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OF THE
STATE OF DELAWARE

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Re: In re Kent County Adequate Public Facilities Ordinances Litigation
Consolidated – C.A. No. 2921-VCN
Date Submitted: February 4, 2008

Dear Counsel:

Petitioners, land owners and developers, are challenging Respondent Kent County's adoption and implementation of its Adequate Public Facilities Ordinances (the "APFOs"). The parties dispute the right of Petitioners to obtain discovery regarding the adoption of the APFOs directly from Respondents Kent County Levy Court Commissioners and Respondents Kent County Regional Planning Commission members. The Respondents have invoked both legislative immunity and legislative privilege in their effort to resist Petitioners' discovery.

Petitioners have noticed the depositions of the seven Respondent members of the Kent County Levy Court (the "Levy Court") and the seven Respondent members of the Kent County Regional Planning Commission (the "Planning Commission") (collectively the "Kent County Officials" or, more generally, "Kent County" or the "County"). The County has refused to produce the Kent County Officials for depositions and has moved for a protective order pursuant to Court of Chancery Rule 26(c); Respondents assert that the Kent County Officials are entitled to absolute legislative immunity[1] from suit and, thus, they also are absolutely

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[1] The members of the Levy Court constitute the elected governing body of Kent County and perform both legislative and administrative functions; the members of the Planning Commission are appointed. Accordingly, there may be some question as to whether the members of the Planning Commission are entitled to assert legislative immunity or legislative privilege to preclude Petitioners from taking their depositions. The parties have not joined debate over whether their appointed status matters in this instance or is one that the Court should even consider. Therefore, for purposes of the pending motion, the Court will assume that the members of the Planning Commission would be considered an integral part of the legislative process, and, thus, they are entitled, to the same extent as members of the Levy Court, to assert legislative immunity or legislative privilege.

The Court must also be mindful that it is considering the assertion of legislative immunity and legislative privilege by members of municipal or local governmental entities. Unlike members of the General Assembly, members of the Levy Court not only enact legislation but they also implement that legislation. Accordingly, care must be taken to recognize the context from which any particular discovery request has arisen, and that the Kent County Officials, as representatives of the interests of a subordinate governmental body, may enjoy protection less than that which would be afforded members of, for example, the General Assembly. In short, the Court is not necessarily addressing the scope of legislative immunity or legislative privilege that would be available to members of the General Assembly. *See, e.g.*, 10 *Del. C.* § 4001 (State Tort Claims Act) (expressly providing that, notwithstanding certain means by which a plaintiff can survive assertion of a statutory tort immunity defense and obtain an award of money damages against the state and certain of its agents, "the immunity of [certain state officials] and members of the

privileged from being deposed by Petitioners.[2] The parties have staked out diametrically opposed "all or nothing" positions on the narrow issue presented for the Court's resolution: whether Respondents are entitled to a protective order prohibiting Petitioners from deposing the Kent County Officials on the grounds of legislative immunity or legislative privilege.

Kent County contends that the doctrine of legislative immunity would be rendered meaningless and that the public policies underlying the doctrine would be eviscerated if the Kent County Officials could be haled into court (or Petitioners' attorneys' conference room) to answer questions about the APFOs. Petitioners counter that the County's view of legislative immunity is unprecedented and that legislative immunity is not so "absolute" as to preclude the taking of the Kent County Officials' depositions under all circumstances. Petitioners further contend that even if legislative immunity is "absolute," immunity has no application in this case because the Kent County Officials are being sued in their official (as opposed to individual) capacities. Petitioners concede, however, that their request to depose

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General Assembly shall, as to all civil claims or causes and actions founded upon an act or omission arising out of the performance of an official duty, be absolute.").

[2] Respondents did not assert legislative immunity as an affirmative defense in their Answer to Petitioners' Fourth Amended Petition for Injunctive Relief, Declaratory Judgment, and Other Relief. After filing the pending motion, Respondents moved to amend their Answer to assert an immunity defense for the Kent County Officials; the Court has not yet addressed that motion.

the Kent County Officials may be subject to heightened judicial scrutiny;[3] nevertheless, they maintain that depositions are necessary because, *inter alia*, the Kent County Officials are the only source of information regarding Petitioners' claims under Delaware's Freedom of Information Act ("FOIA")[4] and because the proposed depositions will amount to only a *de minimis* interference with the Kent County Officials' duties.

Legislative immunity and legislative privilege, both grounded in the same public policies, are closely related and, at times, overlapping concepts.[5] The Court

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[3] *See, e.g.*, *New Castle County v. Christiana Town Center, LLC*, 2004 WL 740029 (Del. Ch. Apr. 7, 2004); *see also* Ct. Ch. R. 26(b)(1) (The Court has discretion to limit the means of discovery in appropriate circumstances.).

[4] 29 *Del. C.* § 10001, *et seq*.

[5] Although both legislative immunity and legislative privilege can support the relief sought by Respondents, namely to preclude Petitioners from taking certain discovery about the APFOs directly from the Kent County Officials, they are conceptually distinct. In cases where immunity applies, a legislator is entitled to a relatively prompt dismissal of all claims against him. Moreover, legislative immunity also acts as something of an absolute testimonial and evidentiary privilege because it can preclude a litigant from ever having the opportunity to summon the immune legislator to provide discovery.

Yet, there may be some instances where, for various reasons, legislative immunity does not apply. For example, depending on the nature of a plaintiff's claims, it may not be evident on the face of the complaint that a legislator is entitled to the protection of immunity, and so limited discovery might be necessary to establish a legislator's entitlement to immunity, *see, e.g.*, *State Employees Bargaining Agent Coalition v. Rowland*, 2006 WL 141645, at *3 (D. Conn. Jan. 18, 2006), *aff'd*, 494 F.3d 71 (2d Cir. 2007). There may also be other instances where a legislator is not a named party to a lawsuit (or has been dismissed) but is nonetheless called upon to testify or to give other evidence. In those instances, the legislative privilege may still apply. The legislative privilege, however, is not as "absolute" as the testimonial and evidentiary protection accompanying immunity; accordingly, it does not deny a litigant the right to require the legislator to appear at a noticed deposition—instead, it operates to limit, possibly severely, the permissible

ultimately is guided in its resolution of this discovery dispute by two reasonably indisputable propositions. First, although the doctrine of legislative immunity will frequently serve as an absolute bar to discovery in matters involving legislative conduct, Respondents' suggestion that a litigant may *never* seek (and that a court may never order) a legislator's deposition is untenable. Second, in cases where discovery from a legislator is permitted, the scope of the inquiry may be sharply limited by the legislative privilege (regardless of whether the legislator is entitled to the defense of immunity) and, more generally, by public policy disfavoring judicial intrusion into the independence of the legislature.

Thus, for the reasons set forth more fully below, the Court concludes that Respondents may not absolutely preclude Petitioners from seeking discovery from the Kent County Officials on the basis of legislative immunity; Respondents may, however, assert legislative privilege to limit the scope of permissible discovery.

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scope of the litigant's inquiry of the legislator. Of course, if it appears that assertion of legislative privilege would deprive the deposition of any productive purpose, a court, in its discretion, might truncate the deposition even before it begins.

In sum, an immune legislator may be able to resist any discovery of matters falling within the "sphere of legitimate legislative activity" because, in the instances where immunity applies, the testimonial and evidentiary protections accompanying it are relatively "absolute." On the other hand, where a legislator is not entitled to (or has not asserted) immunity, he may rely upon the legislative privilege to circumscribe the scope of discovery a litigant may seek, but the legislator may not be able to avoid appearing at the deposition in the first instance.

Given those limitations and the deference a court ought to accord members of a duly constituted legislative body for their legislative acts, the Court seeks additional input from counsel regarding whether a protective order should limit Petitioners' means of seeking discovery from the Kent County Officials, at least initially, to those that might be considered less intrusive and burdensome, such as written interrogatories, depositions upon written interrogatories, or a limitation on the number of Kent County Officials to be deposed.[6]

* * *

A. *Legislative Immunity Cannot Preclude the Depositions of the Kent County Officials at this Stage of the Proceedings*

Legislative immunity absolutely protects legislators from personal liability for "damages on account of their votes, cast in the exercise of discretion vested in them by virtue of their office."[7] The doctrine may also extend to cases where a plaintiff seeks prospective relief, particularly if the relief sought would encroach upon a legislator's official duties (*e.g.*, requiring a legislator to vote in favor of a particular piece of legislation).[8] "The purpose of [legislative] immunity is to insure that the

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[6] *See* Ct. Ch. R. 26(b)(1).
[7] *Shellburne, Inc. v. Roberts*, 238 A.2d 331, 337 (Del. 1967).
[8] *See, e.g.*, *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 82-88 (2d Cir. 2007) (holding that state legislators are immune from suits for injunctive relief). *But see id.* at 85-

legislative function may be performed independently without fear of outside interference,"[9] and, as a matter of public policy, it is well-settled that "legislators engaged in the 'sphere of legitimate legislative activity' should be protected not only from the consequences of litigation's results, but also from the burden of defending themselves"[10] with regard to their official legislative conduct. Thus, where legislative immunity applies, the protection afforded a legislator is twofold: (1) the legislator may not be held personally liable in damages (or required to take a particular legislative act); and (2) the legislator may not be required to appear and defend against a lawsuit (including responding to discovery requests) challenging legitimate legislative activity, except to the extent necessary to assert the immunity.[11]

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86 (citing cases holding that local and municipal legislators are not entitled to legislative immunity from suits seeking injunctive relief).

[9] *Sup. Ct. of Va. v. Consumer's Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (citations omitted).

[10] *Id.* at 731-32; *cf. Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. . . .[T]he time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace . . . [a]nd the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." (citations omitted)).

[11] *See, e.g.*, *Powell v. Ridge*, 247 F.3d 520, 524 (3d Cir. 2001) ("Absolute [legislative] immunity . . . creates not only protection from liability but also a right not to stand trial." (citation omitted)).

Delaware recognizes the doctrine of legislative immunity, but our courts have not defined its precise contours.[12] Legislative immunity under federal law finds its genesis in the Speech or Debate Clause of the United States Constitution.[13] The Speech or Debate Clause of the Delaware Constitution of 1897 mirrors the federal constitution.[14] Although the protections of the Speech or Debate Clause, either state or federal, do not directly apply to the Kent County Officials, the policies animating such protections support the extension of similar (even if not identical) protection to local legislative officers.

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[12] *See, e.g.*, *Shellburne, Inc.*, 238 A.2d at 331; *see also* 10 *Del. C.* § 4001, *et seq.* (State Tort Claims Act) and § 4010, *et seq.* (County and Municipal Tort Claims Act) (The Tort Claims Acts codify common law immunity from civil liability for money damages traditionally afforded to state (and other governmental) actors for their official acts. They do not, however, abrogate, or even address, the common law with respect to any evidentiary or testimonial privileges that might attach to a successful assertion of immunity as a defense to Petitioners' suit. In addition, although the Tort Claims Acts shift the burden to the Plaintiff to rebut the presumption of immunity in order to seek an award of money damages, these acts do not otherwise redistribute the legislator's burden of establishing his entitlement to immunity in other instances. Instead, the burden of establishing an entitlement to an immunity or a privilege typically falls upon the party seeking to assert it. *See, e.g.*, *Deutsch v. Cogan*, 580 A.2d 100, 107 (Del. Ch. 1990) (in light of the broad discovery permitted under Court of Chancery Rule 26, "the party objecting to the discovery bears the burden of establishing the existence of [a] privilege.")).

[13] U.S. Const. art. I, § 6 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place.").

[14] Del. Const. art. II, § 13 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place."). Although comparable provisions of the federal and state constitutions may not necessarily be coextensive in application, *see, e.g.*, *Dorsey v. State*, 761 A.2d 807, 814-15 (Del. 2000), the parties have not suggested any material difference, and the Court will assume consistency.

The Third Circuit has adopted a two-part test for determining whether a particular action is entitled to the protection of legislative immunity.[15] First, the action must be "substantively legislative" (*i.e.*, involves "policy-making" or a "line-drawing" decision).[16] Second, the action must be "procedurally legislative" (*i.e.*, be "undertaken through established legislative procedures").[17] The burden rests on the party asserting legislative immunity to establish the necessary conditions precedent to its application.[18] For local governmental bodies, such as the Levy Court, "[i]t is only with respect to the powers delegated to them by the state legislatures that [their] members . . . are entitled to absolute immunity."[19]

There is no doubt that the APFOs are "substantively legislative." Indeed, they reflect precisely the type of policy-making and line-drawing decisions typically reserved to a legislative body. Petitioners have raised some doubt, however, as to whether adoption of the APFOs was "procedurally legislative." The nub of

[15] *See, e.g.*, *Acierno v. Cloutier*, 40 F.3d 597, 610 (3d Cir. 1994).
[16] *Id.*
[17] *Id.*
[18] *See, e.g. Almonte v. City of Long Beach*, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) (Party asserting legislative immunity "bears the burden of persuasion.").
[19] *Acierno*, 40 F.3d at 610; *see also County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 173 (3d Cir. 2006) ("'An unconstitutional or illegal course of conduct by county government does not fall within the doctrine of absolute immunity merely because it is connected to or followed by a vote of a county board.'" (quoting *Carver v. Foerster*, 102 F.3d 96, 102 (3d Cir. 1996))).

Petitioners' FOIA claim is that a quorum of Kent County Officials held meetings and discussions outside the public record to develop the APFOs initially as well as their amendments. As an inferior legislative body, the Levy Court exists by the grace of the General Assembly[20] and, accordingly, must abide by the legislative procedures prescribed by the General Assembly, including compliance with FOIA's open meeting requirement.

Petitioners speculate (although they have not put forth much credible evidence to support their theory) that, for example, the precision of the amendments to the APFOs introduced at the March 27, 2007 Levy Court meeting, without any prior "on the record" discussion, suggests that the amendments had been discussed by the Kent County Officials outside the public record. Respondents report that the County's attorney anticipated possible problems with the APFOs as initially drafted and, therefore, had prepared several alternative amendments for the Levy Court members to consider. That is one plausible explanation for the precisely drawn amendments; Respondents have not, however, foreclosed the possibility that Petitioners' theory also could be a plausible explanation. Indeed, if Petitioners' allegations are true, it would seem that Respondents violated the procedures by

[20] 9 *Del. C.* § 4101, *et seq.*

which the General Assembly has authorized the Levy Court to enact legislation for Kent County. Accordingly, even if the Court assumes that the Kent County Officials may properly assert an immunity defense in this case, they have not yet satisfied the "procedural" prong of *Acierno* to establish the defense.[21] Thus,

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[21] The Court notes that it has not expressly been called upon to consider an assertion of immunity in a situation where minor, technical non-compliance with proper legislative procedures has been alleged. In *Acierno*, for example, the New Castle County (Delaware) Council was alleged to have violated proper legislative procedure because a proposed rezoning had not received all of the necessary public notices. Nevertheless, the Third Circuit held that, as a matter of federal law, the New Castle County Council had satisfied the procedural prong of the immunity defense and that, in considering whether a legislative body has established that prong of the defense, "[a federal] court need only be satisfied that the municipal body is acting pursuant to the basic legislative procedure." 40 F.3d at 614. The *Acierno* Court noted, however, that a different result might obtain under state law:

> We . . . believe there to be an important distinction between general adherence to legislative procedure for the purposes of taking legislative action as a matter of federal law, as opposed to full compliance with all technical requirements for such legislative action to be valid under state or county law. It may well be that if in fact state law required the substitute to the originally proposed ordinance to also go through all the statutorily required notice procedures and hearings, then Acierno would be able to successfully attack the validity of the [ordinance] in an administrative or state court proceeding. . . . In the present case, we find no indication in the record that members of the County Council bypassed state-mandated procedures *in bad faith* when enacting the [ordinance].

Id. at 614-15 (emphasis added).

The Court need not resolve whether a good faith, technical failure to comply with proper legislative procedures would vitiate legislative immunity under Delaware law. In this case, for example, Petitioners have alleged that the Kent County Officials surreptitiously and intentionally violated Delaware's FOIA, which mandates important procedures governing the Levy Court's enactment of valid legislation. Accordingly, even if an exception similar to the one recognized in *Acierno* exists under Delaware law, the actions alleged to have occurred here could fairly be

Respondents are not entitled to a protective order absolutely precluding the taking of discovery from the Kent County Officials on the basis of legislative immunity at this stage of the proceedings.[22]

B. *The Legislative Privilege Will Sharply Curtail the Permissible Scope of Petitioners' Inquiry Regarding the APFOs*

Legislative privilege is distinct from the doctrine of legislative immunity, even though the former is an outgrowth of the latter.[23] Unlike legislative immunity,

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characterized as in "bad faith" and, thus, as failing the procedural prong of the legislative immunity defense.

[22] *Accord v. Rowland*, 2006 WL 141645, at *3 ("At this juncture, discovery is required before the court can determine whether the defendants are entitled to the defense [of legislative immunity].").

[23] It may be that legislative immunity is better viewed functionally as an affirmative defense to suit with accompanying testimonial and evidentiary restrictions once the defense is established. If so, under these circumstances and at this stage of the litigation, legislative privilege is perhaps the more precise protection available to the Kent County Officials for two reasons. First, it is not clear whether legislative immunity, as an affirmative defense, even will have proper application in this case. (The Court must address that question in connection with Respondents' motion to amend their Answer.). Second, assuming that immunity may be a defense in this case, the Kent County Officials have not yet established their entitlement to immunity because they have not shown that their actions were both procedurally and substantively legislative.

The distinction between legislative immunity and legislative privilege has been somewhat blurred in the case law, and, perhaps, may be largely irrelevant in this case because the protections afforded to the Kent County Officials under either rubric, to the extent either applies in this case, are the same. Complete and successful invocation of legislative immunity under these circumstances would preclude inquiry into *both* the process by which the Kent County Officials drafted the APFOs *and* the substance of the APFOs. As described above, however, in order to invoke legislative immunity (assuming that the doctrine is applicable), a legislator must demonstrate that his actions were *both* procedurally *and* substantively legislative.

There can be little doubt as to the substantively legislative nature of the APFOs. Petitioners' FOIA claim, however, necessarily calls into question whether the drafting of the APFOs was procedurally legislative; thus, the Petitioners must be able to inquire into the process by which the Kent County Officials developed and adopted the APFOs, at least to the extent necessary to

which will more frequently be asserted as an affirmative defense to a lawsuit in which a legislator has been named as a party, legislative privilege is a testimonial and evidentiary privilege that may be asserted even if the legislator is not a named party or entitled to assert the immunity as a defense. It is intended primarily to shield legislators from inquiry into their motivations, mental processes, or the substance of discussions, deliberations, or communications underlying legislative actions. Thus, as with legislative immunity, "the purpose in preventing inquiry into [the] motivation of legislative acts is to shield legislators from civil proceedings which disrupt and question their performance of legislative duties [and] to enable them to devote their best efforts and full attention to the 'public good.'"[24] Indeed, the legislative privilege embodies the venerable principle that it is "not consonant

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determine that the process was in fact procedurally legislative (*i.e.*, in compliance with FOIA), in order for the Kent County Officials to establish their entitlement to immunity in the first instance. Conversely, inquiry into the substance of the APFOs is plainly precluded by either legislative immunity or legislative privilege or both (depending on how one reconciles the cases). Thus, regardless of whether the Kent County Officials have immunity from this lawsuit, the scope of the protective order the Court eventually will enter under these circumstances is the same because inquiry by the Petitioners or the Court into the Kent County Officials' mental processes underlying the APFOs is precluded by the privilege; some limited inquiry into the process by which the APFOs were developed and adopted, however, cannot be avoided.

[24] *ACORN (The New York Ass'n of Community Orgs. for Reform Now) v. County of Nassau*, 2007 WL 2815810, at *2 (E.D.N.Y. Sep. 25, 2007) (quoting *Searingtown Corp. v. Inc. Village of North Hills*, 575 F.Supp. 1295, 1298 (E.D.N.Y. 1981)).

with our scheme of government for a court to inquire into the motives of legislators . . . ."[25]

Although a court should avoid requiring legislators to submit to intrusive discovery concerning matters falling within the "sphere of legitimate legislative activity," the legislative privilege is qualified, not absolute, and so it may yield to the interests of a litigant in obtaining relevant discovery in some limited instances, particularly where the acts in question might fall outside the "sphere of legitimate legislative activity." Even if discovery from a legislator is permitted, however, a party generally may not inquire into the legislator's motivations, mental processes, or the substance of discussions or deliberations relating to the enactment of any particular legislation. Such avenues of inquiry command the greatest protection under the legislative privilege and will routinely be precluded in all but the most exceptional circumstances.[26]

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[25] *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *see also Bogan* 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference. . . .").

[26] *See, e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (Court may be able to inquire into possible discriminatory motives even though such inquiry might otherwise be barred by legislative privilege.).

With respect to certain other matters touching upon the legislative process, the legislative privilege is construed more narrowly,[27] and a court may order discovery of non-privileged information even though it relates to legislative activity. In determining whether to permit such discovery, a court must balance the interests of the party seeking the discovery against those of the legislator in being free from the burdens of complying with discovery requests in civil lawsuits. In balancing those interests, a court may consider several factors, including (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.[28] Courts must also be particularly mindful of the public's interest in being served by legislators who are not mired in protracted civil litigation relating to their official acts and various other public policy concerns underlying the legislative privilege (and legislative immunity).

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[27] *See generally Rodriguez v. Pataki*, 280 F.Supp.2d 89, 94 (S.D.N.Y. 2003) (Testimonial privileges must be construed narrowly because they "contravene the fundamental principle that 'the public . . . has the right to every man's evidence.'" (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

[28] *Id.* at 101.

In light of the foregoing, it is clear that the Kent County Officials are not entitled to "absolute" protection from being deposed by Petitioners. Moreover, Petitioners have demonstrated a sufficient need to seek discovery from the Kent County Officials, particularly with respect to their FOIA claim. Accordingly, the Court will allow Petitioners an opportunity to seek limited discovery from the Kent County Officials; that right, however, will be subject to the Kent County Officials' right to assert legislative privilege to circumscribe the scope of Petitioners' inquiries. Respondents, therefore, are entitled to a protective order limiting the scope of petitioners' discovery requests directed to the Kent County Officials.

Without knowing the exact questions Petitioners intend to ask, it is impossible for the Court to resolve fully the dispute at this point.[29] Nonetheless, some general

[29] Uncertainty about the range of discovery sought by Petitioners has complicated resolution of Respondents' motion for a protective order. It is not clear exactly what Petitioners intend to accomplish in the noticed depositions or whether they intend to seek information protected by legislative privilege. For example, in their Answering Brief, Petitioners wrote:

> The [Planning Commission] and Levy Court Commissioners are the only ones who know what, if anything went on behind closed doors, at least as amongst themselves or in consort with other public officials. The Commissioners also possess unique information about the *meaning of the statutes they adopted*—which the Petitioners contend are vague and ambiguous. The Commissioners were the architects of the APFOs and personally directed their drafting and adoption. This type of information is not available from any other source and is critical to proving—or disproving—the Petitioners' claims, which of course is the whole point and purpose of discovery.

Pet'rs' Ans. Br. at 13 (emphasis added).

Questioning the Kent County Officials about the meaning of the APFOs, as suggested by the quoted passage from Petitioners' Answering Brief, would plainly be an improper avenue of inquiry and would fall squarely within the legislative privilege. Petitioners perhaps recognized that because they went on to state (on the same page of their brief):

> The depositions will also be consistent with protecting the "mental processes of executive and administrative officers," as the Petitioners are not interested in the *legislative motives* underlying the APFOs (*i.e.*, "why" and "how do you justify" questions). Instead, Petitioners *simply seek to take factual discovery* regarding their claims that the APFOs were not adopted in accordance with the procedural requirements of applicable law.

Id. (emphasis added).

Petitioners at oral argument addressed the topics about which they anticipate questioning the Kent County Officials, but the scope of the proposed inquiry remained unclear:

> [COUNSEL FOR PETITIONERS]: [Petitioners] are asking [the Kent County Officials] to *defend their legislative actions on behalf of the County*. The Petitioners do not intend to ask . . . the sort of "why" and "how do you justify" questions which the doctrine of legislative immunity typically precludes. And the Petitioners are not interested in the commissioners' motives, purposes or legislative policy judgments regarding the supposed merits of the APFOs. Rather, the Petitioners are merely interested in discovering the objective facts which would evidence violations, if any, of the various rules, ordinances and statutes cited in support of the Petitioners' claims . . . The Petitioners are merely asking the commissioners to provide testimony upon the question whether the APFOs were adopted in accordance with the requirement of applicable rules, ordinances and statutes.

Tr. of Argument on Resp'ts' Mot. for a Protective Order, Feb. 4, 2008 ("Tr.") at 33-34 (emphasis added).

Further argument did not yield definitive results:

> [COUNSEL FOR PETITIONERS]: We also intend to ask *how the commissioners interpret the Adequate Public Facilities Ordinances*.

guidance is appropriate. Although Petitioners are permitted to seek discovery from the Kent County Officials, such discovery will necessarily be limited by the legislative privilege. Petitioners, for example, may not inquire into the Kent County Officials' motivations for enacting the APFOs, the substance of their public, or lawful private, discussions and deliberations relating to the drafting and enactment of the APFOs, or their understanding of the proper interpretation of the APFOs (*e.g.*,

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> THE COURT: Why is that even relevant? . . . [D]oes it matter what [the Kent County Officials] think [the APFOs] mean[]? Isn't it that you read the ordinance as it was drafted? Maybe you look back at some legislative history so you can see the evolution. But the idea that legislators can come along after they have enacted a law and inform the judicial process and say "Oh, I meant X even though the language probably the better reading is Y." I'm not sure I understand how that's even the type of thing which I can look at.
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> [COUNSEL FOR PETITIONERS]: Well, we have a claim in our fourth amended petition, Your Honor, that the APFOs are so poorly written and so arbitrary and capricious that they're incapable of being understood and enforced.
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> THE COURT: If that's the case, they fail by their very words . . . . Let's posit there's a Levy Court member who says, "I don't understand what this ordinance means." That doesn't necessarily mean that it's void for vagueness . . . That is not something that influences or informs a judicial decision anyway, is it?
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> [COUNSEL FOR PETITIONERS]: Well, Your Honor, it may not rise to a Freedom of Information Act violation, but I would respectfully submit that if commissioners, for example, either didn't read the ordinances at all, didn't read the amendments before they voted on them, or didn't understand them at all, then that informs or would inform the Court's evaluation of whether or not their actions were arbitrary and capricious.

Tr. at 38-40 (emphasis added).

the "why" or "what did you intend" questions). On the other hand, for example, inquiry about discussions among Levy Court members or among Planning Commission members, in the presence of a quorum of the respective body and not at a meeting in compliance with FOIA, would be proper. A more precise delineation of the proper boundaries of inquiry, however, cannot be achieved on the present record.

C. *Management of Discovery*

The Court, "on it own initiative after reasonable notice," may limit the frequency or extent of discovery to avoid "unreasonably cumulative or duplicative" discovery or discovery that "is obtainable from some other source that is more convenient, [or] less burdensome, . . ."[30] The notion of deposing all seven members of the Levy Court and all seven members of the Planning Commission would appear, especially in light of the limited evidentiary basis for Petitioners' allegations of misconduct under FOIA (or other procedural shortcomings), to be not only cumulative but also burdensome.[31] The Court's concern is heightened because of the policies supporting legislative immunity and legislative privilege.

[30] Ct. Ch. R. 26(b)(1).

[31] Although the Court suggested to Petitioners during a teleconference on December 28, 2007, that they might not be permitted to depose all of the Kent County Officials without a showing of need

Counsel, thus, are requested to confer and to agree upon a schedule pursuant to which they will submit the parties' views as to whether any limitation is warranted as to the means or extent of the discovery to be pursued from the Kent County Officials in light of this letter opinion.[32]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: William W. Pepper, Sr., Esquire
Register in Chancery-K

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that would counterbalance the burden, *see generally* Tr. of 12/28/2007 Status Teleconf., it is not clear those comments satisfied the "reasonable notice" provision of Court of Chancery Rule 26(b)(1).

[32] No award of attorneys' fees would be appropriate under Court of Chancery Rules 26(c) and 37(a)(4) because the parties' positions were "substantially justified."