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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

APPELLEE NEW CASTLE COUNTY'S CORRECTED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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Dated: October 30, 2013

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NATURE OF PROCEEDINGS

This action concerns the ordinance considered by the County Council of New Castle County ("County Council") to rezone 36.87 acres of 92.07 total acres owned by appellant Barley Mill, LLC ("Barley Mill" or "Appellant") from Office, Regional ("OR") to Commercial, Regional ("CR") and redevelop the site. A675. On October 25, 2011, County Council barely approved the rezoning ordinance by a narrow 7 to 6 vote.[1] A676.

Plaintiffs below are a non-profit citizens group, Save Our County ("SOC"), as well as several nearby resident homeowners who would be affected by the rezoning. A676-77. Plaintiffs filed a complaint to challenge the rezoning decision, seeking declaratory and injunctive relief. Plaintiffs alleged that a traffic analysis should have been completed and reviewed by County Council before any vote was taken on the rezoning. The defendants below answered the complaint and the parties engaged in discovery, including motion practice. After defendants produced additional discovery materials, Plaintiffs amended their complaint and defendants again answered. A675-723. The parties cross-moved for summary judgment and submitted combined pre-trial and summary judgment briefs. A724-

[1] The Planning Board (a 9 member public board responsible for reviewing proposed changes to zoning, subdivision regulations, deed restrictions and the Comprehensive Development Plan), which also considered the ordinance, recommended against the proposed rezoning. A222.

940. The Court of Chancery scheduled this matter to be heard on January 8, 2013 as both a trial on the merits and argument on the cross-motions for summary judgment.

Prior to this time, all defendants had been aligned. Barley Mill was represented by outside counsel and the governmental entities were represented by the County Law Department. However, during the pendency of this action, on November 6, 2012 a new County Executive was elected. C10.[2] Due to unique circumstances, the new County Executive took office on November 13, 2013, only a week after his election. C10-11. One of the many issues the County Executive faced upon taking office was this litigation. Upon review and analysis of this litigation and the specific allegations, and recognizing the historic size and importance of this project, the County Executive quickly realized that there appeared to have been flaws in the process undertaken by the Department of Land Use (the "Department") and relied upon by County Council in rendering its vote. C12. The County Executive determined that he could not support the position previously taken by the executive branch of the County in the litigation, and notified the Court of Chancery on January 4, 2013 that the County's position had changed and that it was now aligned with the Plaintiffs. A941; A942. The County

[2] Because there are two cross-appellants in this appeal, the documents contained in the County's Appendix being submitted herewith are designated as "C__."

and County Council each retained separate outside counsel to represent them in the litigation going forward as their interests no longer were aligned.

The Court of Chancery postponed the trial scheduled for January 8, 2013 and gave the County a chance to submit a letter outlining its new position, which it did on January 15, 2013. C4-17. The County also moved and was granted the opportunity to amend its answer. The County further requested that the Department and David Culver, General Manager of the Department, be dismissed from the action. The Court of Chancery granted this request.

The trial was rescheduled for April 22, 2013 and lasted more than five hours. A943-1167. Counsel for Plaintiffs and the County submitted letters regarding Councilman Weiner's comments to the Court of Chancery post-trial. A1168-70; A1171-76. The Court of Chancery issued its opinion in this matter on June 11, 2013 (the "Opinion"). The lower court found that the vote of at least one Council Member was arbitrary and capricious. Since that vote was necessary for the ordinance to pass, the court ruled that the vote on the rezoning was a nullity. The court also found that neither statute nor the County code required that a traffic study be considered by County Council in connection with the rezoning.

Barley Mill filed its Notice of Appeal on August 7, 2013, challenging the lower court's finding that the vote on the rezoning was a nullity due to an arbitrary and capricious decision by one of the Council Members. County Council was

"[s]atisfied with the Court of Chancery's ruling" and therefore on August 12, 2013 informed this Court that it would not participate in the appeal. On August 21, 2013, the County filed its cross-appeal on the issue of whether Section 2662 requires County Council to consider a traffic analysis before its vote on the rezoning. Plaintiffs also filed a cross-appeal on this issue as well as whether the New Castle County Unified Development Code ("UDC") similarly required County Council to consider a traffic analysis prior to the vote. County Council, although previously stating that it was taking not participating in the appeal, moved on September 3, 2013 to intervene in the cross-appeals and this Court granted the motion the following day. Barley Mill filed its Opening Brief in this appeal on September 23, 2013 (the "Brief" or "Br."). On October 2, 2013, the County filed a motion to affirm the lower court's decision in an attempt to alleviate the burden on the taxpayers and private citizens funding this litigation as it believed the issues in this appeal are purely factual and that the lower court did not abuse its discretion. Plaintiffs joined in the motion on October 3, 2013 but the motion was denied by this Court the same day.

SUMMARY OF ARGUMENT

Barley Mill's Appeal

The lower court's ruling that Councilman Weiner's decision was arbitrary and capricious should not be reversed. There was substantial evidence in the record to support the court's decision.

1. Denied. The court below did not contravene Delaware law when it reviewed the Council record and invalidated Councilman Weiner's vote. The court did not "erroneously decide" the reason for Councilman Weiner's vote; rather, the lower court's decision is supported by Councilman Weiner's statements given directly before his vote as well as the reasons stated on the record for his vote.

a. Denied. The court below did not review the entire record to "find other statements that the court concludes are inconsistent with those stated reasons." Rather, Councilman Weiner's stated reason for his vote, as well as the statements that directly preceded his vote at that same hearing, make clear that he regarded traffic as a significant concern but felt that he could not vote otherwise. Barley Mill's proffered account of the record, by contrast, is improperly selective, focusing only on Councilman Weiner's statement that he relied upon the recommendation in giving his vote while ignoring Councilman Weiner's explicit statement that, by his own analysis, a "no" vote "would have much more adverse traffic impact and land use impact upon the community."

b. Denied. Councilman Weiner did not provide two reasons for his vote, one impermissible and one not. Rather, his statements go hand in hand and reveal that his reliance on the recommendation was based on a faulty premise, not on substantial evidence.

c. Denied. The lower court applied the correct standard when reviewing Councilman Weiner's vote. The standard applied by the lower court was based on precedent and was not outside the scope of Delaware law.

d. Denied. There is ample evidence in the record to support the lower court's finding that consideration of a TOA was material to Councilman Weiner. The court below cited multiple statements from Councilman Weiner in which he indicated the importance of a traffic study and his dismay that no traffic study was provided to County Council for review prior to its vote on the rezoning. The court did not interpret the Councilman's statement at all, as no interpretation was necessary. The Councilman's statements were clear on their face.

2. Denied. The court below did not err in holding that Councilman Weiner's vote was invalid because it was cast in the absence of information (a TOA) reasonably available to Councilman Weiner. A TOA could have been available to him. The ordinance could have been tabled, and there was evidence in the record to support the lower court's finding that Councilman Weiner did not understand what he could (or could not) do:

a. Denied. The ordinance could have been tabled pending the receipt and review of a TOA. There is no evidence in the record to support Barley Mill's assertion that a motion to table the ordinance would not have received the requisite number of votes to pass, particularly in light of the fact that several of the Council members had voiced concerns regarding traffic.

b. Denied. Councilman Weiner was unaware of or mistaken as to his ability to force Council to table the ordinance until he received and considered a TOA. Given his express concern over traffic, Councilman Weiner likely would have done precisely this if he believed he could, or had been so advised. It is likewise clear from the record that Councilman Weiner was concerned about traffic with regard to the Barley Mill rezoning, and was not simply concerned about changing the law on rezoning in general.

c. Denied. The lower court did not err in finding that Councilman Weiner's 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. The court did not mischaracterize their statements, nor did it fail to consider evidence given during oral argument. Rather, the court made its decision based on the facts and statements of record, including the statements of Councilman Weiner. Despite the Councilman's background, the record makes

clear that he based his decisions on the information relayed by the Department and Barley Mill's counsel, who did, indeed, mislead Councilman Weiner.

The County's Cross-Appeal

This Court should reverse the lower court's determination that 9 *Del. C.* §2662 does not require County Council to consider a traffic analysis before voting on a rezoning ordinance.

1. The plain language of the statute reveals that the legislature intended that a traffic analysis be considered prior to a vote on a rezoning. The rules of statutory instruction require that a reviewing court ascertain the intent of the legislature by giving the terms of the statute their plain meaning. An analysis of the plain meaning of the words used by the drafters in Section 2662 reveals that the General Assembly intended for a TOA to be considered by County Council in advance of a vote on a rezoning ordinance.

2. Under the UDC, County Council's role in the rezoning process ends upon its vote on the ordinance. At the record plan stage, County Council's role is purely administerial and it cannot request any traffic analysis or changes to the existing plan. *See* §40.31.114(C). Therefore, it is essential that County Council review a TOA prior to its vote because it will not have a subsequent opportunity to review a TOA.

3. Section 2662 requires more than the MOU between DelDOT and the Department in this matter. A separate TOA for this particular project should have been submitted to County Council before its vote. Section 2662 does not require that a TIS be performed as stated in the MOU; rather, a TOA is acceptable and does not need the approval of DelDOT.

STATEMENT OF FACTS

Barley Mill Plaza is an office complex located on 92 acres of land at the intersection of Routes 141 and 48 purchased in September 2007 by Barley Mill. A675, 679. In 2008, Barley Mill submitted its application to the Department for a major land development plan for the property. A679. This first plan was for a mixed use of the property, including commercial, office and residential use components. *Id.* Because the property already was zoned as OR,[3] rezoning would not have been necessary under this plan. *Id.* The plan met with considerable resistance from the community, with one of the largest concerns being the likely increase in traffic that would impact surrounding residential areas already suffering from traffic congestion and backup, particularly during rush hours. *Id.*; A684-85. A civic group, Citizens for Responsible Growth ("CRG"), acted as the spokesperson for the community opposition. Due to this substantial community opposition, it seemed apparent that the plan would not get through the County approval process, and indeed, Barley Mill never believed that it would. Barley Mill began negotiations with CRG and entered into a confidential agreement

[3] OR districts "accommodate large regional employment centers that are primarily office employment together with support type uses … Mixed use structures are permitted for the same reason … This district is intended to provide for a wide variety of uses by both location and general character to permit a consistency of employment related uses throughout the County." UDC §40.02.224.

whereby it would generate separate compromise plans for each of the sites for which it had submitted redevelopment plans, including Barley Mill Plaza. A681.[4]

The second, so-called "compromise" major land development plan for Barley Mill Plaza was submitted to the Department in January 2011. A682. This plan eliminated any residential component but proposed more commercial construction – it called for the rezoning of 36.87 acres of the 92.07 total acres from OR to CR and a redevelopment of the site through the removal of approximately 1 million square feet of existing office and the addition of 1.2 million square feet of office, 454,000 square feet of retail and 1.25 million square feet of structured parking facilities. A682; A127.

The plan was referred to the Department for review and on June 7, 2011, a public hearing was held by the Department together with the Planning Board to consider the revised plan. A142-213. At the hearing, traffic was a major topic of discussion among those opposed to the plan. Indeed, the Department's recommendation notes that "[t]raffic issues were far and away the most important." A217. In an attempt to assuage this opposition, counsel for Barley Mill stated on the record that, at the request of DelDOT, they were performing a TOA that could

[4] While presented as a "compromise plan," it was anything but. The original plan as submitted was for a "by right" plan, but Barley Mill knew it would never get a by right plan approved due to the proportionality concerns, and in fact it was not what Barley Mill wanted. Instead, Barley Mill used the "by right" plan to induce support for the compromise plan, the plan it actually wanted to implement. C8-9.

lead to some improvements in the traffic. A151. Despite this representation, many citizens spoke in opposition to the plan, voicing particular concern over the lack of traffic studies and the unavailability of current traffic data. A184; 190 ("DelDOT has not provided any new traffic data since 1989 as we've heard. No rezoning, development, or redevelopment should be approved or even considered for any land in this area or any area until a new updated and accurate traffic impact has been studied and presented. To allow any rezoning to a higher density classification without pertinent information including an up to date traffic impact study is reckless and fiscally irresponsible."). A combined report of the Department and the Planning Board was issued on June 21, 2011. A214-24. The Planning Board voted against the proposal by a vote of five against, two in favor and two abstentions. A222. The Department, however, recommended in favor of the rezoning. A221.

After receiving the Department's recommendation, County Council considered the rezoning application at a meeting of County Council's Land Use Committee on October 4, 2011. A263-349. Counsel for Barley Mill and the head of the Department repeatedly stated that traffic did not need to be considered at that point in time because the decision to go to a two-step process as opposed to a three step process "pushe[d] the traffic component to the end," or the recording

stage.[5] A272; A334-36. Counsel for Barley Mill also addressed the recommendation against the rezoning by the Planning Board, and stated that many of the members that spoke against the application "had traffic concerns which as Council knows is not part of the equation for this type of analysis." A279.

A vote was not taken at the October 4 hearing and the same issues were raised again at the next County Council meeting on October 11, 2011, with the traffic issue garnering considerable discussion At this hearing, in response to questions from Councilman Weiner regarding his concerns over the scope of the TOA being performed in connection with the plan, Barley Mill's counsel revealed that DelDOT had not yet been given all of the traffic information needed to complete its analysis and that Barley Mill was unable to state what types of modifications or improvements would need to be made to the roads. A369-70.

County Council met again on October 25 to vote on the plan. A549-670. Traffic remained a concern, particularly for Councilman Weiner. Councilman Weiner had been vocal about his concerns regarding traffic during the previous hearings, and moments before the vote was taken at the October 25 hearing, Councilman Weiner stated on the record:

[5] During the time between the original and the compromise plan, the UDC was amended to improve and simplify the major plan and rezoning process from a three step review process (the Exploratory Sketch Plan, the Rezoning/Preliminary Plan and the Record Plan Submission) to a two-step process (Exploratory Plan Review Stage and Record Plan Review Stage). *See* UDC §40.31.110.

> I just want to echo the sentiment expressed by many of the speakers about the lack of traffic data. It's a sham that in an inadvertent byproduct of moving from the three-step to the two-step approval process we lost the traffic data and commitment to needed traffic improvements at the time we exercise our discretionary rezoning authority. That's at the time of the rezoning vote. When it comes back to us for a record plan approval we'll only have administerial authority which means we can only vote yes once we are convinced that there's been compliance with all the technical requirements of the code…. What we are left with is a dependence on Land Use Department and the State Department of Transportation to work together in our interest. But what we lose is that we who are elected officials and the electorate don't really have a chance to sit at that table … But the better would have been for us to [have] traffic impact data and a commitment to needed improvements at the time we sit here for a rezoning. But that's a battle that's been lost.

A662-63. The vote then was taken by the Councilmembers, who were required to state the reasons for their vote on the record. A668. Councilman Weiner cast the final, deciding vote, and stated as his rationale:

> 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 and thus I'm following the recommendation of the Land Use Department.

A670. While other members of County Council voted for the ordinance to pass and cited the Department's recommendation as their rationale (A669-70), Councilman Weiner reiterated his concerns about the lack of traffic data available,

voting as he did because in his view, it was the lesser of two evils. The ordinance passed by a narrow 7-6 vote in favor.

ARGUMENT

I. Councilman Weiner's Vote Was Arbitrary and Capricious, And The Court Of Chancery's Decision Should Be Affirmed

A. Question Presented.

Was Councilman 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?

Answer: Yes.

B. Standard of Review

"A rezoning ordinance is usually presumed to be valid unless clearly shown to be arbitrary and capricious because it is not reasonably related to the public health, safety, or welfare … The court may set aside arbitrary and capricious zoning action, *i.e.* one that is not reasonably related to the public health, safety, or welfare." *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986). An action may be found arbitrary if it is "unconsidered" or "taken without consideration of and in disregard of the facts and circumstances of the case." *Willdel Realty, Inc. v. New Castle Cty.*, 270 A.2d 174, 178 (Del. Ch. 1970), *aff'd*, 281 A.2d 614 (Del. 1971). A reviewing court must determine whether the acts of the legislature were supported by a record of substantial evidence. *See Gibson v. Sussex Cty. Council*, 877 A.2d 54, 66 (Del. Ch. 2005) (citing *Tate*, 503 A.2d at 191).

C. Merits of Argument

1. The Court Below Did Consider Councilman Weiner's Stated Reason for his Vote

Barley Mill claims that the lower court ignored Councilman Weiner's stated rationale for his vote in favor of the rezoning on the Barley Mill project and instead reviewed the entire record to ascertain some other reason for his vote. Br. at 20-22. Barley Mill makes this assertion because it claims that Councilman Weiner stated on the record that he relied on the recommendation from the Department and that is where the discussion should end. Barley Mill is incorrect.

Councilman Weiner's full rationale for his vote on the record read:

> 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 there 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. Councilman Weiner did not simply state that he was relying upon the Department's recommendation; rather, he expressed the impact he believed traffic would have and, because of this impact, he stated that he was following the recommendation. The bottom line is that Councilman Weiner believed he had no real option, and essentially chose the lesser of two evils.

Contrary to what Barley Mill would have this Court believe, the lower court did not ignore *Tate*, 503 A.2d 187, and other precedent in this regard. *Tate* holds

that "[u]nless Council creates a record or states on the records its reasons for a zoning change, a court is given no means by which it may review the Council's decision." *Id.* at 191.[6] Barley Mill contends that this is a "disjunctive standard;" therefore, if the Council members state the reasons for their vote on the record, the Court **can not** look to other portions of the record to ascertain other reasons. Br. 19. Barley Mill has not cited any case for this proposition, and in fact, one of the cases cited by Barley Mill states, "We lay down no precise formula that Council must follow in order to satisfy the *Tate* requirements." *New Castle Cnty. Council v. BC Develop. Assoc.*, 567 A.2d 1271, 1276-77 (Del. 1989)

Barley Mill also gives no weight to the next part of the analysis, which is that a reviewing court must determine whether the acts of the legislature were supported by a record of substantial evidence. *See Gibson*, 877 A.2d at 66 (citing *Tate*, 503 A.2d at 191). Given the applicable standards, the lower court was not "required to accept" Councilman Weiner's statement that he relied upon the recommendation of the Department in casting his vote because, as discussed below, the recommendation was not supported by substantial evidence and did not provide the sole basis for Councilman Weiner's decision. Br. 20. To have turned a blind eye to that record would have been "to permit appropriate deference to

[6] The *Tate* standard also indicates that the job of the court is to review the record created by Council. If a court were simply to accept the decision of Council, there would be no need for a record.

denigrate into blind acceptance of Council's findings." *Gibson*, 877 A.2d at 77 (citing *Green v. Cnty. Council of Sussex Cnty.*, 508 A.2d 882, 91 (Del. Ch. 1986), *aff'd* 516 A.2d 480 (Del. 1986)).

2. Councilman Weiner's Reasons for his Vote were not Supported by Substantial Evidence

The lower court was called upon to determine whether the acts of County Council were supported by a record of substantial evidence. *See Tate*, 503 A.2d at 191. In so doing, the court found that Councilman Weiner's vote was "arbitrary and capricious because he admittedly and explicitly voted without information material to his vote that he mistakenly believed was unavailable to him." Op. 27. Barley Mill claims that the lower court erred because "so long as there is also a rational reason articulated in the record and supported by substantial evidence" the inclusion of unsupported or irrational reasons will not render a decision arbitrary and capricious. Br. at 23. Barley Mill's argument misunderstands the lower court's decision.

The Vice Chancellor did not view Councilman Weiner's statement on the record as articulating two separate reasons for his vote, one which was arbitrary (the lack of a traffic analysis) and one which was not (the reliance on the recommendation). Rather, the Vice Chancellor's point was that the two go hand-in-hand – Councilman Weiner desired a traffic study prior to his vote but was told it was not possible and that any such study would have to wait until the record plan

stage. He therefore voted yes and followed the recommendation of the Department, believing he had no other option. However, if he had been able to review a traffic analysis, Councilman Weiner's vote may have come out differently – it was the misinformation that was presented to him by the Department and Barley Mill's counsel that precluded an informed vote.

At least one court in this State has held: "Implicit in the deferential 'arbitrary and capricious' standard of review is the premise that the agency has employed a decision-making process rationally designed to uncover and address the available facts and evidence that bear materially upon the issue being decided. Indeed, it would seem that any decision made without such a process would be arbitrary by definition." *Harmony Const., Inc. v. State Dept. of Transp.*, 668 A.2d 746, 751 (Del. Ch. 1995). Because the decision-making process utilized here did not involve available evidence that would have a material impact on the issue, *i.e.* a traffic analysis, the decision made was arbitrary.

Additionally, the lower court did not find that the Department and Barley Mill's counsel were incorrect when they said that a TOA did not need to be considered until the record stage under the law.[7] Rather, the court stated that it was

[7] While the lower court found that this was legally correct, the County respectfully disagrees and believes that Section 2662 calls for the review of a traffic analysis by County Council prior to its vote and certainly before the record plan review stage.

Continued…

not correct to inform County Council and those present at the various hearings that traffic **could not** be considered until the record plan review stage, when in fact a TOA can (and the County believes must) be considered prior to that point, based on relevant portions of the UDC and County statute. *See* Op. 29-30.

Barley Mill repeatedly argues that Councilman Weiner articulated two wholly separate reasons for his vote to adopt the ordinance: (i) "his comparison of the traffic effects of the Initial Plan and Revised Plan without having a completed TOA;" and (ii) his reliance on the recommendation of the Department. Br. 22-23. As the lower court found, and as is apparent from the face of Councilman Weiner's statement, these points are not disjunctive, and in fact, are not two separate reasons. Councilman Weiner believed that he was not entitled to a TOA, and that voting against the compromise plan would give rise to an even greater adverse traffic impact. He did not simply state, "I believe there are traffic concerns, but I agree with the conclusions and ultimate recommendation of the Department" or something to that affect. Therefore, this was not a situation, as Barley Mill contends, in which one reason was "supported by substantial evidence" and the other was not.

….Continued
This is the subject of the County's cross-appeal and is discussed in Section II, *infra.*

3. The Court of Chancery did not Apply an Incorrect Standard to Determine the Information Needed by Councilman Weiner to Cast an Informed Vote

The lower court did not apply an incorrect standard to determine the information that Councilman Weiner needed in order to cast an informed vote on the ordinance. The Court of Chancery has found:

> The case law addressing the "arbitrary and capricious" standard contemplates that the scope of judicial inquiry is not limited to the adequacy of the evidence considered by the decision-making agency. The inquiry may also include the adequacy of the process by which the relevant evidence and facts were obtained. If the law were otherwise, an agency could rely solely upon selected facts or evidence that would support one particular outcome while at the same time blinding itself—or refusing to inquire into—material facts or evidence that might compel an opposite outcome. That approach, if countenanced, would be the essence of arbitrariness.
>
> As this Court has stated in *Willdel Realty v. New Castle Cty.*, 270 A.2d 174, 178 (Del. Ch. 1970) 'Arbitrary and capricious' is usually ascribed to action which is unreasonable or irrational, or in that which is unconsidered or which is wilful and not the result of a winnowing or sifting process. It means action taken without consideration of and in disregard of the facts and circumstances of the case....
>
> [T]he "arbitrary and capricious" standard of review [] clearly is deferential, and its function is similar to that performed by the business judgment standard for reviewing decisions of corporate boards of directors. The purpose of both review standards is to prevent "second guessing" by courts of decisions that properly fall within the competence of a governmental (or corporate) decision-making body, so long as those decisions rest

> upon sufficient evidence and are made in good faith, disinterestedly, and with appropriate due care.

Harmony, 668 A.2d at 750-51 (finding that, like here, the determination made by the agency, "although concededly supported by 'some' evidence, merits no deference because it was based upon a flawed decision-making process that precluded inquiry into other material facts that, if disclosed, would have demonstrated the error of—or at least have cast serious doubt upon—the [] conclusion.").

Barley Mill contends that the standard applied by the Court of Chancery would "impede Council's ability to administer County affairs efficiently" because "Council members [could] 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." Br. 25. This contention is flawed and ironic, in that County Council has the ability under the statute to table the vote in order to obtain more information (*see* UDC §40.31.113G), and it was County Council members themselves who requested the TOA. By not providing the TOA, it was Barley Mill that was impeding County Council's ability to administer its affairs efficiently.

4. It is Indisputable that a TOA was Substantially Material to Councilman Weiner

Barley Mill contends that the record does not support the court's finding that consideration of a TOA was subjectively material to Councilman Weiner because he "never says so." Br. at 25-26. This contention is contrary to the record. Councilman Weiner was vocal about his concerns over traffic at every hearing, and made clear that he desired a TOA before his vote. Regardless, the lower court did not need to review these statements throughout the record in order to make a determination of Councilman Weiner's views – the rationale for his vote and his comments leading up to the vote at the October 25 hearing leave no room for doubt as to Councilman Weiner's views on traffic.

As the lower court explained and contrary to what Appellant contends, the additional statements made by Councilman Weiner and reviewed by the court did not contradict the reasons he articulated for his vote: "[Councilman Weiner's] statements make clear that it was conceivable that actually seeing the traffic data concerning the Second Plan could have led to him changing his vote. His subsequent explanation for his vote – which he was legally required to provide in accordance with the Supreme Court's decision in *Tate v. Miles*, 503 A.2d 187 (Del. 1986) – does not contradict his earlier statements." Op. 35-36; A646-50; A670. The court stated that Councilman Weiner made "explicit statements that he considered [traffic data] highly relevant to his decision," Op. 37; A646-50; A662-

664, and, as in *O'Neill v. Town of Middletown*, 2006 WL 2041279, at *5 (Del. Ch. July 10, 2006), a case repeatedly cited by Barley Mill, "[p]erhaps [the] Council[man] [] did not mean what [he] said, but that again is not the type of speculation which the Court may pursue."

5. The Votes of County Council Members were Arbitrary because they Voted in the Absence of Information Reasonably Available to them

Barley Mill argues that a TOA was not reasonably available to Councilman Weiner and that he did not have the ability to table the vote on the ordinance until a TOA was provided. Br. 27. Barley Mill misconstrues the UDC and the ability of the members of County Council to table a proposed ordinance.

In its Brief, Barley Mill states that the Manager of the Department told the Planning Board that "this was a redevelopment plan and was subject to a traffic analysis in the form of a TOA." Br. 14 n.8. Barley Mill then states that under the UDC, "a TOA did not have to be completed before Council's vote on the ordinance." *Id.* Barley Mill is wrong. The relevant UDC provisions also require that a traffic analysis be completed prior to County Council's vote.[8] Section 40.08.130(B)(6)(d) of the UDC states that "[a]ll major redevelopment plans, including sites that qualify as a Brownfield and any plan that is also requesting a

[8] The UDC requirements also support the mandate of Section 2662, as discussed in detail *infra*: that a traffic analysis must be considered before voting on a rezoning.

rezoning as part of the submission shall follow the review procedures of Article 31." Section 40.31.110 outlines the procedure and steps followed in any rezoning major (or minor) plan review. Section 40.31.113G then states, "[a]n applicant shall have twelve (12) months from the date of the exploratory plan review letter to proceed forward to the next review stage (*i.e.* the submission of a preliminary plan or record plan). For major plans and all rezonings, ***and upon completion of all studies***, if any, and the exploratory sketch plan is approved, the applicant shall be entitled to file a rezoning/preliminary plan application with the Department…." (emphasis added). Therefore, in accordance with Article 31 of the UDC, that study was required to have been completed prior to the Department's having accepted a preliminary plan and, correspondingly, County Council's vote on the proposed ordinance.

Barley Mill also misconstrues the rules regarding the ability to table ordinances. While true that the sponsor of the ordinance is the only member that can make a motion to table it, there is nothing that indicates that the sponsor could not so move based on an issue raised by another Council member, *e.g.* other members' concerns regarding the lack of traffic impact information. Barley Mill's contention is based on pure speculation – there is nothing in the record to indicate that other Council members would not agree to table the ordinance if they were told, as they should have been, that a TOA could be considered before their vote.

In fact, Barley Mill's argument on this point is no less speculative than the counter-contention that the vote would have turned out differently if the TOA were available and considered by County Council prior to the vote, or if the members were informed that they could and should review any TOA or other traffic study prior to the vote. Regardless, without reviewing any traffic analysis at the time of the vote, the vote of all members of County Council was arbitrary.

Additionally, Barley Mill's contentions are contradictory. While arguing on the one hand that the lower court erred by reviewing the "entire record" to ascertain secondary reasoning for Councilman Weiner's vote, Barley Mill itself refers to statements made by Councilman Weiner at the various hearings to support its contention that Councilman Weiner was neither mistaken about nor unaware of his ability to delay County Council's vote on the ordinance. Br. 30-31 ("All of this becomes clear when the entirety of Mr. Weiner's statements during the Council and Land Use Committee meetings are reviewed…."). Barley Mill's novel assessment of what it claims Councilman Weiner really meant or truly believed in the course of the hearings and in voting as he did is based on the same record evidence meticulously reviewed and persuasively analyzed by the lower court (but which Barley Mill inconsistently faults the court for citing in its opinion).

6. There is Ample Evidence in the Record to Support the Conclusion of the Lower Court that Councilman Weiner was Misled or Mistaken as to his Ability to Delay a Vote of County Council

Barley Mill argues that the lower court erred in finding that Councilman Weiner was unaware of or mistaken about his ability to compel County Council's vote on the ordinance. The reason given by Barley Mill is that statements made by Councilman Weiner go to his desire to change the law as to the necessity and timing of a TOA, and not to his desire to delay the vote on the Barley Mill Plaza ordinance until a TOA for this particular plan was provided. Br. 30. This notion is belied by the record in this case as demonstrated by the lower court.

First, even if the evidence reasonably could be read to suggest that Councilman Weiner did desire a statutory change in the traffic analysis for "any rezoning," that change would apply to the Barley Mill Plaza ordinance because it is a rezoning. Br. 30. But, as demonstrated above, Councilman Weiner did desire a TOA before the vote was held on the Barley Mill Plaza ordinance. *See* A646-50; A662-664.

Additionally, Councilman Weiner's stated desire for a change in the law in this area was borne of his frustration over the lack of information available regarding the Barley Mill ordinance. For example, at the October 4 hearing, Councilman Weiner stated, "I understand that at record plan approval the Land Use Department in and of itself can make the decision of whether or not there's

concurrency. But what I'm concerned about is that the body that elects us there's no election of Land Use Department professionals. Whether they can be assured that the improvements that are needed will be on line when we vote for a rezoning which is a discretionary rezoning?" A340. He further stated, "I think we just don't have assurances, many of us in the room, myself … [t]hat we can vote on a rezoning of ***this magnitude*** without being assured that road improvements will be coming on line when ***this*** project is ready to get its C of O." A341 (emphasis added). At the October 25 hearing, directly before the vote *on the Barley Mill ordinance*, he stated, "I recognize that CRG does have an agreement where it's negotiable that they will sit at the table and basically CRG and Stoltz have agreed to disagree and to fight it out within the issues of traffic … But the better would have been for us to had (sic) traffic impact data and a commitment to needed improvements at the time we sit here for a rezoning." A663. Whether or not Councilman Weiner had in mind other rezonings, the Court of Chancery correctly determined that it is clear from his "lament" that he specifically was referring to the ordinance that was in front of him at the time. Op. 32.

Barley Mill argues further that even if Councilman Weiner's ability to cast an informed vote on the ordinance was the basis for his comments, if he "truly believed" that he did not have enough information regarding traffic he could have voted "no." Br. 31. But this once again ignores the words spoken by Councilman

Weiner – the one and only statement that, according to Barley Mill, the lower court should have considered – in which he explained exactly why he did not vote against the ordinance.

7. The Statements of Counsel for Barley Mill and The General Manager of the Department were Misleading.

The court below did not err in finding that Councilman Weiner's misunderstanding of the law and procedure was "fueled" by statements made by counsel for Barley Mill and the Manager of the Department. Br. 33. Councilman Weiner stated more than once that it was a "shame" that traffic could only be considered at the record planning stage and not before a vote on the rezoning. A114. This mistaken belief never was corrected by Barley Mill's counsel or the Manager of the Department. To the contrary, they consistently advised: "Other traffic is not relevant for this part of the analysis given the Council's conscious decision to adopt the two-step process as opposed to the three-step process which pushes the traffic component to the end;" (A272); "All those other issues stormwater, sewer capacity, water capacity, school capacity, road capacity are issues of concurrency that come at the record plan stage…So I appreciate that frustration … but we try to strictly focus on what the code tells us to focus on…." A334-35. While the Manager of the Department may not have said traffic considerations were "inappropriate" before the rezoning vote, neither he nor

counsel for Barley Mill ever pointed out that a TOA could be considered (and should have been considered) at that point in time.[9]

All of the County Council members were entitled to have the results of the completed TOA, and were misinformed by the Department's General Manager and Barley Mill's counsel, prior to voting on the proposed rezoning, when they were told that transportation issues would all be addressed with the record plan submission. Although the potential *solutions* to identified traffic problems may be identified later during the record plan process, the problems themselves needed to be identified and provided to the Planning Board and County Council (through the results of the completed traffic study) in advance of their taking positions and/or voting on the rezoning proposals.

County Council was further misled because not only was a traffic study required, it had been scoped by DelDOT in 2008. In an email exchange, DelDOT was asked whether it would perform a TIS or TOA for the Barley Mill project,

[9] It is not surprising that the Manager of the Department and counsel for Barley Mill were giving the same advice, because they were working together to get this project passed through County Council. This collaboration was evidenced in an email exchange: On October 24, 2011, a Council member received a Traffic Congestion Management Map from a concerned citizen in advance of the October 25, 2011 County Council meeting. The Council member forwarded the map to the Manager, asking for his thoughts. On October 25, *the same day the vote would be taken on the ordinance*, the Manager of the Department forwarded the map to counsel for Barley Mill, stating that he should be prepared to again address the "traffic issue." C2.

because while DelDOT had indicated a TIS was needed, the "scoping minutes" referenced a TOA. C1. The response from DelDOT on June 6, 2008 was that, "Originally, we said TIS, but Roger Roy complained at the meeting and thought that if we called this a TIS, the locals would complain … since we would still require everything in the scope regardless [of] if it was called a TIS or a TOA, Ted was ok with [the Department] referring to it as a TOA." C1.

Despite Councilman Weiner's background, it was well within reason that he, as well as the other County Council members, would have relied upon (and therefore been misled by) the views given and statements made by the experts who deal with these topics on a daily basis. In fact, the Vice Chancellor questioned Barley Mill's counsel at the hearing on these same issues, to assure that he himself understood the advice and information that was intended to be and was relayed to County Council by both counsel and the Manager of the Department. A1136-41.

The record in this case makes irrefutably clear that Councilman Weiner believed that a traffic analysis was an essential component of his vote on the ordinance; without this information, which could have been available to him but for a manifestly flawed process, his vote was arbitrary. For all of the reasons stated above, the lower court's finding that Councilman Weiner's vote was arbitrary and capricious should be affirmed.

II. Section 2662 Requires County Council to Consider a Traffic Analysis Prior to Voting on a Rezoning Ordinance And The Court Of Chancery's Decision On This Should Be Reversed

A. Question Presented.

Whether 9 *Del. C.* §2662 requires County Council to consider a traffic analysis before voting on a rezoning ordinance. A1054; A1056-62; C7-9.

B. Scope of Review

This Court's review of statutory interpretation is *de novo*. *See Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013); *Sierra Club Citizens Coal., Inc. v. Tidewater Env. Servs., Inc.*, 51 A.3d 463, 466 (Del. 2012); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

C. Merits of Argument

1. The Role of County Council in Rezonings.

County Council acts in its legislative capacity when it considers a rezoning ordinance, but this legislative power is not inherent. *See New Castle County Council v. BC Devel. Assoc.*, 567 A.2d 1271, 1275 (Del. 1989). An analysis of the powers of County Council in the area of land use must begin with the Delaware Constitution, Article II, Section 25, through which the Delaware General Assembly delegated some of its police power to the County government. The scope of the delegation is found in Title 9 of the Delaware Code. Any regulations adopted by County Council must be "designated and adopted for the purpose of promoting the

health, safety, morals, convenience, order prosperity or welfare of the present and future inhabitants of [Delaware]." 9 *Del.C.* §2603.

A large part of County Council's role in protecting the public health, safety and welfare of citizens with respect to land use culminates with a vote on a zoning ordinance. Rezonings, such as the one at issue in this litigation, have major implications for infrastructure capacity as well as for neighboring properties and thus generally garner substantial community involvement. Therefore, it is at the rezoning stage that the County Council plays its major legislative and policy role. Due to the importance of rezonings, the statutory obligations imposed on County Council should be followed closely. The Court of Chancery's decision with regard to Section 2662 does not allow County Council to fulfill all of these obligations and should be reversed.

2. The Quality of Life Act.

Section 2662 is part of the Quality of Life Act of 1988 ("QOLA"). *See* 9 *Del. C.* §§2651 *et seq.* The purpose of the QOLA is to "utilize and strengthen the existing role, processes and powers of County Councils in the establishment and implementation of comprehensive planning programs to guide and control future development. Through the process of comprehensive planning, it is intended that units of County Council can preserve, promote and improve the public health,

safety, comfort, good order, appearance, convenience, law enforcement and fire prevention and general welfare…." 9 *Del. C.* §2651(a).

Section 2662 provides:

> **§ 2662. Highway Capacity.**
>
> The County Council[10] shall not approve any proposed change in the zoning classification for land (i.e., any "rezoning request") without first complying with the following procedures:
>
> (1) As soon as possible, but in any event no later than June 30, 1988, the County Council, through its designated planning agency, shall establish an agreement with the Delaware Department of Transportation (DelDOT) to provide a procedure for analysis by DelDOT of the effects on traffic of each rezoning application.
>
> (2) Each such agreement shall be approved by a resolution or ordinance, consistent with County procedures, and shall establish traffic level of service suitable to the County and DelDOT.
>
> (3) The purpose of the agreement shall be to ensure that traffic analyses are conducted as part of the zoning reclassification process within the County.

[10] Section 2662 was amended in 1998 to replace the phrase "county government" with the phrase "County Council." 71 Laws 1998, ch. 401, §15, eff. July 13, 1998. This change evidences the intent of the General Assembly to entrust traffic considerations to County Council, rather than the Department. It also evidences that the 1988 enactment of that section intended more than the mere establishment of an agreement with DelDOT "no later than June 30, 1988." Additionally, the plain language of the statute evidences the legislative intent regarding the timing of the traffic considerations as the remainder of that section remained unchanged.

> (4) The agreement shall provide for the review of traffic impacts according to nationally recognized traffic criteria and shall, at a minimum, consider the effects of existing traffic, projected traffic growth in areas surrounding a proposed zoning reclassification and the projected traffic generated by the proposed site development for which the zoning reclassification is sought.

The County believes that the statute is clear on its face that the legislature intended that County Council must consider a traffic analysis before any vote on a rezoning, a conclusion that is reinforced by a detailed analysis of the language in the statute.

3. The Rules of Statutory Interpretation Dictate that County Council Should have Reviewed a Traffic Analysis Prior to the Vote on the Ordinance.

A court's goal upon interpreting a statute is to ascertain and give effect to the intent of the legislators, as expressed in the statute." *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010); *see also Kelty*, 73 A.3d at 929. In determining this intent, courts must "give unambiguous statutory language its plain meaning 'unless the result is so absurd that it cannot be reasonably attributed to the legislature.'" *Kelty*, 73 A.3d at 929 (citation omitted); *see also Reinvestment II, LLC v. Bd. of Assessment Review of New Castle Cnty.*, 2013 WL 5496778, at *3 (Del. Super. Sept. 20, 2013) ("When there is a question regarding the meaning or effect of a statute, this Court will seek to interpret that statute in a manner consistent with the legislative intent of the statute. Legislative intent is discerned from the language of the statute. When interpreting statutory language, absent a

precise definition, this Court will give words their plain meaning, notwithstanding an absurd result."). "Every word, phrase, or sentence of the statute will be given weight and consideration, again, as long as a reasonable result is achieved." *Reinvestment II*, 2013 WL 5496778, at *3. "'[I]n interpreting a statute[,] a court should always turn first to one, cardinal canon [of construction] before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Friends of the H. Fletcher Brown Mansion v. City of Wilmington*, 2013 WL 4436607, at *8 (Del. Super. July 26, 2013) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Given these guidelines, it is not difficult to determine the legislative intent of the drafters of Section 2662. The lower court erred by not engaging in this analysis with respect to Section 2662, instead interpreting the statute too narrowly.

a. The plain language of the statute reveals the legislature's intent that a traffic analysis be considered prior to a vote on a rezoning

A word by word, section by section analysis of the language chosen by the legislature for Section 2662 reveals that the General Assembly intended for a traffic analysis to be considered prior to County Council's vote on a rezoning.

The introductory paragraph of the statute states that County Council shall not approve any rezoning request, characterized as a **proposed** change in the zoning classification for land, without following all of the **procedures** listed. The highlighted language is important for two reasons. First, the characterization of a rezoning request as a proposed change indicates that it is just that, a proposal, which can be changed, amended, reconsidered or rejected depending on the results of County Council's review. Second, the use of the plural in the term "procedures" indicates that County Council must comply with all of the four subsections that follow, and does not indicate that more weight is to be given to one section over any another.

Next, subsection 1 states that the mandatory agreement entered into with DelDOT is ultimately between DelDOT and County Council (through its planning agency) to provide a procedure for analysis by DelDOT of the effects on the traffic of **each** rezoning application. If County Council does not have the traffic analysis before it votes on a rezoning, it cannot fulfill subsection 1 of this statute, because County Council will not know the effects on traffic for that particular rezoning application. Subsection 1 is not limited to an agreement generally with DelDOT, but requires a traffic analysis for each individual application.

Additionally, and most importantly, subsection 3 of Section 2662 holds the key to determining the intent of the legislature – the General Assembly specifically

included language in this subsection providing that the purpose of the agreement with DelDOT referenced in subsection 1 "is to ensure that ***traffic analyses are conducted as part of the zoning reclassification process***…." As detailed below, the zoning reclassification process terminates once County Council votes on the ordinance, which it did in this case on October 25, 2011. Therefore, in order for this subsection to have any meaning, all traffic analyses must occur before a vote on a rezoning ordinance.

Finally, subsection 4 describes that the agreement with DelDOT shall consider the traffic "surrounding a ***proposed*** *zoning reclassification* and the projected traffic generated by the proposed site development *for which the zoning reclassification* ***is*** *sought*." The highlighted language demonstrates that a traffic analysis needs to be considered before any vote is taken on a rezoning ordinance – any traffic analysis that comes after the fact cannot be considered on a proposed reclassification because that reclassification becomes effective once the vote is taken.

The interpretation of the statute utilized by the lower court and Barley Mill renders everything after subsection 1 superfluous. Op. 16. The General Assembly would not have included the remaining three subsections if they were intended to be without effect. *See Reinvestment II*, 2013 WL 5496778, at *3 ("When interpreting statutory language, absent a precise definition, this Court will give

words their plain meaning, notwithstanding an absurd result."). This is particularly true when the statute was amended in 1998 and the legislature determined to keep all of the subsections contained in this statute, despite the fact that the MOU referenced had been signed in 1990. *See* n.10 *supra*.

The lower court also stated that statute does not impose any "affirmative obligations on the County Council to *consider* traffic in its rezoning votes." Op. 16-17 (emphasis in original). However, the Vice Chancellor erred by not considering all of the words and sections included in the statute as a whole, as above. Had the lower court done so, it could have reached only one conclusion – County Council should have received and reviewed a completed traffic analysis before it voted on the rezoning ordinance in order to fulfill its statutory obligation.

b. The statute is unambiguous

While perhaps the statute could have been more artfully drafted, the County believes that the language is free from ambiguity. If, however, the language of Section 2662 were deemed ambiguous, the applicable interpretive construct would lead to the same result. As this Court has stated:

> A statute is ambiguous if it is reasonably susceptible of two interpretations. If it is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning. Several rules guide courts in the construction of an ambiguous statute: '[E]ach part or section [of a statute] should be read in light of every other part or section to produce an harmonious whole. Undefined words in a statute must be given their

> ordinary, common meaning. Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.'"

Dewey Beach Enterpr., Inc. v. Bd. of Adjustment of the Town of Dewey Beach, 1 A.3d 305, 307-308 (Del. 2010); *see also Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999) (When confronting an ambiguous statute, a court should construe it "in a way that will promote its apparent purpose and harmonize [it] with other statutes within the statutory scheme.).

Under this standard, the analysis performed above applies, and each word and phrase must be considered. Reading the statute as a whole leads inescapably to the conclusion that a traffic analysis was required and should have been considered before the vote. Ambiguous or not, the plain language of the statute does not render it difficult to determine the General Assembly's intent and County Council's obligations.

4. The Logical Conclusion of the Rezoning Review Process Demonstrates that a Traffic Analysis must be considered prior to the Vote

The UDC outlines the process that is to be undertaken by County Council when considering a zoning ordinance. After a Planning Board meeting, the Department and the Planning Board issue a recommendation to either approve or deny the rezoning and the preliminary plan. The recommendation, which includes

an approved preliminary plan, is then submitted to County Council, which holds a public hearing and renders a decision. §40.31.113(F)-(G). At this time, County Council is able to table the rezoning ordinance for the purpose of obtaining more information. §40.31.113(G). Once approval is given by County Council, a record plan is submitted to the Department. If the record plan meets all requirements of the UDC, it is approved by the Department. All major plans are given to County Council for "its consent." §40.31.114(C). County Council then schedules the matter for the next public hearing and either adopts the resolution approving the plan or can "table and refer the plan back to the Department, no more than twice, with specific questions relating to technical compliance with this Chapter, State or Federal constitutional requirements, or any other statute or ordinance for which compliance is required." *Id.*

Therefore, once a zoning ordinance is passed, County Council's role in the process is over, because County Council's function in the context of a record plan review is merely administerial. The Head of the Department acknowledged County Council's limited role at this point:

> Mr. Kovach: And when you said it comes back to Council for a vote that vote is on what?
>
> Mr. Culver: That would be your administerial vote on the consent of the record plan to be recorded. So by code you can then refer back twice for technical questions as it relates to that plan.

> Mr. Kovach: Okay and it's limited to response on a technical question the County wouldn't have. The Council wouldn't have the ability to, the County wouldn't have the ability to request alteration of the plan in any substantive way?
>
> Mr. Culver: No not at that point in time. Unless when you send it back for a consent we found that there was an error made or something that then would require a material change to the plan….

A400. Councilman Weiner acknowledged his understanding of this process as well when he stated at the October 25 hearing:

> It's a shame that in an inadvertent byproduct of moving from the three-step to the two-step approval process we lost the traffic data and commitment to needed traffic improvements at the time we exercise our discretionary rezoning authority. That's at the time of the rezoning vote. When it comes back to us for a record plan approval ***we'll only have administerial authority which means we can only vote yes once we are convinced that there's been compliance with all the technical requirements of the code***.

Op. 12; A662-63 (emphasis added); *see also* UDC §40.31.114C. County Council, at this point in the process, is not able to raise any concerns regarding traffic. Without receiving and reviewing a traffic analysis before the vote, County Council essentially never has the opportunity to effect any changes that it perceives may be needed upon review of a traffic analysis. Therefore, if the mandates of Section 2662 are to be effectuated, Section 2662 only can be read as requiring the consideration of the traffic analysis prior to the record plan stage.

Additionally, subsection 2 of Section 2662 provides that "[e]ach such agreement shall be approved by a resolution or ordinance, ***consistent with County procedures….***" (emphasis added). County procedures dictate that the study be completed prior to the vote. *See* UDC §§40.08.130B(6)(d); 40.31.113G ("An applicant shall have twelve (12) months from the date of the exploratory plan review letter to proceed forward to the next review stage (*i.e.* the submission of a preliminary plan or record plan). For major plans and rezonings, ***and upon completion of all studies***, if any, and the exploratory sketch plan is approved, the applicant shall be entitled to file a rezoning/preliminary plan application with the Department….") (Emphasis added). Therefore, not only did County Council have an obligation to obtain and review a completed traffic analysis prior to its vote on the ordinance pursuant to Section 2662, but, consistent with this mandate, it also had an obligation under the UDC. Regardless of whether County Council looked to the statute or the UDC for guidance, what is clear is that County Council did not meet its obligations when it failed to consider a traffic analysis or request that one be provided for consideration before it voted on the ordinance.

5. Section 2662 requires more than the MOU entered into with DelDOT.

The County does not dispute the fact that DelDOT and the Department entered into a Memorandum of Understanding ("MOU"), but it does dispute Barley Mill's contention that the MOU was enough to satisfy the statutory

obligations of Section 2662. Rather, a separate traffic study on the Barley Mill plan should have been completed and given to County Council to review prior to its vote. Barley Mill argued below that the MOU calls for a TIS, and because only DelDOT can order a TIS, the issue was out of the hands of County Council. A812.[11] However, Section 2662 does not specify that a TIS is required. Therefore, other traffic analyses or studies (including a TOA that can be completed without DelDOT) could be performed and considered consistent with the statutory language. *See Christiana Town Center, LLC v. New Castle County*, 2009 WL 781470 (Del. Ch. Mar. 12, 2009) (County Council had and considered a completed TOA at the time of the vote on the rezoning ordinance). The court in *Christiana Town Center* also recognized that the plaintiff in that case "rightly points out" that a "rezoning is not simply a change in intensity of use, it is a change in the nature of the use. And, because the change in the rezoning context is arguably more fundamental, there is more of a chance that important traffic effects will result." *Id.* at *8.

The Court of Chancery in *Deskis v. The County Council of Sussex County*, 2001 WL 1641338, at *9 (Del. Ch. Dec. 7, 2001) (citing the Sussex County

[11] Barley Mill's argument is, of course, self-serving: while County Council did not consider a traffic analysis in connection with its vote on October 25, 2011, County Council could not have done so because there was no completed traffic analysis at the time, and in fact, had not been received at the time of the trial. *See* A1130-37.

statutory equivalent to Section 2662) determined that a traffic study should have been considered prior to the vote on the rezoning, and stated:

> Delaware law mandates that the County Council consider DelDOT's traffic analysis before deciding whether or not to rezone. DelDOT presented to the County Council a report that recommended the proposed rezoning. The County Council chose to rely on DelDOT's report over the mostly anecdotal evidence presented by the opposition. I perceive no reason why County Council's adopting a traffic study that was prepared by a state agency –and that is required by statute – should be viewed as an improper delegation of the Council's legislative powers.

The record makes unequivocally clear that traffic was of the utmost importance to those involved with and voting on the ordinance to rezone Barley Mill Plaza. Not only would it have been prudent for County Council to review a traffic analysis prior to its vote, County Council was statutorily obligated to consider this analysis under Section 2662.

The Court of Chancery erred in making a finding to the contrary, and that decision should be overturned by this Court. The County's position as to the importance of adherence to Section 2662 has been stated best by this Court:

> We recognize that land use regulation is a legislative function and is exercised in an atmosphere of informality which sometimes attends the representative process. But important considerations of public policy and private property are at stake in land use regulation, and the rezoning process itself resembles a judicial determination. County Council does not have a free hand to grant rezoning upon request. It must conform with

> standards established by the General Assembly and due process considerations. At a minimum, such proceedings require adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result and, most importantly, an adherence to the statutory or decisional standards then controlling. Only when the administrative process affords these fundamental protections will the result receive judicial deference.

Green, 516 A.2d at 481.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the judgment of the court below that the decision on the voting ordinance was arbitrary and capricious and should reverse the court's judgment that with regard to the obligations contained in Section 2662 and enter judgment in favor of the County on this issue.

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