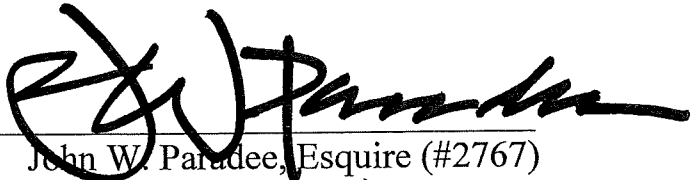


IN THE SUPREME COURT OF THE STATE OF DELAWARE

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.)

APPELLANT'S REPLY BRIEF ON APPEAL

**BROCKSTEDT MANDALAS FEDERICO,
LLC**

BY: 

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Dated: June 1, 2026

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NATURE OF PROCEEDINGS

Plaintiff restates the Nature of Proceedings set forth in Plaintiff's Opening Brief. Defendants filed their Answering Brief on May 18, 2026. This is Plaintiff's Reply 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 restates the Statement of Facts set forth in its Opening Brief. In addition, Plaintiff is compelled to point out a number of factually inaccurate or unsupportable statements found in Defendants' Answering Brief:

(1) At pages 2, 3, 7, and 8 of their Answering Brief, Defendants suggest that, following the Superior Court's July 11, 2024 Opinion reversing Defendants' first denial of Plaintiff's Application, Plaintiff "submitted a second conditional use application." In fact, Plaintiff never filed a second application. Rather, Plaintiff merely requested a new hearing upon its original Application (i.e., no submission of a second application was required or occurred).

(2) At page 5 of their Answering Brief, Defendants assert – without any citation to the record – that: "For the past 20 years, the Town of Middletown planned, and property owners have developed the surrounding properties with the understanding that the Property would someday be a commercial site." This gratuitous assertion finds no factual support whatsoever in the record below. Likewise for the suggestion, at page 6 of Defendants' Answering Brief, that Plaintiff's Application was "completely inconsistent with previous development around the Property which had relied upon the previous approval of the Property for development as a shopping center." There is absolutely nothing in the record below

to substantiate Defendants' naked contention that other property owners in the area "had relied upon" development of Plaintiff's property for a shopping center.

(3) Throughout their Answering Brief, Defendants repeatedly assert that approval of Plaintiff's Application would result in "additional traffic" beyond that which would be generated by development of Plaintiff's property for a shopping center – an assertion which also finds *zero* factual support in the record below. Indeed, to the contrary, the record is unequivocally clear that development of Plaintiff's property as garden apartments would result in *less than one-third (1/3) the amount of traffic* that would be generated if the property were developed as a shopping center. (A-545-554).

(4) Similarly, there is nothing in the record below to support Defendants' assertion of a concern that Plaintiff's proposed development "would be in addition to several other new residential subdivisions in the area that would already [sic] increase the already-congested volume on Brick Mill Road and Main Street." Simply stated, there are no facts of record relating to traffic volumes on Brick Mill Road or Main Street, and certainly no facts of record to suggest that Plaintiff's proposed development would exacerbate this alleged (yet undocumented) concern.

(5) Plaintiff never suggested or contended that "the Town of Middletown lacked an apartment complex".¹ Rather, Plaintiff's presentation merely noted that

¹ Defendants' Answering Brief at page 6.

the Town of Middletown lagged behind local, state, and national averages for multi-family housing, and therefore, the Town needs more apartments to satisfy market demand and support the Town's affordable housing goals – a conclusion expressly championed by *both* of the Town's most recent (2012 and 2022) Comprehensive Plans. (A-170-171; A-329-415; A-417-542).

(6) Throughout their Answering Brief, Defendants make reference to “safety and welfare concerns” as a basis for denial of Plaintiff's Application, when the record is utterly devoid of any facts elucidating what those unspecified concerns might be.

(7) At page 6 of their Answering Brief, Defendants acknowledge that the Town Council initially denied Plaintiff's Application because it was “inconsistent with changes [the Town Council] was making to the Comprehensive Plan and related planning and development policies”, a Plan which was not the law at the time of Plaintiff's Application (and thus, no lawful basis for denial). Notably, although the Town Council did adopt a new Comprehensive Plan in October of 2022 – after Defendants' February 7, 2022 denial of Plaintiff's Application and before Defendants' November 4, 2024 denial of Plaintiff's Application – there is nothing new within the Town's 2022 Comprehensive Plan to suggest that development of Plaintiff's Property for garden apartments would be inconsistent with that Plan. Quite to the contrary, as pointed out during Plaintiff's November 4, 2024

presentation to the Town Council, development of Plaintiff's Property for garden apartments is entirely ***consistent with both*** the 2012 and 2022 Comprehensive Plans. (A-170-171; A-329-415; A-417-542).

(8) At page 12 of their Answering Brief, Defendants assert that Plaintiff's Verified Petition in Chancery "alleged no facts demonstrating imminent, irreparable, or ongoing conduct warranting the extraordinary exercise of equitable jurisdiction." And yet, Count IV of Plaintiff's Petition does precisely that – indeed, paragraph 46 of Plaintiff's Petition alleges that Plaintiff "will suffer irreparable harm absent permanent injunctive relief, as the [Plaintiff] has embarked upon courses of development, undertaken substantial changes of position, made significant expenditures, and incurred extensive financial obligation in pursuit of the [Plaintiff's] Application, harms which cannot be fully or adequately remedied by monetary damages." (A-22). Additionally, paragraph 48 of Plaintiff's Petition expressly alleges that the Plaintiff "lacks an adequate remedy at law." (A-22).

(9) At pages 15-16 of their Answering Brief, Defendants assert that Plaintiff "never meaningfully advanced" its jurisdictional argument below. This, too, is wrong. At ¶ 22, n. 12 of Plaintiff's Second Amended Complaint (A-93), Plaintiff contended "that (a) the Court of Chancery's dismissal of Plaintiff's initial Petition for lack of subject matter jurisdiction was wrongfully decided, and (b) limiting the Plaintiff's remedies under the facts of this case to a writ of *certiorari*

review subjects the Plaintiff's case to the wrong (extremely limited) standard of review and deprives the Plaintiff of various remedies that should be (and, historically, have been) available to aggrieved parties in the same position as the Plaintiff here." Plaintiff raised these same contentions at p. 5, n. 6 of Plaintiff's October 29, 2025 Reply Brief in Superior Court (Transaction ID #77465938), 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.²

² *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).

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.

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 acting in a legislative-discretionary or quasi-legislative capacity, and therefore, *certiorari* review is inappropriate, and (b) reflexive application of the rigid and severely-limited scope of *certiorari* review here, under the unique facts of the instant case, would allow the Town Council to deny Plaintiff’s Application for reasons with *zero support* in the record, and worse, *directly contrary to the undisputed evidence of record*. For these reasons, mere *certiorari* review in Superior Court cannot possibly afford an adequate remedy for Plaintiff’s claims.

The Court of Chancery Had Jurisdiction To Hear Plaintiff’s Claims “Ubi jus ibi remedium”³

Plaintiff contends that the Court of Chancery possessed subject matter jurisdiction over Plaintiff’s claims in the instant case because Plaintiff was seeking

³ “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.”).

an equitable remedy – affirmative injunctive relief, reversing Defendants’ denial of Plaintiff’s Application and granting affirmative approval of same, or alternatively, compelling Defendants to approve Plaintiff’s Application⁴ – and, for the reasons explained below, there is no adequate remedy at law.⁵ In support of this contention, Plaintiff submits that, (a) 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 (b) 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.

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

⁴ See Count IV and prayer for relief paragraph (E) of Plaintiff’s Verified Petition filed in the Court of Chancery on March 11, 2022. (A-1-24).

⁵ *Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 WL 4561227 at *1 (Del. Ch. Oct. 3, 2008); *Delawareans for Educational Opportunity v. Carney*, 2018 WL 4849935 at *5 (Del. Ch. Oct. 5, 2018) (“jurisdiction exists if a plaintiff requests equitable relief and there is no adequate remedy at law”).

Notably, the Town of Middletown Code does not establish any special, distinct, ***objective*** criteria for the Town Council’s consideration of an application for garden apartments as a conditional use in the C-3 zoning district. Rather, Section 4.I.(2) of the Town Code redirects every application for garden apartments as a conditional use in the C-3 zoning district to the criteria set forth in Section 10.A.(1) of the Town Code. (A-660-661; A-699). More telling is that, without exception, ***every*** application for a conditional use permit under the Town Code is required to satisfy the unmistakably ***subjective*** criteria established by Section 10.A.(1) of the Town Code – i.e., “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.” Some conditional uses must also satisfy additional ***objective*** criteria – for example, customary home occupations, professional occupations, and bed and breakfast establishments in the R-1B and R-1A zoning districts (Town Code Section 4.B.(2)(b), (c), and (e), and Town Code Section 4.C.(2)(b), (c), and (e), respectively), single-family dwelling conversions to multiple dwelling units, nursing homes and rest homes, day care centers, medical offices, and bed and breakfast establishments in the R-2 zoning district (Town Code Section 4.D.(2)(a), (b), (c), (d) and (f), respectively), planned neighborhood design

dwelling in the R-3 zoning district (Town Code Section 4.E.(2)(a)), and food trucks in the C-2 and C-3 zoning district (Town Code Section 4.H.(2)(e) and Town Code Section 4.I.(2)(b), respectively), must satisfy certain specific *objective* criteria in order to secure approval. But *every* application for conditional use must satisfy the *subjective* criteria established by Section 10.A.(1) of the Town Code. What this means is that the Town Council of the Town of Middletown has reserved the right to deny any and all conditional use applications, in all zoning districts, whenever, in the judgment of the Town Council, the application fails to satisfy the *subjective* criteria established by Section 10.A.(1) of the Town Code. In doing so, the Town Council has reserved its legislative discretion to decide which uses may be made, and where, in the very same way which the Sussex County Council had done in the *Steen* case decided by Vice-Chancellor Hartnett in 1989⁶, a factor which then Vice Chancellor Strine found meaningful in the *Gibson* case decided in 2005.⁷

And yet, while the Town of Middletown Code does not permit garden apartments in every zoning district,⁸ the point remains – because the *only* criteria for

⁶ *Steen v. County Council of Sussex County*, 576 A.2d 642 (Del. Ch. 1989).

⁷ *Gibson v. Sussex County Council*, 877 A.2d 54, 64-65 (Del. Ch. 2005).

⁸ In the Town of Middletown, garden apartments are a permitted use (subject to certain special requirements) in the R-3 zoning district (Town Code Section 4.E.(1)(b)), and a conditional use (with no special requirements specified) in the C-2 and C-3 zoning districts (Town Code Section 4.H.(2)(f) and Section 4.I.(2)(c), respectively). Presumably, garden apartments are prohibited in all other zoning district. See Section 3.C.(1) of the Town Code (A-630-631).

evaluating an application for garden apartments in the C-3 zoning district are the manifestly *subjective* criteria established by Section 10.A.(1) of the Town Code, and because evaluation of those criteria requires exercise of the same discretionary “what goes where” judgment as the Town Council exercises when considering amendments to the Town’s zoning regulations⁹ – it follows that the Town Council was acting in a legislative or quasi-legislative capacity when it denied Plaintiff’s Application in the case at bar.

If the Town of Middletown Code set forth any number of *objective* criteria for consideration of Plaintiff’s Application – such as, by example, a maximum permitted number of dwelling units per acre, a maximum lot coverage ratio, a maximum number of dwelling units per building, a minimum lot width, a minimum lot size, a minimum open space requirement, a minimum number of required parking spaces, and/or a maximum building height – and if the fate of Plaintiff’s Application were decided by a board, commission, or other agency which is subordinate to the legislative body of the Town, like a Planning Commission or Board of Adjustment, applying such previously-ordained *objective* criteria – then Plaintiff would have no quarrel with the conclusion that the determination of Plaintiff’s Application was a

⁹ For example, 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. (A-705).

quasi-judicial exercise. Here, however, where Plaintiff's Application was denied by the legislative body of the Town, applying the patently *subjective* criteria established by Section 10.A.(1) of the Town Code – which are the same kind of subjective “what goes where” criteria applied by the Town Council when making rezoning decisions and changes to its zoning regulations¹⁰ – Plaintiff respectfully submits the determination of Plaintiff's Application was a legislative or quasi-legislative exercise, for which writ of *certiorari* review is unavailable¹¹, inappropriate, and plainly inadequate.

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

As Vice Chancellor Zurn observed in *Delta Eta*:

During the Middle Ages, English common law was administered through a system of writs, and a plaintiff could obtain judicial relief only by invoking one of those writs. ‘A certiorari proceeding involves one of the oldest common law writs, tracing its origins to the Norman Kings.’ ‘In England, the writ was used primarily by judges of the King's Bench to supervise the conduct of inferior court officers.’ A writ

¹⁰ In this regard, the language of Town Code Section 10.A.(1) is very similar to the language of 9 *Del. C.* § 2603, 9 *Del. C.* § 4903, 9 *Del. C.* § 6904, and 22 *Del. C.* § 301, which define the legislative discretion of the governing bodies of Delaware's counties and municipalities when enacting and amending zoning regulations.

¹¹ Review by writ of *certiorari* is not available for actions taken in a legislative capacity. *Delta Eta Corporation v. City of Newark*, 2023 WL 2982180, at *17 (Del. Ch. Feb. 2, 2023) (“the act of rezoning is legislative in nature and therefore cannot be subject to a writ of certiorari that precludes this Court's jurisdiction”), *citing Delaware Barrel & Drum Co. v. Mayor and Council of City of Wilmington*, 175 A.2d 403, 404 (Del. Super. 1961) (“The common-law writ of *certiorari* lies to reviews acts which are judicial or quasi-judicial in nature, and does not lie to review acts which are administrative or legislative in nature.”).

of *certiorari* allows ‘a higher court to review the conduct of a lower tribunal of record.’ It ‘is simply a form that calls up, for review, the record from the lower court or tribunal.’

The rigid and formalistic writ-based approach to the law eventually proved inadequate to address the needs of a changing society. Such shortcomings gave rise to courts of equity, which ‘supplement[ed] the common law’ and ‘mitigate[d] its severity,’ and ‘generally [filled] the growing gap between the rigid and rigorous common law on the one hand, and the expanding universe of practical controversies born of an increasingly sophisticated society on the other.’¹²

In today’s modern legal world, where advanced technology allows for audio/visual recording, the preparation of transcripts, and the rapid creation and transmission of records of proceedings, the writ of *certiorari* is an obsolete creature of ancient artifact which has long outstripped its utility. During the Middle Ages, when the record-creating capabilities of audio/visual recording equipment, transcripts, photocopiers, computers, and the internet were inconceivable, it made perfect sense to limit a higher court’s review of a lower tribunal’s conduct to the strictures of *certiorari* review – i.e., where the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly. But these are no longer the Middle Ages. And it is high time for Delaware jurisprudence to shed the shackles of such an artificial, antiquated, and unjustly constraining concept as writ of *certiorari* review for a legislative body’s denial of a land use application, based

¹² *Delta Eta*, at *10.

upon purely subjective reasons which find no support in the record – or worse, which run contrary to the evidence of record.

Unlike the Plaintiff in *Delta Eta*, who “conceded the availability of a writ of *certiorari* from the Superior Court and did not contest that it would afford an adequate remedy,”¹³ Plaintiff here steadfastly maintains 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.

As articulated above, because the **subjective** criteria for the Town Council’s consideration of Plaintiff’s Application, as set forth in Section 10.A.(1) of the Town of Middletown Code, are the same sort of policy-making criteria employed by the Town Council when evaluating whether a rezoning 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) – rather than a series of objective standards specified in the Code, the satisfaction of which may be assessed by the exercise of quasi-judicial discretion – the Town Council was acting in a legislative capacity when it denied Plaintiff’s Application. In other words, the Town Council was exercising its legislative discretion to determine ***which uses may be conducted***

¹³ *Delta Eta*, at *9.

where within the Town limits,¹⁴ rather than determining whether a proposed use satisfies a series of pre-ordained, specifically-enumerated, objective standards.

Moreover, because the subjective criteria for the Town Council's consideration of Plaintiff's Application (as set forth in Section 10.A.(1) of the Town of Middletown Code) are so nebulous and imprecise, it is impossible to determine whether or not those criteria 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 permit. By way of example, if the Town Code required Plaintiff to demonstrate that its Application satisfied a specific requirement for a certain percentage of open space, but the Town Council denied Plaintiff's Application for failure to satisfy that requirement, while at the same time creating a record adequate to demonstrate that the requirement was not met, then it would be a relatively simple exercise upon appeal to review the Town Council's decision and ascertain whether or not the denial was based upon the failure to satisfy a specific Code requirement (i.e., the Town Council proceeded regularly, did not exceed its jurisdiction, and created an adequate record tied to the requirements of the Code). Here, however, because the criteria of

¹⁴ It is not disputed in the record below that the Town Council has granted every other conditional use application ever presented for garden apartments in the C-3 zoning district – in other words, the Town has *never* denied any conditional use application for garden apartments in the C-3 zoning district, other than Plaintiff's Application.

Section 10.A.(1) are so subjective, vague, and ambiguous, 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.

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). Neither of these grounds for the Town Council's denial of Plaintiff's Application are supported by the record – indeed, the record is devoid of support for the first reason, and for the second reason, all record evidence is to the contrary. Yet, due to the extraordinarily limited scope of *certiorari* review, the Superior Court below was unduly constrained from performing the type of analysis which Vice Chancellor Strine undertook in *Gibson*.

If this Honorable Court were to sustain the decisions of the Court of Chancery and the Superior Court in the case at bar, the result would prove an invitation to future mischief by county and municipal legislative bodies – and, by extension, the deprivation of “full and fair relief” to wrongly denied applicants – as there would be no guardrails to protect private property owners from the whim and caprice of a designing decision-maker. All the denial of a conditional use application would need to do is recite the legal standard in the applicable code in a formulaic, perfunctory, and conclusory fashion – without articulating any findings tied to record facts in support of its rationale – and the denial will prove ironclad, impossible to challenge, and immune from judicial review. Indeed, the denial could be based upon dreamt up facts with no support in the record at all (“this is not what I had in mind when I invented the internet”) – or worse, conclusions which are belied by the undisputed facts of record (“the earth is flat”) – and yet, the aggrieved applicant will have no recourse whatsoever. As long as the decision maker covers its tracks and avoids exceeding its jurisdiction, committing an error of law, or proceeding irregularly, the denial will be sustained.

For all of the foregoing reasons, and based upon the unique facts specific to the case at bar, review on *certiorari* is “not fully sufficient to protect or redress the resulting injury under the circumstances.”¹⁵ Because *certiorari* review cannot

¹⁵ *Delta Eta*, at *16.

possibly afford full, fair, and adequate relief to Plaintiff under the circumstances here encountered, Plaintiff has no adequate remedy at law. For this reason, the Court of Chancery should have retained jurisdiction to adjudicate Plaintiff's claims.

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.

For the most part, Plaintiff is content to rest upon the arguments set forth in Argument II of its Opening Brief. Plaintiff would be remiss, however, if Plaintiff failed to highlight two revealing passages from Defendants’ Answering Brief:

(1) First, at page 24 of their Answering Brief, Defendants make the remarkable concession that the Town Council’s finding “need only explain enough of the *factual* and legal basis for the reviewing court to determine that the decision was grounded in the applicable standards *and supported by matters appearing in the record* [emphasis added].” Defendants thus acknowledge that the Town Council was required to identify facts of record to support its conclusions. Of course, as Plaintiff’s Opening Brief demonstrates, this Defendants did not do. To the contrary, 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 articulating any specific facts to support its conclusions. For this reason, the Town Council’s denial of Plaintiff’s Application – like the Sussex County Council’s denial in the *Gibson* case – should be reversed.

(2) Second, at page 25 of their Answering Brief, Defendants suggest that the Town Council’s decision “complied with the governing legal standards by expressly tying factual concerns identified in the record to the conditional use criteria contained within the Zoning Code.” This, too, is simply incorrect, as becomes obvious when reviewing the passages cited at pages 25-28 of Defendants’ Answering Brief. For example, Defendants note that Councilman Thomas voted no “[b]ecause the increased flow of traffic, as well as the safety for the residents of Dove Run.” And yet, the record below is **undisputed** that development of Plaintiff’s property for garden apartments would result in **one-third less traffic** than development of Plaintiff’s property as a shopping center. (A-562). Furthermore, Councilman Thomas failed to articulate any facts of record to support his conclusion that development of Plaintiff’s property would result in greater safety impacts than development of Plaintiff’s property as a shopping center.

Rather than regurgitate all of the shortcomings in the stated rationale of every other Councilman who voted to deny Plaintiff’s Application, Plaintiff simply refers the Court to pages 32-41 of Plaintiff’s Opening Brief. Suffice to say that, for the reasons set forth in Plaintiff’s Opening Brief, 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.¹⁶ Therefore, the Council’s denial of Plaintiff’s Application should be reversed, with the consequence that Plaintiff’s Application be deemed approved.¹⁷

¹⁶ 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.”).

¹⁷ 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*.

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