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Re: Salem Church (Delaware) Associates v.  
New Castle County and The State of Delaware  
C.A. No. 20305-NC  
Date Submitted: January 7, 2004

Dear Counsel:

Defendant New Castle County (the "County") asserts that portions of the Complaint filed by Plaintiff Salem Church (Delaware) Associates ("Salem Church") are immaterial, impertinent, and scandalous and, thus, pursuant to Court of Chancery

Rule 12(f), should be stricken.<sup>1</sup> While the County's position is not without some appeal, its motion will be denied because it has failed to demonstrate that the challenged allegations are irrelevant or that it will suffer prejudice from them.<sup>2</sup>

### **I. BACKGROUND**

In 1974, the owners of approximately 100 hundred acres of land located in Pencader Hundred, New Castle County, Delaware, now known as "French Park" persuaded the County to rezone their property to the category of Diversified Planned Unit Development ("DPUD"). After obtaining approval of an Exploratory Sketch Major Land Development Plan showing the land's proposed development, no additional approvals were sought.

Salem Church bought French Park from those owners on July 21, 1987. Salem Church alleges that between 1987 and 1997 it unsuccessfully sought to obtain additional

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<sup>1</sup> Specifically, the County challenges Paragraphs 14, 15, and 16 of the Complaint, together with the first sentences of Paragraphs 17, 21, 22, and 30, and the last sentence of Paragraph 33.

<sup>2</sup> The County's motion carries the impression that the County does not perceive the challenged allegations as assisting Salem Church's effort to state a claim upon which relief can be granted. That question, one that is distinct from the inquiry required by Court of Chancery Rule 12(f), is properly answered in the context of a motion under Court of Chancery Rule 12(b)(6). The County's co-defendant in this action, the State of Delaware, has separately presented such a motion.

approvals to develop the lands.<sup>3</sup> In 1999, Salem Church attempted to gain final subdivision plan approval for French Park. Salem Church alleges that the County informed it that the Exploratory Plan was still valid and that Salem Church could obtain final approval in accordance with the process in effect in 1974 by submitting a revised preliminary plan which conformed to the Exploratory Plan and was based on 1974 regulatory requirements.<sup>4</sup> Salem Church claims that in spite of submitting such a plan it never received the promised final approval.

The chief reason approval was never received was Senate Bill No. 143 (“SB 143”) which was introduced in the General Assembly in the spring of 2001 and signed into law on May 17, 2001.<sup>5</sup> This legislation added the last two sentences of 9 *Del. C.* § 2659(c) and, as a result, conditioned development of Salem Church’s proposed project, for which an exploratory sketch had been approved in 1974, upon compliance with current environmental and traffic impact standards.<sup>6</sup>

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<sup>3</sup> Compl. ¶ 7.

<sup>4</sup> *Id.* ¶ 9.

<sup>5</sup> 73 Del. Laws, c. 33.

<sup>6</sup> The last two sentences of 9 *Del. C.* § 2659(c) provide:

All subdivision or land development applications heretofore or hereafter filed or submitted to New Castle County that do not receive final approval from New Castle County government within 5 years from the date of application shall be subject to the environmental standards contained in

Salem Church filed its Complaint in this action on May 16, 2003. It asks this Court to prevent the enforcement of SB 143 against it. Its main arguments are that the alleged bad faith motives of the County in supporting the legislation and the General Assembly in enacting the legislation should prevent its application to French Park and that the legislation interferes with Salem Church's vested property rights.

The County objects to those portions of the Complaint which allege these bad faith motives on the part of County and State officials in the adoption of SB 143. The following paragraphs of the Complaint are representative of the allegations to which the County has taken offense:

14. By Spring of 2001, various County and State elected officials decided to try and prevent the French Park subdivision plan from receiving final approval. They were motivated in part by a desire to prevent French Park from receiving final approval based upon the potential negative political impact that it could have on their careers, and in part by the fact that some of the elected officials had a personal animus toward the owner of Salem Church: Frank E. Acierno ("Acierno"). The County enlisted the assistance of State officials because the County knew it could not legally change the rules for French Park since the County Code and the County

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Chapter 40, Articles 5 and 10, of the New Castle County Code, as may be amended, and the traffic impact standards contained in Chapter 40, Articles 5 and 11, of the New Castle County Code, as may be amended. This section shall not be construed to extend any time limitations pertaining to the expiration of subdivision or land development applications contained in the New Castle County Code.

Opinion Letter had already “grandfathered” French Park. Thus, the County hoped to achieve indirectly what it could not do directly.

15. Based upon the political desires of certain County and State elected officials, combined with their personal dislike of Acierno, State legislation was prepared and introduced in the Delaware General Assembly in order to attempt to take away the ability of Salem Church to receive final record plan approval for French Park. At all times, the County and State officials intended to deprive Salem Church of its vested rights to develop the DPUD Lands in accordance with the 1974 rezoning and Explanatory Plan approvals, as well as the Preliminary Plan approval in 2001. . . .

16. The political concerns with respect to French Park, combined with a personal animus toward Acierno, drove County and State officials to ultimately bring about the introduction of Senate Bill No. 143. . . . The lead sponsors of SB 143 were State Senator Anthony DeLuca (“DeLuca”) and State Representative William Oberle (“Oberle”). One of the chief County proponents of the legislation was New Castle County Executive Thomas P. Gordon (“Gordon”). Gordon has an extreme personal dislike of Acierno. DeLuca’s wife and Oberle’s daughter have been employed for years by Gordon. Thus, a conspiracy among a small number of close-knit political allies pushed SB 143 through the General Assembly for purposes of advancing their own political agendas and careers, and carrying out their own personal animosities against Acierno.

. . . .

30. The actions of the County and the State were taken in bad faith, with an intent and motive to deny Salem Church its property rights and to carry out a political and personal vendetta against Acierno.

## II. ANALYSIS

Under Chancery Court Rule 12(f), “the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”<sup>7</sup> Motions to strike focus on the form of the pleading and not the substance of the pleadings.<sup>8</sup> It is said that these motions are not favored.<sup>9</sup> They are granted sparingly and only when clearly warranted with all doubt being resolved in the nonmoving party’s favor.<sup>10</sup> “The test employed in determining a motion to strike is: (1) whether the challenged averments are relevant to an issue in the case and (2) whether they are unduly prejudicial.”<sup>11</sup>

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A useful starting point is a review of the definitions of “immaterial,” “impertinent,” and “scandalous.” “‘Immaterial’ matter is that which has no essential or

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<sup>7</sup> Court of Chancery Rule 12(f).

<sup>8</sup> *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 660 (Del. Super. 1985).

<sup>9</sup> *Id.*

<sup>10</sup> *Mills v. Gosling Creek, Inc.*, 1993 WL 485901, at \*2 (Del. Super. 1993) (interpreting Superior Court Civil Rule 12(f) which is identical to Chancery Court Rule 12(f)).

<sup>11</sup> *Shaffer v. Davis*, 1990 WL 81892, at \*4 (Del. Super. 1990); *Pack & Process, Inc.*, 503 A.2d at 660–61. See also 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 12.37[3] (3d ed. 2004) (“To prevail on [a] motion to strike, the movant must clearly show that the challenged matter ‘has no bearing on the subject matter of the litigation and

important relationship to the claim for relief or the defenses being pleaded, or a statement of unnecessary particulars in connection with and descriptive of that which is material.”<sup>12</sup>

Similarly, impertinent material is defined as “statements that do not pertain, and are not necessary, to the issues in question.”<sup>13</sup> Finally, scandalous material is defined as that “which improperly casts a derogatory light on someone, most typically on a party to the action.”<sup>14</sup>

Factual allegations must be irrelevant to the claims asserted and the relief sought in order to be stricken from the complaint.<sup>15</sup> For instance, in *Vets Welding Shop, Inc. v. Nix*, the Court was asked to strike Count IX of a complaint. While acknowledging that the “import of Count IX was not entirely clear,” the Court refused to strike it, holding “[a]lthough the exact theory that the defendants are relying on in Count IX is not clear

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that its inclusion will prejudice the defendants.” (quoting *FRA S.P.A. v. Surg-O-Flex of Am., Inc.*, 415 F. Supp. 421, 427 (S.D.N.Y. 1976)).

<sup>12</sup> 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1382, at 706-08 (2d ed. 1990).

<sup>13</sup> *Id.* § 1382, at 711.

<sup>14</sup> *Id.* § 1382, at 712.

<sup>15</sup> See *Vets Welding Shop, Inc. v. Nix*, 1988 WL 67703, at \*1–\*2 (Del. Super. 1998).

from the pleading, it cannot be said that if the defendants establish a valid legal theory for the allegation in Count IX that it would not advance the defendants' cause."<sup>16</sup>

Furthermore, "[o]bjectionable material will be stricken only if it is clearly shown to be unduly prejudicial."<sup>17</sup> For instance, in *Shaffer v. Davis*, the Court rejected the defendants' motion to strike because there had been no showing of prejudice even though they claimed the objectionable allegations were irrelevant.<sup>18</sup> The Court noted that "defendants have made no attempt to show prejudice if the irrelevant pleadings remain in the pleadings. Thus, the Court denies defendants' Motion to Strike subject to defendants' right to renew the motion upon a showing of prejudice."<sup>19</sup> However, in *Board of Education v. Sussex Tech Education Association*,<sup>20</sup> where the Court was asked to determine whether a teacher's claim of improper termination was subject to arbitration

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<sup>16</sup> *Id.* at 4. See also *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at \*7-\*8 (Del. Super. 2001) (refusing to strike allegations to which the Court could find no connection in the case but instead allowing party to amend complaint to remove allegations or name another party as defendant).

<sup>17</sup> *Pack & Process, Inc.*, 503 A.2d, at 661; *Shaffer*, 1990 WL 81892, at \*4. Allegations which offend a party's sensibilities will not be stricken if they are relevant to the action. See *Shaffer*, 1990 WL 81892, at \*4-\*5; *Mills*, 1993 WL 485901, at \*2.

<sup>18</sup> *Shaffer*, 1990 WL 81892, at \*4.

<sup>19</sup> *Id.* See also *Vets Welding Shop, Inc.*, 1988 WL 67703, at \*3 ("because the parties have not plead sufficient facts for the Court to determine that these charges are unduly prejudicial, on their face, the motion to strike . . . is DENIED.")

<sup>20</sup> 1998 WL 157373 (Del. Ch. Mar. 18, 1998).



and the School District's Complaint included specific detail of the conduct which caused the teacher's dismissal, irrelevance and prejudice supported a motion to strike.<sup>21</sup> The alleged improper conduct involved "touching female students and conducting activities of a sexual nature in the classroom."<sup>22</sup> The Court reasoned that:

[The] specific allegations have no legal relevance to the purely procedural issue involved here, which is what tribunal — this Court or an arbitrator — should decide the question of arbitrability. Those "charging allegations" are also unduly prejudicial, because they attack [defendant's] character, and their determination (by an administrative body) is contested and on appeal. Because they would be irrelevant to the procedural issue presented here and to the Court's analysis, it was unnecessary to include these charging allegations in the complaint. By including those allegations the plaintiff has made public, charges that are contested and of a highly sensitive nature for no legally appropriate reason. In these circumstances, even though motions to strike are normally disfavored, the Court grants the motion to strike the irrelevant and prejudicial allegations. . . ."<sup>23</sup>

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<sup>21</sup> *Id.* at \*2.

<sup>22</sup> *Id.* at \*1.

<sup>23</sup> *Id.* at \*2. Furthermore it should be noted that:

The granting of a motion to strike scandalous matter is aimed, in part, at avoiding prejudice to a party by preventing a jury from seeing the offensive matter or giving the allegations any other unnecessary notoriety. Of course, if the complaint will not be submitted to the jury, or if the case will be tried to the court . . . there is less need to strike scandalous allegations.

5A WRIGHT & MILLER, *supra* note 12, § 1382, at 715-16.

The County claims first that portions of the Complaint are immaterial because they have no bearing on Salem Church’s requested relief. Salem Church contends that it should be shielded from the consequences of SB 143 because of the forces motivating certain public officials to pursue enactment of SB 143. The challenged allegations are relevant to the grounds tendered by Salem Church as support for the relief that it seeks.<sup>24</sup> Thus, the allegations will not be stricken as immaterial or irrelevant.<sup>25</sup>

The County next claims prejudice because these allegations are nothing more than attacks on the legislators who enacted the SB 143 and that they will “place a cloud over

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<sup>24</sup> This, of course, does not mean that the allegations – even if true – would justify limiting the application of SB 143. I note in passing that SB 143 was overwhelmingly passed in both the Senate and the House of Representatives. That the motivations of a few legislators (even if proven) could somehow taint the enactment of legislation with substantial support in the General Assembly is a question for another day.

<sup>25</sup> The County also asserts that “[p]resumably, Plaintiff will not stop with the allegations in the Complaint and will also seek freewheeling discovery into the motives of the legislators who enacted SB-143 — a practice that courts do not allow.” Def. New Castle County’s Br. in Supp. of its Mot. to Strike Pursuant to Ct. of Chancery Rule 12(f) at 10. These concerns, if they do materialize, are better addressed in the context of specific discovery disputes. The “free speech and debate” clause of the Delaware Constitution may prohibit legislators from being deposed to determine why they voted the way they did. *See* Del. Const. art. II, § 13 (1897); *McClendon v. Coverdale*, 203 A.2d 815, 815–17 (Del. Super. 1964); *Shellburne, Inc. v. Roberts*, 238 A.2d 331, 337 (Del. 1967). *See also* RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION, A REFERENCE GUIDE* 87 (2002).

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the reputations of these political officials.”<sup>26</sup> First, the County has not demonstrated how negative comments about members of the General Assembly or County officials will prejudice the County. Second, any potential prejudice is significantly less than that which could have befallen the teacher in *Sussex Tech Education Association*, who risked having further publication of accusations of sexual misconduct if the offending portions of the complaint were not stricken. In contrast, Salem Church merely alleges personal animus and political motivations on the part of elected officials.

Because the County has not shown that the challenged allegations are irrelevant to Salem Church’s claim or that the County will be prejudiced if they remain as part of the Complaint, I deny the County’s Motion to Strike.

### **III. CONCLUSION**

For the foregoing reasons, the County’s Motion to Strike is denied.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-NC

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<sup>26</sup> Def. New Castle County’s Br. at 13.