IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIAM J. WOZNICKI, individually and as President of the Brookmeade I Civic Association, SUSAN RIVENBARK, individually and as president of the Brookland Terrace Civic Association,	)	
Plaintiffs,	)	
v.	)	C.A. No.:02A-05-011-FSS
NEW CASTLE COUNTY, a political subdivision of the State of Delaware, THOMAS P.L GORDON, New Castle County Executive, NEW CASTLE COUNTY PLANNING BOARD, NEW CASTLE COUNTY COUNCIL, NEW CASTLE COUNTY DEPARTMENT OF LAND USE, COUNTRY SWIMMING CLUB, INC., EASTERN STATES DEVELOPMENT COMPANY, INC.	)	
Defendants.	)	

Submitted: December 18, 2002
Decided: June 30, 2003

MEMORANDUM OPINION

Upon Appeal From A Rezoning Decision By The New Castle County Council –
AFFIRMED

Mr. William Woznicki, 2510 Teal Road, Wilmington, Delaware, 19805. *Pro Se* Plaintiff.

Ms. Susan Rivenbark, 110 North Woodward, Wilmington, Delaware, 19805. *Pro Se* Plaintiff.

Scott G. Wilcox, Esquire, New Castle County Law Department, Government Center 87 Reads Way, New Castle, Delaware, 19720. Attorney for Defendant, New Castle County.

Ronald L. Stoner, Esquire, 1107 Polly Drummond Plaza, Newark, Delaware, 19711. Attorney for Defendant, Country Swimming Club, Inc.

Lisa B. Goodman, Esquire, Young Conaway Stargatt & Taylor, 1000 West Street, 17th Floor, P.O. Box 391, Wilmington, Delaware, 19899-0391. Attorney for Defendant, Eastern States Development Company, Inc.

AND

STATE OF DELAWARE EX REL,	)	
RICHARD L. ABBOTT, individually,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 02M-03-029-FSS
	)	
CHARLES L. BAKER, General Manager	)	
NEW CASTLE COUNTY DEPARTMENT	)	
OF LAND USE, a political subdivision	)	
of the State of Delaware, NEW CASTLE	)	
COUNTY PLANNING BOARD,	)	
CHRISTOPHER A. COONS, President	)	
of New Castle County Council, EASTERN	)	
STATES CONSTRUCTION COMPANY,	)	
	)	
Defendants.	)	

Submitted: December 18, 2002
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MEMORANDUM OPINION

Upon Appeal From A Rezoning Decision By The New Castle County Council –
AFFIRMED

Richard L. Abbott, Esquire, The Bayard Firm, 222 Delaware Avenue, Suite 900, P.O. Box 25130, Wilmington, Delaware, 19899. Attorney for Plaintiff.

Eric L. Episcopo, Esquire, New Castle County Law Department, 87 Reads Way, New Castle, Delaware, 19720-1648. Attorney for Defendant, Baker.

Scott G. Wilcox, Esquire, Brian J. Merritt, Esquire, New Castle County Law Department, Government Center, 87 Reads Way, New Castle, Delaware, 19720. Attorneys for Defendant, New Castle County.

SILVERMAN, J.

The above-captioned cases are not consolidated, but they are closely related. They challenge New Castle County Council's rezoning part of the Country Swim Club property, at 2700 Centerville Road. *Woznicki* was filed by two citizens who also are Presidents of neighboring civic associations. *Baker* was filed by a county councilman opposed to the rezoning. First, the court will discuss the rezoned property and the rezoning, then the standard of review. Finally, the court will present the Appellants' claims as it addresses them one-by-one.

I.

The approved rezoning involves a 5.3 acre lot that is part of a 16 acre parcel owned by the Country Swimming Club, Inc.[1] The property is located west of Wilmington, towards Hockessin. For now, the land is undeveloped countryside, except that the swimming club operates a private, community-style swimming facility. Officially, the site is described as "open field, mixed hardwood forest, and forest and wetlands." After the subdivision and rezoning, the swimming club will continue to operate its swimming pool on the club's remaining 11 acres. The new 5.3 acre parcel will be paved, except for a storm water management area and marginal, token landscaping. Most of the paving will be used for a 246 spot surface parking lot and most of the rest of the parcel will contain a two-story, 60,200 square foot

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[1] The corporation also refers to itself as the "Country Swim Club, Inc."

office building. The parking lot will be illuminated by several light standards.

On the development's southern border are seven or eight single-family homes that face Teal Road in Brookmeade. Those homes will be screened from the development by a proposed buffer with 0.3 opacity. The property's western border is Centerville Road. To the development's north is a large parcel zoned for regional office buildings. A large office building has been built on the land, and more office construction is authorized there. To the development's east, of course, is the remaining swim club property.

Until it was rezoned, the 5.3 acre parcel was designated Suburban Reserve (SR).[2] By its terms, the Suburban Reserve (SR) is not a permanent designation. That zoning classification preserves the district's "countryside character" until the County provides sewer service to it. When the "sewering" of the area has occurred, the County's Unified Development Code[3] contemplates that a Suburban Reserve (SR) will be rezoned Suburban (S).[4] According to the UDC, a

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[2] New Castle County Unified Development Code, § 40.02.234, Enacted February 25, 22003, Supp. No. 5, Update 2.

[3] New Castle County Unified Development Code, § 40.02.234, Enacted February 25, 22003, Supp. No. 5, Update 2.

[4] New Castle County Unified Development Code, § 40.02.234 (A), Enacted February 25, 22003, Supp. No. 5, Update 2.

Suburban (S)[5] district

> permits a wide range of residential uses . . . . This district permits moderate to high density development and a full range of residential uses in a manner consistent with providing a high quality suburban character. Significant areas of open space and/or landscaping shall be provided to maintain the balance between green space and buildings that characterize suburban character . . . . The Suburban District is used to in-fill tracts containing at least five (5) acres or where New Castle County seeks to redevelop the area to suburban character.

In this case, the 5.3 acres are being rezoned Office, Neighborhood (ON).[6] The UDC describes the Office, Neighborhood District (ON) as:

> A. This district is intended to provide for professional and administrative offices in a park-like setting whose character is suburban transition.
>
> B. Building heights and floor area ratios are designed to provide a setting that is generally compatible with most of the County's residential areas.

It is understood that the development is not served by a sewer, but a sewer improvement project is in the offing. Accordingly, despite the rezoning, the County alleges that it will not issue building permits and a certificate of occupancy

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5 New Castle County Unified Development Code, § 40.02.232, Enacted February 25, 22003, Supp. No. 5, Update 2.

6 New Castle County Unified Development Code, § 40.02.223, Enacted February 25, 22003, Supp. No. 5, Update 2.

until the development has a sewer. In effect, what happened was 5.3 acres of a 16 acre lot originally designated for rezoning from Suburban Reserve (SR) to Suburban (S) was rezoned, instead, to Office, Neighborhood District (ON). The rezoning also supposedly ensures that the original parcel's remaining two thirds supposedly will remain undeveloped.

The County's Comprehensive Development Plan is significant because, in part, the rezoning was justified as a way to provide a transition between the residences in Brookmeade to the development's south, and the regional office park to the development's north. As discussed below, the County's zoning code provides some rationale for in-filling a 5+ acre parcel located between a suburban residential district and a regional office district. Moreover, as presented above, the Suburban (S) zoning designation "permits moderate to high density development and a full range of residential uses . . . ." That means the original zoning map probably would have allowed the developer to build a moderate to high density residential complex on the entire 16 acre parcel, once a sewer is in. Instead, once the sewer is built the developer will be able to put a two story, "professional" office building and parking lot on a portion of the parcel. But more than two thirds of the entire parcel will not be developed.

II.

The standards the court must use when reviewing a zoning decision are well established. On appeal, the court's role is not to read the record, review the evidence and reach its own conclusions based on its own findings of fact. On appeal, the court's role is restricted to reading the record and deciding if the administrative decisions are supported by evidence having substance. The court's limited role is even more circumscribed in an appeal like this, where the final decision in question was made by an elected, legislative body.

The zoning authority must explain its rezoning decisions. But as a matter of law, zoning decisions are presumed valid. Before a court can overturn a rezoning, the appellant must clearly show that the decision was arbitrary and capricious. A zoning decision is arbitrary and capricious if it is not a result of a winnowing or sifting process, or if it is made without consideration of, or disregard for, the facts. The court cannot re-weigh the evidence and make its own findings of fact. Nor may the court reach its own conclusion about what is best for the public's health, safety and welfare.[7]

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[7] *Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council*, 1998 WL 671235 (Del. Ch.); *McKee v. City of Dover*, 1998 WL 109973 (Del. Super. Ct.); *New Castle County Council v. BC Development*, 567 A.2d 1271, 1275 (Del. Super. Ct.1989); *Tate v. Miles*, 503 A.2d 187, (continued...)

III.

The first ground for the *Woznicki* appeal is the claim that the rezoning violates the State's Land Use Planning Act[8] because Appellants cannot find proof that the Office of State Planning Coordination was notified by the County about the proposed rezoning, which is required by the Act.[9] Although a representative of the developer swears that he sent notice to the state agency, the Act calls for "timely written notice" by the local jurisdiction. In this instance that means the County, and there is no record of the County's having obeyed the Act's notice requirement.

The County's apparent noncompliance with the Act's notice requirement is a concern. But it is not fatal to the Council's rezoning decision here. The Act is a means to an end. It facilitates coordination between the "many levels of government" involved in land use decisions and promotes consistency and efficiency in order to "streamline[]" the zoning process.[10] Toward that end, the Act gives the

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[7](...continued)
191 (Del. 1986).

[8] *Del. Code Ann.* tit. 29, (1997 & Supp. 2002).

[9] *Del. Code Ann.* tit. 29, §9214 (1997).

[10] *Del. Code Ann.* tit. 29, §9201 (1997).

state coordinating agency responsibilities to other levels of government.[11] In other words, the Act creates a limited role for the State as coordinator for local rezoning matters.

Here, the state agency does not challenge the County, nor do any of the entities to which the state agency has responsibilities. And, significantly, Appellants point to no specific harm caused by the County's apparent neglect. Appellants merely imply that the County's failure to notify the State automatically dooms, or delays, the final rezoning decision. Although the Office of State Planning Coordination may not have coordinated the State's agencies' responses to the rezoning application, the record includes undisputed evidence that the affected agencies received notice. The record also includes submissions to the County from several state agencies. There is no reason, therefore, to view the County's seeming indifference to the Act as more than a troubling, technical defect.

Finally, as to Appellant's first argument, the Act does not condition rezonings on approval from the Office of State Planning Coordination. To the contrary, either the state agency or the County can waive the Act.[12] The court reiterates, however, that state law expressly requires that the County "shall provide

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[11] *Del. Code Ann.* tit. 29, §9215 (1997).

[12] *Del. Code Ann.* tit. 29, §§9223 and 9234 (1997).

the Office of State Planning Coordination with a timely written notice of any proposed local land use planning action subject to this chapter before local action is taken."[13] In this case, it appears that the developer carried out the County's legal responsibility and no coordination by the Office of State Planning Coordination was necessary. In a future case or in another court the County's failure to comply with the Land Use Planning Act might be actionable. But in this case, where the developer notified the potentially affected agencies and neither an affected agency nor the Office of State Planning Coordination has complained, there is no reason to overturn the County Council's action.

IV.

The next ground for appeal is that the rezoning violated 22 *Del. C.* §305 because 78% of the parcel's neighbors opposed rezoning. The statute requires a super-majority of the County Council to enact a rezoning over a majority of the neighbors' opposition. The swim club rezoning passed by a bare majority. Twenty-two *Del. C.* §305, however, only applies to rezoning by "a legislative bodies of cities and incorporated towns."[14] In other words, the statute upon which Appellants rely does not apply to this rezoning by the County Council of a parcel in the

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[13] *Del. Code Ann.* tit. 29, §9214 (1997).

[14] *Del. Code Ann.* tit. 22, §301 (1997).

unincorporated portion of New Castle County. And, therefore, a super-majority was unnecessary.

In their reply, Appellants argue further that New Castle County is a part of the State of Delaware and it should be treated like any other part of the State. Appellant's argue, "There needs to be some parity between municipal, county and state government laws."

As a practical matter, in some instances it may be difficult to see a difference between portions of some municipalities and portions of the unincorporated part of the County. Some towns have suburban-like areas, while some parts of the County seem urban. Nevertheless, the General Assembly treats municipalities and counties differently in many ways. The legal distinction is ancient and organic. In part, the differing treatment can be explained currently by differences in the ways municipalities and counties provide governmental services, and in their tax structures. Using this case as an example, it is difficult to envision a similar project in almost any of the municipalities located in New Castle County. In any event, the General Assembly draws a formal distinction between municipal and county land that the court cannot ignore.

V.

The next challenge to the rezoning concerns the fact that the developer

was not required to submit an environmental impact statement about the project. Foremost among Appellants' several concerns are the claims that the redevelopment will harm protected wetlands on the parcel and promote flooding nearby. Appellants point to a 1989 engineering study that included a "Wetland Delineation Plan" and a Council member's statement that according to the Delaware Nature Society, "this is the third worst flood plane in the county."

It appears from the record that the County's land use planners decided not to require an environmental impact statement. That decision was based at least on a representative of the United States Army Corps of Engineers' opinion that the parcel is not a "jurisdictional wetland." Similarly, the developer's plans call for a large catch basin designed to ensure that no more water will run off the land after development than before. The proposed development is supposed to pose no increased flooding risk. And the General Manager of the County's Land Use Office insists that before the County will issue a building permit, the final engineering plans will have to meet that end. Some neighbors may have reason to suspect those conclusions and assurances, but the court is not allowed to ignore them. The environmental issues were put squarely before the County's land use professionals and, ultimately, the County Council. The decisions were supported by substantial evidence and, therefore, they are unassailable on appeal.

VI.

Appellants' last two arguments are substantive and related. They complain that the rezoning was voted down originally on June 12, 2001. It passed on March 26, 2002 after one council member changed his vote. Appellants seem to see the rezoning's adoption coming only eight months after its defeat as proof that the rezoning was capricious. They argue that the rezoning "is not preserving the [parcel's] Suburban Character."

When the council member changed his vote, he voiced his reasons. First, he observed that some rezoning opponents view the parcel simply as "open space," which is how it appears. But, the council member correctly stated that "open space is not quite the appropriate designation – it's an undeveloped parcel." The councilman's initial point was that although the parcel was raw land, the existing zoning map contemplated the land's development once a sewer was built to it.

Next, the swing voter explained that the neighborhood opposition seemed to have lessened and he discounted the opponents' petitions for reasons presented at the hearing. Beyond the perceived change in the neighbors' sentiment, the council member apparently was swayed by the County's land use experts' support for the change, which was characterized as "corrective," and which was precipitated by changes between the rejected rezoning and the approved proposal. Furthermore,

the council member seemed reassured that "engineering studies would have to be complete[d] during presentation for the plans for this site."

The record reveals deep division between some of the rezoning's supporters and some of its opponents. It is enough here to say that reasonable minds could differ about the rezoning. Despite what some neighbors prefer, the parcel cannot remain Suburban Reserve (SR) forever. Its rezoning to Suburban turns only on sewer service. And, as discussed above, regardless of the land's present character, were it to become Suburban it then could be put to moderate to high density residential use. So as a practical matter, the Council's decision was less about whether the parcel would be rezoned at all, and more about whether the land should be used for a professional office building or for a townhouse project. The pros and cons of either use to the neighbors and the County are debatable and the narrowly divided Council members debated them. It cannot be said, therefore, that the Council's decision was arbitrary or capricious.

VII.

Appellants also echo the two arguments made in the companion case, *Abbott v. Baker*. First, Appellants and former council member Abbott argue that the Planning Board did not approve the proposed rezoning by five votes as required by its by-laws before it could recommend the rezoning to the Council. They contend,

therefore, that the Council could not approve the rezoning.

A quorum of the Board considered the application at its December 18, 2001 meeting. Four members voted in favor, and two voted against. The Board's vote was conveyed to the Council in the Department of Land Use's Recommendation, which emphasizes the fact that the proposal did not carry and "the vote represents only an opinion of the Board members present . . . and is not to be considered a formal recommendation of the board." The Board's recommendation is not a pre-condition to a rezoning, and its failure to muster five votes did not invalidate the Department's Recommendation.[15] The Council certainly understood and took into consideration what happened with the Board.

Second, Appellants and Abbott argue that before recommending approval of the rezoning, the Department did not consider all the factors it is was required by law to consider. Specifically, under the UDC, the Department had to take into account five factors.[16] Appellants and Abbott claim that the Department only considered three. They say the Department failed to consider the "effect on nearby properties" and the "Consistency with the character of the neighborhood."

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[15] *McKee v. City of Dover*, 1998 WL 109973 (Del. Super. Ct.).

[16] New Castle County Unified Development Code, § 40.31.410, Enacted February 25, 22003, Supp. No. 5, Update 2.

It seems implicit in its recommendation that the Department considered the five criteria, even if it failed to discuss them all, one-by-one. Nevertheless, after the issue was raised, the Department issued an explanatory Memorandum on February 22, 2002. The Memorandum is explicit. First, it confirms that the Department considered all the required factors. Then, the Memorandum provides the Department's rationale. In effect, the Memorandum is an amendment to the Department's original Recommendation and it meets the UDC's terms.

As explained above, the court is not free to consider the Department's Recommendation and the Council's decision, anew. The court appreciates Appellants' claim that the proposed office is out of place and their disagreement with the notion that an office building on a several acres of black top, with light standards, is a necessary or appropriate "transition" from their neighborhoods to the proposed office center on the other side of the rezoned parcel. The decision, however, does not rest with the court. This rezoning was heavily debated. Whether the court thinks the Council got it right, or not, it is clear that the Council seriously considered both sides' evidence and their arguments. The presumption in favor of the Council's decisions has not been overcome.

VIII.

For the foregoing reasons, the New Castle County Council's March 26, 2002 zoning decision, adopting Ordinance No. 02-023, is ***AFFIRMED.***

IT IS SO ORDERED.

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Judge

oc: Prothonotary (Civil)