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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

APPELLEE/CROSS-APPELLANT NEW CASTLE COUNTY'S REPLY BRIEF ON CROSS-APPEAL

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Dated: December 31, 2013

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I. THE LOWER COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFFS' CLAIM UNDER SECTION 2662 OF THE QUALITY OF LIFE ACT OF 1988, 9 *DEL. C.* § 2662 ("SECTION 2662")

The court below erred when it ruled that Section 2662 does not require a traffic analysis prior to a vote on a rezoning. The lower court dedicated little time addressing this argument in the Opinion, and the County and Plaintiffs believe this is an important issue that is worthy of further discussion, and should be overturned. Nothing in Barley Mill's Combined Answering Brief to Plaintiffs' and the County's Cross-Appeals ("Answering Brief" or "AB") leads to a different conclusion.

A. Section 2662 Requires that County Council should have Obtained and Considered a Traffic Study before Voting on the Barley Mill Rezoning[2]

As evidenced in Barley Mill's Answering Brief, Barley Mill and the County do agree on several facets of the application of Section 2662 to this litigation: (i)

[1] Defined terms have the same meaning as in Appellee New Castle County's Answering Brief on Appeal and Opening Brief on Cross-Appeal ("NCCOB") filed on October 30, 2013.

[2] The County does not address Barley Mill's standing argument in any detail here, as that argument is addressed to Plaintiffs' right to challenge this rezoning, other than to point out that 9 *Del. C.* §2699 specifically contemplates private individuals challenging a zoning or other land use application. The County also notes that if any party has the right and obligation to ensure proper enforcement of County law, it is undisputedly the County itself which is exercising that right by bringing the issue before the Court.

they agree about the purpose and function of the Quality of Life Act, which includes Section 2662; (ii) they agree about the general constructs of statutory interpretation; and (iii) they agree that Section 2662 is not ambiguous. (NCCOB 36-37; AB 8-10). However, any agreement ends there, as there is a sharp divide in the parties' contentions as to the practical application of Section 2662.

1. The plain language of Section 2662 requires a traffic analysis prior to the vote on a rezoning

Barley Mill's argument that Section 2662 "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" not only makes no sense, it misconstrues the statutory requirements. (AB 8 (emphasis added)). Though by now this Court is undoubtedly intimately familiar with the language of Section 2662, the County will reiterate the language only as necessary.

When discussing subsection 1 of Section 2662, Barley Mill focuses on the fact that the County entered into an MOU with DelDOT by the date directed. The County does not dispute those facts. However, the part of the statute that Barley Mill ignores is that the purpose of the MOU is to "provide a procedure for analysis by DelDOT of the effects on traffic of ***each*** rezoning application." (Emphasis added). This language indicates that a separate traffic study ***for the Barley Mill project*** should have been completed and given to County Council to review prior to its vote on that rezoning. The only way for County Council to understand and

be informed of the "effects on traffic of [the Barley Mill] rezoning application," and thus comply with subsection 1 of Section 2662, is to be provided with and review the traffic analysis before its vote on the rezoning. Subsection 1 is not limited to an agreement generally with DelDOT, but requires a traffic analysis for each individual application. Entering into the 1990 MOU by itself, therefore, does not fulfill the requirements of subsection 1.

Subsection 3 of Section 2662 is the subject of the greatest dispute among the parties with regard to the intent of the legislature. Subsection 3 provides that "[t]he purpose of the agreement shall be to ensure that traffic analyses are conducted as part of the zoning reclassification process within the County." Barley Mill is correct in its Answering Brief when it states that the record plan stage comes after County Council's vote on the rezoning, and thus there is a process that is not officially complete after the vote. AB 13. However, what Barley Mill fails to recognize is that that procedural step is not a part of the ***rezoning classification*** process.

The County is well aware of the process involved in considering a zoning ordinance, and in fact outlined the process in its Opening Brief. NCCOB 41-44. The rezoning classification process has taken place once the ordinance is passed. UDC §40.31.113. The zoning map has been changed by passage of the ordinance, and the parcel has been rezoned. There is a process that continues, but the

reclassification has taken place, and County Council's role after this point is purely administerial. This point was made in the County's Opening brief and was explicitly stated by both the Head of the Department and Councilman Weiner during the course of the hearings in connection with the Barley Mill rezoning. NCCOB 42-43. Barley Mill does not acknowledge the words of these men in its Answering Brief, and, to use one of Barley Mill's own conclusions, this silence should be viewed as acquiescence. AB 20-21.

Barley Mill claims that County Council's role in the process does not end with the vote because it has the power to table the vote on a record plan for traffic-related reasons. AB n.46. But Barley Mill then admits, as it must, that County Council itself "does not get to vote again on whether to approve the rezoning request," claiming that regardless, this fact "does not mean that [County Council's] role in the zoning reclassification process is over." *Id.* This conclusion belies logic and leads back to the inescapable truth that County Council already has voted without the benefit of the traffic analysis, thus rendering an uninformed vote. That County Council has the ability to question DelDOT at a later time does not change the fact that it did not have this information at the crucial time when it was needed the most. Therefore, Barley Mill's statement that the "General Assembly's decision to use the language 'part of the rezoning reclassification process' in Section 2662(3) instead of 'prior to a Council vote' is presumed to be a deliberate

one" holds true (AB 21) – because the reclassification aspect of the zoning process had ended after the vote, the legislature did not need to use different language. Without receiving and reviewing a traffic analysis before the vote, County Council essentially never has the opportunity to effect any changes that it perceives may be needed upon review of a traffic analysis. Therefore, Section 2662 must be read as requiring the consideration of the traffic analysis prior to the record plan stage.

Barley Mill again misconstrues the County's position with regard to Subsection 4 of Section 2662. Barley Mill repeatedly states that the review of traffic impacts is DelDOT's, not County Council's. AB 15. The County has never claimed that County Council needs to ***perform*** the traffic analysis, as that is undoubtedly a task left to DelDOT or other traffic engineers. Rather, what the County argued, and what was not addressed by Barley Mill, is that subsection 4 states that the agreement with DelDOT shall consider the traffic "surrounding a ***proposed zoning reclassification*** and the projected traffic generated by the proposed site development ***for which the zoning reclassification is sought***." As stated in the Opening Brief, the County's point, which is directly related to the arguments raised previously with regard to subsection 3, is that the highlighted language demonstrates that a traffic analysis needs to be considered before any vote is taken on a rezoning ordinance – any traffic analysis that comes after the fact

cannot be considered on a proposed reclassification because that reclassification becomes effective once the vote is taken.

2. The statute is not ambiguous, but even if it were, the same conclusion would be reached – County Council should have received and considered a traffic study prior to its vote

a. The legislative history cited by Barley Mill does not lead to a different conclusion

Barley Mill makes much of the fact that prior to the passage of what is now codified in Section 2662, a separate, more detailed bill was introduced, Senate Bill No. 300, which Barley Mill claims "would have put directly into Section 2662 what Cross-Appellants insist is intended by S.B. 327's far less detailed language." AB 18. While perhaps the language of proposed Senate Bill No. 300 was more detailed, that level of detail is not necessary to get to the desired result. The County's position has always been that Section 2662 ***as stated*** provides for only one logical conclusion – that County Council should be provided with a traffic analysis prior to the vote. Barley Mill has provided no background as to why S.B. 300 was not passed, and without any transcripts of those sessions, one is only left to speculate, which the County declines to do. Additionally, the County has never stated that a TIS needs to be performed in all cases, rather a TOA or other traffic analysis also could be acceptable depending on the situation, and the TOA or other analysis need not be performed by DelDOT.

Barley Mill insists that the synopses of the proposed bills "provide the clearest evidence concerning the General Assembly's intent." AB 17. The County does not dispute this fact, and believes that the synopsis for S.B. 327, which "confirms what the plain language of Section 2662 says" (AB 18), indicates that the traffic analysis from DelDOT should have been provided to County Council prior to the vote. While proposed S.B. 300 may have been a bit more explicit, that language was not necessary to relay the intent of the General Assembly and therefore not necessary to reach the County's conclusion.

b. The canons of statutory construction also lean in the County's favor

Barley Mill insists that the County (and Plaintiffs) argues that County Council must receive "a completed formal traffic analysis (*i.e.*, a TIS or TOA) for *every single rezoning* before voting, no exceptions" despite the fact that certain projects were never intended to have a traffic analysis performed. AB 20 (emphasis in original). Barley Mill is incorrect. What the County has consistently argued is that a plain reading of the statute requires a traffic analysis before County Council voted on ***this***, the Barley Mill rezoning, particularly due to its magnitude and importance. County Council members expressly stated their desire for a traffic analysis for the Barley Mill rezoning, and the County is not aware of any exception

(nor has one been noted by Barley Mill) which would allow this rezoning to go through without a traffic analysis.[3]

Barley Mill's assertion regarding 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'" is exactly what the County has argued. AB 10, 21 (citing *Colonial Ins. Co. v. Ayers*, 772 A.2d 177, 181 (Del. 2001)). Following this principle leads to the conclusion that the legislature intended subsections 3 and 4 to have meaning. However, as noted in the Opening Brief, reading the statute in the manner suggested by the lower court and Barley Mill renders everything after subsection 1 superfluous and meaningless, which is against all statutory constructs. NCCOB 39 ("The General Assembly would not have included the remaining three subsections if they were intended to be without effect." (citing *Reinvestment II, LLC v. Bd. Of Assessment Review of New Castle Cnty.*, 2013 WL 5496778, at *3 (Del. Super. Ct. Sept. 20, 2013))). The County agrees with Barley Mill that the General Assembly's decision to use the language that it did was a "deliberate" decision and one that leads to the conclusion espoused by the County. AB 21.

[3] Barley Mill's examples of the amendments to the UDC which allowed for exceptions to the requirement for a traffic study actually lean in the County's favor – a traffic analysis is required under Section 2662, and if that requirement is to be waived or relaxed, the UDC will state those exceptions. AB 21. The statute need not be amended to include every exception, rather, as it does, it need only state the general rule.

c. The 1998 amendment to Section 2662 is relevant to determining the meaning of the statute

As noted by the County in the Opening Brief, Section 2662 was amended in 1998, ten years after the agreement between the County and DelDOT was to be entered into, to replace the term "county government" with "County Council." NCCOB 35 n.10 (citing 71 Laws 1998 ch. 401, §15, eff. July 13, 1998). Barley Mill dedicates two pages in the Answering Brief to discussing the history of the House Bill which enacted this amendment in an attempt to argue that the change was "technical and not substantive," especially because "history confirms" that County Council, "or its predecessor, the Levy Court, has had the ultimate responsibility within County government for zoning matters since at least 1951." AB 23. Barley Mill helps make the County's point – if it already was obvious what was meant by the statute, Section 2662 would not need specifically to be amended to change this language.

Additionally, Barley Mill, despite intimating that it does not quite understand the County's point, articulates it precisely – "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." AB 23 n.73. If entering into the MOU by June 30, 1988 was all that was required by Section 2662, then it would not make sense to amend the statute once the agreement had been entered into. Ten years had passed, and the statute could have

been taken out, not simply amended, to reach the same conclusion. It is also worth noting again, as stated several times by Barley Mill, that the General Assembly does not put words into a statute that they do not intend to have meaning. *See Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 2013 WL 4436607, at *8 (Del. Super. July 26, 2013); AB 10 n.32 (citing *Colonial Ins. Co. v. Ayers,* 772 A.2d 177, 181 (Del. 2001)). Thus, the 1998 amendment to Section 2662 provides further evidence to support the conclusion that Section 2662 contemplates more than merely entering into the MOU.

B. The Cases Cited by Plaintiffs and the County are Directly on Point and Lead to only one Conclusion – a Traffic Study should have been Considered by County Council prior to the Rezoning Vote

Barley Mill grasps at straws in an attempt to argue that the cases relied upon by Plaintiffs and the County do not support their position with respect to Section 2662. Despite this attempt by Barley Mill, however, it is undeniable that these cases bolster the Cross-Appellants' position.

Primarily, it must be noted that Barley Mill states that "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." AB 10 (citing *One-Pie Invs., LLC v.* Jackson, 43 A.3d 911, 915 (Del. 2012)). Following the existing judicial

interpretations of Section 2662 and the analogous statutes in the other counties leads to the conclusion reached by Plaintiffs and the County.

Additionally, Barley Mill claims that the cases cited are not applicable to the present situation because the question of whether the relevant statutes require that a TIS or TOA be performed was not at issue in those cases because in all of them a TIS had been completed before the respective county council's rezoning vote. AB 24. This "distinction" does not render these cases irrelevant, rather it reiterates the County's point – a traffic analysis was completed in these cases because it was required to be. Barley Mill's statement 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*" is not a logical conclusion. *Id*. (emphasis in original). A review of the cases themselves makes that apparent.

The distinctions that Barley Mill attempts to make with regard to *Deskis v. The County Council of Sussex County*, 2001 WL 1641338 (Del. Ch. Dec. 7, 2001) are red herrings. Barley Mill ignores the language explicitly stated by the Court of Chancery in *Deskis* (citing the Sussex County statutory equivalent to Section 2662):

> ***Delaware law mandates*** that the County Council consider DelDOT's traffic analysis ***before deciding whether or not to rezone***. DelDOT presented to the County Council a report that recommended the proposed rezoning. The County Council chose to rely on DelDOT's report over the mostly anecdotal evidence

> presented by the opposition. I perceive no reason why County Council's adopting a traffic study that was prepared by a state agency – ***and that is required by statute*** – should be viewed as an improper delegation of the Council's legislative powers.

Id. at *9 (emphasis added). Barley Mill states that this language is "dicta" and that the statute's language is not discussed in this case. AB 24-25. Dicta or not, the court's statements make clear that the language did not need to be analyzed because the court had no doubt as to necessity of a traffic analysis prior to the vote. The court in *Deskis* also made clear that upon county council's vote to adopt the ordinance, the comprehensive zoning map was amended and the zoning classification was changed, *id.* at *1, lending credence to the County's point regarding the rezoning classification process.

Barley Mill likewise overreaches in attempting to distinguish *Citizens Coalition, Inc. v. Sussex Cnty. Council*, 2004 WL 1043726 (Del. Ch. Apr. 30, 2004). The court in that case stated that Section 6962 (the Sussex County equivalent to Section 2662) "***requires [Sussex County Council]*** to 'consider the effects of existing traffic, projected traffic growth in areas surrounding a proposed zoning reclassification and the projected traffic generated by the proposed site development for which the zoning reclassification is sought.'" *Id.* at *4 (emphasis added). While DelDOT did not perform a new TIS for the project at issue in that case, it had prior TISs for the same area that were found to be sufficient to review

for this project. *Id.* Contrary to what Barley Mill cites in the Answering Brief, petitioners in *Citizens Coalition* did not contend that no TIS was necessary, rather because there were prior traffic analyses for the same area they did not contend that a new, separate TIS was required for this project. *See* AB 26 n.82; *Citizens Coalition*, 2004 WL 1043726, at *4 n.21. Therefore, Sussex County Council was able to consider the effects of traffic in that case, unlike here where there is not and never was a traffic analysis performed for the area at issue, and thus County Council never had the opportunity to review any traffic impact.

Finally, *Hansen v. Kent Cnty.,* 2007 WL 1584632 (Del. Ch. May 25, 2007), also supports Cross-Appellants' position, despite Barley Mill's wishes to the contrary. In the context of discussing the agreement needed between the county and DelDOT, the court in *Hansen* specifically noted that "[t]o determine whether an acceptable LOS could be achieved following a rezoning, ***a TIS is conducted***." *Id.* at *2 (emphasis added). The TIS in this case, as well as in *Deskis*, was not performed by DelDOT, and need not be. Despite Barley Mill's best efforts, it cannot be denied that *Deskis*, *Citizens Coalition* and *Hansen* all support Cross-Appellants' reading of the statute. Section 2662 required a review of a traffic study before County Council voted on the Barley Mill rezoning. Ambiguous or not, this application provides the only logical reading of Section 2662.

CONCLUSION

For these reasons and for those stated in the Opening Brief, this Court should affirm the judgment of the court below that the decision on the voting ordinance was arbitrary and capricious and should reverse the court's judgment that with regard to the obligations contained in Section 2662 and enter judgment in favor of the County on this issue.

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