IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MULBERRY KNOLL ASSOCIATES, LLC and J.G. TOWNSEND, JR. & CO.	)	
Petitioners,	)	
v.	)	C.A. No: S26A-07-002 MHC
SUSSEX COUNTY COUNCIL	)	
Respondent.	)	

ORDER

Submitted: October 29, 2026
Decided: November 6, 2026

ORDER REFUSING TO CERTIFY RESPONDENT'S CERTIFICATION OF INTERLOCUTORY APPEAL

Richard A. Forsten, Esquire, Pamela J. Scott, Esquire, and Jennifer M. Becnel-Guzzo, Esquire, Saul Ewing, LLP, *Attorneys for the Petitioners*

William Kassab, Esquire, Vincent G. Robertson, Esquire, Mark F. Dunkle, Esquire, and Madeline S. Bloom, Esquire, *Attorneys for Respondent*

CONNER, J

Upon Consideration of Respondent's, Sussex County Council, Application for Certification of Interlocutory Appeal, it appears to this Court that:

1. On January 16, 2026, Respondent, Sussex County Council, denied Petitioners' rezoning application. After Petitioner filed a timely action in the Court of Chancery, the Court of Chancery issued its Order Dismissing the complaint with leave to transfer pursuant to 10 *Del. C.* §1902 on May 11, 2026.[1] On May 29, 2026, the Court of Chancery denied Petitioners' Motion for Reargument.[2] Petitioners then filed an Amended Petition for Review by *Certiorari* in Superior Court on July 14, 2026.[3]

2. On September 23, 2026, Respondent filed a Motion to Dismiss arguing 10 *Del. C.* §8126(a) prohibits filing the amended Petition because it is outside the 60 day statute of repose.[4] In an oral ruling, this Court denied the Motion to Dismiss relying heavily on *Citizens Against Solar Pollution v. Kent County*.[5]

[1] CH D.I. 11 Court of Chancery Docket
[2] CH D.I. 15 Court of Chancery Docket
[3] D.I. 2 Super. Ct. Docket
[4] D.I. 6 Super. Ct. Docket
[5] *See Citizens Against Solar Pollution v. Kent County*, 2023 WL 8000917 (Del. Super. Ct. Oct. 17, 2023.)

3. On October 27, 2026, Respondent filed an application seeking certification of an interlocutory appeal of the Motion to Dismiss denial.[6] On October 29, 2026, Petitioners filed their opposition.[7]

4. In deciding whether to certify Respondents' appeal this Court must consider the following: Supreme Court Rule 42(b)(i) "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Delaware Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.";[8] (b)(ii)" [i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.";[9] and the eight factors listed in (b)(iii).[10]

---

[6] D.I. 12 Super. Ct. Docket – Application for Interlocutory Appeal
[7] D.I. 16 Super. Ct. Docket – Response Opposing Application for Interlocutory Appeal
[8] Super. Ct. R. 42(b)(i)
[9] Super. Ct. R. 42(b)(ii)
[10] (A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice.

5. Respondent contends they meet the criteria required for an interlocutory appeal required under Supreme Court Rule 42(b)(iii)(A), 42(b)(iii)(B), 42(b)(iii)(C), 42(b)(iii)(D), 42(b)(iii)(G), and 42(b)(iii)(H). Petitioners oppose this application.

6. After considering Respondent's application, the Court finds that denial of the Motion to Dismiss does determine an issue of material importance, it does not determine an issue of material importance sufficient to warrant appellate review before the determination of judgment is reached in this Court. Additionally, the Court has considered each of the criteria of Delaware Supreme Court Rule 42(b)(iii) and concludes as follows to the criterion specifically raised by Defendant:

a. Rule 42(b)(iii)(A). The issue in this matter is not of first impression in Delaware. In *Citizens Against Solar Pollution*, the Plaintiffs sought interlocutory review after Superior Court ruled that 10 *Del. C*. §1902 must be construed liberally allowing the filing of the Writ of *Certiorari* outside of the thirty days to file.[11] The Delaware Supreme Court also refused the interlocutory appeal.[12] This Court recognizes that in the case at hand the issue is whether a liberal reading of the transfer statute permits a filing beyond the sixty day statute of repose. In *Citizens Against Solar Pollution* the issue was

[11] *Citizens Against Solar Pollution v. Kent County*, 2023 WL 8000917 (Del. Super. Ct. Nov. 17, 2023).
[12] *Kent County v. Citizens Against Solar Pollution*, 312 A.3d 634 (Table) (Del. 2024)

whether a liberal reading of the transfer statute permitted the filing of a Writ of *Certiorari* outside the thirty-day requirement. However, the analysis is the same in that a liberal reading of the transfer statute is required to avoid the harsh result of a case being totally ousted. Therefore, this Court does not find this is a case of first impression. Factor (A) does not favor *Certiorari.*

b. Rule 42(b)(iii)(B). Respondent argues that the trial court's decisions are conflicting. Respondent contends *Admiral Holding v. Town of Bower*[13] is in conflict with the holding in *Citizens Against Solar Pollution v. Kent County*[14] which, as stated previously, this Court relied heavily to makes its oral ruling. The Court is in agreement with Petitioners that the *Admiral Holding* ruling involved an untimely transfer outside of what the court ordered. In this case, the Court of Chancery had allowed transfer after declaring it did not have jurisdiction. The Writ of *Certiorari* was then timely filed in this case. Factor (B) does not favor *Certiorari.*

c. Rule 42(b)(iii)(C). Factor (C) involves a question of law regarding application of a statute or statutes. Respondent contends that in this case 10 *Del. Code* §1902 and 10 *Del. Code* §8126(a) cannot be reconciled. The Court

[13] *Admiral Holding v. Town of Bowers* 2004 WL 2744581 (De. Super. Ct. Oct. 18, 2004).
[14] *Citizens Against Solar Pollution v. Kent County*, 2023 WL 6884688 (Del. Super. Ct. Oct. 17, 2023).

disagrees. Petitioners timely filed their action in the Court of Chancery. The Court of Chancery transferred the case to Superior Court pursuant to §1902 which must be liberally construed to not deprive a litigant their day in court. Petitioners met their sixty day obligation. Respondent argued that Petitioners should have known that a very recent Superior Court decision warned that Superior Court may have jurisdiction over these rezoning decisions. This Court disagrees and further recognizes that a similar issue of jurisdiction is in the Supreme Court currently. Therefore, Petitioners initial filing in the Court of Chancery was not improper since the Court of Chancery had ruled on rezoning cases for decades.[15] Factor (C) does not favor *Certiorari.*

d. Rule 42(b)(iii)(D). The Respondent argues the denial of the Motion to Dismiss on it face satisfies this criterion without any further analysis. As stated in the previous section, what trial court has jurisdiction over rezoning reviews seems to be in limbo currently and maybe settled in the near future. However, what trial court has jurisdiction was not part of the ruling to deny the Motion to Dismiss. Factor (D) does not favor *Certiorari.*

[15] *See* D.I. 8 *See* page 4, footnote 7 in Ex. 4 of Petitioner's Response to the Motion to Dismiss.

c. Rule 42(b)(iii)(G). Respondent is correct that interlocutory review could terminate the litigation. Therefore, the criteria of Supreme Court Rule 42(b)(iii)(G) is met.

d. Rule 42(b)(iii)(H). Respondent cites 42(b)(iii)(H) but does not elaborate how interlocutory review would serve considerations of justice. The Court is at a loss how justice could be served by interlocutory review. Granting the Motion to Dismiss would have left Petitioners without a remedy in both the Court of Chancery and the Superior Court. Section 1902 provides the discretion to avoid the harsh result of leaving a litigant courtless after the Court of Chancery transferred this case. Factor (H) does not favor *Certiorari.*

7. This Court must conclude that any potential benefits of interlocutory appeal at this stage is substantially outweighed by the inefficiency, disruption, and cost of an interlocutory appeal. The application to certify the Court's October 16, 2026, decision to deny the Motion to Dismiss to the Delaware Supreme Court is **DENIED**.

IT IS SO ORDERED.

/s/ Mark H. Conner
Mark H. Conner, Judge

cc: Prothonotary