

TO: Mayor and Members of the Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Christopher J. Forsyth, Assistant City Attorney
DATE: August 7, 2006
SUBJECT: Appeal of In Re: Hooters lawsuit

Hooters Inc. of Troy has filed an appeal of the decision in the *In Re: Hooters* lawsuit. In this appeal, Hooters has asked the Michigan Court of Appeals to reverse Oakland County Circuit Court Judge Mc Donald's opinion of July 28, 2006. Judge McDonald ruled against Hooters, and found that the City Council legitimately denied Hooter's request for a transfer of the Sign of the Beefcarver Class C liquor license and entertainment permit. Hooters argues that Judge McDonald's decision was "reversible error so manifest that an immediate reversal of the order should be granted without formal submission."

Just as in the Oakland County Circuit Court, Hooters has asked for an expedited hearing of the matter. Hooters has also asked to deviate from the normal Court of Appeals process. Hooters is seeking an immediate decision of the Court of Appeals that essentially overrules the Troy City Council, and requires a reversal of the decision to deny Hooter's request for a transfer of the Sign of the Beefcarver Class C liquor license and entertainment permit. In order to obtain this extraordinary relief, Hooters is required to obtain a unanimous vote of the Court of Appeals panel.

A copy of the appeal is attached for your review. Due to the expedited nature of the appeal and the alleged emergency basis of the filing, Troy's response is due on Wednesday, August 9, 2006. This date is before Council would have an opportunity to authorize our appearance in the case. However, our office has timely filed a response, based on the previous direction of City Council. We will continue to represent the City's interest in this case, absent objection from the Troy City Council.

If you have any questions, please let us know.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re HOOTERS OF TROY, INC.,
Plaintiff

Court of Appeals No. _____
Lower Ct. Case No. 06-075618-AS
Hon. John J. McDonald

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**PLAINTIFF/APPELLANT'S MOTION, UNDER MCR 7.211(C)(4) FOR PEREMPTORY
REVERSAL OF THE TRIAL COURT'S JULY 28, 2006 ORDER**

For the reasons stated more fully in its Brief in Support of its Motion, under MCR 7.211(C)(4), for Peremptory Reversal of the Trial Court's July 28, 2006 Order, Plaintiff can establish that, by ignoring an on-point, existing precedent of this Court, the trial court committed reversible error so manifest that an immediate reversal of the order should be granted without formal submission. Therefore, plaintiff requests that this Honorable Court (1) grant this motion for peremptory reversal; (2) reverse the decision of the trial court; (3) remand this matter to the trial court for entry of an order of superintending control requiring that the City of Troy recommend plaintiff's application for transfer of a class C liquor license; and (4) grant any other relief that this Court deems appropriate, just and equitable.

Dated: 2/4/06

Respectfully submitted.

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**BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT'S MOTION,
UNDER MCR 7.211(C)(4) FOR PEREMPTORY REVERSAL OF
THE TRIAL COURT'S JULY 28, 2006 ORDER**

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction in this matter consistent with MCR 7.203(A)(1) because this is an appeal from a final order. Specifically, this appeal is from the circuit court's July 28, 2006 Order Denying Motion for Order of Superintending Control, which provides that "[t]his order resolves the last pending claim and closes this case."

STATEMENT OF QUESTIONS INVOLVED

Plaintiff operates a restaurant with a class C liquor license in the City of Troy. Plaintiff has taken steps to relocate its restaurant within the city. Plaintiff applied to transfer the class C liquor license from the existing restaurant on the new premises to itself. The City of Troy refused to recommend the transfer on ambiguous grounds such as the attire of Plaintiff's employees and the image of Plaintiff's business. The issue is whether the City's refusal to recommend the transfer was an arbitrary and capricious act?

- The plaintiff answers: Yes.
- The respondent City of Troy answers: No.
- The trial court answered: No.

INTRODUCTION

Plaintiff Hooters of Troy, Inc. ("Hooters") operates a restaurant in the City of Troy ("Troy"). Hooters' restaurant has maintained, for almost one decade, a class C liquor license. In early-2006, after having decided to relocate its business within Troy, Hooters entered into separate contracts for the lease of a new location of its restaurant and for transfer of a class C liquor license for the restaurant. Following statutory protocol, Hooters applied to Troy for a recommendation to the Michigan Liquor Control Commission that Hooters receive the license transfer. Despite the fact that the Troy liquor advisory committee recommended the transfer and no party objected, including the Troy Police Department, to the recommendation, Troy denied Hooters request for the recommendation. Consequently, the Michigan Liquor Control Commission must deny the transfer request.

Hooters applied to the circuit court for an order of superintending control. In its application, Hooters cited this Court's decision in *Pease v City Council of the City of St. Clair Shores*, 85 Mich App 371; 271 NW2d 236 (1978). *Pease* and the instant case involve substantially identical facts. The trial court, however, failed to follow the ruling of *Pease*, instead holding that so long as there was "some basis" for Troy's decision, the Court was powerless to disturb that decision. *Pease* clearly does not support the trial court's position, and, in fact, demands that this Court reverse the trial court. Given the trial court's decision was clearly inconsistent with the established law of this state, this Court should grant this motion for peremptory reversal.

STATEMENT OF FACTS

A. The Plaintiff

Hooters is the plaintiff in this action. Hooters is a wholly-owned subsidiary corporation of Hooters of America, Inc. Hooters of America, Inc. is based in Atlanta, Georgia and operates restaurants located in 46 states and several foreign countries. Hooters restaurants are widely recognized for (1) their menu, highlighted by chicken wings, and (2) the casual beach – theme apparel worn by their female servers.

B. Hooters Seeks to Change Locations Within the City of Troy

Hooters has operated a restaurant in Troy continuously since December 1996. Since that time, Hooters has operated a facility located at 1686 John R. Rd., Troy, MI (the "John R Restaurant"). The John R Restaurant faces a large commercial thoroughfare, but the rear of the John R Restaurant abuts a residential neighborhood. Hooters has maintained a liquor license for the John R Restaurant from December 1996 to the present.

In 2005 Hooters entered negotiations to move its operations from the John R. Restaurant to 2950 Rochester Rd., Troy MI (the "Rochester Road Restaurant"). The Rochester Road Restaurant is situated at the intersection of Rochester Road and Big Beaver Road and is surrounded entirely by commercial or industrial use properties.

Hooters intends to operate the Rochester Road Restaurant and to lease the premises from Sign of the Beefcarver, Inc. The Rochester Road Restaurant is currently vacant and has been since the Wagon Wheel restaurant¹ shuttered its doors. On December 31, 2005, Wagon Wheel and Hooters entered into a lease for the Rochester Road Restaurant. On January 6, 2006, Wagon Wheel and Hooters entered into an

¹ Sign of the Beefcarver, Inc. operated a restaurant on the premises of the Rochester Road Restaurant under the name Wagon Wheel. Collectively, this brief refers to Sign of the Beefcarver, Inc. and Wagon Wheel as "Wagon Wheel."

agreement for Wagon Wheel to transfer its liquor license for the Rochester Road Restaurant to Hooters.

C. Hooters Seeks Approval For The Transfer Of The Wagon Wheel Liquor License.

On January 17, 2006, Hooters filled an application with the Michigan Liquor Control Commission (the "MLCC") for transfer of the liquor license from Wagon Wheel to itself.² On March 14, 2006 the MLCC responded by opening a mandatory investigation into the request. This investigation also included an investigation by the local law enforcement agency (i.e., the "Troy Police Department") and the local legislative body (i.e., the "Troy City Council").

As part of its investigation and report, the Troy Police Department reported that over the ten years that Hooters operated the John R Restaurant, it received only three citations for violations of the liquor code: (1) a 1997 violation for conducting a beer promotion for a prize amount in excess of \$50; (2) a 2001 violation for serving an intoxicated patron; and (3) a 2003 violation for serving a minor decoy used by the MLCC. In addition, the Troy Police Department compared calls it made to Hooters with calls it made to other restaurants and bars. This comparison revealed that calls to Hooters were only exceptional for the number of reports of larceny from vehicles; a distinction "which is not a reflection of the business." (Exhibit A; 06/05/06 Troy Police Department Report).³ Notably, none of the police calls to Hooters complained of "lewd or lavacious behavior." (*Id.*). Given the facts uncovered during its investigation, the Troy Police Department did not object to approval of Hooters' request to transfer the license. (Exhibit B; 06/08/06 Troy Police Department Report).

² When the transfer is granted, Hooters intends to place its current liquor license for the John R Restaurant into escrow or to sell the license.

³ Both parties presented the trial court with several documents as exhibits to the motion; all of the exhibits appended to this brief were presented previously to the trial court.

The issue of approving the license was presented to the Troy liquor advisory approved recommending the transfer by a unanimous vote. (Exhibit B).

The Troy City Council considered Hooters' request to transfer the license at its June 19, 2006 meeting. Councilwoman Robin Beltramini moved, seconded by Mayor Louise Schilling, that the Troy City Council recommend approval of the license transfer. During discussion of the issue, some council members expressed concern over whether a business with the name "Hooters" was appropriate to place at the so-called "gateway to the City." (Exhibit C: Synopsis of 06/19/06 Troy City Council Meeting). Indeed, council members specifically limited their reasoning for voting against the request to concerns over Hooters' "impression" and "image." (Exhibit C at pp. 4, 6). None of the council members stated that they were voting against the recommendation because of concerns over previous liquor violations or concerns over crime or public safety. (*Id.*). By a four-to-three vote, the Troy City Council denied the motion to recommend the liquor license transfer. (*Id.* at p 6-7).

D. Procedural History

On June 27, 2006, Hooters filed a complaint seeking a writ of superintending control ordering the Troy City Council to recommend approval of the transfer of the liquor license from Wagon Wheel to Hooters. Consistent with MCR 3.302(E)(1), Hooters served a copy of the Complaint on the City of Troy. More than twenty-one days after filing the complaint, Hooters filed a motion asking the trial court to issue an order of superintending control. The City of Troy opposed this motion.

At the oral argument on the motion, the trial court heard arguments from both Hooters and the City of Troy. Following the argument, the trial court announced its determination on the record:

I think there is a distinction between the facts of this case and the other two cases. In the other, in *Bundo [v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976)] and the other case you cited, [*Bisco's, Inc v*

Michigan Liquor Control Comm'n. 395 Mich 706; 238 NW2d 166 (1976)] they already had an existing license and it was a renewal. So there's a distinction there. I think -- . . . I think it's a discretionary call for the City Council to make. They're a legislative body. And as long as there's some basis for it, they may be wrong, but as long as there's some basis for it and it's not arbitrary and capricious. I am going to deny your request. [(Exhibit D; 07/28/05 Hearing Transcript at pp. 17-18)].

ARGUMENT

A. Standard of Review

This Court reviews the trial court's decision on an action requesting an order of superintending control for an abuse of discretion. *In re Grant*, 250 Mich App 13, 14; 645 NW2d 79 (2002). To the extent that this Court reviews legal conclusions made by the trial court, the review is *de novo*. *Grant, supra.* at 14-15.

B. **The Trial Court Clearly Erred By Ignoring This Court's Binding Precedent In *Pease*. This Court's Determination In *Pease* IS Clear And On Point: A City May Only Deny A Liquor License Transfer Request For Reasons Legitimately Based On The Use Of The Liquor License In A Particular Location. Concerns About The "Image" Or "Impression" Of A Business Are Not Legitimate Reasons For Denying A Transfer Request.**

The Court of Appeals has already squarely addressed the issue of whether a writ of superintending control should issue to mandate that a municipality recommend transfer of a liquor license. *Pease, supra.* In *Pease*, the plaintiffs requested that the defendant city council recommend to the Michigan Liquor Control Commission transfer of a class C liquor license to their names. *Pease, supra* at 372. The plaintiffs appeared before the defendant city council four times requesting the transfer, and each time the council refused the request. *Id.* Following the council's final rejection of their requested recommendation, the plaintiffs filed a claim for writ of superintending control with the circuit court. *Id.* at 373.

The city council presented the circuit court with nine reasons why it denied the requested transfer. *Id.* at 375-76. These reasons included concerns with traffic, parking, the proximity of the establishment to a residential neighborhood, and the objections of the city manager and police department. *Id.* The trial court rejected the city's rationale and found the city's denial to be an arbitrary and capricious exercise of authority. *Id.* at 373. The circuit court issued an order mandating that the council recommend the transfer. *Id.*

On appeal, the Court of Appeals affirmed the trial court's decision. *Id.* at 378. The Court of Appeals began by noting that “[t]he scope of judicial review of a local legislative body’s disposition of requests for liquor licenses is extremely narrow . . . and the local disposition will only be overturned upon a showing that it was arbitrary and capricious.” *Id.* (citations omitted). The Court of Appeals then set forth the recognized, legitimate reasons for denying issuance or transfer of a liquor license. *Id.* at 373-75. These reasons included: (1) “the bad moral character of the applicant . . . [which allows the municipality] to restrict liquor traffic to persons of good moral character who may be reasonably expected to keep their businesses free from greater vices, which have impelled restrictive legislation on the question;” (2) “the location of the proposed place of business . . . where the area in question has been zoned as one within which intoxicating liquor may not be sold;” (3) “unfitness of the particular building;” and (4) “peculiar circumstances of time and place . . . [such as] aggravation of existing law enforcement problems due to youthful population and recent rioting.” *Id.* (internal quotation marks and citations omitted).

The *Pease* Court of Appeals held that a city’s denial of a liquor license transfer request must be based on one of these objective reasons, and not on some subjective whim. The Court of Appeals explained: “where there are no questions as to the qualifications of the applicant, the fitness and safety of the particular building or the legality of maintaining a liquor business in the requested location, the denial of the liquor license must be based upon some unusual circumstance, or other *criteria*^[4] that would *reasonably* justify such a refusal.” *Id.* at 375 (emphasis added).

⁴ The Court of Appeals noted that the criteria necessary to justify the denial of a transfer of a license would typically come in the form of “guidelines, enacted in advance of a given application, . . . [which would] offer some protection to the individual against arbitrary denials.” *Id.* at 375 n 3.

Juxtaposing the objective criteria cited by the court, with the reasons proffered by the city council, the Court of Appeals found that the city council's stated reasons were not sufficient to deny the request to transfer the license. *Id.* at 376-77. Consequently, the Court of Appeals concluded:

Thus, in the instant case we have a proposal in full conformity with all pertinent zoning and traffic ordinances, and no evidence whatever of any unusual circumstance that would justify imposing heavier requirements on plaintiffs than upon other similarly situated businesses. We do not substitute our judgment for that of the council, but in the absence of evidence in the record which would explain and justify the council's action, we must concur with the trial court that the council acted arbitrarily in this case. [*Id.* at 377-78]

The facts of this case are indistinguishable from the facts evaluated by the Court of Appeals in *Pease*. Specifically, in both cases, the plaintiffs sought transfer of a class C liquor license. In both cases the city council refused to recommend the transfer. In both cases the refusal of the city council was not based on any objective criteria (i.e., in *Pease* it was based on speculative and non-specific concerns over traffic, parking and disrupting a residential neighborhood; in this case the denial was based on the name of the restaurant and a speculative, non-specific concern that it would not project the "gateway" of the city as an "upscale metropolitan community."). In both cases, following the city council's refusal to recommend the transfer, the plaintiffs sought writs of superintending control from the circuit courts.⁵

Given the substantive factual similarities between this case and *Pease*, this Court should reach the same conclusion as the Court of Appeals in *Pease* and hold that the

⁵ The facts of this case are somewhat more compelling than the facts addressed by the Court of Appeals in *Pease*. For instance in *Pease*, the chief of police and city manager had recommended against transferring the licenses; in this case the Troy Police Department supported Hooters' request to transfer the license. In *Pease*, the establishment was located in an area adjacent to a residential community; in this case, Hooters seeks to move from an area abutting a residential community to an area without any residences nearby. In *Pease*, the city council cited concerns of the residents of the area who feared a disruption to the peace and quiet of the neighborhood; in this case, no such concerns were ever expressed. Indeed, in light of these factual differences, this Court should be even further compelled to follow the decision of the Court of Appeals in *Pease* and issue the order of superintending control.

city council's actions were arbitrary and capricious. Consequently, just as the Court did in *Pease*, this Court should issue an order of superintending control to the city council requiring them to recommend transfer of the license to the Michigan Liquor Control Commission.

Moreover, while *Pease* is the most apposite case (in fact, it is precisely on point) it is hardly the only case standing for the proposition that municipalities may not act arbitrarily in denying requests for transfers or issuance of liquor licenses. See, eg, *DeRose v City of Lansing*, 13 Mich App 238, 240-41; 163 NW2d 839 (1969) (Where plaintiff sought transfer of class C liquor license from previous owner who had held and operated that license for fifteen years, the city council abused its discretion in denying the transfer on the sole grounds that the chief of police did not recommend the transfer); see also *Wong v City of Riverview*, 126 Mich App 589, 593; 337 NW2d 589 (1983) (reaffirming the Court's holding in *Pease* that "where no evidence exists explaining the city's decision, the decision must be capricious. . . . Because none of the city's proffered reasons were valid, this Court concluded that the city's actions must have been arbitrary or capricious."); see also *Roseland Inn, Inc. v McClain*, 118 Mich App 724; 325 NW2d 551 (1982) (stressing the important role of objective criteria in the municipality's decision to grant, renew or transfer liquor licenses and expressing concern that without such criteria, city councils, vested with significant statutory authority to control liquor licenses could create "an open door to favoritism and discrimination."⁶)

⁶ The concern over favoritism and discrimination is particularly heightened here, where the City of Troy's refusal to recommend the transfer is based in substantial part on the name of the establishment and the attire of its employees and how these factors co-exist with the city's self-image. If this Court were to allow the city's denial to stand, and to condone the use of an entity name and worker attire as valid reasons for denying transfer of a liquor license, what is to prevent four nativist city council members from denying a liquor license to an Irish-American proprietor who wishes to have his name on his establishment and have his servers dressed in traditional Irish garb? Nothing. This illustration highlights the potential for abuse were this Court to allow cities to justify their liquor license decisions on such fanciful and subjective whims as a restaurant's name, the appearance of its servers and the city's self-image.

- C. **The Trial Court Labored Under The Erroneous Presumption That Hooters Had No Due Process Rights In Seeking Judicial Review Of The City Of Troy's Refusal To Recommend The Liquor License Transfer. In Fact, This Court Has Consistently Held That Applicants For Liquor Licenses And Applicants For Transfers Of Liquor Licenses Are Entitled To A Modicum Of Due Process Rights. Specifically, The City Council's Determination Must Be Rooted In Objective Criteria.**

The City of Troy argued, in opposing Plaintiff's motion for a superintending control order, that the determination of whether to recommend transfer of a liquor license is a discretionary determination which "is not subject to review by a court." In support of this proposition, Plaintiffs cited to *Scott v Township Board of Arcada Twp*, 268 Mich 170; 255 NW2d 752 (1934). However, what Plaintiffs failed to explain to the Court was that *Scott* was specifically overruled by the Michigan Supreme Court in *Bundo*. *Bundo, supra* at 703 ("Thus in *Scott* . . . *Johnson v Michigan Liquor Control Commission, supra*, was misconstrued . . . cases which misconstrued the law no longer can be followed."). Confirming its repudiation of *Scott*, the Michigan Supreme Court concluded that "[p]rohibition of judicial review is neither mandated by the constitution or the MLCA [Michigan Liquor Control Act] nor is it necessary to the preservation of the local community's traditional power to exercise broad discretion over liquor licensing." *Id.* at 698.

While the City of Troy has extolled the supremacy of legislative authority under the Act, the Michigan Supreme Court explained that in the context of this state's constitutional framework, that authority is not absolute; that authority is subject to the "checks and balances" at the core of our constitutional system of government:

the local legislative bodies' authority under § 17 of the MLCA to effectively block the renewal of an existing liquor license is not an improper delegation of power but rather is a legislatively imposed restriction or check on the power of the liquor control commission's power in this area. However, if the courts are precluded from reviewing the arbitrary and capricious actions of the local bodies, the question then becomes what is the check on the local legislative body's power to prevent renewal of liquor license for any reason whatsoever. It is unlikely that the drafters of Const 1963, art 4, § 40 or MLCA, § 17 intended that the local

communities should have unbridled and unrestricted control over liquor licenses. On the contrary both the constitutional and statutory provisions made provision for a system of checks on absolute control. We will not ascribe an intent to the Legislature that the local bodies be given unbridled power to block the renewal of licenses. Rather, we reaffirm a principle recognized early in this Court's history but subsequently lost in later opinions, that principle being that the power of the local communities to control alcoholic beverage traffic is extremely broad but does not permit local legislative bodies to act arbitrarily and capriciously and further, when the local bodies conduct themselves in such a manner their actions are reviewable by the courts. [*Id.* at 700-01].

Given that *Bundo* plainly eviscerates the opinion in *Scott*, and implicitly undermines any reliance on the wholly inapposite holding in *Warda v City Council of City of Flushing*, 472 Mich 326; 696 NW2d 671 (2005),⁷ both the City of Troy and the trial court attempted to distinguish the instant case from *Bundo*. (Ex. C at p 17). However, the distinction cited by the City of Troy and the trial court is without any substantial difference. Indeed, the trial court noted that it believe that *Bundo* was not controlling because in *Bundo* "they already had an existing license and it was a renewal" (Exhibit C at p 17).

But the trial court's distinction is irrelevant because (1) it is factually incorrect; (2) it is legally incorrect; and (3) it has no bearing on whether the City of Troy's denial of the transfer request was arbitrary and capricious. Factually, it is undisputed that, in this

⁷ *Warda* did not involve the denial of a liquor license transfer or request. *Warda, supra.* *Warda* did not involve a claim of denial of due process or any other constitutional right. *Id.* at 336. Rather, *Warda* was solely limited to the issue of whether a there was judicial review of a city council's determination to deny a request for reimbursement of attorney fees under a statute which specifically made such a decision discretionary. *Id.* The Supreme Court held that where (1) the statute grants discretionary power to the local legislative body; (2) the statute does not explicitly provide for any judicial review; and (3) the plaintiff makes no constitutional claim; then the court has no ability to review the City's determination. The instant case is clearly inapposite. Specifically, plaintiff has claimed that its constitutional property rights were violated by the arbitrary and capricious denial of the transfer request. (Exhibit E; Complaint at ¶21). Plainly, the court has the authority to review the claims made by Hooters in this case. *Id.* ("Even a discretionary action of a governmental agency must still comport with the constitutions of this state and the United States. As we have noted elsewhere: [T]he power of judicial review does not extend only to invalidating unconstitutional statutes or other legislative enactments, but also to declaring other governmental action invalid if it violates the state or federal constitution.") (internal quotation marks and citations omitted).

case, Hooters has a valid class C liquor license.⁸ Thus, it, like the plaintiff in *Bundo*, has a property interest in its license, which is protected by the constitutional right to due process. *Bundo, supra; see also Pease, supra; Bisco's, Inc, supra*. Legally, the trial court was incorrect in holding that applicants are not entitled to review of city council decisions. Indeed, this Court held that “even though the first time applicant has no right to procedural due process, this Court will review the city’s decisions. . . . It is limited only to whether or not the city has acted arbitrarily and capriciously.” *Wong v City of Riverview*, 126 Mich App 589, 593; 337 NW2d 589 (1983) (citing *Fuller Central Park Properties v City of Birmingham*, 97 Mich App 517, 296 NW2d 88 (1980)). Therefore, both the City of Troy and the trial court are incorrect in stating that the judiciary has no power to review the City of Troy’s determination.

D. The Trial Court Did Not Correctly Apply The Arbitrary And Capricious Analysis; If It Had, It Would Have Relied On *Pease* To Determine That The City Of Troy’s Action Did Not “Have A Real And Substantial Relation To The Object Sought To Be Attained.”

Furthermore, the trial court, to the extent that it did attempt to employ an analysis of whether the City of Troy’s action was “arbitrary and capricious,” substantially misconstrued that analysis. Specifically, Michigan courts have held that “the guaranty of due process “demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” *In re McEvoy*, 267 Mich App 55, 70-71; 704 NW2d 78 (2005) (citing *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 435-436, 258 NW2d 414 (1977)). In the case of liquor license transfer requests, this Court in *Pease*, defined the general reasons, in which a city council could root its reasons for denying a transfer request. *Pease, supra*.

⁸ Admittedly, in the current application, Hooters is seeking transfer of Wagon Wheel’s license and seeking to place its own license in escrow. However, it can accomplish the same objective by transferring its own license and placing the Wagon Wheel license in escrow.

However, instead of inquiring into whether the reasons stated by the Troy City Council “have a real and substantial relation to the object sought to be attained[.]” (i.e., the *Pease* factors) the trial court instead stated that “so long as there’s some basis” for the City of Troy’s decision, the court could not disturb that decision. (Exhibit C at p 18). The trial court’s analysis was erroneously shallow. Indeed, if the standard truly were “some basis,” every legislative decision would be unreviewable by a court, and private property interests would only be as firm as a legislative body’s whim. This is not the law.

Rather, the law plainly requires that for a legislative action to survive a challenge that it is arbitrary and capricious, it must “have a real and substantial relation to the object sought to be attained.” *In re McEvoy, supra*. In this case, the City of Troy’s determination that Hooters could not transfer the liquor license because Hooters’ “image” was inconsistent with the City of Troy’s alleged “image”⁹ is not substantially related to whether a vendor should be allowed to serve alcohol on the particular premises. Neither the City of Troy nor the trial court could justify the City of Troy’s actions on the basis of the *Pease* factors, and, thus, the City of Troy’s actions do not “have a real and substantial relation to the object sought to be attained.”

⁹ Tellingly, nothing the City of Troy did would prevent Hooters from transferring its restaurant business exclusive of liquor sales. For all of the statements about the City not desiring a Hooters at its “gateway,” nothing the City did prevents Hooters from relocating. Indeed, all the City did was to prevent Hooters from selling liquor to its customers – a fact that is wholly unrelated to its allegedly objectionable “image.” Thus, the action of the City of Troy is unrelated to the sale of alcohol and the aims of the Act.

RELIEF REQUESTED

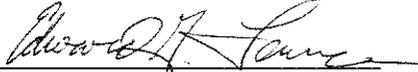
The controlling law in this state plainly provides that where, as here, a city council denies a request for transfer of a liquor license for reasons unrelated to the service of alcohol in a business and related public safety concerns, the council has acted in an arbitrary and capricious manner. Where, as here, the council has acted in an arbitrary and capricious manner in denying the transfer of a liquor license, this Court clearly held that the trial court should issue a writ of superintending control. The trial court's failure to follow the rule of *Pease* in this case presents an error so manifest that immediate reversal is required. Therefore, plaintiff requests that this Honorable Court (1) grant this motion for peremptory reversal; (2) reverse the decision of the trial court; (3) remand this matter to the trial court for entry of an order of superintending control requiring that the City of Troy recommend plaintiff's application for transfer of a class C liquor license; and (4) grant any other relief that this Court deems appropriate, just and equitable.

Dated: 8/4/06

Respectfully submitted,

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