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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 and THOMAS S. NEUBERGER, Plaintiffs-Below, Appellees/Cross-Appellants, v. NEW CASTLE COUNTY, Defendant-Below, Appellee/Cross-Appellant, and THE COUNTY COUNCIL OF NEW CASTLE COUNTY, Defendant-Below, Cross-Appellee.	)	No. 419, 2013 Court Below: Court of Chancery of the State of Delaware C.A. No. 7151-VCG

REPLY BRIEF ON CROSS-APPEAL BY CROSS-APPELLANTS SAVE OUR COUNTY, INC., ET AL.

Jeffrey S. Goddess (No. 630)
Rosenthal, Monhait & Goddess, P.A.
919 N. Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
Attorney for Plaintiffs-Below, Appellees/Cross-Appellants

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I. THE PROCESS FOLLOWED BY COUNTY COUNCIL VIOLATED 9 *DEL.C.* § 2662, WHICH REQUIRED INVALIDATION OF THE VOTE

A person reading the statute at issue – 9 *Del.C.* § 2662 – would reasonably conclude that the General Assembly expected that New Castle County Council would have basic traffic information available to it before voting on a rezoning which would introduce a large shopping mall, particularly when that mall would be partially adjacent to residential neighborhoods, with nearby roadways, including the State's only scenic byway, already overtaxed by residential, office and commuter traffic. By the statute, the General Assembly was directing that before a rezoning request is approved by County Council, there should be a review of traffic impacts which "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." 9 *Del.C.* § 2662(4). That was not done here, despite the fact that under Delaware common law, any zoning action requires "the strictest compliance with all applicable procedures."[1]

[1] *Shevock v. Orchard Homeowner's Ass'n., Inc.*, 621 A.2d 346, 349 (Del. 1993), citing *Carl M. Freeman Associates, Inc. v. Green*, 447 A.2d 1179, 1182 (Del. 1982). More recently, that principle was reiterated and dispositive in *Friends of the H. Fletcher Brown Mansion v. The City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011).

In its brief opposing the cross-appeal,[2] Barley Mill first challenges plaintiffs' standing to assert the County's violation of § 2662, and then makes a lengthy, multi-part argument for its desired interpretation of the statute, – arguing that the statute mandates no more of the County Council than that it enter an agreement with DelDOT whereby DelDOT does all the traffic analysis and provides all consideration on the subject. In the passages which follow, the plaintiffs will demonstrate the fallacies of Barley Mill's arguments.

A. The Plaintiffs Have Standing To Challenge The Rezoning On The Basis Of Council's Violation Of State Law

Barley Mill first attacks the plaintiffs' standing. (BM Ans.Br. – 5.) However, the plaintiffs are exercising the long-recognized right of affected citizens to challenge a rezoning for, *inter alia*, non-compliance with legislated procedures. That cross-cutting fact favorably distinguishes the rezoning situation here from circumstances in which other citizens have lost, for lack of standing, when they sought to challenge a governmental action (or inaction) as being contrary to the dictates of a State statute.

Aggrieved residents have long been held to have standing to challenge a rezoning as being inconsistent with State law, and this distinction has been recognized for many years. *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 558-561 (Del. Ch. 1991). Consistent with that, no challenge to standing was raised, nor suggested *sua sponte* by the courts deciding *Deskis v. County Council*

[2]Barley Mill's Combined Answering And Reply Brief, hereafter cited as "BM Ans.Br." Plaintiffs' Answering Brief On Appeal And Opening Brief On Cross-Appeal will be cited as "Pl. Op.Br."

of Sussex County, 2001 WL 1641338 (Del. Ch., Dec. 7, 2001); *Citizens Coalition, Inc. v. Sussex County Council*, 2004 WL 1043726 (Del. Ch., Apr. 30, 2004), *aff'd* 860 A.2d 809 (Del. 2004) (TABLE); and *Hansen v. Kent County*, 2007 WL 1584632 (Del. Ch., May 25, 2007), – three cases in which citizens were advancing claims under the parallel versions of § 2662 applicable in Sussex and Kent Counties.

That "standing" to challenge compliance with the statute was not made an issue in *Hansen* becomes more striking by virtue of the fact that a year previous to *Hansen*, its author, Vice Chancellor Noble, had given extensive analysis and discussion to the issue of a private right of action in the rezoning sphere and had concluded, with primary reference to the *Couch* decision, that zoning challenges are different, such that "application of an implied right of action analysis is unnecessary" with respect to them. *O'Neill v. Town of Middletown ("O'Neill I")*, 2006 Del. Ch. LEXIS 10 (Del. Ch., Jan. 18, 2006) at *133.[3]

In the court below, the plaintiffs stood on this principle that citizens' rezoning challenges are in a separate category, where the more usual analysis of "standing" issues are not applied. The plaintiffs cited *Couch* and *O'Neill I* (as well as *Deskis, Citizens Coalition* and *Hansen*) in the course of their reply briefing to the lower court. (A 846-848.) Yet, when arguing on "standing" to this Court, Barley Mill fails to mention that long-established principle, nor even mention

[3] It is also noteworthy that in *Hansen*, the Vice Chancellor, citing to his *O'Neill I* decision, had indicated a lack of standing as to two other aspects of the plaintiffs' challenges there, but not as to the matter of traffic consideration under 9 *Del.C.* § 4962 (the version of § 2662 applicable to Kent County.) *Hansen*, 2007 WL 1584632 at *3, n. 19.

Couch. And even more remarkably, while Barley Mill does cite *O'Neill I* in that passage of their argument, it is only for its holding that there is no private right of action *against DelDOT* for failing to require a TIS in connection with any particular rezoning. (BM Ans.Br. 7.) However that is not the claim plaintiffs are making, and thus that particular holding in *O'Neill I* is irrelevant here.

Barley Mill's other citation in that passage of its argument is to *Christiana Town Center, LLC v. New Castle County* ("*CTC*"), 2009 Del.Ch. LEXIS 40 at *42, n. 61 (Del. Ch., Mar. 12, 2009), *aff'd* 985 A.2d 309 (TABLE) (Del., Dec. 1, 2009). (BM Ans.Br. 6.) However, the citation is to an extended footnote at the close of that opinion, discussing contentions which had not been raised in that case. Indeed, in the footnote it was noted that the plaintiffs there were *not* alleging that they had a private right of action to challenge whether or not New Castle County had complied with § 2662. Hence, the discussion which followed was *obiter* on the subject. Further, the plaintiffs here, quite unlike the plaintiffs in *CTC*, are not asserting a private right of action to compel a particular level of service ("LOS") result. Rather, one basis for their challenge was, and is, that the most fundamental and logical mandate of the statute had not been met by their County government, and that the result was a voting process which produced a rezoning that was arbitrary and adverse to their interests. That differs from the challenge made by the plaintiffs in *CTC* for, as that court expressly noted, the plaintiffs there were not alleging arbitrary and capricious conduct in the traditional sense.[4]

[4] *CTC*, 2009 Del.Ch. LEXIS 40 at *16. Case law has always recognized a right of judicial review of actions taken for arbitrary or impermissible reasons which impair property rights and

It appears to be a question of first impression in this Court as to whether county residents, adversely affected by a rezoning reclassification, have standing to assert their county's violation of § 2662 (and its counterpart provisions for Kent and Sussex). However, as shown, rezoning case precedent supports their having "standing" here and, as reasoned in *Couch*, that principle rests on long-standing authorities of this Court.[5]

B. The Plaintiffs' Construction Of § 2662 Is Correct

In captioning the next section of its argument, Barley Mill introduces a major misattribution, which it carries forward through its brief, by misrepresenting the plaintiffs' construction of § 2662. Barley Mill gives this title:

> Section 2662 Does Not Require Council To Obtain And Consider A Completed TIS Or TOA Before Voting On Every Rezoning.[6]

However, the plaintiffs *do not assert* that § 2662 requires a completed TIS or TOA for every rezoning. Nor does the statute use the terms "TIS" or "TOA". Rather, in subsection (4), the statute speaks in plain, non-technical language about what should be received before zoning reclassification. Consistent with that, in the entire section of their opening brief on cross-appeal addressed to § 2662, the terms "TIS" and "TOA" do not appear. (Pl. Op.Br. 38-42.)[7]

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other fundamental rights. *Cannon v. State*, 807 A.2d 556 (Del. 2002); *Holland v. Zarif*, 794 A.2d 1254, 1265-69 (Del. Ch. 2002); *O'Neill I*, 2006 Del.Ch. LEXIS 10 at *53-57.

[5] *Couch*, 593 A.2d at 560, citing to *Tate v. Miles*, 503 A.2d 187 (Del. 1987) and *Council of Sussex County v. Green*, 516 A.2d 480 (Del. 1986).

[6] BM Ans.Br. 7.

[7] The plaintiffs were consistent on this in their briefing below, as well. The plaintiffs have *never*

Other plaintiffs have lost on the merits when challenging whether a DelDOT traffic report and recommendation to a county council was accurate and sufficient (*Deskis*), whether a fresh TIS was required over and above those which DelDOT felt were sufficient to inform its report and recommendation (*Citizens Coalition*), and what level of service (LOS) should be the target of a traffic study (*CTC*). However, under the facts of this case, where the rezoning for a regional shopping mall was voted upon and approved without any traffic studies and projections whatsoever provided to Council, plaintiffs believe their argument on § 2662 is on bedrock, and that this Court will not be diverted by Barley Mill's misattributed "strawman" argument about TISs and TOAs.

Barley Mill argues that § 2662 unambiguously requires no more of County Council than that an agreement be entered with DelDOT whereby DelDOT does all the analysis and, critically, that there is no obligation on County Council to wait on its rezoning vote to receive and consider any traffic information. (BM Ans. Br. 10.) Put most simply, under their interpretation of the statute, County Council's job was done once an agreement was entered with DelDOT in 1990.

There is no doubt that one focal point of § 2662 is that there was to be an inter-governmental agreement containing certain specified features. However, if that were the sole purpose, and if the statute did not intend to require something more of County Council prior to every rezoning reclassification, the introductory

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argued that § 2662 requires a completed TIS or TOA before voting on every rezoning. (A 749-757; A 845-855.) Moreover, in their reply brief below the plaintiffs expressly stated: "First, the plaintiffs are not asserting and appealing on the basis that a completed TIS was required, but that some measure of traffic data, including projections, was required under 2662." (A 854.)

clause would not read as it does, referring to the County Council "complying with the following *procedures*." Under Barley Mill's interpretation, there would be just a solitary "procedure" for County Council, – being its entry into an agreement with DelDOT. But if that were the sole intent of the statute, it could have begun with the language in subsection (1). The introductory clause would be surplusage, contrary to the familiar rule of statutory construction noted in *DiSabatino v. Ellis*, 184 A.2d 469, 473 (Del. 1962). Also, both subsections (3) and (4) refer to "zoning reclassification," and it is particularly clear in subsection (4) that the direction being given was that the analysis is to be performed prior to the approval of any rezoning application.[8]

Barley Mill then draws from a provision in the County's UDC which requires a "letter of approval" from DelDOT prior to plan recordation. With those component pieces, Barley Mill has devised an interpretation which puts all responsibility on DelDOT, with no role or obligation on either the County Department of Land Use or the County Council with respect to the consideration of the traffic impact of a proposed rezoning. (BM Ans.Br. 13-16.)

There are at least three reasons to reject that statutory construction, the first being that the introductory clause of § 2662 makes it clear that certain things must occur before County Council approves any rezoning request. Second, the sort of information exchange and analyses called for by § 2662 would be eclipsed and no

[8] Section 2662(4) referring to "projected traffic growth in areas surrounding a *proposed zoning reclassification* and the projected traffic generated by the proposed site development for which the zoning reclassification is sought." (*Italics* added.)

longer cognizable once County Council has voted to approve a rezoning request. All that remains to be done beyond that point is record plan approval, and Council's role at that final stage is ministerial only. UDC § 40.31.114,C.[9] Regardless of any traffic volumes and bottlenecks revealed by a traffic analysis that would arrive after Council's vote – even if "the projected traffic generated by the proposed site development" projected gridlock – Council could not go back on its substantive vote and nor, for that matter, could the Department go back on its recommendation. The rezoning reclassification was already granted.[10]

Third, when arguing that the statute unambiguously puts all onus on DelDOT and none on the County with respect to the consideration of traffic impact, Barley Mill cites to the 1990 MOU. (BM Ans.Br. 15.) To be sure, that MOU did provide that DelDOT would perform technical analysis, but the procedural regime established by the MOU is totally consistent with the plaintiffs' reading of the statute. It is clear from the MOU that there was to be a dialogue on traffic, and that it would come early in the rezoning process to inform the decision makers. The MOU called for the County Department of Planning (now its Department of Land Use) to request a preliminary traffic analysis from DelDOT within five working days of its receipt of a rezoning request, and for DelDOT to

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[9] In the course of a 2009 amendment, § 40.31.114, pertaining to the record plan stage, was amended in a fashion which relettered the "Council consent" provisions from subsection "C" to "D," but the text – limiting Council to a ministerial role – was unchanged.

[10] *See* UDC § 40.31.113,G, the final sentence of which states that "The record plan submitted to the Department shall be submitted in strict accordance with the development depicted on the approved preliminary plan *that was relied upon by County Council when it granted the rezoning.*" (*Italics* added.) (That provision was formerly at subsection "F" of § 40.31.113.)

report back to the Department within twenty working days thereafter. The information DelDOT was providing back to the County included the topics specified as a minimum by § 2662(4), such as existing annual average and peak hour volumes, along with peak hour projections of traffic to be generated by the site. And in its report back, DelDOT would also include "currently planning mitigation programs and transportation improvements."[11] Continuing, the MOU clearly and plainly would keep the County – both the Department and the Council – in the decisional process vis-à-vis traffic. Absolutely reflective of that, the MOU provides:

> 15. New Castle County Department of Planning is responsible for coordinating and distributing all required information, including DelDOT's report of traffic impact to the New Castle County Council.[12]

These provisions from the 1990 MOU are absolutely consistent with the plaintiffs' reading of the statute, and quite inconsistent with a notion that the statute went no further than to command that the two layers of government enter into an agreement which would keep the County Council away from the subject of traffic – the current and projected volume and impact of traffic – for any given rezoning application. As the Vice Chancellor stated after seven pages of colloquy with Barley Mill's attorney, the most important issue for him with respect to § 2662 was not whether there was a statutory breach, but the legislative intent and how that played into the charge of arbitrary action by the Council. (A 1092.) And

[11] 1990 MOU, ¶ 2, at B 99-100.

[12] 1990 MOU, ¶ 15. *See also*, ¶¶ 4 and 6. B100-104.

that legislative intent obviously was that traffic analysis consistent with § 2662 had to be prepared and reviewed prior to Council's vote on a rezoning request.

As an alternate argument for its interpretation of the statute, Barley Mill turns to other extraneous evidence, one of which is a Senate bill introduced a month earlier than the bill introduced in January, 1988, which eventually became § 2662. (BM Ans.Br. 18.)[13] An examination of the first version, S.B. 300, shows that a primary focus was to establish level of service (LOS) "D" as a bare minimum, regardless of whatsoever else the County and DelDOT might have agreed upon as a threshold level for "significant adverse impact." Had S.B. 300 come to vote and passed in its original form, it would have involved the General Assembly in a high level of detail relative to the rezoning process. Most of the particularized requirements in S.B. 300 – including, most notably, enshrining LOS "D" – did not appear in the latter bill, S.B. 327. But there is no reason to think that the prime sponsor of both – Sen. Roger Martin – had a complete turnabout so far as the process envisioned, such that a month later all he cared to require was that there be some type of agreement, with little or no role or obligation on the County on any individual rezoning.

It is all speculation really, but a more likely hypothesis is that in the negotiations to obtain approval and a greater number of co-sponsors, it was agreed that LOS "D" not be enshrined legislatively and that, contrary to the provision in S.B. 300, DelDOT would not have sole discretion to determine whether a second

[13] The two pieces of legislation – S.B. 300 and S.B. 327 – are in Barley Mill's Compendium of Authorities.

level, traffic impact study would be required. Unlike S.B. 300, S.B. 327, and hence § 2662, doesn't speak to those topics, and the ensuing 1990 MOU left it to the County Planning Department to determine if a traffic impact study would be required.[14] However, the same overall regime and protocol – the back-and-forth, the exchange of information between DelDOT and the County prior to approval of any rezoning request – was obviously still intended.

Barley Mill also cites the principle of legislative acquiescence. (BM Ans.Br. 19 -20.) However, the basis which Barley Mill gives for that is feeble in the extreme, while the relevant extrinsic evidence wholly favors the plaintiffs. What Barley Mill cites to is the County's continual expansion of the provisions in its UDC which carved exceptions to its TIS requirement. However, and to repeat, the plaintiffs do not rest their claim with respect to § 2662 on the lack of a TIS; that is a diversionary strawman. Further, while the County amended its UDC in 2003 and then again in 2006 to create further carve-outs for "redevelopment," it is unrealistic to expect that the General Assembly spends its time and scarce resources monitoring and reacting promptly to legislation of subordinate units throughout the State. Rather, the maxim is sensibly applied only when there has been a long-standing practice and application by the subordinate unit of government, as appeared in the very decision cited by Barley Mill.[15] Hence, regardless of the repeated UDC amendments over the previous decade (which have

[14] 1990 MOU, ¶ 4; B 100.

[15] *One-Pie Investments, LLC v. Jackson*, 43 A.3d 911, 915 (Del. 2012), in which there had been a consistent practice "for decades under the statute in question."

so confused any outsider's efforts to keep track of it), the pertinent fact, which is contrary to any notion of legislative acquiescence, is that New Castle County has never had a major rezoning come to vote without at least some measure of traffic projections being available to Council. (B 98.)

Further, that maxim of construction also presumes that the legislature is aware of existing *judicial* decisions. *One-Pie Investments*, 43 A.3d at 915, n. 12. In that regard, in 2001 there was the comment in *Deskis* that "Delaware law mandates that County Council consider DelDOT's traffic analysis before deciding whether or not to rezone," and, in 2004, the comment in *Citizens Coalition* that "Section 6962(4) requires SCC (Sussex County Council) to 'consider ... the projected traffic generated by the proposed site development for which the zoning reclassification is sought.'"[16] Those decisions are consistent with the legislative intent, and of course no change was subsequently enacted to § 2662.

A striking item in the record further gives lie to the reassuring picture which Barley Mill attempts to paint about traffic matters being solely for DelDOT. In a letter in May, 2009 to three members of the General Assembly, the Secretary of Transportation stated – albeit speaking to the First Plan at that point – "We still intend to provide advice to the County in terms of the transportation system improvements they should be requiring in order to achieve LOS D. We will be happy to work with them to make suggestions regarding how to meet that standard including modifications to the mix and intensity of uses being proposed if the

[16] *Deskis*, 2001 WL 1641338 at *9; *Citizens Coalition*, 2004 WL 1043726 at *4.

analysis indicates that such modifications may be appropriate." (B 56.) However, up to the point of the Department's favorable recommendation – which lowered the vote total required for passage, from nine Council members to seven – and then to the point of the critical Council vote on October 25, 2011, there was no information flow concerning traffic given to County Council. That was unprecedented.

In sum, Barley Mill's arguments on § 2662 are unavailing. The County violated § 2662 when it gave Barley Mill a "pass" by not considering what the statute mandates for consideration. The statute required more of the County than that it enter an agreement with DelDOT in 1988, and the plaintiffs have standing to challenge a rezoning as arbitrary and capricious when their county's violation of its obligations led to a rezoning which affects them adversely.

II. THE COUNTY UDC REQUIREMENTS CONCERNING TRAFFIC INFORMATION WERE NOT MET, AND FOR THAT REASON AS WELL, THE VOTE SHOULD HAVE BEEN INVALIDATED

If Barley Mill's proposal had not been favored with "redevelopment" status, a TIS – a full, second level traffic study – would have been required under the applicable provision in the "Transportation Impact" Article of the County's UDC.[17] On this conclusion, the parties seem to agree.[18]

A. The Plan Was Not Properly Characterized As "Redevelopment"

In its brief, Barley Mill coins the term "Redevelopment Statute" and then uses it repeatedly through that passage of argument. (BM Ans.Br. 28-31.) Perhaps that was just chosen for rhetorical convenience, but it serves to note that the passages of the UDC pertaining to redevelopment do not stand alone. Rather, they are folded into the UDC, primarily in Article 8, pertaining to "Nonconforming Situations." When speaking to the purpose, applicability and consequent enhancements for redevelopment, the reference is to granting a credit "for both extractive use sites and Brownfields; and for sites with legally existing gross floor area ("GFA") that has been demolished by more than fifty (50) percent of its GFA."[19] The common feature in that list is that these are all situations where the premises have sat fallow and are likely to so remain unless incentives are provided for redevelopment. There is no reason to think that by adding the requirement that

[17] UDC § 40.11.120,A.

[18] In colloquy with the Court below, counsel for Barley Mill twice agreed on that point. A 1081.

[19] UDC § 40.08.130,B.6.

the previously existing floor area "has been demolished by more than fifty percent," the County didn't really care whether the premises "has been" demolished or "would be demolished" to accommodate a developer's proposal. There is no reason to think that the County wanted to add a broadly overwhelming third category which, read as Barley Mill would have it read, would apply to any structures built in the County prior to 1997. It is a standard principle of statutory construction that words grouped in a list in a statute should be given a related meaning. *Delaware Board of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012).

Also, from the historic legislation on Article 8 which Barley Mill provided in its first compendium (at Tabs 19 and 20), one can see that when amending that section in 2008, primarily to include "extractive use sites," the County also amended UDC § 40.08.130,B,6,a., changing the descriptive phrase from "has been demolished (partially or in whole)" to read "has been demolished by more than fifty (50) percent of its GFA." If the County's intent were to broaden the reach of that provision, then inasmuch as it was already amending the clause, that would have been the appropriate time to openly amend from "has been demolished" to "has or *will be*" demolished.

Similarly as to Barley Mill's expansive interpretation of the term "underutilized" in the statutory grouping "vacant, abandoned or underutilized."[20] The first two definitional terms – vacant and abandoned – would be surplusage if "underutilized" meant and required only that a structure was "built prior to 1997,"

[20] UDC § 40.33.300.

regardless of the quality and current state of use of the property and the structures thereon.

In its brief, Barley Mill again hits back with hyperbolic prose, arguing that a plain reading of these provisions "would gut the Redevelopment Statute and defeat the purpose for its adoption," and that "If Plaintiffs' interpretation of the Redevelopment Statute were correct, no redevelopment project could be undertaken except in the rarest (and most unfortunate) of circumstances." (BM Ans.Br. 29 & 30.) A moment's reflection would confirm that this is not so. Undeniably, sites which already have existing, solid and substantial buildings on them erected pre-1997 wouldn't be eligible to receive the exemption, enhancements and financial benefits which go with "redevelopment" status.[21] However, things would not grind to a halt in New Castle County. Developers could still redevelop sites in full compliance with the UDC requirements or apply for a variance.[22]

And that just speaks to developers' side of the equation. The overall common good is enhanced if predictability is provided in the zoning process, so that individuals making the most significant purchase in their lives – their family home – would not be faced with what the plaintiffs are facing here. And lastly, if the economy is such that development in the County does come to a halt, and developers do need lessened fees and requirements and greater enhancements to

[21] *See, Acierno v. New Castle County*, 2009 WL 3069691 (Del. Super., Sept. 17, 2009) at *5, listing the "significant advantages" which redevelopment status provides.

[22] UDC § 40.08.130,B,1,2 and 6,b.

improve existing buildings, then the appropriate response would be a forthright pitch to the County, rather than tunneling through an ordinance intended to address Brownfields and extractive sites and already demolished settings by using an interpretation which injects maximum uncertainty in the reliability of County zoning.

Barley Mill also urges that the County is entitled to deference in the interpretation of its rules, regulations and ordinances. (BM Ans.Br. 31.) In the abstract, that is a standard "black letter" principle of construction, but the plaintiffs do, indeed, object to its application here, in several regards. First, the record in this case is absolutely clear that County Council did not make any determination as to whether or not the proposal qualified for "redevelopment" status.[23] In a footnote in its answering brief, Barley Mill suggests that when the court below stated in its Opinion that "because the County Council's position is reasonable, I defer to their interpretation," the reference by the court was to the briefs submitted below.[24] But the briefs which Barley Mill refers to were written by Barley Mill's attorneys, not the attorneys for County Council, and at the merits hearing Council's lawyer said nothing on the subject of "redevelopment." (A 1142-1148.)

To the extent there is any record as to how and when a determination was made that this plan qualified for "redevelopment" status, it is near-invisible. The term seems to have been affixed early on by the Department of Land Use. There is

[23] *See* Pl. Op.Br. 46-47, and the record references therein, i.e., A 591-592; 1082.

[24] BM Ans.Br. 31, n. 97.

no evidence of any reasoned process by the Department.[25] This is contrary to the process that occurred in *Acierno v. New Castle County*, *supra*. In that instance in 2009, there had been an extensive back-and-forth open process, beginning with a denial letter from the Department, which spelled out its rationale for denying "redevelopment status"; the applicant wrote back, requesting reconsideration by the Department's General Manager; the Department then issued a final decision, again spelling out its rationale; and then the applicant had petitioned the New Castle County Board of Adjustment. In other words, a very open process. Nothing of the sort occurred here when that highly critical determination was being made.[26]

Third, and finally, in this case in particular there is no reason to give any presumption of regularity to the administrative determinations made by the Department. As already pointed out, the record shows that the General Manager of the Department, Mr. Culver, was serving at the pleasure of the County Executive, whose wife had until very recently represented Barley Mill and the associated entities on this and three other development projects. (Pl. Ans.Br. 30, n. 23.) And this was with an "acting" qualification because Culver had not satisfied the residency requirement for the County's top officials (requiring residency within six months of appointment). However, coincident with the Department issuing its

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[25] *See* n. 4, supra.

[26] In addition to the adverse consequences to the neighbors, the exemptions and benefits to the developer from granting redevelopment status are all at taxpayer expense, which would run into tens of millions for road improvements because of the lack of any enforceable LOS standards for the TOA that was ordered here. *See*, colloquy between the Vice Chancellor and Barley Mill's attorney concerning the absence of any LOS standards, and the consequences flowing from that in the absence of a TIS. (A 1128-1135.)

favorable recommendation on the rezoning application, the County Executive submitted Mr. Culver for full appointment, and the Councilmanic sponsor of the rezoning ordinance introduced an ordinance eliminating the residency requirement. (BR 47.)[27]

Further, once the new County Administration took over during the pendency of this case, it was learned that a previous significant discovery response had been substantially understated. Barley Mill's answer to Interrogatory 21 only had referred to Barley Mill's attorney and engineer having had "several discussions during the latter portion of 2010 with New Castle County representatives, including David Culver and Brian Merritt [an Assistant County Attorney], regarding the process by which the Barley Mill application" would proceed. Barley Mill denied having knowledge of the identity of the decision-maker who had ultimately agreed for the Department, and stated "None" when asked to identify any writings growing out of those discussions (B 14-15.). However, once the new County Executive took office and gained access to some files, it was learned that there had also been direct communications between Ms. Scott and Gregg Wilson, the County Attorney, and that those discussions had progressed to the point of Ms. Scott forwarding a proposed, so-called Settlement Agreement.

[27] Pressure from above was also being felt at that time by others in the Department. Mr. Bennett, in an email exchange with the Assistant Planning Manager, Mr. Bieri, referred to "this historic debacle that will forever scar the landscape." The exchange ended with Bieri replying "You know – it's so sad – its no longer funny!!" (BR 38 & 39.) And as the Departmental Recommendation Report was being drafted, Bennett, writing to Culver and Bieri, prefaced a redraft with "As requested, my second painful go around with his overlord, Dave." (BR 40.)

That revelation only came to light after a first, January, 2013 hearing date had been vacated in order to square away the County's separate representation. The next month, the lower court held a teleconference on the subject of when to go forward with the merits hearing. In that teleconference, plaintiffs' counsel commented on the difficult choice between requesting continuation of the stay in order to await additional documents or going ahead. Plaintiffs' counsel added that if the hearing were to go forward without further exploration of what the Court referred to as "the taint argument," under the circumstances there should not be a presumption of administrative regularity. To that suggestion, the Court responded:

> Well, I think you can make that argument if we go forward without altering the briefing, and I doubt at this point if I am going to – if my position turns on the regularity and giving a presumption to the way things are done by the County, I have a problem. So I doubt we are going to get to that point. But I appreciate you raising the issue.[28]

In sum, treating Barley Mill's proposal as a "redevelopment" did not square with the plain language of the pertinent statutory provisions; it was not a decision made in a public manner; and it was made by a Department manager whose independence was demonstrably subject to question.

B. Even If The "Redevelopment" Characterization Could Stand, That Does Not So Radically Alter The Process That County Council Should Receive No Reports And Information Concerning Traffic Impact

Citing only to a "submission checklist" form, Barley Mill states it did provide required preliminary traffic data to the Department. (BM Ans.Br. 33,

[28] BR 17-19.

n. 100.) However, that submission itself does not appear in the record and, in any event, it would have related to the First Plan, not to the Second Plan in 2011, – the Second being a plan for a mall designed and intended to draw traffic. But, to the point of this particular argument, whatever Barley Mill had provided to the Department, not a bit of it was shared with County Council. Barley Mill argues to this Court that "the County concluded that there were no studies outstanding that would have prevented Council from considering the (rezoning) Ordinance." (BM Ans.Br. 34.) However, that is just another *ipse dixit*, arguing backwards from the fact that the Department did submit its report to Council.

The record shows that in its May 3, 2011 pre-hearing comment letter, the Department planners had instructed Barley Mill: "Provide a Trip Generation Comparison of the Revised Plan with the March 2008 Preliminary Traffic Analysis and the May 2008 Traffic Operational Analysis Scope. In turn, the Scope may need update." (AR 56.) The fact that the Department shifted its stance between May 3 and June 21, 2011, deciding not to wait for the trip generation comparison that it had requested, makes its so-called conclusion (that no studies were required) that much more curious, suspicious and suspect. Further, and as noted in plaintiffs' opening brief, the record also reflects that Culver became aware prior to the vote that a preliminary version of that study had been completed, and yet did not make inquiry with DelDOT or otherwise take any steps to inform the Council about it. (Pl. Op.Br. 15.) Hence, reduced to its essence – and all that the record supports – Barley Mill's argument should read "Despite the fact that the

Department had some early traffic data, had requested a comparison trip analysis, and was aware that DelDOT was studying the matter and had received traffic counts at a point in time prior to Council's vote, Mr. Culver alone determined that Council should go ahead to vote because whatever the traffic data and analysis would show, it was not a matter for Council's consideration."

Further indication of the infirmity of Barley Mill's argument on this point is reflected in the remarks by its own attorney to the Council Land Use Committee on October 4, 2011. He instructed that the reason traffic issues were not relevant for Council's consideration was due to the procedural amendment which compressed what had been a three step process into two steps, which change "pushes the traffic component to the end." (A 272.) It was that change which was being argued as the rationale for Council to stay away from traffic issues. Hence, the obvious conclusion to be drawn is that if the shift from three-step to two-step would make the timing difference, then when the underlying precept was shifted once again – and it was clarified that this Second Plan was, indeed, to be proceeding under the pre-2008, three-step process – then presumably the rationale for embargoing the subject of traffic had evaporated, too. Under the former, standard practice, the Council vote should await the results of the traffic studies.

Finally, Barley Mill cites to two cases decisions in an effort to refute what it characterizes as the plaintiffs' "hyper-literal interpretation" of the phrase "additional studies and/or information" in the UDC. (BM Ans.Br. 34.) It cites to *CTC*, but that gains nothing for their argument, because although a TIS was

excused in *CTC*, traffic information and a DelDOT recommendation had been provided to Council prior to its vote.[29]

Nor does Barley Mill's other citation, *Woznicki v. New Castle County*, 2003 Del.Super. LEXIS 232 (Del. Super., June 30, 2003) justify its remarkable argument that Council should be kept in the dark about traffic, – implicitly, an argument that consideration of traffic effects is solely a matter for DelDOT. In *Woznicki*, the subject was not traffic, but environmental impact. But unlike the situation here, in *Woznicki* there were no reports outstanding. As stated in the Opinion, "The County's Land Use Planners decided not to require an environmental impact statement," but that decision, in turn "was based at least on a representative of the United States Army Corp of Engineers' Opinion that the parcel is not a 'jurisdictional wetland'." The *Woznicki* court was able to conclude that the environmental issues had been "put squarely before the County's Land Use professionals and, ultimately, the County Council. The decisions were supported by substantial evidence and, therefore, they are unassailable on appeal."[30] The absolute opposite dynamic occurred here. There was nothing "put squarely before" the County's Land Use professionals on the matter of traffic, nor was any of it put before the County Council.

In sum, nothing can salvage Barley Mill's argument that although the UDC stated that one of the "submission requirements" for a zoning/preliminary plan

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[29] *CTC I*, 2009 Del.Ch. LEXIS 40 at **2, 10-13, and 17.

[30] *Woznicki*, at *13-14.

application is the provision of "any required studies or reports,"[31] that requirement was not to be read literally, and really is meaningless.

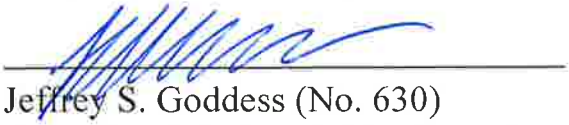
[31] UDC § 40.31.112,C & G.

CONCLUSION

The invalidation of the vote for passage of the rezoning should stand. The County Council voted without having any minimal traffic information, including projections, in violation of State law, § 2662, and contrary to the requirements of its own UDC. The Department recommendation – which was case-dispositive because it set the vote requirement for the public body, and which was essentially the sole rationale mentioned by any of the seven member majority – was incredibly conclusory, particularly given the lack of traffic information which reasonably should have played into consideration of the specified factors to be considered on any rezoning application.

And beyond all these failings, not only was misleading guidance given to Council by the Department manager and by the developer's attorney, without correction by any attorney for Council, but – as the lower court accurately concluded – the record here reflects that the misleading guidance was causative as to the vote of at least one Councilmember in the seven to six majority.

Respectfully submitted,



Jeffrey S. Goddess (No. 630)
Rosenthal, Monhait & Goddess, P.A.
P.O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
Attorney for Plaintiffs-Below, Appellees/Cross-Appellants

December 30, 2013

CERTIFICATE OF SERVICE

I, Jeffrey S. Goddess, do hereby certify that on December 30, 2013, I electronically filed the foregoing REPLY BRIEF ON CROSS-APPEAL BY CROSS-APPELLANTS SAVE OUR COUNTY, ET AL., and that notification of such filing will be delivered to the following registered and non-registered participants via LexisNexis File And Serve*Express*:

John E. Tracey, Esquire
Christian Douglas Wright, Esquire
William E. Gamgort, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square, 1000 N. King Street
Wilmington, DE 19801

Sidney S. Liebesman, Esquire
R. Montgomery Donaldson, Esquire
Lisa Zwally Brown, Esquire
Montgomery, McCracken, Walker & Rhoads, LLP
1105 N. Market Street, Suite 1500
Wilmington, DE 19801

Robert J. Katzenstein, Esquire
Kathleen M. Miller, Esquire
Smith, Katzenstein & Jenkins LLP
800 Delaware Avenue, 10th Floor
P.O. Box 410
Wilmington, DE 19899

/s/ Jeffrey S. Goddess

Jeffrey S. Goddess (No. 630)
Rosenthal, Monhait & Goddess, P.A.
P. O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433