IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

VIVIAN AND ROBERT C. BARRY, JOSEPH W. AND MARY NELSON, and ROBERT M. FITZGERALD, Plaintiffs, v. THE TOWN OF DEWEY BEACH, AND COMMISSIONERS OF THE TOWN OF DEWEY BEACH, PATRICIA F. WRIGHT, ELLEN MAYHEW, ALICE WALSH, and DALE H. COOKE, Defendants, and DEWEY BEACH SUITES, LLC, Intervenor-Defendant.	:	**C.A. No. 1083-S**

MEMORANDUM OPINION

Date Submitted: January 11, 2006
Date Decided: June 8, 2006

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NOBLE, Vice Chancellor

Plaintiffs Vivian Barry, Robert C. Barry, Joseph W. Nelson, Mary Nelson, and Robert M. Fitzgerald seek a declaratory judgment ruling invalid a conditional use ordinance enacted by Defendant Town of Dewey Beach (the "Town"). The Plaintiffs additionally seek injunctive relief prohibiting the approval of permits pursuant to the challenged ordinance. Also named as defendants in this action are Town Commissioners Patricia Wright, Dale H. Cooke, Ellen Mayhew, and Alice Walsh.[1] Intervenor-Defendant Dewey Beach Suites, LLC ("DBS"), a motel owner expecting to benefit because of the ordinance, was granted leave to intervene under Court of Chancery Rule 24(a)(2).

Before the Court are cross-motions for summary judgment. Because the Plaintiffs have not demonstrated that they have standing to pursue their claims, their action must be dismissed.

I. FACTS

On December 28, 2004, the Town Commissioners adopted Ordinance No. 523 (the "Ordinance"),[2] creating a conditional use classification to allow

[1] During the pendency of this litigation, an election was held and, with the exception of Cooke, none of the named individual defendants continues to serve as a Town Commissioner. In addition, during this period, Plaintiff Fitzgerald was elected and now serves as a Town Commissioner.

[2] The Ordinance is captioned: "AN ORDINANCE TO AMEND CHAPTER 14, SUBCHAPTER 500, ENTITLED DISTRICT REGULATIONS, OF THE MUNICIPAL CODE OF THE TOWN OF DEWEY BEACH, DELAWARE, TO ADD NEW SECTIONS 14-502.4(9) AND 15-503.4(14) TO PROVIDE FOR CONDITIONAL USE

for the conversion of existing hotels and motels to condominiums within the Town's Resort Residential ("RR") and Resort Business ("RB") zoning districts. Hotels and motels are no longer deemed permitted uses in the Town; thus, any hotel or motel is a non-conforming use.[3]

Condominiums are a permitted use under the Town Code. Section 2-202 of the Town Code includes condominiums in its definition of "multi-family dwellings."[4] Sections 14-502.2[5] and 14-503.2[6] provide that "multi-family dwellings" are among the "permitted uses" for the RR- and RB-zoning districts, respectively. Multi-family dwellings are required to comply with certain zoning requirements, including those for area, bulk, density, and parking.[7] In order to convert hotels and motels to condominiums under the Town's permitted-use zoning regime (*i.e.*, to multi-family dwellings), the

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CLASSIFICIATIONS IN THE RR-RESORT RESIDENTIAL AND RB-RESORT BUSINESS DISTRICTS FOR THE CONVERSION, DEDICATION, OR DECLARATION FOR EXISTING HOTELS OR MOTELS TO OWNERSHIP AS CONDOMINIUM UNITS PURSUANT TO THE DELAWARE UNIT PROPERTY ACT."

[3] With respect to hotels and motels in the RB district, see Defs.' Op. Br. in Supp. of Defs.' Mot. for Summ. J., Ex. 15 (Town Ordinance No. 430) (enacted April 8, 2000).

[4] Section 2-202 defines "Dwelling, Multi-Family" as "[a] building designed for or occupied exclusively by two (2) or more families living independently of each other. Multiple-family dwellings shall be considered as apartments, garden apartments, *condominiums*, duplex or similar structures." (emphasis added).

[5] *See* Town Code § 14-502.2 ("Permitted Uses") ("Any use permitted in a Neighborhood Residential District and multi-family dwellings and municipal buildings.").

[6] *See* Town Code § 14-503.2(2) ("Permitted Uses") ("A building or land shall be used only for the following purposes: . . . (2) Multiple family dwellings, structures of mixed commercial and residential use, subject to the mixed use provisions of Subch. 700, 800 and 900.").

[7] *See* Town Code Subchs. 14-400, 14-500, 14-700 and 14-900.

properties must conform to the restrictions placed on such uses by the Town Code (*i.e.*, the relevant area, bulk, density, and parking requirements).[8]

The Town Code also sets forth the Town's conditional use authority. Section 14-801 explains the purpose of conditional uses:

> The purpose of this Subchapter [authorizing conditional uses] is to provide for certain uses which cannot be well adjusted to their environment in particular locations with full protection offered to surrounding properties by rigid application of the district regulations. These uses are generally of a public or semi-public character and are essential and desirable for the general convenience and welfare, but because of the nature of the use, the importance of relationship [sic] to the Comprehensive Plan, and possible impact, not only on neighboring properties, but on a large section of the Town, require the exercise of planning judgment on location and site plan.

Although the Ordinance sets forth certain minimal requirements for hotels and motels converting under a conditional use permit,[9] it expressly exempts conversions proceeding under the Ordinance from most, if not all, of the restrictions otherwise applicable to multi-family dwellings under the Town Code (including those requirements imposed on new or existing condominiums built as permitted uses).[10] From among the requirements for

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[8] *See* Town Code § 14-409 ("No change of use of a property shall be permitted unless the new use conforms to the regulations of this Code.").

[9] For example, the Ordinance provides for certain parking, amenity, and fire safety requirements; minimum residential unit size; and a prohibition on conversion to fractional interest, time-share interest, or "any form of cooperative ownership . . . ."

[10] With respect to conversions in the RR zoning district, the Ordinance states:

conversion made less restrictive under the conditional use scheme, the Plaintiffs point to significant changes in applicable density requirements. Their Verified Complaint (the "Complaint") alleges:

> The most notable departure . . . from the current requirements of the Code is the recommendation for a minimum square footage of 750 square feet per condominium unit. This square footage allows for a dwelling unit density that is more than four times higher that [sic] the Code allows for permitted use condominium/multi-family dwellings.[11]

The significant effect of the Ordinance is that it purports to authorize the conversion of motels and hotels to condominiums, a conversion that in

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> The conversion, dedication or declaration of a hotel or motel to residential condominium units, shall not require compliance with the following sections of Subchapter 14-400, 14-500, 14-700 and 14-900 of Chapter 14 provided the declarant/owner does not propose any expansion of footprint of the existing building(s) and provided the declarant/owner does not propose to add any additional square footage to the existing building(s): Sections 14-409 (Change of Use), 14-502.7 (1, 2, 4 and 5) (Area and Bulk Requirements of RR District), 14-701 (Parking Requirements), 14-905 (Yards, Front, Side and Rear), 14-910 (Special Regulations for Town Houses and Multi-unit Structures), and 14-912 (Natural or Planting Area). The height requirements of Section 14-502.7 shall be applicable.

Ordinance No. 523, § 1. With respect to conversions in the RB zoning district, the Ordinance states:

> The conversion, dedication or declaration of a hotel or motel to residential condominium units shall not require compliance with the following sections of Subchapters 14-400, 14-500, 14-700 and 14-900 of Chapter 14 provided the declarant/owner does not propose any expansion of footprint of the existing building(s) and provided the declarant/owner does not propose to add any additional square footage to the existing building(s): Sections 14-409 (Change of Use), 14-503.7 (1, 2, 4, 5 and 6) (Area and Bulk Requirements of RB District), 14-701 (Parking Requirements), 14-905 (Yards, Front, Side and Rear), 14-910 (Special Regulations for Town Houses and Multi-unit Structures), and 14-912 (Natural or Planting Area). The height requirements of Section 14-503.7 shall be applicable.

Id. at § 2.

[11] Compl. at ¶ 12.

many—if not all—instances could not be accomplished if hotels and motels were to convert to condominiums as permitted uses instead of conditional uses under the Ordinance, because they would be unable feasibly to comply with the area, bulk, density, and parking requirements otherwise required of multi-family dwellings.[12]

* * *

Before the Town Commissioners approved the Ordinance which facilitated the conversion of hotels and motels to condominiums, the question was referred to the Town's Planning and Zoning Commission. The Planning and Zoning Commission held public hearings on August 18, October 12, and November 10, 2004, at which the initial draft ordinance was reviewed.[13] An opportunity for public comment was provided at the August 18 and October 12 meetings. Plaintiffs' counsel was among those who offered comments at the October 12 meeting. Only the initial draft of the ordinance was available for review at those meetings.

The Planning and Zoning Commission revised the initial draft of the ordinance to incorporate its recommendations. The commission voted, at

[12] *See* Town Code § 14-409 ("Change of Use") ("No change of use of a property shall be permitted unless the new use conforms to the regulations of this Code.").
[13] The adequacy of the notice of these meetings is not challenged in this litigation.

the conclusion of November 10, 2004 meeting, unanimously in favor of recommending approval of the ordinance, as modified.

Next, the Town Commissioners held a special meeting on December 28, 2004, to consider the proposed ordinance.[14] The public had the opportunity to comment at this meeting. Several comments were made and letters from the public were entered into the record. The Town Commissioners made minor changes to the Planning and Zoning Commission's draft of the Ordinance, and then voted four to one to adopt the amended draft as Ordinance No. 523. Plaintiffs' attorney, who also served as a Commissioner (and now is the Town's Mayor), cast the lone dissenting vote. Following adoption of the Ordinance, notice was published in the *Cape Gazette* and the *Delaware Coast Press* on January 14, 2005.

DBS has proceeded with conversion of a motel to condominiums pursuant to the Ordinance.

II. CONTENTIONS

In the Complaint, the Plaintiffs set forth what amounts to a claim that enactment of the Ordinance was an improper exercise of the Town's conditional use authority under its enabling ordinance for conditional use

[14] The sufficiency of notice of this meeting is not challenged.

zoning.[15] Specifically, the Plaintiffs contend that the Ordinance is not consistent with the purposes for which the Town may employ its conditional use authority and that it establishes as a conditional use a use that is not a "type of use eligible for classification as a conditional use" since that use is already a permitted use.[16] The Plaintiffs' challenge centers around two aspects: (1) the Ordinance allows as a conditional use a use (condominiums) that is a permitted use in the district, and (2) the Ordinance reduces, instead of enhancing, the "conditions" with which hotel and motel owners must comply in order to convert their properties to condominiums.[17] It is without doubt that these facts present, at the very least, an unusual exercise of a municipality's conditional use power. It appears from the Complaint that the Plaintiffs also argue that the Town had a duty to create a record setting forth its reasons for adopting the Ordinance, including the reasons for why the Ordinance satisfied the purposes for adoption of such ordinances

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[15] *See* Compl. at ¶¶ 1, 21.

[16] *Id.* at ¶ 21. The Complaint also alleges that the Ordinance "conflicts with [§] 2-202 of the Town Code" and, therefore, is invalid for "failing to define the condominium conversions as multi-family dwellings and thereby improperly exempting the conversions from the Code requirements for multi-family dwellings . . . ." *Id.*

[17] *See, e.g.*, 3 ARDEN H. RATHKOPF, DAREN A. RATHKOPF, & EDWARD H. ZIEGLER, JR., THE LAW OF ZONING AND PLANNING §§ 61:4, 61:6 (4th ed. 2004). *Compare id.* at § 61:11 (describing the distinction between conditional uses and variances).

enumerated in the Town Code.[18] The Plaintiffs evidently argue that the Town failed to create the necessary record supporting its legislative act.[19]

The Plaintiffs' Opening Brief purports to assert a number of additional grounds for relief that the Plaintiffs "realized as a result of preparation for [their Opening Brief] . . . ."[20] It appears that the Plaintiffs seek to present three principal, additional claims.[21] First, the Plaintiffs claim that the

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[18] In considering this issue, it may be instructive to consider the analysis in *Newark Landlord Ass'n v. City of Newark*, 2003 WL 22724663, at *1 (Del. Ch. Nov. 17, 2003) ("In Delaware, ordinances 'enjoy the same presumption of validity as statutes and will not be declared void except on unescapable grounds.'" (quoting *Langley v. Elsmere Assocs.*, 1994 WL 149256, at *1 (Del. Super. Feb. 23, 1994))), and to compare *CBS Foods, Inc. v. Redd*, 1982 WL 533240, at *3 (Del. Super. Jan. 19, 1982) (holding that city council, in enacting conditional use ordinance, performs legislative function, while council's approval of permits under ordinance is exercise of administrative or "quasi-judicial" function), with *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986) (discussing the understanding that, when rezoning, legislative function is being performed that also resembles judicial function and therefore a sufficient record must be created).

[19] The issue has been raised of Plaintiffs' non-compliance with Court of Chancery Rule 8(e), which requires that "[e]ach averment of a pleading shall be simple, concise, and direct." *See also Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000). In light of the Court's conclusions, it is not necessary to address this matter.

[20] Pls.' Op. Br. in Supp. of Pls.' Mot. for Summ. J., or in the Alternative Pls.' Ans. to Defs.' Mot. for Summ. J. at 6, 7. It is unclear from the Plaintiffs' brief whether they are preemptively requesting leave to amend their Complaint to assert additional claims following an adverse ruling on summary judgment or whether they seek to amend their Complaint presently. The Plaintiffs, however, have fully briefed each of these additional claims, leading to the conclusion that these claims are presently being asserted.

[21] The Plaintiffs have not made separate motion to amend their Complaint to include these additional claims. The merits of these claims have been argued by the Defendants, however, without serious objection to the lack of procedural compliance. Although it is questionable whether these claims are properly before the Court, resolution of this issue is not outcome determinative given the Court's subsequent holding. *But see infra* note 52**.**

For the same reasons, the Court need not resolve the potentially interesting question (not raised by the parties) of whether the Plaintiffs' additional claims relate back to the date of filing of this action or are barred for having been raised after the expiration of

Ordinance "violates the delegation requirements of" 22 *Del.C.* § 302, which provides, *inter alia*, that a municipality's zoning regulations "shall be uniform for each class or kind of buildings throughout each [zoning] district but the regulations in 1 district may differ from those in other districts."[22] It has been said that this category of claim amounts to a type of statutory equal protection challenge.[23] Second, the Plaintiffs assert that the Ordinance improperly conflicts with the Town's Comprehensive Plan. Third, they argue that the Planning and Zoning Commission failed to have present a final draft of the Ordinance at its second meeting and thereby violated the requirement that it hold public hearings with an opportunity for public comment with respect to the proposal. This claim is separately addressed in

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sixty days following publication of notice of the adoption of the Ordinance, *see* 10 *Del.C.* § 8126; *see also Fields v. Kent County*, 2006 WL 345014 (Del. Ch. Feb. 2, 2006).

[22] Unlike the other two claims described, below, the Plaintiffs do not specifically request, in the text of their opening brief, leave of the Court to amend their Complaint to add a claim with respect to 22 *Del.C.* § 302. Moreover, the Complaint fails to identify this statute as a basis for this action.

[23] See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL § 5.13 (1998), for a helpful discussion of courts' mixed treatment of claims brought under comparable provisions.

See also Stephen C. Glenn, Inc. v. Sussex County Council, 532 A.2d 80, 84 (Del. Ch. 1987) (rejecting claim that special condition imposed on grant of conditional use permit violated equal protection under 42 U.S.C. § 1983); 3 RATHKOPF, *supra* note 17, § 61:19; *cf. Green v. County Council of Sussex County*, 508 A.2d 882, 889 (Del. Ch. 1986), *aff'd*, 516 A.2d 480 (Del. 1986). The Plaintiffs have expressly disclaimed any federal equal protection argument. *See* Pls.' Ans. to Intervenor Def.'s Br. in Supp. of Intervenor Def.'s Mot. for Summ. J. at 8.

This provision appears to derive from § 2 of the Standard State Zoning Enabling Act. *See* U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 2 (rev. ed. 1926); *see also* Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 794 (2003).

some detail, below. Defendants, the Town and Commissioners, resist the Plaintiffs' claims on their merits. DBS contends that the Plaintiffs lack standing to bring this action.

III. ANALYSIS

A. *The Standard for Summary Judgment*

The parties have filed cross-motions for summary judgment. "Under Court of Chancery Rule 56, summary judgment may be granted only when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. When deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists."[24] A party opposing summary judgment, however, "may not rest upon the mere allegations or denials of [her] pleading, but . . . , by affidavits or as otherwise provided in [Court of Chancery Rule 56] must set forth specific facts showing that there is a genuine issue for trial. If [she] does not so respond, summary judgment, if appropriate, shall be entered against [her]."[25] In the context of the parties'

[24] *O'Neill v. Town of Middletown*, 2006 WL 205071, at *6 (Del. Ch. Jan. 18, 2006) (citations omitted).
[25] CT. CH. R. 56(e).

cross-motions for summary judgment, no issue of fact material to resolution of these motions is in dispute.[26]

B. *Standing—A Threshold Question*

The Court must first address whether the Plaintiffs have standing to maintain this litigation. DBS has argued that the Plaintiffs lack standing to proceed with any of their claims. For the reasons explained below, the Court concludes that the Plaintiffs have failed to meet their burden of demonstrating the standing needed to pursue this action.

1. Requirements for standing

"Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"[27] "The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance."[28] This Court must answer the "threshold question" of standing affirmatively in order to "ensure that the litigation before the

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[26] *See* CT. CH. R. 56(h). In their opening brief in support of their cross-motion for summary judgment, the Plaintiffs have requested that, should their motion be denied, the Court nevertheless find that triable issues of fact remain. Without expressly addressing this unusual procedural request, the Court can find no issue of fact material to the Court's holding, below.

[27] *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

[28] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers."[29] Standing deals "only with the question of *who* is entitled to mount a legal challenge and not . . . the merits of the subject matter in controversy."[30]

The Plaintiffs bear the burden of demonstrating that they have standing.[31] At the summary judgment stage, a party attempting to meet this burden may not rest on "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts' which must be taken as true for purposes of the summary judgment motion."[32]

From among the requirements imposed in Delaware for demonstrating standing,[33] a party must, in the absence of a statutory grant of standing, show that its "interest in the controversy [is] distinguishable from the interest

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[29] *Id.*

[30] *Id.* (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (emphasis in original)).

[31] *Dover Historical Soc'y*, 838 A.3d at 1109 ("The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing." (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[32] *Dover Historical Soc'y*, 838 A.2d at 1110 (quoting *Lujan*, 504 U.S. at 561). The Plaintiffs have submitted a verified complaint which here has the effect of an affidavit. *See, e.g.*, *Taylor v. Jones*, 2002 WL 31926612, at *2 n.6 (Del. Ch. Dec. 17, 2002).

In *Dover Historical Society*, the Court explained that, "[i]f the facts alleged to support an assertion of standing are controverted, those facts must then be 'supported adequately by the evidence adduced at trial.'" 838 A.2d at 1110 (quoting *Lujan*, 504 U.S. at 561). In the context of the parties' cross-motions for summary judgment, the facts of record are not in dispute.

[33] *See Dover Historical Soc'y*, 838 A.2d at 1110; *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 903-04 (Del. 1994); *see also O'Neill*, 2006 WL 205071, at *28.

shared by other members of a class or the public in general."[34] In *Federal Election Commission v. Akins*,[35] the United States Supreme Court stated, in language applicable here, that "[w]hether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."[36] In *Akins*, the Supreme Court explained that this type of analysis (*i.e.*, whether a grievance is too widely shared to merit standing):

> invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature-*for example, harm to the "common concern for obedience to law."* The abstract nature of the harm-*for example, injury to the interest in seeing that the law is obeyed*-deprives the case of the concrete specificity that characterized those controversies which were "the traditional concern of the courts at Westminster," and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.[37]

[34] *Stuart Kingston, Inc.*, 596 A.2d at 1382; *see also Comm. of Merchs. & Citizens Against Proposed Annexation, Inc. v. Longo*, 669 A.2d 41, 44 (Del. 1995).
[35] 524 U.S. 11 (1998).
[36] *Id.* at 23; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978); *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring) ("[I]n the absence of a specific statutory grant of the right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street."). For the consequences of the political process, see note 1, *supra*.
[37] 524 U.S. at 23-24 (citations omitted) (emphasis added); *see also Dover Historical Soc'y*, 838 A.2d at 1114 (quoting *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001)).

Put simply, identification by a party merely of a "common concern for obedience to law" constitutes the quintessential example of an interest that is insufficient to warrant standing.[38]

2. The Plaintiffs have failed to demonstrate standing

In this instance, the Plaintiffs have offered no cognizable evidence in support of standing beyond the allegations of the Complaint. They have alleged that the approval of a conditional use permit under the Ordinance:

> will greatly compromise the faith that citizens of Dewey Beach have in the effectiveness and fairness of the existing Town Zoning Code. If the applicant for conversion is allowed to violate so greatly the density limits of the Code, other property owners will demand the same treatment. Much of the property in the Town could be developed at higher density than currently allowed by the Code at great profit to individual property owners but to the ultimate detriment of the quality of life in the Town. The uniform enforcement of the Zoning Code requirements is the way that each property owner can rationalize and accept constraints on his/her desire to achieve maximum financial gain. A greater good can be achieved, but only if everyone complies with the law. Few citizens will be willing to make sacrifices for the common good when a few are favored by the legislative process and are allowed to reap windfall profits at the expense of the community. Once faith in the Code is lost, it will be extremely difficult to sustain the support and confidence of the number of citizens needed to ensure attainment of the goals of the zoning code.[39]

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[38] An "exception" to this rule may be found in instances where the Court views the interest, although widely-shared, as not abstract, but instead sufficiently concrete and particularized. *See Akins*, 524 U.S. at 24-25; *Dover Historical Soc'y*, 838 A.2d at 1113 ("[T]he fact that a grievance is widely held does not make it abstract and not judicially cognizable if individual plaintiffs can demonstrate a concrete and particularized injury.").

[39] Compl. at ¶ 17.

As stated above, this is the Plaintiffs' only "evidence" that may plausibly be considered by the Court in resolving this issue.

This offering by the Plaintiffs is nothing more than a bald statement of interest of the sort which earlier opinions have unremittingly chastised as insufficient. In the absence of any additional showing, standing cannot be premised on a merely abstract desire to ensure municipal obedience to the law. Indeed, the Plaintiffs have set forth almost precisely the type of generalized grievance that constitutes the classic example of a harm that will not, by itself, confer standing—*i.e.*, a "common concern for obedience to the law."[40] Furthermore, they have failed to identify any "concrete and particularized injury."[41] Because the Plaintiffs have not met the threshold requirement of demonstrating standing, their claims must be dismissed.

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[40] To hold otherwise would subject the Court (and interested persons) to litigation by "mere intermeddlers" and expand its function to the rendering of advisory opinions. The Court notes, however, that it would likely not have been difficult for the Plaintiffs to satisfy the requirements of standing. Nevertheless, it is their burden, and they have failed to meet it.

[41] Their failure is not merely one of proof—such as relying on unverified allegations. Instead, their articulated interests are fairly characterized as political, and only political, in nature. In this context, generalized references to "density" or "quality of life," without more, are not specific enough and do not adequately inform the Court of the consequences that would support judicial intervention into the municipal political process.

C. *Plaintiffs' Challenge to the Public Hearing Process Before the Planning and Zoning Commission*

One of the Plaintiffs' challenges to the Ordinance may be deserving of additional consideration because, in part, of the importance of public participation in the workings of local government as recognized in the Town Code. The Plaintiffs contend that the Town's Planning and Zoning Commission failed to satisfy the public hearing requirements set forth by the Town Code. Section 14-1301(c)(1) provides: "The Zoning Commission shall hold a public hearing on any proposed amendment, supplement, or change before submitting its report to the Town Commissioners and for this purpose may request the submission of all pertinent data and information by any person concerned."[42] The Planning and Zoning Commission held three public meetings on the Ordinance, and the public was allowed an opportunity to comment at the first two meetings. The Plaintiffs, however, challenge whether the Planning and Zoning Commission complied with the public hearing requirements because no copy of the final draft of the ordinance ultimately recommended to the Town Commission was made available during the Planning and Zoning Commission's first two meetings.

[42] Town Code § 14-1301(b) provides, in relevant part, that "[b]efore taking any action on any proposed amended, supplement, or change, the Town Commissioners shall submit the same to the Zoning Commission for its recommendations and report . . . ." The reference of such matters to a municipal planning commission for recommendation and report is authorized by 22 *Del.C.* § 708.

A preliminary draft of the ordinance was available for consideration at those meetings; however, the draft ultimately approved by the Planning and Zoning Commission at its November 10 meeting significantly differed from the preliminary draft. In their briefs, the "Plaintiffs argue that a third public meeting [(*i.e.*, another opportunity for public comment)] was required on November 10 because up to that point in time no proposal had in fact been prepared or discussed."[43]

In order to address this claim in more detail, the Court must return to the issue of standing. In *Citizens Coalition, Inc. v. County Council of Sussex County (Citizens Coalition I)*,[44] the plaintiff-organization asserted, among other claims, a due process challenge regarding the public's opportunity to participate in a hearing on a zoning matter before the County Council.[45] The Court denied the defendants' motion to dismiss the plaintiff's "procedural" claims on standing grounds, finding that it had made, *inter alia*, specific allegations of harm to an interest the statute was designed to protect.[46] Even

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[43] Pls.' Reply Br. in Supp. of Pls.' Mot. for Summ. J. at 10 (emphasis in original).

[44] 1999 WL 669307 (Del. Ch. July 22, 1999).

[45] *See id.* at *5 - *6.

[46] *See id.* at *5. The opinion quotes the plaintiff's complaint as alleging that the public "was not allowed an opportunity to investigate and respond to th[e] information [relied upon by Council in its decision], thereby denying the public any meaningful opportunity to participate" in the rezoning hearing. *See id.*

In many instances, drawing the line between "procedural" and "substantive" is not worth the effort. In this action, however, the distinction is both reasonably clear and, more importantly, instructive.

though this proceeding is at the summary judgment stage, the Plaintiffs rely solely on the allegations contained in their verified complaint.[47] Yet, as explained above, a mere interest implicating a "common concern for obedience to the law" is insufficient to merit standing.

The Complaint also alleges, however, that the Plaintiffs are "property owners and voters in the Town of Dewey Beach who wish to have the Town and the Commissioners/defendants adhere to the requirements of the law when changing, amending or supplementing the provisions of the Town Zoning Code."[48] Although the additional, mere facts of owning property and of being voters in the Town are insufficient to satisfy standing with respect to the Plaintiffs' other claims (*i.e.*, their substantive claims), it is at least arguable that, under *Citizens Coalition I*, these facts may merit standing for the Plaintiffs' claim regarding the sufficiency of the public hearing (*i.e.*,

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[47] In accordance with the Plaintiffs' request, and because the parties have engaged on the merits without serious objection, the Court has treated the Plaintiffs' "allegation" that a final draft of the Ordinance was not available at the Planning and Zoning Commission's second public hearing as incorporated into the Complaint, even though it was raised only in their brief and no proper motion to amend the Complaint was submitted. *See supra* note 21. The Plaintiffs have not made a similar request that additional information relevant to standing be added. Indeed, the question of standing was first raised by DBS in its opening brief, and the Plaintiffs' only response on the issue, contained in their answering brief, persuasively communicates their belief that their interest in generalized fairness assured by adherence to the law is sufficient and that any factual basis in addition to that contained in the Complaint is not necessary to demonstrate standing. *See* Pls.' Ans. to Intervenor Def.'s Br. in Supp. of Intervenor Def.'s Mot. for Summ. J. at 5-8 (reiterating Plaintiffs' allegations in the Complaint that they were deprived of their expectation interest in fairness and "the rule of law"). *But see infra* note 52.

[48] Compl. at ¶ 4.

their procedural claim).[49] This potential arises because the opportunity for comment by the Town's citizens is presumably the interest the ordinance requiring a public hearing before the Planning and Zoning Commission is intended to protect.

In *Citizens Coalition I*, however, a non-abstract injury to an interest the statute at issue in that case was designed to protect was specifically identified and set forth, *inter alia*, by the plaintiff.[50] In this instance, the Complaint fails to allege that the Plaintiffs (or even the public) were denied an opportunity to comment or that the opportunity afforded them was not meaningful.[51] Instead, the Complaint merely sets forth alleged violations of ordinance and statute and then, in substance, asserts that this litigation is premised on—and intended to vindicate—what amounts to a "common concern for obedience to the law." No other evidence is offered in support of standing. Although it would likely not require significantly more, the Court views the Plaintiffs' mere statement that they are property owners and

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[49] Standing with respect to due process regarding public notice and hearing claims is distinct from standing to challenge the sufficiency of the record created by the Town Commission, which addresses the substantive validity of the Ordinance.

[50] *See supra* note 46**.**

[51] Indeed, as described above, the Plaintiffs' fourth claim does not appear in the Complaint; nor do any relevant facts regarding the claim. In addition, it should be noted that the decision in *Citizens Coalition I* was rendered at the motion to dismiss stage, while this litigation is at the summary judgment stage.

voters in the Town as insufficient to merit standing, by itself, in this instance.

Even assuming, *arguendo*, that the Plaintiffs do have standing to maintain this claim,[52] the Court concludes that it is without merit for the following reasons. First, review of the record makes clear that the public had sufficient opportunity to comment on the issue of conversion and on potential changes to be made to the preliminary draft.[53] Indeed, at the beginning of the Planning and Zoning Commission's first meeting on August 18, an alternate draft of the ordinance was presented on behalf of

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[52] The Plaintiffs, in their brief on standing, state that their "procedural" claims are "not much different" from those asserted in *Citizens Coalition I*. *See* Pls.' Ans. to Intervenor Defs.' Br. in Supp. of Intervenor Defs.' Mot. for Summ. J. at 5. Unlike the Court's analysis in *Citizens Coalition I* (or in this case, above), the Plaintiffs have characterized *all* of their claims as "procedural," instead of adhering to the procedural/substantive terminology traditionally employed. *See* Pls.' Ans. to Intervenor Defs.' Br. in Supp. of Intervenor Defs.' Mot. for Summ. J. at 8-10 (expressly describing, at least, their claims brought under 22 *Del.C.* § 302 and § 14-801 of the Town Code as "procedural"). Nevertheless, the Plaintiffs' characterization injects a lack of clarity into the issue of what injury they offer as evidence of standing (notwithstanding the additional issue of whether such information is even properly before the Court). As a consequence, the Court addresses the merits of this claim, as well.

[53] *Cf. Citizens Coalition, Inc. v. County Council of Sussex County (Citizens Coalition II)*, 773 A.2d 1018, 1024-25 (Del. Ch. July 21, 2000) (rejecting, on motion for summary judgment, plaintiff's claim that public record for county council meeting was insufficient and holding that plaintiff had actual knowledge, and public had constructive knowledge, of facts at issue). In this instance, the Plaintiffs are not challenging a failure to make available evidence on which the body relied in coming to its decision, but instead on the availability of a draft embodying the ultimate decision—*i.e.*, the final draft ordinance. The Court is skeptical that a planning and zoning commission, after hearing public comment on an issue, cannot make at least some changes to a non-binding draft ordinance reflecting the issues debated without requiring another full public hearing. Moreover, that is the function of the planning and zoning commission—to make a recommendation after consideration of information it has gathered.

another entity with an interest in converting hotels and motels to condominiums. This draft and the reduction in restrictions thought by some to be necessary to make conversions feasible were debated at both the August 18 and the October 12 meetings.[54] Of course, it is possible that subsequent amendments may be of such a broad character as to deprive the

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[54] In short, fairly before the public were the notions that (1) the initial draft referred to the Planning and Zoning Commission would likely not make conversion feasible for many of the properties and (2) any ordinance that would allow conversions would likely severely compromise the specific site-based requirements imposed generally on condominiums as multi-family dwellings. The following examples from the minutes (or informal transcript) of the August 18 meeting make the point:

> "Susan Frederick, of George, Miles and Buhr [an engineering firm], speaking on behalf of Highway One Limited Partnership, stated that she had performed an informal survey of hotels and motels in Dewey Beach. . . . She stated that each existing unit would violate the Dewey Beach Code area, setback and length of building requirements. If there is a serious intent to permit conversions, then there must be a variance provision to allow existing units to become condominiums."
>
> "It was [the Town Attorney's] opinion that virtually no existing hotel or motel units could meet the Code's requirements for residential setbacks and area requirements."
>
> The Town Attorney also reported that the ordinance under consideration would "exempt the converted units from all the bulk and area requirements."
>
> "John Snow stated that no owner could comply with the proposed Town Draft. 'If you want to permit conversions, the draft proposed by Highway One, L.P. [a draft presented at the meeting that reduced the applicable multi-family requirements] is what is needed.'"

Pls.' Op. Br. in Supp. of Pls.' Mot. for Summ. J., or in the Alternative Pls.' Ans. to Defs.' Mot. for Summ. J., Exs. 7 & 18. *Cf. Klaw v. Pau-Mar Constr. Co.*, 135 A.2d 123, 126-27 (Del. 1957) (addressing compliance with statutory requirements where notice of public hearing did not precisely describe zoning amendment city council adopted). In the *Citizens Coalition* litigation, the requirement that the County Council hold a public hearing with regard to the rezoning arose from state statute, thereby implicating certain conditions on delegation of powers to municipalities. *See Citizens Coalition II*, 733 A.2d at 1023 (finding that County Council's change to proposal on file was "plainly immaterial," but declining to rule on strict compliance issue); *see also Fields*, 2006 WL 345014, at *3. In this instance, the requirement that the Planning and Zoning Commission hold a public hearing arises from municipal ordinance. *See* Town Code § 14-1301(c).

public of a meaningful opportunity to comment.[55] In this instance, the revisions to the preliminary draft may have been significant; however, given the substantial opportunity afforded the public for comment before the Planning and Zoning Commission and, more importantly, the subsequent opportunity to comment on the final draft granted the public at the Town Commissioners' December 28 meeting, this argument is ultimately without merit. The Planning and Zoning Commission's recommendation was, of course, not binding on the Town Commissioners, who were charged with the final decision of whether to adopt or reject the Ordinance. The Court, therefore, does not view the denial of a third opportunity for public comment before the Planning and Zoning Commission as actionable.[56]

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[55] *See Klaw*, 135 A.2d at 126-27 ("It is of course possible to conjur up a set of circumstances in which the final enactment would be so foreign to the original proposal of which notice had been given and a hearing held as to justify a court in setting the final enactment aside as in the nature of a fraud on the public and a failure to make even token observance of [the requirements for public hearing and comment].").

[56] Also, it may not, because of its *de minimis* nature, be worthy of any remedy. *See,, e.g.*, *Citizens for Smyrna-Clayton First v. Town of Smyrna*, 2002 WL 31926613, at *7 - *8 (Del. Ch. Dec. 24, 2002) (Master's Report) (denying injunctive relief for failure to show tangible harm resulting from planning and zoning commission's site plan approval), *confirmed in part*, C.A. No. 1545-K, Chandler, Ch. (Dec. 31, 2002), *aff'd*, 818 A.2d 970 (Del. 2003) (TABLE); *see also* 2002 WL 31926613, at *4 ("[A] de minimis invasion of rights, even the right to procedural due process, is simply beyond a remedy.").

IV. CONCLUSION

Accordingly, for the reasons stated above, the Intervenor-Defendant's Motion for Summary Judgment is granted, and this action is dismissed. The Plaintiffs' Motion for Summary Judgment is denied.[57]

IT IS SO ORDERED.

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[57] The Defendants' Motion for Summary Judgment is rendered moot by the grant of the Intervenor-Defendant's motion.