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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: June 16, 2008
Decided: May 13, 2009

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Re: *Brohawn, et al. v. The Town of Laurel, et al.*
Civil Action No. 2781-CC

Dear Counsel:

As you know, on May 4, 2009, I reassigned this case from Master Ayvazian to myself for all purposes. Since that time, I have reviewed and considered all written submissions in connection with the parties' cross-motions for summary judgment. This is the Court's decision on the pending motions.

Plaintiffs initiated this lawsuit against the Town of Laurel and the other property owner defendants, including Glen R. Jones and REJ, Inc. The relevant issue is whether Laurel properly annexed two tracts of land and later rezoned those properties for commercial/business use. Based on the parties' submissions, I conclude, for the reasons set forth below, that plaintiffs lack standing to challenge the annexation of the properties, but the language in the 2006-8, 2006-9, and 2006-10 ordinances relating to commercial zoning are invalid because the ordinances are inconsistent with Laurel's Comprehensive Plan. Thus, I grant defendants' motion for summary judgment regarding the annexation issues and grant plaintiffs' motion for summary judgment relating specifically to the zoning provisions of ordinances 2006-8, 2006-9, and 2006-10.

I. BACKGROUND[1]

This action involves the annexation of Tax Map Nos. 2-326.00-37 and 2-326.00-38 (the "Car Store Property") and the annexation and rezoning of Tax Map Nos. 1-32-12.00-109, 1-32-12.00-109.1, 1-32-12.00-118, 1-32-12.00-119, 1-32-12.00-123, 2-32-6.00-40, and 2-32-6.00-41 (the "Discovery Lands") into Laurel. These parcels are contiguous to other lands that were annexed by Laurel. Plaintiffs live outside the town limits of Laurel, but adjacent or near to the annexed properties.

On March 29, 2004, Laurel approved "The 2004 Greater Laurel Comprehensive Plan" (the "Comp Plan") to outline its land use policy. According to 22 *Del. C.* §§ 101(1) and 303, Laurel was required to adopt the Comp Plan if it wished to undertake annexations to expand its municipal boundaries.[2] Before adopting the Comp Plan, Laurel was approached by certain parties to consider adding an area on the north side of Discount Land Road, east of Route 13, to its potential annexation plans. But State officials, whose approval of the Comp Plan was necessary under State law, declined to consider the request due to its lateness. Nevertheless, Laurel later revisited the Comp Plan and sought to amend it to include lands northeast of the Route 13/Discount Land Road intersection.[3]

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[1] Although the parties have filed cross motions for summary judgment, they have not presented arguments to the Court detailing issues of material facts in disagreement. Therefore, I describe the undisputed facts as presented by the parties in their submissions to the Court.

[2] Section 303 of Title 22 requires a municipality such as Laurel to make zoning regulations "in accordance with a comprehensive plan." 22 *Del. C.* § 303.

[3] The State of Delaware developed a system requiring municipal amendments to comprehensive plans to undergo a process known as the Preliminary Land Use Service Review, commonly known as the PLUS process. *See Hansen v. Kent County*, 2007 WL 1584632, at *4 n.18 (Del. Ch. May 25, 2007). During the PLUS review process, the Office of State Planning Coordination ("OSPC") reviews the municipal application and provides comments on the proposed comprehensive plan amendments. *Id.* at *4 n.18. The OSPC reviews the comprehensive plan application for compliance with State law and certifies the amended comprehensive plan. While the municipality determines the ultimate fate of any comprehensive plan amendment, if the amended comprehensive plan is certified, the municipal body is qualified to receive certain State services. *Hansen*, 2007 WL 1584632, at *4; *see also* 29 *Del. C.* § 9103. Once a comprehensive plan is adopted by a municipality and certified, the municipality may annex land that is a part of its future annexation area, as delineated on its comprehensive plan. Municipalities may annex land that is "contiguous" to the jurisdiction. 22 *Del. C.* § 1012. If the comprehensive plan authorizes annexation, if there is no opposition from another adjoining jurisdiction or from the property owner, and if the OSPC approves the plan of services, the municipality is free to amend its boundaries. *See* 22 *Del. C.* § 101.

On January 17, 2006, Laurel's Mayor and Town Council approved the Comp Plan change to add the Car Store Property and the Discovery Lands. The same Ordinance, No. 2006-1, amended the "Future Land Use" map in the Comp Plan to designate the lands for Commercial/Business use. The commercial/business designation is also used to:

> delineate areas in the Town which are currently used or are appropriate for general commercial or business uses which provide a range of retail and personal services in order to fulfill recurring needs of residents and visitors and which by the nature or scale of the operations permitted and careful site planning are compatible with adjoining commercial and residential areas.[4]

These Comp Plan changes were later certified by the State. Then, on May 31, 2006, Discovery Group principal Robert Horsey wrote Laurel's Mayor and Town Council requesting annexation of seven separate parcels of land, as identified by their Sussex County tax parcel numbers. Greg Johnson ("Johnson") also wrote Laurel's Mayor and Town Council on behalf of The Car Store, Inc. requesting the annexation of two parcels of land identified by tax parcel numbers. Horsey's land could not be annexed into Laurel unless the land on which The Car Store was located, adjacent to Laurel's town boundary, was annexed first since none of Horsey's seven parcels abutted Laurel's town limits. The annexation request included 510 acres of land, which formed a contiguous boundary with the Laurel town limits.

After receiving the letters from Horsey and Johnson, Laurel appointed a special annexation committee. As a part of the annexation process, Laurel prepared a "Plan of Services." Title 22, § 101(3) requires such a plan, which must include an explanation of how various utility services will be provided when the new territory is annexed. On August 14, 2006, the annexation committee convened to consider the Horsey and Johnson annexation requests and later approved the request.[5]

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[4] Zoning Ordinance of the Town of Laurel, § 4.5 (2006).

[5] The annexation committee is a group of three members of the Town Council appointed to investigate the advantages and disadvantages of any annexation request. The annexation committee is authorized by Section 3A of Laurel's Town Charter. In its report on the Car Store Property, the annexation committee found that: (1) the property is contiguous to Laurel's boundaries; (2) Sussex County has no objection to the proposed annexation because the property is part of Laurel's short term growth area under the Comp Plan; (3) annexation would generate additional tax revenue for Laurel; (4) annexation would allow additional impact and connection

Laurel then approved an amendment to the Comp Plan which changed the projected land use from "commercial/business" to a "mixed use development" designation. On September 15, 2006, the OSPC stated that neither it nor any State agency objected to the mixed-use designation. Mixed-use development is characterized by:

> combining two or more principal uses (such as retail, entertainment, office, residential, lodging and civic/cultural/recreation) that are mutually supporting; by a significant physical and functional integration of project components, including uninterrupted pedestrian connections; and by development in conformance with a coherent plan that stipulates the type and scale of uses, permitted densities, and related items.[6]

On November 6, 2006, Laurel's Mayor and Town Council approved Resolution 2006-8, scheduling a public hearing for November 20, 2006, to consider the annexation and zoning. At the public hearing, the Discovery Group discussed the details of its development plan. On December 4, 2006, Laurel's Mayor and Town Council introduced Ordinance No. 2006-8 and Ordinance No. 2006-9, which proposed to approve the annexations requested by Johnson and Horsey. Both ordinances also proposed to amend Laurel's zoning ordinance to designate all nine parcels for commercial/business use. No mention was made of the fact that the 2006 amendment to the Comp Plan, as certified by the State, designated this future growth area as "mixed use."

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fees; (5) current water and sewer lines are several hundred feet from the property; and (6) annexation would not generate any municipal street aid funds. Balancing the advantages and disadvantages of the Car Store Property, the Laurel annexation committee unanimously recommended approval of the annexation of the Car Store Property.

In its report on the Discovery Lands, the annexation committee found that: (1) the properties to be annexed are contiguous to Laurel's boundaries; (2) the proposed annexation would generate an additional $6,411.87 per year in real estate taxes; (3) if the properties were developed as a mixed-use development as proposed, Laurel would also receive significant additional tax revenue; (4) if 2,400 equivalent dwelling units were built, Laurel would receive $5,760,000.00 in impact and connection fees; (6) the developer would cover the costs of all necessary upgrades to the wastewater treatment plant and other upgrades for water and sewer services; (7) existing water and sewer lines are several hundred feet from the property; and (8) the proposal would not generate any additional street aid funds. Balancing the advantages and disadvantages of the Discovery Lands, the annexation committee unanimously recommended approval of the annexation of the Discovery Lands.

[6] Zoning Ordinance of the Town of Laurel, § 2.1 (2006).

On January 8, 2007, Laurel's Mayor and Town Council convened a meeting to consider the final votes on Ordinance Nos. 2006-8, 9 and 10. All three ordinances were promptly voted upon and approved by unanimous vote.[7] Four council members stated that the annexation and zoning designation was "in the best interest of the Town." The Mayor similarly stated that he felt the plan was "good for the Town to endorse" and that it would "increase the revenue and provide additional services to those businesses." The Mayor and one Town Council member also indicated that it was good to bring the Route 13 corridor into Laurel.

II. ANALYSIS

Summary judgment is granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[8] The evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the non-moving party, and summary judgment will be denied "where the proffered evidence provides 'a reasonable indication that a material fact is in dispute.'"[9] A court's role in reviewing zoning and annexation decisions is limited to a review of the record.[10] Because this Court's review is limited to a review of the record, no material facts are in dispute. Since the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is any issue of material fact, pursuant to Court of Chancery Rule 56(h) "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[11]

A. Plaintiffs Lack Standing to Challenge the Annexation

[7] One Council member, Ms. Fisher, was absent. After the vote, all three ordinances were formally signed into law.

[8] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

[9] *Mickman v. Am. Int'l Processing, LLC*, 2009 WL 891807, at *1 (Del. Ch. Apr. 1, 2009) (quoting *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

[10] *See, e.g., Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council*, 1998 WL 671235, at *5 (Del. Ch. Aug. 14, 1998).

[11] Ct. Ch. R. 56(h).

Plaintiffs allege that the procedure by which Laurel's Mayor and Town Council annexed the Car Store Property and the Discovery Lands was unlawful for several reasons. Plaintiffs, however, lack standing to assert this claim. As the Supreme Court held in *Dover Historical Society v. City of Dover Planning Commission*, "the party invoking the jurisdiction of a court bears the burden of establishing the elements of standing."[12] To establish standing, plaintiffs must demonstrate: (1) an injury-in-fact; and (2) that the interests that they advance are within the "zone of interests to be protected."[13] An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[14]

Here, the Court must determine whether plaintiffs have demonstrated an "injury-in-fact" resulting from the annexation. Plaintiffs are not property owners within Laurel; nor do plaintiffs pay taxes to Laurel. They have no direct interest in whether or how Laurel provides municipal services to its citizens, and they have no direct interest in the boundary of the municipality. The ordinances effecting the annexation provide which government (Sussex County or Laurel) will govern and how municipal services will be provided to the relevant properties, and do not cause any "actual" harm to plaintiffs in any way.[15] Because plaintiffs have not demonstrated that they have suffered any "injury-in-fact" resulting from the annexation, plaintiffs lack standing with respect to their claims challenging Laurel's annexation of the Car Store Properties and the Discovery Lands.

In addition to their lack of standing for not having demonstrated an "injury-in-fact," plaintiffs also fail to demonstrate that the interests they advance are within the "zone of interests to be protected" by the annexation ordinances. In *Committee of Merchants and Citizens against the Proposed Annexation, Inc. v. Longo, et al.*, the Court noted that "standing" refers to plaintiffs' "right to invoke the jurisdiction of a court to enforce a claim or redress a grievance," and "[*i*]*n order to achieve standing, the plaintiff's interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general.*"[16] Furthermore, this Court applies the "concept of standing as a matter of self-

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[12] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[13] *T & R Land Co. v. Wootten*, 2006 WL 2640962, at *2 (Del. Ch. Sept. 7, 2006) (citing *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del.2003)).

[14] *Id.*

[15] Defs.' Ex. A, 6-7.

[16] *Comm. of Merch. & Citizens Against Proposed Annexation, Inc. v. Longo, et al.*, 669 A.2d 41, 44 (Del. 1995), (emphasis in original).

restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"[17] Laurel's annexation procedures, as defined in § 3 of its Charter,[18] are designed to protect only residents in both Laurel and the area to be annexed. A property owner living outside the annexed territory does not fall within the "zone of interests to be protected" by the annexation procedures.[19] Thus, the outsiders (plaintiffs) lack standing to challenge the municipal boundary determination because the outsider is not within the zone of interest required for standing. Accordingly, plaintiffs lack standing to challenge the annexation provisions in the ordinances.

B. Plaintiffs' Challenge of the Zoning Ordinances

Plaintiffs next challenge the validity of Laurel's zoning ordinances concerning the Discovery Lands and the Car Store Property. Plaintiffs allege that the commercial/business zoning designation is invalid on the basis that Ordinances Nos. 2006-8, 2006-9, and 2006-10 conflict with the mixed-use zoning designation in the legally binding August 14, 2006 Comp Plan. The August, 2006 Comp Plan was reviewed and ultimately approved by the State, specifically the Governor's Advisory Council on Planning Coordination, acting with delegated authority from the General Assembly.[20] Accordingly, if the zoning ordinances at issue in this case do not conform with the State approved August, 2006 Comp Plan then they will be deemed invalid.

Defendants first argue, as they did with the annexation challenge, that plaintiffs have no standing to challenge the zoning decisions. In this instance, however, I conclude plaintiffs have sustained an "injury-in-fact" and that they are within the "zone of interests" to be protected.[21] The purposes underlying the requirement that development within municipalities be consistent with the comprehensive plan are to "promote the health, safety, prosperity and general public welfare."[22] The impact on plaintiffs, who live on property adjoining the rezoned properties, is self-evident. Indeed, standing does not require an actual or physical harm to have already occurred. As Vice Chancellor Noble observed in *O'Neill v. Town of Middletown*, "[r]equiring that actual construction begin in order to violate the prohibition on inconsistent 'development' contained in [the relevant local ordinance] would impose a hypertechnical interpretation on the statute;

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[17] *Id.* (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).
[18] *See* 64 *Del. Laws* 288.
[19] *T & R Land Co.*, 2006 WL 2640962, at *2.
[20] 22 *Del. C.* § 702(f).
[21] *O'Neill v. Town of Middletown*, 2006 WL 205071, at *30 (Del. Ch. Jan. 18, 2006).
[22] 22 *Del. C.* § 702(b).

rezoning is certainly the first (and a necessary) step to such development."[23] Denying plaintiffs standing to challenge the validity of a zoning ordinance until after a specific project had been approved or they had experienced a physical harm as a result of development would result in inefficient and detrimental outcomes. Once land has been rezoned the potential for irreversible injury is sufficiently real, particularized, and concrete to warrant standing.

Furthermore, the interests that plaintiffs intend to advance in this action are those the zoning ordinances were designed to protect. The contradiction of the ordinances with the Comp Plan will permit development that is patently inconsistent with the substantive vision that State planners intended. In the Comp Plan itself, the document states it purpose:

> The Comprehensive Plan has been developed in keeping with the 2003 Sussex County Comprehensive Plan Update and with the Governor's Livable Delaware Program. The design goals of Livable Delaware are to coordinate development around existing centers, relate it to public transit, pedestrian and bicycling facilities, ensure the adequacy of public services, encourage mixed-use development, protect natural resources and create a growth boundary between urban centers and the surrounding countryside.[24]

The intent of the Comp Plan was to develop a land-use regime in harmony with the State and County plans, that is, to benefit all of the citizens of Sussex County and the State of Delaware. Moreover, although plaintiffs live outside Laurel's zoning jurisdiction, they live in close proximity to the Car Store Property and the Discovery Lands and, therefore, have legitimate claims as members of the class for whose especial benefit § 702 was enacted. The statement of purpose in § 702 shows the legislative intent that County residents living close to municipalities are among the intended beneficiaries of the statute's provisions.[25] That section provides that "[i]t is the purpose of this section to encourage the most appropriate uses of the physical and fiscal resources of the municipality, counties and the State through a process of municipal comprehensive planning."[26] Defendants' argument that the Comp Plan and the zoning ordinances enacted thereunder were developed

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[23] *O'Neill*, 2006 WL 205071, at *31 n.266.
[24] Pls.' Br. Ex. 24, 11.
[25] *O'Neill*, 2006 WL 205071, at *29 (citing 22 *Del. C.* § 702(d)).
[26] 22 *Del. C.* § 702(a). "Section 702 also clearly demonstrates an intent to promote coordination among municipalities, counties, and the State in making land use decisions." *O'Neill*, 2006 WL 205071, at *29.

to benefit only the residents of Laurel is not supported by statute or the legislative intent revealed therein.

In addition, the PLUS review process also provides significant evidence that plaintiffs have standing to bring this case. The fact that the Comp Plan must be approved by the State shows that the State and certainly citizens who reside on property adjoining or in close proximity to the rezoned property, have a considerable interest in the development of town lands. The purpose of the State's review is to ensure that all growth inside or outside various municipal limits is consistent with the State's objectives. Plaintiffs, especially since they are located in such close proximity to the lands in question, have standing to ensure that Laurel complies with the authority granted it by the State—that it enact zoning ordinances in conformity with its State approved Comp Plan.[27]

Given that plaintiffs have standing, the only remaining question is whether Laurel's zoning ordinances 2006-8, 2006-9, and 2006-10 are inconsistent with its August, 2006 Comp Plan. The State delegates zoning authority to municipalities, but this delegation comes with the condition that zoning ordinances are to be prepared and adopted consistent with comprehensive plans,[28] which are approved by the State.[29] Once adopted, "[a] comprehensive plan shall have the force of law and no development shall be permitted except as consistent with the plan."[30] This requirement "is, of course, no mere technicality."[31] Indeed, the consistency requirement is a "'fundamental feature' of the scheme of delegation of zoning authority to municipalities by the State."[32]

The inconsistency between the zoning ordinances adopted by Laurel and the intent of the Comp Plan is obvious. Laurel adopted zoning ordinances that zoned the Car Store Property and the Discovery Lands *commercial/business*, but in the Comp Plan, as amended in August, 2006, those areas were intended to be zoned

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[27] *See O'Neill*, 2006 WL 205071, at *30.
[28] "Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, and the general uses of land within the community, and critical community development and infrastructure issues." 22 *Del. C.* § 702(b).
[29] 22 *Del. C.* §§ 702(d), (f).
[30] *O'Neill*, 2006 WL 205071, at *31 (quoting 22 *Del. C.* § 702(d)).
[31] *Id.* (quoting *Lawson v. Sussex County Council*, 1995 WL 405733, at *4 (Del. Ch. June 14, 1995)).
[32] *Id.* at 32 (citing *Lawson*, 1995 WL 405733, at *4).

mixed-use. Defendants insist that the zoning ordinances are consistent with the mixed-use designation in the Comp Plan because the designation "mixed-use" implies multiple zoning possibilities (both residential and commercial), including the possibility that the entire area could be developed as a commercial development. This argument is meritless. There is a clear substantive difference between the zoning designations "mixed-use" and "commercial/business." Mixed-use zoning is specifically designated as a "plan" that would allow a "mix" of residential use combined with integrated "retail, entertainment, office, residential, lodging and civic/cultural/recreation" use. Mixed-use zoning, as defined by Laurel, envisions a combination of residential and commercial use harmonized in a coherent and specific plan. Commercial/business zoning, however, could completely exclude residential use. Theoretically, a planned residential/commercial development, contemplated in the mixed-use designation, could fit within the commercial/business designation, but not visa-versa—intense commercial developments would not be appropriate under the mixed-use zoning designation. Laurel's commercial/business zoning ordinance provides free reign to develop the land completely commercially. This zoning is not only in direct contravention of the mandate in the August, 2006 Comp Plan that the lands be developed for residential use, it is also contrary to the stated intentions of the Comp Plan and the State to "encourage mixed-use development, protect natural resources and create a growth boundary between urban centers and the surrounding countryside."[33] Accordingly, the disputed ordinances are invalid.

III. CONCLUSION

For the reasons stated above, I conclude plaintiffs lack standing to challenge Laurel's annexation of the Car Store Property and the Discovery Lands, but I conclude that the zoning portions of Ordinances 2006-8, 2006-9, and 2006-10 are invalid as inconsistent with Laurel's August, 2006 Comp Plan. Consequently, I grant defendants' motion for summary judgment regarding the annexation issues and deny the balance of defendants' motion. I grant plaintiffs' motion for summary judgment as it relates specifically to the zoning provisions in ordinances 2006-8, 2006-9, and 2006-10. An Order has been entered implementing this decision.

[33] Pls.' Br. Ex. 24, 11.