IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAVE OUR COUNTY, INC.; BARBARA FURBECK; LAWRENCE GIORDANO, JAMES GRAVES; THOMAS S. NEUBERGER,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 7151-VCG
NEW CASTLE COUNTY; THE COUNTY COUNCIL OF NEW CASTLE COUNTY; THE DEPARTMENT OF LAND USE, NEW CASTLE COUNTY; DAVID M. CULVER, as GENERAL MANAGER, DEPARTMENT OF LAND USE; and BARLEY MILL, LLC.	)	
Defendants.	)	

PLAINTIFFS' PRETRIAL REPLY BRIEF, REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, AND ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTION

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INTRODUCTION

The defendants' answering brief has a major theme, although never offered as an express argument. The defendants repeatedly make the suggestion – though stated as a certainty – that the rezoning plan filed in 2011 was smaller, and therefore better, than the plan which was first filed in 2008. To be sure, they never posit that as an express rationale for upholding the rezoning, knowing full well that that would be an insufficient basis to approve an otherwise flawed plan which did not conform with the law and rezoning principles. Indeed, they devote a section in their answering brief to arguing that the 7-member majority of Council did not rely upon the Settlement Agreement with Stoltz when voting favorably on the rezoning.[1] Yet, defendants hardly miss an opportunity to refer to the rezoning plan as "scaled down," "reduced," and the product of "compromise." Hence, and despite having earlier resisted the plaintiffs' discovery efforts by contending that nothing was relevant prior to the filing of the rezoning application in 2011, they now liberally lard their brief with comparison references to the 2008 plan, obviously for some intended purpose and impact.

The plaintiffs do not want to be perceived as shying from defendants' theme.[2] However, and whatever defendants' strategic rationale for repeated suggestions about "scaling down" and

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[1] Defendants' Opening Brief In Support Of Their Motion ... and Answering Brief In Opposition To Plaintiffs' Motion ("Ans. Br.") – 42.

[2] For instance, both the 2008 and 2011 plans contemplate converting a quiet, heavily landscaped, low-rise office complex into a sea of asphalt, tall buildings and 24/7 lighting over the entire 92 acre parcel. Both plans propose commercial space approaching half the size of Christiana Mall. And under the 2011 rezoning proposal, more intensive commercial uses would be permitted than under the 2008. Further, there is strong evidence to doubt whether the 2008 proposal would ever come to fruition even if all approvals were given. Writing to the County Executive in December, 2009, the chief operating officer for the Stoltz Group complained that with the proportional building requirement, the project was economically unfeasible and "defies marketplace realities." E-mail letter, B. Coburn/Stoltz to County Executive Coons, December 1, 2009; C – 34. Lastly, when the "compromise" surfaced, the public opposition was extensive and not simply mixed.

"compromise," it bears repeating that a rezoning application has to stand on its own, satisfying statutory standards, after being evaluated under a process which meets statutory procedural requirements. Further, most critical to the circumstances here, the entire 92 acre site is still slated to be fully developed. While the residential component has been eliminated,[3] the shopping mall across the front of the property remains, – and remains unstudied. The anticipated traffic effect was never studied or reported upon for either plan, and there never has been engagement from the other side on the merits of the traffic situation, – neither at the level of the Department of Land Use, nor at County Council, nor even now in the joint brief of Stoltz and the County.

So all the repeated comments by the defendants, along with their subliminal urgings that the second plan was somehow better – being "scaled down" and the like – should be ignored. Whether or not the total footprint of buildings would be appreciably smaller, there is no evidence that consideration was given – neither by the Department nor the Council majority – to the traffic impact that would arise. For siting a mall, within a mile of a busy two-lane bridge (Tyler McConnell Bridge) and numerous already congested roads, traffic volume and effect (along with stormwater runoff, light and noise) should have been the most important consideration. But traffic was assiduously treated as a premature non-subject by the Department, both in its Report and in the misleading advice provided by the Department head, David Culver; runoff was finessed; and one is left to guess if light and noise disturbance were seriously considered, since those subjects were never mentioned by the seven members whose 7:6 vote carried the day.

The plaintiffs are expressing the position of hundreds of civic associations and groups and thousands of County residents. *See* fn. 83, *infra*, and the position papers cited therein.

[3] 700 residential units, – which, under what was a "mixed use" plan, would have to have been constructed in stages as the new commercial and office space would be constructed.

ARGUMENT

I. THE COUNTY DEFENDANTS' ERRONEOUS FAILURES ON THE MATTER OF TRAFFIC IMPACT

The plaintiffs have argued, and continue to submit, that the County's approach to the traffic issue violated State law and the County's own UDC and, as a separate matter, that the majority vote to approve the rezoning without any data or study of expected traffic was irrational in any event.

The topic of how the traffic issue was handled (or rather, mishandled and ignored) is a primary focus in the plaintiffs' briefing. However, although they devote an equivalent number of pages to the traffic issue in their answering brief, the defendants only talk around that subject, never coming to grips with it head on.

A. The Requirements Of State Law As To Traffic; 9 *Del.C.* § 2662

The plaintiffs' assertion that the County violated State law in this rezoning is grounded upon 9 *Del.C.* § 2662, which is part of the Quality Of Life Act. The stated purpose of the Act is "to utilize and strengthen the existing role, processes and powers of County Councils in the establishment and implementation of comprehensive planning programs to guide and control future development." 9 *Del.C.* § 2651(a). The Act makes specific requirements as to the components of the County's comprehensive plan and speaks to its status as a zoning control. 9 *Del.C.* §§ 2656 and 2659. And, by § 2662, the Act requires the study of traffic impact before County Council votes on any rezoning.

1. The Plaintiffs Have Standing. The defendants' first response has been to challenge plaintiffs' standing to base their zoning appeal in part upon that statute. Delaware case authority is squarely with the plaintiffs' on this point, however.

The three Court of Chancery decisions which the plaintiffs cited for the substantive requirements of § 2662 absolutely reflect that adversely affected residents have standing to appeal a rezoning on the basis that their respective county government has failed to follow the dictates of the Quality Of Life Act with respect to traffic analyses, including projected traffic growth in the surrounding area and projected traffic to be generated by the proposed development. Those decisions are *Deskis v. County Council of Sussex County*, 2001 WL 1641338 (Del. Ch., Dec. 7, 2001); *Citizens Coalition, Inc. v. Sussex County Council*, 2004 WL 1043726 (Del. Ch., April 30, 2004), *aff'd* 860 A.2d 809 (Del. 2004) (TABLE); and *Hansen v. Kent County*, 2007 WL 1584632 (Del. Ch., May 25, 2007). As plaintiffs noted when citing those decisions in their opening brief, in each there had been a study by DelDOT, which study in turn had been provided to and discussed by the legislative body which approved the particular rezoning. The plaintiff-appellants in each of those three decisions had argued that still more should have been done (*Citizens Coalition*) or that other conclusions should have been drawn from the studies which had been performed (*Deskis* and *Hansen*). The plaintiffs in those decisions were ultimately unsuccessful, but in none of the decisions was it suggested that the plaintiffs lacked standing to advance a challenge under the statute in the first place.

Hansen is particularly helpful toward understanding and confining the defendants' argument which asserts lack of a private right of action. The author of *Hansen* was Vice Chancellor Noble. The previous year, in *O'Neill v. Town of Middletown*, 2006 WL 205071 (Del. Ch., Jan. 18, 2006) (*O'Neill I*), he had provided extensive analysis and discussion on the issue of private right of action in the rezoning sphere. Of note, V.C. Noble's *O'Neill I* decision is a touchstone for the defendants' argument here,[4] along with an *obiter* discussion by Chancellor

[4] Ans. Br. – 15, 16.

Strine in *Christiana Town Center, LLC v. New Castle County*, 2009 WL 781470 (Del.Ch., Mar. 12, 2009), *aff'd* 985 A.2d 389 (TABLE), 2009 WL 4301299 (Del., Dec. 1, 2009), which they cite often.

In *Hansen*, the proposed rezoning had first been approved, then appealed and overturned, and then approved again by Kent Levy Court. On a second appeal, the challengers were asserting both that the traffic impact study (the "TIS") had been insufficient and that the application should have gone through a second review by the Office of State Planning Coordination. In *Hansen*, V.C. Noble first addressed traffic considerations. When doing so, he made no comment nor suggestion that the challengers lacked standing to make allegations under the traffic statute. Only later in the opinion, when discussing the assertion of an allegedly improper failure to provide a second State-level PLUS[5] review, did V.C. Noble make the observation, in a footnote, that there was likely no private right of action under the PLUS statutes.[6] An equivalent footnote – or an earlier placement of that footnote – was to be expected if V.C. Noble also felt that an affected resident could not bring a zoning appeal on the basis that her county government was not following pertinent State law.

That is also key to understanding the focus in *O'Neill I* and *Christiana Town Center*, putting them into context. In *O'Neill I*, V.C. Noble held there was no private right of action *against DelDOT* for failing to require a full TIS under DelDOT's Rules and Regulations for Subdivision Streets.[7] It is never suggested in *O'Neill I*, nor in *Hansen*, that residents could not

[5] "PLUS" referring to a Preliminary Land Use Service consideration by the Office of State Planning Coordination.

[6] *Hansen*, 2007 WL 1584632 at *3.

[7] *O'Neill I*, at *23-24.

appeal a rezoning on the basis that their own local government had failed to follow the dictates of State law. Indeed, *O'Neill I* took note of the "well-established" principle in Delaware that residents have standing to challenge a county rezoning, as distinct from whether there is a private cause of action under a State statute to sue a State agency for statutory enforcement.[8] Further, as noted repeatedly in case law, inasmuch as zoning authority is not an inherent power but, rather, is delegated from the General Assembly, there must be strict compliance by the local government with applicable law and procedures pertaining to that delegation.[9]

Against that decisional background, when one turns to *Christiana Town Center*, one sees that the comments made by Chancellor Strine upon which defendants place reliance do not suggest that residents lack a right to appeal a rezoning on the basis that State law requirements were not met by their county government.[10] First, as expressly mentioned in the footnoted discussion there, the challenger, CTC, was not asserting that New Castle County had failed to comply with § 2662. For that reason alone, the discussion which followed was obiter on that subject. The footnote next cites to *O'Neill I*, but *O'Neill I* only held that there is no private right of action *against DelDOT for failing to require a TIS.* As just discussed, *supra*, *O'Neill I* did not deny adversely affected residents the opportunity to appeal a rezoning on the basis that their local legislative body had violated State law when carrying out its quasi-judicial function. Third, although the discussion in that footnote in *Christiana Town Center* was disparaging a notion that private individuals had a "right to sue" to force a State agency and a county government to take a

[8] *O'Neill I*, at *27.

[9] A black letter principle most recently noted in *Friends of the H. Fletcher Brown Mansion v. The City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011). *See also, Shevock v. Orchard Homeowners Ass'n., Inc.*, 621 A.2d 346, 349 (Del. 1993) and decisions cited therein.

[10] *Christiana Town Center*, 2009 WL 781470 at *12, fn. 61.

particular action under a joint agreement, that is not what the challengers are doing here. They are not "suing" to enforce the statute, and they are not attempting to create a private right of action from the statute to compel a particular level of service (LOS) result. Rather, they are exercising their long-standing common law and statutory right to challenge the action of their county in rezoning property in a way which harms them, and their county government is not inoculated or walled off from the component charge that when approving the rezoning, it acted contrary to a State law. That has been the right of aggrieved residents for scores of years, if not a century.[11]

Lastly, to the extent the foregoing analysis is not sufficient to wholly eradicate any doubt as to the minimal significance of the footnote discussion in *Christiana Town Center* here, it serves to note that Chancellor Strine's speculation about the duration of the practice complained of, and thereby a suggestion of acquiescence, is inapplicable here for two reasons. The Court there remarked that "The General Assembly has had over twenty years to make it clear that § 2662 was intended to require that DelDOT and New Castle County establish a mandatory LOS requirement for all rezonings in New Castle County." In contrast to that, the challengers here are *not* asserting that DelDOT and New Castle County had to establish any particular LOS requirement for all rezonings in New Castle County. What they are asserting is that State law – specifically, 9 *Del.C.* § 2662 – requires that County Council not approve any rezoning request without traffic analyses as part of the zoning reclassification process, to include projected traffic growth in the area and traffic to be generated from the development. Second, the "know nothing" manner in which the County acted in this case has not gone on for twenty years.

[11] *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 559-60 (Del.Ch. 1991).

Indeed, as annotated *infra* at fn. 20, this was the first occasion that County Council had ever approved a rezoning without the benefit of traffic studies in hand.

In sum, the plaintiffs have standing and every right to challenge the County defendants' actions here against State law.

2. The Plaintiffs Do Not Claim Under The 1990 MOU (Or The 2008 MOU).

The next plea in avoidance from the defendants is that the plaintiffs are not so much basing their appeal on § 2662 as their arguments "actually concern" the 1990 MOU. And after thus again mischaracterizing plaintiffs' arguments, defendants not only toss up another assertion of lack of standing, but also argue that the plaintiffs therefore had to make DelDOT a necessary party and, moreover, that the statute of limitations had run on challenging under the 1990 MOU.[12]

The simple fact of the matter is that the plaintiffs are not claiming under the 1990 MOU, nor under either 2008 MOU, for that matter. There is nothing furtive or misleading about the plaintiffs' stance, – no reason to critically suggest that the plaintiffs have somehow "gone to lengths" to deny that their claim is based on the MOUs.[13] To be sure, as residents adversely affected by the rezoning, the plaintiffs wish that DelDOT had taken a more active stance, had pressed an earlier timetable on the developer for completion of the studies, and had announced in a public way, in August, 2011, that Stoltz had just provided updated traffic counts, and then had released the data. However, the plaintiffs would be the first to admit that they had no knowledge – just as County Council was given no knowledge – as to the particular state of affairs vis-à-vis DelDOT, and what was going on there relative to traffic studies. The plaintiffs were also aware that if they were to seek relief in the nature of compelling DelDOT to take a specific action, it

[12] Ans. Br. – 16-20.

[13] *Cf.,* Ans. Br. – 16.

would require making DelDOT a party, complicating this case. Also, given the views expressed back in 2009 by the then-Secretary of the Department of Transportation when the first plan was under review, it might have been a pointless effort in any event:

> We believe we will need to follow the county's lead in recognizing that this is a redevelopment project where special rules apply. 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 analysis indicates that such modifications may be appropriate.[14] (*Italics* added.)

In any event, it was the County Department of Land Use, not DelDOT, which violated § 2662 and which told Council that analyzing traffic concerns before a rezoning was premature, not its bailiwick, and unnecessary. And it was Council, by voting without any traffic study, that also violated § 2662. The plaintiffs are not appealing on the MOUs.

3. Proper Construction Of § 2662. In another effort to shield from judicial scrutiny the County's inaction on the traffic issue, the defendants next assert that the County has met all that the statute requires by virtue of having entered an MOU with DelDOT back in 1990. Essentially, what they argue is that by the statute the General Assembly was compelling County Council to do no more than enter an agreement with DelDOT, and that whether traffic was studied and reported prior to any given rezoning vote was immaterial.

In reply, as illustrated by the facts in this case, such a narrow reading can produce an absurd result. It is illogical to think that, on the one hand, the General Assembly wanted to "ensure that traffic analyses are conducted as part of the rezoning classification process within

[14] Letter, Carolann Wicks, Secretary, to Representatives Katz, Brady and Hudson, May 19, 2009. C – 1. (Documents cited for the first time in this brief are in the accompanying Plaintiffs' Reply Appendix, using the prefix "C – .")

the County," but yet would be content with a situation such as occurred here, where *no traffic analyses was provided*.

To the contrary, a proper reading of § 2662 is that the General Assembly expected that before approving any rezoning request, County Council would have received a traffic analysis. The intent of the General Assembly could hardly have been otherwise when it declared that the purpose of the agreement was "to ensure" that traffic analyses are conducted. This was the reading given by Justice (then-Vice Chancellor) Jacobs in *Deskis*, namely, that "Delaware law mandates that County Council consider DelDOT's traffic analysis before deciding whether or not to rezone."[15] *Citizens Coalition*, *supra*, and *Hansen*, *supra*, are implicitly in accord. All three decisions – *Deskis, Citizens Coalition* and *Hansen* – turned on the sufficiency of the traffic studies provided in the given case. By contrast, here there were absolutely no traffic studies provided to the Council before it voted. In fact, as discovery has revealed, a partial study was kept from the Department and Council.[16] One would not have to speculate for long as to the outcomes in *Deskis*, *Citizens Coalition* and *Hansen* if there had been such blatant disregard of the statutory requirement in those instances.

To read § 2662 as the defendants urge is tantamount to suggesting that when the General Assembly enacted the Quality Of Life Act, despite its focus on the "role, processes and powers of County Councils,"[17] it just intended to paper over Council's role in the transportation area, and did not really care what happens in practice. To employ an observation made in *C v. C*, 320 A.2d 717, 722 (Del. 1974), "But such a reading makes it extremely difficult to attribute any

[15] *Deskis*, 2001 WL 16413382 at *9.

[16] Op. Br. – 18.

[17] 9 *Del.C.* § 2651(a).

consistent purpose to the action of the General Assembly." Such a reading would create an absurd possibility, fully realized here. It would be violative of what is referred to as "the golden rule of statutory interpretation," which is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting it.[18]

To be sure, the General Assembly was not dictating all details concerning how the interaction between county zoning authorities and DelDOT should ensue. That level of detail was delegated to DelDOT and the counties to work out in agreements. However, it is unmistakable from a reading of § 2662 that it was intended that no rezoning would come to vote without any traffic study information being provided whatsoever.

In support of their narrow reading of the statute, the defendants argue that the General Assembly may be "presumed to have acquiesced in that interpretation" over the passage of time and events.[19] However, the cases which they cite involved circumstances far different than what occurred here and, by that contrast, actually support plaintiffs' argument here. For instance, in *Harvey v. City of Newark*, 2010 WL 4240625 (Del. Ch., Oct. 20, 2010), the City of Newark's Charter had been interpreted consistently for over half a century before the City's attorneys, in the case presented, argued for a contrary interpretation. In *One-Pie Investments, LLC v. Jackson*, 43 A.3d 911, 915 (Del. 2012), there had been a consistent practice "for decades under the statute in question," from which it could be presumed that the legislature had acquiesced. And in *Office of the Chief Medical Examiner v. Dover Behavioral Health Sys.*, 976 A.2d 160, 166 (Del. 2009), the General Assembly had reenacted the statute in question without significant alteration years after consistent Superior Court decisions interpreting the statute in question.

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[18] *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1287-88 (Del. 2011); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).

[19] Ans. Br. – 26, including fn. 48.

By contrast, there are no predicates to suggest General Assembly acquiescence here to any notion that the County did not have to consider analyses of projected traffic. This particular rezoning was the first occasion when that had occurred.[20]

The defendants also assert that DelDOT, too, has acquiesced, but read closely they only say that DelDOT acquiesced to a change in the County UDC which nominally dispensed with a full TIS before Council vote on rezonings.[21] Two quick and fully sufficient responses may be made to that suggestion. 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. Second, in 2008, the County and DelDOT had entered another MOU, supplemental to the 1990 MOU, which did mandate a full TIS for any rezoning proposal with this volume, – hardly an indication of acquiescence.[22]

Lastly, the defendants also argue, in the alternative, that the General Assembly's intention would be met, even without traffic data and analyses being provided to County Council, by virtue of the fact that after a rezoning vote, an approved plan may not be recorded unless and until DelDOT provides a letter of "no objection."[23] However, that argument only makes sense if one also credits the notion that in New Castle County, the zoning reclassification process is only complete when the plan is filed, – which is a semantic twist added to the UDC in 2010. And as noted in plaintiffs' opening brief, that provision is artificial, a bit of semantic

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[20] County Defendants' First Supplemental Interrog. Ans. No. 8(c) and d); A – 671-73. E-mail B. Merritt, Esq. to J. Goddess, Esq., Aug. 28, 2012; C – 3.

[21] Ans. Br. – 27.

[22] 2008 MOU, A – 662. (Of passing note, *Christiana Town Center* concerned the 1990 MOU, not the 2008.)

[23] Ans. Br. – 24.

legerdemain, because no further consideration of the rezoning, qua rezoning, will take place after the Council vote.[24]

At the end of this passage of their answering brief, the defendants suggest that construing § 2662 would be "messy business."[25] That is a curious word choice. There is no question that the General Assembly was declaring that, as a general matter, County Council had to have an analysis of anticipated traffic before voting on a rezoning, and that henceforth a rezoning vote with no traffic information whatsoever would be improper.

B. The Requirements Of The UDC As To Traffic; The "Redevelopment" Issue

The County's UDC also requires that certain traffic information be provided to the Department, to be analyzed and then submitted to the Council prior to its consideration and vote on a rezoning application. That was stated as a basic proposition in the plaintiffs' opening brief.[26] The defendants have not taken issue with that conclusion. Instead, their sole argument on this rests on the characterization of this proposal as "redevelopment," so as to take advantage of an exemption which, they contend, supports a blackout on traffic information here.

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[24] Further, since the rezoning application was being processed under procedures in effect in 2008, this semantic twist was not in place. Op. Br. – 28-29.

[25] Ans. Br. – 29.

[26] Op. Br. – 29-30. To concisely repeat this statutory starting point: UDC § 40.11.120, "Need For Traffic Analysis," begins, at 120,A, by requiring that an applicant for a rezoning must submit certain traffic information, including "approximate vehicle trips per day during the week and the weekend, and the a.m. and p.m. peak hour trips generated by the proposed development." At 120,C, it is provided that if, based upon the information supplied by the applicant, it appears that the proposed development "could generate significant traffic impacts, the Department shall require the applicant to prepare and submit a traffic impact study to the Department and DelDOT."

As will be shown, the exemption is not as broad and effective as the defendants would have it. However, because the defendants now appear to be banking all on the "redevelopment" characterization, it first serves to note that "redevelopment" was not mentioned in the plan filing (dated 01/14/11) nor mentioned in the transmittal letter on March 24, 2011, when it was filed.[27] Second, at the June 21, 2011 Planning Board meeting, a member remarked about the limitations of Tyler McConnell Bridge and how that morning's traffic had been backed up heavily on both Rts. 141 and 48, and posited that "So maybe it's the redevelopment aspect of this that's really a problem." David Culver responded that whether or not this was a redevelopment application or "a straight-out rezoning or any other rezoning or any other land development plan that we deal with when you see it here you don't have those issues resolved. Those issues are never resolved until you get to that record plan."[28] And Barley Mill's attorney, speaking to the Council Land Use Committee on October 4, 2011 – with Culver in attendance – advised that traffic concerns were not relevant at the Councilmanic stage by virtue of a procedural amendment which Council had passed, abridging what had been a three-step process (exploratory/ preliminary/record) to a two-step process.[29] The fact that "redevelopment" was not asserted as a justification at either hearing, but instead was specifically rejected as an explanation, certainly gives cause to question the credibility to be given to defendants' contrary argument here.

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[27] B – 51 and 46.

[28] A – 142-143. Summarized in the Planning Board Recommendation as "Mr. Culver reminded the Board that the redevelopment process has no impact on the timing of the traffic analysis." A – 622.

[29] October 4, 2011 Trans., at pp. 10 and 17; A – 166 and 173. ("The members (of the Planning Board) that spoke against it some of them had traffic concerns which as Council knows is not part of the equation for this type of analysis.")

When one turns to the "redevelopment" provisions in the UDC, one finds nothing which would excuse the failure to have provided traffic information when, as in the instant case, *such traffic information has been requested*. The statutory provision which defendants cite – UDC § 40.08.130,B,6,(e),vii – does read that a traffic operational analysis (which otherwise is presumptively mandatory under Article 11), will not be requested in every instance of a redevelopment application; rather, that it may be requested. But there is nothing in the "redevelopment" provision which suggests or justifies that when, as occurred here, a traffic operational analysis *has been requested*, the Department nonetheless can or should make its recommendations in the absence of those traffic results, or that the Council is to be told that traffic is not its concern, that it is a subject to be dealt with later.[30] In fact, the statutory scheme is to the contrary. By UDC § 40.08.130,B,6(d), which speaks to the review process for redevelopment plans, it is provided that any redevelopment plan "that is also requesting a rezoning as part of the submission shall follow the review procedures of Article 31." And Article 31, as it was in effect prior to the 2010 change, and therefore applicable to the Barley Mill rezoning application, required that "If additional studies and/or information are required for the proposed project, those studies and/or information must be provided to the Department prior to the rezoning/preliminary plan submission."[31] A traffic study had been requested at the

[30] In its Report on June 21, 2011, recommending approval, the Department had stated that "the revised preliminary plan associated with this rezoning cannot proceed to County Council until it addresses all the issues identified in the TAC Report and TAC report letter dated May 3, 2011." (A – 613, at 623.) And the referenced May 3, 2011 letter had instructed and required, under "Transportation," "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." (A – 607, at 611.) There is nothing in the record to explain the Department's apparent change of heart to forego what is had once required, – and certainly nothing having to do with "redevelopment."

[31] (Former) UDC § 40.31.112C.

exploratory plan review stage, and it was that exploratory stage review which was used to grandfather the 2011 application into the pre-amendment procedures. In a word, "redevelopment" is no refuge from traffic studies – and from providing those studies for consideration – when, as here, such studies *have been* requested.

Also, and a wholly independent point, it is incredible to think that Barley Mill Plaza qualified as "redevelopment." The properties were substantially occupied. The office buildings in Barley Mill Plaza are currently characterized as being in "good" or "average/good" condition.[32] As cited and excerpted in plaintiffs' opening brief, the UDC definition refers to "A process used to identify previously developed land that is now vacant, abandoned or underutilized real property where older structures if they exist are rehabilitated or replaced." That is not a description of the Barley Mill Plaza office park. Further, as quoted in the plaintiffs' opening brief, the statutory statement of purpose states that redevelopment is intended to facilitate and encourage the continued viability of previously developed lands by granting a credit for sites where more than 50% of the floor area has been demolished.[33] UDC § 40.08.130,B,6. That, too, is not a description of Barley Mill Plaza as it went before Council.[34]

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[32] Tax Parcel Records for Barley Mill Plaza; C – 6-33. *See also*, e-mail letter, B. Coburn, COO/Stoltz to County Executive Coons, December 1, 2009, complaining that what the County was requiring vis-à-vis the mixed use plan would require Stoltz to "demolish about 600,000 sf of existing office to keep our proportions in balance. We can't do this because it is impractical, un-financeable, and would require displacing existing tenants from leased space. It is also somewhat circular as the introduction of non-office uses requires *demolition of viable existing office space* to keep uses in balance." (*Italics* added.) C – 35.

[33] Op. Br. – 31.

[34] *See*, e-mail by B. Rowe of CRG, Feb. 26, 2011: "GC (Greenville Center) and BMP (Barley Mill Plaza) are functioning and viable today and certainly not blighted or decaying facilities. Therefore, the expansion of these facilities should not qualify as redevelopment." This was forwarded to the Department, but there is no indication of any analysis or response. C – 36-37.

Lacking any statutory support to try to justify fitting this square peg into a round hole, the defendants again turn to a passage from the *Christiana Town Center* decision.[35] However, the passage cited is wholly inapplicable to the circumstances here. In the passage which defendants excerpt, the Court remarked that the redevelopment provisions were to create incentives for the reuse of existing development by limiting "pressure for sprawl, a phenomenon that has adverse transportation effects, increased infrastructure costs, and destroys precious open spaces." Those adverse effects – sprawl, traffic jams, increased road and sewer costs, and destruction of open space – are precisely what would occur, and is precisely what the plaintiffs and others have been warning about for years, *if the rezoning goes through*.

The defendants make a passing remark that the plaintiffs' arguments regarding "redevelopment" have been offered "perhaps half-heartedly."[36] However, the heated and exaggerated prose they then employ through the rest of that passage of argument suggests real concern on their part. Otherwise, how to explain the accusation that the plaintiffs' reading "if sustained, would gut the Redevelopment Ordinance and defeat the purpose for its adoption: the reutilization of previously developed properties as an alternative to the development of green fields"? They describe plaintiffs' interpretation as "a draconian result." They further remark that if plaintiffs' interpretation of the redevelopment ordinance were correct – that is, that it be read literally as it is written, as applying to vacant, abandoned or underutilized real property that has been over 50% demolished – "No redevelopment project could be undertaken except in the rarest (and most unfortunate) of circumstances."[37]

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[35] Ans. Br. – 31.

[36] Ans. Br. – 30.

[37] Ans. Br. – 30, 31 and 32.

Nothing about the plaintiffs' construction of the redevelopment ordinance would cripple its operation. Depleted borrow pits, abandoned gas stations, closed shopping centers and rundown, half-empty apartment buildings could still qualify for redevelopment treatment. It is the defendants' interpretation which does violence to the statutory language and creates a clearly erroneous result. Under the defendants' interpretation, what occurred here could occur at virtually any site within New Castle County so long as the buildings on the premises were a few decades old and the proposal was to build something bigger. Further, it should be critically noted that while defendants go on at some length about this in their brief, there is no record evidence of any analysis by the Department of the claim for "redevelopment" status after the application was filed. It seems to have been accepted reflexively that 600,000 sf of viable existing office space (the developer's own description, albeit uttered privately) would be demolished and still qualify as "redevelopment."

In summary, the UDC required that at least a traffic operational analysis be provided; language in Article 8, pertaining to "redevelopment," made this obligation less automatic, but in fact such a study had been requested here and was underway; there is nothing in the UDC, including its redevelopment provisions, which approves the holding back of such information once requested; and, in any event, the rezoning plan here should not have been characterized as "redevelopment" in any event.

Therefore, both by virtue of State law and the UDC, at least a traffic operational analysis was required and should have gone to Council before its vote. Given the violation of both State law and the County's own ordinances, the rezoning vote here followed an invalid process and must be overturned.[38]

[38] S*hevock v. Orchard Homeowners Ass'n., Inc.*, 621 A.2d 346 (Del. 1993).

C. The Requirements Of Common Sense; Arbitrary And Capricious To Defer Traffic Consideration

The plaintiffs also submit that in addition to the requirements of State law and the County UDC, common sense and rationality also required that the Council receive the benefit of traffic studies for the rezoning here.

The defendants have adjusted their stance when attempting to respond to this argument. To the arguments under State law and the County UDC, the defendants responded that a traffic analysis was not required. But that would be an insufficient response to the "arbitrary and capricious" argument, which essentially poses the question: "Even if, as you say, a traffic analysis were not required by law, why not at least have one provided, and wait for it?" The defendants obviously knew how irrational an answer of "Just because!" would appear.

So the defendants attempt a response to this challenge by pointing to the fact that traffic was mentioned and reported upon numerous times as being a point of concern.[39] However, while it is true that traffic concerns were mentioned repeatedly – indeed, since back in 2008 – that is not to suggest that there was an open and informed debate on the subject. To be sure, the opponents – plaintiffs included – went on at length about their traffic concerns. But to cite that "traffic concerns" were mentioned in the record numerous times does not refute the plaintiffs' argument that no data was provided to Council, and that the majority of Council Members followed Culver's direction and avowedly turned a blind eye to the topic.[40]

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[39] Ans. Br. – 33-34.

[40] In their Answering Brief, the defendants recast Culver's advice on the subject. They state his advice as being "that Council could vote on a rezoning without a completed traffic analysis, and that any issues arising out of the traffic analysis could and would have to be dealt with at the record plan stage ...." Ans.Br. – 34. The use of the term "could" implies that the Council was being provided an optional choice. However, as quoted several times throughout this brief and the opening brief, the Department's advice was much more directive and normative; in a word, it

The approach of punting on the subject was commended to the Council by the Department, both in its Report recommending approval[41] and through its Department head.[42] So while the subject of traffic undoubtedly was in the air, so to speak, Council was not informed on the subject with any data, and there is no indication that traffic was considered by the 7-member majority who voted as the Department recommended, – to approve the plan and let any traffic issues be handled by DelDOT engineers down the line.[43] And, as a consequence, a big box center was situated at one of the busiest intersections in New Castle County without the benefit of any data driven debate on the traffic to be expected. This was the height of irrationality, particularly when current traffic counts were available and a study was supposedly underway.[44]

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was that Council should not be concerned with traffic volume; that it was not a subject for Council.

[41] A – 614 and 618.

[42] Oct. 4, 2011 Trans., p. 72; A – 228.

[43] No plainer statement illustrates this mindset than the remarks of Councilmember Smiley, admonishing his fellow Councilmembers and those in attendance on October 4th as follows:

> The developer works with DelDOT on meeting the criteria that they set and once and if the County gets the letter of no objection from DelDOT then that's what it is. I just want to clear that up because I want to hear the facts. I want to hear what everyone has to say today but I really don't want everyone spinning their wheels with losing 15 minutes or five minutes of their talk time on traffic when this isn't where it needs to be. Thank you."

Oct. 4, 2011 Trans. at pp. 36-37; A – 192-193. (Mr. Smiley was one of the seven votes in favor of approving the rezoning.)

[44] While the Stoltz organization did not share traffic information with the County, it certainly had its own notion as to how traffic would flow. Its marketing website for Barley Mill Plaza stated, *inter alia*: "Incomparable location prominently situated at the northeast corner of Route 141 and Route 48. This primary crossroad provides access to the entire Wilmington area of the region offering one of the highest average household incomes of more than $100,000;" "Desirable 'daytime' traffic with large immediate corporate community;" "Exceptional access to I-95 and Route 202;" "Adjacent affluent and prestigious communities of Greenville and Westover Hills

The defendants attempt to analogize the dynamic here to what occurred in *Woznicki v. New Castle County*, 2003 WL 21499839 (Del. Super., June 30, 2003).[45] The issue in that rezoning was whether the decision by the Department to not require an environmental impact statement had been supported by substantial evidence. The Department had received some feedback from the U.S. Corps of Engineers, and had determined that inasmuch as the final engineering drawings would be reviewed for compliance, an environmental impact statement was not required. There are two distinctions between *Woznicki* and the present case, one procedural and one substantive. Procedurally, the determination as to whether an environmental impact assessment report would be required was within the statutory discretion of the Department.[46] By contrast, and as discussed in the preceding passages of argument, by State law traffic analysis is required prior to a rezoning vote by Council, and under the UDC traffic analysis prior to vote was required, whether the application were considered as an ordinary rezoning or as a redevelopment with rezoning where a traffic study had been requested.

Second, as a substantive matter, runoff poses what is substantially a binary question, namely, whether the runoff will or will not be handled by what has been engineered and placed underground. Traffic volume is different. Even if traffic flow can be handled with an adequate number of additional lanes, ramps, overpasses, road restrictions, lights and the like, the traffic

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with proximity to the Pennsylvania communities of Chadds Ford, Unionville, Kennett Square and West Chester;" and "Adjacent to the DuPont corporate campus of Chestnut Run Plaza and just minutes south of the 2.5 million square foot DuPont Experimental Station and the DuPont Country Club." "Market Demographics" were that 2,400 individuals lived within one mile, with an average household income of $142,780; within five miles, 65,105 population, with average household income of $113,351. C – 38-39.

[45] Ans. Br. – 34, fn. 71.

[46] UDC § 40.10.410.

infrastructure is not underground; rather, it is above-ground and disruptive by itself, and the traffic both entering the site and passing through remains audible and visible.

And the irrationality of the Council majority's approach appears even more irrational in light of the fact that this was the first time that a rezoning came to a Council vote without a traffic study.[47]

Plaintiffs will close this passage of argument by posing the same rhetorical question mentioned at the start. Simply put, why did the Department not extend itself to obtain the traffic data that was available at the time of the Councilmanic vote? Why did Council not wait to receive that data, as well as the study that was presumably in the works, just a few months away? Why make this the first rezoning vote without traffic study, when the rezoning had so much potential for adverse impact on residential areas, on a site which was productive and in good condition? By what logic could a rational, informed decision be made on a critical rezoning matter without the very information central to that decision?

To be sure, it is understandable why the developer would not be eager to supply traffic information. The developer knew it was contemplating a high-volume shopping mall. But perhaps the County, in its final brief, will attempt a fresh answer to the question posed. To say that traffic impact is of no moment in a rezoning decision because DelDOT engineers would have to sign off before anything gets built is a total, illogical abdication of its rezoning authority.

II. THE REZONING WAS INCONSISTENT WITH THE COMPREHENSIVE MAP AND PLAN

The Future Land Use Map in effect at the time of this rezoning application designated Barley Mill Plaza for "Community Redevelopment."[48] There is nothing about the rezoning

[47] *See* fn. 20.

proposal – to rezone as "Commercial, Regional (CR)" – which was oriented toward the community. "Community" and "regional" are distinct terms, regardless of where their margins may meet. As Culver stated in the public hearing, "This is a regional use. There's not any neighborhood directly being served by this regional use. This is CR."[49]

In their answering brief, the defendants responded to this point with several passing observations and one main argument. In passing, they say that the "Initial Plan," filed in 2008, had contained more commercial and office footage and yet a rezoning would not have been required for it. However, that is of no moment to the issue as to whether the 2011 plan, and Commercial Regional (CR) zoning, was consistent with Community Redevelopment. Moreover, the 2008 plan was a "mixed use" plan, including residential, and the encouragement of such mixed use plans – which essentially create their own community – was an express objective of the 2007 Comprehensive Plan.[50]

The defendants also take passing issue with plaintiffs' reference to this proposal as being a "regional mall."[51] To be sure, the exact nomenclature isn't important because, as noted above, this clearly isn't intended to be a "community" shopping center in any event. But it serves to note that when taking issue on the terminology, the defendants play games with the figures, by suggesting that the proposal here is smaller than has been filed and that the Christiana Mall, to which the plaintiffs made comparison reference, is bigger than it is. That is wrong. Plaintiffs'

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[48] 2007 Map; A – 47.

[49] June 21, 2011 Trans. at p. 25; A – 144.

[50] 2007 Comprehensive Plan, II. Future Land Use And Design, Part D, "Goals, Objectives and Strategies," Objective 4; C – 61, 63.

[51] Ans. Br. – 37, fn. 80.

statement of comparison that this proposal is "approaching half the size of Christiana Mall" (OB – 36) is correct. [52]

The core response by the defendants on this issue is that the term "Community Redevelopment" is actually a misleading term, – though of course they don't phrase it that way. They point out that much of Northern New Castle County is designated on the Future Land Use Map as being for "Community Redevelopment," and, from that they argue that if the term is read literally, confining it to projects oriented to communities, the County somehow would be "hamstrung" in its attempts to develop within the Community Redevelopment Areas.[53] Essentially, what they argue is that the term "Community Redevelopment" should not be read literally, but instead it should be taken as a junk category, elastic enough to embrace more than just community-oriented redevelopment, but also regional and industrial uses, – essentially, anything other than residential, rural and heavy industry.[54]

This argument by the defendants is both inconsistent on their part and exaggerates the difficulties for a developer (and a County government inclined to help development). It is inconsistent because while the County has insisted upon a literal reading of 9 *Del.C.* § 2662*,* despite the illogical result that their reading would bring, here, for the second time, they would

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[52] The plan calls for 454,000 s.f. of commercial space. (Preliminary Major Land Development Plan, Site Data; B – 51. (*See also*, computation by Department; B – 64.) And Christiana Mall is 1.1 million s.f. The defendants provided the Court with tax parcel materials (B – 117-159) to get to a figure of 1.5 million square feet for Christiana Mall, but they included parcels for the box stores across the road from Christiana Mall proper, such as the sites where Costco and Dicks Sporting Goods are located, tax parcels 0902400030, 31 and 32 and 0903000111. *See also,* GGP (General Growth Properties) marketing website for Christiana Mall, as being 1,113,738 sf. C – 72.

[53] Ans. Br. – 37.

[54] Ans. Br. – 36.

have the Court wholly ignore the language in their own ordinances. As the Court has seen, on the matter of "redevelopment" they would read out the language about a site "that has been demolished" by more than 50%, asking that it be read as meaning "has been or will be" demolished.[55] And now here they assert that the term "community" embraces "regional," even though both by the UDC and common usage, "community" is lesser and smaller than "regional," thus arguably fitting within "regional," while the opposite is decidedly not the case. Simply put, a regional use and "Commercial Regional" zoning is not providing for "Community Redevelopment."

Further, even were the Court to accept the defendants' argument which renders the Future Land Use Map virtually meaningless, still the rezoning proposal does not meet the Comprehensive Plan. And conformity with the Comprehensive Plan is a requirement under State law.[56] It is also an express requirement of the County's UDC, being one of the five enumerated factors to be considered "in determining whether a zoning map amendment should be recommended (by the Department) or approved (by the Council)."[57]

Against the Objectives of the 2007 Comprehensive Plan, this proposal should have failed miserably. It was "fundamentally inconsistent with the basic thrust" of the Comprehensive Plan:[58]

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[55] They even claim "redevelopment" permits 100% demolition – one million square feet – although the redevelopment ordinance expresses preference for restoration of existing structures. Ans. Br. – 31.

[56] 9 *Del.C.* § 2603(a); *New Castle County Council v. BC Development Associates*, 567 A.2d 1271, 1277.

[57] UDC § 40.31.410. The first factor, A., is stated as "Consistency with the Comprehensive Development Plan and the Purposes of this Chapter."

[58] *O'Neill I*, at *32, paraphrasing *Green, supra*.

- Objective 1 requires management of new growth to "ensure that the growth which occurs is developed in a prudent fashion without placing a strain on the infrastructure that serves the existing population, and the resources that are critical to the greater public good."

- Objective 2 is that new development in Northern New Castle County should be guided "to achieve greater use of existing infrastructure and public resources," notes that "the mix of residential and non-residential uses and densities will be consistent with the underlying zoning as well as the density and integrity of existing neighborhoods."

- Objective 4 calls for guiding mixed use "into the Redevelopment Areas." Mixed use is to be encouraged.

- Objective 11 is to "require the design and uses in each center to complement and enhance those centers and the surrounding community."

- Objective 12 is to "Encourage redevelopment and in-fill projects that complement and enhance existing neighborhoods and restore older commercial centers as vital components in the community."[59]

On this vital subject, the Department provided just a few sentences in its report when recommending approval, despite the obvious departure from the thrust of the Comprehensive Plan. As to the required factor of "Consistency with the Comprehensive Development Plan," it said only that "While the comprehensive plan encourages mixed use developments, it also recognizes the need to identify certain areas of the County that can support additional commercial and office development."[60] It is particularly illogical that the Department could have reached and recommended this conclusion about Comp Plan consistency without any data

[59] 2007 Comprehensive Plan, II Future Land Use and Design, D "Goals, Objectives and Strategies;" C – 62-69.

[60] Department Report at A – 619.

and consideration concerning the traffic to be expected. Nonetheless, this unelaborated and illogical conclusion concerning Comp Plan consistency played its part in an overall favorable recommendation from the Department which, in turn, lowered the vote requirement from nine affirmative votes to a simple majority of seven.

Council received no further analysis on the Comp Plan issue than this conclusory report. And Council heard no testimony suggesting Comp Plan consistency other than a conclusory introduction by Barley Mill's attorney.[61] That can be contrasted with scores of contrary communications and testimony from the public. Even those few members of the public (from CRG) who recommended approval of the plan did not argue nor suggest that the rezoning would be consistent with the Comprehensive Plan.

Council itself said nothing on that subject. Thus, there is no substantial basis in the record to sustain a finding that the rezoning was in conformity with the Comprehensive Plan. *O'Neill v. Middletown*, 2006 WL 2041279 (Del. Ch., July 10, 2006), at *4. *Green v. County Council of Sussex County*, 508 A.2d 882, 891 (Del. Ch. 1986), *aff'd* 516 A.2d 480 (Del. 1986).

As seen, under the defendants' views any site with buildings erected before the UDC (in other words, before 1997) would be candidates for "redevelopment," regardless of their true condition and whether they can be preserved. And so far as siting a regional shopping center, under their view all that is required under the Comprehensive Plan is that it is to be located on a major road, regardless of current traffic conditions on that road. (Indeed, the more traffic, the more volume, the more attractive it becomes to shopping center developers.) Hence, under defendants' view, any site on a major road with buildings older than twenty-five years would be

[61] October 4, 2011 Trans., p. 8; A – 164.

a proper candidate for commercial development and would be inherently consistent with the Comprehensive Plan.[62]

To paraphrase the sentiments of Chancellor (then-Vice Chancellor) Chandler when denying the request for reargument in *Orchard Homeowners Ass'n v. County Council of Sussex County*, 1992 WL 87326, *aff'd sub nom Shevock v. Orchard Homeowners Ass'n*, 621 A.2d 346 (Del. 1993):

> (W)here the proposed use of property to be rezoned so clearly falls outside of the acceptable uses for the new zoning classification, the rezoning cannot possibly be a product of reasoned judgment. Furthermore, this holding will not result in the Court becoming a super enforcement body for the County's Zoning Code. I merely refuse to rubberstamp Council's rezoning ordinance where the proposed use is so clearly outside of the county's own classification scheme.

In sum, and contrary to the defendants' assertion, the determination that this rezoning and proposed use would be consistent with the Comprehensive Plan was *not* supported by substantial evidence. No amount of rhetoric about development being "hamstrung" under plaintiffs' reading of the Comprehensive Plan, nor criticisms to the effect that the plaintiffs' just don't get it, or that

[62] In his remarks to Council, Barley Mill's attorney suggested an even greater short-circuiting than that. He told Council that since the site was in an area designated for Community Redevelopment in the Future Land Use Map, "What this means is this rezoning unlike a lot that you have to consider does not require a Comprehensive Development Plan amendment." October 4, 2011 Trans., p. 8; A – 164. Culver, in attendance, did not correct or qualify that remark by suggesting that there would still be factors in the Comprehensive Plan warranting analysis. Hence, given the apparent fact that "Community Redevelopment" is a category used over much of the Future Land Use Map in Northern New Castle County, then by this construct, when commercial development is being proposed along a major road, the Comp Plan would not matter, because such considerations would have been trumped, or short-circuited. Essentially, the requirement for consistency, articulated in § 40.31.410,A, would drop out for much of New Castle County.

the situation could have been worse, should substitute for a reasoned determination on this point, and so many other critical points as this rezoning progressed.[63]

III. OTHER IRRATIONAL, ARBITRARY AND CAPRICIOUS FAILINGS

A. The UDC Standards For Zoning Amendment Were Not Met

The UDC specifies five substantive factors to be considered by the Department, and then the Council, in determining whether a zoning map amendment should be approved. UDC § 40.31.410.

In their answering brief, the defendants posit that the plaintiffs are arguing that the rezoning approval here failed only with respect to two of those criteria. In fact, the plaintiffs challenge a failure to meet all five. This time, express subheadings will be provided, and the defendants will have a further opportunity to respond:

1. "A. Consistency With The Comprehensive Development Plan." As just argued and demonstrated in Arg. II, *supra*, the rezoning proposal was inconsistent with the Comprehensive Plan. Numerous Objectives and Strategies in that plan were ignored or relegated to inconsequential status.

2. "B. Consistency With The Character Of The Neighborhood." There are no malls in the neighborhood. To be sure, the property is at the intersection of two major arterials. Those arterials are already overtaxed, even without a single commercial establishment for the 5 miles between Faulkland Road and Fairfax on Route 141, nor anything commercial on the 5 miles of Lancaster Pike, Route 48, from the outskirts of Hockessin to a grocery store in Wilmington, save for a pharmacy, a farmers market and a single bank, all at separate locations.

[63] Of course, and as remarked in conclusion in *O'Neill I*, the County "could have chosen sooner to amend its comprehensive plan." 2006 WL 205071 at *37.

Further, to say that the area "is decidedly highway oriented" – as the Department did in its Report[64] and as the defendants have stated in their brief[65] – is a hollow misstatement, and another use of an elastic term which signifies nothing. True, the area has two arterials passing through it, but neither the area nor the site is "highway oriented" unless this developer is allowed to make it such, with forty foot tall stores and thousands of parking spaces. Presently the area is decidedly not "highway oriented." One of the four corner properties is a 130 acre nature preserve, and the other three are heavily landscaped office parks, none of which could be considered "highway oriented" simply because the office workers enter and exit off the highway. The expectation of the residents living off of those arterials – as also reflected in their home prices – is that there is a long stretch of non-commercial roadway to their homes. And certainly the immediately adjacent properties, most of which are residential, are decidedly not highway-oriented.[66]

3. "C. Consistency With Zoning And Use Of Nearby Properties." Here, too, both the Department in its report[67] and the defendants in their brief[68] resort to semantics while avoiding the facts. One of those facts is that the zoning proposal is not consistent with the zoning of nearby properties. So they place their emphasis on the alternative term, the "use" of nearby properties, claiming that under such a "broader view," this proposal does "not represent a

[64] A – 619.

[65] Ans. Br. – 40.

[66] Op. Br. – 2.

[67] A – 620.

[68] Ans. Br. – 40.

significant departure from present land use patterns." However, that conclusory characterization is also untrue and was unsupported.

At the risk of over-repetition, this proposed use is not designed for nearby properties. The nearby properties are residential, office complexes, a nature preserve, a youth athletic field and cemeteries. The proposal is not designed for them. As revealed in its marketing materials, it is designed to draw shoppers from all over the bi-state area. Contrary to defendants' assertion, it is not a "logical extension" of the fact that there is a core of well-maintained, nicely landscaped office parks, behind which are well-maintained neighborhoods in every direction. There is no substantial evidence that this rezoning is consistent with the use of nearby properties.

4. "D. Suitability Of The Property For The Uses For Which It Has Been Proposed." Only from the perspective of the developer could it be said that this property is suitable for what is being proposed.[69] However, any suggestion, let along support for a conclusion that the use is "suitable" for anyone else but the developer is unsupported by any facts of record. Also, whereas the Department's conclusory comments on this particular factor included a remark that the plan "proposes a regional stormwater management facility that is expected to limit and reduce flooding impacts downstream in the Elsmere community," that remark was unfounded, as will be demonstrated in the next passage of argument.[70]

5. "Affect (sic) On Nearby Properties. On this factor, too, the Department's report was conclusory and there was nothing in the record to support a favorable conclusion. In their answering brief, the defendants refer to "a record that exceeded 650 pages," including testimony by those opposed to the application "and a myriad of documents submitted into the

[69] Which undoubtedly is why Barley Mill bought the property and is reflected in its marketing materials. C – 38-41.

[70] Arg. III,B, *supra*.

record." True as to the record's size, but it is past the point that defendants should have cited affirmative and substantial testimony to the effect that nearby properties would not be adversely affected by the noise and light pollution, traffic and trash from a seven day per week shopping center of this size operating in their midst. There is no such affirmative evidence in the record. And the fact that some of the residences affected by the mall do not directly abut it because they are across Rt. 141 or Rt. 48 is unpersuasive, as is the fact that there is a surface level train track behind the property. None of the roads (which would have increased traffic) nor a surface railroad track to the rear would adequately or practically buffer nearby properties from the adverse effects.

And of course overriding all of this is the choking level of traffic to be expected both on Rts. 141 and 48 and through several of the neighborhoods as commuters and shoppers would attempt to fine alternate routes to get past the bottleneck. Both the traffic and any structures created to deal with the traffic would forever have an adverse effect on the nearby properties and would alter the character of the neighborhood.[71]

In sum, there is not substantial evidence in the record to support a conclusion that the UDCs own standards for zoning map amendment had been met.

B. The Stormwater Issue Was Mishandled, And The Claimed Improvement Was Illusory

When giving a favorable recommendation, the Department reported that the plan "proposes a regional stormwater management facility that is expected to limit and reduce flooding impacts downstream." This had been remarked by Barley Mill's counsel at the public hearing a few weeks earlier. He had said that a stormwater basin included in the plan "will

[71] Two Scenic Byways are intersected within a mile of the 141/48 intersection. Letter, C. Wicks, Secretary of DelDOT, to Reps. Valihura, Lavelle and Hudson, September 19, 2008. C – 75.

account (for) some portion of that off-site draining which is causing the problems."[72] The plaintiffs argue that that was misleading, certainly unanalyzed, such that any beneficial effect with respect to the current stormwater situation had been "oversold."

In their answering brief, the defendants have no supportive facts to provide on this issue, – nothing in the touted 650 page record nor otherwise. Rather, what they retreat to is that the law requires nothing more than maintaining the status quo, and does not mandate a reduction in the amount of water exiting from a site.[73] 7 *Del.C.* § 4003.

That fallback position may not be correct, – at least if this were a true "redevelopment" under the UDC, for it requires improvements in capacity in areas such as stormwater management to provide mitigation "or enhanced protection for existing natural/environmental resources."[74] However, in any event there is not record support for the notion that the drainage pond would maintain the status quo. The fact is that there was no evidence of record as to how drainage would be affected by paving over so much acreage. And what makes this even more mysterious and confounding is that the Department had specifically asked that particular stormwater studies be provided to its own engineers, rather than just deferring to third-party agencies. For instance, in its report back to Apex Engineering on the plan filing – on May 3, with a public hearing approaching June 7, 2011 – the Department had required certain studies prior to the next submission of the application.[75]

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[72] Op. Br. – 39.
[73] Ans. Br. – 41.

[74] UDC Art. 40.08.130,B,6(e).

[75] Department Preliminary Plan Report, May 3, 2011; A – 607, 609-11. (At "Engineering," Item 2, pertaining to the technical analysis of proposed ponds vis-à-vis the New Castle County Drainage Code; Item 3, downstream easements; Item 6 commenting on the non-delineated floodplain study; and Item 7.)

The defendants' further reply to this may be that that level of technical study and detail on stormwater is not required prior to record plan submission. However, whether or not that is a correct statement under current County procedures, in fact, and for reasons of their own,[76] the applicant argued for and succeeded in having this proposal proceed as a continuation, with the procedures in effect as they were in 2008. Under the UDC review procedures in effect in 2008, it was provided that "If additional studies and/or information are required for the proposed project, those studies and/or information must be provided to the Department prior to the rezoning/preliminary plan submission." And preliminary plan submission was to *precede* the County Council hearing on the rezoning. UDC (former) §§ 40.31.110; 40.31.112,C and 40.31.113.

C. The Rush To Vote Was Capricious And Unreasonable

This particular challenge by the plaintiffs was not even given a full response by the defendants. Rather, the defendants attempted to treat it in a footnote, which concludes that "the idea that this matter evidenced a "rush to judgment" can be dismissed on its face."[77]

In reply, a first observation is that indignation is no substitute for evidence. But on this topic, too, the defendants provide nothing more than rhetoric, along with the observation that no literal time requirements were being broken.

However, Departmental requests and requirements for the submission of information had not been met, and some of that information – such as the quite relevant information pertaining to traffic – was immediately at hand, in the offices of DelDOT and Stoltz. The wrongful failure of

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[76] Undoubtedly their desire included avoidance of the inflexible requirement in the 2008 MOU that there be a full traffic impact study on a project of this size.

[77] Ans. Br. – 41, at fn. 90.

the Department to take any further initiative to obtain this critical information which the Department itself had requested when making a favorable recommendation in June becomes even more confounding since, by State statute, the Department is required to "make use of the expert advice and information which may be furnished" by third-party agencies.[78]

The charge is that there was no reason in logic that this matter came to a vote on October 25, 2011, with so many loose threads and unanswered requests. Perhaps on this, too, the defendants will attempt a substantive, fact-driven reply in their final brief.

D. Improper To Treat This As A Continuation

The defendants respond on this issue by asserting that the decision to handle matters in the way it was done here was within the Department's discretion. In reply, it may be observed that although there is certainly room for administrative discretion as a general proposition, an entity with zoning authority must follow its procedures because the rezoning process must "amount to more than a series of ad hoc decisions." *Green v. County Council of Sussex County*, 508 A.2d 882, 891 (Del. Ch. 1986), *aff'd* 516 A.2d 480 (Del. 1996).

The determination to grandfather the application to the 2008 filing and allow both to proceed were matters of consequence. If the 2011 filing had been treated as a fresh matter, the 2008 DelDOT/County MOU would have applied and, with it, a full TIS would absolutely have been required. But the filing was deemed to be a continuation of the 2008 filing, supposedly thereby grandfathering it back to the procedures which were in effect when the 2008 application had been made.[79]

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[78] 9 *Del.C.* § 2604.

[79] The 2008 filing had preceded the 2008 MOU by just days, and had preceded the 2009 amendment to the County procedures, effective January, 2010, which provided for just a two-filing process, rather than three (exploratory, preliminary, then record) and which added the

But allowing this grandfathering, as a continuation, begged several key questions. First, as filed in 2008, the application was a redevelopment plan that did not request a rezoning. As such, under the procedures, it could proceed from the exploratory plan stage to record plan submission without the interim preliminary plan filing and review. UDC § 40.08.130,B(6)(c)(ii)(b). Having received exploratory plan approval, and then several extensions, Barley Mill made a record plan filing just before the second extension was to expire on December 19, 2009. However, additional studies had been called for at the exploratory plan stage and, by the review procedures in effect under the UDC as of 2008, "If additional studies and/or information are required for the proposed project, those studies and/or information must be provided to the Department *prior to the rezoning/preliminary plan submission*."[80] This was not done here. Essentially, no preliminary plan (with reports) was filed.

The crux of the matter is that a 2011 filing was given the benefit (from a developer's perspective) of the 2008 procedures, but not the obligations that should have accompanied it. That was procedurally improper.

That grandfathering treatment also begged a second question, namely, what would become of the 2008 application once the 2011 application was considered a continuation. From all available information, there is no precedent for two plans proceeding at once, under the same application number, with the former hanging in abeyance, presumably ripe for filing, like a sword over the head of Council and the public.

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provision that a rezoning, although approved by Council, does not really occur until record plan approval and recordation, – a rhetorical device which was urged here to assuage seven Council members to forego their standard practices on traffic analysis and much else.

[80] Former UDC § 40.31.112,C.

The circumstances here were sufficiently unique and complex that the developer's attorney and engineer met with the Department head, Culver, and a County attorney in October, 2010, to discuss timing issues.[81] And the County has produced a one-page, undated memorandum indicating that the subject of how to proceed was given thought.[82] However, that a matter may have been given thought does not overcome the illogic, nor justify the striking precedent that two plans were allowed to proceed at once under the same application number. And with that, adding from whole cloth the notion that the first plan would toll, not expire, while the second is pending. It becomes increasingly apparent, even from the sketchy record, that the procedural decisions on the rezoning application here were fairly characterizeable as "a series of ad hoc decisions." *Green*, 508 A.2d at 591.

E. Improper To Consider Other Stoltz Group Sites

In responding to this challenge, here, too, the defendants attempt to have it both ways. On the one hand, they tout the overall settlement agreement as an advantageous compromise. However, those were not public negotiations,[83] and the vast majority of all residents in the area

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[81] County Supplemental Interrog. Ans. 21; A – 681-82.

[82] Ans. Br. – 44, citing B – 45.

[83] "While CRG started with good intentions, they have since publicly portrayed themselves as representing and speaking for the majority of New Castle County residents and with having obtained broad support from several area Civic groups, we find these statements to be disingenuous and misleading." Statement of M. Blake/Greater Hockessin Area Development Association to Planning Board, June 6, 2011; C – 76; also June 7, 2011 Trans. at pp. 45-48; A – 95-98. *See also*, June 6, 2011 email letter from Bill Franey, president of Milltown-Limestone Civic Alliance to Planning Board: "Contrary to news articles, CRG has not provided the informed representation that was originally promised. We believe it started out with good intentions, but went astray.... The CRG leaders told people, on rare occasions, what could be done about the situation and said to do otherwise would invite court action that the public could not afford. Apparently, the preferred method of communication was to meet privately, then send articles to the media." C – 80. June 10, 2011 email letter from Chuck Mulholland, President of the Civic League of New Castle County, to Planning Board: "I join with Bill Franey and Bill

and citizens dependent upon Rts. 141 and 48, were in opposition; only the speakers from the immediate Greenville area were in favor.[84]

And conversely, while touting the compromise to this Court, the defendants argue the other way by saying that no member of the Council had expressly said that the Agreement, and what otherwise might occur at Greenville if the deal was not legislatively endorsed, was part of their consideration. Still, there are enough gaps and non-sequiturs in how the matter was considered through the County to its passage – from the failure to insist upon reports, to the timing of the vote – leaving strong question over whether the terms of the Agreement were not in Council's consideration when seven members voted to approve a project as ill-fitting as this.

F. Genesis In Conflicted Representation

The plaintiffs are not contending that this issue, standing alone, is sufficient to warrant a reversal. However, even in the absence of depositions – which certainly would have been objected to, and likely not allowed prior to this stage – there is enough in the record here to overcome any presumption of regularity in favor of this rezoning decision. Most particularly, the focus falls on the Department of Land Use, with its significant role to not only provide a recommendation on a rezoning proposal, but also having the statutory authority to reduce the affirmative vote required, from a super-majority of nine to a simple majority of seven.[85]

Dunn of MCLA and Mark Blake of GHADA that the sufficient notification to interested umbrella organizations was never offered, even when requested." C – 82.

[84] Perhaps to add gloss to the Agreement, the defendants remark that it was "brokered by then-County Executive Coons." Ans. Br. – 49. However, the documentation they cite for that assertion is also consistent with a notion that CRG and Stoltz had negotiated the Agreement and then gone to then-County Executive (now U.S. Senator) Coons for public relations purposes when the deal, the Agreement, was revealed.

[85] 9 *Del.C.* § 2614(a).

The record reflects that Departmental staffers were critical of the proposal.[86] In May, 2011, the Department was calling for additional information and studies.[87] Yet in June, while uncertainty remained as to Culver's employment status (owing in part to his non-residency), the Department issued a report favorable to the proposal, but with a minimal and erroneous discussion of the UDC-mandated factors.[88] And by the October Council hearings, Mr. Culver was an advocate for approval. In his advocacy, he both affirmatively advised Council to ignore traffic considerations and endorsed the remarks of Barley Mill's counsel to that effect. In all, there is linkage from Culver to the Council vote and from County Executive Clark, whose wife had represented the developer to the point of filing, to Culver. Clark need not have voted to influence the Council vote.

G. Insufficient Record On Council's Rationale

It is understood that, as noted in *O'Neill v. Town of Middletown*, 2006 WL 2041279 (Del. Ch., July 10, 2006) (*O'Neill II*) at *4, there is no "specific pathway" that a Council must follow to satisfy its obligation to provide a record of its reasons behind its rezoning decision. However, from the record here, even given its most favorable treatment through the defendants' briefing efforts, it is impossible to see what the majority members considered and what they thought about future traffic impact. There is a similar void as to what the majority felt about the

[86] A – 721. Also, there is evidence suggesting that pressure was coming from someone higher up than Culver. (Email, M. Bennett to D. Culver, June 20, 2011, sending a draft report while referring to "my second painful go around with his overlord, Dave." C – 84.

[87] A – 607-612.

[88] *See* discussion of the UDC-mandated factors, *supra* at pp. 22-32.

"redevelopment" characterization, or how this all fit under the Comprehensive Plan. [89] Realistically, all the Court has before it is the Department report, which was erroneous (on traffic) and highly conclusory (on "redevelopment" and on "consistency" with the Comprehensive Plan and the satisfaction of the other requisite criteria for a rezoning). The requisite standard for a record was not met and thus the rezoning must be reversed for that reason, as well.[90]

CONCLUSION

As set forth in the plaintiffs' opening brief and in the preceding arguments in this reply brief, the County's processes and the ultimate vote on the rezoning were legally improper, both procedurally and substantively, resulting in an arbitrary and capricious rezoning which should not stand. The plaintiffs will have been harmed in ways which cannot be remediated, and, as a consequence, the appropriate remedy is to invalidate the rezoning and require reconsideration under fully-compliant procedures.

Respectfully submitted,

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[89] *Cf.*, *Acierno v. New Castle County*, 2009 WL 3069691 (Del. Super. 2009), wherein reasons for the determination to deny "redevelopment" status were specified by the Department, and then the Board of Adjustment.

[90] *O'Neill II*, 2006 WL 2041279 at * 8. *See also*, *County Council of Sussex County v. Green*, 516 A.2d 480 (Del. 1986); *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986) and *New Castle County Council v. BC Development*, 567 A.2d 1271, 1277 (Del. 1989).