second Amended Complaint?³²

Scope of Review

On appeal from a decision of the Superior Court, this Honorable Court reviews conclusions of law *de novo*.³³

Merits of Argument

The Plaintiff respectfully submits that, even under the severely limited standard for writ of *certiorari* review, Defendants’ denial of Plaintiff’s Application cannot survive scrutiny. In the instant case, the Town Council “proceeded irregularly” – and thus committed reversible error – by *failing to identify any facts of record* to support its denial of Plaintiff’s conditional use application. Instead, the Council denied Plaintiff’s Application for utterly arbitrary reasons, without

³² This question was raised below at pp. 14-37 of Plaintiff’s August 25, 2025 Opening Brief in Superior Court; at pp. 4-16 of Plaintiff’s October 29, 2025 Reply Brief in Superior Court; and during oral argument in Superior Court on December 1, 2025.

³³ *Delle Donne & Associates, LLP v. Millar Elevator Service Co.*, 840 A.2d 1244, 1251 (Del. 2004).

articulating any specific facts to support its conclusions, notwithstanding that Plaintiff's Application met the standards for conditional use approval set forth in Section 10.A(1)(a) of the Town Code. For this reason, the Town Council's denial of Plaintiff's Application – like the Sussex County Council's denial in the *Gibson* case – must be reversed.

Notably, the sole grounds for the Town Council's denial of Plaintiff's conditional use application in the instant case are two-fold: (1) an unsupported contention that, despite all evidence to the contrary, development of Plaintiff's property for garden apartments would somehow increase traffic in the surrounding area, and (2) a likewise naked assertion that the entire eastern side of Middletown was developed in accordance with a "master plan", premised upon a "promise" supposedly made by Plaintiff more than 22 years earlier, that Plaintiff's property would never be developed for anything other than a shopping center. (A-153-158). Neither of these grounds for the Council's denial are supported by *any* facts of record – indeed, both grounds are readily refuted by the record – and for this reason, the Superior Court's conclusion that the Council proceeded regularly in its denial of Plaintiff's Application must be reversed.

Reasons Cited by Councilman Thomas

As the sole basis for his vote to deny Plaintiffs' Application, Councilman Thomas stated: "I believe this will adversely affect the health and safety of persons

in the Brick Mill and Dove Run area because of the increased flow of traffic as well as the safety of the residents of Dove Run.” (A-153-154). Although this stated rationale parrots the language of Town Code Section 10.A.(1)(a)(i), Councilman Thomas *failed to articulate any facts of record* to support this rationale. *Where* in the record is there any evidence that development of Plaintiff’s property would result in greater traffic (or safety) impacts than development of Plaintiff’s property as a shopping center? There is *none*, and indeed, the record evidence is completely to the contrary.³⁴ Councilman Thomas’s failure to articulate facts explaining how 1/3 less traffic volume would somehow result in an “increased flow of traffic” or otherwise “adversely affect the health and safety” of neighboring residents is thus “fatal”.³⁵

Reasons Cited by Councilman Sherman

As the basis for his vote to deny Plaintiffs’ Application, Councilman Sherman stated, “It’s my belief that this plan will add both traffic and safety concerns, both in the neighboring developments and the existing shopping center. It also conflicts with the town’s previous planning and development of the surrounding areas since the original plan was first recorded.” (A-154). Notably, however, Mr. Sherman did

³⁴ Critically, the record below is *undisputed* that development of the subject property for garden apartments would result in *one-third less traffic* than development of the subject property as a shopping center. (A-562).

³⁵ *Middlecap Assoc., LLC v. Middletown*, 2024 WL 3385825 at *5 (Del. Super. July 11, 2024).

not (could not) cite to any evidence in the record to support his conclusion that development of Plaintiff's property for garden apartments rather than a shopping center "will add both traffic and safety concerns." Perhaps that is because *all record evidence is to the contrary*. (A-562). Nor did Mr. Sherman cite any evidence in the record to support his conclusion that Plaintiff's application "conflicts with the town's previous planning and development of the surrounding areas." As articulated at pages 20-23 of Plaintiff's Opening Brief below, there is *no evidence in the record* that Plaintiff ever made any "promise" that the subject property would never be developed for anything other than a shopping center, and likewise, there is *no evidence in the record* that the eastern side of Middletown was developed in accordance with some "master plan" premised upon any "promise" supposedly made by Plaintiff more than 22 years earlier.

Reasons Cited by Councilman Orr

As the basis for his vote to deny Plaintiffs' Application, Councilman Orr stated:

I believe that the proposed garden apartments will adversely impact the health and wellbeing of the people working and living in the adjoining neighborhoods. Having less commercial opportunities for current residents will cause additional travel time to obtain the goods and services that they may need or require. Additionally, this project – this proposed project will also be in conflict with the general purpose and spirit of the town's comprehensive plan that has been in place for and followed for many years. The development design with the current zoning is to provide services and retail environments and employment opportunities for local residents. This proposed conditional use request

does not meet these guidelines and, hence, I would feel that it would be detrimental to local residents.” (A-154-155).

Like Councilman Sherman before him, however, Councilman Orr did not (could not) cite to any evidence in the record to support his conclusions. First, there is *no evidence in the record below* that development of the subject property as garden apartments rather than a shopping center would “cause additional travel time to obtain the goods and services that [current residents] may need or require” beyond the travel time those residents presently experience, and Councilman Orr failed to explain how maintaining the present status quo with regard to “travel time to obtain goods and services” would “affect adversely the health and safety of persons residing or working in the neighborhood”. Second, Councilman Orr cited *no evidence in the record* to support his bald conclusions that Plaintiff’s Application is “in conflict with the general purpose and spirit of the town’s comprehensive plan”, or that “the development design with the current zoning is to provide services in retail environments and employment opportunities for local residents”. All Councilman Orr had to do was point to some specific provision in the Town’s Comprehensive Plan – or any other evidence of record – which might have supported his conclusions. But this he did not do. By contrast, Plaintiff placed into evidence 13 different citations to the Town’s Comprehensive Plan, evidencing that Plaintiff’s Application is consistent with the Plan. (A-170-171). In the face of Plaintiff’s evidence that its Application is, in fact, *consistent* with the Town’s Comprehensive Plan (Ex. J, Tab

11, SAC; A-93-95, A-170-171), Councilman Orr’s formulaic recitations of language found in the Code, without citation to any facts of record, is “fatal”.³⁶

Reasons Cited by Councilman Chas

As his basis for denying Plaintiff’s Application, Councilman Chas stated:

The 192 apartments also is going to create pedestrian traffic and that pedestrian traffic getting to and from elementary schools, early childhood center, and high school. Currently, there is high school students that even park over in that area and have to get across. I think that during the times where children are traveling to and from, I think that puts an extra volume that is – it only takes one person to get hurt as a result of this. And that’s my concern. I just don’t want to – I don’t want to put anybody at risk there. I can say this is not the right conditional use for this area. And so, for those reasons as well as the safety, I vote no. (A-155-156).

The rationale cited by Councilman Chas suffers from two critical flaws: First, there is ***no evidence in the record*** indicating how much pedestrian traffic 192 garden apartments would generate for the area, as compared to the amount of pedestrian traffic a shopping center use would generate; or that development of the subject property for garden apartments would necessarily generate any particular amount of pedestrian traffic “getting to and from” local schools, or cause any more high school students to “park over in that area” than are already parking there at present. Second, Councilman Chas failed to explain ***how or why*** garden apartments – which the record indisputably establishes would create ***one-third less vehicular traffic*** – would

³⁶ *Middlecap*, 2024 WL 3385825 at *5.

somehow create more pedestrian traffic than development of the property for a shopping center use. In other words, Councilman Chas did not (and could not) cite to any facts of record (because there are *none*) indicating how much pedestrian traffic 192 garden apartments would generate for the area, as compared to the amount of pedestrian traffic a shopping center use would generate. Thus, Councilman Chas's rationale for denying Plaintiffs' Application are *not supported by material facts of record*, and his decision is therefore arbitrary, capricious, and otherwise contrary to law.

Reasons Cited by Councilman Blythe

Councilman Blythe voted to deny the Application because:

[T]he plan will adversely affect the health and safety of persons residing and working in the neighborhood of the proposed use. It will increase the flow of traffic through the shopping center and the Dove Run community during peak hours, and quitting at the intersection of Middletown High School, which already has a significant pedestrian traffic level. It's also in conflict with the general purpose of the comprehensive plan and the related planning and development policies, because for the last 20 years, all of the approved in the surrounding area have been with the assumption that this parcel would be for commercial use." (A-156-157).

Like Councilmen Sherman and Orr, Councilman Blythe made perfunctory reference to two of the three criteria set forth in Section 10.A(1)(a) of the Town Code – and yet, just like Councilmen Sherman and Orr, Councilman Blythe relied upon factual premises which the record simply will not support. First, the record refutes any suggestion that garden apartments “will increase the flow of traffic through the

shopping center and the Dove Run community during peak hours”. In fact, the exact opposite is true, as the record indisputably demonstrates that garden apartments would generate *one-third less traffic* than a shopping center use. (A-562). Second, as explained above, the suggestion that development of the subject property for garden apartments – a conditional use permitted in the C-3 zoning district – somehow conflicts with the general purposes of the Town’s Comprehensive Plan or related planning and development policies, on the theory that all other development in the surrounding area over the last 20 years was approved based upon an assumption that the subject property would be developed as a shopping center, finds *no support in the record*. Simply stated, there is *no evidence of record* establishing that either the Town’s Comprehensive Plan or “related Town planning or development policies” dictate the subject property must be developed for a shopping center use, rather than any of the other uses permitted in the C-3 zoning district.³⁷ Because the rationale cited by Councilman Blythe are not supported by the record before Council, Councilman Blythe’s determination to deny Plaintiffs’ Application constitutes reversible error.

³⁷ It bears repeating here that Plaintiff placed into evidence 13 different citations to the Town’s Comprehensive Plan, evidencing that Plaintiff’s Application is consistent with the Plan. (A-93-95, A-170-171). By contrast, Councilman Blythe offered no such citations.

Reasons Cited by Councilman Royston

Councilman Royston voted to deny the Application, stating:

Garden apartments will adversely affect the health and safety of persons residing and working in the neighborhood of the proposed use. The roads and public services will be negatively impacted by the proposed addition of a 192-unit apartment complex. Adding high-density housing will increase traffic congestion in the area and place additional burdens on EMS and fire companies that will not be present with the commercial center. The apartments will exit via Dove Run neighborhood to an already congested Brick Mill Road during peak hours, causing more safety concerns in a neighborhood and for the schools. Second, the addition of 192 apartment conflicts with the town's comprehensive plan. Many residents moved to the area for a sense of community and with the understanding that the property would be a commercial center. The town's planning and development goals have been approved over the past 20 years, as was explained earlier, with the understanding that this property will be a shopping center. Had the town known during the 20-year period that the property would be developed as an apartment complex, the town would have acquired more commercial use in the area, more traffic and safety components to this and the other developments." (A-157-158).

As did Councilmen Sherman, Orr, and Blythe before him, Councilman Royston made formulaic, perfunctory, and conclusory reference to two of the three criteria set forth in Section 10.A(1)(a) of the Town Code – yet, like Councilmen Sherman, Orr, and Blythe, Councilman Royston also relied upon false premises which the record before Council simply does not support.

First, Councilman Royston's admonitions that "roads and public services will be negatively impacted by the proposed addition of a 192-unit apartment complex" and "[a]dding high-density housing will increase traffic congestion in the area and

place additional burdens on EMS and fire companies that will not be present with the commercial center”, are patently incorrect and readily refuted by the evidence before Council. Stated another way, it is categorically *false and unsustainable* – based upon the factual record presented to Council – that development of the subject property for garden apartments would somehow increase traffic congestion or create a greater burden on roads and public services than would development of the property for a shopping center use. To the contrary, the record is *undisputed* that development of the subject property for garden apartments would result in *one-third less traffic* than a shopping center use. (A-562). Second, a simple review of the record confirms that traffic from the proposed garden apartments development would *not* go through the Dove Run community. Instead, as the Preliminary Major Land Development Plan submitted with the Application clearly indicates, there would be no curb cuts or interconnections between the proposed garden apartments and the Dove Run community. (A-166, A-178-181). Third, the suggestion that development of the subject property for garden apartments conflicts with the general purposes of the Town’s Comprehensive Plan or related planning and development policies, because all other development in the surrounding area over the last 20 years was approved based upon an assumption that the subject property would be developed as a shopping center, finds *no factual support in the record*. Once again, there is nothing in the record below to establish that either the Town’s

Comprehensive Plan or “related Town planning or development policies” dictate the subject property must be developed for a shopping center use, rather than any of the other uses permitted in the C-3 zoning district. Instead, that record demonstrates that development of the subject property for garden apartments is consistent with both the Town’s Comprehensive Plan (A-170-171) and the Town Council’s prior decisional precedent (A-229-256).

For the reasons set forth above, the Council “proceeded irregularly” ’by denying Plaintiffs’ Application for reasons having *zero basis in fact*. Certainly, the Council’s stated reasons for denying Plaintiff’s Application fail to meet the Council’s burden to demonstrate that its decision is supported by record facts rather than the product of arbitrary and capricious “ad hoc” behavior.³⁸ Therefore, the Council’s denial of Plaintiff’s Application should be reversed, with the consequence that Plaintiff’s Application be deemed approved.³⁹

³⁸ See *O’Neill v. Town of Middletown*, 2006 WL 205071 at *35 (Del. Ch. Jan. 18, 2006) (“A conclusory statement of [consistency or inconsistency with a comprehensive plan] cannot, by itself, constitute substantial evidence.”).

³⁹ See *Gibson* at 79-80 (Del. Ch. 2005) (finding that the Council had “taken its best shot at justification and essentially missed the mark”, and therefore, relief “compelling a grant of the conditional use permit is justifiable.”).

CONCLUSION

For all the foregoing reasons, the decisions of the Court of Chancery and the Superior Court below should be reversed. Plaintiff respectfully prays that this matter be remanded back to the Court of Chancery, with instructions to review the Town Council's denial of Plaintiff's Application under the "arbitrary and capricious" standard applied in *Gibson*.

**BROCKSTEDT MANDALAS FEDERICO,
LLC**

BY: 

John W. Paradee, Esquire (#2767)

Mark A. Denney, Jr., Esquire (#5156)

6 South State Street

Dover, Delaware 19901

(302) 677-0061

Attorneys for Plaintiff-Below Appellant

Middlecap Associates, LLC

DATED: April 20, 2026