



**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 and )  
THOMAS S. NEUBERGER, )  
Plaintiffs-Below, )  
Appellees/Cross-Appellants, )  
v. )  
NEW CASTLE COUNTY, )  
Defendant-Below, )  
Appellee/Cross-Appellant, )  
and )  
THE COUNTY COUNCIL OF NEW )  
CASTLE COUNTY, )  
Defendant-Below, )  
Cross-Appellee. )

No. 419, 2013  
Court Below:  
Court of Chancery of the  
State of Delaware  
C.A. No. 7151-VCG

**APPELLEES' SAVE OUR COUNTY, INC., ET AL.  
ANSWERING BRIEF ON APPEAL AND, AS  
CROSS-APPELLANTS, OPENING BRIEF ON CROSS-APPEAL**

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## NATURE OF THE PROCEEDINGS

Following a trial-type hearing on cross-motions for summary judgment, the Court of Chancery invalidated a New Castle County rezoning ordinance which, had it stood, would have rezoned a 36.8 acre site in New Castle County to allow the applicant developer to convert that site into a regional shopping center, ten football fields long, with “big box” stores, restaurants and drive-throughs.

The action below in the Court of Chancery, seeking declaratory and injunctive relief against implementation of the rezoning ordinance, was commenced on December 27, 2011. It was brought by nearby resident homeowners and Save Our County, Inc., a non-profit citizens’ group whose membership was drawn from regions directly affected by the rezoning. The action was defended by the applicant developer, Barley Mill, LLC (“Barley Mill”) and, at first, was also defended by all the New Castle County defendants, acting jointly through the New Castle County Department of Law.

A divergence developed among the County defendants, however. In January, 2013, the recently-elected County Executive ceased the County’s defense of a report and recommendation which had been issued on the rezoning proposal by the County’s Department of Land Use. That report and recommendation had been highly consequential to all events which followed.<sup>1</sup> Consistent with his view

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<sup>1</sup> The Department’s recommendation in favor of approving the rezoning lessened the vote required for Councilmanic passage, from two-thirds (nine to four) down to a simple majority (seven to six). This is a feature of both State law (9 *Del.C.* § 2614) and County ordinance (UDC § 40.31.113,G). Further, the Department’s recommendation was the only rationale stated by two of the bare majority voting in favor. *Infra* at 36.

that the Department report and recommendation were infirm, the County Executive also supported the ultimate relief sought by the plaintiffs, namely, cessation of any further progression to develop the site commercially until traffic information would be provided, analyzed and reported upon prior to a County Council vote. (A 942.)

From that point, the two sets of New Castle County defendants each retained separate outside counsel. County Council continued to defend its actions and ultimate vote, alongside Barley Mill. By contrast, going forward New Castle County was substantially aligned with the plaintiffs.<sup>2</sup>

On April 22, 2013, the matter proceeded to a daylong hearing, and on June 11, 2013, the Court of Chancery rendered its Memorandum Opinion (“Op.”). Based upon what it characterized as “the unusually clear record in this case,”(Op. 37) the Court of Chancery concluded that at least one councilmember’s vote in favor of the rezoning had been arbitrary and capricious, based on misinformation, which thereby nullified the 7-6 vote in favor and rendered the ordinance’s passage invalid. (Op. 38.) An Order was entered on that ruling on

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<sup>2</sup> At a hearing February 4, 2013, the attorney for what were then informally referred to as the “Executive Branch Defendants” gave assurance on the record that any injunctive relief as might be entered against defendant New Castle County would be effective to reach the Department of Land Use and its general manager without their being continued as named parties-defendant. Upon that representation, plaintiffs moved to voluntarily dismiss without prejudice defendants Department of Land Use, New Castle County, and David M. Culver, as General Manager. (B 19-21.) That was granted and an Order entered on February 11, 2013. (B 22.) From that point the sole government defendants were New Castle County (hereafter, the “County”), the County Council of New Castle County (hereafter, the “Council”), and Barley Mill, LLC.

July 17, 2013.<sup>3</sup> The Council did not appeal from that ruling and order which had declared its vote invalid, but Barley Mill appealed to this Court.

In its Memorandum Opinion, before ruling for the plaintiffs on the arbitrary and capricious nature of the Council vote, the Court below ruled against the plaintiffs on two separate legal arguments. The first argument was that State law – 9 *Del.C.* § 2662 – mandated consideration of traffic prior to Council vote on a rezoning, as a matter of law. The second was that County ordinance – the County’s Unified Development Code (the “UDC”) – mandated that certain traffic information be provided and that traffic studies underway be completed and provided prior to Council vote. The plaintiffs have cross-appealed from those two determinations that were adverse to them. The County also has cross-appealed from the determination regarding 9 *Del.C.* § 2662. The Council is a cross-appellee on the cross-appeals.

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<sup>3</sup>The Opinion and Order are attached to the Opening Brief of Barley Mill, LLC.

## SUMMARY OF ARGUMENT

1. Denied. The General Manager of the County Department of Land Use and the attorneys for Barley Mill gave erroneous guidance to County Council concerning whether and to what extent Council had the authority to demand and then consider traffic data when deciding whether to approve the rezoning application.

a. The Court of Chancery further concluded, properly, in a very narrow, case specific decision, that the record contained clear evidence that that erroneous advice, constraining Council's deliberations, had been outcome determinative with at least one member of Council.

b. To the extent that Councilmember, Mr. Weiner, also mentioned the Departmental recommendation, that recommendation rested on a misleading and patently inaccurate report which provided no analysis regarding traffic.<sup>4</sup>

c. & d. Masquerading as concern for adherence to the appropriate evidentiary standard, Barley Mill attempts a "floodgates" argument, to the effect that the court below has implicitly adopted a standard of review "which imposes obligations on zoning bodies and reviewing courts well beyond what Delaware law requires." That is not so. The decision below was narrow and fact-driven; the court below was not declaring a new analytic standard.

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<sup>4</sup> The Department report and recommendation, which had independent legal significance by virtue of setting the vote requirement, also was conclusory in numerous other regards, unsupported by substantial evidence. *See* Arg. II, *infra*.

2. Denied. Again, the court below did not err when it declared the vote of at least one member (Councilman Weiner) to be invalid.

a. The Court of Chancery properly ruled, on the facts and law, that misinformation was given to all by the Department's general manager and by Barley Mill's attorney, and that instead Councilman Weiner *could* have obtained traffic information material to his vote. (Op. 32, 38.)

b. & c. In an effort to get around those passages in the record which disfavor its position, Barley Mill goes outside the record to urge that Mr. Weiner – the particular Councilmember whose swing vote made the difference – was not mistaken after all because he knew otherwise concerning the Council's role and discretionary authority. Besides the impropriety of going beyond the record – and some hypocrisy in light of Barley Mill's resistance to most of the discovery attempted in this case – it is invalid to argue that the lower court committed error when that argument is based on speculation as to what a Councilmember really had in mind, as against what he had stated.

3. Alternate Ground For Affirmance. The Department report and favorable recommendation opined that the proposal was compatible with the rezoning standards mandated for consideration by the County's UDC. The standards required consideration of the regional mall proposal against such factors as "consistency with the character of the neighborhood" and "affect (sic) on nearby properties."<sup>5</sup> The Department purported to do that evaluation, and came to a

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<sup>5</sup>UDC § 40.31.410.

favorable recommendation, in the absence of providing or applying any traffic analysis whatsoever. For the siting of a regional mall, that ostrich-like avoidance of any traffic information and refusal to present any traffic analysis to the Council before it was to deliberate and vote was just as fundamentally arbitrary and capricious as the later majority vote itself. *Harmony Const., Inc. v. State Dept. of Transp.*, 668 A.2d 746, 751 (Del. Ch., 1995). Inasmuch as that report and recommendation set the vote for passage at just seven, and was the sole rationale cited by two of the seven who voted in favor, that gaping failure in the report, as well as conclusory and misleading descriptions elsewhere in the report, provide further, independent reason to invalidate the vote.

4. On Cross-Appeal. Contrary to the determination of the court below (Op. 15-16), State law – 9 *Del.C.* § 2662 – requires that Council receive and consider a traffic analysis before it voted on the proposed rezoning. With respect, the court below erred in its interpretation of the statute by failing to give effect to every part of the statutory provision, and instead came to a construction which is not consistent with the statutory purpose and intent.

5. On Cross-Appeal. New Castle County’s statutory scheme relative to zoning and rezoning is set out in the UDC. The procedure specified there requires initial submission of certain traffic information “for all major plans and rezonings,” and then, based upon that information, further traffic studies may be required by the County Department of Land Use or the Delaware Department of

Transportation.<sup>6</sup> And if additional studies have been required, all such “studies and/or information must be provided to the Department prior to the rezoning/preliminary plan submission.”<sup>7</sup> A study on traffic had been called for here by DelDOT. However, although Culver, General Manager of the Department, was aware that current data from the study was in the hands of DelDOT, nothing was requested by Culver prior to submission of the rezoning to Council for its vote. The UDC requirement, therefore, had not been met.

Barley Mill argued to the court below that its proposal was exempt from that requirement on the basis that its proposal was characterizable as a “redevelopment” plan. The court below accepted that argument. (Op. 17-23.) With respect, that was an erroneous conclusion in two regards:

a. As a matter of law, the project could not qualify as “redevelopment,” inasmuch as the UDC provision concerning “redevelopment,” read both literally and in context, does not apply to premises such as these; and

b. In any event, the exemption for redevelopment projects was only with respect to what otherwise would have been a requirement for a traffic impact study (a “TIS”). That exemption is not so broad and extensive as to support the total pre-vote blackout on traffic information that occurred here.

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<sup>6</sup> UDC § 40.11.120, A and C.

<sup>7</sup> UDC § 40.31.112, C and G.

## STATEMENT OF FACTS

Background. Barley Mill Plaza is an office complex of 24 low-rise, two-story buildings situated throughout a landscaped 92 acres. It was built in the 1980's and has been operated continuously as an office park. To its north and east, Barley Mill Plaza adjoins the long-established Westover Hills, West Park and West Haven neighborhoods. To its west, along Route 141, it faces large estates, mature residential properties and 130 acres of open space in conservancy. The majority of the total perimeter of Barley Mill Plaza (approximately 78% of it) either borders or is across a roadway from residential or other low impact uses (such as the conservancy property, two cemeteries and a youth athletic field). (A 707-08; 711.)

In September, 2007, the site was purchased by Barley Mill, LLC. At that time and continuing, the office park was in good condition, well maintained and substantially occupied. (B 28; 58-59.) Within a year of purchase – in May, 2008 – Barley Mill filed an application with the Department seeking approval for a major land development plan which called for the demolition of most of the existing buildings and construction of 2.8 million square feet of mixed use space, – residential, commercial and office use, along with a hotel and parking garages. This 2008 plan application (in the Opinion, the “First Plan”) generated significant community opposition on account of its size, scale and character.

At about the same time, affiliated entities also controlled by the same development group (the Stoltz Group) filed exploratory plans for developments on three other prominent sites in the same locale within New Castle County. Two of

those applications – for the Greenville Center and the former Columbia Gas site – also generated significant community opposition. Negotiations then ensued between the Stoltz Group and certain civic groups over these applications.

What emerged from that process was an Agreement, dated as of December 31, 2010, between the four affiliated limited liability companies on the one hand and, on the other, a civic association, Citizens For Responsible Growth In New Castle County, Inc. (“CRG”). Among other provisions, this confidentially negotiated Agreement provided for a separate, so-called “Compromise Plan” for each of the sites. The Stoltz Group would submit the Compromise Plans, while its earlier plans and applications would be held in abeyance.<sup>8</sup> The Agreement also bound CRG to be supportive of the Compromise Plans at all future public hearings.

The 2011 application; the Second Plan. Barley Mill then submitted a new major land development plan for the 92 acre site on March 27, 2011. This one eliminated any residential component. However, it proposed a much more intrusive and intensive commercial construction than the First Plan. On the 92 acre site, the 36.8 acres at and closest to the intersection of Routes 141 and 48 would be a regional mall, with eight free-standing pad sites, five of which would be along Route 141. Restaurants and other businesses could go on to those pads. Total retail space there would be as large as ten football fields. (A 132-38.)

The level of intensive, concentrated commercial development now being proposed would not be permissible under the existing, OR zoning. Hence, a

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<sup>8</sup> There is no provision in the UDC nor any past practice authorizing a stay and pendency of one plan while a substitute proceeds.

rezoning would have to be obtained.

The County rezoning process. Broadly speaking, the rezoning process starts with submission of a plan to the Department, along with certain data, including basic traffic data. That is analyzed by the Department, which is also to reach out to various State agencies for input. The application then proceeds to a public hearing, held jointly by the Department along with the Planning Board of New Castle County. Following that hearing, the Department and the Planning Board each issues a report and recommendation.<sup>9</sup>

The application then goes to County Council. Both by State law and by the County's UDC, there is to be a public hearing and vote by Council on an ordinance to amend the County Zoning Map.<sup>10</sup> Also, by State law and County Ordinance, the Department's recommendation on a proposed rezoning determines the vote total required for passage at Council, – whether a simple majority for approval if the Department is in favor, or a two-thirds majority (nine votes) if the Department has recommended disapproval of the zoning amendment.<sup>11</sup>

The factors for consideration by the Department and, later, by the Council, are set forth in the UDC, and include “consistency with the character of the neighborhood” and “affect (sic) on nearby properties. (Op. Br. of Barley Mill (“BM Op.Br.”) at 13.)

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<sup>9</sup>UDC § 40.31.113,F.

<sup>10</sup>9 *Del.C.* § 2607; UDC § 40.31.113,G.

<sup>11</sup>9 *Del.C.* § 2614; UDC § 40.31.113,G.

Proceedings on the Second Plan. The major issue of community objection to the Second Plan, as with the First, was with respect to traffic conditions in the area, anticipating increased traffic forcing even longer delays at the intersection of State Routes 141 and 48, further backing up traffic heading between Hockessin and downtown Wilmington on Route 48 (Lancaster Pike), as well as traffic heading to the DuPont Experimental Station across the two lane Tyler McConnell Bridge a mile further north on Route 141. Many ancillary feeder and back roads in the area are already overtaxed certain times of the day by commuter traffic.

In its brief to this Court, Barley Mill makes an unannotated assertion that “This modification (as between the First and Second Plans) did not trigger DelDOT (or the Department) to request a change in the type of traffic analysis for the project.”<sup>12</sup> That is wrong on several levels. When the Department considered the rezoning application in advance of the public hearing, it signaled this with respect to the topic of “Transportation”:

The Revised Plan eliminates housing, but adds drive-throughs and replaces most General Office space with Medical Office. Provide a Trip Generation Comparison, of the Revised Plan with the March 2008 Preliminary Traffic Analysis and the May 2008 Traffic Operational Analysis Scope. In turn, the Scope may need updating. (B 74.)

The record is silent as to what was going on at DelDOT and what its thoughts may have been about the Second Plan relative to the First. But an important theme and undeniable fact, which permeates every aspect of the handling (mishandling) on

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<sup>12</sup> Op. Br. of Barley Mill (“BM Op. Br.”) at 13.

this rezoning application, was that no specifics and no analysis whatsoever concerning the traffic impact to be expected were received or considered by the Department, let alone reported to the County Council by the Department.

The joint Planning Board/Department public hearing was held on June 7, 2011. In his opening remarks, counsel for Barley Mill began intoning a theme that traffic concerns were not germane to the public hearing and, by extension, were not germane for the Planning Board or the Department nor, ultimately, for the Council:

Per the request of DeIDOT we are undertaking a traffic operational analysis to determine what, if any impact the scaled down proposal will have on the surrounding network. And as the Board and County is aware before this Plan can be recorded, those issues will be sorted through and the record plan will likely contain a series of notes about particular improvements that will have to be done. (A 151.)

The vast majority of the public in attendance did not accept that approach and orientation. Two State Representatives and sixteen citizens – including several SOC members and one of the eventual plaintiffs – spoke in opposition. Most cited concerns for traffic conditions that would be created by the large mall. The lack of study and lack of current traffic data was repeatedly cited with alarm.<sup>13</sup> Post-hearing emails and letters were decidedly in opposition as well.

Five individuals did speak in favor of the rezoning, but all five had been part of the negotiating team for CRG with the Stoltz Development Group, and were

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<sup>13</sup> See, e.g., A 161-62, 181 & 190. See also, Letter to Planning Board and Department indicating the breadth of the community concern, noting that opposition had been registered by umbrella civic organizations in Hockessin and Milltown-Limestone, representing over 200 individual neighborhoods. (B 90.)

thereby contractually bound to supply supportive testimony at public hearings. (A 562-63.) Most resided close to the Greenville Center (for which the Stoltz Group had first filed a plan calling for a 12-story tower overlooking the adjacent neighborhood there). And most pertinent to the argument here, none of the five who spoke in favor was actually sanguine about traffic at the site; rather, on that subject, they just expressed hope in their negotiated process. (A 160.)

Councilmember Weiner attended the hearing. He remarked:

I believe that Council's adoption of a UDC text amendment in the fall of 2009 which apparently incorporated what I now believe to be the unintended consequence of removing traffic information from the public and the County's scrutiny is a decision which now should be reversed. It was not until the Barley Mill Plaza Planning Board hearing in this room January 2010 *when the Stoltz then attorney<sup>14</sup> announced at the public hearing that the community had no legal right to consider traffic information that I then realized what a mistake it was to have adopted that law. (A 210.) (Italics added.)*

The public hearing then ended with final comments from Barley Mill's attorney. As to traffic, he stated again that it was incorrect that no traffic analysis was being performed:

We are required to study 15 intersections in and around the property including new ones to be created by the site. Those will involve current counts. Not outdated counts. We have to actually count the traffic that's going through the intersection. In fact done that twice. That information will be reviewed, scrutinized, and commented on not only by CRG as Mr. Beck pointed out

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<sup>14</sup> Referring to Pamela L. Scott, Esquire; former counsel for the Stoltz Group projects.

but by DeIDOT and New Castle County as well. And ultimately lead to additional improvements that are going to be added to part of the plan. (A 212-13.)

No mention was made of County Council as one of the future recipients of the current traffic counts and study.

Two weeks later, on June 21, 2011, a combined report was issued. The Planning Board – a body of nine citizens charged under the New Castle County Code with the power and duty “to review, hear, consider and make recommendations to approve or disapprove applications for zoning map amendments – voted five against and two in favor, with two abstentions. (A 222.) However, while the recommendation by the Planning Board proved influential with some of the Councilmembers who later voted against the rezoning, its negative recommendation had no impact on the Council’s majority vote requirement.

By contrast, the Department recommended in favor of the proposed amendment, to change the zoning from Office, Regional (OR) to Commercial, Regional (CR).<sup>15</sup> The failings of the Departmental report and recommendation will be discussed in detail in several passages which follow,<sup>16</sup> but for this narrative overview, the basic and important point is that beyond noting that traffic was a repeated and legitimate concern, the Department report to Council neither discussed nor provided any specifics or detail on traffic. (A 214-221.)

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<sup>15</sup> As the term implies, Commercial, Regional (CR) zoning is intended to provide for regional commercial services, to “create large commercial complexes rather than development strips.” UDC § 40.02.225.

<sup>16</sup> Arg’s. I and II, *infra*.

The application then progressed to County Council. This was the first occasion in modern memory when a major rezoning got to County Council without any specific traffic information. (B 98.) In September, the sponsor of the rezoning ordinance, Councilmember Kilpatrick, had heard that a traffic study had been completed for Barley Mill Plaza. She sent a note to General Manager Culver, seeking confirmation and asking whether a copy was available. Culver replied that he had heard that “The traffic numbers have been completed but they had not been sent to DeIDOT for review as of yet” but that “it appears that the applicant has been in discussions with DeIDOT on what the numbers are showing and what improvements may be necessary.” However, rather than replying that he would try to learn more, and perhaps get a copy of the numbers so as to better inform the Councilmembers, he further advised “I know how you feel, but I guess until they make an ‘official’ submission to DeIDOT we need to wait.” (B 92.)

On October 4, 2011 Council’s Land Use Committee held a hearing to consider the rezoning ordinance. All thirteen Councilmembers were in attendance. Barley Mill’s attorney, John Tracey, was given the floor at the start, and among his remarks he stated “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.” Further, when responding to an inquiry regarding the Planning Board’s having made a negative recommendation, Mr. Tracey stated that “The members that spoke against it some

of them had traffic concerns which as Council knows is not part of the equation for this type of analysis.” (A 272, 279.)

This instruction that traffic considerations were outside of Council’s bailiwick was reinforced by General Manager Culver. For instance, when a Councilmember pointed out to Culver that it appeared as though the Department, when giving a favorable recommendation on the rezoning, was placing exclusive reliance on DelDOT “in terms of the roads after we voted and we don’t have any information prior to it,” Culver agreed. In his response, Culver pulled traffic effect out of consideration, as though it were just a question of technical capacity and design, to be decided by DelDOT. He remarked:

(W)hile I appreciate discussions on stormwater and roads and schools, economics, those are not factors that we are by law supposedly to be taking into consideration of the rezoning.... 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 the frustration ....” (A 334-36.)

That interpretation was supported by Councilmember Smiley, the author of the 2009 amendment to the UDC which had condensed the rezoning process from three steps to two and which thereby, as claimed by Barley Mill’s attorneys, had pushed traffic issues to the final, record plan stage, where Council would not have any discretion. Mr. Smiley admonished his fellow members and the public in attendance, saying:

The developer works with DelDOT on meeting the criteria that they set and once and if the County gets the letter of no objection from DelDOT then that’s what it is.

I just want to clear that up because I want to hear the facts. I want to hear what everyone has to say today but I really don't want everyone spinning their wheels with losing 15 minutes or five minutes of their talk time on traffic when this isn't where it needs to be. Thank you.”  
(A 298-99.)

The subject of traffic came up a week later at the regular Council meeting on October 11, 2011. There was this exchange between Councilman Weiner and Barley Mill's attorney:

MR. WEINER: And when do you think you'll be told how much of a fair share contribution do you need to make to whatever improvements DeIDOT would recommend.

MR. TRACEY: We have to give DeIDOT the data, the traffic generation data which they have to review. They'll come back then with the scoping letter. I would expect plus or minus three months. (A 370.)

A week later, at the October 18, 2011 meeting of Council's Land Use Committee, the environmental chair of the Civic League for New Castle County urged the Council to wait until learning more about traffic (and stormwater drainage), that “There is no rush to take a final vote next Tuesday.” (A 522-23.) A week after that, she elaborated her remarks in an email to a Councilmember, and provided a copy of the Transportation Corridor Congestion Management Map from the New Castle County Comprehensive Plan, to show how imperiled the traffic situation was in the area already. The Councilmember receiving her communication forwarded it to Culver, asking:

FYI on this congestion map what are your thoughts and are we sure DeIDOT is addressing this??? I would like

your thoughts as I want to mention this tonight also????  
(B 94.)

Culver neither made inquiry to DeIDOT nor replied to the Councilmember. Rather, he forwarded that inquiry to the attorney for Barley Mill, saying “You should be prepared to again address the traffic issue.” (B 97.)

At the October 25, 2011 Council meeting, again there were expressions of concern about traffic impact and the lack of any specifics in terms of how traffic might increase. No one offered any insights or feedback in terms of what DeIDOT had seen in the numbers, what more it was requiring by way of study, and what it might require by way of road configuration and engineering projects.

Toward the end of the meeting, Councilmember Weiner remarked:

I just want to echo the sentiment expressed by many of the speakers about the lack of traffic data. It’s a shame that in (sic) as inadvertent by product of moving from the three-step to the two-step approval process we lost the traffic data and commitment to needed 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 administrative 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. (A 662-63.)

And moments later, when Councilman Weiner cast his vote, which proved to be the final and decisive vote, he remarked:

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. (A 670.)

A final, critical fact only surfaced in colloquy initiated by the court below. It was conceded by Barley Mill's counsel that the limiting guidance which had been provided to County Council by the General Manager and by Barley Mill's attorneys concerning Council's supposed inability to obtain and consider traffic information had been erroneous, and that no corrective information had been given to Council by the County Law Department. (A 1096-1107.)<sup>17</sup> And what had been the stated predicate for that wrongful advice from Barley Mill's attorneys – the assertion that “other traffic is not relevant for this part of the analysis” because the application was proceeding under the two-step review process adopted in late-2009 – was wrong, as well. As Barley Mill now states clearly to this Court, the Second Plan application, although filed March 27, 2011, was proceeding under rezoning procedures in effect back as of March 26, 2008, when application had been made for the First Plan. (BM Op.Br. at 6, fn. 2.) In other words, proceeding under the three-step process.

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<sup>17</sup> As noted in Op. 24-25.

## ARGUMENT

### I. THE COURT BELOW PROPERLY INVALIDATED THE COUNCIL VOTE

Question Presented. Whether the Council vote on this rezoning was properly held to be arbitrary and capricious?

The plaintiffs presented their argument on this issue in their briefs to the lower Court. (A 761-63; 861-65.) The issue was then argued to the Court below both by the plaintiffs (A 1006-1022) and, in accord with plaintiffs' position, by the County. (A 1061-1064.) The court below considered the issue and invalidated the vote. (Op. 29-38.)

Standard And Scope Of Review. The findings and conclusions below were made following an extensive hearing on a paper record. In reviewing the lower court determinations, this Court will consider whether substantial evidence supported the rezoning decision and whether legal error had been committed. *Bd. v. Adjustment of Sussex County v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

Merits Of Argument. There is a glaring dispositive set of core facts that Barley Mill tries mightily to obscure. First, there is the undisputed fact that erroneous advice was given to the decision makers by Barley Mill's attorney and by the General Manager of the County's Department of Land Use, the highest administrative authority in such matters, concerning the extent of Council's abilities to obtain and consider traffic information. The second fact is that one member of Council – whose vote tipped the balance for passage – stated on the

record that this (misinformed) orientation on the major subject of traffic had influenced his vote.

Barley Mill points out that Mr. Weiner also mentioned the Department's recommendation when casting his vote. From that, Barley Mill steps off into an extended passage to the effect that the Department's recommendation was a sufficient alternate reason which should have precluded invalidation of his vote. (BM Op.Br. 20-23.) Barley Mill asserts that because Mr. Weiner made mention of the Departmental recommendation at the very moment he cast his vote, he had thereby given "a rational and valid reason for his vote that is supported by substantial evidence." (BM Op.Br. 22.)

A direct response to that assertion is that the court below came to a well-supported and appropriate interpretation of Mr. Weiner's statements. As the court stated in the Opinion:

His (Councilmember 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* – does not contradict his earlier statements. In fact, the record is silent as to any data or expert opinion that the mixed-use First Plan would have produced worse traffic problems than the all-retail Second Plan. (Op. 35-36.)

As the court found, Mr. Weiner's only explanation for his vote was his unsubstantiated view that the First Plan would have more adverse traffic and land use impact than the Second. After giving this explanation, Mr. Weiner simply

noted “... and thus I’m following the recommendation of the Land Use Department.” He did not say the Department’s recommendation was the reason for his vote. Rather, without the information which he said would have been material to him, he was “thus ... following” the recommendation.

A second response to Barley Mill’s challenge is that the Departmental recommendation was not, contrary to Barley Mill’s argument, “free from legal error and supported by substantial evidence as to how traffic was handled.” The opposite was true. The Departmental report and recommendation, in addition to its other flaws,<sup>18</sup> provided absolutely no traffic analysis, instead just mentioning that traffic issues were a focal point of concern but were to be addressed at a later point in the process. Yet, the report professed to analyze rezoning factors – such as “effect on nearby properties” and “consistency with the character of the neighborhood” – which clearly required some consideration and assessment of traffic impact.<sup>19</sup> And only through colloquy initiated by the Vice Chancellor was it revealed by Barley Mill’s counsel that under the protocol for this particular application, “there were no level of service standards applicable to this plan.” So even the notion conveyed in the report and Culver and Tracey’s remarks that DelDOT had authority to prevent a traffic nightmare and compel Barley Mill to fund essential road improvements was erroneous. (A 1131-35.)

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<sup>18</sup> See Arg. II, *infra*.

<sup>19</sup> A 220-21. See also A 1098-99 (colloquy in the lower court hearing: “THE COURT: Where in the department’s recommendation report does it say traffic impact will be less with the shopping center than it would have been under the original mixed use plan? MR. WRIGHT: I’m not sure that it does, Your Honor.”)

Barley Mill next asserts, as a third assigned error, that the decision below somehow altered the evidentiary standard of review. It asserts in its Opinion that the lower court has required that Councilmembers “obtain and consider *all* evidence *subjectively* material to their decision that is reasonably available,” and that this imposes “a much higher burden on Council in gathering evidence, and requires significantly greater judicial inquiry as courts review the record.” (BM Op.Br. 24.)

This ominous “floodgates” argument goes well beyond what was said in the Opinion. It was a narrow, fact-drawn opinion, “based on the unusually clear record in this case, which establishes that at least one member of the County Council desired traffic data, because he believed that the traffic data would be material to his decision whether or not to vote in favor of the rezoning ordinance.” (Op. 37.) Contrary to Barley Mill’s accusation, there is nothing in the Opinion which requires that all Councilmembers obtain and consider all evidence subjectively material to their decision, nor that reviewing courts might later have to search and determine the record for what evidence was subjectively material to each member, and whether that evidence was reasonably available.

Barley Mill next argues that “the standard is inadvisable as a matter of public policy” because it gives each member a veto power over Council’s work and, even beyond that, it somehow “imposes an obligation on individual Councilmembers to hold up legislation until they receive information or analyses from other agencies. (BM Op.Br. 25.) At least two responses can be made to that

accusation. First, when invalidating the majority vote, the Opinion turned on the (misinformed) basis for his vote as articulated by Mr. Weiner, the dispositive voter. Had the vote count been 12-to-1, or 9-to-3, or virtually any other permutation, and with a different record of remarks, then perhaps the public policy argument might have more appeal. Second, the suggestion that the Opinion implicitly gave every Councilmember veto power in any and all circumstances is directly belied by an argument which Barley Mill makes just a few pages further on. With extensive citation to the County Council Rules, Barley Mill later argues that Mr. Weiner, as a solitary member, did *not* have the authority to table the rezoning ordinance. (BM Op.Br. 27-29.)

It serves to note that while the developer makes a public policy argument that the Opinion creates an unworkable rule for County Council and other rezoning authorities, County Council itself makes no such complaint. County Council is *not* an appellant on this issue, and when forms of implementing orders were being exchanged post-Opinion below, the attorney for County Council resisted the form of Order submitted by plaintiffs and instead wrote this to the Vice Chancellor:

In the Opinion, the Court recognized County Council's authority to exercise its discretion with respect to matters delegated to it by the General Assembly, including rezoning decisions. (Op. at 2, 14.) The Court further recognized the narrow scope of the Court's role in reviewing a discretionary decision made by County Council, so as not to invade the deliberative process. Within these parameters, for the reasons stated in the Opinion, the Court held that County Council's rezoning

vote in this case was invalid. Our proposed form of Order reflects that holding. (B 25.)

The form of Order submitted by Council was entered.

Again, Barley Mill next argues that the court below held that Mr. Weiner could have had the rezoning ordinance tabled. (BM Op.Br. 27-29.) That was not the lower court's reasoning. At the passage cited – Op. 33 – the observation by the Court was that:

Despite statements from Department Manager Culver and the Developer's attorney to the contrary, it would have been possible *for the County Council to have tabled the vote* on the rezoning vote until DelDOT had produced its traffic study. (*Italics added.*)

To be sure, had Messrs. Culver and Tracey (and the Stoltz attorney previous to Mr. Tracey) not given erroneous information, perhaps Mr. Weiner would have pressed for tabling of the Ordinance until the requested information was provided. Had accurate information been provided to Council as to its own authority – and, as was revealed through the court proceeding, accurate information as to DelDOT's lack of muscular authority – such a request may have gained many adherents. After all, six Councilmembers were opposed to the rezoning. As the swing vote, Mr. Weiner surely could have garnered enough support that Council would have tabled in order to obtain traffic information.<sup>20</sup> As it was, Mr. Weiner proceeded to vote on a false

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<sup>20</sup> Particularly if, instead of erroneous advice, Barley Mill's attorney or General Manager Culver had given the correct advice back at the June 7, 2011 public hearing. Had that correct advice been given months earlier, the entire course of events might have been different, and not just Councilmember Weiner's vote.

binary proposition, under the impression that there was no way, no how, that Council was entitled to traffic information before the vote.

Barley Mill also claims that Weiner did not believe that a traffic study was material to him because he did not use the term “material.” (BM Op. Br. 26.) However, it was plain that Mr. Weiner thought it was a “mistake” and a “shame” that as a result of the movement from the three-step process to a two step process, Council could no longer evaluate traffic data and consider Barley Mill’s commitment to needed traffic improvements. Further, contrary to Barley Mill’s argument, Mr. Weiner was not asking for “exactly what infrastructure improvements would be made,” – although, as was stated in the Department report, Barley Mill’s attorney had claimed that the TOA “will identify the highway improvements needed.”<sup>21</sup>

Lastly, Barley Mill offers a two-fold argument to the effect that (1) Councilman Weiner was smart and experienced, so he really wasn’t mistaken about Council’s authority in the matter, and (2) the advice given by Barley Mill’s attorney and the General Manager wasn’t all that misleading to him. (BM Op.Br., Arg. II,b and c.)

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<sup>21</sup> The record does not reflect what was actually included in the TOA. Barley Mill refused to give such information to the plaintiffs, and even though Barley Mill had submitted a preliminary TOA to DelDOT and DelDOT had approved it in August, 2011 (B 6-7), and Culver had been made aware of that fact in September, he declined to obtain it. State Representative Debbie Hudson had it right when she asked at the October 4th Council hearing, “Next, are you satisfied with the traffic information that is supposedly coming to you from the state that will be a TIS or a TOA? Personally I’m not satisfied with it but we are working on that.” (A 303.)

There are several responses to that, beginning with the observation that Barley Mill is now arguing to go behind statements given at the time of vote. Such an approach, inviting a court to speculate over what might have been the “real” reason – beyond the stated reason – for a Councilmember’s vote would be both “burdensome” (as Barley Mill itself has earlier complained) and highly speculative.<sup>22</sup>

Through partial quotes of remarks by others, Barley Mill argues that neither its attorneys nor the General Manager affirmatively misled Council in general, or Mr. Weiner in particular. However, the Vice Chancellor’s review and analysis was correct. (Op. 31.) It was unequivocal in the record that all Councilmembers were told that they would not be receiving any information from a traffic study prior to casting their only discretionary vote on whether or not to rezone the property, that traffic had been taken out of their hands, and that DelDOT would determine the required improvements at the record plan stage (when Council no longer would have discretionary authority). One might logically infer that all those who cited the Department recommendation in their voting statements were influenced by that misadvice, since the Department report was written with an orientation that traffic was not an issue for Council. But Councilman Weiner (and Councilman Street) went further, remarking with frustration at that advice.

In sum, the law was misrepresented to Council, the misrepresentation was also embodied in the Departmental report and recommendation, and at least two in

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<sup>22</sup> *O’Neill v. Town of Middletown*, 2006 Del.Ch.LEXIS 131 (Del. Ch. July 10, 2006) at \*26-27.

the seven member majority (Councilmen Smiley and Tackett) cited only the Department recommendation as their rationale. The plaintiffs thus argued below, and continue to submit (*infra*, at Arg. II), that the entire vote was fatally flawed on account of the erroneous advice. However, it certainly was correct for the court below to invalidate the vote when there was even further evidence in the articulation by Councilman Weiner that he considered traffic information material to his vote and that he had been put into a situation of voting without it. That extremely limited, narrow holding should be upheld on appeal.

## **II. THE FAILINGS OF THE DEPARTMENT OF LAND USE REPORT AND RECOMMENDATION ALSO WARRANTED INVALIDATION OF THE VOTE**

Question Presented. The Department report and recommendation was outcome determinative. Therefore, in light of the factors mandated in the UDC for consideration on rezoning applications, was it not legally erroneous, arbitrary and capricious of the Department to recommend in favor of the rezoning for a shopping mall without any analysis of present and future traffic conditions? And were there not other unsupported failings of analysis, and conclusions lacking any substantial evidence, which further vitiated the Department's recommendation as a justification for the rezoning?

The plaintiffs presented their argument on this issue in their pretrial briefs (A 763-67; A 865-76), and argued the issue to the court below, as did the County. (A 1023-43; A 1064-66.) However, although the court below made critical mention of the assertions given by General Manager Culver – his instructions that traffic consideration comes later, and is a matter for DelDOT engineers, not the Council – no express determination and ruling was made with respect to the Department report and recommendation. (Op. 24-26, 30 & 33.)

Standard And Scope Of Review. Following a trial on a paper record, this Court may affirm judgment on any ground fairly presented below. *Tickles v. PNC Bank*, 703 A.2d 633, 636 (Del. 1997).

Merits Of Argument. Plaintiffs had cited Councilman Weiner's frustrated comments – about the lack of traffic data, Council's limited role, and the total deferral to DelDOT – as the culmination of a faulty process which had led to

an uninformed and unreasonable result. Although the invalidation of Weiner’s one vote in this 7:6 situation was sufficient to invalidate passage of the ordinance, it was and remains the position of the plaintiffs that the application was entirely mishandled within the County, most particularly but not exclusively with respect to the lack of traffic analysis. That mishandling was reflected in the report of the Department, carried forward with consequent result in its recommendation in favor of the rezoning, which thereby set the vote requirement at seven, rather than nine.<sup>23</sup>

The report noted, several times, that the traffic impact of inserting a regional shopping mall was a major point of concern. However, it went no further on that topic beyond saying that in the future DeIDOT would receive and analyze a traffic study and that, before Plan recordation, DeIDOT would have to sign off on “whatever improvements might be necessary to accommodate the rezoning.” In other words, the orientation behind the report was that the decision on whether or not to rezone was an independent question, to precede traffic analysis and without any sense of traffic mitigation “to accommodate the rezoning.” Those matters would supposedly be determined and controlled by DeIDOT.

Discovery revealed a major fallacy behind reliance on DeIDOT, to wit, that DeIDOT considered the proposal to be “grandfathered” and therefore not subject to

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<sup>23</sup> To place the report in perspective, Mr. Culver was acting General Manager at the time the Second Plan was submitted. To that point, Barley Mill had been represented for three years by Ms. Scott, the wife of Paul Clark, who initially was County Council President and then, in 2010, had become County Executive. Ms. Scott resigned from this representation after the Second Plan had been submitted, when the County Ethics Commission had pointed out the irreconcilable conflict of interest that existed. (B 64.) Once Mr. Clark was County Executive, Mr. Culver served at his pleasure. Shortly before the Department report was issued, Mr. Culver was promoted to General Manager, the “acting” qualification removed. (B 76-77.)

the State's Level-of-Service "D" (LOSD) standards, and that DelDOT actually considered its role to be advisory only, sharing suggestions. (B 56-57.) Later, colloquy driven by the Vice Chancellor revealed a second, related fallacy, to wit, that as of 2011 – when the Department rendered its report and recommendation and then Council voted – DelDOT did not have the authority to compel Barley Mill to fund improvements in order to achieve any particular LOS. (A 1131-35.)

However, even apart from the misrepresented notion that there was comfort to be derived from DelDOT at the end of the plan approval process, the approach of not providing even minimal data and analysis on the traffic to be expected was illogical when assessing a project as major as a regional mall at what was already one of the busiest intersections in New Castle County. Moreover, that approach was at total odds with the UDC requirement that when considering whether to recommend a rezoning, there must be consideration of certain specific factors. Turning to the treatment of those factors in the report:

Consistency With The Comprehensive Development Plan. The UDC requirement that a proposed rezoning be reviewed for consistency with the County's comprehensive development plan is hand-in-glove with the state law requirement that all developments allowed by the County must be "in conformity with the land use map." 9 *Del.C.* § 2659(a). The Department report gave short shrift and erroneous guidance on both topics.

The future land use map in effect at the time of the vote designated the area of Barley Mill Plaza for "Community Redevelopment." (B 27.) The rezoning of

this site to the most intensive commercial category – Commercial, Regional (CR) – was absolutely inconsistent with the “community” designation on the map. While the two terms are undefined in the UDC, they are separate terms and while an area, once zoned Commercial, Regional (CR) can have community services within it, one does not expect that an area shown on the future land use map as being for “Community Redevelopment” would countenance a regional mall intended to draw shoppers from out of state. Yet, the Department erroneously opined that “With respect to the future land use map, there is no need to amend the 2007 Comp Plan Update.”<sup>24</sup>

When the report turns from its one misleading sentence about the future land use map to the County comprehensive plan, it is equally as erroneous. It provides only perfunctory discussion of the Objectives of the 2007 Comprehensive Plan. Against the stated Objectives, the project failed miserably:

- Objective 1 requires management of new growth to “ensure that the growth which occurs is developed in a prudent fashion without placing a strain on the infrastructure that serves the existing population, and the resources that are critical to the greater public good.”
- Objective 2 is that new development in northern New Castle County should be guided “to achieve greater use of existing infrastructure and public resources,” noting that “the mix of residential and non-residential uses and

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<sup>24</sup> For discussion cataloging decisions pertaining to conformity (or lack of conformity) with land use maps and comprehensive plans, *see, Farmers for Fairness v. Kent County Levy Court*, 2012 WL 295060 (Del. Ch., Jan. 27, 2012).

densities will be consistent with the underlying zoning as well as the density and integrity of existing neighborhoods.”

Obviously the proposal would violate those very first two objectives, in that it *would* place a strain on the infrastructure that serves the existing population, and the uses and densities will *not be consistent* with the underlying zoning as well as the density and integrity of existing neighborhoods.

Consistency With The Character Of The Neighborhood. There are no regional malls in the area. The shopping complex was proposed to occupy the entire half mile frontage along Route 141, with several hundred feet along Route 48 at the 141/48 intersection. Today there is not a single commercial establishment on 141 from Faulkland Road to Fairfax, a distance of five miles. It is 100% residential, office and institutional. The 141/48 intersection consists of three large, heavily landscaped office parks (one of which is Barley Mill Plaza) and a 100+ acre nature preserve.

For the report to have stated that the area “is decidedly highway oriented” was a hollow misstatement, – using an elastic term which signifies nothing. While the area has two arterials passing through it, neither the area nor the site is “highway oriented” unless the developer were allowed to make it such, with 40 foot tall stores and thousands of parking spaces. The property adjoins four residential neighborhoods and a high school athletic field. The expectation of the residents living off of those arterials is that there is a long stretch of non-

commercial roadway to their homes. The character of the neighborhoods is decidedly *not* highway oriented.<sup>25</sup>

Consistency With Zoning And Use Of Nearby Properties. Claiming to take a “broader view” on this factor, the Department reported that the proposed development “does not represent a significant departure from present land use patterns,” since one could view commercial uses as “logical extensions of higher density and non-residential development that has historically occurred outward from the city along this (Route 48) corridor.”

Of course that sidestepped the fact that such “non-residential development” that has grown up along Lancaster Pike has been office park in nature, and one doesn’t reach anything commercial of any significant size until Hockessin, five miles away. The “nearby properties” are residential, office complexes, a nature preserve, a youth athletic field and cemeteries. The proposal is inconsistent with the use of those properties, and a regional mall would be a fundamental departure from the current land use.<sup>26</sup>

Suitability Of The Property For The Uses For Which It Has Been Proposed. The proposal was to place a regional mall along a residential and office corridor, less than a mile from Delaware’s only National Scenic Byway and the

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<sup>25</sup> The most succinct descriptive comment on the inappropriateness of the regional mall proposal appears in an internal email exchange between two Department staffers in April, 2011: “I am thrilled to be part of this historic debacle that will forever scar this area;” “You know – it’s so sad – its no longer funny!!” (B 68-69.)

<sup>26</sup> At the second Council hearing, Barley Mill’s attorney stated, essentially as a concession, that “(O)bviously there’s no CR in our immediate proximity. If this one gets approved it still becomes the only CR.” (A 367.)

gateway to the historic Brandywine Valley. Only from the perspective of the developer could it be said that this property was suitable for what was being proposed.<sup>27</sup> And the Department's support for a conclusion that the mention in that passage of a so-called "regional stormwater management facility that is expected to limit and reduce flooding impacts downstream in the Elsmere community" was another bit of misleading rhetorical overselling.<sup>28</sup>

Effect On Nearby Properties. On this factor, too, the Department's report was unfounded, with nothing in the record to support a favorable finding on it. A regional mall will generate noise and light pollution, traffic and trash from a seven day per week shopping center. And the remarks in the report that the nearby residential areas will not be affected by the mall because they do not directly abut it – being across Route 141 or Route 48 or behind a surface level train track – is nonsensical.

And of course overriding all of this is the choking level of traffic to be expected both on Routes 141 and 48 and through several of the neighborhoods as commuters and shoppers would attempt to find alternate routes to get past the bottleneck. Both the traffic and any structures created to deal with the traffic would forever have an adverse effect on the nearby properties and would alter the

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<sup>27</sup> As revealed in its marketing materials, the plan is designed to draw shoppers from all over the region. (B 60-61.)

<sup>28</sup> The facts revealed through discovery were that the retention pond, the core of such facility, would only reduce by an inch the periodic flooding in nearby apartments which generally is in the two to three foot range. And there was nothing in the record to support any statement or inference that flooding conditions further downstream – say, in Elsmere – would be improved. Further, Barley Mill – both in its attorney's remarks to Council (A 361-62) and in its brief to the court below (A 827) – has made clear that it only intends to meet its obligations under 7 *Del.C.* § 4003A, which does not mandate a decrease or improvement in offsite flow.

character of the neighborhood. The report makes no mention of traffic when discussing this factor, yet concludes this passage with the absurd statement that “the direct potential for adverse impacts are limited.”

Lastly, this Departmental report was not just an advisory or technical handout for Councilmembers to consider and give such weight as they may choose. By state law, the favorable recommendation based on this report lowered the vote count for passage. Reliance on the Departmental recommendation was key to passage of the rezoning ordinance, and for two of the Councilmembers, that was all that they mentioned. (A 668-70.) For that reason, and because that recommendation had lowered the number of votes required for passage, the recommendation and the report which it grew out of are subject to the same level of review and scrutiny as the legislative actions themselves.

And on that basis, the report and recommendation are completely unsubstantiated. To be sure, the rhetoric in the report goes on at length, but on the most critical issue – traffic impact – it provides no analytic information whatsoever, – just a promise of future technical attention. It made gross misrepresentations of existing land uses around the site, and stated conclusions on the rezoning factors that were unsupported by fact or rational analysis.

It is a principle in our law that reviewing courts “must guard against any inclination to permit appropriate deference to denigrate into blind acceptance of counsel’s filings.”<sup>29</sup> The same may be said as to review of administrative findings

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<sup>29</sup> *Green v. County Council of Sussex County*, 508 A.2d 882, 891 (Del. Ch.), *aff’d* 516 A.2d 480 (Del. 1986).

which so affected the councilmanic process and which, as Barley Mill would have it, serve as the majority's statement of rationale. Upon examination, the report and recommendation was grossly perfunctory, misleading and unreasoned on the most essential issues to be considered.

To be sure, there have been case decisions where challengers to a rezoning are unsuccessful when taking issue with the level of detail and analysis that has gone into a traffic study or other technical study provided to a council. However, those decisions all presented situations where some traffic analysis had been provided.<sup>30</sup> Here, *no* study was provided, and *no* information other than the negative information and predictions of gridlock provided by the testifying public. Upon that record, the report and recommendation and, with it, the subsequent vote, should be overturned.

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<sup>30</sup>See, discussion *infra*, in Arg. III, of *Deskis v. County Council of Sussex County*, 2001 WL 1641338 (Del. Ch. Dec. 7, 2001); *Citizens Coalition, Inc. v. Sussex County Council*, 2004 WL 1043726 (Del. Ch., April 23, 2004) *aff'd*, 860 A.2d 809 (Del. 2004) (TABLE); and *Hansen v. Kent County*, 2007 WL 1584632 (Del. Ch., May 25, 2007). See also, *Christiana Town Center, LLC v. New Castle County*, 2009 WL 781470 (Del. Ch., Mar. 12, 2009), *aff'd* 985 A.2d 309 (TABLE), 2009 WL 4301299 (Del., Dec. 1, 2009), discussed in Arg. IV.

### III. A PROPER CONSTRUCTION OF 9 DEL.C. § 2662 ALSO REQUIRES INVALIDATION OF THE VOTE

Question Presented: Was 9 Del.C. § 2662 properly construed as requiring only that Council and DelDOT enter into a procedural agreement? Does it not require that Council give informed consideration to traffic issues before approving any rezoning request?

The plaintiffs presented their argument on this issue in their pretrial briefs. (A 749-57; 845-855.) The § 2662 issue was then argued to the court below at the hearing, both by the plaintiffs (A 954-58; 962-70) and by the County supporting plaintiffs' position. (A 1058-62.) The court below considered this issue, ruling against the plaintiffs. (Op. 15-16.)

Standard And Scope Of Review. The question is one of statutory interpretation, and therefore is a legal question which is reviewed *de novo*. *Sussex County Dept. of Elections v. Sussex County Republican Committee*, 58 A.3d 418, 421 (Del. 2013).

Merits Of Argument. Proceeding to vote on a major rezoning without any traffic analysis, as was done by County Council here, was a violation of State law, 9 Del.C. § 2662.<sup>31</sup> The statute requires that County Council not approve any rezoning request until there has been a consideration of the "effects of existing

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<sup>31</sup> The provision is part of the Quality of Life Act of 1988, which Act, for New Castle County, is codified at Subchapter II of Title 9, Ch. 26, Zoning, §§ 2651-2662. For Kent County, the Act appears at 9 Del.C. §§ 4951-4962, and for Sussex County, 9 Del.C. §§ 6951-6962. The Kent and Sussex equivalents to § 2662 are §§ 4962 and 6962; the only distinction is that § 2662 is specifically addressed to, and obligates, "County Council," while §§ 4962 and 6962 are addressed to "county government."

traffic, projected traffic growth in areas surrounding a proposed rezoning classification and the projected traffic generated by the proposed site development for which the rezoning classification is sought.” That was not done here and, as a consequence, the rezoning was invalid inasmuch as Council lacks authority to alter or disregard applicable law. *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).

When discussing the issue, the court below gave a very narrow reading to the statute, as though it required no more than that County Council enter into an agreement with DelDOT. (Op. 16.) However, the statute requires more of County Council than that it enter into an agreement, regardless of what the agreement provides and, more importantly here, regardless of whether the County follows through in any given situation. To read § 2662 as the lower court has done is to read out clause (3) (“To ensure that traffic analyses are conducted as part of the rezoning classification process within the County”) and clause (4) (“The review of traffic impacts ... (including) the projected traffic generated by the proposed site development for which the zoning reclassification is sought.”) The lower court’s reading of the statute renders those provisions inoperative, contrary to the principle that, if possible, every part of a statute must be given effect. *DiSabatino v. Ellis*, 184 A.2d 469, 473 (Del. 1962). Instead, by reducing the statutory requirement to lip service, that construction creates “mischievous consequences inconsistent with the general statutory intention.” *C v. C*, 320 A.2d 717, 722 (Del. 1974).

In *Deskis v. County Council of Sussex County*, 2001 WL 1641338 (Del. Ch. Dec. 7, 2001), one of the challenges by residents opposed to a rezoning was that

the Council had failed to follow the requirements of 9 *Del.C.* § 6962 (the Sussex County equivalent to § 2662). There, Justice (then-Vice Chancellor) Jacobs observed that “Delaware law mandates that the County Council consider DelDOT’s traffic analysis before deciding whether or not to rezone.”<sup>32</sup> Justice Jacobs gave the record extensive analytic discussion before concluding that Council’s action had met the statutory obligation. Quite in contrast to the silent record here, there DelDOT’s analysis of traffic statistics had been communicated to Sussex County Council, several times, also recommending the rezoning and advising that “The County can be confident that the proposed development would generate fewer trips than has already been approved.” The Sussex Council had considered that data and report when considering the statutorily-mandated factors, including “the projected traffic growth in areas surrounding a proposed rezoning classification.”<sup>33</sup>

Although plaintiffs repeatedly urged the significance of the *Deskis* holding (A 754, 852), the court below characterized it as “dicta.” (Op. 17 at fn. 63.) However, that is not a logical reading of *Deskis*. The *Deskis* court engaged in extensive analysis as to whether the Sussex County Council had met the statutory requirements. Even had there been no express declaration that the QOLA statute required consideration of the traffic analysis, so much was implicitly evidenced by the court’s analysis there. A similar declaration and pattern is found in *Citizens Coalition, Inc. v. Sussex County Council*, 2004 WL 1043726 at \*\*2-5 (Del. Ch.,

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<sup>32</sup> 2001 WL 1641338 at \*9.

<sup>33</sup> *Deskis*, 2001 WL 1641338 at \*\*7-9.

April 23, 2004) *aff'd*. 860 A.2d 809 (Del. 2004) (TABLE). There, too, the charge was made that the Sussex County Council had not met the statute. And in that case, too, the court declared that state law “requires SCC to ‘*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.’” (*Italics* original.) *Accord, Hansen v. Kent County*, 2007 WL 1584632, at \*\*2-4 (Del. Ch., May 25, 2007), examining the record on a rezoning for Kent County Levy Court’s compliance with 9 *Del.C.* § 4962. The records in those three cases – *Deskis*, *Citizens Coalition* and *Hansen* – sustained findings that those county councils had acted appropriately under the statute. However, the records in those three cases were the diametric opposite of the silent record here. And, more to the immediate point, it is absolutely unlikely that those three decisions would have read as they do if their authors had concluded, as the lower court did here, that 9 *Del.C.* § 2662 (or its equivalent) did not require Council “even to consider traffic.” (Op. 15-16.)

Lastly, it is somewhat confounding that fifteen pages further in its Opinion the lower court cited § 2662 (along with certain provisions of the UDC) for this:

In light of these statutes and ordinances, it is evident that the legislature and Council itself intended for traffic information to be *available* to the County Council. That the County Council is not required to utilize traffic data in its analysis by law does not reduce the relevance and materiality of such data to the Council’s exercise of its legislative rezoning function. (*Italics* original.) (Op. 30.)

Plaintiffs submit that the statutory interpretation expressed in *Deskis* and *Citizens Coalition*, and followed there and in *Hansen*, was correct, in that the statute requires County Council *consider* the sort of traffic information which is enumerated in the statute. But even if one were to construe § 2662 as only reflecting a legislative intent that traffic information be made “*available* to the County Council,” then even under that construction the statute was not met under the facts of this case, and the vote must be invalidated.

#### **IV. THE PROPER CONSTRUCTION, INTERPRETATION AND APPLICATION OF THE COUNTY UDC PROVISIONS CONCERNING TRAFFIC INFORMATION AND “REDEVELOPMENT” ALSO REQUIRES INVALIDATION OF THE VOTE**

Question Presented. Whether a UDC exemption for “redevelopment” projects was properly applicable here and, even if applicable, whether that excused and justified the total blackout on traffic data and analysis, first at the Departmental level and then at the Councilmanic level?

Plaintiffs presented their argument on this issue in their pretrial briefs. (A 757-63; 855-860.) This was then argued to the Court below both by the plaintiffs (A 997-1006) and, in support of plaintiffs’ position, by the County. (A 1064-68.) The court below considered and addressed this issue, ruling against plaintiffs. (Op. 17-23.)

Standard And Scope Of Review. This issue presents a mixed question of law and fact. To the extent it is a question of statutory interpretation, it is a legal question, reviewable *de novo*. *Sussex County Dept. of Elections, supra*. Factual determinations are reviewed under the “substantial evidence” standard. *Bd./Sussex v. Verleysen, supra*.

Merits Of Argument. By longstanding precedent, when acting on a zoning matter a legislative body must strictly comply with all applicable procedures, including its own, such that any action not taken in accordance is deemed arbitrary and capricious. *Shevock v. Orchard Homeowner’s Ass’n, Inc.*, 621 A.2d 346, 349 (Del. 1993). The rezoning vote here and the processes leading

up to it violated the County's own requirements and for that reason, as well, the vote should have been held invalid.

The UDC has a separate provision – Art. 11 – concerning Transportation Impact. It begins by stating, at § 40.11.000, that “No major land development or any rezoning shall be permitted if the proposed development exceeds the level of service standards set forth in this Article....” At § 40.11.120, speaking to “Need For Traffic Analysis,” it required that an applicant submit certain traffic information “for all major plans and rezonings,” including approximate vehicle trips per day “generated by the proposed development.” And in its Art. 31, Procedures And Administration, the UDC provided that any additional studies or information required were to be provided to the Department prior to the rezoning/preliminary plan submission.<sup>34</sup>

Parenthetically, those requirements are strikingly consistent with the requirements of the State statute, 9 *Del.C.* § 2662, discussed in Arg. III. They are also consistent with the County/DelDOT agreements entered in the wake of that statute, – both the 1990 DelDOT/County MOU and the more stringent MOU effective March 31, 2008.<sup>35</sup> But the pertinent point is that a traffic study had been

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<sup>34</sup> UDC § 40.31.112C, instructing that “If additional studies and/or information are required for the proposed project, those studies and/or information must be provided to the Department prior to the rezoning/preliminary plan submission;” § 40.31.112,G, stating “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.”

<sup>35</sup> 1990 Joint Agreement (B 99); 2008 Memorandum of Agreement (B 105). The latter is more stringent in the sense that it mandates a traffic impact study (“TIS”) for any development that will produce more than 2000 vehicles per day or 200 vehicles per hour.

required and presumably was underway, but yet – in contrast to the pre-vote record that had been developed in any other rezoning case precedent – neither the results of the study nor any study whatsoever had been provided to the Council here. On its face, this was in violation of the UDC. And, under the principles of *Shevock*, warranted invalidation of the vote.

Barley Mill successfully argued to the lower court that notwithstanding these provisions, it had an exemption by virtue of another provision within the UDC, pertaining to “redevelopment” plans. With respect, the analysis and conclusion of the court below to accept that argument was erroneous, for two reasons:

A. The plan was not properly characterizeable as a “redevelopment” plan. “Redevelopment” is defined at UDC § 40.33.300 as:

A process used to identify previously developed land that is now vacant, abandoned or underutilized real property where older structures if they exist are rehabilitated or replaced.

“Redevelopment” is addressed in Art. 8 of the UCC, pertaining to “Nonconforming Situations.” At § 40.08.130,6, speaking to “Redevelopment and Brownfields,” there is this declaration of purpose:

**Purpose.** Redevelopment is intended to facilitate and encourage the continued viability of previously developed lands by granting a credit for both extractive use sites and Brownfields; and for sites with legally existing gross floor area (GFA) *that has been demolished by more than fifty (50) percent of its GFA.* New construction may be configured or located elsewhere on

*the site although rehabilitation or restoration of existing structures is highly recommended. (Italics added.)*<sup>36</sup>

Hence, neither the definition nor the purpose of “redevelopment” applied to Barley Mill Plaza. It was neither underutilized nor half-demolished. It was in good condition, 80% rented, and none of the buildings had been demolished.

However, having given an extremely literal reading to 9 *Del.C.* § 2662 (to the point of an illogical result, plaintiffs contend), the lower court took the opposite approach on the redevelopment provision in the UDC statute, giving it such an elastic reading that its literal terms were eclipsed. Under the lower court’s construction, any property built under the former code – prior to 12/31/97 – would qualify for “redevelopment” treatment, regardless of whether occupied or demolished, and regardless of whether the plan would restore any of the existing structures.

The lower court seems to have come to its construction on the basis of a County “interpretation” which appears nowhere in the record. However, such an intent was not articulated by the Department of Land Use in its report, nor by County Council in its deliberations. In fact, Council was not at all involved in determining whether the application called for redevelopment, and it is impossible to understand the lower court’s reference when it stated “(B)ecause the County Council’s position is reasonable, I defer to their interpretation. (Op. 23.) As late as the evening of the vote, the sponsor of the rezoning ordinance was not aware the proposal involved redevelopment, and had to be so advised by Culver, whose

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<sup>36</sup> UDC § 40.08.130,B,6.

Department had allowed the proposal to proceed under that designation from the outset. (A 591-92.) And as counsel for Barley Mill stated at argument to the court below, “The issue of whether this qualified as a redevelopment was not before the Council.” (A 1082.)

Nor was there anything in the Department report, nor anything in the record, to evidence that the Department had given any consideration to why this qualified as redevelopment. Parenthetically, if a “redevelopment” characterization had been thought of all along as the proper trip switch for Barley Mill to avoid supplying any traffic analysis to Council, it is remarkable that it was never mentioned at the time of these events (i.e., until the matter got to court). Instead, at the County level, the attorneys for Barley Mill were giving the advice that the 2009 UDC amendment to Article 31 – from the three-step to two-step – is what pushed traffic data and its consideration to the end.

B. Apart from whether or not this Second Plan qualified for “redevelopment” status under the UDC, the fact of the matter is that the exemption which that status affords is not so broad as to countenance and excuse what happened here. The pertinent language in the UDC redevelopment provisions was as follows:

An operational analysis may be required for major plans.  
A traffic impact study shall only be required if requested  
by *DelDOT*.<sup>37</sup>

DelDOT had not requested a TIS here; but it had requested a TOA. And because any redevelopment plan requesting a rezoning “shall follow the review procedures

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<sup>37</sup> UDC § 40.08.130,B,6,e,7.

of Article 31”<sup>38</sup> and, as noted above, Article 31 requires that any additional studies or information required for the proposed project are to be provided to the Department prior to the submission of the plan for Council vote, the TOA should have been provided prior to proceeding to Council.<sup>39</sup> Obviously Barley Mill’s attorneys must have believed that the UDC required that all requested traffic studies had to be submitted prior to a rezoning vote, regardless of their self-selected designation of the project as “redevelopment.” They never argued for a supposed redevelopment exemption as events were unfolding with the County. Rather, they instructed Council and the public that it was the 2009 amendment that had removed traffic from Council’s consideration.

The court below misperceived plaintiffs’ argument on this point. It introduced this passage in the Opinion by stating that plaintiffs had faulted the process for want of a TIS. However, while counsel for plaintiffs will accept responsibility for any confusion or misperception, plaintiffs faulted the process for allowing this proposal to have proceeded to Council vote without any analysis whatsoever of the traffic existing, the traffic to be expected from developments already approved, and the traffic which would likely arise were the proposed project allowed. Such a study had been requested by DeIDOT; it supposedly had been underway for years; and, presumably, was within arm’s-length, just months away. Instead, this regional mall, in an unprecedented move, came to vote without any traffic analysis whatsoever.

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<sup>38</sup> UDC § 40.08.130,B,6,d.

<sup>39</sup> UDC § 40.31.112,G.

Lastly, and anticipating a possible reply by Barley Mill, this abject failure to provide an informed process cannot be salvaged by reference to *Christiana Town Center, LLC v. New Castle County* (“*CTC*”), *supra*. The critical issue determined in that case, where a rezoning received unanimous approval, was whether a TIS should also have been required, over and beyond the traffic information that had been provided, for what was uncontestedly a redevelopment project. Noting ambiguity in the UDC on this question, the lower court’s determination, affirmed by this Court, was that a TIS was not required. However, the factual run-up to that challenge was far different than the facts here. In *CTC*, a TOA requested by DeIDOT had been provided. (Parenthetically, in just two months.) The results had been analyzed and reported by DeIDOT to Council, along with a DeIDOT recommendation that the applicant, Sears, be required to pay for part of the surrounding road improvements. After DeIDOT had issued its recommendations, “Restrictions were added to Sears’ proposed plan conditioning any building permits on Sears entering into an agreement with DeIDOT to fund part of the cost of constructing the surrounding road improvements.” In other words, what had transpired in *CTC* was precisely what Councilman Weiner was requesting here,<sup>40</sup> and what the UDC required.

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<sup>40</sup> *See, infra*, at 26.

## CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the court below, invalidating the vote of County Council on the subject rezoning ordinance.

Respectfully submitted,

*/s/ Jeffrey S. Goddess*

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