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IN THE

Supreme Court of the State of Delaware

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

v.

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

and

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

and

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

NO. 419, 2013

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

BARLEY MILL, LLC'S CORRECTED COMBINED ANSWERING BRIEF TO PLAINTIFFS' AND THE COUNTY'S CROSS-APPEALS AND REPLY BRIEF TO ITS APPEAL

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Response To Plaintiffs' Summary Of Argument On The Cross-Appeal

4. Denied. Plaintiffs' claim under 9 DEL. C. § 2662 fails for two alternative reasons:

A. There is no private right of action to enforce Section 2662, because there is nothing in the plain language of the statute suggesting the General Assembly intended to provide a private right or a private remedy with respect to any violations of Section 2662 as Delaware law requires.

B. Section 2662 does not require Council to obtain and consider a completed formal traffic analysis for every proposed development with a rezoning before voting on the rezoning. Rather, Section 2662 plainly and unambiguously requires only that the County enter into an agreement with DelDOT that provides for DelDOT's review and analysis of traffic as part of the County's rezoning process, and provides the broad parameters of what the agreement is supposed to address while leaving it to the County and DelDOT to work out the specific language, as befits the County's needs. But even were Section 2662 ambiguous, the legislative history surrounding its enactment shows that the General Assembly consciously rejected what Cross-Appellants insist Section 2662 requires, and confirms that the General Assembly's intent was consistent with the statute's plain language.

5. Denied. The Court of Chancery correctly held that the Revised Plan qualified as a redevelopment plan under Article 8 of the UDC, and that the UDC did not require that a TOA for the Revised Plan be completed and provided to Council be-

fore Council voted on the Ordinance.

Response To The County's Summary Of Argument On The Cross-Appeal

1. Denied. There is no private right of action to enforce Section 2662, and the plain language of the statute, its legislative history, and canons of statutory construction compel a rejection of Cross-Appellants' interpretation, as explained in Item 4 in the Response to Plaintiffs' Summary of Argument on the Cross-Appeal.

2. Denied. Under the UDC, Council's vote is not the end of the "zoning reclassification process" in the County, which continues into and through the record plan stage. A record plan must be in strict conformity with the preliminary plan upon which a rezoning is approved; if it is not then the record plan fails and the rezoning along with it. The County is confusing the end of the zoning reclassification process with the end of Council's role within that process, and, in any event, the County is also wrong because Council's role in the process does not end when it votes.

3. Denied. See Item 1 above and Item 4 in the Response to Plaintiffs' Summary of Argument on the Cross-Appeal.

ARGUMENT

I. THE COURT BELOW CORRECTLY ENTERED JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFFS' CLAIM UNDER SECTION 2662 OF THE QUALITY OF LIFE ACT

A. Questions Presented

Was judgment in favor of defendants below appropriate with respect to Plaintiffs' claim under Section 2662 of the Quality of Life Act, 9 DEL. C. § 2662, when (i) there is no private right of action to enforce Section 2662, and (ii) Section 2662 does not require Council to obtain and consider a completed TIS or TOA before voting on a rezoning? (A800-02; A806-15; A889-94; A901-05; Op. 15-17)

B. Standard Of Review

The interpretation of a statute, including determining whether a private right of action exists to enforce that statute, presents a question of law subject to *de novo* review by this Court.[1]

C. Merits Of The Argument

1. The General Assembly Enacts The Quality Of Life Act To Aid In The Coordination Of Land Use Planning Among State, County, and Municipal Governments

The Quality of Life Act[2] was enacted to provide for coordination of planning and land development activities among the State, county, and municipal governments, to encourage appropriate uses of real property and other resources in order to preserve,

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[1] *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009) ("Questions of statutory interpretation are questions of law that this Court reviews *de novo*.").

[2] 66 DEL. LAWS ch. 207. The bill directed that the new laws be inserted in three different places in Title 9 of the Delaware Code, in the three chapters that address county zoning power: chapters 26 (New Castle), 49 (Kent), and 69 (Sussex). Additional bills were enacted along with the primary legislation. *See* 66 DEL. LAWS chs. 195, 197-200, 216, 217. References to the Quality of Life Act in this brief are to the version applicable to New Castle County, unless stated otherwise.

promote, and improve public health and general welfare.[3] As enacted, the statute delegates to the County the power and responsibility to plan for the County's future development and growth, and to adopt (and amend) a comprehensive plan for zoning, subdivision, and other land use decisions to guide that future development and growth.[4] The statute requires the County to designate a "local planning agency" that would have primary responsibility for developing the comprehensive plan,[5] and sets forth the items that the County must include in its comprehensive plan.[6]

Transportation is one element that is required to be addressed in the comprehensive plan, and the General Assembly envisioned that the County, through its designated planning agency, would work with DelDOT in developing this element of the comprehensive plan.[7] To further that cooperation between the County and DelDOT, the General Assembly passed a companion bill to the Quality of Life Act enabling statute, which directs the County to enter into an agreement with DelDOT "to provide a procedure for analysis by DelDOT of the effects on traffic" of a rezoning application, and prohibits the County from approving any rezoning applications after June 30, 1988 if such an agreement is not in place (unless an exception in the enacting legislation applies).[8] This legislation, now codified at 9 DEL. C. § 2662,[9] prescribes the manner in

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[3] 9 DEL. C. § 2651.

[4] 9 DEL. C. §§ 2653, 2660.

[5] 9 DEL. C. § 2655.

[6] 9 DEL. C. § 2656(g); *see also* 66 DEL. LAWS. ch. 207.

[7] 9 DEL. C. § 2656(g)(2) (stating that transportation issues would be "developed in conjunction with the Department of Transportation").

[8] 66 DEL. LAWS ch. 217 (approved Feb. 5, 1988).

[9] 70 DEL. LAWS ch. 270 (approved July 19, 1995).

which the County must approve the agreement, identifies the purpose of the agreement, and sets forth certain items that the agreement should contain.[10]

The General Assembly, in crafting the Quality of Life Act, went to great lengths in describing not only the purpose of the statute, but how the General Assembly intended for the statute to work and what it wanted to see in the comprehensive development plans created by the counties and their designated local planning agencies. In sum, the Quality of Life Act sets guidelines for the implementation of the County's Comprehensive Development Plan and creates a planning regime for the benefit of State, county, and municipal governments to aid in the inter-governmental coordination of land use planning.

2. No Private Right Of Action Exists To Enforce Section 2662

The first reason why Plaintiffs' statutory claim under Section 2662 fails is that the statute does not create a private right of action for individuals to assert that the County or DelDOT has violated its terms. And if there is no private right of action to enforce Section 2662, Plaintiffs have no standing here to challenge its enforcement.

Delaware law sets forth a straightforward test for determining when a statute creates a private right of action for citizens to enforce it:

> A statutory private remedy will be available only if legislative ***intent*** to provide such a remedy is present. A statute does not grant a private cause of action simply because the statute has been violated and a person harmed. Our task here is one of statutory construction limited solely to determining whether or not the General Assembly ***intended*** to create the private right of action asserted by [the plaintiff].[11]

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[10] *See* 9 DEL. C. § 2662(2)-(4).

[11] *Brett v. Berkowitz*, 706 A.2d 509, 512 (Del. 1998) (emphasis added) (citing multiple United States Supreme Court cases).

A court's task in this situation "is to interpret the statute . . . to determine whether it displays an intent to create not just a private right but also a private remedy."[12] In that analysis, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons."[13] For that reason, "[s]tatutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[14]

Applied to Section 2662, it is plain that the statute lacks any language suggesting that the General Assembly intended to provide a private right of action to enforce the provisions of Section 2662. The statute contains no language expressly or impliedly creating a private right of action, and recognition of such a right of action would undermine the statute's purpose of promoting coordination of planning and land development activities among the State, county, and municipal governments.

This was the conclusion reached by the Court of Chancery in *Christiana Town Center, LLC v. New Castle County*, where the court, rejecting an appeal from a Council decision to approve a rezoning needed for a redevelopment plan, stated that there was no private right of action to challenge the County's compliance with Section 2662 of the Quality of Life Act: "Section 2662 is a mandate by the General Assembly that two administrative agencies take an action; there is no reason to believe that the Gen-

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[12] *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10, at *90 (Del. Ch. Jan. 18, 2006) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

[13] *Id.* at *118 n.219 (quoting *Alexander*, 532 U.S. at 289).

[14] *Id.* at *90 (quoting *Alexander*, 532 U.S. at 287). *See also id.* at *115 ("[W]hen the text and structure of the statutes under which the regulations have been promulgated permit no finding of an implied right of action, judicial inquiry for the existence of an implied right of action is at its end.").

eral Assembly intended to give private individuals the right to sue to enforce this provision."[15] The Court of Chancery reached a similar conclusion just three years earlier in *O'Neill v. Town of Middletown*, finding that there is no private right of action against DelDOT for failing to require a TIS in connection with a rezoning.[16]

A holding by the Court that Section 2662 permits citizens to maintain private causes of action to challenge the County's compliance with its terms would give citizens the ability to interject themselves into a comprehensive planning regime carefully crafted by the General Assembly for the purpose of giving guidance to State, county, and municipal instrumentalities.[17] This Court should, therefore, hold that there is no private right of action to enforce Section 2662, and direct entry of judgment in favor of Barley Mill on Plaintiffs' statutory traffic claim (Count I).[18]

3. Section 2662 Does Not Require Council To Obtain And Consider A Completed TIS Or TOA Before Voting On Every Rezoning

The second reason why Plaintiffs' statutory claim under Section 2662 fails is

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[15] 2009 Del. Ch. LEXIS 40, at *42-43 n.61 (Del. Ch. Mar. 12, 2009) ("*CTC I*") (citing *O'Neill*, 2006 Del. Ch. LEXIS 10, at *115), *aff'd,* 985 A.2d 389 (TABLE) (Del. Dec. 1, 2009) ("*CTC II*").

[16] 2006 Del. Ch. LEXIS 10, at *117-18.

[17] The General Assembly's intent not to provide a private right of action to challenge the County's compliance with Section 2662 is further demonstrated by Section 2659 of the Quality of Life Act, which expressly provides that the land use maps which form a part of the Comprehensive Plan have the force of law. *See* 9 DEL. C. § 2659(a). Had the General Assembly intended to provide citizens with the ability to use the Quality of Life Act's provisions as a means to enforce a mandate from the General Assembly to two government entities, like it did for the County's land use maps, it would have done so in the nearly quarter-century the statute has been in existence.

[18] The court below declined to address this argument (Op. 17 n.63), even though the issue of a private right of action is a necessary prerequisite to construing the statute's terms. *O'Neill*, 2006 Del. Ch. LEXIS 10, at *32 (noting that "[b]efore turning to the merits of the Plaintiffs' claims" alleging violations of statutory and regulatory provisions, the "Court must first answer the threshold question of whether the Plaintiffs have the right to maintain this litigation[,]" and that "this inquiry involves, first, whether a right of action exists for each claim").

that the statute does not require Council to obtain and consider a completed TIS or TOA for each and every proposed rezoning before voting on that rezoning. Rather, Section 2662 unambiguously requires only that the County enter into an agreement with DelDOT that provides for DelDOT's review and analysis of traffic as part of the County's rezoning process, and describes the broad parameters the agreement should cover, while leaving it to the County and DelDOT to work out specific language consistent with the County's needs. However, even were Section 2662 ambiguous, the legislative history surrounding its enactment shows that the General Assembly consciously rejected what Cross-Appellants insist Section 2662 requires, and confirms that the intent instead is consistent with the statute's plain language.

a. Delaware Law On Statutory Construction

The fundamental principles of statutory construction are well-settled in this State: the goal is to determine the legislature's intent when it enacted the statute.[19] If "the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls,"[20] and "the Court's role is then limited to an application of the literal meaning of the words."[21] Only if the statute is ambiguous does the Court looks outside the four corners of the text to determine the statute's meaning.[22]

For a statute to be ambiguous, either the plain language must be susceptible to more than one reasonable interpretation, or applying the literal words must lead to

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[19] *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 66 (Del. 1993); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

[20] *Grand Ventures*, 632 A.2d at 66.

[21] *Coastal Barge*, 492 A.2d at 1246.

[22] *Town of Bethel v. West*, 1997 Del. Ch. LEXIS 106, at *8 (Del. Ch. Aug. 18, 1997).

such absurd consequences that it simply cannot be possible that the General Assembly could have meant it.[23] In making those determinations, the Court "give[s] words used in the statute their common, ordinary meaning,"[24] reads "each part or section . . . in light of every other part or section to produce [a] harmonious whole,"[25] and does not consider individual subsections of a statute in isolation because a "statute is passed by the General Assembly as a whole and not in parts or sections."[26]

If a statute is ambiguous, "the Court must rely upon methods of statutory construction to arrive at what the legislature meant."[27] The synopsis accompanying a bill is considered to be the "primary source of"[28] and "instructive in determining the General Assembly's intent."[29] Also relevant is the history surrounding a statute's enactment,[30] including a legislature's choice among one of several alternative or competing bills.[31] Additionally, this Court applies certain interpretive principles when construing

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[23] *Grand Ventures*, 632 A.2d at 68; *Coastal Barge*, 492 A.2d at 1246. *See also* Norman J. Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION (7th ed.) § 45:12 ("[T]he absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.").

[24] *Town of Bethel*, 1997 Del. Ch. LEXIS 106, at *8.

[25] *Coastal Barge*, 492 A.2d at 1245.

[26] *Id.*

[27] *Id.* at 1246.

[28] *Wilmington Sav. Funds Soc'y v. Kaczmarczyk*, 2007 Del. Ch. LEXIS 33, at *17 n.39 (Del. Ch. Mar. 1, 2007) (citing *Carper v. New Castle Cnty. Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. 1981)).

[29] *See, e.g., Dep't of Health & Social Servs. v. Jain*, 29 A.3d 207, 215 (Del. 2011) (citing *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007)).

[30] *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000) (noting that where a statute is ambiguous, "courts should consider the statute's history"); *State v. Lillard*, 531 A.2d 613, 617 (Del. 1987) ("Legislative history and preliminary statements . . . can often aid in statutory construction.").

[31] *See United States v. Speakman*, 594 F.3d 1165, 1176 (10th Cir. 2010) (using legislative history – specifically evidence that "the Senate considered and rejected a broader version" of the statute – to reinforce the court's construction of the statute).

ambiguous statutory language. Included among them is the "well-established principle" that "the General Assembly is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction, and when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended."[32] Similarly, this Court presumes that the General Assembly is aware of administrative and judicial interpretations of its statutes, and if the General Assembly fails to change a statute's language following such an interpretation, the Court presumes that the General Assembly has acquiesced in that interpretation.[33] Finally, when a statute has been applied in a consistent way by the relevant government body, that is "strong evidence in favor of interpreting the statute in accordance with that practical application."[34]

b. Section 2662 Is Unambiguous And Council Complied With Its Requirements

Applying the foregoing principles to the language of Section 2662 below, it is clear that the statute is unambiguous, Council has complied with its requirements, and it did not prohibit Council from approving the Ordinance on October 25, 2011.

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[32] *Colonial Ins. Co. v. Ayers*, 772 A.2d 177, 181 (Del. 2001) (referring to this as "a well-established principle of statutory construction").

[33] *Cf. One-Pie Invs., LLC v. Jackson*, 43 A.3d 911, 915 (Del. 2012) (following the principle that "[w]here a particular interpretation has been placed on a statute by the court . . . and the legislature at its subsequent meetings has left the statute materially unchanged, it is presumed that the legislature has acquiesced in that interpretation") (alterations in original).

[34] *Harvey v. City of Newark*, 2010 Del. Ch. LEXIS 215, at *29-30 (Del. Ch. Oct. 20, 2010).

The Opening Clause

The County Council shall not approve any proposed change in the zoning classification for land (i.e., any "rezoning request") without first complying with the following procedures:

On its face, the opening clause of Section 2662 states that Council cannot approve any rezoning requests until it has complied with the procedures set forth in Subsections (1) through (4) of Section 2662.

Subsection (1)

As soon as possible, but in any event no later than June 30, 1988, the County Council, through its designated planning agency, shall establish an agreement with the Delaware Department of Transportation (DelDOT) to provide a procedure for analysis by DelDOT of the effects on traffic of each rezoning application.

Subsection (1) does three things: (i) it directs Council to enter into an agreement with DelDOT, (ii) it tells Council what kind of agreement to enter into with DelDOT, and (iii) it sets a deadline by which Council must enter into that agreement. Council has complied with each of these requirements. *First*, Council entered into an agreement with DelDOT, the "1990 MOU" discussed by the court below.[35] *Second*, the 1990 Joint Agreement between the Delaware Department of Transportation and New Castle County regarding transportation facilities ("1990 MOU") provides a procedure for DelDOT's analysis of the effects on traffic of each rezoning application.[36] *Third*, Council complied with Subsection (1) even though the agreement was not finalized until after the June 30, 1988 deadline, because Section 2662's enacting legislation included a provision allowing any county which already had a traffic analysis

[35] *See* NEW CASTLE CNTY. RES. 90-212 (B99-104); *see also* Op. 16.

[36] *See* 1990 MOU (B99-104); *see also CTC I*, 2009 Del. Ch. LEXIS 40, at *38 ("The resulting Agreement sets out a detailed process for evaluating the traffic effects of rezonings.").

agreement with DelDOT to continue to operate under that agreement until the new agreement took effect.[37] Here, the County and DelDOT had entered into such an agreement in 1982 providing for DelDOT's analysis of traffic, bringing Council within the safe harbor.[38]

Subsection (2)

Each such agreement shall be approved by a resolution or ordinance, consistent with County procedures, and shall establish traffic level of service suitable to the County and DelDOT.

Subsection (2) does two things. *First*, it states how the agreement must be approved by the County. *Second*, it identifies one of the agreement's goals. Both are present here. *First*, Council approved the 1990 MOU via Resolution 90-212 (Sept. 11, 1990) (B104). *Second*, the 1990 MOU establishes traffic level of service suitable to the County and DelDOT.[39] Council complied with Subsection (2).

Subsection (3)

The purpose of the agreement shall be to ensure that traffic analyses are conducted as part of the zoning reclassification process within the County.

Subsection (3) describes the intended purpose of the County/DelDOT agreement: to ensure that DelDOT analyzes traffic as part of the County's zoning reclassi-

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[37] *See* 66 DEL. LAWS ch. 217, § 3 (1988). In considering whether Section 2662 is ambiguous, this Court may consider S.B. 327 because it is the actual legislation by which the General Assembly created what is now Section 2662, and is thus not extrinsic evidence. *See generally* 1A SUTHERLAND STATUTORY CONSTRUCTION §§ 20:1-20:28 (discussing the structure of statutes). A copy of S.B. 327 is included in the Compendium of Authorities.

[38] *See* 1990 MOU at B99 (stating that it is replacing NEW CASTLE CNTY. RES. 82-239).

[39] *See* 1990 MOU at B99 (noting resolution's adoption), B101-02 (addressing traffic LOS); *see also CTC I,* 2009 Del. Ch. LEXIS 40, at *41 (discussing the 1990 MOU's establishment of LOS D as a "benchmark goal").

fication process. It is clear that the obligation to analyze traffic is DelDOT's, not Council's, because Subsection (3) addresses the purpose of the required agreement, and Subsection (1) states that the agreement must provide a procedure for DelDOT to analyze traffic. The 1990 MOU clearly has as its purpose DelDOT's analysis of traffic as part of the County's zoning reclassification process, as it states in the recitals that "as part of the Quality of Life Legislation, the Delaware General Assembly has identified the need to coordinate land development based on traffic impact."[40] Council complied with Subsection (3).

The County argues that Subsection (3) proves that "all traffic analyses must occur before a [rezoning] vote" because the "zoning reclassification process within the County" supposedly ends with Council's vote. (County Br. 39, 41-42) There are two reasons why the County is wrong.

First, the zoning reclassification process within the County does *not* end with Council's vote. The process clearly continues after Council votes, as the UDC itself shows.[41] It is not complete until the associated development plan is recorded, which cannot occur without a letter of approval (or "no objection") from DelDOT, which DelDOT will not issue until it has finished its analysis and the necessary road improvements (if any) needed for plan approval have been identified.[42] The record plan

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[40] *See* 1990 MOU, Recitals (B99); *see also id.* ¶ 2 ("New Castle County Department of Planning will request a preliminary traffic analysis (PTA) from DelDOT for each rezoning request..."); *cf. CTC I,* 2009 Del. Ch. LEXIS 40, at *38 (noting the 1990 MOU was entered into pursuant to Section 2662 and "sets out a detailed process for evaluating the traffic effects of rezonings").

[41] UDC § 40.31.110 (summarizing the County zoning reclassification process).

[42] UDC § 40.31.114.C (stating that the Department cannot approve a record plan without certain necessary items, including a letter of approval from DelDOT).

also cannot be submitted unless it is in "strict conformity" with the approved preliminary plan "relied upon by County Council when it granted rezoning."[43] A record plan not in strict conformity with the approved preliminary plan is returned to the preliminary plan stage for reconsideration of the plan (and any required rezoning for it) by the Department, the Planning Board, and Council.[44] If the record plan fails, the rezoning fails with it.[45] It seems that the County is confusing the "zoning reclassification process" with "Council's role in the process" (County Br. 42), which are two different things.[46]

Second, the County continues to ignore that Subsection (3) does not impose direct obligations; rather, it only speaks as to what shall be the "purpose of the agreement." So even if the County were correct that the zoning reclassification process ends when Council votes, it is clear, as noted above, that the purpose of the 1990 MOU meets the requirements of the plain language of Subsection (3).[47]

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[43] UDC § 40.31.113.G.

[44] UDC § 40.31.114. *See also* A464; A475-76.

[45] *Cf.* UDC § 40.01.130.D.3 ("If a rezoning of the property occurred simultaneously with the approval of the preliminary plan and the Department has determined that a new revised preliminary plan is required, the zoning of the property shall revert to the previous zoning district.") (for plans where construction has not commenced within five years of plan recordation).

[46] But even there, the County is wrong, because Council's role in the process does not end with the vote. Council has the power to table the vote on a record plan for traffic-related reasons and request DelDOT to appear before it to discuss traffic issues associated with the plan. *See, e.g.*, Minutes of May 3, 2011 Mtg. of New Castle Cnty. Council Land Use Comm. (http://www2.nccde.org/council/Documents/MeetingMinutesDocuments/LU%20Min%205-3-11.pdf). That Council does not get to vote again on whether to approve the rezoning request does not mean that its role in the zoning reclassification process is over.

[47] What the County is really saying here is that the 1990 MOU does not achieve its stated purpose because of how the County and DelDOT have implemented it. But that is not a claim under Section 2662, it is a claim under the 1990 MOU itself, which Plaintiffs lack standing to pursue and which would require the participation of an indispensable party, DelDOT, who cannot be joined. *See CTC I*, 2009 Del. Ch. LEXIS 40, at *37-40; *see also* A802-06; A894.

Subsection (4)

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

Subsection (4) adds to Subsection (1) by specifying in greater detail what needs to be in the County/DelDOT agreement—what standards should govern DelDOT's review of traffic impacts, and what factors DelDOT should consider. Once again, it is clear that the referenced review of traffic impacts is DelDOT's review, not Council's, because "[t]he agreement" referred to in Subsection (4) is the agreement required by Subsection (1), and that agreement specifies DelDOT's review of traffic. It is also clear that the factors identified after "at a minimum" are not things that Section 2662 is requiring Council itself to consider, because Subsection (4) sets up a "The agreement shall . . . and shall . . ." sentence structure, so what follows after each "shall" refers back to the agreement at the beginning of this subsection—*i.e.*, things that are to be a part of DelDOT's review of traffic impacts.[48]

The 1990 MOU clearly provides for DelDOT to review traffic impacts according to nationally-recognized standards, identifies both existing and projected traffic growth as elements to be analyzed by DelDOT, and it relies on Section 15 of DelDOT's 1985 *Rules and Regulations for Subdivision Streets*.[49] Section 15 of the *Rules and Regulations* references criteria from nationally-recognized traffic authori-

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[48] Sentence structure and rules of grammar are relevant in construing statutes. *See Klotz v. Warner Commc'ns, Inc.*, 674 A.2d 878, 881 (Del. 1995).

[49] *See* 1990 MOU, ¶ 7 at B101-02.

ties such as the United States Department of Transportation's Federal Highway Administration, the National Academy of Sciences' Transportation Research Board, and the Institute of Transportation Engineers.[50] Council complied with Subsection (4).

★ ★ ★

Delaware courts do not rewrite unambiguous, plain language enacted by the General Assembly to create rights or obligations a statute's words do not provide.[51] Here, the intent of the General Assembly is clear from the plain language of Section 2662: the General Assembly wanted the County to enter into and maintain an agreement with DelDOT, the body designated under State law with responsibility and authority for maintaining our State's roadways, that would provide for DelDOT's review and analysis of traffic as part of the County's rezoning process. This construction of Section 2662 gives effect to all of the words in the statute, considers all of the statute's provisions together as part of a harmonious whole, and does not lead to consequences so manifestly absurd that there is no possibility that the General Assembly could have intended such an interpretation. This Court should therefore affirm the lower court's ruling that Section 2662 did not require Council to obtain and consider a TOA before voting on the Ordinance.

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[50] *See* RULES & REGULATIONS FOR SUBDIVISION STREETS, § 15 (1987), *available at* http://www.deldot.gov/information/pubs_forms/manuals/subdivisions/index.shtml.

[51] *See Ewing v. Beck*, 520 A.2d 653, 661 (Del. 1987) ("It is a settled principle that Courts will not engage in 'judicial legislation' where the statute in question is clear and unambiguous."); *Mayer v. Exec. Telecard*, 705 A.2d 220, 222 (Del. Ch. 1997) ("[I]t is not the province of this Court to create an entitlement that the General Assembly has elected not to provide").

c. Even If Section 2662 Were Ambiguous, Consideration Of Extrinsic Evidence Leads To The Same Conclusion Regarding Section 2662's Meaning

Even assuming, *arguendo*, this Court were to conclude that Section 2662 is ambiguous, consideration of relevant extrinsic evidence—the legislative history surrounding Section 2662's enactment, application of canons of statutory construction, and the manner in which traffic analyses have historically been handled—confirms that the General Assembly's intent in enacting Section 2662 was to compel the County to enter into and maintain an agreement with DelDOT that would provide for DelDOT to review and analyze traffic as part of the County's rezoning process, and provide the broad parameters of what the agreement should address while leaving it to the County and DelDOT to work out the specifics.

(1) The Legislative History Surrounding Section 2662's Enactment Demonstrates That Barley Mill's Construction Of The Statute Is Correct

The legislative history surrounding Section 2662's enactment as part of the Quality of Life Act—in particular the synopsis to the enacting legislation and the General Assembly's consideration and rejection of a competing and significantly more detailed bill—provides the clearest evidence concerning the General Assembly's intent and confirms Barley Mill's interpretation of the statute's plain language.

The bill which created Section 2662, Senate Bill No. 327 ("S.B. 327"), was introduced in the 134th General Assembly on January 26, 1988 and passed by the General Assembly and signed into law by Governor Castle on February 5, 1988.[52] The synopsis for S.B. 327 states the General Assembly's intent plainly:

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[52] 66 DEL. LAWS ch. 217.

> This Act requires each County government to enter into an agreement with the Delaware Department of Transportation to ensure that traffic analyses are part of the re-zoning process. Under the provisions of this Act, each county is to enter into such an agreement not later than June 30, 1988. Any current agreement covering the subject matter of this Act shall remain in effect until replaced by an agreement between the County and the Department.[53]

Importantly, even though the synopsis to S.B. 327 confirms what the plain language of Section 2662 says, it is not the only evidence of the General Assembly's intent.

S.B. 327, as noted, was introduced and passed during the early days of the second half of the 134th General Assembly's session. Before then, the General Assembly had met in December 1987 during a special session called by Governor Castle specifically to address the pending Quality of Life legislation. During that session, Senator Roger Martin introduced a more detailed bill, Senate Bill No. 300 ("S.B. 300"), that would have put directly into Section 2662 what Cross-Appellants insist is intended by S.B. 327's far less detailed language. Unlike S.B. 327, whose synopsis confirms the General Assembly only intended to require each county to enter into and maintain an agreement with DelDOT, S.B. 300 would have gone further:

> This bill provides that no request for rezoning or subdivision may be approved without an evaluation of traffic impact and a Traffic Impact Study where necessary.[54]

Thus, S.B. 300, had it survived, would have imposed specific requirements for traffic levels of service *directly* into State law instead of directing the counties to reach their

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[53] S.B. 327 (as amended by S.A. 2), 134th Gen. Ass'y (Feb. 5, 1988) (enacted). A copy of S.B. 327 is included in the Compendium of Authorities.

[54] S.B. 300, 134th Gen. Ass'y, Synopsis (Dec. 8, 1987). A copy of S.B. 300 is included in the Compendium of Authorities.

own agreements with DelDOT that included an appropriate traffic level of service:

> Under this bill, a rezoning or subdivision application may not be approved if traffic levels were to fall below an acceptable level of service as mutually determined by the County and DelDOT, but in any event not less than service level 'D' during peak traffic hours.[55]

S.B. 300, then, proves that the General Assembly knew how to create a statute that imposes direct obligations, but ultimately decided instead to proceed with something different—*i.e.*, S.B. 327 and the current wording of Section 2662.[56]

(2) Application Of Canons Of Statutory Construction Also Establish That Barley Mill's Construction Of Section 2662 Is Correct

Not only does Section 2662's legislative history confirm that Barley Mill's construction of Section 2662 is correct, so do traditional canons of statutory construction.

First, there is the canon that the General Assembly is presumed to be aware of administrative and judicial interpretations of its statutes, and if it fails to change a statute's language following such an interpretation, the Court presumes that the General Assembly has acquiesced in that interpretation,[57] and the related canon that if a statute has been applied in a consistent way by the government body responsible for implementing it, that is "strong evidence in favor of interpreting the statute in accordance with that practical application."[58] Here, the canons dictate that Cross-Appellants'

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[55] *Id.*

[56] The County's argument regarding Section 2662's post-enactment legislative history—specifically, the minor change of one word in 1998—is addressed below in Argument I.C.3.a.(3).

[57] *Cf. One-Pie Invs., LLC v. Jackson*, 43 A.3d 911, 915 (Del. 2012) (following the principle that "[w]here a particular interpretation has been placed on a statute by the court . . . and the legislature at its subsequent meetings has left the statute materially unchanged, it is presumed that the legislature has acquiesced in that interpretation") (alterations in original).

[58] *Harvey v. City of Newark*, 2010 Del. Ch. LEXIS 215, at *29-30 (Del. Ch. Oct. 20, 2010).

interpretation of Section 2662 must be rejected, because while Cross-Appellants insist that Section 2662 requires Council to receive and consider a completed formal traffic analysis (*i.e.*, a TIS or TOA) for *every single rezoning* before voting, no exceptions,[59] the County's land use process has *always* contemplated, since at least 1997, that some development projects with rezonings could proceed without a formal traffic analysis being performed at all, let alone completed before Council voted.

For example, when the UDC was adopted in 1997, it contained provisions permitting the Department to waive a TIS under certain circumstances.[60] In response, the General Assembly did nothing. Then, in 2003, the County amended Article 8 of the UDC to create a procedure by which certain major redevelopment plans, including plans for Brownfields in which a rezoning was needed, could be excused from completing a formal traffic analysis (*i.e.*, TIS or TOA).[61] Again, the General Assembly did nothing. Then, in 2006, the County amended Article 8 again to cover all major redevelopment plans, including those with rezonings.[62] And the General Assembly again did nothing. Thus, the County and DelDOT have for the past 16 years interpreted and applied Section 2662 in a way that is contrary to what Cross-Appellants say the General Assembly intended, but the General Assembly has *never* done anything about it. This Court should, therefore, presume the General Assembly's silence constitutes

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[59] Plfs. Br. 38-39; County Br. 37-38.

[60] *See* UDC § 40.11.121 (1997); UDC § 40.31.112.E.3 (1997). The Department still has this ability today. *See* UDC § 40.11.121 (2013); UDC § 40.31.112.C (2013). The 1997 and 2013 versions of Articles 11 and 31 of the UDC are included in the Compendium of Authorities.

[61] NEW CASTLE CNTY. ORD. NO. 03-069 (2003). A copy of Ordinance No. 03-069 is included in the Compendium of Authorities.

[62] NEW CASTLE CNTY. ORD. NO. 06-007 (2006). A copy of Ordinance No. 06-007 is included in the Compendium of Authorities.

acquiescence in that interpretation of Section 2662.[63]

Second, there is the "well-established" canon of construction that "the General Assembly is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction, and when different terms are used in various parts of a statute, it is reasonable to assume that a distinction between the terms was intended."[64] Here, Cross-Appellants insist that the phrase "part of the zoning reclassification process" in Section 2662(3) really means "prior to a Council vote" (Plfs. Br. 39; County Br. 38-39), but the opening clause of Section 2662—in particular its use of the words "without first complying"—shows the General Assembly knew how to say one thing must occur before another, because it did that when it mandated that Council not approve a rezoning prior to complying with the procedures set forth in subsections (1) through (4). The General Assembly's decision to use the language "part of the zoning reclassification process" in Section 2662(3) instead of "prior to a Council vote" is presumed to be a deliberate one.[65]

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[63] This is not the first time a Delaware court has had occasion to consider the General Assembly's silence concerning Section 2662. In *CTC I*, the plaintiffs claimed that Section 2662 required the County and DelDOT to establish a mandatory traffic level of service requirement for all rezonings, but the Court of Chancery rejected the argument, stating that if the County and DelDOT had misinterpreted Section 2662 as not requiring them to establish a mandatory LOS requirement for all rezonings, the General Assembly's failure over twenty years to make it clear that the County and DelDOT had not complied with the General Assembly's intent was evidence that the plaintiffs' construction of Section 2662 was incorrect. 2009 Del. Ch. LEXIS 40, at *43 n.61. It was, the court said, more likely that the General Assembly intended Section 2662 to encourage the County and DelDOT to develop benchmarks for transportation standards and work cooperatively to achieve those standards, rather than impose universal, inflexible, legally-mandated specifics. *Id.*

[64] *Colonial Ins. Co. v. Ayers*, 772 A.2d 177, 181 (Del. 2001) (referring to this as "a well-established principle of statutory construction").

[65] Cross-Appellants' argument also fails as a matter of language usage. "[P]art of the zoning reclassification process" describes something that occurs over a period of time, in which a series of steps or actions occur that lead toward a result, while "prior to" focuses on a specific point in time for purposes of setting a deadline. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 927, 929 (Freder-

In the same way, the General Assembly's decision to use the phrase "a procedure for analysis by DelDOT of the effects on traffic of each rezoning application" in Section 2662(1) must be presumed to mean something different than "Council must analyze a TIS or TOA before every rezoning vote," contrary to Cross-Appellants' claim. (Plfs. Br. 38-39; County Br. 37-38) The General Assembly knew how to write the necessary language to make it happen if that was the goal, because the language existed in failed S.B. 300[66] but was eliminated in S.B. 327.

(3) The General Assembly's Minor 1998 Amendment To Section 2662 Is Not Relevant To Determining Section 2662's Meaning

The County makes one additional argument regarding legislative intent and the meaning of Section 2662, based on a 1998 amendment to the opening clause of Section 2662 in which the term "county government" was replaced with "County Council." The legislation making this change was House Bill No. 668 in the 139th General Assembly.[67] The County asserts that H.B. 668 is evidence of (i) the General Assembly's intent "to entrust traffic considerations to County Council, rather than the Department [of Land Use]," and (ii) its intent that Section 2662 requires "more than the mere establishment of an agreement with DelDOT 'no later than June 30, 1988.'" (County Br. 35 n.10) In fact, the enactment of H.B. 668 is evidence of neither.[68]

Both the text of H.B. 668 and the history of zoning authority in the County

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ick C. Mish, et al., eds., 10th ed. 1997) (defining "process" as "a series of actions or operations conducing to an end" and "prior" as "earlier in time or order").

[66] *See* S.B. 300, 134th Gen. Ass'y, § 1 and Synopsis (Dec. 8, 1987).

[67] 71 DEL. LAWS ch. 401 (1998) (also referred to herein as "H.B. 668").

[68] It should also be noted that the County's argument is a strawman, because nobody is arguing the General Assembly intended to entrust traffic considerations to the Department.

demonstrate the fallacy of the County's claim. H.B. 668 was 56 pages long, with 132 sections amending, altering, adding, or repealing more than 200 sections of Title 9.[69] The purpose for all of those changes, according to the General Assembly, was to clarify existing language in Title 9 and reflect the restructuring of the County government,[70] and Section 15, the only section of H.B. 668 upon which the County relies, changed "county government" to "County Council" not only in Section 2662 but in every single section (save two) of every single chapter of Title 9 applying specifically to the County.[71] Moreover, history confirms the fallacy because Council, or its predecessor, the Levy Court, has had the ultimate responsibility within County government for zoning matters since at least 1951.[72] "County government" already meant Council in 1988, proving H.B. 668's one-word change was technical and not substantive.[73]

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[69] *See* 71 DEL. LAWS ch. 401 (1998).

[70] H.B. 668, 139th Gen. Ass'y (June 4, 1998) (introduced) ("Original H.B. 668"), Synopsis at 53-56. A copy of Original H.B. 668 is included in the Compendium of Authorities for this brief.

[71] *See* 71 DEL. LAWS ch. 401, § 15 (1998) ("Amend Part II of Title 9 of the Delaware Code by deleting the term 'county government' as it appears therein, except in § 1501 and § 1521(b), and substituting in lieu thereof the phrase 'County Council'.").

[72] *See* 48 DEL. LAWS ch. 321 (1951) (titled "An Act Granting The Levy Court Of New Castle County Authority To Adopt Zoning Regulations").

[73] In a footnote, the County also argues that H.B. 668 shows that the General Assembly intended Section 2662 to require "more than the mere establishment of an agreement with DelDOT 'no later than June 30, 1988.'" (County Br. 35 n.10) Although the County does not elaborate, it appears to be saying that there was no need to keep Section 2662 in place after June 30, 1988, if all that it was intended to do was compel the County to enter into an agreement with DelDOT by that date. The County's conclusion fails for want of a valid premise: Section 2662 and its siblings do not simply require the counties to enter into agreements with DelDOT by June 30, 1988, without regard to whether those agreements continue in force. On the contrary, it is clear that the General Assembly imposed a continuing obligation on the counties, and if at any point a county ceases to have a valid traffic analysis agreement with DelDOT, it cannot approve any proposed rezonings until it fixes that.

d. The Cases Relied Upon By Cross-Appellants Do Not Compel A Different Conclusion As To Section 2662's Meaning

Cross-Appellants also argue that three decisions from the Court of Chancery demonstrate that their interpretation of Section 2662 is correct and the lower court's ruling in favor of Council and Barley Mill was erroneous: *Deskis v. County Council of Sussex County,*[74] *Citizens Coalition v. Sussex County Council*;[75] and *Hansen v. Kent County.*[76] None of these cases supports Cross-Appellants' position.

As an initial matter, none of these cases is relevant because the legal question this Court is being asked to decide—whether Section 2662 requires that a TIS or TOA be performed for every rezoning, and that Council receive and consider every such TIS or TOA before voting—was not at issue in any of them. In all three cases, a TIS had already been completed before the respective county council's rezoning vote. That a TIS had been completed *as a factual matter* does nothing to illuminate or provide guidance on whether prior completion of a traffic analysis is *legally required.*

With regard to *Deskis*, the Court of Chancery's statement that Sussex County's version of Section 2662 requires a completed TIS from DelDOT before a rezoning vote does not compel a different conclusion regarding Section 2662, for three reasons. *First*, as explained above (Argument I.C.3), the plain language of Section 2662 (and its siblings) simply does not support the court's statement. *Second*, the statement is *dicta* because it was completely unnecessary to the court's ruling on the issue where it

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[74] 2001 Del. Ch. LEXIS 146 (Del. Ch. Dec. 7, 2001).

[75] 2004 Del. Ch. LEXIS 52 (Del. Ch. Apr. 30, 2004), *aff'd*, 860 A.2d 809 (Del. 2004).

[76] 2007 Del. Ch. LEXIS 72 (Del. Ch. May 25, 2007).

appeared,[77] and the opinion does not engage in any construction of Section 6962's language.[78] *Third*, even were the statement not *dicta*, *Deskis* would require dismissal of Plaintiffs' Section 2662 claim here because DelDOT, upon whom the court describes Section 6962 as imposing direct obligations,[79] was a party in *Deskis* but is not a party here and cannot be joined as a party pursuant to 10 DEL. C. § 8126.[80]

Citizens Coalition also does not support Cross-Appellants' interpretation of Section 2662. The plaintiff claimed that "the rezoning violates 9 *Del. C.* § 6962(4) because the applicant failed to obtain a TIS," but the court instead held that the plain language of Section 6962(4) does not require Sussex County Council to obtain and consider a formal traffic analysis for every proposed development with a rezoning,[81] nor does it obligate DelDOT to perform such an analysis for a proposed develop-

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[77] As already noted, the TIS in *Deskis* was completed before the rezoning vote, so the legal question prompting the court's statement was not before the court. 2001 Del. Ch. LEXIS 146, at *3-4. Cross-Appellants take different paths in dealing with this problem. Plaintiffs pretend there is no problem, focusing instead on irrelevant factual differences between *Deskis* and this case. (Plfs. Br. 39-40) The County instead plunges ahead and mischaracterizes *Deskis* as "*determining* that a traffic study should have been considered prior to the vote on the rezoning." (County Br. 46 (emph. added))

[78] The court also did not consider the threshold question of whether members of the public have a private right of action to enforce 9 DEL. C. § 6962, thus putting *Deskis* squarely at odds with the court's more recent opinion in *CTC I*. *See* Argument I.C.2, *supra*.

[79] *See* 2001 Del. Ch. LEXIS 146, at *25-28.

[80] No action challenging the legality of an ordinance relating to zoning can be brought after the expiration of 60 days from the date of publication of the notice of adoption of the ordinance. 10 DEL. C. § 8126(a). This has been consistently interpreted to mean that indispensable parties to an action cannot be joined outside the 60-day statute of repose. *See, e.g.*, *Makitka v. New Castle Cnty. Council*, 2011 Del. Ch. LEXIS 198, at *12-14 & n.18 (Del. Ch. Dec. 23, 2011); *CTC I,* 2009 Del. Ch. LEXIS 40, at *37 n.54. Here, the 60-day period passed in late December 2011. (AR58)

[81] 2004 Del. Ch. LEXIS 52, at *12.

ment.[82] Thus, *Citizens Coalition* runs counter to Cross-Appellants' persistent claim[83] that Section 2662 requires Council to receive and consider a formal traffic analysis (*i.e.*, a TIS or TOA) for every rezoning before voting, without exception.[84]

Finally, *Hansen* also does not support Cross-Appellants on Section 2662, for two reasons. *First*, *Hansen* only describes 9 DEL. C. § 4962 as requiring Kent County and DelDOT to agree "about certain procedures and standards regarding the potential traffic impacts" of a rezoning, which is consistent with the interpretation of Section 2662 compelled by its clear and unambiguous language. *See* Argument I.C.3.a, *supra*. *Second*, the *Hansen* court rejected the plaintiffs' claim that it was erroneous for the Levy Court to proceed to a vote on the rezoning for the proposed development without knowing exactly what traffic improvements were required and getting DelDOT's sign-off on those traffic improvements, because DelDOT's role in considering and addressing traffic in connection with a rezoning continues past the rezoning vote and into the site planning or subdivision process, and "[a]dvancing DelDOT's efforts to the rezoning stage of land development would serve no apparent purpose."[85]

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[82] 2004 Del. Ch. LEXIS 52, at *12 n.21 ("Petitioners do not contend that DelDOT had an obligation to perform a separate TIS for this development. In fact, DelDOT does not have such an obligation.") (citing *Deskis*, 2001 Del. Ch. LEXIS 146 (Del. Ch. Dec. 7, 2001) (internal citation omitted).

[83] *See, e.g.*, Plfs. Br. 6, 38-39; County Br. 36-38; *see also, e.g.*, A749-57; A852; A1171-76.

[84] As with *Deskis*, *Citizens Coalition* should not be embraced because the statement that Section 6962(4) requires council itself to consider traffic effects is plainly wrong, because the statute clearly refers to DelDOT's consideration of traffic effects. *See* Argument I.C.3.a., *supra*.

[85] 2007 Del. Ch. LEXIS 72, at *9-10. The court also stated that requiring proof of exactly how potential traffic effects will be addressed (such as by having a traffic signal guaranteed by DelDOT) before a rezoning can be approved "is neither practicable nor, more importantly, required." *Id.*

II. THE COURT BELOW CORRECTLY HELD THAT THE UDC DID PROHIBIT COUNCIL FROM VOTING ON THE ORDINANCE BEFORE A TOA WAS COMPLETED, BECAUSE THE REVISED PLAN QUALIFIED AS A REDEVELOPMENT PLAN AND WAS NOT SUBJECT TO THE UDC TRAFFIC STUDY REQUIREMENTS

A. Questions Presented

Did the court below correctly hold that the UDC did not require a completed TOA before Council voted on the Ordinance, because (i) the Revised Plan qualified for redevelopment status under UDC Article 8, and (ii) Section 40.31.112 does not require a completed TOA before a redevelopment plan can move to the preliminary plan stage of land development? (A815-18; A901-05; A915; Op. 17-23)

B. Standard Of Review

The interpretation of a statute such as Article 8 of the UDC presents a question of law subject to *de novo* review by this Court.[86] And because both the court below and this Court sit in an appellate capacity when reviewing the decisions of administrative agencies, this Court owes no deference to any factual findings made by the court below.[87]

C. Merits Of The Argument

1. The Court Below Correctly Held That The Revised Plan Qualifies As A Redevelopment Plan Under UDC Article 8, Which Exempts Such Plans From The Traffic Study Requirements Of The UDC, And Thus Did Not Prohibit Council From Voting On The Ordinance

Plaintiffs argue that the Ordinance is also invalid because the Revised Plan did

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[86] *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009).

[87] *Tony Ashburn & Son, Inc. v. Kent Cnty. Reg'l Planning Comm'n*, 962 A.2d 235, 239 (Del. 2008). Council is treated as an administrative agency when it considers zoning ordinances. *CTC II*, 2009 Del. LEXIS 615, at *6.

not qualify as a redevelopment plan under Article 8 of the UDC, and therefore was not exempt from Article 11, which requires the completion of a TIS for all major plans and rezonings unless certain exceptions apply, and prohibits an applicant from filing a preliminary plan until the TIS is completed.[88] (Plfs. Br. 44)

The court below rejected the argument, finding that the Property was properly classified as a redevelopment because it was developed under the County Code prior to the adoption of the UDC, one of the criteria for redevelopment status under Article 8. (Op. 18 (citing UDC § 40.08.130.B.6.e.7)) Quoting and relying upon the prior judicial interpretation of the Redevelopment Statute in *CTC*, the court below held that "it seems clear that the purpose of the redevelopment exception was to encourage owners to bring non-code-compliant properties up to code. I see nothing in the [Redevelopment Statute] indicating that the County Council intended the redevelopment exception to be used sparingly." (Op. 21) Accordingly, the court below held that even if the relevant provisions of Article 8 were ambiguous, it would defer to the County's interpretation of the statute. (Op. 21-23)

On appeal, Plaintiffs again take issue with the designation of the Revised Plan as a redevelopment plan. They contend that the plain language of the Redevelopment Statute, which makes sites "developed under the Former Code" potentially eligible for redevelopment status, must be read in light of the statute's "purpose," which Plaintiffs

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[88] The designation of the Revised Plan as a redevelopment plan influences what, if any, traffic analysis might be required for the Revised Plan. Under UDC § 40.08.130.B.6.e.7, "an operational analysis may be required for major plans. A traffic impact study shall only be required if requested by DelDOT." Here, DelDOT and the Department decided to require a TOA for the Revised Plan. As noted in *CTC I*, 2009 Del. Ch. LEXIS 40, at *28-37, that decision adjusted the standards applicable to the traffic impacts of this plan as well as the process by which such results are analyzed.

insist limits redevelopment status to Brownfields, extractive sites, or properties that have already suffered at least a 50% demolition. (Plfs. Br. 45-46) Plaintiffs also complain that the lower court's construction of the Redevelopment Statute grants deference to an interpretation that Plaintiffs claim "appears nowhere in the record." (Plfs. Br. 46) Assuming, *arguendo,* that Plaintiffs' challenge to the Revised Plan's status as a redevelopment plan is timely,[89] Plaintiffs' contentions regarding redevelopment under Article 8 are still wrong.

Plaintiffs' argument centers on the fact that the buildings on the Property, which were constructed 25-30 years ago, are still standing and that they possess some level of occupancy. Plaintiffs assert that the Property cannot use the Redevelopment Statute as it is not vacant, abandoned or underutilized,[90] nor have the buildings been demolished by more than 50%. (Plfs. Br. 46) This narrow reading, if sustained, would gut the Redevelopment Statute and defeat the purpose for its adoption: reutilization of previously developed properties as an alternative to the development of green fields.[91] But that narrow reading has been rejected[92] in favor of a reading that recognizes and

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[89] The Department had concluded that the Revised Plan would be reviewed as a redevelopment plan by December 31, 2008. (A49-50) This conclusion was first made during the Exploratory Plan stage for the Project, consistent with UDC § 40.08.130.B.6. (A39; A49; A56)

[90] Given that the Initial Plan proposed the construction of 2.8 million square feet of buildings absent any discretionary relief, it is clear that the existing square footage of just over one million square feet represents an underutilization of the Property, an underutilization specifically targeted by the Redevelopment Statute. The existing square footage represents using the land to 40% of its capability under the UDC. "Underutilize" is defined in MERRIAM-WEBSTER DICTIONARY 2067 (2d ed. 2001) as "to utilize less than fully or below the potential use." This existing development of the Property, which consists of 25-30 year old buildings, clearly fits these criteria.

[91] *See CTC I*, 2009 Del Ch. LEXIS 40, at *23-24; *see also* Op. 20-21 (relying upon *CTC I*).

[92] *See Acierno v. New Castle Cnty.*, 2009 Del. Super. LEXIS 348 (Del. Super. Sept. 17, 2009) (affirming Department's denial of "redevelopment" status for a property based on the language of UDC § 40.08.130.B.6).

gives effect to the language in the UDC identifying (i) when redevelopment is permitted (to revitalize properties that were Brownfields, developed under the Former Code, developed before subdivision regulations, or are extractive use sites), and (ii) stating an owner whose property qualifies for redevelopment may utilize all of the square footage on the site that is ***existing or existed (or was approved for the site)***.[93]

The Property fits comfortably within these parameters as it was developed under pre-UDC zoning regulations and is significantly underutilized. The Revised Plan proposes the demolition of over 1 million square feet of existing footage (A132-38; A353), a proposal that embraces the goals sought to be achieved by redevelopment: "creating incentives for the reuse of existing development . . . [by limiting] pressure for sprawl, a phenomenon that has adverse transportation effects, increases infrastructure costs, and destroys precious open spaces."[94] When a property, such as this one, is brought into greater compliance with the UDC through redevelopment, it furthers the goal of comprehensive planning, as it might otherwise be impossible to address emerging issues sought to be rectified by newer codes if "there are properties that are, by grandfathering, exempt from important new requirements for decades. Streamlining the redevelopment plan approval process helps address this problem by giving developers an incentive to bring property into code compliance. In this way, the UDC can influence properties that it would ordinarily be unable to regulate."[95]

If Plaintiffs' interpretation of the Redevelopment Statute were correct, no rede-

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[93] UDC § 40.08.130.B.6.

[94] *CTC I*, 2009 Del. Ch. LEXIS 40, at *23-24.

[95] *Id.*

velopment project could be undertaken except in the rarest (and most unfortunate) of circumstances. A property owner wishing to utilize the Redevelopment Statute would be first compelled to allow its property become vacant and then physically demolish some or all of the buildings on the property before applying to the County for approval of a plan. Of course, a project's approval is not guaranteed until the land use process is completed. If this were the required path to follow for redevelopment, no property owner, particularly one with fully or partially occupied buildings, would attempt to bring an older property into conformity with the current UDC because it would be far too risky to take such a drastic step without an approved plan.

In short, the County and the Department have never read the Redevelopment Statute as narrowly as Plaintiffs desire. The County accepts projects such as the present one, where the plan mandates removal of 100% of the buildings on the Property and the project demonstrates the required level of design improvements as satisfying the purpose and intent of the Redevelopment Statute. In so doing, the County reasonably interpreted how to enforce the Redevelopment Statute, and under settled law the County is entitled to deference in the interpretation of the rules and regulations it adopts, implements, and interprets.[96] Thus, while Plaintiffs might object to the granting of such deference,[97] the court below was correct to grant such deference here.[98]

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[96] *See Rappa v. Engelhardt*, 256 A.2d 744, 746 (Del. 1969); *CTC II*, 2009 Del. LEXIS 615, at *6.

[97] Plaintiffs object to granting deference to the County's interpretation, claiming that the interpretation appears "nowhere in the record" and was not articulated by the Department in the Recommendation or discussed by Council in its deliberations. (Plfs. Br. 46) Thus, according to Plaintiffs, it is "impossible to understand" what the court below meant. This is simply not true. The "position" and "interpretation" to which the Court was referring are Council's position and interpretation as they are set forth in the merits briefs submitted below. (A816-18; A901-05; AR59)

[98] Plaintiffs preemptively attempt to discredit the *CTC* opinions, claiming that the "factual run-up" in *CTC* was "far different." (Plfs. Br. 49) The effort fails, because *CTC*'s applicability to Plaintiffs'

2. UDC Section 40.31.112 Did Not Require A Completed TOA Before A Proposed Development Could Proceed To The Preliminary Plan Stage Of Land Development

Plaintiffs and the County make a second argument for why the court below purportedly erred in ruling that the UDC did not prohibit Council from voting on the Ordinance before a TOA was completed and submitted, based on UDC § 40.31.112. (Plfs. Br. 47-48; County Br. 44) Subsection G of that section, prior to the 2009 UDC amendments, set forth the timing for when an applicant could submit a preliminary plan or record plan, and states in part that "For major plans and rezonings, and upon completion of all studies, if any, and the exploratory sketch plan is approved, the applicant shall be entitled to file a rezoning/preliminary plan application with the Department." UDC § 40.31.112.G. Cross-Appellants insist, without citing to any interpretive authority, that this reference to the completion of studies before an applicant is permitted to proceed to the preliminary plan stage of development necessarily requires the completion of a TOA, if one was requested by DelDOT, before a proposed development plan can proceed to the preliminary plan stage.[99]

Cross-Appellants are wrong. The argument fails to grasp the particulars of the land use process in this attack, confusing the relationship between the information that

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challenge to the lower court's ruling on redevelopment lies not in the similarity or dissimilarity between the facts of *CTC* and this case, but in this Court's and the Court of Chancery's applying settled Delaware law in granting deference to the County's interpretation of the Redevelopment Statute. *CTC II*, 985 A.2d 389, 2009 Del. LEXIS 615, at *6; *J.N.K., LLC v. Kent Cnty. Levy Court*, 974 A.2d 197, 208 (Del. Ch. 2009) ("[W]here a party is challenging a county's reasonable interpretation of a code that county enacted, Delaware courts properly defer to the county's interpretation of its own code."). And yet Plaintiffs are even wrong about the dissimilarity of the "factual run-up," as explained in the next section regarding Cross-Appellants' argument regarding UDC § 40.31.112.G.

[99] In addition to subsection G of UDC § 40.31.112, Plaintiffs reference subsection C (Plfs. Br. 44), whose language is functionally identical for purposes of the arguments regarding subsection G.

is required to be submitted to the Department at the outset of the planning process with the information that is required to be provided to Council prior to its vote, a vote that occurs much earlier in the land development process than the approval of the final plan. That results, here, in Plaintiffs' misplaced reliance on the preamble of UDC § 40.11.120, a code section inapplicable to this plan as it was adopted after this plan was submitted. (AR22-51) While the UDC may require preliminary traffic data to be provided to the Department in the context of certain plans,[100] this requirement does not mandate Cross-Appellants' desired result. Indeed, it was held in *CTC* that UDC § 40.08.130 trumps Article 11's traffic requirements as the method for analyzing traffic associated with a redevelopment proposal if a TOA is requested instead of a TIS (as occurred here).[101] Thus, while UDC § 40.08.130 suggests that major redevelopment plans, including rezonings, follow the procedural review process outlined in Article 31, that same process, through the choice of a TOA exempts the project from the requirements of Article 11 and Article 31 with regard to the completion of the traffic analysis.[102] (A332-38)

Cross-Appellants are also wrong because it is clear the County has *never* applied Section 40.31.112.G in the manner it now claims. This clarity is evident from the fact that the County, under the current County Executive, joined in Barley Mill's argument in the final brief below that Section 40.31.112.G had not been interpreted by

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[100] *See* UDC § 40.31.112.D.3. Barley Mill provided this information to the Department at the outset of the land use process for this Project. (A27)

[101] *CTC*, 2009 Del. Ch. LEXIS 40, at *29-31.

[102] *CTC*, 2009 Del. Ch. LEXIS 40, at *29-32.

the County to apply to a TOA. (AR59)[103] It is also evident from how the Revised Plan proceeded through the County's land use process, because the County concluded that there were no studies outstanding that would have prevented Council from considering the Ordinance, as the Department's May 3, 2011 comment letter and its Recommendation show. (A215; AR52-57)

And, finally, that clarity is also evident from looking at two cases, where the outcomes would not have been possible if Cross-Appellants' hyper-literal interpretation of "additional studies and/or information" in UDC § 40.31.112.G were correct. In *CTC*, the TOA requested by DelDOT was not completed until *after* the Planning Board met and the Department issued the recommendation on the rezoning.[104] The rezoning application would not have been able to proceed to the filing of the preliminary plan, let alone proceed all the way past the Planning Board meeting and the issuance of the Department's recommendation, if Cross-Appellants were correct that UDC § 40.31.112.G applied to a TOA.[105] And in *Woznicki v. New Castle County*, the court expressly rejected an argument that an environmental impact study and a stormwater drainage plan had to be completed before Council voted on a rezoning.[106] Were Cross-Appellants' interpretation of UDC § 40.31.112.G correct, such "additional studies and/or information" would have needed to be completed before a preliminary plan

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[103] The County did not change its endorsement of this position until after the current County Executive switched sides one business day before the originally-scheduled January 8, 2013 merits hearing, in a January 15, 2013 letter to the court below. (AR60-73)

[104] *CTC I*, 2009 Del. Ch. LEXIS 40, at *13.

[105] The Court will also note that how the TOA was handled in *CTC* is contrary to the County's insistence that the law requires a completed TOA not just before Council votes, but before the Planning Board meets and before the Department issues its recommendation. (County Br. 31)

[106] 2003 Del. Super. LEXIS 232, at *12-16 (Del. Super. June 30, 2003).

could have been filed, let alone before Council voted on the rezoning.

III. PLAINTIFFS HAVE FAILED TO SHOW THAT THE LOWER COURT'S INVALIDATION OF THE ORDINANCE SHOULD BE UPHELD BECAUSE OTHER PURPORTED "FAILINGS" WITH THE DEPARTMENT'S RECOMMENDATION MADE COUNCIL'S VOTE ARBITRARY AND CAPRICIOUS

A. Questions Presented

Did the Department commit any legal error in its Recommendation, or does the record lack substantial evidence for the Department's finding that the Revised Plan and proposed rezoning satisfied the factors required under the UDC, such that Council's vote on the Ordinance is thereby rendered arbitrary and capricious? (A824-36; A911-18)

B. Standard Of Review

When reviewing a zoning decision, this Court applies the same deferential scope of review as the court below.[107] This Court presumes a rezoning decision is valid unless it can be "clearly shown" that it is arbitrary and capricious because it is "not reasonably related to the public health, safety, or welfare."[108] The arbitrary and capricious standard is "the least judicial role, short of unreviewability,"[109] and asks whether the decision was "unconsidered."[110] Therefore, if a zoning decision is free of legal error and there is substantial evidence in the record to support it, it must be affirmed.[111]

"Substantial evidence" means "such relevant evidence as a reasonable mind

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

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

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

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

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

might accept as adequate to support a conclusion."[112] A court does not weigh the evidence, resolve questions of fact, or make its own factual findings or credibility determinations,[113] and it "must view the evidence and reasonable inferences from that evidence in the light most favorable to the [zoning body's] decision."[114] As applied to claims that a proposed development or rezoning violates the County's Comprehensive Development Plan, the question is "whether 'substantial evidence' exists to support a finding of consistency with the plan's goals."[115] If there is some relevant evidence to support the decision, the court must affirm, even if the decision is objectively wrong or against the weight of the evidence, and even if the court would have decided the matter differently.[116] Legal rulings are reviewed *de novo*.[117]

C. Merits Of The Argument

1. The Department Did Not Commit Any Legal Error In Its Recommendation

The question of whether the Department committed any legal error in the Recommendation turns on (i) whether 9 DEL. C. § 2662 requires Council to receive and consider a TIS or TOA for a proposed development before voting on a rezoning, which is the subject of Argument I.C., *supra*, and (ii) whether the UDC required the

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[112] *Id.* at *13.

[113] *Id.*

[114] 83 AM. JUR.2D *Zoning and Planning* § 960.

[115] *O'Neill v. Town of Middletown*, 2006 Del. Ch. LEXIS 10, at *158 n.279 (Del. Ch. Jan. 18, 2006) (citing *Green v. Cnty. Council of Sussex Cnty.*, 508 A.2d 882, 890 (Del. Ch. 1986) (explaining significance of distinction between requiring consistency with "the" plan, as opposed to "a" plan), *aff'd*, 516 A.2d 480 (Del. 1986)).

[116] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *CCS Investors, LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009).

[117] *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

TOA to be completed before Council could vote, which is the subject of Argument II.C., *supra*. Because the Recommendation correctly interpreted Section 2662 and the UDC, Plaintiffs have failed to show there was legal error.

2. The Recommendation's Findings Are Supported By Substantial Evidence[118]

a. The Rezoning Is Consistent With The Comprehensive Development Plan's Designation Of The Property In The Future Land Use Map And The Factors Identified In UDC § 40.31.410

Plaintiffs' arguments regarding the consistency of this proposal with the Comprehensive Development Plan ("Comp Plan") rely on both 9 DEL. C. § 2659(a) and UDC § 40.31.410.A. Neither citation helps their cause. Section 2659(a) establishes that only the Land Use Map has the force of law. This is buttressed by 9 DEL. C. § 1305(b), which provides that the Comp Plan "shall be viewed as a document expressing the general policies and intentions of the County Council with respect to future development [and] ... ***[i]t shall not have the force and effect of a law or ordinance***." (emphasis added)

In the County, there are only two classifications available for land that is not zoned for residential or heavy industrial use: New Community Development Area ("NCDA") and Community Redevelopment Area ("CRA"). (AR21) The NCDA and CRA classifications capture two distinct areas of land: largely undeveloped areas, primarily in Southern New Castle County (NCDA) and previously developed, nonres-

[118] Initially, it should be noted that Plaintiffs' argument with regard to the Recommendation is limited by the language in the UDC. While Plaintiffs seem to suggest that they are challenging the Recommendation itself (as opposed to Council's reliance on it), a recommendation on a rezoning is just that, a recommendation, and pursuant to UDC § 40.31.510 is not the proper subject of an appeal.

idential areas, predominantly in Northern New Castle County (CRA).[119] (AR21) The Recommendation concluded that the Revised Plan was consistent with the Comp Plan and thus no amendment to the Comp Plan was necessary. (A220) Expanding upon this, the Department noted that the Comp Plan encourages development in the CRA that takes advantage of existing infrastructure, particularly in proximity to existing developed areas and on properties zoned for the "highest, most intense use." (A246; A220)

Demonstrating the breadth of development options available to a property owner in this area, the Recommendation notes that while, for instance, mixed use centers are permitted within these areas, they are not mandated as other nonresidential development may be appropriate. (*Id.*) As the Department noted, the Revised Plan provided for a slight increase in office space (approximately 10% more than the existing square footage on the site), as well as the addition of 454,000 square footage of commercial space (approximately 180,000 square feet of which is concentrated in a building targeted for a hotel), uses which were appropriate for a site that was already developed with over a 1,000,000 square feet of nonresidential development and which was being redeveloped in accordance with the Redevelopment Statute. (A220) The redevelopment contemplated by the Revised Plan is consistent with the "Community Redevelopment" designation for the Property under the Comp Plan.

Plaintiffs also argue that the Commercial Regional classification accompanying this rezoning is inconsistent with term "Community" applied to the CRA. This posi-

[119] The Christiana Mall, a frequent target of Plaintiffs' slings and arrows, is also located within the CRA.

tion is inconsistent with the definition of "Commercial Regional," which provides that "this district is intended to provide for community and regional commercial services. Its character is Suburban Transition."[120] Thus, while Plaintiffs argue that the word "community" in CRA is not satisfied by the Revised Plan, they must turn to semantics to argue that the word "community" in the definition of Commercial Regional somehow excludes this proposal. Given that the Initial Plan, and its 2.85 million square feet of development (including higher amounts of commercial and office development), is permitted as a matter of right in the CRA, this rezoning to CR, with ***lesser*** amounts of both commercial and office development than the Initial Plan, cannot logically be said to somehow run afoul of the provisions of the CRA.

Despite Plaintiffs' arguments to the contrary, a primary goal of the Comp Plan is to promote redevelopment. (AR1-20) The CRA promotes the flexible use of already developed nonresidential parcels (such as the Property) by identifying them as appropriate locations for commercial, office, redevelopment or mixed use development. From the introductory letter of then-County Executive Christopher Coons (the "Coons Letter") through the text of the Plan itself, the focus is on the reuse and redevelopment of previously developed parcels as a method by which open areas can be preserved and sprawl prevented. (*Id.*) Indeed, the Coons Letter notes that "connected communities" can come in a variety of forms, ranging from mixed use, multi-story buildings (something aggressively resisted for the Property) to "redeveloping existing locations...that incorporate schools, commercial areas or parks near housing." (AR1) Thus, the CRA is located "primarily along transportation corridors and industrial are-

[120] UDC § 40.02.225.A.

as," and "will be targeted for continued revitalization" with a goal towards, among other things, "prioritizing and incentivizing redevelopment." (AR4)

As the Department noted, the Property with its existing office development and zoned with one of the more intense zoning classifications in the UDC (A245), is decidedly highway-oriented, convenient to transit and well-suited for development, all factors consistent with the Comp Plan's desire to promote redevelopment. (A220-21) As Delaware courts have noted, the text of the Comp Plan contains a variety of goals and objectives which can often be in conflict with each other.[121] In this instance, many of those goals are focused on redevelopment, development along transportation corridors, preserving natural resources, providing commercial and nonresidential services adjacent to office uses and redevelopment in response to underutilization of existing development, all goals met by this proposal. (AR1-20) The CRA dominates the Route 48/141 interchange making these parcels, all zoned OR, available for redevelopment. In that vein, the Revised Plan fits comfortably within the parameters established by the CRA.

b. There Is Substantial Evidence To Support The Department's Finding That The Rezoning Is Consistent With The Character Of The Neighborhood

The Recommendation also examines the "consistency with the character of the neighborhood."[122] While Plaintiffs complain that this area lacks commercial development, the Recommendation found that the Revised Plan was consistent with the character of the neighborhood, noting the "suburban transition" character of the CR

[121] *See, e.g., O'Neill, supra*, 2006 Del. Ch. LEXIS 10 at *156-57.

[122] UDC § 41.31.410.B.

zoning district and the Property's placement within the surrounding transportation network. While residential development exists on the opposite side of the railroad tracks, two of the three remaining corners at this intersection (along with the remainder of this Property) are zoned OR. (A214-16; A220) The property to the east contains a mixture of commercial, office and higher density residential uses. (*Id.*) All of the OR parcels at this intersection are permitted, by right, to explore much more development than currently exists, including dense, mixed use development.[123] Given the decidedly highway oriented nature of the Property (A221), the prevalence of non-residential zoning in the area, and the development potential that exists for this (and surrounding) property under the UDC as a matter of right, the Recommendation reasonably concluded that the proposed rezoning was consistent with the character of the neighborhood.

c. There Is Substantial Evidence To Support The Department's Finding That The Rezoning Is Consistent With The Zoning And Use Of Nearby Properties

With regard to "consistency with zoning and use of nearby properties,"[124] Plaintiffs' claim is rooted in their disagreement with the manner by which the Department applies this criterion. (Plfs. Br. 34) Plaintiffs focus on the lack of commercial development in this area while failing to acknowledge that the OR zoning existing on this and surrounding properties could support, by right, large concentrations of commercial development pursuant to the "mixed use" provisions of the UDC. While touting

[123] UDC Table 40.03.110.A. Indeed, a much larger, mixed use development with substantially more commercial development was originally proposed for this parcel.

[124] UDC § 41.31.410.C.

the expectations of those living in the area of the Property, the Plaintiffs conveniently ignore the fact that the existing OR zoning on these properties permits buildings to reach 180 feet in height as a matter of right, something capped at a far lower height by this proposal. (A671-72)

The record reveals that this area is dominated by a broad mix of zoning categories (from residential to commercial). The uses range from densely packed apartments to single family homes; from large office parks to commercial uses (including grocery stores, restaurants, car dealerships, gas stations and other shopping areas). Indeed, contrary to Plaintiffs' argument, large commercial districts exist roughly a mile away in Greenville. The Property is bordered by heavily travelled arterial roadways and an active rail line. Finally, the zoning in the majority of this area could support mixed use development to far greater intensity than that proposed by this plan as a matter of right. The transitional nature of the proposed zoning classification (A220-21) fits within the zoning and use scheme in this area, focusing the commercial development against the highly traveled roadways as opposed to the areas of the Property that are closer to residential development.

d. There Is Substantial Evidence To Support The Department's Finding That The Property Is Suitable For The Uses For Which It Has Been Proposed

As to the suitability of the Property for the use for which it has been proposed,[125] Plaintiffs seem to assume that the use of the Property must be suitable to everyone except the Property owner (Plfs. Br. 34-35), a conclusion that is specious on its face. Beyond that, the evidence demonstrated that the scaled down use could be

[125] UDC §40.31.410.D.

accommodated on the Property without the benefit of zoning variances and that the proposal would bring the Property up to current UDC standards. (A214-24) Additional restrictions, reached in consultation with the community, were added to ensure that certain uses would not be accommodated on the Property and that future development of the Property would also be limited.[126] (A671-72, A530-626; A105-26) There was substantial evidence in the record to support the conclusion that the proposed use is suitable. Plaintiffs' argument does not show that the record lacks substantial evidence; it merely shows that Plaintiffs disagree with the conclusions drawn from that evidence.

e. There Is Substantial Evidence To Support The Department's Finding That The Effect On Nearby Properties Was Not Such That The Rezoning Application Should Be Rejected

Finally, substantial evidence supports the Department's evaluation of the effect of this proposal on nearby communities.[127] It remains uncontradicted that this Property sits at the corner of a heavily-traveled intersection surrounded on most sides by nonresidential development or open space. Residential development that lies in the area of this Property is separated either by open space, a rail line or the remaining office development. The Department correctly noted that the potential for direct adverse impact was limited at best; indeed, a number of area residents supported the Revised Plan, testimony which augmented statements offered by Barley Mill and the Department. (*See, e.g.*, A299-311; A404-23; A532-43; A561-77)

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[126] Restrictions such as these are a permitted tool to be utilized by Council in the consideration of a rezoning application. *Deskis*, 2001 Del. Ch. LEXIS 146, at *7.

[127] UDC §40.31.410.E.

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In the end, the Recommendation is just that, a recommendation. It evaluates the rezoning against five criteria, none weighted more than another; indeed, it is possible for the Department to find that the proposal satisfies some but not all of the criteria and still issue a positive recommendation. Plaintiffs adroitly suggest that a favorable recommendation "lowers" the needed vote total for passage (Plfs. Br. 36), but this misstates the legislative burden. A rezoning vote, as with most legislative pronouncements, requires only a majority vote to pass.[128] Thus, the Recommendation did not lower the required vote count for passage; instead, it is Plaintiffs' desire for a negative recommendation, something that would have changed the legislative standards by increasing the needed vote total, that drives their complaints.

The Recommendation results from both the Department's review of the plan, the comments from technical review agencies, and the results of a public hearing to vet the application before the public. (A214-24) The Recommendation, in addition to providing a history of the Project, analyzing the technical aspects of the Project and evaluating the Project against the criteria required by the UDC, noted that the traffic analysis for this Project, consistent with State law and the UDC, would be evaluated as the Project moved forward. While Plaintiffs may not like this process, it is the legislative process that governed this request. Moreover, the fact that they disagree with the nonbinding positions expressed in the Recommendation does not mean that the opinions expressed in that document are "grossly perfunctory, misleading and unreasoned." (Plfs. Br. 37) The Recommendation accurately summarized the pattern of

[128] UDC § 40.31.113.G; CNTY. COUNCIL R. 3.6.3, 4.5.1.

development in this area, the role played by reviewing agencies, the uses existing and permitted in this area, and how this Project would fit in this framework. To borrow language from the Superior 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.[129]

The Recommendation and the vote of Council were supported by substantial evidence and should be sustained.

[129] *Woznicki v. New Castle Cnty.*, 2003 Del. Super. LEXIS 232, at *18-19 (Del. Super. June 30, 2003).

IV. THE LOWER COURT'S RULING THAT MR. WEINER'S VOTE WAS ARBITRARY AND CAPRICIOUS MUST BE REVERSED

A. The Court Below Erred When It Ignored Mr. Weiner's Reliance On The Recommendation As The Reason For His Vote And When It Held A TOA Was Subjectively Material To Mr. Weiner's Vote

1. Mr. Weiner Stated The Reason For His Vote On The Record When He Voted, As Required By State Law And The County Council Rules

In the Opening Brief, Barley Mill showed that this Court has imposed a disjunctive requirement on zoning bodies that they either state the reason for a zoning decision on the record or create an evidentiary record so one-sided that there is no doubt as to the reason. (Opening Br. 18-20) Barley Mill also showed that the two options are not equal, and this Court strongly prefers that zoning bodies like Council formally state the reasons for a zoning decision, such as by having Council members state the reason(s) when they cast their votes, or by approving written findings which are attached to the zoning ordinance. (Opening Br. 18-20) Barley Mill also showed that under Delaware law it is unnecessary and improper for a court to review the entire evidentiary record to determine the reasons for a zoning body's decision when the zoning body has stated the reasons on the record. (Opening Br. 19-20) And, finally, Barley Mill showed that the decision of the court below is contrary to these principles because the court below failed to acknowledge or credit Mr. Weiner's stated reason for his vote—his reliance on the Department's Recommendation—and instead reviewed the entire record. (Opening Br. 22)

In their Answering Briefs, Cross-Appellants concede the validity of these principles, making no effort to dispute them. Instead, they attempt to distinguish the applicability of these principles to the ruling below, but their arguments lack any merit.

Starting with Plaintiffs, their reply to Barley Mill's discussion of *Tate*, *BC Development*, and *O'Neill* (Opening Br. 18-22) is to deny that Mr. Weiner relied on the Recommendation as the reason for his vote, because when Mr. Weiner voted he only said he was "following" the Recommendation. (Plfs. Br. 21-22) But this assertion misses the point: it has long been the case that Council members may rely upon (*i.e.*, follow) the recommendations and conclusions of the Department or the Planning Board as the reason for their vote.[130] When Council members state on the record that they are relying on (*i.e.*, following) a Department or Planning Board recommendation on a rezoning ordinance, the reasons expressed in that recommendation are the Council members' reasons for their votes. Thus, if the recommendation is free of legal error and supported by substantial evidence, the requirements of *Tate* and *BC Development* are satisfied.

Turning to the County, it offers two arguments in opposition. *First*, the County claims that Barley Mill has misapplied Delaware law because the standard is not a disjunctive "state or create" standard, and that Barley Mill supposedly failed to cite any case for that proposition. *See* County Br. 18. *Second*, the County claims that Barley Mill's argument ignores the fact that a reviewing court must determine whether Council's legislative act is supported by substantial evidence in the record. *See* County Br. 18-19. As to the first argument, the simple answer is that the County should take another look at the four cases cited in footnote 24 on page 19 of the Opening

[130] *See, e.g.*, CNTY. COUNCIL R. 4.5.1.3 ("During roll call, each Council member shall state the reason for their vote or that they agree with the reasons outlined in recommendation made by the Department of Land Use/Planning Board who considered the following factors in formulating such a recommendation . . . .").

Brief—this Court's opinions in *Tate* and *BC Development*, and the Court of Chancery's opinions in *O'Neill II* and *Tidewater Utilities* (Opening Br. 18-22)—which plainly state the "either/or" nature of the obligation imposed on Council and other zoning bodies.[131] And as to the second argument, it fails because it misstates Barley Mill's argument. Barley Mill has never contended that judicial review of the evidentiary record on a rezoning ordinance is *per se* improper for any purpose if a zoning body has stated its reasons. Clearly, a reviewing court can—indeed, must—review the evidentiary record for two reasons: (i) to confirm whether the decision is free of legal error; and (ii) to confirm the decision is supported by substantial evidence. (Opening Br. 17) But *Tate*, *BC Development*, and *O'Neill II*, among others, instruct that a court cannot review the evidentiary record to find the reasons for the decision when the zoning body has stated those reasons, and that is what the court below did when it ignored Mr. Weiner's explicit reliance on the Recommendation and proceeded to review the evidentiary record and find a reason for Mr. Weiner's vote. That is the issue being appealed, not the County's strawman mischaracterization of Barley Mill's claim.[132]

2. Mr. Weiner's Reliance On The Recommendation Is A Rational And Valid Reason For His Vote That Is Supported By Substantial Evidence

In the Opening Brief, Barley Mill demonstrated that the lower court's failure to

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[131] The County's reliance on *BC Development* (County Br. 18) is meritless. The County has conflated how ***a court*** complies with *Tate* and its progeny (*i.e.*, the issue here) with how ***Council*** does so (*i.e.*, what this Court discussed in *BC Development*). That there is no precise formula that Council must follow to comply with *Tate* is irrelevant to the question of whether a reviewing court is permitted to go behind the stated reasons for a decision.

[132] In other words, nobody, including Barley Mill, is arguing that a court must simply "accept the decision of Council." *See* County Br. 18 n.6.

acknowledge and credit Mr. Weiner's reliance on the Recommendation as the reason for his vote was also erroneous, because in doing so the lower court failed to adhere to the rule, as explained in *Coker v. Kent County Levy Court*, that when a zoning body gives more than one reason for its decision, only one of those reasons needs to be valid in order for the decision to be upheld. (Opening Br. 22-23) Cross-Appellants do not cite or discuss *Coker*, thus conceding the validity of the rule set forth in the court's opinion. Instead, Cross-Appellants argue that Barley Mill's argument fails because the Recommendation is not free of legal error (Plfs. Br. 22; County Br. 20-21), it is not supported by substantial evidence in the record before Council (County Br. 19-21), and because Mr. Weiner stated a single, unitary reason for his vote (County Br. 19, 21). Each of these arguments fails.

First, Cross-Appellants' insistence that the Recommendation is not free of legal error is simply a restatement of their argument that Council was prohibited by both State law (9 DEL. C. § 2662) and County law (UDC § 40.31.112.G) from voting on the Ordinance before receiving a completed TOA. It is, therefore, invalid for the reasons already discussed in Arguments I and II in this Reply Brief.

Second, and likewise, Cross-Appellants' argument that the Recommendation's factual findings are not supported by substantial evidence is simply a restatement of Argument II in Plaintiffs' Answering Brief and is invalid for the reasons discussed in Argument III above.

Third, and finally, the County's argument that Mr. Weiner stated a single, unitary reason for his vote is wrong because the County either misunderstands or misstates the relevant inquiry, the relevant standard, and the evidentiary record. For ex-

ample, the County fails to understand that even if Mr. Weiner identified a single, unitary reason when he voted, he did not mention a TOA, he mentioned *his own analysis of traffic and land use impact.* (A670) Thus, the County's repeated assertion that "the lack of a traffic analysis" and "the reliance on the recommendation" went together in Mr. Weiner's stated reason for his decision is wrong.[133] Next, there is the County's mischaracterization of the record to support its argument, such as its claim that Mr. Weiner was told that "it was not possible" to receive a completed TOA before the vote (County Br. 19), its claim that Mr. Weiner voted yes because he "believ[ed] he had no other option" (County Br. 20), or its claim that Mr. Culver or Barley Mill's attorney told Council "traffic could not be considered until the record plan review stage" (County Br. 21). Each of these claims is false, belied by the color-coded Council hearing transcripts, as discussed at length in Barley Mill's Opening Brief. And then there is the County's misstatement of the substantial evidence standard (County Br. 20), a standard which Barley Mill correctly explained in Arguments I.B and I.C.3.c in the Opening Brief and in Argument III.B in this brief.

3. The Court Below Incorrectly Applied The Substantial Evidence Standard To Determine What Information Mr. Weiner Needed In Order To Cast An Informed Vote

As Barley Mill explained in the Opening Brief, under Delaware law a zoning body only needs to meet the low evidentiary threshold of "substantial evidence" for its decision to be affirmed, meaning that there only needs to be enough evidence to be

[133] In other words, the only way that the lack of a TOA can be considered part of the reason for Mr. Weiner's decision is by going beyond Mr. Weiner' stated reasons when he voted, reviewing the record for other (but not all) statements by Mr. Weiner, and by "interpreting" what Mr. Weiner actually said when he voted, all of which is improper for the reasons discussed in Arguments I.C.3.a and I.C.3.d in the Opening Brief and Argument IV.A.1 above.

"adequate to support a conclusion," and it does not matter if there is additional material evidence not considered by the zoning body. (Opening Br. 17-18, 23-24) Instead of applying this deferential standard, the court below applied a standard that requires an individual member to obtain and consider *all* evidence *subjectively* material to that member, which imposes obligations on zoning bodies and reviewing courts well beyond what Delaware law requires. (Opening Br. 23-25) Cross-Appellants, in their Answering Briefs, fail to grapple with the issue in any meaningful way.

Plaintiffs respond to the crux of the argument simply by denying it, insisting without explanation that there is nothing in the Opinion which supports Barley Mill's characterization of what the court below did. (Plfs. Br. 23) However, perfunctory *ipse dixit* denials are not a proper responsive argument under Delaware law.[134] Plaintiffs also insist that the public policy implications of the lower court's ruling are irrelevant because of the vote count, saying that the argument might have more appeal if the vote had not been close. (Plfs. Br. 24) But this comment makes no sense, because Council generally operates by majority rule, and imposing on each Council member the obligation to hold up proposed legislation pending receipt of all information subjectively material to that Council member that is reasonably available effectively gives each Council member the equivalent of a Senatorial hold[135] where neither State nor

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[134] *See, e.g., Universal Compression, Inc. v. Tidewater, Inc.*, 2000 Del. Ch. LEXIS 151, at *28 (Del. Ch. Oct. 19, 2000) (holding that Tidewater's argument failed because it was "at best an ipse dixit assertion"); *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1995 Del. Ch. LEXIS 130, at *17 (Del. Ch. Oct. 19, 1995) (finding defendants' challenges, which "border[ed] on *ipse dixit* assertions having minimal (or no) legal support," to be unpersuasive).

[135] A "Senatorial hold" is the parliamentary procedure in the United States Senate that allows a Senator to prevent legislation from reaching a vote. Most legislation reaches the Senate floor for a vote by unanimous consent, so a Senator can generally hold up legislation by informally signaling the Senator's objection to the legislation reaching the floor. *See* Rule VII, RULES OF THE SENATE,

County law provides for it. Finally, Plaintiffs insist that Barley Mill's argument is inconsistent in light of Barley Mill's argument noting that Mr. Weiner did not have the ability to move to table the Ordinance, let alone ensure that the motion would pass. (Plfs. Br. 24) The response to this claim is simply to note that Barley Mill's arguments are made in the alternative, as Plaintiffs should have recognized.

The County's argument fares no better. Nowhere does the County explain how the lower court's ruling can be squared with the low evidentiary threshold of substantial evidence. It certainly does not do so by devoting nearly a full page of single-spaced text to a block quote from the Court of Chancery's opinion in *Harmony Construction* (County Br. 22-23), an opinion which Barley Mill addressed in the Opening Brief (Opening Br. 38). The issue here is whether Council members are obligated to hold up Council legislation until they can obtain and consider *all* information each of them subjectively believes is material to their decision—with "all" being the key word—even if that information is not something that Council is specifically required by law to consider in connection with a rezoning. If 9 DEL. C. § 2662 and the UDC do not say Council must wait for a completed TIS or TOA before voting on a proposed rezoning, it cannot be arbitrary and capricious (*i.e.*, "unconsidered") for Council members to choose to go ahead and vote without awaiting that evidence, so long as the record contains substantial evidence to support a decision that is based on consideration of the statutorily-prescribed factors.[136]

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http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome); *see also Senate Hold*, TAEGAN GODDARD'S POLITICAL DICTIONARY, http://politicaldictionary.com/words/senate-hold/.

[136] This is not to say that traffic considerations are entirely irrelevant to rezoning decisions, or that Council members are somehow forbidden from considering traffic when voting on a rezoning. Neither Barley Mill nor Mr. Culver ever suggested such. *See* Opening Br. 33-34.

4. Even If It Were Proper To Review The Entire Record To Determine The Reasons For Mr. Weiner's Vote, The Finding Of The Court Below That A TOA Was Subjectively Material To Mr. Weiner Was Erroneous

In the Opening Brief, Barley Mill showed that even were the lower court's "all evidence subjectively material" standard appropriate, the evidence in the record does not support the lower court's finding that consideration of a TOA was material to Mr. Weiner, because the lower court's finding rests upon the lower court's improper interpretation and weighing of some (but not all) of the things Mr. Weiner said during Council's lengthy deliberations, and the court's failure to interpret those statements in the light most favorable to Mr. Weiner's affirmative vote. (Opening Br. 26-27) The statements by Mr. Weiner relied upon by the court below for its conclusion that receipt and consideration of a TOA for the Revised Plan was "material" to Mr. Weiner in fact do not discuss Mr. Weiner's purported belief that receiving a completed TOA for the Revised Plan might change his vote, but instead go to a different issue, his desire that the law be amended so that Council would know before any rezoning vote the exact infrastructure improvements that would be made and have the property owner's ironclad commitment to pay for them. (Opening Br. 26-27; A662-63)

Cross-Appellants' response is another *ipse dixit* denial of Barley Mill's argument, claiming that just because Mr. Weiner did not use the word "material" does not mean the results of a completed TOA were not material to him, and that the importance of a completed TOA to Mr. Weiner is "plain" or "indisputable" when all of Mr. Weiner's statements in the record are considered. (Plfs. Br. 26; County Br. 24-25) They make no effort to explain Mr. Weiner's actual statements in the record, relying instead entirely on the lower court's interpretation of those statements. Cross-

Appellants fail to respond to Barley Mill's point that a completed TOA would not accomplish the purpose for which the court below was requiring it (comparing the traffic effects from the Initial Plan and the Revised Plan) (Opening Br. 26), they ignore Barley Mill's point that the court below focused only on Mr. Weiner's statement about "traffic impact," even though Mr. Weiner referred to both traffic impact ***and*** land use impact (Opening Br. 26), and they ignore the fact that Mr. Weiner identified at least three different issues as being of "great concern" to him, and yet "great concern" was equivalent to "material" only for traffic. (Opening Br. 27 n.44)

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

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

In the Opening Brief, Barley Mill established that the court below erred when it held that a completed TOA was "reasonably available" to Mr. Weiner, because under the County Council Rules Mr. Weiner could not move to table the Ordinance and any motion to table would have required the independent votes of at least six other Council members in order to pass. (Opening Br. 27-29) Council—*as a body*—had the power to table the Ordinance, but Mr. Wiener—*as a member*—did not have the power to make that happen. (*Id.*) Therefore, a completed TOA could not have been reasonably available to Mr. Weiner unless State or County law requires a sponsor to move to table an ordinance, and likewise imposes upon a majority of Council the duty to vote in favor of such a motion, if just one Council member believes additional information is material to that member's vote—and neither State nor County law does so. (*Id.*)

Plaintiffs respond to this argument by saying that "perhaps" Mr. Weiner would

have pressed Ms. Kilpatrick to move to table the Ordinance had he not been misled by Mr. Culver or Barley Mill's counsel, that his request "may have" gained many supporters had Council not been misled as to its authority, and he "surely" could have convinced six other Council members to table the Ordinance. (Plfs. Br. 25) Such rank speculation is not a valid substitute for argument. Plaintiffs also conveniently gloss over the fact that the "authority" at issue here is the authority of Council and its individual members ***to table legislation*** pending the receipt of additional information, and it is crystal clear from the record that neither Mr. Culver nor Barley Mill's attorney ever spoke a word about Council's ability to table legislation.[137]

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

In the Opening Brief, Barley Mill established that the court below erred when it held that a completed TOA was "reasonably available" to Mr. Weiner, because there is no evidence in the record to support the lower court's conclusion that Mr. Weiner was unaware of or mistaken as to what options were available to him under the County Council Rules to delay a vote on the Ordinance, and that such a conclusion defies

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[137] The County engages in similar speculation in its Answering Brief, despite acknowledging that Barley Mill correctly describes the County Council Rules. (County Br. 26-27) The County also claims it is Barley Mill's burden to prove that a majority of Council members would not have agreed to table the Ordinance had a motion been brought, even though Delaware law places the burden on Cross-Appellants to overcome the clear presumption in favor of upholding County legislative enactments. *See, e.g.*, *Farmers for Fairness v. Kent Cnty.*, 940 A.2d 947, 956 n.43 (Del. Ch. 2008) ("In a case where a plaintiff challenges the validity of legislation adopted by a legislative body elected by the members of a polity, the plaintiff bears the burden to demonstrate the infirmity of that legislation."). And the County attempts (again) to castigate Barley Mill for supposedly being contradictory about the propriety of reviewing the entire record (*id.* 27), once again failing to recognize that arguments can be made in the alternative, as Barley Mill did here.

credulity given Mr. Weiner's many years of service on Council. (Opening Br. 29-32)

In response, the County disputes Barley Mill's explanation in the Opening Brief (Opening Br. 30-31) that the statements of Mr. Weiner upon which the court below relied are directed to Mr. Weiner's desire to change County and State law so that the kind of "traffic impact data and a commitment to needed improvements" that have always been addressed after a rezoning vote (during record plan review) would instead be dealt with before the vote. (County Br. 28-30) But the County is arguing about the wrong issue, because what is at issue here is not whether Mr. Weiner was thinking at all about traffic effects (or a TOA) for the Revised Plan when he expressed a larger desire to change County and State law. (County Br. 28-29) Rather, the issue is Mr. Weiner's knowledge or awareness of the parliamentary procedures available to delay a vote on the Ordinance (*i.e.*, the motion to table) (*see* Opening Br. 27-32), because the lower court's ruling that a completed TOA was reasonably available to Mr. Weiner depends on the court's conclusion that Mr. Weiner, the second-longest serving member of Council, lacked such knowledge or awareness. (Op. 34-36) And there is no evidence in the record before Council—including the statements of Mr. Weiner cited by the court below—directed to that particular issue.[138]

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

In the Opinion, the lower court stated its belief that Mr. Culver and Barley

[138] Plaintiffs' only response to this argument is to complain that Barley Mill is being inconsistent with regard to the propriety of going behind the statements given at the time of the vote on the Ordinance (Plfs. Br. 27), a complaint which fails to recognize that the two arguments about which Plaintiffs complain are arguments made in the alternative. (*See, e.g.*, Opening Br. 22, 25, 29, 30)

Mill's attorney were the cause of Mr. Weiner's purported lack of knowledge as to his ability to cause a delay in Council's vote on the Ordinance. (Op. 32-33) Barley Mill demonstrated in the Opening Brief that this conclusion is entirely lacking in record support because at no point during any of the six different Planning Board and Council meetings did either Mr. Culver or Barley Mill's attorney utter even a single word about County law regarding parliamentary procedure (*i.e.*, tabling the Ordinance). The record is indisputably clear on that point. (Opening Br. 33-35)

Cross-Appellants' arguments in their Answering Briefs do not show otherwise. For their part, Plaintiffs continue to insist that it is "unequivocal" that "the law was misrepresented to Council" by Mr. Culver and Barley Mill's attorney. (Plfs. Br. 27) But they are being disingenuous, because the "law" that they are talking about (whether State or County law requires Council to consider a completed TIS or TOA before a rezoning vote) is ***not*** the "law" that the court below addressed in the Opinion (whether the law enabled Mr. Weiner to cause a delay in the vote).[139] The County similarly focuses on the wrong question of "law." (County Br. 30-31) Little wonder that that they both do, because it is clear, as noted above, that neither Mr. Culver nor Barley Mill's attorney ever said a word about the ability of Mr. Weiner or anyone else on Council to cause a delay in the Ordinance vote. But even if Cross-Appellants were talking about the correct "law," the transcripts of the Council meetings show that neither Mr. Culver nor Barley Mill's attorney ever said Council was forbidden from con-

[139] *Contrast* Plfs. Br. 27 ("all Councilmembers were told that they would not be receiving any information from a traffic study. . . that traffic had been taken out of their hands") *with* Op. 33 ("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 ordinance until DelDOT had produced its traffic study.").

sidering traffic, [140] as explained in the Opening Brief (33-35).[141]

[140] The County concedes Mr. Culver never said it was "inappropriate" to consider traffic before a rezoning vote, but then tries to fault Mr. Culver and Barley Mill's attorney for not speaking up to say that Council members could consider traffic. (County Br. 30-31) The County seems to forget that it has its own lawyer (the County Attorney), who was in attendance during portions of Council's consideration of the Ordinance and even spoke directly to Council (*see, e.g.*, A506-08; A512; A528).

[141] As a final point, the County also claims that the reason why Mr. Culver and Barley Mill's attorney made similar statements regarding how traffic is handled was because they were conspiring to get the Project passed through Council. (County Br. 31 n.9) The County's "evidence" to support this accusation is a single October 24, 2011 email from Mr. Culver to Barley Mill's attorney telling him to be ready to discuss traffic at the October 25 Council meeting. With a record of thousands of pages, this is the only document the County submits to support this suggestion. The notion that this single email is evidence of a conspiracy can be dismissed on its face: if the County believes that Barley Mill's attorney needed to be reminded (after five prior hearings) that traffic would come up at the October 25 Council meeting, it fails to appreciate the record in this case.

CONCLUSION

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

Respectfully submitted,

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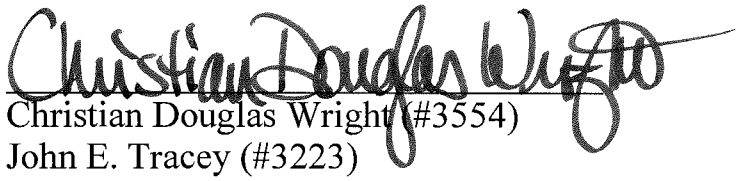

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Dated: December 6, 2013

CERTIFICATE OF SERVICE

I, Lakshmi A. Muthu, Esquire, hereby certify that on December 18, 2013, I caused a copy of *Barley Mill LLC's Corrected Combined Answering Brief to Plaintiffs' and The County's Cross-Appeals and Reply Brief to Its Appeal* to be served on the following counsel of record in the manner indicated below:

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