EFiled: Aug 16 2016 01:55PM EDT
Filing ID 59430234
Case Number 200,2016

IN THE

Supreme Court of the State of Delaware

GOLF COURSE ASSOC, LLC AND TOLL BROS., INC.,
Petitioners-Below, Appellants,

v.

NEW CASTLE COUNTY, NEW CASTLE COUNTY DEPARTMENT OF LAND USE, AND NEW CASTLE COUNTY BOARD OF ADJUSTMENT,
Respondents-Below, Appellees

NO. 200, 2016
APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE, C.A. NO. N15A-02-007 JAP

APPELLEES' CORRECTED ANSWERING BRIEF ON APPEAL

MONTGOMERY, McCRACKEN, WALKER & RHOADS, LLP

Sidney S. Liebesman (DE Bar #3702)
Lisa Zwally Brown (DE Bar #4328)
1105 North Market Street, Suite 1500
Wilmington, DE 19801
(302) 504-7800

Attorneys for New Castle County, New Castle County Department of Land Use, and New Castle County Board of Adjustment, Respondents-Below, Appellees

Dated: August 8, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This appeal arises from the January 7, 2014 rejection of a record plan submission from Appellants Toll Bros., Inc. ("Toll Bros.") and Golf Course Assoc, LLC (collectively, "Appellants") by appellee New Castle County Department of Land Use (the "Department"). That decision to reject the plan was affirmed by both appellee New Castle County Board of Adjustment (the "Board") by decision dated September 25, 2014, and the Delaware Superior Court by a thorough, detailed and well-reasoned decision dated March 28, 2016. This Court must affirm the decision of the Superior Court and deny Appellants' third bite at the proverbial apple.

In May 2010, Toll Bros. submitted an Exploratory Sketch Plan for the approval of a two hundred and sixty-three acre lot subdivision (the Delaware National development) to the Department. Pursuant to the Unified Development Code ("UDC"), Toll Bros.' development plan required a traffic impact study ("TIS") to be performed. A Traffic Impact Scoping Meeting was held on April 3, 2010. On June 8, 2010, the Department issued its Exploratory Plan Initial Report. A012-019. The UDC requires that the record plan for a development be submitted within 36 months of the date of the Department's initial report. *See* UDC Table 40.31.390.

Toll Bros. submitted its Preliminary Traffic Analysis to the Delaware Department of Transportation ("DelDOT") on July 6, 2010. Toll Bros.' plan was reviewed for public comment at the September 7, 2010 hearing of the Department and the New Castle County Planning Board. The Department released its Post Hearing Exploratory Sketch Plan Report on October 21, 2010. *See* A029-30. On March 30, 2011, DelDOT informed the Department that it required additional time to review Toll Bros.' TIS, particularly with regard to the level of service ("LOS") concerns. A038-39.

In May 2013 Toll Bros. requested and was granted the two 90-day extensions allowed under the UDC for submission of its record plan, extending the record plan submission deadline until December 8, 2013 to avoid expiration of the plan. *See* A110-112. On December 6, 2013, DelDOT's consultant completed its TIS review. A116-175. Also on December 6, 2013, DelDOT issued its Letter of No Objection to the Recordation of the Plan ("LNO"). A113-115. DelDOT accepted its consultant's recommendations but noted that the proposed development would not meet the LOS requirements addressed in the UDC. *Id.* Toll Bros. submitted its Record Plan to the Department the same day.

The Department provided its review letter to Toll Bros. on January 7, 2014. A176-178. The Department informed Toll Bros. of its decision after review and consideration of all materials presented by Toll Bros., including the TIS,

DelDOT's submission and the relevant provisions of the UDC. The Department concluded that it could not approve the TIS in accordance with the UDC and therefore determined that the Record Plan had expired. *Id.*

On February 5, 2014, Toll Bros. submitted its appeal from the Department's unfavorable decision to the Board. A179-183. After full briefing, the Board heard argument on this matter at the public meeting held on August 14, 2014. The Board voted on the appeal at its September 25, 2014 meeting and found in favor of the Department and affirmed its decision to reject the TIS and expire the plan, and against Toll Bros., by a vote of 4-2. *See* A184-199.

Appellants appealed to the Delaware Superior Court on February 20, 2015. A200-235. The parties fully briefed this matter, and oral argument was held on December 21, 2015. A370-440. Post-argument, the court below requested supplemental correspondence which the parties provided on January 13 and January 20, 2016. *See* A441-565. The court below issued the opinion in this matter (the "Opinion" or "Op.") on March 28, 2016, affirming the decision of the Board and upholding the Department's rejection of the plan. OB Ex. A. Appellants filed their Notice of Appeal on April 22, 2016 and submitted their Opening Brief of Appellants ("OB") on July 7, 2016. Filing ID 59248659. This is Appellees' answering brief in opposition to this appeal and in support of the decision of the lower court.

SUMMARY OF ARGUMENT

Appellants' Argument:

I. The Department's rejection of the TIS and expiration of the Exploratory Plan is invalid as it directly contradicts the UDC and the direction of the Department provided to the Appellant.

Appellees' Response:

I. Denied. The Department was required to reject the TIS and expire Appellants' Exploratory Plan under the plain language of the UDC. Pursuant to the UDC, it was the Department, and not DelDOT, that had to finally approve the TIS and the Department did not tell Appellants otherwise.

Appellants' Argument:

II. The rejection of the TIS and expiration of the Exploratory Plan was invalid because it constituted an unconstitutional condition under *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586 (2013).

Appellees' Response:

II. Denied. The rejection of the TIS and the expiration of the Exploratory Plan did not constitute an unconstitutional condition because the Department never made a demand on Appellants. The Department's actions did not constitute a legislative exaction, and there was nothing unconstitutional in the Department's rejection of the TIS and expiration of the plan as required under the UDC.

STATEMENT OF FACTS

This action centers around Toll Bros.' proposed development of 263 single-family homes on the site of the former Delaware National golf course located near Route 48 outside of Wilmington, Delaware. Op. at 1. As explained above, Toll Bros. submitted an exploratory plan and sought to have the plan pass on to the record plan stage. Any plans are subject to the provisions of the UDC, which governs development in the County, and seeks to ensure that any proposed development will not place a strain on the existing infrastructure. As developers design major land development plans, they must account for traffic in the area and demonstrate that the proposed development will not result in traffic that exceeds available capacity. A review of the UDC demonstrates that traffic is a significant concern in any proposed large development. For example, Section 40.01.015(D) of the UDC states that it is designed to ensure, among other things:

> the provision of adequate public facilities including transportation … by providing that development does not exceed the carrying capacity of these facilities or systems [and] safe and convenient traffic control and movement including a reduction or prevention of congestion of public streets….

Concurrency is also of concern for proposed development and is addressed in Article 5 of the UDC. Section 40.05.000 states:

> This Article establishes the actual development capacity of individual sites based on current adequacy ("concurrency") of roads, water, sewers, and schools.

> Concurrency for these facilities shall be obtained through compliance with this Article, Article 11 ["Transportation Impact"]….
>
> This Article requires an applicant for rezoning, subdivision development plan or land development plan to conduct a carrying capacity analysis which regulates the maximum intensity of development based on actual infrastructure capacity. The carrying capacity analysis is designed to ensure that the public health, safety, welfare and quality of life of the citizens of this County are protected by preventing development from exceeding the existing carrying capacity of public facilities needed to sustain the proposed development.
>
> **Transportation capacity.** The County has numerous areas of congestion that may limit the development potential of a site. Each proposed development is allocated capacity based upon a traffic impact study for the proposed development. The allocation of this capacity sets a maximum development potential for each site.

Additionally, Section 40.05.110 provides that "[t]he base capacity of a site is determined by the remaining capacity available as determined by the traffic impact study conducted pursuant to Article 11."

To ensure that the UDC accomplishes its purpose, applicants submitting any major plans and rezonings must provide specific information regarding the traffic in that area. *See* UDC §40.11.120(A). If the development could "generate significant traffic impacts," the applicant must submit a TIS. *Id.* at §40.11.120(B). The requirements for the contents of the TIS are listed in UDC §40.11.130. Once DelDOT receives the final TIS, it has sixty days to review the TIS and submit

written comments to the Department. *See* §40.11.140(A). DelDOT then submits the TIS along with DelDOT's comments to the Department for review in accordance with the guidelines set forth in Section 40.11.150(A). Under this Section, the Department must review the TIS taking into account the LOS requirements. *Id.* at §40.11.150(A)(3). Upon this review, the Department has three options: it must approve, approve with conditions or disapprove the TIS. UDC §40.11.150(B). Importantly, this section also states that "[t]he project ***shall not be approved*** if it will ***result in an unacceptable level of service*** for roadway segments or intersection(s) within the area of influence of the project." *Id.* (emphasis added).

The UDC required the submission of a TIS for the proposed Delaware National development. DelDOT's consultant reviewed the TIS and DelDOT accepted the consultant's recommendations and issued its LNO on December 6, 2013. A113-115. The consultant's review letter stated that "[t]he proposed development will not meet the New Castle County [LOS] Standards as stated in Section 40.11.210 of the Unified Development Code (UDC) unless physical and/or traffic control improvements are implemented…." A117. The letter also stated:

> [a]n appropriate fix has not been identified for the intersection of Delaware Route 48 and Centerville Road to achieve the LOS concurrency requirement for New Castle County. This is due to the fact that in DelDOT's view, any such fix must not only work from a technical perspective regarding the placement of appropriately

> designed infrastructure improvements, but also from a traffic management and safety perspective. Any such improvements to this intersection also carry with them an estimated cost far out of proportion to the measurable impact that this development proposal has on this intersection, either now or after full buildout.

A118-119. Thus, after rejecting potential fixes to the LOS issues due to safety concerns and the disproportionate costs, the final determination was that the proposed development did not meet the LOS concurrency requirement.

As the lower court recognized, "[e]ven before the issuance of the McCormick Taylor comments Toll Bros. anticipated the intersection would be a stumbling block to its plans." Op. at 12. Because of this, Toll Bros. had proposed modifications to the intersection to counter some of the traffic concerns, and this proposal was estimated at $1.1 million, which Toll Bros. offered to pay. This proposal was not accepted in the TIS. Rather, the preferred fix would cost approximately $3.6 million, and DelDOT was willing to apply Toll Bros.' $1.1 million toward this preferred solution. As stated in the TIS:

> DelDOT will accept and require the developer to contribute towards a future project of the type described in the Conceptual Plan, although specifics of any future project for improvements at this intersection are still to be determined, and while reserving the right to apply such funds to a different solution at this intersection, at such time and under such conditions as the Department may determine.

A119.

DelDOT issued its LNO despite finding that the plan failed to meet the UDC's concurrency requirements. The LNO specifically stated that the letter is "not a DelDOT endorsement of the project" (emphasis in original) and, most importantly, stated "[u]ltimate responsibility for the approval of any project rests with the local government in which the land use decisions are authorized." A113. On the basis of this letter, Toll Bros. submitted its record plan the same day.

The Department issued its review letter on January 7, 2014, rejecting the plan as expired because, pursuant to the UDC, "[n]o Record Plan submission shall occur until such time that the TIS [Traffic Impact Study] is approved and the plan meets the concurrency requirements of Article 11." A176. Because the UDC mandates that the Department must disapprove the TIS if the development will lead to an unacceptable LOS, a record plan could not be submitted, and thus the December 8, 2013 deadline for the submission of Toll Bros.' record plan had expired.

Toll Bros. argues that it should be entitled to ignore the provisions contained in the UDC because the letters issued by the Department during the plan review process never explicitly stated the possibility that the Department could reject the TIS even if Toll Bros. received an LNO from DelDOT. The Board ultimately rejected this and Toll Bros.' other arguments, and found that the UDC "makes it clear" that it is the Department that ultimately approves or disapproves the TIS,

and that Toll Bros. did not provide an acceptable TIS before its time ran out to submit a record plan. A197. Therefore, the Board agreed that the plan had expired.

The Board concluded that "the Department made no error in its interpretation of the applicable sections of the *New Castle County Code* that the Department's findings and conclusion were the result of orderly and logical review of the evidence and the applicable provisions of the UDC," and denied Toll Bros.' appeal. *Id*. Appellants appealed the Board's decision to the Delaware Superior Court, which affirmed the Board's decision and found that: (i) the UDC expressly required the Department to independently review the TIS; (ii) the Department was obligated to disapprove the TIS (as it did) because the intersection at Lancaster Pike/Centerville Road did not meet the minimum standards specified in the UDC; and (iii) the Department's disapproval of the TIS and rejection of the record plan did not constitute an unconstitutional exaction as there was no demand made on Appellants. Op. at 21. Appellants yet again attempt to have the Department's decision overturned, but they will not fare any better with this Court. For the reasons stated by the Board, the Superior Court and in Appellees' papers, the Department's rejection of the TIS and expiration of the plan must be upheld and

Appellants have not demonstrated that substantial evidence exists to overturn that decision.[1]

[1] While not in the record as it occurred after the Notice of Appeal was filed in this matter, Appellees note that Appellant Golf Course Assoc submitted a new plan covering the same property in June 2016, before Appellants filed their Opening Brief.

ARGUMENT

I. THE DEPARTMENT CORRECTLY APPLIED THE UDC TO THE TIS AND THE EXPLORATORY PLAN AND THE LOWER COURT'S DECISION SHOULD BE AFFIRMED.

A. Question Presented.

Did the court below properly conclude that the Department was obligated to reject the TIS pursuant to the UDC and that the disapproval of the TIS and expiration of the Plan were supported by substantial evidence? This question was preserved in the Board's opinion (A186-197) and in the briefing presented to the Superior Court (A292-300).

Answer: **Yes.**

B. Standard of Review

The scope of review for this Court is the same as that applied at the Superior Court level: "If the record before the administrative body shows that there was substantial evidence upon which the board or agency could properly have based its decision, the reviewing court must sustain the administrative ruling." *Sawers v. Bd. of Adjustment*, 1988 WL 117514, at *2 (Del. Oct. 26, 1988) (citing *Searles v. Darling*, 83 A.2d 96, 99 (Del. 1951)). Any legal determinations of the Superior Court are reviewed *de novo*. *See id.* (citing *Fiduciary Trust Co. of N.Y. v. Fiduciary Trust Co. of N.Y.*, 445 A.2d 927, 930 (Del. 1982)).

C. Merits of Argument

1. The Department Correctly Applied the UDC and was Required to Reject the TIS and thus Expire the Plan

Both the Board and the court below upheld the Department's determination to reject the TIS. While acknowledging that the County has authority over land use matters within its jurisdiction, Appellants claim that the Department did not "exercise[] its authority in accordance with applicable law." OB at 9. This argument is belied by the provisions of the UDC.

Section 40.11.150 of the UDC states that, upon receipt of the TIS and comments from DelDOT, the Department reviews the TIS, focusing on six factors, one of which is the LOS requirements under the UDC. This Section further provides that, upon receipt and review of the TIS:

> [t]he ***Department shall approve, approve with conditions or disapprove the traffic impact study***. The Department shall approve the project when the traffic impact study demonstrates that acceptable levels of service will be maintained for roadway segments and intersections within the area of influence of the project… The project shall not be approved if it will result in an unacceptable level of service for roadway segments or intersections within the area of influence of the project.

UDC 40.11.150(B) (emphasis added). The lower court found that "the UDC expressly required the Department to independently review the TIS" (Op. at 21), and relying upon Section 40.11.150, held:

> With respect to the specific issue of approval of the TIS, the UDC **unambiguously** provides that it is the county,

> not DelDOT, which has the final say whether to approve the TIS. Section 40.11.150 requires that the Department of Land Use itself review the TIS…
>
> The same section requires that, after this review, 'the Department shall approve, approve with conditions or disapprove the traffic impact study.' Finally the section makes this approval a precondition to the developer's submission of the record plan. The **statute leaves no room for doubt, therefore, that the county's Department of Land Use has the final say whether to approve the TIS and its approval is required before the developer may file the Record Plan.**

Op. at 24-25 (emphasis added).

Yet despite the clear direction in the UDC, Appellants state that the court below "erred in its conclusion because neither § 40.31.113, nor the other sections of the UDC relied upon by the court below and the Department, explain which entity must approve a TIS before a record plan can be submitted." OB at 8; *see also* OB at 14 (claiming that the UDC is ambiguous because although sections 40.11.150 and 40.31.113 each indicate that approval of the TIS is required, they "fail to provide which entity's approval it is referencing."). Appellants have taken the position that it was DelDOT's approval that was necessary, and because DelDOT issued its LNO, the Department was not free to reject the TIS. Appellants base this argument exclusively on the review letters exchanged between the Department and Appellants during the planning process. According to Appellants, "these letters repeatedly reminded the Appellant that it was DelDOT's approval

that was required to advance the Plan to the next state of the process." OB at 10. In support of this contention, Appellants cite to language in the review letters which "directed that the 'TIS must be approved by DelDOT' before advancing to Record Plan" and claim that "[n]one of these letters suggested that the Department's approval of the TIS was a prerequisite to submitting the Record Plan." OB at 10-11 (citing A037; A044; A050; A076-83; A103-04; A108).

The Department's review letters never stated that the process ends with DelDOT's approval nor that Department approval is not needed. Nor do these letters purport to nor can they be read to circumvent the language of and the process outlined in the UDC. Appellants selectively cite to provisions of the UDC, ignoring those that do not support their position. Appellants also ignore the language contained in the TIS itself. The McCormick Taylor letter states, "An appropriate fix has not been identified … to achieve the LOS concurrency requirement for New Castle County … **Should the County choose to approve the [Plan]**, the following items should be incorporated into the site design and reflected on the record plan…." A118, 121 (emphasis added).

The lower court noted, "[i]t is manifest that the General Assembly intended New Castle County, not state government, to have the final say in land use matters." Op. at 22. The court below also rejected Appellants' argument that statements by Department employees "preclude the county from exercising its

authority to reject the plan on the basis of traffic concerns" because "statements by public administrators cannot change unambiguous provisions of a statute." Op. at 27. Despite Appellants' repeated attempts to claim the UDC is ambiguous, the court below tackled the issue head on:

> According to Toll Bros. the language '[n]o record plan submission shall occur until such time that the TIS is approved' is ambiguous because it does not specify by whom the TIS much 'approved.' This section must be read in the context of section 40.11.150's requirement that the Department of Land Use 'approve, approve with conditions or disapprove the traffic impact study.' It is a 'well settled rule of statutory construction' that 'related statutes must be read together rather than in isolation, particularly when [as in the instant case] there is an express reference in one statute to another statute.' When read in conjunction with section 40.11.150, there is no room for doubt that the required approval referred to in section 40.31.113 is that of the Department of Land Use.

Op. at 26.

The Superior Court also pointed out that "this is not the first time Toll Bros. has argued it was misled by administrative notices from New Castle County in a land use matter." Op. at 28. In *Toll Brothers v. Wicks*, 2006 WL 1829875 (Del. Ch. June 21, 2006), Toll Bros. claimed that DelDOT issued a final decision when it refused to approve Toll Bros.' traffic improvement plans. The court found differently, however, and held that New Castle County is the final decision-maker in the TIS approval process. The court stated:

> It is clear as a matter of law that, under the [Unified Development Code], **DelDOT's role in the TIS approval process is advisory.** Section 40.11.150 of the UDC makes clear that **DelDOT merely offers recommendations and comments to the ultimate decision-maker, i.e., New Castle County**. Section 40.11.150A states that upon receipt of a TIS with recommendations from DelDOT, *NCCDLU shall review the TIS* with regard to six factors … The UDC provides that DelDOT's TIS recommendations are merely advisory. They are not binding and DelDOT's recommendations do not constitute a final decision. This is in accord with Delaware law, legal precedent and the [New Castle County Code].

Id. at *4, 5 (emphasis in bold added); *see also* Op. at 25.

Appellants claim that this case is "much different" from *Wicks* and from *Warren v. New Castle County*, 2008 WL 2566947 (D. Del. 2008), a case relied upon by the Superior Court, because this matter "focuses not on an alleged omission in the Department's direction to Toll Bros., but instead on the Departments' affirmative interpretations and direction regarding specific provisions of the UDC." OB at 12. Appellants also claim that this case addresses the question that was alluded to but not addressed in *Wicks*, "namely, whether the Department is within its rights to withhold its approval of a plan on the issue of traffic after DelDOT has approved the TIS and provided its LNO, steps which meet (or exceed) the requirement for plan advancement given to Appellant by the Department in its review letters." OB at 12 n.18. But *Wicks* did not leave that question unanswered – it explicitly stated that the role of DelDOT is "advisory"

and "merely offers recommendations and comments to the ultimate decision-maker, i.e. New Castle County." *Wicks*, 2006 WL 1829875, at *4. Given this language, it is disingenuous for Appellants to now claim they were not aware that the Department was the ultimate decision-maker.

Appellants also complain that the lower court essentially was asserting that Appellants were "too sophisticated to be confused and should have known better," OB at 13, based on the Superior Court's reliance on this Court's decision in *Trans-America Airlines, Inc. v. Kenton*, 491 A.2d 1139 (Del. 1985). Much like in that case, in which this Court stated: "we find unpersuasive any view expressed by the Administrator of the Division of Corporations which may be in conflict with both the plain language of the Statute and the action taken by the Secretary of State," the lower court found that in this action, "statements by employees of the Department of Land Use cannot, as a matter of law, change the unambiguous terms of the UDC." Op. at 29-30. Furthermore, a direction from the County that the applicant must obtain DelDOT approval should not be read as an abdication of the County's duty to disapprove the TIS in the event it reveals a failing LOS, but rather as an admonition that DelDOT approval would be required to obtain County approval.

Appellants attempt to distinguish *Kenton* as "fundamentally different" from this action because here, "as opposed to casual sympathies that contradicted the

language in a governing statute offered by an administrator … the review letters relied upon by the Appellant were affirmative (and official) pronouncements from the Department … evaluating the plan against the requirements of the UDC." OB at 13. Appellants further state that because the reports "repeatedly advise the Appellant that it is DelDOT's approval that is required to advance the plan to the next stage of the process, the Appellant should not be held to a higher standard simply because it is a regular consumer of the Department's services, as opposed to a mere property owner entering the land use process for the first time." OB at 13-14. Toll Bros., which Appellees concur should have known better, is not being held to any type of higher standard. Even if, to use Appellants' analogy, a property owner entering the land use process for the first time would be in this same situation, the standard that would be applied to him or her, just as that applied to Appellants, is the plain language of the statute.

Despite Appellants' attempts to avoid the relevant UDC provisions, the UDC is clear and unambiguously provides that the TIS needed to be approved by the Department. Because the plan did not meet the LOS and concurrency standards, the Department had no choice but to reject the plan, a decision which was upheld by the Board and the Superior Court and should be affirmed by this Court.

2. The Fact that the Intersection would be in Failure with or Without the Plan does not Change the Analysis that the Department was Required to Reject the Plan under the UDC

Appellants next attempt to argue that because the intersection at issue was identified in the TIS as headed to failure by 2016, the failure would occur whether or not the project went forward, and therefore pursuant to Section 40.11.150(B) the TIS should have been approved. OB at 15-16. The fact that the intersection will result in failure in the future does not support Appellants' argument that the Delaware National development should have been approved. Not only would that run contrary to Section 40.11.150(B), it would run afoul of the intent of the UDC to protect the existing infrastructure. Knowingly approving a development which will make an already bad traffic situation worse cannot be and is not allowed under the plain language of the UDC.[2]

Appellants state that the lower court "suggested it was caught 'between a rock and a hard place' because the UDC expressly provided for a path forward when LOS was being maintained and for when a project itself triggered a LOS failure, while leaving open the question of what to do when there is an LOS failure not the result of the project," and that Appellants "should not be penalized for this ambiguity." OB at 14-15. But that is not what the lower court said, nor are

[2] Indeed, the UDC does not say that the project must "cause" an unacceptable LOS, but rather that the project need only result in an unacceptable LOS.

Appellants being penalized. What the court below said was that while "Toll Bros. seizes on the language in Section 40.11.150 that the 'project shall not be approved if it will result in an unacceptable level of service' … Toll Bros. loses any such benefit when that sentence of the statute is placed in the context of the immediately preceding sentence, which provides the Department shall approve the project when the traffic impact study demonstrates that 'acceptable levels of service will be maintained.' Under this portion Toll Bros. is not entitled to approval because acceptable levels of service already do not exist and therefore intersection (sic) cannot possibly 'be maintained' by adding more traffic from its development." Op. at 32-33.

The court below did acknowledge an "interstitial gap" in Section 40.11.150 as to "what must occur if the proposed development adds to *existing* congestion." Op. at 33 (emphasis in original). But the lower court said that finding the answer to this question was "easy" because County Council "has made its intent abundantly clear" that the "intent of the UDC is the avoidance of traffic congestion." Op. at 33. As the lower court noted, "[t]he notion that the county did not intend to prevent an increase in existing congestion is wholly inimical to the purpose of 'reduc[ing] the danger and congestion of traffic.'" Op. at 34.

Appellants argue that it was not their project that caused the LOS failure, and state that they were "more than willing to either construct [their] original

improvement or contribute [their] fair share towards the DelDOT improvement," and that rejecting the TIS, "and thus the Plan, leaves an anticipated LOS failure unaddressed for the foreseeable future." OB at 16. However, as Appellants point out, the TIS noted that the intersection was projected to fail with or without the Delaware National plan, and thus rejection of the TIS was not the cause of any unaddressed failures in the foreseeable future. Appellants also ignore the language in the TIS itself:

> [a]n appropriate fix has not been identified for the intersection of Delaware Route 48 and Centerville Road to achieve the LOS concurrency requirement for New Castle County. This is due to the fact that in DelDOT's view, any such fix must not only work from a technical perspective regarding the placement of appropriately designed infrastructure improvements, but also from a traffic management and safety perspective. Any such improvements to this intersection also carry with them an estimated cost far out of proportion to the measurable impact that this development proposal has on this intersection, either now or after full buildout.

A118-119. As the court below noted, "[b]y statute the county may not approve a new development unless its carrying capacity is supported by existing infrastructure, infrastructure under construction or infrastructure under contract. Therefore the fact that Toll Bros. designed a fix for the intersection and is willing to pay for it does not justify, or even permit, the approval of the TIS." Op. at 35.

The statute is not ambiguous, but regardless, under any reading of this statute the TIS needed to be approved by the Department, not DelDOT. However,

even if the Court were to find that the statute is ambiguous, "it is basic that courts should defer to judgments of an administrative agency as to the meaning or requirements of its own rules, where those rules require interpretation or are ambiguous." *Christiana Town Center, LLC v. New Castle County*, 2009 WL 781470, at *8 (Del. Ch. Mar. 12, 2009); *see also Save Our County, Inc. v. New Castle County*, 2013 WL 2664187, at *8 (Del. Ch. June 11, 2013).

The lower court's well-thought out and factually-based opinion makes it clear that there was substantial evidence to uphold the Board's decision, and thus the Superior Court's decision should be affirmed.

II. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S CONCLUSION THAT THE DEPARTMENT'S REJECTION OF THE RECORD PLAN SUBMISSION DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS

A. Question Presented.

Did the court below correctly affirm the Board's conclusion that the Department's rejection of the record plan submission did not violate any constitutional rights under *Koontz v. St. John's River Management Dist.*? This question was preserved in the opinion of the Board (A186, 197) and in the briefing presented to the Superior Court (A301-308).

Answer: **Yes.**

B. Standard of Review

The scope of review for this Court is the same as that applied at the Superior Court level: "If the record before the administrative body shows that there was substantial evidence upon which the board or agency could properly have based its decision, the reviewing court must sustain the administrative ruling." *Sawers v. Bd. of Adjustment*, 1988 WL 117514, at *2 (Del. Oct. 26, 1988) (citing *Searles v. Darling*, 83 A.2d 96, 99 (Del. 1951)). Any legal determinations of the Superior Court are reviewed *de novo*. *See id.* (citing *Fiduciary Trust Co. of N.Y. v. Fiduciary Trust Co. of N.Y.*, 445 A.2d 927, 930 (Del. 1982)).

C. Merits of Argument

1. The Department's Rejection of the Plan did not Violate any Constitutional Rights under *Koontz*

Appellants maintain that the Department's rejection of the TIS in this matter was a violation of constitutional rights under the "unconstitutional conditions" doctrine found in the *Nollan/Dolan/Koontz* trilogy of cases. OB at 18-33. The *Koontz* line of cases is inapplicable to this situation for several reasons.

First, there was no demand made on Appellants. As the court below noted, "[a]n essential element of the unconstitutional exaction doctrine is a coercive demand by the government. Here the county never made any demand, much less a coercive one." Op. at 21; *see also* Op. at 44-45 ("The un-rebutted record here shows there was never a demand on Toll Bros. by the county, and therefore it has not attempted to impose an unconstitutional exaction."). Indeed, the lower court cited to the dissent in the *Koontz* decision (which was also cited in Appellees' brief submitted to the Board), noting that it "underscored that a demand is required in these cases:"

> *Nollan* and *Dolan* apply only when the government makes a 'demand[]' that a landowner turn over property in exchange for a permit. I understand the majority to agree with that proposition: After all, the entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the government may use its control over benefits (like permits) to 'coerc[e]' a person into giving up a constitutional right. A *Nollan-Dolan* claim therefore depends on a showing of government

> coercion, not relevant in an ordinary challenge to permit denial. Before applying *Nollan* and *Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed.

Op. at 44-45 (citing *Koontz*, 133 S.Ct. at 2610).[3]

Appellants argue that there was a demand made by the Department. Appellants claim that "[t]he only path forward for this project, based on the Department's rejection of the TIS, was for the Appellant to shoulder the entire burden for this Improvement. It is the requirement to fully address LOS at the Intersection without balancing the proposed subdivision's impact on it that is the constitutional failure under *Koontz*." OB at 26. In other words, the Department's conclusion that the Appellants' contribution toward the DelDOT Improvement was insufficient because LOS at the Intersection was unresolved, thus rejecting DelDOT's "accepted path forward" and "giving Appellant only two choices: fully repair the Intersection, despite its disproportionate impact on it, or abandon the plan," constituted a demand for purposes of a *Koontz* type analysis, according to Appellants. OB at 24. This argument fails, as correctly determined by the court below.

The court below provided a synopsis of the *Nollan-Dolan-Koontz* cases, and

[3] The lower court noted that trial courts ordinarily "do not rely upon dissenting Supreme Court opinions when fashioning their own opinions," but that emphasized that the majority agreed with this proposition. Op. at 45.

concluded that the "repeated references to extortion [in those cases] are pertinent here because they demonstrate that a demand is essential to an unconstitutional exactions claim." Op. at 49. In a footnote, the lower court noted that it "has reviewed Toll Bros. written submittals to the Board and finds no contention there was a demand. The absence of any such contention, either before the Board or here, [is] understandable because the evidence strongly suggests there never was one." Op. at 50 n.71. The court further noted that "[t]he standard of review here requires this court to accept all factual findings which are supported by substantial evidence, and the record amply supports the Board's findings." Op. at 50.

Appellants claim that the "demand" here was "simply the act of requiring an applicant to comply with the government's interpretation of what its ordinances required." OB at 26. If that is true, every land use project submitted could challenge the Department's decision and the Department could not perform its job, which is to abide by and perform under the UDC.

The lower court's decision is supported by *California Bldg. Assoc. v. City of San Jose*, 2015 WL 3650184 (Cal. June 15, 2015), which states, "[n]othing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It

is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called exaction under the takings clause and that brings the unconstitutional conditions doctrine into play." *Id.* at *14 (citations omitted). Thus, as there was no exaction, *Koontz* is not applicable in this matter.

Appellants attempt to dismiss *California Bldg.* by claiming that the requirements of Section 40.11.150 "do not constitute general restrictions on use" such as those in *California Bldg.*, and that "similar projects, impacting different intersections with the same level of traffic, may be faced with wildly differing infrastructure improvements tied not to the impact of its project but, instead, to what needs to be done to correct the problem." OB at 29. In Appellants' hypothetical scenario, all projects would be subject to the uniform requirements of the UDC, and once a TIS was submitted for any project, the Department would accept or reject that TIS based on the same factors found in the UDC as applied here.

Unlike the *Koontz* case and the others relied on by Appellants, this is not a case in which there was a County-imposed exaction that the developer disagreed and followed thereafter by the plan being denied by the County. Instead, the County rejected the proposed solution as being in violation of the UDC. This was not an *ad hoc* exaction, but rather a denial of the plan based on legislative pronouncements. The UDC sets a cap on traffic, and dictates that intersections

cannot be in failure. The only proportionate response to failure of capacity is the denial of the plan, precisely what occurred here.

Additionally, the *Koontz* line of cases rely on the "rough proportionality" test, which requires a local government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). This type of test is not applicable to the UDC. The UDC was adopted by New Castle County Council and mandates that development plans may not proceed if they would result in an unacceptable LOS. The standards set forth in the UDC are legislative determinations that apply to the entire county, not to individual properties.

2. The UDC is not an Unconstitutional Legislative Exaction

Appellants argue that even though this case does not involve an *ad hoc* exaction, it was nevertheless a legislative exaction and therefore unconstitutional under *Koontz*. In support of this argument, Appellants argue that this matter is similar to *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004) and *B.A.M. Develop., L.L.C. v. Salt Lake County*, 282 P.3d 41 (UT 2012), because in those cases the government acted through the implementation of an ordinance, and not in an *ad hoc* fashion. OB at 25. Appellants argue that by finding that the language in the UDC trumps any constitutional limitations on

governmental authority over land use applicants, the Board ignored the "basic protections the Constitution affords land use applicants: namely that 'the few' should not be compelled to 'bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" OB at 28, 29 (citing *Flower Mound*, 15 S.W.3d at 642). While the Texas Supreme Court in *Flower Mound* determined that, in Texas, a legislature can in at least one instance run afoul of the exactions line of cases, that court admitted that it was alone among the state high courts who have dealt with similar issues, namely California, Arizona, Colorado, Georgia and North Carolina. *See id*. at 641 n.128. Appellate courts in other jurisdictions also have upheld this majority position. *See Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (holding that the tests are inapplicable to legislatively enacted exactions); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist*., 62 P.3d 404, 409 (Or. Ct. App. 2003) (same). Additionally, the court in *Flower Mound* declined to decide whether the *Nolan* and *Dollan* cases should apply to ***all*** legislative exactions. *Id*. at 641.

Appellants also rely on *B.A.M. Develop., L.L.C. v. Salt Lake County*, 282 P.3d 41 (UT 2012). Appellants note that in the *B.A.M.* decision, a developer was required to provide property to accommodate the widening of an adjacent road and that was considered an exaction imposed upon the development. OB at 23 n.50. However, what Appellants fail to mention is that in *B.A.M.* the county had a

"highway dedication" ordinance which applied to any developer "seeking construction permits for any 'parcel of land [abutting a] public street which does not conform to current county [road] width standards.' Those developers must dedicate and improve the additional street width necessary for conformity with county road-width standards." 282 P.3d at 43. The Court in *B.A.M.* explained that a "development exaction is a government-mandated contribution of property imposed as a condition of approving a developer's project." *Id*. at 45. Unlike in *B.A.M.* in which there was an exaction but which was found to be proportionate to the impact of the project, there has been no dedication of property in this matter.

The lower court concluded that "[i]n all three of the *Nollan-Dolan-Koontz* trilogy there was an individualized administrative judgment which resulted in a demand on a particular owner. In this case there is a statutory scheme applicable to all property owners in the county. It is a scheme which is directly linked to the need for supporting infrastructure generated by the proposed development." Op. at 52. Appellants try to skirt around this argument by stating that "[t]he fact that the Department's action was rooted in an ordinance that, on its surface, applies to all property owners in the same manner, is of no moment where the impact of that ordinance … fails to account for the disproportionate impact that may result in a particular instance." OB at 32. Appellants rely on the case of *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072 (N.D. Ca. 2014) for support of this

proposition, a case which was not mentioned in any of their previous submissions nor addressed by the court below.

In *Levin*, the ordinance at issue required property owners wishing to withdraw their rent-controlled property from the rental market to pay a lump sum to displaced tenants. Appellants latch on to this case because the court in *Levin* struck down the ordinance under the *Koontz* standard. However, what Appellants fail to mention is that the *Levin* court only applied the *Nollan/Dolan/Koontz* standard because "'whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government' and thus 'amount[s] to a *per se taking* similar to the taking of an easement or lien.'" *Id.* at 1075.

The *Levin* court stated that "the [unconstitutional exaction] doctrine comes into play when the government demands a private payment in exchange for granting a landowner permission to make a different use of her property." *Id.* at 1081. In fact, the *Levin* decision states, "[i]n line with *Nollan*, *Dolan*, and *Koontz*, Plaintiffs' complaint 'does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money.' Rather, Plaintiffs' claim relies, as it should, 'on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent.'" *Id.* at

1084 (citing *Koontz*, 133 S. Ct. at 2600). None of that occurred here.

Even if the *Koontz* line of cases applied to this matter and required a rough proportionality between the cost of the impact and the price of the exaction, the response required by the UDC is proportionate. In this case, the County was presented with a plan that adds additional traffic to intersections that will already be in failure due to lack of capacity. The proportionate response in the face of that failure is to restrict additional traffic until additional capacity can be achieved. There is a limit to the amount of development that existing infrastructure can take. Once that limit is reached, development must wait until the infrastructure can catch up to accommodate it. Additionally, the UDC does not leave the developer without options. The UDC allows a developer to pursue other options, including altering its plan to yield a lower development density, phasing construction to coincide with the completion of transportation construction projects, and/or making traffic improvements as approved by the County and DelDOT. *See* UDC §§40.05.520, 40.11.120(A). The fact that the UDC identifies options to address LOS failures does not equate to an exaction or render the action unconstitutional.

For all of these reasons, there was no demand and thus no unconstitutional exaction under *Koontz*. The Board and the Superior Court made the correct determinations of law and the lower court's decision must be affirmed.

CONCLUSION

For all of the reasons set forth above, this the judgment of the court below should be affirmed.

MONTGOMERY, McCRACKEN, WALKER & RHOADS, LLP

/s/ Sidney S. Liebesman
Sidney S. Liebesman (DE Bar #3702)
Lisa Zwally Brown (DE Bar #4328)
1105 North Market Street, Suite 1500
Wilmington, DE 19801
(302) 504-7800

Attorneys for New Castle County, New Castle County Department of Land Use, and New Castle County Board of Adjustment, Respondents-Below, Appellees

Dated: August 8, 2016