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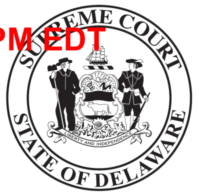

IN THE

Supreme Court of the State of Delaware

BARLEY MILL, LLC,
Defendant-Below, Appellant, Cross-Appellee,

v.

SAVE OUR COUNTY, INC., BARBARA FURBECK, LAWRENCE GIORDANO, JAMES GRAVES, and THOMAS S. NEUBERGER,
Plaintiffs-Below, Appellees, Cross-Appellants,

and

NEW CASTLE COUNTY,
Defendant-Below, Appellee, Cross-Appellant,

and

THE COUNTY COUNCIL OF NEW CASTLE COUNTY,
Defendant-Below, Appellee, Cross-Appellee.

NO. 419, 2013

APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 7151-VCG

CORRECTED OPENING BRIEF OF BARLEY MILL, LLC

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SEPTEMBER 23, 2013

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NATURE OF PROCEEDINGS

On October 25, 2011, the County Council of New Castle County ("Council"), by a 7-6 vote, enacted Ordinance No. 11-050 ("Ordinance"), to rezone a 36.8-acre portion of 92 acres of land on the northwestern edge of the City of Wilmington (the "Property") owned by appellant Barley Mill, LLC ("Barley Mill"). (A23-38; A139; A670) On December 27, 2011, plaintiffs below ("Plaintiffs"), residents of New Castle County ("County") opposed to Barley Mill's redevelopment plan for the Property and the related rezoning, appealed Council's decision to the Court of Chancery. (A21)

Plaintiffs asserted three claims. First, they claimed the Ordinance was invalid because under State and County law a formal traffic analysis, either a formal traffic impact study ("TIS") or a less-intensive traffic operational analysis ("TOA"), must be completed and provided to Council before it can vote on any rezoning. (A683-89) Second, they claimed the Ordinance was invalid because the rezoning was inconsistent with the County's Comprehensive Development Plan and thus violated 9 DEL. C. § 2659. (A689-90) Third, they claimed the Ordinance was invalid because Council's decision was arbitrary and capricious for multiple reasons. (A697-704)

Following discovery and lengthy briefing, a hearing on the merits was set for January 8, 2013. An eleventh-hour decision by the County to switch sides and support Plaintiffs (A941-42) delayed the hearing for three months while the County's change of legal position was addressed and its accusations of wrongdoing by the two previous County Executives were investigated. On April 22, the court below heard more than five hours of argument. (A943-1167) Plaintiffs and the County filed additional written material following the April 22 hearing. (A1168-76)

On June 11, the court below issued its opinion ("Opinion"). The court below ruled in favor of Council and Barley Mill on the question of whether State or County law required Council to obtain and consider before voting on the Ordinance the TOA requested by the County and the Department of Transportation ("DelDOT"). (Op. 16, 23) But the court then held that even though the law does not require Council to do that, the decision of one Council member, Robert S. Weiner, Esquire, to vote without obtaining and considering that TOA was arbitrary and capricious because the TOA was subjectively material to Mr. Weiner, and he mistakenly believed he did not have the ability to delay the vote on the Ordinance until the TOA was provided. (Op. 33) That belief was mistaken, the court held, because Mr. Weiner could have had the Ordinance tabled until he received a TOA, which meant that a TOA was reasonably available to Mr. Weiner. (Op. 24-26) The court held that Mr. Weiner voted without having all information subjectively material to his decision that was reasonably available to him, rendering his vote arbitrary and capricious and depriving the Ordinance of the seventh vote needed for passage. (Op. 34-35)

On July 17, the court below entered its Order invalidating the Ordinance. On August 7, Barley Mill filed its Notice of Appeal. On August 21, Plaintiffs and the County filed Notices of Cross-Appeal against Barley Mill, stating that they intend to argue that (i) the court below erred in holding that neither State nor County law required Council to obtain and consider a TOA before voting, and (ii) there are additional grounds not addressed by the court below as to why Council's vote was arbitrary and capricious. On September 3, Council filed a Motion to Intervene in the cross-appeal, which this Court granted on September 4.

SUMMARY OF ARGUMENT

The lower court's ruling that Mr. Weiner's decision was arbitrary and capricious should be reversed, because Mr. Weiner's decision was free of legal error and Plaintiffs failed to show there was no substantial evidence in the record to support it.

1. Mr. Weiner explicitly and properly relied upon the recommendation ("Recommendation") by the County's Department of Land Use ("Department") as the reason for his vote, and the court below contravened Delaware law when it reviewed the Council record and invalidated Mr. Weiner's vote on the basis of a different reason that the court erroneously decided was the reason for Mr. Weiner's vote:

a. When a zoning body states the reasons for its decision on the record, and when those reasons are free of legal error and supported by substantial evidence, a court is bound by those stated reasons and may not review the entire record to find other statements that the court concludes are inconsistent with those stated reasons. Here, Mr. Weiner explicitly stated the reason for his vote on the record when he voted to approve the rezoning—his reliance on the Recommendation—and the Recommendation is free of legal error and supported by substantial evidence. The court below ignored this explicitly-stated reason when it invalidated Mr. Weiner's vote.

b. A zoning decision may not be invalidated because one reason for the decision is impermissible, if there is also a rational and valid reason given for the decision that is supported by substantial evidence. Here, Mr. Weiner's stated reason for his vote, his reliance on the Recommendation, is a rational and valid reason supported by substantial evidence, but the court below erroneously invalidated Mr. Weiner's vote on the basis of a different reason the court said was impermissible.

c. A zoning body only needs to meet the low evidentiary threshold of "substantial evidence" for its decision to be affirmed, meaning that there only needs to be enough evidence to be "adequate to support a conclusion," and it does not matter if there is additional material evidence not considered by the zoning body. Instead of applying this deferential standard, the court below applied a standard that requires an individual member to obtain and consider <u>all</u> evidence <u>subjectively</u> material to that member, which imposes obligations on zoning bodies and reviewing courts well beyond what Delaware law requires.

d. Even were the lower court's "all evidence subjectively material" standard appropriate, the evidence in the record does not support the lower court's finding that consideration of a TOA was material to Mr. Weiner, because Mr. Weiner never said it. Instead, the finding below rests upon the lower court's interpretation of and weighing of some (but not all) of the things Mr. Weiner said during Council's lengthy deliberations, and the court's failure to interpret those statements in the light most favorable to Mr. Weiner's decision.

2. The court below also erred when it held Mr. Weiner's vote was invalid because it was cast in the absence of information (a TOA) reasonably available to Mr. Weiner, because the premises underlying the Court's holding are invalid—a TOA was *not* reasonably available to Mr. Weiner because he did *not* have the ability to prevent Council from voting on the Ordinance until the TOA was completed, and there is no evidence that Mr. Weiner did not understand what he could (or could not) do:

a. Mr. Weiner *never* had the ability by himself to prevent Council from voting on the Ordinance until the TOA was provided. Under the County Council

Rules, only the sponsor(s) of legislation may move to table it, and the Ordinance's sponsor was Ms. Janet Kilpatrick, not Mr. Weiner. And even if Mr. Weiner could have moved to table the Ordinance, the motion would have needed the independent votes of at least six other members of Council to pass.

b. Mr. Weiner was not unaware of or mistaken as to his ability to force Council to table the Ordinance until he received and considered a TOA. The statements of Mr. Weiner relied upon by the court below do not go to the procedural question of whether Mr. Weiner could delay *this* Council vote on *this* Ordinance until a TOA for *this* redevelopment plan was provided. Nowhere in the record—*not even once*—does Mr. Weiner say that he wished he could do so. Instead, those statements go to a different issue—Mr. Weiner's desire to have County and State law changed so that Council knows before any rezoning vote *exactly* what infrastructure improvements will be made in connection with a proposed plan, and have the property owner's ironclad commitment to pay for those improvements.

c. The lower court's statement that Mr. Weiner's purported lack of awareness or mistake as to his ability to delay Council's vote on the Ordinance was the fault of the Department's General Manager (Mr. Culver) or Barley Mill's counsel is based on an erroneous characterization of their statements, and the lower court's failure to consider record evidence referenced during oral argument. The record is clear that Mr. Weiner, a 17-year member of Council with extensive experience in land use and traffic law, who has participated in dozens if not hundreds of rezoning votes, was not misled by any statements from those speaking before Council on this matter.

STATEMENT OF FACTS

1. A Brief Overview Of Land Development In New Castle County

a. The County's Plan Review Process For Development Plans With Rezonings

When a landowner files an application for a major subdivision plan accompanied by a rezoning, that process is regulated by the County's Unified Development Code,[1] and administered by the Department. This process typically entails the completion of the three stages of the County planning process ("Exploratory," "Preliminary," and "Record" plan reviews). UDC § 40.31.110.[2] At the Exploratory (UDC § 40.31.112.D) and Preliminary (§ 40.31.113) plan review stages, an applicant submits to the Department the required plans as well as other information required by the UDC. The Department reviews the plan and the additional information to determine whether the plan is "acceptable" to move to the next stage of the process. As part of this review process, a public hearing is held at each stage to further vet the plan.

If the proposed plan includes a rezoning, an ordinance to rezone the property is introduced before Council. When the Department and the Planning Board hold the public hearing on the preliminary plan, that hearing also must assess the plan against the legal standards applicable to a rezoning request under the UDC. UDC

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[1] NEW CASTLE CNTY. CODE, ch. 40 (hereinafter, the "UDC").

[2] In late 2009, Council adopted Ordinance No. 09-066 to collapse the County's development process from three steps to two steps. UDC amendments do not apply to applications already on file, 9 DEL. C. § 2659(c), and Barley Mill's application to redevelop the Property was filed on March 26, 2008. (A23-38) All citations to the UDC in this brief are to the applicable version of the UDC in effect on March 26, 2008, and are included in the Compendium of Relevant Authorities because the version of the UDC available online (http://czo.nccde.org) is the current version.

§ 40.31.410. At a scheduled Planning Board business meeting following the public hearing, the Department and the Planning Board issue a recommendation to Council to either approve or reject the rezoning and the preliminary plan. *Id.* The rezoning ordinance is then taken up by Council, which must hold a public hearing and render a decision. *Id.* If the rezoning ordinance is adopted, the applicant is permitted to proceed to the third step of review, the filing of the record plan. *Id.*

At the record plan stage, the applicant is required not only to complete the full construction plans for the project, it must also secure all agency approvals required by the UDC. UDC § 40.31.114. These include, but are not limited to, (i) DelDOT for transportation matters, (ii) the State Fire Marshal for state fire regulations, and (iii) the Department's Engineering Section for stormwater and drainage matters. *Id*. Once the Department certifies that the record plan is complete, it is forwarded on to Council, which, following a public hearing, takes final action on the record plan. Upon final approval, the plan is recorded at the Recorder of Deeds. *Id.*

b. <u>The County's Redevelopment Ordinance</u>

Council amended the County's review process with the adoption by ordinance of a "redevelopment statute," first enacted in 2002 and substantially amended in 2006. Found in Article 8 of the UDC, the statute seeks to encourage the redevelopment of vacant, abandoned, or underutilized properties by offering developers incentives for utilizing these sites as opposed to undeveloped "green fields." UDC § 40.08.130. This process, which was thoroughly described by the Court of Chancery and this

Court in *Christiana Town Center, LLC v. New Castle County*,[3] shortened the development process for major plans from three steps to two steps except in cases where a rezoning is requested, and provides incentives such as density bonuses, a waiver of impact fees and, as discussed below, the potential for a modified traffic review, to developers who focused their efforts on qualifying properties.

c. How Traffic Issues Are Handled

An applicant submitting an exploratory sketch plan to the Department must include with the plan raw traffic data concerning the area around the proposed development, such as the number of vehicle trips, road conditions, accidents, and, if available, peak level of service at intersections. UDC § 40.31.112.D.3.[4] Generally speaking, the Department reviews this traffic data and decides whether a formal TIS is required in order to determine the proposed development's effect on traffic in areas around the proposed development. If the Department determines that a TIS is necessary, then the traffic capacity and level of service requirements set forth in Article 11 of the UDC must be met. UDC § 40.31.112.F.3.

However, the UDC imposes different requirements regarding traffic for plans which qualify for redevelopment status under Article 8. Under Article 8, either the Department or DelDOT may require an applicant to complete a TOA to determine the potential traffic impact from the proposed redevelopment, but only DelDOT can require the applicant to perform a TIS. UDC § 40.08.130.B.6.e.7.

DelDOT's determination not to request a TIS for a redevelopment plan affects

[3] 2009 Del. Ch. LEXIS 40 (Del. Ch. Mar. 12, 2009) ("*CTC I*"), *aff'd*, 985 A.2d 389, 2009 Del. LEXIS 615 (Del. Dec. 1, 2009) ("*CTC II*").

[4] Barley Mill submitted this traffic data with its Exploratory Sketch Plan in 2008. (A27)

the plan process in two different ways. First, the redevelopment plan is not required to meet Article 11's traffic capacity and level of service requirements.[5] Second, if a TIS is required, an applicant is not permitted to proceed to the next step of plan review until the TIS is completed. UDC § 40.31.112.F. As a practical matter, then, when a TIS is required, a proposed rezoning cannot get to a Council vote until after the TIS is completed, because a development plan cannot move from the Exploratory stage to the Preliminary stage until the TIS is completed. The same is not true for a TOA.

With either a TOA or a TIS, the information collected is provided to DelDOT for its analysis, consistent with DelDOT's absolute responsibility under State law for the "care, management and control" of State roads and for regulating traffic upon and access to those roads. *See* 17 DEL. C. §§ 131(a), 141(a), 146(a). If DelDOT finds infrastructure improvements are needed to accommodate a proposed development, its report on the TOA/TIS recommends improvements DelDOT believes might address the issue, such as relocating site entrances, adding or retiming traffic signals, or modifying nearby intersections. It is not until the record plan stage that the specific improvements for the proposed project are identified.[6] This identification generally occurs prior to DelDOT issuing the letter of approval required before a record plan can be approved and recorded. UDC § 40.31.114.B.1.

2. The Barley Mill Office Complex

[5] *See CTC II*, 2009 Del. LEXIS 615, at *4-5; *CTC I*, 2009 Del. Ch. LEXIS 40, at *29-32.

[6] This was explained repeatedly by Mr. Culver. (A247-48; A332-33; A340-41) Council member George Smiley noted it as well. (A298-99) *See also Hansen v. Kent Cnty.*, 2007 Del. Ch. LEXIS 72, at *10 (Del. Ch. May 25, 2007) ("Traffic signals are evaluated and, if appropriate, approved by DelDOT during the site planning or subdivision process. Advancing DelDOT's efforts to the rezoning stage of land development would serve no apparent purpose.")

This matter has its genesis in a proposal to redevelop and reinvigorate the Property, a sprawling office park located on a 92-acre collection of parcels of land at the northeast corner of the intersection of State Routes 48 and 141. (A23-38; A146-50) The Property presently contains over 1,000,000 square feet of office space distributed through a number of buildings largely constructed in the early- to mid-1980's under prior versions of the County zoning code. (A147) DuPont, the primary tenant of these buildings at the time of this application, was in the process of relocating a number of its employees working at the Property to other DuPont facilities, resulting in an increase in the number of vacancies at the Property.

3. Barley Mill, LLC Acquires And <u>Seeks To Redevelop The Property</u>

Barley Mill acquired the Property in 2007, and in late March 2008 filed an application with the Department to redevelop the Property. (A23-38) The Property was zoned Office Regional ("OR") under the UDC, which permitted a variety of uses on the Property, including a mixed use development option that would incorporate residential, commercial and office uses.[7] The submitted plans proposed to demolish all existing buildings on the Property and redevelop the site with 700 residential units, 675,000 square feet of retail space, and 1,485,000 of office space, for a total of over 2.8 million square feet of development (the "Initial Plan"). (*Id.*; A146-47) As this proposal called for the demolition of greater than 50% of the existing square footage on the Property, and because the Initial Plan showed at least a 400% improvement to existing design elements, the project was classified as a redevelopment plan pursuant

[7] UDC, Table 40.03.110.A.

to the Article 8 of the UDC. (A23-38; A57-59) DelDOT requested a TOA from Barley Mill (as did the Department), but DelDOT did not request a TIS. (A39; A40-45)

4. Community Opposition To The Initial Plan

The Initial Plan was one of several County plans submitted to the Department by Barley Mill and affiliated entities in the spring of 2008 for the greater Wilmington area (the "Area Plans"). (A299-300). Almost from its inception, the Initial Plan attracted debate. The Initial Plan was vetted at two hearings of the County Planning Board (the "Board"). (A46-47) While a number of residents raised objections to the Initial Plan (A216), the Initial Plan was considered "by-right" under the UDC, and no discretionary votes were needed for it. (A398-99) Recognizing this, a number of area residents and civic organizations formed Citizens for Responsible Growth in New Castle County ("CRG"), an umbrella civic organization designed to negotiate with the Owner and its affiliates with respect to the Area Plans. (A153; A299-300) While talks over a reduction in the scale of the proposed projects were initiated, the Initial Plan continued to progress through the land use process such that it had entered the final stage of that process (the "Record Plan") by 2010. (A398; A55-59; A61)

5. Barley Mill Reaches A Compromise With CRG

Subsequent to the submission of the Record Plan to the Department, the County, through then-County Executive Christopher A. Coons ("Mr. Coons"), brought CRG and Barley Mill and its affiliated entities together in an effort to forge a compromise regarding the Area Plans. (A62-64) As these discussions bore fruit, Mr. Coons issued a press release announcing that a compromise had been reached with the various ownership entities for the Area Plans to revise the pending plans in an effort to

ease the concerns of area residents. (*Id.*) The press release detailed the changes to the Area Plans and also confirmed that some of the revised plans would require discretionary approvals from Council or the County's Board of Adjustment to be brought to fruition. (*Id.*) With regard to the Property, these revisions included the elimination of the residential component of the Initial Plan, along with a 221,000 square foot reduction in the commercial space and a 285,000 square foot reduction in the office space. (A75-85; A216) These changes reduced the overall square footage from 2,850,000 square feet to 1,654,000 square feet. (A62-64)

This compromise was ultimately memorialized in a Compromise Agreement by and between CRG and ownership entities of the Area Plans (the "Agreement"). (A68-104) In addition to memorializing the proposed changes for the Area Plans, the Agreement also required the preparation of voluntary assurances regarding the future use and development of the Area Plans (the "Deed Restrictions") to be recorded on each of the properties bound by the Agreement following the conclusion of the land development process for each property. (A73-75) The Deed Restrictions applicable to the Property memorialized, among other things, the maximum square footage permitted, the size and height of the buildings, the permitted uses, and other design elements to be incorporated on the Property. (A105-126)

6. <u>Barley Mill Files The Revised Plan</u>

In accordance with the direction of the Department and consistent with the Agreement, Barley Mill, on or about March 24, 2011, submitted its revised plan for the Property (the "Revised Plan"). (A127-138) The Revised Plan, although no longer considered a mixed use plan because of the elimination of the residential component,

remained a redevelopment plan under Article 8 of the UDC. Because the Revised Plan was no longer a "mixed use" development, a rezoning of a portion of the Property was required to complete the revisions contemplated by the Agreement. As such, Barley Mill, in accordance with the Agreement, proposed rezoning nearly 37 acres of the Property from OR to Commercial Regional ("CR"). (A139A) The area proposed for rezoning was largely concentrated along the Route 141 frontage of the Property, the same area that was the primary focus of the commercial development on the Initial Plan. (A31-38; A132-38) This modification did not trigger DelDOT (or the Department) to request a change in the type of traffic analysis for the project.

Because the Initial Plan had already reached record plan review, the County advised Barley Mill as to how the Revised Plan would be reviewed under the UDC. (A139) Because a rezoning was being proposed in conjunction with the reduction in square footage, it was necessary for the Board, the Department, and Council to review the rezoning component of the Revised Plan against the standards contained in UDC § 40.31.410 before a revised record plan could be submitted. *Id.*

7. The Revised Plan Is Reviewed By The Department And The Planning Board

The Revised Plan was considered by the Department and the Board at a public hearing on June 7, 2011. (A146-213) The hearing was well-attended by County residents with an interest in the application, and many testified regarding the application. (A143-45) In addition, Barley Mill, through its attorney and engineer, testified regarding the application, and the Department, through Mr. Culver, responded to questions posed by the Board. (A146-213) The Board, following the conclusion of testimony, kept the record open several days for the submission of additional information

regarding the application. (A197-98) The Board reconvened on June 21, 2011 for its business meeting. The Department issued its recommendation that Council approve the rezoning, finding the application satisfied each of the criteria of UDC § 40.31.410.[8] (A227-40) The Board disagreed with the Department and issued a non-binding recommendation that Council deny the rezoning. (A257-58) The application was then forwarded to Council for its consideration.

8. Council Considers The Revised Plan

The Revised Plan was first considered by Council at its October 4, 2011 Land Use Committee meeting. (A158-60) This meeting was also well-attended by members of the public, with people in favor of or opposed to the application receiving an opportunity to discuss the matter. (A193-243) In addition, Council received numerous emails, letters and submissions regarding the application. Council was also afforded the opportunity to ask questions of Barley Mill's counsel, Mr. Culver, and others speaking on the matter. In addition to the criteria applicable to a rezoning, traffic was discussed at this meeting, with Mr. Culver providing Council, in response to questioning, an extended discussion of the role that traffic plays in a rezoning application under the UDC. (A329-41) Council did not vote on the Ordinance.

Council reconvened on October 11 to consider the Ordinance. (A354-470) At this meeting, Council again heard from Barley Mill, the Department, and members of the public. During the course of this hearing, one recurring theme voiced by those

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[8] As part of the discussion before the Board, the Board was reminded by Mr. Culver that this was a redevelopment plan and was subject to a traffic analysis in the form of a TOA. (A147-51; A248-49) Under applicable provisions of the UDC, a TOA did not have to be completed before Council's vote on the Ordinance. (A215; A39; A56)

opposed to the rezoning, as well as some members of Council, was the lack of County involvement in the enforcement of the Deed Restrictions. (AA376; A428-29; A451-52; A455) Barley Mill indicated that it did not object to the County being included as a party to some or all of the Deed Restrictions. (A456) Council briefly recessed so that the Deed Restrictions could be reviewed for a determination of which, if any, of the Deed Restrictions could be incorporated into the Ordinance and/or the Revised Plan. (A473-74) Ultimately, a proposed amendment to the Ordinance was introduced before Council that would incorporate nine of the Deed Restrictions into the Ordinance to provide the County with the ability to enforce those provisions (the "Add-Ons"). Following the reading into the record of the Add-Ons,[9] Ms. Kilpatrick, the Ordinance's sponsor, moved to table the Ordinance to allow for additional public input and for Council to consider the proposed Add-Ons. (A367) Council unanimously approved, and then adjourned. (*Id.*)

Council reconvened for two additional public meetings to discuss the Revised Plan. While the primary focus of the additional meetings was the Add-Ons, members of the public offering testimony were not limited in the topics that they could discuss. (A477-670) Thus, a wide variety of topics were covered at the October 18 Land Use Committee meeting and the October 25 Council meeting. At the outset of the October 25 meeting, Council voted to amend the Ordinance to include the Add-Ons, as well as an additional restriction regarding the timing of the construction of a stormwater management pond on the Property. (A597-98; A625-26)

[9] For purposes of ease of understanding only, Barley Mill has adopted the nomenclature used by Plaintiffs below for the additional restrictions.

9. Council Votes On And Approves The Ordinance

Council then considered the entire Ordinance, as amended. Council members had additional opportunities to speak, as did members of the public. Council President Kovach then closed the floor to public comment, and a motion to call the vote was made and seconded. (A662-70) County Council Rules require members to state the reason for their vote on a proposed rezoning during the roll call,[10] so Mr. Kovach reminded members that they needed to state their rationale when they voted, and all thirteen members proceeded to do so. (A668) Council votes in alphabetical order,[11] so Mr. Weiner was the thirteenth and final member to vote, and he stated:

> I am voting yes because by my analysis to vote no would have much more adverse traffic impact and land use impact upon the community and therefore I believe that it's more suitable to build a smaller shopping center ***thus I'm following the recommendation of the Land Use Department***.

(A670) (emph. added). The Ordinance passed by a 7-6 vote. Council then adjourned, having spent 13 hours over four meetings considering the Ordinance and the Revised Plan.[12] The Ordinance was then referred to the County Executive for his signature. As the County Executive had previously recused himself from any participation in this matter due to his wife's former representation of Barley Mill, by law the Ordinance was allowed to become law without his signature. (A673-74)

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[10] CNTY. COUNCIL R. 4.5.1.3. Members are required to state their reasons on the record either by stating their reasons in their own words, or by relying on the reasons for or against the proposed rezoning set forth in the recommendations from the Department and/or the Planning Board.

[11] CNTY. COUNCIL R. 4.4.6.

[12] According to the audio transcripts of the October 4, 11, 18, and 25 meetings, Council met for a combined 14 hours, 34 minutes, of which 12 hours, 41 minutes (87%) were spent discussing the Ordinance. *See* Meeting Archive/Audio – County Council, http://www2.nccde.org/council/Schedule/Archive/default.aspx (last visited Sept. 21, 2013).

ARGUMENT

I. THE COURT BELOW ERRED IN RULING THAT MR. WEINER'S VOTE WAS ARBITRARY AND CAPRICIOUS

A. Question Presented

Was Mr. Weiner's vote arbitrary and capricious because he cast it without obtaining and considering all information he subjectively believed was material to his decision that was reasonably available to him? (A759-772; A819-20; A861-64; A906-08; A1094-112; A1127-28; A1138-40)

B. Standard Of Review

When reviewing a zoning decision, this Court applies the same deferential scope of review as the court below.[13] This Court presumes a rezoning decision is valid unless it can be "clearly shown" that it is arbitrary and capricious because it is "not reasonably related to the public health, safety, or welfare."[14] The arbitrary and capricious standard is "the least judicial role, short of unreviewability,"[15] and asks whether the decision was "unconsidered."[16] Therefore, if a zoning decision is free of legal error and there is substantial evidence in the record to support it, it must be affirmed.[17]

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[13] *Lynch v. City of Rehoboth Beach*, 894 A.2d 407, 2006 Del. LEXIS 115, *12-13 (Del. 2006).

[14] *Willdel Realty, Inc. v. New Castle Cnty.*, 281 A.2d 612, 614 (Del. 1971).

[15] *Del. Transit Co. v. Roane*, 2011 Del. Super. LEXIS 370, at *40 n.101 (Del. Super. Aug. 24, 2011) (quoting *Arbitrariness*, 33 FED. PRAC. & PROC. JUDICIAL REV. § 8334 (2011)).

[16] *Willdel Realty, Inc. v. New Castle Cnty.*, 270 A.2d 174, 178 (Del. Ch. 1970).

[17] *New Castle Cnty. Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275-76 (Del. 1989) ("*BCD*").

"Substantial evidence" is "more than a scintilla, but less than a preponderance," and merely consists of enough evidence to be "adequate to support a conclusion."[18] A reviewing court cannot reweigh or judge the evidence, pick and choose among conflicting evidence, or make its own factual findings or credibility determinations,[19] and it "must view the evidence and reasonable inferences from that evidence in the light most favorable to the [zoning body's] decision."[20] If there is some relevant evidence to support the decision, the court must affirm, even if the decision is objectively wrong or against the weight of the evidence, and even if the court would have decided the matter differently.[21] Legal rulings are reviewed *de novo*.[22]

C. Merits Of The Argument

1. The Court Below Erred In Holding That The Reason For Mr. Weiner's Vote Was His Comparison Of The Traffic Effects For The Initial And Revised Plans And That A TOA Was Subjectively Material To Mr. Weiner's Vote

a. The Court Below Did Not Follow Precedent On Judicial Review Of Zoning Decisions And Failed To Credit Mr. Weiner's Stated Reason For His Vote

Nearly 27 years ago, in *Tate v. Miles*, this Court held that zoning bodies must give the reasons for their zoning decisions, so that a court may properly perform the limited review allowed under Delaware law to determine whether the zoning body properly considered the statutorily-prescribed factors.[23] The zoning body must *either*

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[18] *Olney v. Cooch*, 425 A.2d 610, 613-15 (Del. 1971) (reversing as improper Superior Court's conclusion that agency's decision was erroneous in light of overwhelming contradictory evidence).

[19] *Lynch*, 2006 Del. LEXIS 115, at *13.

[20] 83 AM. JUR.2D *Zoning and Planning* § 960.

[21] *Olney*, 425 A.2d at 614; *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009).

[22] *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.2d 326, 329 (Del. 2012).

[23] *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).

state its reasons on the record *or* create an evidentiary record that is so one-sided that there is no uncertainty as to the reasons for the decision.[24] This is a disjunctive standard—state *or* create—but the two options are not equally favored: this Court strongly prefers that zoning bodies formally state their reasons on the record.[25] The reason why is that members of a deliberative body like Council have multiple opportunities to speak on a given subject matter, and ascribing meaning, intent, and importance to everything a member says is not a simple task. Reviewing the entire record to ascertain the reasons for a decision introduces uncertainty because a court has to try and figure out what among all the things a member said is the basis for that member's vote, and risks having a court "substitute its views for the reasons given by the member of the [zoning body],"[26] and thus "the nature of the grounds for the zoning decision would itself become a subject of litigation."[27]

In other words, *Tate* and the cases that follow it instruct that when a zoning body states the reasons for its decision on the record when it votes, and when those reasons are free of legal error and supported by substantial evidence in the record, a

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[24] *Tate*, 503 A.2d at 191; *BCD*, 567 A.2d at 1276; *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 131, at *14 (Del. Ch. July 10, 2006) ("*O'Neill II*"); *Tidewater Utils., Inc. v. Sussex Cnty.*, 1986 Del. Ch. LEXIS 455, at *3-4 (Del. Ch. Sept. 17, 1986).

[25] *Tate*, 503 A.2d at 191; *BCD*, 567 A.2d at 1276-77. They may do so, for example, by having members state their reasons when they cast their votes, or by approving a written statement of factual findings and legal conclusions to be attached to the ordinance. *O'Neill II*, 2006 Del. Ch. LEXIS 131, at *15-16. *See also BC Dev. Assocs. v. New Castle Cnty. Council*, 1988 Del. Ch. LEXIS 155, at *12 (Del. Ch. Dec. 6, 1988) (reasons may be shown "through statements made at the conclusion of the hearing or through written findings of fact and conclusions of law prepared and adopted thereafter"), *rev'd in part on other grounds*, 567 A.2d 1271 (Del. 1989).

[26] *O'Neill II*, 2006 Del. Ch. LEXIS 131, at *22, *25-26 (finding town council member's stated reason for her rezoning vote invalid and refusing to review the record to see if there were proper and sufficient reasons and then substitute those reasons).

[27] *Tidewater*, 1986 Del. Ch. LEXIS 455, at *7 n.2.

court is bound by those stated reasons and may not then review the entire record to find and speculate on other statements that might have influenced the members.[28]

In New Castle County, *Tate* has been formally incorporated into the County Council Rules, and members are required to state the reasons for their vote on the record when they give their vote. (*See* Stmt. of Facts, *supra*, at n.10) Here, when Mr. Weiner voted yes, he stated that he was following the Recommendation. (A670)[29] Therefore, with regard to the lower court's ruling, if the Recommendation was free of legal error and supported by substantial evidence with regard to how traffic was handled, Mr. Weiner could rely on the Recommendation as the reason for his decision,[30] and the court below was required to accept it.

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[28] *O'Neill II*, 2006 Del. Ch. LEXIS 131, at *26; *see also McQuail v. Shell Oil Co.*, 183 A.2d 572, 580 (Del. 1962) ("The stated reasons for a decision...are to be taken as the premises on which public officers have taken official action."); 83 AM. JUR.2D *Zoning and Planning* § 955 ("If a zoning agency has stated its reasons for its actions, a reviewing court should not reach beyond those stated purposes to search the record for other reasons[.]"); *DeMaria v. Enfield Planning and Zoning Comm'n*, 271 A.2d 105, 109 (Conn. 1970) ("[W]here a zoning commission has formally stated the reasons for its decision[,] the court should not go behind that official collective statement...[in an] attempt to search out and speculate upon other reasons which might have influenced some or all of the members of the commission[.]") (cited in *O'Neill II*).

[29] Because the rulings below turn on words attributed to Mr. Weiner, Mr. Culver, and Barley Mill's counsel during the six Council and Planning Board meetings, their statements during those meetings have been highlighted in the transcripts to make them easier to find. Mr. Culver's statements are in blue, Barley Mill's counsel's statements are in yellow, and Mr. Weiner's statements are in pink. Statements of Council's attorney, Ms. Carol Dulin, and then-County Attorney Gregg Wilson are in green. The transcripts are otherwise identical to what was before the court below.

[30] *Holowka v. New Castle Cnty. Bd. of Adjustment*, 2003 Del. Super. LEXIS 161, at *32 (Del. Super. Apr. 15, 2003) ("The Court finds [the Department's] report to be strongly convincing and substantial evidence in favor of the Board's decision. In its report, the [Department] similarly considered the legal standard articulated for granting zoning variances, notably, Sec. § 40.31.451 of the UDC and 9 DEL. C. § 1313, and the four-step analysis in *Kwik-Check*."); *Comm'rs of Slaughter Beach v. Cnty. Council of Sussex Cnty.*, 1981 Del. Ch. LEXIS 485, at *12 (Del. Ch. July 13, 1981) ("Council had a right to rely on the report and recommendation of the Planning and Zoning Commission as well as all else that was presented to it, and presumably did so.").

Here, the Recommendation is indeed free of legal error and supported by substantial evidence. It correctly identifies and addresses the factors that must be considered under UDC § 40.31.410 to support a rezoning, and it explains why the proposed rezoning meets those elements. (A214-24) It is consistent with the lower court's ruling that State and County law do not require Council to obtain or consider a TOA before a rezoning vote (*compare* A214-24 *with* Op. 16),[31] and it correctly describes the nature of the TOA being done for the Revised Plan, identifies traffic concerns raised by members of the public, and conveys the comments some of the Planning Board members made concerning traffic (A214-24). It also correctly describes applicable law and procedures in noting that the Revised Plan cannot be approved and recorded, and the Property cannot be developed, until DelDOT is satisfied that traffic mitigation and infrastructure improvements are appropriate, and that this occurs during the record plan review (*i.e.*, after the rezoning vote) (A215; A219),[32] consistent with DelDOT's absolute responsibility for the care, management, and control of public roads, and the regulation of traffic on and access to those roads.[33]

In short, Mr. Weiner relied upon the Recommendation for his vote, and the Recommendation followed State and County law in not advising that Council was required to have a completed TOA before voting on the Ordinance, and in telling Council that determining the specific required traffic mitigation and infrastructure changes

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[31] Barley Mill is not appealing the ruling that neither State nor County law required Council to obtain and consider a TOA before voting on the Ordinance. Plaintiffs and the County cross-appealed on that ruling; Barley Mill will therefore address that ruling in its cross-appeal answering brief.

[32] Mr. Culver repeated these points during the Council meetings. *See* A339; A343.

[33] *See* 17 DEL. C. §§ 131(a), 141(a), 146(a).

is DelDOT's responsibility and is handled during the record plan stage.[34] Mr. Weiner therefore appropriately relied on the Recommendation with regard to traffic.[35]

The court below discussed none of this in the Opinion. The court did not acknowledge Mr. Weiner's reliance on the Recommendation as the stated reason his vote (*see* Op. 12, 32), let alone give it the weight that Delaware law requires. Instead, the court below reviewed the entire record and concluded that the reason for Mr. Weiner's vote was that he believed traffic impact from the Initial Plan would be worse than from the Revised Plan (Op. 12), and that one statement by Mr. Weiner (among many) during four different meeting showed that a completed TOA was material to Mr. Weiner's decision (Op. 32-33, 35). This was erroneous under Delaware law, and the judgment should be reversed because of it.

b. The Court Below Erred Because Mr. Weiner Gave A Rational And Valid Reason For His Vote That Is Supported By Substantial Evidence

Mr. Weiner's reliance on the Recommendation as the reason for his vote renders the lower court's ruling erroneous for another reason: the court held that Mr. Weiner's vote was arbitrary and capricious because the reason for his vote was invalid (his comparison of the traffic effects of the Initial Plan and Revised Plan without having a completed TOA), even though Mr. Weiner articulated a rational and valid reason

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[34] Council also received and considered hours of statements from the public, a significant portion of which was directed to traffic. (A404-54; A560-91; A613-25; A653-62) So Mr. Weiner's decision can hardly be characterized as "unconsidered" with regard to traffic, even without a completed TOA.

[35] *See, e.g.*, *Hutchins v. Cnty. Council of Sussex Cnty.*, 1986 Del. Ch. LEXIS 500, at *11-12 (Del. Ch. Dec. 18, 1986) (suggesting it would have been appropriate for Sussex County Council, as a reason for its vote to approve a rezoning, to rely on the fact that the State would cure traffic problems before development of property was completed, if that reason had been stated on the record, even though DelDOT had not completed and analyzed the TIS before council voted).

for his vote that is free of legal error and supported by substantial evidence (his reliance on the Recommendation). Under the limited scope of review courts exercise over zoning decisions, only one of the reasons given by a member of a zoning body needs to be sufficient in order to sustain that member's vote (and by extension the decision of the zoning body): "The inclusion of unsupported or irrational reasons will not render a decision arbitrary and capricious so long as there is also a rational reason articulated in the record and supported by substantial evidence for the decision."[36]

Here, as explained in the preceding section of this brief, Mr. Weiner's reliance on the Recommendation is permissible, and the Recommendation is free of legal error and its conclusions are supported by substantial evidence. Regardless of whether the court below was correct that Mr. Weiner's belief that traffic effects would be worse under the Initial Plan than under the Revised Plan was an arbitrary and invalid reason (because of the failure to obtain a TOA before voting), Mr. Weiner's reliance on the Recommendation is sufficient to sustain Mr. Weiner's vote and the Ordinance.

c. The Court Below Applied The Wrong Evidentiary Standard To Determine What Information Mr. Weiner Needed In Order To Cast An Informed Vote

The third reason why the court below erred is that it applied an incorrect standard to assessing Mr. Weiner's vote. Council only needs to meet the low evidentiary standard of "substantial evidence" to justify its decision. (*See* Std. of Rev., Arg't I.B,

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[36] *Coker v. Kent Cnty. Levy Court*, 2008 Del. Ch. LEXIS 190, at *24 (Del. Ch. Dec. 23, 2008) (citing 101A C.J.S. *Zoning & Land Planning* § 343 ("[W]here any one of the reasons given for the denial of an application is sufficient, it is unnecessary to review other reasons given.") and RATHKOPF'S THE LAW OF ZONING AND PLANNING § 62:33 ("A board abuses its discretion when its decision is based *solely* on grounds which it could not consider, or when it is 'arbitrary.'")). *See also Rapoport v. Zoning Bd. of Appeals*, 19 A.3d 622, 630 (Conn. 2011) (holding same).

supra) But instead of applying this deferential standard, the court below held that a Council member has a duty to obtain and consider *all* information *subjectively* material to that member's decision that is reasonably available. (Op. 32, 35) This Court should decline to embrace this approach, for two reasons.

First, it is contrary to the "substantial evidence" standard, which requires only that there be evidence *adequate* to support a decision. Adequate evidence sets a floor or minimum threshold that must be met in order to sustain a decision, and once that threshold is exceeded judicial inquiry into the sufficiency of the evidence ends, and it does not matter if there is other material evidence that was not considered.[37] Requiring Council members to obtain and consider *all* evidence *subjectively* material to their decision that is reasonably available imposes a much higher burden on Council in gathering evidence, and requires significantly greater judicial inquiry as courts review the record to determine what evidence was subjectively material to each Council member, whether that evidence was reasonably available, and whether the Council member considered that evidence in her decision.[38]

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[37] *See Searles v. Darling*, 83 A.2d 96, 98-100 (Del. 1951) (suggesting that if the record before a zoning body contains substantial evidence to support the decision reached, a court cannot reverse the decision on the basis of additional material evidence not in the zoning body's record, even if the additional material evidence would cause the court to come to a different conclusion); *Mellow v. Bd. of Adjustment*, 565 A.2d 947, 951-52 (Del. Super. 1988) (holding that when a zoning body's record contains substantial evidence to support the decision, it does not matter if there is other material evidence not considered by the zoning body); *cf. Holley Enters. v. City of Wilmington*, 2009 Del. Ch. LEXIS 101, at *11-12 (Del. Ch. June 5, 2009) (rejecting argument that substantial evidence requires an agency to "gather evidence" to support its decision "beyond a shadow of a doubt").

[38] The *Harmony* opinion cited by the court below (Op. 28-29) is consistent with this analysis. The court there stated the uncontroversial proposition that an agency needs to have an adequate decision-making process, one "rationally designed to uncover and address available facts and evidence," in order to find an agency decision is supported by substantial evidence. *Harmony Constr., Inc. v. DelDOT,* 668 A.2d 746, 750-51 (Del. Ch. 1995). But the process chosen does *not* have to uncover *all* material information reasonably available to be valid, because a "rationally designed" process does not guarantee that result. Instead of applying *Harmony*'s limited holding correctly, the court

Second, the standard is inadvisable as a matter of public policy. It is anti-majoritarian, because it allows a Council member to hold up legislation for purely subjective reasons that may bear no relationship to the statutory factors Council is required to weigh,[39] and it effectively gives that member veto power over Council's work simply on that member's say-so that the information is material.[40] It will also impede Council's ability to administer County affairs efficiently,[41] because it imposes an obligation on individual Council members to hold up legislation until they receive information or analyses from agencies, such as DelDOT, over which Council has no control—leading to indefinite delays in the consideration of County legislation if those agencies will not accede to Council's unilaterally-imposed timetable.

Judicial review of Council zoning decisions is a limited, highly-deferential form of review. The court below applied a more searching and intensive standard of "all information subjectively material" to Mr. Weiner's vote that is reasonably available, and its ruling should be reversed for this reason as well.

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below construed *Harmony* to require "all material information reasonably available" (Op. 34 n.114), turning an opinion about process into one about the necessary amount of evidence.

[39] *But see* Argument I.C.2, *infra* (explaining why Mr. Weiner did not have the ability to cause Council to delay consideration of the Ordinance until he received a TOA).

[40] The lower court's ruling if affirmed will extend far beyond Council's consideration of rezoning legislation, because the "arbitrary and capricious" standard of review and the "substantial evidence" evidentiary threshold apply not only to the acts of county councils, but to many State agencies as well. *See, e.g.*, *Julian v. DelDOT*, 53 A.3d 1081, 1083 (Del. 2012) (arbitrary and capricious); 29 DEL. C. § 10142(d) (substantial evidence).

[41] 9 DEL. C. § 330(b)(1) (imposing such an obligation on Council).

d. The Finding Of The Court Below That A TOA Was Subjectively Material To Mr. Weiner Is Erroneous Because Mr. Weiner Never Said It Was Material, And Delaware Law Did Not Allow The Court Below To Weigh And Value Mr. Weiner's Various Statements

Finally, the decision of the court below must also be reversed, even if its new evidentiary standard were appropriate, because the record does not support the lower court's finding (Op. 33) that consideration of a TOA for the Revised Plan was subjectively material to Mr. Weiner. Mr. Weiner *never* says so. In the testimony relied upon by the court below, Mr. Weiner merely expressed the view that it would be "better" if the law required Council to know before any rezoning vote *exactly* what infrastructure improvements would be made in connection with a proposed development and have the property owner's ironclad commitment to pay for those improvements. (A662-63) That testimony is merely an expression of his desire to change County and State law, not something that can reasonably be construed as a statement that the TOA for *this* development plan was "material" to his vote.[42]

Because Mr. Weiner never actually stated that a TOA was "material," the court below could only reach its conclusion by independently reviewing the record and interpreting one of the many things that Mr. Weiner said during Council's deliberations

[42] Even were it appropriate for the court below to construe "better" as equivalent to "material," the ruling would still be erroneous because it would not accomplish the purpose for which the court below was requiring it—to render Mr. Weiner's reason for his vote an informed reason. *First*, the kind of traffic information to which Mr. Weiner was referring, specific mandated infrastructure improvements and the developer's ironclad commitment to pay for them, do not come out of a TOA and are not decided prior to Council rezoning votes. *See* Stmt. of Facts, *supra*, at n.6, and Arg't I.C.2.b, *infra*. *Second*, the reason for Mr. Weiner's vote as determined by the court below was Mr. Weiner's *comparison* of the traffic effects from the Initial Plan and the Revised Plan (Op. 33), but the TOA required by the court below would only address potential traffic effects from the Revised Plan, meaning Mr. Weiner would be unable to make the desired comparison, and the reason for his vote (as determined by the court below) *still* would not be fully informed.

as showing that Mr. Weiner's vote was arbitrary and capricious because the reason for his vote (according to the court) was his belief that traffic effects from the Initial Plan would be worse than those from the Revised Plan (Op. 12), and thus he could not rely upon that reason without obtaining and considering a completed TOA.[43] In doing so, the court below improperly weighed the evidence, failed to interpret that evidence and the reasonable inferences from it in the light most favorable to Mr. Weiner's decision, and elevated the TOA to "material" status for Mr. Weiner.[44]

2. The Court Below Erred In Ruling Mr. Weiner Voted In The Absence Of Information Reasonably Available To Him

a. Mr. Weiner Did Not Have The Ability To Prevent Council From Voting On The Ordinance

The second part of the lower court's ruling that the TOA was reasonably available to Mr. Weiner is its conclusion that there was no legal barrier to Mr. Weiner stopping Council from voting until he received and considered the TOA. (Op. 33) The reason why, according to the court below, was that Mr. Weiner could have had the Ordinance tabled until the TOA was provided (*id.*), because under the UDC provi-

[43] The court below incorrectly paraphrased what Mr. Weiner said, because Mr. Weiner referred to "traffic impact" *and* "land use impact" (A670), but the court focused only on traffic impact (Op. 33).

[44] The lower court's elevation of the TOA to "material" status is a textbook example of why this Court strongly prefers that the reasons for zoning votes be stated on the record: traffic was not the only issue Mr. Weiner mentioned as an issue of concern during Council's 13 hours of deliberation, yet the court apparently found his concerns rose to "material" status only for traffic. *Compare* A524-26 (referring to the effect of the Property's redevelopment on the nearby Downs Conservancy as "important" and "a great concern") *and* A516 (referring to what would happen to the Property's trees was "a concern") *with* A369 (referring to traffic as a "major concern"). This inconsistent treatment of similar statements illustrates why courts may not search the record to find reasons for a decision when the reason is clearly stated on the record, and why they may not weigh and value the record evidence themselves.

sions applicable to the Revised Plan, Council could table a rezoning ordinance for the purpose of obtaining more information (Op. 26 (citing UDC § 40.31.113.G)).

The lower court's ruling is wrong because the court improperly conflated the *substantive* question of whether Council has the power to table a rezoning ordinance with the *procedural* question of who within Council has the power to make that happen. Under the County Council Rules, only the sponsor of an ordinance has the ability to move to table it.[45] Ms. Kilpatrick sponsored the Ordinance (A671), so only she, and not Mr. Wiener, could have moved to table the Ordinance. And even if Ms. Kilpatrick would have agreed to do so, routine motions require a majority vote to pass under the Council Rules, meaning seven of thirteen members.[46] So even if Mr. Weiner sponsored or co-sponsored the Ordinance,[47] he would still have needed to persuade six other members of Council to vote yes. In other words, Council—*as a body*—had the power to table the Ordinance, but Mr. Weiner—*as a member*—did not have the power to make that happen.

Mr. Weiner's inability to move to table the Ordinance, and his need for six other members of Council to agree with him (even if he could move), mandate reversal of the lower court's invalidation of the Ordinance, because the ruling that a TOA was "reasonably available" depends entirely on Mr. Weiner's ability to force a delay by causing the Ordinance to be tabled until a TOA was completed and provided to

[45] CNTY. COUNCIL R. 3.1.1. ("The sponsor manages the legislation and is the only Council member who can introduce, table, lift from the table, substitute, and/or withdraw the legislation."); *see also* CNTY. COUNCIL R. 3.4.1. and 8.1.6.2.

[46] CNTY. COUNCIL R. 3.6.3.

[47] A co-sponsor is authorized to move to table legislation when the primary sponsor is absent. CNTY. COUNCIL R. 3.1.1.

him (Op. 33), and he lacked that ability. Ms. Kilpatrick cannot be faulted for not moving to table the Ordinance when she relied on the Recommendation as the reason for her vote (A669), the Recommendation correctly interpreted State and County law as not requiring a completed TOA before Council's vote, and she did not otherwise state on the record that a TOA was material to her vote.

Finally, to the extent the Opinion could be interpreted as holding that Council as a body has a duty to delay a vote on legislation if just one member believes additional information is material to that member's vote, that ruling would also be plainly erroneous. Under County law and the Council Rules, a sponsor of legislation has no duty to move to table an ordinance, nor does a majority of Council have any duty to vote in favor of such a motion, simply because one member of Council believes he needs more information. State law vests Council with the power to set its own rules and procedures,[48] and in the absence of any State law imposing such duties there is no legitimate basis for judicial intrusion into a legislative body's determination of its voting rules and duties.[49] Moreover, as previously noted, imposing such duties here would create a "tyranny of the one" where one Council member could hold up legislation for purely subjective reasons, a result not countenanced by State or County law.

The lower court's reasoning why a TOA was "reasonably available" to Mr. Weiner was wrong, and because the ruling that Mr. Wiener's vote was arbitrary and

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[48] 9 DEL. C. § 339 ("The governing body of each county may make rules for its government not inconsistent with the Constitution and laws of the State.").

[49] *See, e.g.*, *State Farm Mut. Automobile Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995) ("[A]n administrative agency's interpretation of its rules and regulations will not be reversed unless clearly erroneous"); *CTC II*, 2009 Del. LEXIS 615, at *6 (deferring to Council's interpretation of the UDC).

capricious depends entirely on whether that reasoning was correct, this Court can reverse the judgment on this basis alone.

b. There Is No Evidence In The Record To Support The Lower Court's Conclusion That Mr. Weiner Was Unaware Of Or Mistaken As To Whether He Could Force A Delay In The Council Vote

Not only did the court below err in concluding that Mr. Weiner had the ability to compel a delay in Council's vote on the Ordinance, it also erred in concluding that Mr. Weiner was unaware of or mistaken as to his ability (or inability) to do so. The reason why is that the statements of Mr. Weiner relied upon by the court below[50] do not go to the procedural question of whether Mr. Weiner could delay *this* Council vote on *this* Ordinance until the TOA for *this* redevelopment plan was provided. Nowhere in the record—*not even once*—did Mr. Weiner say that he wished he could do so.

Instead, the statements relied upon by the court below go to an entirely different issue—Mr. Weiner's desire to have County (and State) law changed so that Council knows before any rezoning vote *exactly* what infrastructure improvements will be made in connection with a proposed development, and have the property owner's ironclad commitment to pay for those improvements. So when Mr. Weiner referred generally to "traffic impact data and a commitment to needed improvements" in the portion of the record relied upon by the court below, he is not referring to the results of just a TIS or TOA, as the court below concluded, because all that a TIS or a TOA does is identify *possible* infrastructure improvements that *might* be needed.[51] What Mr. Weiner was referring to was changing State and County law so that what has *al-*

[50] *See* Op. 32 (citing A662-63).

[51] Mr. Culver made this clear repeatedly. *See* A248; A332-33; A337)

ways been decided *after* a rezoning vote (during record plan review)—such as the exact location of entrances and exits, the addition or change in timing of traffic signals, or the widening of turn lanes—is moved forward in the plan review process so that DelDOT and the developer finalize it before Council votes on a rezoning.

All of this becomes clear when the entirety of Mr. Weiner's statements during the Council and Land Use Committee meetings are reviewed, particularly the lengthy exchange Mr. Weiner (and Council member Jea Street) had with Mr. Culver during the October 4 Land Use Committee meeting, with Mr. Culver reminding Council members as to how the existing review process worked and identifying potential difficulties with implementing Mr. Weiner's desired change in State and County law. (A210; A332-43; A645-50)[52] The court below, despite citing that exchange (Op. 10-11), failed to connect these discussions to Mr. Weiner's later reference to "traffic impact data and a commitment to needed improvements" during the October 25 Council meeting.

In other words, with these statements Mr. Weiner was not simply seeking "the ability to cast an *informed* vote" on *this* Ordinance. (Op. 37) But even if the ability to cast an informed vote on this Ordinance was truly the basis for Mr. Weiner's comments, if Mr. Weiner truly believed he did not have enough information about the traf-

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[52] During the October 4 exchange Mr. Weiner incorrectly suggested that the County's change from a three-step to a two-step plan review process in 2010 is the reason why a TOA for the Revised Plan did not need to be completed before Council voted on the Ordinance (A336). He is quickly corrected by Mr. Culver (A337), something the court below missed when it suggested Mr. Culver and Barley Mill's counsel caused Mr. Weiner's purported mistaken belief (Op. 32). The Court will also note that Council member George Smiley sought the floor at the end of the lengthy exchange between Mr. Weiner and Mr. Culver to highlight Mr. Culver's correction: **"Mr. Culver[,] I want to thank you once again [for] adjusting some of the misinformation that has been in the past and will continue to be put out as to what the two-step process did."** (A343) (emph. added)

fic impact of the Revised Plan as compared to the Initial Plan, all he needed to do was vote "no" or "present" and the Ordinance would have failed.[53]

Finally, the lower court's conclusion that Mr. Weiner was unaware of or did not understand what options were available to him to delay Council's vote on this Ordinance, in addition to not finding any support in the record, does not square with the reality of Mr. Weiner's knowledge and experience. Mr. Weiner is a land use attorney, has represented the County's 2nd District since 1996,[54] and has participated in the introduction, passage, defeat, and tabling of dozens if not hundreds of rezoning ordinances.[55] During that time, he has also chaired Council's Land Use Committee, the National Association of Counties' Land Use and Growth Management Subcommittee, and an Ad Hoc County Council Committee responsible for "Crafting Innovative Traffic Monitoring And Mitigation Agreement Guidelines."[56] Moreover, statements by Mr. Weiner establish his awareness of County law and procedure.[57]

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[53] Barley Mill pointed this out at oral argument (A1102-03), referencing a statement by Council member Penrose Hollins following a statement by Mr. Weiner at the October 25 meeting (A664). The court below rejected this, saying that a "no" vote would have been just as uninformed as a "yes" vote. (Op. 37) The reason why is not obvious, since an applicant needs to present evidence sufficient to persuade the requisite number of Council members that a proposed rezoning satisfies the statutory requirements, and if a member believes that an applicant has not presented enough information to allow the member to determine if those requirements are met, the member may vote no.

[54] *See Robert Weiner – District 2*, http://www2.nccde.org/council/District2/default.aspx (last visited Sept. 23, 2013) ("*Robert Weiner – District 2")*; *see also Biography*, http://www.bobweiner.com/bio.asp (last visited Sept. 23, 2013) ("*Biography*").

[55] The Legislation Search page on the County's web site identifies more than 250 different ordinances since January 1, 1997 relating to changes in the County's zoning maps (*i.e.*, rezonings). *See* http://www3.nccde.org/legislation/search/ (search "Title and Description" for "zoning" and "Introduced After" for "1/1/1997") (last visited Sept. 20, 2013).

[56] *Robert Weiner – District 2*; *Biography*.

[57] For example, Mr. Weiner repeatedly discussed his own investigation, review, and consideration of County law and procedure regarding traffic and land use issues, and not anything he was told by Mr. Culver or Barley Mill's counsel. *See* A645-50 (stating "I've been working on this directly and indirectly for the past three years"; "[A]fter exhaustive legal research which I as an attorney looked at, I

In short, there is no record evidence to support the lower court's conclusion that Mr. Weiner had a mistaken belief regarding what procedural options were available to him to delay this particular Council vote. The lower court's conclusion that a TOA was reasonably available to Mr. Weiner but that he mistakenly believed he could not force a delay in the vote is erroneous for this reason as well and should be reversed.

c. Mr. Weiner Was Not Misled By Any Statements On County Law And Procedure From The Department's General Manager And Barley Mill's Counsel

The court below also erred when it said Mr. Weiner's purported misunderstanding of County law and procedure was presumably fueled by statements by Mr. Culver or Barley Mill's counsel. (Op. 32) There is no evidence to support the lower court's belief that Mr. Culver or Barley Mill's counsel *ever* said a word about Council's ability to delay a rezoning vote pending receipt of a completed TOA. The record citations relied upon by the court below for that belief (*see* Op. 7-10, 33) are discussions of the factors considered by Council under the UDC at the time of a rezoning vote and how the development process handles traffic, but even there the court misinterpreted what was said. In short, Mr. Weiner did not rely upon and was not misled by anyone's statements regarding County law and procedure when he cast his vote.

With respect to Mr. Culver, the court below accused Mr. Culver of "represent[ing] that traffic was not to be considered prior to the County Council's vote on the rezoning ordinance" (Op. 24), but does not quote Mr. Culver's alleged statement, and the record page cited by the court does not contain a statement from Mr. Culver

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agreed with the conclusion"; "I've looked at current law and precedent"; "[I]n my opinion, Stoltz's legal counsel may be in a strong legal position that his clients' original plan [for] 700,000 square feet of commercial [space] can be built in that first phase").

even remotely close to what the court attributes to him, nor do the record pages in the immediate vicinity. (A247-50; A333-36) Instead, these pages reflect the same point noted above—Mr. Culver explaining that it is DelDOT which decides the exact traffic changes and infrastructure improvements that will be made, and DelDOT does not do that until the record plan stage.[58] The record clearly shows that Mr. Culver *never* said that general concerns and questions by Council members about traffic were "inappropriate" or that consideration of traffic "must" (or can only) come after a rezoning. Any contrary suggestion by the court below is erroneous.[59]

With respect to Barley Mill's counsel, he truthfully and correctly told Council that deciding the exact infrastructure improvements and changes that would be made was not some that was addressed at the time of a rezoning vote—because those decisions are made by DelDOT, and DelDOT does not make those decisions until the record plan stage—but the lower court's description of counsel's comments are not con-

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[58] The lower court's statement that Mr. Culver's statement that such decisions are DelDOT's exclusive responsibility is merely "his view" (Op. 10) ignores the fact that DelDOT is vested with exclusive authority over the public roads and highways. *See* 17 DEL. C. §§ 131(a), 141(a), 146(a).

[59] The court below did not accurately characterize any relevant statement by Mr. Culver or Barley Mill's counsel with regard to Council's consideration of traffic. In addition to the incorrect description on page 24 of the Opinion addressed in the text above, the court below also incorrectly describes Mr. Culver and Barley Mill's counsel as saying that Council was "prohibited from considering traffic as part of its vote" (Op. 26), and incorrectly states they "maintained that consideration of the TOA to be conducted by DelDOT must be postponed until after the vote of the County Council" (Op. 31). Neither accusation is supported by any of Mr. Culver's or Barley Mill's counsel's statements during any of the Council or Planning Board meetings, nor is there any record evidence that even one member of understood either of them to have said anything like that. *See, e.g.*, A626-27 ("MS. KILPATRICK: [...] Looking at the history of this property and the traffic we know through the Chancery Court law suit that we are allowed to look at these things. We are allowed to look at traffic."), A664 ("MR. HOLLINS: [...] If you are concerned about traffic you simply vote no. There was another development across town not too very long ago where it was demanded by this Council that a traffic study be done and they would not go forward with it so that did not stop this Council from using its discretion to vote no....").

sistent with what was actually said.[60] *At most*, Barley Mill's counsel misspoke *once* when he incorrectly referred to the "traffic aspect" of the plan getting "pushed to the end" because of the County's 2010 change from the three-step plan review process to a two-step plan review process. (A272) But this is an irrelevant misstatement, because (i) the reason why a TOA did not have to be completed before the Council vote has nothing to do with the three-step/two-step issue, (ii) the misstatement was repeatedly corrected by Mr. Culver, and (iii) while Mr. Weiner made the same misstatement toward the end of the October 25, 2011 Council meeting (three weeks later), he did not get the idea from Barley Mill's counsel.[61]

<u>CONCLUSION</u>

For all of the reasons set forth above, this Court should reverse the judgment of the court below and direct entry of judgment in favor of Defendants.

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[60] *Contrast* A272-73 (counsel's statements) *with* Op. 8-9 (lower court's characterization of counsel's statements). *See also* A332-43 (Mr. Culver's colloquy with Mr. Weiner on the same subject).

[61] Barley Mill explained to the court below during oral argument that Mr. Weiner made the three-step/two-step misstatement before Barley Mill's counsel did, and that Mr. Weiner had not yet arrived at the October 4 Land Use Committee meeting when Barley Mill's counsel made the challenged statement, but the Opinion nonetheless still incorrectly suggests Barley Mill's attorney is the source of Mr. Weiner's confusion about the three-step/two-step issue. *Contrast* A1105-06; A1137-40 *with* Op. 32. *See also* A210 (Mr. Weiner's misstatement before the Board); A272 (counsel's misstatement four months later), A331 (Mr. Weiner's arrival). In fact, when Mr. Weiner first uttered the misstatement during the June 7 Planning Board meeting, he did so *after* Mr. Culver had explained that the Revised Plan was subject to the three-step review process (A197).

Respectfully submitted,

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