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Case No. 2478-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CATHERINE G. O'NEILL and VINCENT J. O'NEILL,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 2478-VCN**
TOWN OF MIDDLETOWN, a Delaware municipal corporation; MAYOR & COUNCIL OF MIDDLETOWN, the governing body of the Town of Middletown; 301 WEST VENTURES, LLC, a Delaware limited liability company; WAL-MART STORES, INC. a Delaware corporation; WAL-MART STORES EAST LP, a Delaware limited partnership; VICTOR P. KOHL, JR.; and BENJAMIN G. KOHL,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: January 10, 2007
Date Decided: March 29, 2007

Richard L. Abbott, Esquire of Abbott Law Firm, Hockessin, Delaware, Attorney for Plaintiffs.

Joseph Scott Shannon, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware, Attorney for Defendants Town of Middletown and Mayor and Council of Middletown.

William E. Manning, Esquire, Richard A. Forsten, Esquire, and James D. Taylor, Jr., Esquire of Buchanan Ingersoll & Rooney, Wilmington, Delaware, Attorneys for Defendant 301 West Ventures, LLC.

Margaret F. England, Esquire and Karen L. Turner, Esquire of Eckert Seamans Cherin & Mellott, Wilmington, Delaware, and Donald A. Rae, Esquire and Robert T. Johnson, Esquire of McGuire Woods LLP, Baltimore, Maryland, Attorneys for Defendants Wal-Mart Stores, Inc. and Wal-Mart Stores East LP.

Chad M. Shandler, Esquire of Richards Layton & Finger, P.A., Wilmington, Delaware, Attorney for Defendants Victor P. Kohl, Jr. and Benjamin G. Kohl.

NOBLE, Vice Chancellor

I. INTRODUCTION

This is the Court's third memorandum opinion issued in the course of an effort to rezone a 98-acre parcel (the "Parcel") located on the northwest side of U.S. Route 301, south of Bunker Hill Road and State Route 299, in Middletown, Delaware, from manufacturing to commercial. Proposed development centers on the construction of a 203,818 square foot Wal-Mart Supercenter on 25 acres of the Parcel. Following this Court's invalidation of two previous attempts to rezone the Parcel,[1] the Town's municipal body sought to make the third time the proverbial charm. Two citizen-plaintiffs have once again supplied the opposition; this time, they allege that the ordinance rezoning the Parcel was invalid because, among other alleged defects, its approval had been facilitated in executive sessions held in violation of the Delaware Freedom of Information Act ("FOIA").[2] Before the Court are cross-motions for summary judgment. For the reasons that follow, the Court concludes that the Town's third attempt to rezone the Parcel should not be disturbed.

[1] *See O'Neill v. Town of Middletown*, 2006 WL 205071 (Del. Ch. Jan. 18, 2006) ("*O'Neill I*") (invalidating rezoning of the Parcel to C-3 because the rezoning was inconsistent with the comprehensive plan); *O'Neill v. Town of Middletown*, 2006 WL 2041279 (Del. Ch. July 10, 2006) ("*O'Neill II*") (invalidating rezoning of Parcel to C-3 because of municipality's failure to provide reasons supporting its decision). The reader's familiarity with *O'Neill I* and *O'Neill II* is presumed.

[2] 29 *Del. C.* ch. 100.

II. BACKGROUND

A. *The Parties and Procedural History*

Plaintiffs Catherine G. O'Neill and Vincent J. O'Neill (the "Plaintiffs" or the "O'Neills") reside near the site of the proposed Wal-Mart Supercenter. They have brought suit against two groups of Defendants: (1) the Town of Middletown (the "Town") and its Mayor and Council (the "Council"),[3] and (2) Parcel owners (collectively, the "Applicants") 301 West Ventures, LLC, Wal-Mart Stores East LP ("Wal-Mart"), and Victor P. Kohl, Jr. and Benjamin G. Kohl.[4]

Last year, on July 10, 2006, the Court in *O'Neill II* invalidated a second attempt by the Town to rezone the Parcel from manufacturing-industrial (MI) to employment-regional-retail commercial (C-3) because the Council members failed either to explain how their decision rationally related to the township's health, safety, and welfare or, in the alternative, to "create a record" that would sufficiently establish the basis for their rezoning decision.[5] Undaunted, a week after the Court's decision in *O'Neill II*, the Applicants renewed their efforts and

[3] At all relevant times, the Mayor was Kenneth L. Branner, Jr. Members of the Council were Robert McGhee, James Reynolds, Catherine Kelly, and Jason Faulkner.

[4] Wal-Mart Stores, Inc. is also a named defendant, but it is neither a legal nor an equitable owner of the Parcel.

[5] Articulation of some basis for a zoning decision—either in some form of a statement of reasons or, in some instances, a record from which the Court can ascertain the zoning authority's reasons for doing what it did—is a prerequisite for the rather deferential judicial treatment given to a zoning authority's actions. *See Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986); *see also New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276–77 (Del. 1989); *O'Neill II*, 2006 WL 2041279, at *4.

formally requested that the Council place on its agenda of August 7, 2006, the introduction of another rezoning ordinance concerning the Parcel.[6] A month later, on September 11, 2006, the Council unanimously voted to rezone the Parcel from MI to C-3 and the Mayor signed the ordinance into law the next day. The Plaintiffs brought suit shortly thereafter.[7] The Defendants moved for summary judgment on December 1, 2006. The Plaintiffs filed their cross-motion for summary judgment on December 19, 2006.

B. *Factual Background*

The facts in this case are relatively straightforward and generally fall within three periods: (1) the introduction of a rezoning ordinance on August 7, 2006, (2) the approval of the ordinance by the Town's Planning and Zoning Commission (the "Planning Commission") on August 17, 2006, and (3) the formal approval of the ordinance by the Council on September 11, 2006.

1. The Council Meets in Executive Session and an Ordinance is Later Introduced

On July 19, 2006, two days after the Applicants submitted their formal request for an ordinance to be introduced at the next regularly scheduled Council meeting, the Mayor convened a meeting with Robert Pierce, Chairman of the

[6] Opening Br. of All Defs. in Supp. of their Mot. for Summ. J. ("DOB") Ex. 3 (July 17, 2006).
[7] Compl. (Oct. 16, 2006); Am. Compl. (Nov. 27, 2006). The Complaint was amended a second time on February 1, 2007, to challenge other land use approvals dependent upon the rezoning.

Planning Commission; Morris Deputy, Town Manager; Scott Chambers, Esquire, Town Solicitor; and Joseph Scott Shannon, Esquire, the Town's Litigation Counsel. Also present, in part, were William E. Manning, Esquire, and Richard A. Forsten, Esquire, counsel to 301 West Ventures. Not surprisingly, the purpose of the meeting was to discuss the *O'Neill II* decision and to outline a process the Town could follow without offending Delaware law and, more specifically, the Court's admonition in *O'Neill II* "to provide the reasoning supporting its [zoning] decisions in a manner rationally tied to the record before it."[8]

Minutes of this meeting reflect that: the Planning Commission was to prepare a report to the Mayor and Council; an executive session was needed when the Planning Commission met in August; it was necessary for the Planning Commission's findings to be read into the record; Planning Commission members "[would] vote for or against the rezoning motion based on agreement or disagreement with findings"; an executive session to discuss legal matters was needed when the Council met in September; and Shannon was expected to prepare a draft rezoning ordinance.[9] The draft ordinance Shannon prepared was e-mailed to Deputy, as well as to Rae Teel, an administrative assistant for the Town, in advance of the Council's next meeting.

[8] 2006 WL 2041279, at *8.
[9] DOB Ex. 4 (July 19, 2006 minutes).

On August 7, 2006, the Council convened to consider, among other items, a proposed ordinance concerning the Parcel.[10] Before introducing the ordinance, the Council entered into an executive session to discuss "legal matters." There, Shannon summarized *O'Neill II* for the benefit of members of the Council. Naturally, discussion centered on what the Town could do to rectify what it had improperly done in April of 2006, when it failed to provide reasons for its approval of the Parcel's rezoning. Shannon advised the Council on the steps needed "to create an adequate record for a decision for or against the pending rezoning of the Kohl property" and that the "reasons for or against the rezoning . . . need to be based on the rules and regulations of the Town of Middletown."[11] When the public hearing reconvened, the ordinance to rezone the Parcel was introduced.

2. The Planning Commission Meets and Recommends Approval of Rezoning Ordinance

On August 17, 2006, the Planning Commission met specifically to consider the rezoning of the Parcel.[12] Once the meeting was convened, its members entered into an executive session. As he had done during an executive session of the Council a week earlier, Shannon provided Planning Commission members with background on the *O'Neill II* decision, "explain[ing] that the [Court of Chancery] did not have an adequate record of findings . . . when the property was rezoned,"

[10] *Id.* Ex. 5 (Aug. 7, 2006 Council agenda); *id.* Ex. 7 (Aug. 7, 2006 Council minutes).
[11] *Id.* Ex. 6 (Aug. 7, 2006 Council executive session minutes).
[12] *Id.* Ex. 12 (Aug. 17, 2006 Planning Comm'n minutes).

and stressing the importance of "establish[ing] a record adequate for judicial review that is either for or against the rezoning."[13] Shannon then gave members a sample voting statement, which he had prepared to illustrate what should be in the record to avoid the error found in *O'Neill II.* The procedure was simple: each member was instructed to "vote *for* or *against* the rezoning based on whether they *agree[d]* or *disagree[d]* with the [proposed] findings of fact."[14] Although members apparently did not engage in substantive discussion about whether the Parcel should be rezoned,[15] they were not in the dark as to what facts the Applicants found important. Proposed findings of fact supporting the rezoning, prepared by the Applicants' counsel, had been distributed—whether purposefully or inadvertently, it is not clear—to members during the executive session.[16]

When the Planning Commission reconvened in public session, members were given a presentation by Forsten, Applicants' counsel, on the proposed findings of fact. In general, Forsten's presentation tracked the proposed findings of fact, focusing on four themes: rezoning to C-3 conformed with the Town's Comprehensive Plan; traffic concerns had, for the most part, already been resolved; a Preliminary Land Use Service ("PLUS") review was not required; and the State's assessment of the Parcel as an "excellent water recharge area" did not preclude

[13] *Id.* Ex. 11 (Aug. 17, 2006 Planning Comm'n executive session minutes).
[14] *Id.* (emphasis added).
[15] *Id.*; Pierce Dep. at 75, 78; Chillas Dep. at 43, 69.
[16] *See* Chillas Dep. at 52–54.

rezoning.[17] Forsten also informed the Planning Commission that "the merits of the earlier rezonings ha[d] not been successfully challenged nor questioned."

The proposed findings of fact were eventually read into the record after a motion by one of the Planning Commission members, David Chillas, to recommend that the Mayor and Council approve the ordinance based on the findings. Public comment followed, and the O'Neills' attorney voiced opposition on the basis that there were outstanding traffic and environmental problems.[18] In response, Forsten noted, among other things, that the Comprehensive Plan did not identify the Parcel as an environmentally sensitive area and reiterated the Court's earlier reaction that commercial use of the 98-acre Parcel "ma[de] sense."[19] One member of the Planning Commission would later comment that the information presented and public comments made at the August 17 Planning Commission were not surprising; he had heard "[b]asically the same" arguments for and against rezoning the Parcel as he had during the two previous times.[20] Unanimously, the Planning Commission voted to recommend that the Mayor and Council approve

[17] DOB Ex. 12 (Aug. 17, 2006 Planning Comm'n minutes); *id.* Ex. 15 (Proposed Findings of Fact).
[18] *See id.* Ex. 12 (Aug. 17, 2006 Planning Comm'n minutes).
[19] *Id.*; *O'Neill II*, 2006 WL 2041279, at *7; *O'Neill I*, 2006 WL 205071, at *37.
[20] Chillas Dep. at 84.

the rezoning ordinance—and each member read verbatim from the sample voting statement that Shannon had prepared.[21]

3. The Council Conducts a Public Hearing, Meets in Executive Session, and Ultimately Approves the Ordinance

With the Planning Commission's approval, the ordinance needed to pass one more hurdle: the Council. On September 11, 2006, two months after the Court's decision in *O'Neill II*, the Mayor and Council convened a regularly scheduled meeting to consider once again the Parcel's rezoning. In accordance with the Town's Charter, copies of the ordinance were posted in five public places around the Town—the Town Hall, the Post Office, two supermarkets, and one convenience store—before to the meeting.[22]

Shortly after the Mayor and Council convened the public hearing, they conducted an executive session for the stated reason of "legal and personnel issues."[23] The O'Neills' previous two suits—and the prospect of a third suit—figured prominently in the decision to meet outside of public view. The minutes of

[21] Each member of the Planning Commission stated that the Mayor and Council should rezone the Parcel "for the reasons stated in the Proposed Findings of Fact" and because rezoning from MI to C-3 "[was] consistent with the Town's Comprehensive Plan." *See* DOB Ex. 12 (Aug. 17, 2006 Planning Comm'n minutes); *id.* Ex. 13 at 58–60 (Aug. 17, 2006 Planning Comm'n Tr.).
[22] *Id.* Ex. 36 at § 8 ("No ordinance . . . shall be passed by Council . . . unless such ordinance has been introduced at some previous regular meeting and copies thereof posted in five public places in said Town, at least ten days before final action of the Council thereon."). Copies of the ordinance were posted on August 28, 2006. *Id.* Ex. 18 (Rae Teel Aff. of Publication).
[23] *Id.* Ex. 21 (Sept. 11, 2006 Council minutes); *id.* Ex. 19 (Sept. 11, 2006 Council agenda).

the executive session indicate that counsel advised the Council on the "proper procedures to follow concerning the creation of an adequate record for judicial review [on] a vote for or against the rezoning of the property in the event [the Plaintiffs' counsel] files against the rezoning again." The procedure outlined was simple: the findings of fact would be read into the official record; after the Mayor's motion on the ordinance based on the findings of fact, members of the Council would decide whether to "vote for or against the rezoning"; and, however they decided, they would express their reasons and establish an adequate record by reading from the voting statement "script" that had been prepared by Shannon. Shannon also reminded Council members that the vote on the proposed rezoning was not a vote for or against Wal-Mart, but a vote on whether the Parcel should be rezoned to C-3.[24]

When the public meeting reconvened, some concerns were aired by residents and those in attendance that the Council had met in executive session, but both the Mayor and the Town's Solicitor responded that the executive session had been planned and noticed on the meeting's agenda. Furthermore, it was emphasized that no conclusions had been made during the executive session and the merits of the rezoning had not been discussed.[25]

[24] *Id.* Ex. 20 (Sept. 11, 2006 Council executive session minutes).
[25] *Id.* Ex. 21 (Sept. 11, 2006 Council minutes).

The rezoning of the Parcel eventually came before the Council. The Mayor first read a statement, which he explained was necessary because of the new procedure that had been adopted post-*O'Neill II*:

> There are some things that we can be doing better and as you've seen over the last couple of months, we are taking the necessary steps to make those improvements.
>
> You are aware of the lawsuit that was filed over our rezoning of the Kohl Property earlier this year. The Court found that we did not do anything wrong, but that we did not make a clear enough record to allow someone attending the meeting or reviewing the minutes to understand why each of the Council members voted in the way that they did. . . . [W]hen casting their vote on a rezoning or land use plan application, [members] will be asked to state the reason for their vote.
>
> Because tonight will be the first time that we are doing this, written voting statements have been prepared that give each Council member an option to vote either for, or against, the zoning and land use applications being heard.
>
> No one up here knows how any other Council member is planning to cast their vote, and no one has told us how to vote.
>
> What we have is a text that will support either for or against the application and which provides the record necessary for anyone reading the minutes to understand the reason behind each Council member's vote.
>
> You are free to take a look at these papers to see for yourself what they say. . . .
>
> There are reasons for which we can grant applications, and there are reasons why we can deny them, but those reasons must be found first and foremost in the Town's Zoning Code and Subdivision Regulations, as well as the Town's Comprehensive Plan. . . .
>
> What each Council member has before them is a statement that says: 'After the motion, presentation application and public hearing, to cast your vote FOR the Rezoning: I vote yes on the motion to rezone the parcels from MI to C-3 for the reasons stated in the Findings of Fact and Recommendations made by the Planning and Zoning Commission and because I find that rezoning the parcels from MI to C-3 is consistent with the Town's Comprehensive Plan.'

If you vote no, you do so because you think they do not.[26]

Following the Mayor's statement, the Planning Commission's Findings of Fact and Recommendations were read into the record by the Town's Solicitor. The Applicants' counsel then delivered a presentation, reiterating many of the points found by the Planning Commission. A representative of the O'Neills then objected to the ordinance on the grounds that the rezoning would not protect the health, safety, and welfare of the community and, more specifically, that the Parcel had not been subject to a PLUS review and that necessary transportation infrastructure improvements would not be timely funded. Several residents also voiced concerns, ranging from whether the Council members had already made up their minds, to whether Wal-Mart offered its employees a sufficient health plan, to whether the Delaware Department of Transportation ("DelDOT") had sufficient funding to make contemplated road improvements.[27]

In the end, the motion to approve the rezoning of the Parcel from MI to C-3 passed unanimously. As instructed, each member of the Council used the voting statement to explain the reasoning for his or her vote. Thus, the members, as they voted in the affirmative, stated that they were doing so "for reasons stated in the Findings of Fact and recommendations" made by the Planning Commission and because "rezoning from M-I to C-3 [would be] consistent with the Town's

[26] *Id.*
[27] *Id.*

Comprehensive Plan."[28] Members' reasons, however, were not limited to those contained in the voting statement. One member of the Council added that "[the rezoning] will also bring jobs to the region." Another commented that "the future plan for [the Parcel] is a much-needed addition to the Town of Middletown." And another member was moved by the "jobs and things that will be coming to that area."[29]

On September 12, 2006, the day after the Council unanimously approved rezoning the Parcel from MI to C-3, the Mayor signed the ordinance into law.[30] The O'Neills brought this action a month later.

III. CONTENTIONS

The Plaintiffs argue that the Town's most recent attempt to rezone the Parcel from manufacturing-industrial to commercial use was invalid for both procedural and substantive reasons. Procedurally, the Plaintiffs challenge the Town's decision not to subject the Parcel to another PLUS review and allege that the rezoning was invalid because no written ordinance had ever been introduced, considered, or voted upon by the Council. Their most significant procedural challenge, however, centers on violations of FOIA. The Plaintiffs argue that the Town held executive sessions on "legal" matters that went beyond what is permitted under FOIA and

[28] *Id.*
[29] *Id.*
[30] *Id.* Ex. 25.

did so in order to assure approval of the rezoning ordinance. Furthermore, they assert that the Town violated FOIA by inadequately describing the purposes for the executive sessions on meeting agendas and for failing to keep contemporaneous minutes of these sessions. Substantively, the Plaintiffs contend the rezoning was arbitrary and capricious, and therefore, invalid, because the Town ignored information originating with DelDOT and the Delaware Department of Natural Resources and Environmental Control ("DNREC") as to the rezoning's effect on traffic safety and environmental conditions.

IV. ANALYSIS

A. *Standard Applicable on Cross-Motions for Summary Judgment*

The parties' cross-motions for summary judgment are governed by Court of Chancery Rule 56. To prevail under this familiar standard, each moving party must demonstrate that there are no genuine issues of material fact and that each party is entitled to judgment as a matter of law."[31] When deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that no material question of fact exists.[32] A party opposing such a motion, however, "may not rest upon mere allegations or denials of [its] pleading, but . . . , by

[31] Ct. Ch. R. 56(c).
[32] *See Advanced Litig., LLC v. Herzka*, 2006 WL 2338044, at *4 (Del. Ch. Aug. 10, 2006); *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

affidavit or otherwise . . . must set forth specific facts showing that there is a genuine issue for trial."[33] Summary judgment will not be granted, however, when the record reasonably indicates that a material fact is in dispute or "if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[34]

B. *Alleged Violations of FOIA*

1. The Minutes of the Executive Sessions

The Plaintiffs challenge the validity of the Parcel's rezoning based on several violations of FOIA. One of the alleged violations concerns whether minutes of the three executive sessions held by the Council and Planning Commission were maintained.[35] The Plaintiffs have alleged that they were not.[36] In addition, they assert that Deputy, the Town's Manager, spoliated evidence

[33] Ct. Ch. R. 56(e).

[34] *Lillis v. AT&T Corp.*, 2006 WL 3860915, at *1 (Del. Ch. Dec. 21, 2006) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)). Because the O'Neills have argued, albeit unpersuasively, that factual issues exist, the Court is precluded from relying on Court of Chancery Rule 56(h), which treats cross-motions for summary judgment in the absence of identified factual issues as the practical equivalent of a stipulation for decision on the merits based on the record submitted. *See, e.g.*, *Union Oil Co. of Ca. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *9 n.37 (Del. Ch. Dec. 15, 2006); *Town of S. Bethany v. Nagy*, 2006 WL 1451528, at *1 (Del. Ch. May 12, 2006); *Chambers v. Genesee & Wyoming Inc.*, 2005 WL 2000765, at *5 n.21 (Del. Ch. Aug. 11, 2005) ("Because both sides have alleged that there are outstanding issues of fact material to the resolution of the other's motion, Rule 56(h) does not apply by its own terms.").

[35] The pertinent executive sessions were held on August 7 and September 11, 2006, by the Council, and on August 17, 2006, by the Planning Commission.

[36] *See* Am. Compl. ¶ 38.

when, after preparing written minutes, he discarded handwritten notes he had taken during executive sessions.

By Section 10004(f) of Delaware's "sunshine law," "[e]ach public body shall maintain minutes of all meetings, including executive sessions . . . and shall make such minutes available for public inspection and copying as a public record." Given the undisputed record, the Court concludes that this statutory mandate was satisfied; the Town has already produced the minutes pertaining to the three executive sessions.[37] Yet, the O'Neills contend that the Town still violated FOIA because Deputy destroyed his handwritten notes from the executive sessions he attended.

One of Deputy's responsibilities was to draft minutes of executive sessions, and his practice was, first, to take handwritten notes during the executive sessions and, then, to reduce the notes to typed minutes.[38] Once typed, and provided there was no further need, Deputy would then dispose of the handwritten notes.[39] He continued this practice for the three pertinent executive sessions.

The Court declines the O'Neills' invitation to apply the spoliation of evidence doctrine to Deputy's conduct because that doctrine is not relevant to the question before the Court: whether the Town satisfied its statutory obligations to

[37] *See* DOB Exs. 6, 11 & 20.
[38] *See* Deputy Dep. at 54–55; Teel Dep. at 14.
[39] *See* Deputy Dep. at 37.

maintain minutes of its executive sessions. Contrary to the O'Neills' understanding,[40] the FOIA does not require preservation of contemporaneous handwritten notes or minutes of an executive session. Instead, it requires a public body both to keep minutes of executive sessions and to make them available for public inspection. The record reflects that the Town did both; the typing of handwritten notes does not thwart the legislative policy. In short, there is no genuine issue of material fact. Accordingly, the Plaintiffs' claim that minutes of the executive sessions had not been kept fails.

2. The Stated Reasons for the Executive Sessions

The Plaintiffs also contend that rezoning is invalid because the Town failed to describe adequately the purposes for its executive sessions on posted meeting agendas and, consequently, misled the public.[41]

Section 10004(c) of FOIA establishes that when a public body elects to hold executive sessions, "[t]he purpose of such executive sessions shall be set forth in the agenda" and limited to the purposes permitted by FOIA. *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board* teaches that, because executive sessions must be the exception and not the rule, the FOIA "requires the public body to inform the public in the notice of the executive session

[40] *See* Pls.' Opening Br. at 41 (arguing that "the Town never actually kept contemporaneous Minutes of the Executive Sessions as required by FOIA").
[41] *Id*. at 42-43; *see also* Am. Compl. ¶ 38.

of its precise reason or reasons for convening in private."[42] A general listing of several of the potential grounds for an executive session provided for in § 10004(b), however, would contravene the purpose of FOIA.[43] Thus, the Court must look to whether the Council and the Planning Commission provided specific and adequate reasons for entering into executive sessions.

For the executive sessions before the Court, three purposes were set forth by the Council and the Planning Commission, respectively. For the Council meeting of August 7, 2006, the agenda noted that an executive session would be held to discuss "Personnel & Legal Issues."[44] For the Planning Commission's meeting of August 17, 2006, the agenda noted that an executive session would be held for "Legal Issues."[45] Finally, for the Council's meeting of September 11, 2006, the agenda noted that the Council would enter executive session to consider "Personnel & Legal Issues."[46] The minutes of the three executive sessions all reflect that the Council or the Planning Commission engaged in discussion of legal issues relating to the Parcel.[47]

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[42] 1994 WL 274295, at *10 (Del. Ch. May 19, 1994).
[43] *Id.* (concluding that "[a] recital of several potential grounds for holding an executive session, concluding with a catch-all category such as 'any other purpose provided by law,' may have gratified a lawyer's instinct to 'cover all bases,'" but did not satisfy FOIA's requirement that "specific ground or grounds" be set forth).
[44] DOB Ex. 5.
[45] *Id.* Ex. 10.
[46] *Id.* Ex. 19.
[47] *Id.* Exs. 6, 11 & 20.

Although more precise reasons could have been offered by the Council and the Planning Commission, the reasons they did articulate on the agendas satisfy the FOIA. The statute requires public bodies to provide the reason for entering into an executive session, but that does not require public bodies to elaborate in great detail on agendas what legal, personnel, or other subjects are to be discussed.[48] Therefore, the Court concludes that there is no triable issue of fact regarding the sufficiency of the stated reasons for the executive sessions.

3. The Propriety of the Executive Sessions

A determination that a public body sufficiently noticed its intent to hold an executive session under FOIA does not confirm that the executive session itself was a proper one. The inquiries are separate. Having concluded that the Town set forth adequate reasons on its agendas for the convening of executive sessions, the Court now turns its attention to the heart of the parties' dispute: whether the Town engaged in illegal executive sessions.

The FOIA codifies the general rule that meetings of public bodies are to be conducted in public.[49] The statute is premised on the fundamental proposition that

[48] *Cf. Common Cause of Del. v. Red Clay Consol. School Dist. Bd. of Educ.*, 1995 WL 733401, at *3-*4 (Del. Ch. Dec. 5, 1995); *see also* Op. Atty. Gen. No. 05-IB26, 2005 WL 3991284 (Del. A.G.), at 5 (opining that agenda reference to "Personnel & Legal Issues" provided "adequate notice under FOIA of the intent to hold an executive session and the matters to be discussed in executive session"); Op. Atty. Gen. No. 02-IB12, 2002 WL 1282812 (Del. A.G.), at 1-2 (opining that agendas for two executive sessions pertaining to "Executive Session to Discuss Personnel" had satisfied "FOIA's generalized requirements for an agenda").

[49] 29 *Del. C.* § 10004(a).

open and public meetings enable citizens to monitor the workings of their government.[50] In some circumstances, however, and in the context of certain subject matter, a public body may depart from the general rule and convene in private.[51] One of these exceptions is for "[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to . . . pending or potential litigation."[52]

On August 7, 2006, members of the Council convened an executive session for the purpose of receiving legal advice following this Court's invalidation of the Town's second rezoning attempt. Advice focused on what the Council would have to do to ensure that a future rezoning attempt complied with Delaware law; more

[50] *See* 29 *Del. C.* § 10001; *see also Del. Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984) (recognizing that open meetings laws ensure governmental accountability and also serve as an "acknowledge[ment] that public entities, as instruments of government, should not have the power to decide what is good for the public to know") (citation omitted); *Reeder v. Del. Dept. of Ins.*, 2006 WL 510067, at *12 (Del. Ch. Feb. 24, 2006) ("FOIA's purpose is to enable citizens to see their government do business and to obtain access to public records. By these measures, it is hoped that more public-regarding decisions will be made, as public officials will know that the public can scrutinize their actions and hold them accountable through the various means afforded in our republican form of democracy.").

[51] But even where a public body convenes in private, there are certain "safeguards" designed to ensure that the public is not left "in the dark." *See Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10 (Del. Ch. May 19, 1994), *reh'g denied*, 1994 WL 274308 (Del. Ch. June 10, 1994). For example, FOIA demands that timely and adequate notice be provided to citizens for when and why an executive session is being held and also restricts public bodies from venturing into discussion of topics outside of the executive session's declared purpose.

[52] 29 *Del. C.* § 10004(b)(4).

specifically, Shannon advised the Council on how it could "create an adequate record for a decision for or against the pending rezoning of the Kohl property."[53]

The roadmap that Shannon provided the Council was, the Plaintiffs argue, more than enough.[54] But two other executive sessions were held—and these sessions, they argue, went beyond what FOIA permits. On August 17, 2006, the Planning Commission convened an executive session to review *O'Neill II* and was advised by Shannon that findings of fact would be introduced into the record and that each member "should vote for or against the rezoning based on whether they agree[d] or disagree[d] with the findings." Members were also given a document upon which they could rely during the public hearing.[55] And, on September 11, 2006, Council members held another executive session to consider how to create a legally sufficient, adequate record. The minutes of that meeting reflect that Shannon advised members that they should read the prepared voting statement to express their support for or opposition to the rezoning and that Wal-Mart's business practices should have no bearing on the decision to rezone the Parcel.[56] The prospect of another suit by Plaintiffs' counsel loomed large during that

[53] DOB Ex. 6 (Aug. 7, 2006 Council executive session minutes).
[54] Accordingly, the Plaintiffs have not challenged the propriety of the August 7, 2006, session and the Court need not consider it. *See* Pls.' Opening Br. at 44-45.
[55] DOB Ex. 11 (Aug. 17, 2006 Planning Comm'n executive session minutes).
[56] *Id.* Ex. 20 (Sept. 11, 2006 Council executive session minutes).

executive session.[57] Given the two previous challenges by the O'Neills, Council members reasonably expected that, with a third rezoning attempt, a third suit would soon follow. Accordingly, they sought Shannon's legal advice before resuming the public hearing on September 11, 2006.[58]

Legal strategy sessions are, of course, an enumerated exception to the requirement for open meetings, but Delaware's statute contains a strong qualifier to the exception's application: "*but only* when an open meeting *would* have an adverse effect on the bargaining or litigation position of the public body."[59]

Section 10004(b)(4)'s quoted language is the product of extensive revisions of FOIA by the General Assembly in 1985. A central purpose of the revisions was to "limit[] the available grounds for an executive session."[60] Thus, given the General Assembly's intent that an executive session be the exception and not the

[57] Thus, Shannon's legal advice was "with respect to . . . potential litigation." *Id.* (noting that discussion turned to the process in which an adequate record for judicial review was to be created by the Council "in the event Mr. Abbott files against the rezoning again").

[58] *See, e.g.*, McGhee Dep. at 30–31 ("We needed guidance because we h[ad] lost . . . two or three cases before concerning this property. So we needed some guidance. Even though I knew where I wanted to go, I still needed guidance from counsel.").

[59] 29 *Del. C.* § 10004(b)(4) (emphasis added). Many states have a similar exception—*see, e.g.*, MASS GEN. LAWS ch. 39, § 23B(3) (2006) ("To discuss strategy with respect to . . . litigation if an open meeting *may* have a detrimental effect on . . . [the] litigating position of the governmental body . . .") (emphasis added); N.Y. PUB. OFF. LAW § 105(1)(d)(2006)—but Delaware appears to have little, if any, company in restricting the use of legal advice-related executive sessions to those situations where a public body's litigation position would, as opposed to might, be harmed by an open meeting.

[60] Synopsis, House Bill No. 246 at 5, 133rd General Assembly (1985); 65 Del. Laws. c. 191; *see also Chemical Industry Council*, 1994 WL 274295, at *11.

rule, the Court must determine whether the Town can "justify its invocation of that exceptional procedure."[61] The record indicates that it cannot.

The Town argues that "[i]t was more than reasonable for the [Planning] Commission and Council to conclude, as they adjourned to executive session, that a discussion in public would hurt the Town's litigation stance."[62] That argument, however, is not accompanied by any explanation as to *how* the Town would be adversely affected. The Defendants draw the Court's attention to *Common Cause of Delaware v. Red Clay Consolidated School District Board of Education*,[63] a case in which the Court held that executive sessions by a school board were deemed proper in light of pending litigation involving the district and the public's intense interest and deep divisions on the issue of an open enrollment plan. They appear to argue that, as in *Common Cause*, residents of the Town were keenly interested in the rezoning ordinance and that there was much public scrutiny of the issue. The Court's conclusion in *Common Cause*, based on the specific facts and circumstances of that case, does not alter FOIA's requirement that a public body justify its determination that an open meeting would harm its litigation position. Reference to intense "public interest" or "public scrutiny" may be part of a public body's calculus, but it cannot serve as a dispositive guide to whether an executive

[61] *Chemical Industry Council*, 1994 WL 274295, at *11. Under FOIA, the burden of proof is on the public body to justify its decision to convene an executive session. 29 *Del. C.* § 10005(c).
[62] Defs.' Reply Br. at 20.
[63] 1995 WL 733401.

session is justified; otherwise, such an overly broad and poorly-defined metric could permit executive sessions to become less of an exception and more of the norm.

Furthermore, Section 10004(b)(4) contains no reference to a "reasonable belief" or "good faith belief" standard. Instead, Section 10004(b)(4) requires the Town to show how an open meeting *would* have had an adverse impact on its position. The standard is a high one and, given the General Assembly's intent in imposing it, the Court has no authority to deviate from it.

The Council's executive session of September 11, 2006, did not properly fall within § 10004(b)(4). The minutes reflect that members of the Council were briefed by Shannon on the proper procedures to follow in creating a legally adequate record for judicial review, but members had also received such advice during their executive session on August 7, 2006. Shannon also informed members of what had occurred at the most recent Planning Commission meeting, but it is unclear from the record why transmittal of this information could not have occurred in public and how disclosure of such information would have prejudiced the Town. Also, Shannon instructed Council members to read from voting statements when voting either for or against the rezoning. Members were reminded that the vote was about rezoning the Parcel to C-3, not the business practices of Wal-Mart. Again, nothing has been offered by the Defendants as to

how such information would have affected the Town's litigation position adversely. Much, if not all, of the discussion during the September 11, 2006, executive session should have taken place in the public hearing.[64] Accordingly, because of its failure to satisfy its burden under § 10005(c), the Court concludes that the Council engaged in an illegal executive session.[65]

With the finding that the Council's executive session of September 11, 2006, contravened the spirit and letter of FOIA, the Court must determine what remedy is appropriate. By § 10005(a), the General Assembly has empowered the Court to set aside "[a]ny action taken at a meeting in violation of [FOIA]."[66] In *Chemical Industry Council*, the Court concluded that the stern sanction of invalidation was

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[64] At its core, the legal advice given to the Council and to the Planning Commission was procedural in nature. It addressed the means of satisfying the obligation to set forth the basis for a rezoning decision. For this type of advice, it is not readily apparent why the public body's litigation posture would be harmed by public view. The public body's concerns about harm to its litigation position would be more readily discernable in the context of advice regarding, for example, a public works contract dispute where weaknesses in the public body's litigation position might be explored. In the present context, the "quasi-judicial" nature of the public body's function is consistent with the notion that providing the advice in an open meeting would not likely harm its position.

The test, of course, is not whether the Court, on review of what transpired during an executive session concludes that no harm would have resulted from disclosure of the lawyer-client communications that, in fact, occurred during the executive session. Instead, the Court must assess the reasonable expectations and concerns of the public body when the executive session was convened. That effort would be facilitated if the public body set forth its concerns at the time.

[65] Similarly, this analysis leads to the conclusion that the Planning Commission's executive session was also improper because no showing has been made as to how the Town's litigation position would have been affected if the Planning Commission had received legal advice in public.

[66] The language chosen by the General Assembly authorizes, but does not require, the Court to overturn the challenged action: "Any action taken at a meeting in violation of [FOIA] may be voidable by the Court of Chancery." 29 *Del. C.* § 10005(a).

the only appropriate remedy where there were material breaches of FOIA and where invalidation of the regulations would have no adverse consequences on innocent parties.[67] Critical to the Court's conclusion, however, was not simply that illegal executive sessions were held but that the Board had essentially promulgated the regulations outside of public view.[68] Although the regulations were formally approved in the Board's public meeting, they had been formulated, extensively deliberated upon, and agreed to in an executive session immediately preceding the public meeting.[69] That was not the case here.[70]

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[67] 1994 WL 274295, at *14-*15. The Court's decision in *Chemical Industry Council* was not without some pause. It recalled its prior recognition in *Ianni v. Dep't of Elections of New Castle County*, 1986 WL 9610 (Del. Ch. Aug. 29, 1986), that invalidation was a "serious remedy" and one that should not be employed absent a showing that a substantial public right had been affected. Moreover, the Court looked to distinguish the facts before it from those in *Levy v. Board of Education of the Cape Henlopen School District*, 1990 WL 154147 (Del. Ch. Oct. 1, 1990), where invalidating and enjoining a school district's fully implemented reassignment plan was deemed too draconian a remedy in light of the serious disruption it would cause to students and educational staff.

[68] *Chemical Industry Council*, 1994 WL 274295, at *14 ("Because most of the Board's deliberations on the proposed Regulations took place behind closed doors, the public had no opportunity to observe and monitor the Board's proceedings and to understand the basis for the Board's actions on a matter of public importance.").

[69] *Id.* at *4 ("During the June 9 executive session, the Board continued to discuss the proposed Regulations until a point was reached where a majority of the Board members supported a specific draft proposal. . . . The Board then resolved to move into public session to vote on those agreed-upon Regulations. . . . At the June 9 public session, . . . [n]o debate or discussion of those Regulations took place, and no changes were made to the proposed Regulations previously agreed to.") (internal citations omitted).

[70] As with the Council's adoption of the rezoning ordinance following a violation of the open meeting requirements of FOIA, the Planning Commission's favorable recommendation need not be invalidated, as an exercise of the Court's discretion in this context, because of, *inter alia*, the absence of both substantive (as opposed to procedural) discussion and any "action" taken during the improperly convened executive session.

Before the Court are minutes of each of the executive sessions. There is no reference to any discussion on the merits of the proposed rezoning from MI to C-3 or to any other matters that could be fairly deemed substantive in nature. What the minutes do reflect is that Planning Commission and Council members learned of the implications of the Court's ruling in *O'Neill II* and of the necessary procedural steps for creating an adequate record for judicial review. Their procedural duties were explained in the context of the pending application. Furthermore, nothing suggests that substantive deliberations had occurred or that something even akin to a "straw vote" had taken place.[71]

In short, there was no identifiable "action" taken during these executive sessions. The record does not support any reasonable inference that the executive sessions somehow made the outcome a foregone conclusion (or even more likely).[72] Thus, under these circumstances, the Court's discretion should not be exercised to return the Parcel to an industrial zoning classification.

[71] Substantive discussion appears to have been confined to the public hearing on September 11, 2006. *See* DOB Ex. 21 (Sept. 11, 2006 Council minutes), Exs. 22 & 23 (Sept. 11, 2006 Council Tr.).

[72] This was, after all, the third time for the same Council members to consider virtually the same rezoning of the Parcel. It should also be noted that, despite the O'Neills' general allegations that "pre-ordained bases [for the rezoning were] thrust upon [members of the Planning Commission and Council] by [the Town's] legal counsel," Pls.' Reply Br. at 3, or that the Town's "legal counsel hijacked the Executive Sessions in order to set forth a plan of action which assured a positive outcome [for] the developer," Pls.' Opening Br. at 49, there is no factual basis to suggest that the decision to rezone the Parcel was anything but the considered judgment of elected officials.

C. *The Existence of a Written Ordinance*

The Court is also urged to declare the Parcel's rezoning invalid because, the Plaintiffs allege, no written ordinance in "final form" was ever introduced, considered, or voted upon by the Council.[73] They argue that it was not until September 12, 2006—one day after the Council's vote—when municipal staff printed the ordinance and when the Mayor signed and dated it. Thus, two issues face the Court: (1) the procedural requirements that the Town had to satisfy in order to properly pass the ordinance and (2) whether those requirements were met by the Town.

Delaware courts expect zoning authorities to strictly comply with procedural requirements governing the approval of land use decisions. In both *Green v. County Council v. Sussex County*[74] and, more recently, *Fields v. Kent County*,[75] the Court recognized that, because counties and other municipalities may only regulate land use in accordance with a delegation of authority by the General Assembly, nothing less than full compliance with the conditions imposed on the exercise of that power is sufficient. For counties, Delaware statutory law requires that

[73] Pls.' Opening Br. at 37; Am Compl. ¶ 11.
[74] 415 A.2d 481, 483 (Del. Ch. 1980) (invalidating a county's zoning amendment for, among other reasons, the county's failure to reduce the amendment to writing prior to its enactment and for not advertising the amendment in the manner required under state law).
[75] 2006 WL 345014, at *3 (Del. Ch. Feb. 2, 2006) (invalidating a county's amendment of its comprehensive plan where the amendment had been improperly approved by resolution and not, as required by state law, an ordinance).

"[e]very proposed [county] ordinance shall be introduced in writing and in the form required for final adoption."[76] There is no such statutory requirement, however, for municipalities.[77] Thus, the Court must look to the Town's Zoning Code and its Charter.

The Town's Zoning Code is silent on the procedure for adopting ordinances.[78] It does highlight the procedures to amend existing zoning regulations, but it offers no insight into whether a written ordinance in "final form" must be produced before its enactment. The Town's Charter does, however, speak to the issue of ordinances. Section 8 provides, in pertinent part, that:

> No ordinance, except in cases of emergency, shall be passed by Council other than at a regular meeting; nor unless such ordinance has been introduced at some previous regular meeting and copies thereof posted in five public places in [the] Town, at least ten days before final action of the Council thereon.[79]

Missing from the Charter's language is any reference that would support the Plaintiffs' argument that some final, written form of ordinance was required. What is required is that (1) the ordinance be introduced at a prior Council meeting, (2) copies of the ordinance be posted in five public places in the Town, and that (3)

[76] 9 *Del. C.* § 4110(h)(i)(1) (Kent County); 9 *Del. C.* § 1152(a) (New Castle County); 9 *Del. C.* § 7002(m)(1) (Sussex County).
[77] *See* 22 *Del. C.* ch. 3.
[78] *See* Pls.' Opening Br. Ex. 46 (Town of Middletown Zoning Code).
[79] DOB Ex. 36 (Town of Middletown Charter).

such posting be at least ten days before final action is taken on the ordinance. All three requirements appear to have been satisfied.

On August 7, 2006, before the Council meeting later that day, a copy of the ordinance had been sent electronically by Shannon, the Town's counsel, to Deputy, the Town's Manager.[80] The ordinance had also been e-mailed to Teel, an administrative assistant. The Defendants admit that the ordinance was not in "final form." A reference to the date of passage had been left blank and three references to the Planning Commission's recommendation, the Council's determination, and the Council's ultimate action (none of which was actually known then), were drafted to reflect the outstanding choices that were to be made (*i.e.*, whether the Planning Commission would "recommend" or "not recommend" the rezoning, whether the Council would determine that the Parcel "should" or "should not" be rezoned, and whether the lands "are" or "are not" rezoned by the ordinance).[81] Perhaps understandably, these "either/or" options were meant to avoid any suggestion that the outcome of the votes on the ordinance had been preordained. In any event, the ordinance, which existed in electronic form, was formally introduced at the August 7, 2006, meeting.

The Plaintiffs contend that the Defendants are "attempt[ing] to rewrite history by asserting that a draft ordinance which sat in an electronic mailbox in the

[80] *See* DOB Ex. 8.
[81] *Id.* Ex. 9.

Town's computer system can somehow be magically transmuted into a final, written ordinance."[82] In so doing, they ignore an important fact: on August 28, 2006, pursuant to its Charter, the Town caused the ordinance to be physically posted in five public places.[83] These postings, quite obviously, were in written form.

In short, the Plaintiffs' claim that the rezoning is invalid because of the Town's failure to reduce the ordinance to final written form is groundless. The undisputed facts do not allow for any inference other than a conclusion that the Town complied with the mandate of its Charter. There is no evidence that members of either the Council or the Planning Commission were prevented from obtaining a written ordinance or that members of the public were not sufficiently put on notice of the ordinance, which was slated for final action on September 11, 2006.

D. *Challenging the Zoning's Validity for Lack of a PLUS Review*

The Plaintiffs also assert that the Town's third rezoning attempt is invalid because it was never preceded by a PLUS review. Under Delaware law, local land

[82] Pls.' Opening Br. at 2.
[83] *See* DOB Ex. 8.

use planning actions, such as certain kinds of rezonings, are subject to a pre-application review process whereby an applicant is required to respond in writing to comments made by the Office of State Planning Coordination ("OSPC").[84] Although the Parcel had undergone a PLUS review back in late 2004,[85] it had not been the subject of another review following the Court's decision in *O'Neill II*. The Plaintiffs cite this undisputed fact as fatal to the validity of the Town's third rezoning ordinance. The Court disagrees.

In *O'Neill I*, the Court addressed the issue of standing within the context of Delaware statutes providing for a pre-application review and comment process. There, the Court held that no private right of action exists where plaintiffs are asserting that private defendants failed to respond to comments reported by the OSPC as part of a PLUS review under 29 *Del. C.* ch. 92.[86] In explaining its decision, this Court recognized that:

> The purpose underlying [29 *Del. C.*] § 9204(d) is to encourage compliance with OSPC recommendations and to aid the state and the municipalities in discovering whether such compliance has occurred and, if not, why not. The intended beneficiary of the statute is the government, not the private plaintiffs. The clear text of the statute may only be read to create a right in the divisions of government that are to receive the required reports. . . . [E]ven assuming, *arguendo*,

[84] *See* 29 *Del. C.* §§ 9203 & 9204(c).
[85] In October 2004, the OSPC summarized comments from state agencies that had reviewed the Parcel. *See* DOB Ex. 40. Almost two years later, in late June of 2006, the Town was notified by OSPC that it was not required to undergo another review. *See id.* Ex. 41 ("This project is not required to be reviewed through PLUS again. The PLUS review does not expire. The comments in our letter dated October 8, 2004 still stand.").
[86] *O'Neill I*, 2006 WL 205071, at *37.

> that such a right were to exist, no plausible argument can be made that the statute's language and context evinces an intent to create a private enforcement *remedy* in the Plaintiffs.[87]

The Plaintiffs argue that another PLUS review was necessary because the third rezoning request was a new application and because "significant changes in road safety and capacity issues in the ensuing two years militat[ated] in favor of a new review."[88] This may be true, but it does not address the issue of whether the Plaintiffs have standing to bring a challenge based on an apparent failure to submit the rezoning effort to another administrative review. It was the OSPC's determination in June of last year that no further PLUS review was necessary. As noted in *O'Neill I*, the PLUS review process exists for the benefit of the government, and not for the O'Neills as private plaintiffs. Accordingly, the Court rejects the Plaintiffs' claim that the third rezoning was invalid for lack of another PLUS review as a matter of law.

E. *Substantive Challenges to the Parcel's Rezoning*

The O'Neills also challenge the rezoning ordinance on substantive grounds, arguing that the Town arbitrarily and capriciously approved the rezoning without regard to countervailing evidence of outstanding traffic and environmental impact problems. In so doing, they bear a heavy burden of rebutting the presumption of

[87] *Id.*
[88] Pls.' Opening Br. at 30.

validity the Court affords to zoning decisions reasonably related to the public health, safety, or welfare.[89] Only where the challenged decision is not even "fairly debatable" will the Court substitute its judgment for that of a zoning authority.[90] Therefore, it follows that "disagreement as to the wisdom of the [zoning decision]" is insufficient alone to thwart "the duty of courts to affirm" the zoning authority's judgment.[91]

First, the O'Neills cite the unsafe traffic conditions that would result from the rezoning to C-3 (*i.e.*, roadway segments and intersections not being able to handle the increased traffic from the proposed Wal-Mart development on the Parcel). In specific, they point to the Westown Circulation Concept Plan, which called for approximately $35 million in traffic improvements in anticipation of rapid growth in new housing and commercial, office, and industrial space on the west side of the Town.[92] The plan, which was prepared on behalf of DelDOT in June 2005, faced a financial roadblock: DelDOT would later acknowledge that it lacked the resources to implement it and that funding had not yet been secured for

[89] *Tate*, 503 A.2d at 191 (stressing that the burden of rebutting the Court's presumption of validity is on the opponent to the rezoning). In part, judicial deference is given because zoning is essentially a "legislative function." A court's deference, however, is not without some limitation. In *Tate*, the Delaware Supreme Court acknowledged that a zoning decision also "resembles a judicial determination" and, accordingly, "must be supported by a record sufficient to withstand judicial challenge." *Id.*
[90] *Id.*
[91] *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971).
[92] *See* DOB Ex. 16.

the fiscal year beginning July 1, 2006. This, the O'Neills assert, was a fact that the Council could not ignore and, accordingly, the decision to rezone was not a "fairly debatable" one.

No evidence, however, was provided by the O'Neills to suggest that traffic conditions under a C-3 classification would be worse than under an MI classification. Given the highly deferential treatment the Court gives to zoning decisions, the Court cannot overturn an ordinance simply because there is evidence that a traffic plan has yet to receive funding. After all, the lack of funding did not preclude DelDOT in June 2006 from issuing a "no objection" letter to the entrance location of the Parcel's proposed development project.[93]

Second, the O'Neills petition the Court to question the Council's judgment because it ignored the Parcel's status as an "excellent water recharge area" under the Source Water Protection Program. As such, under guidelines adopted by DNREC, no more than 50% of the area can be "impervious cover" development. A rezoning to C-3, however, would permit up to 80% of new development to be impervious cover, whereas a MI rezoning would keep the limit at 50%. Thus, proposed development could exceed DNREC's guidelines by 30% and this, the

[93] *Id.* Ex. 43. Furthermore, the O'Neills have not contended that the Parcel's rezoning was inconsistent with the Town's Comprehensive Plan. *See* 22 *Del. C.* § 702(d) (prohibiting development inconsistent with a municipality's comprehensive plan).

O'Neills argue, illustrates how the ordinance is not tied to the health, safety, and welfare of the community.

Again, however, the O'Neills' concerns, while perhaps valid, are not accompanied by record evidence that would push the Council's approval of the ordinance beyond what the Court can conclude is fairly debatable. DNREC's guidelines are precisely that—guidelines. They do not prohibit rezoning to C-3. Indeed, no Delaware statute does. Furthermore, under the State law that created the Source Water Protection Program, county and municipal governments are required to adopt regulations governing the use of land within such areas to ensure that overall water quality is maintained.[94] The regulations need not be adopted, however, until December 31, 2007.[95]

The Council did not enact this ordinance blindly. It was aware that several other parcels of land within the State-designated "excellent water recharge area" had already been subject to impervious cover development restrictions. In its considered judgment, the Town concluded that these protections were sufficient and a rezoning of the Parcel to C-3 would not jeopardize the overall water quality of the western portion of the Town. Absent some basis to doubt the appropriateness of giving deference to the Town's zoning decisions, the Court will

[94] *See* 7 *Del. C.* § 6082(b).
[95] *Id.*

not disturb the rezoning and will grant summary judgment in the Defendants' favor.

V. CONCLUSION

The decision to rezone may be based on a multitude of considerations: the need to conform a parcel to a municipality's comprehensive plan, the need to address expeditiously changes in a community, or the collective desire to attract a certain kind of development, to name a few.

Because a municipality enjoys considerable deference in the exercise of its land use authority, the scope of a court's review is, necessarily, limited. And it should be. Courts are neither charged with, nor competent at, conducting a wholesale assessment of the particular merits of a land use decision.

Judicial deference, however, is conditioned on the unobtrusive requirement that a municipality provide a reviewing court with an adequate basis for its decision. In *O'Neill II*, the Court noted that "zoning authority members might gain assurance from providing answers to the following two questions when considering a rezoning application: (1) what supportable findings of fact are made with respect to the rezoning; and (2) how do those findings of fact relate to and further the public health, safety, and/or welfare?"[96] The Court is satisfied that the Town has addressed both. It approved a rezoning of the Parcel from MI to C-3

[96] *O'Neill II*, 2006 WL 2041279, at *8.

based on the Planning Commission's Findings of Fact and because the rezoning was consistent with the Town's Comprehensive Plan. The O'Neills even acknowledge that the Town's findings of fact were not wholly inaccurate.[97] They may disagree with some of the findings, but that is not enough to invalidate a decision. In short, the O'Neills have failed to offer any record evidence that would rebut the presumption of validity that, under *Tate v. Miles*, this Court must accord to zoning decisions reasonably related to the public health, safety, or welfare.

Therefore, for the foregoing reasons, the Defendants' motion for summary judgment is granted, and Plaintiffs' cross-motion for summary judgment is denied.[98] An order implementing this Memorandum Opinion will be entered.

[97] Pls.' Answering Br. at 45 (". . . at least some of the Proposed Findings of Fact were clearly true . . ."); Pls.' Reply Br. at 14 ("There were at least some accurate statements contained in the developers' 'Findings of Fact.'").

[98] The O'Neills filed their Second Amended Complaint on February 1, 2007, to assert claims that the subdivision and land development approvals by the Town on December 6, 2006, were invalid because they were based on an invalid rezoning. Having concluded that the Council's decision to rezone the Parcel should not be set aside, the O'Neills' additional claims, as framed by Counts V and VI of their Second Amended Complaint, fail as a matter of law.