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Re: Hansen v. Kent County
C.A. No. 2288-VCN
Date Submitted: January 8, 2007

Dear Counsel:

On February 2, 2006, this Court set aside the rezoning by Defendant Kent County (the "County")[1] of a parcel on the east side of U.S. Route 13, near

[1] The governmental defendants are the County and its governing body, the Kent County Levy Court (the "Levy Court"). They are sometimes referred to collectively as the "County."

Cheswold, in Kent County, Delaware because the approval was accomplished by resolution and not by ordinance.[2] Thereafter, the rezoning application was considered and approved again.[3] Neighbors again sought judicial review.[4] Before the Court are cross-motions for summary judgment.

Defendant Cheswold Village Properties, LLC (the "Owner") owns a tract of 57.23 acres (the "Property") near Cheswold. It desires to develop 33.52 acres of the Property as a commercial center to be known as Cheswold Village. The Property, until rezoning, was a combination of BG (Business General), AC (Agricultural Conservation), and IL (Light Industrial) zoning classifications. In addition to seeking a rezoning of 28.4 acres—some from AC, but most from IL, to BG, the Owner also needed a revision of the County's Comprehensive Plan to accommodate the proposed commercial use.

[2] *Fields v. Kent County*, 2006 WL 345014 (Del. Ch. Feb. 2, 2006). Also set aside was a related amendment to the County's Comprehensive Plan.
[3] The Comprehensive Plan was also amended again to allow for the rezoning.
[4] The Plaintiffs are Jeffrey Hansen, Lauran Hansen, Howard Widdoes, and Helen Knight, all of whom reside in close proximity to the rezoned lands.

When the matter came before the Levy Court following the Court's decision invalidating the first attempted rezoning, an ordinance was introduced,[5] and the Owner's application was again referred to the Regional Planning Commission which held a public hearing, considered opposition from the neighbors, including the Plaintiffs, and, a week later at its business meeting, recommended approval of both the rezoning and amendment of the Comprehensive Plan.

The Levy Court then held a public hearing on April 25, 2006, on the Comprehensive Plan amendment and the proposed rezoning; the Plaintiffs, with their counsel, and other neighbors appeared in opposition. Among the concerns expressed by the neighbors were (1) the need for another review by the Office of State Planning Coordination ("OSPC") and (2) the sufficiency of the traffic impact study (the "TIS") conducted at the behest of the Delaware Department of Transportation ("DelDOT"). After the public hearing record was closed, the Levy Court voted to table the ordinance. One member of the Levy Court wanted to confirm that the OSPC saw no need for additional State review or input. The Levy

[5] App. to Pls.' Opening Br. Ex. 4.

Court announced that the rezoning would be considered at its next regularly scheduled meeting in four weeks. At that meeting, on May 23, 2006, as prophesied, the Levy Court voted on the ordinance; the vote was 4-1 in favor. In the interim, it had received a letter from the OSPC confirming, as had been reported to the Levy Court during the earlier public hearing, that OSPC's prior review of the initial rezoning sufficed and that further review was not necessary.[6] Similarly, some questions about traffic were clarified by additional review of the TIS which had previously been submitted.[7] The Plaintiffs' counsel was afforded an opportunity to address his clients' concerns, even though the public hearing record had not been reopened, but the scope of his presentation was limited to those topics which were reviewed specifically by the Levy Court at that time.[8]

[6] *See* Defs.' Ans. Br. Ex. E at 2 & Ex. T.
[7] *See* Defs.' Ans. Br. Ex. E at 2-3. The question was whether the warrant analysis for a new traffic light had been performed. It had. Whether it had been performed sufficiently is a contention now raised by the Plaintiffs.
[8] *Id*. at 3-6. The information regarding OSPC review and the status of the warrants analysis was not new information; it merely supplemented and confirmed the record presented at the public hearing.

* * *

A party may obtain summary judgment under Court of Chancery Rule 56 if there are no material facts in dispute and it is entitled to judgment as a matter of law. In this instance, there are cross-motions for summary judgment, and the parties have not identified any issues of fact that are in dispute. Thus, under Court of Chancery Rule 56(h), the Court will "deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[9]

The burden confronting a party challenging a rezoning is well-established:

> Rezoning decisions are presumptively valid and will not be set aside unless clearly shown to be arbitrary and capricious. The party challenging a rezoning has the burden of rebutting the presumption of validity and showing that the rezoning is arbitrary and capricious. If the reasonableness of a zoning change is fairly debatable, the judgment of the [Levy Court] must prevail.[10]

[9] *See, e.g.*, *Deloitte & Touche USA LLP v. Lamela*, 2007 WL 1114075, at *5 n.27 (Del. Ch. Apr. 6, 2007).
[10] *Citizens' Coal., Inc. v. Sussex County Council*, 2004 WL 1043726, at *2 (Del. Ch. Apr. 30, 2004), *aff'd*, 860 A.2d 809 (Del. 2004) (TABLE).

* * *

The Plaintiffs suggest that this Court's setting aside of the earlier rezoning requires the process to start anew, with the full gamut of review by the various state agencies having land use responsibility. These proceedings—before both the Levy Court and this Court—involve the same rezoning application. That minor modifications or clarifications may have been made does not change the status. The earlier rezoning was set aside purely because of a procedural—technical may be the better adjective—shortcoming of the County; that is not the type of occurrence that should require a rezoning applicant to suffer the full burden of an entirely new process.

The Levy Court did refer the rezoning back to the Department of Planning Services and the Regional Planning Commission, but there is no reason why it could not solicit that guidance which it thought appropriate. An interest in obtaining input from the Regional Planning Commission does not demonstrate that a new application was involved.

In sum, the second approval of the rezoning of the Property was simply another step in the administrative and judicial processing of the same land use application.[11]

* * *

The Plaintiffs bring four discrete challenges to the rezoning.

1. Traffic Considerations

By 9 *Del. C.* § 4962, the County was required to agree with DelDOT about certain procedures and standards regarding the potential traffic impacts of its rezonings. The agreement between the County and DelDOT, reflected in Resolution 1005, adopted on June 20, 1988, established acceptable levels of services ("LOS") that had to be met before a rezoning could be approved.[12] To determine whether an acceptable LOS could be achieved following a rezoning, a TIS is conducted. The TIS performed on behalf of the Owner predicted that an

[11] Thus, the rezoning currently before the Court may benefit, if otherwise applicable, from the record developed during the first rezoning effort.
[12] *See* App. to Pls.' Opening Br. Ex. 7.

acceptable LOS could be achieved with the installation of a traffic light on U.S. Route 13 that would facilitate access to the Property.[13]

Traffic signals are authorized by DelDOT as the result of a warrants analysis. Eight warrants are specified,[14] but, for the rezoning, only three were considered: Warrant 1, the eight-hour traffic volume; Warrant 2, the four-hour traffic volume, and Warrant 3, the peak-hour traffic volume.[15] The result of this analysis would suggest that a signal is appropriate. Other warrants were not considered and, thus, the Plaintiffs argue that a complete warrants analysis was not performed, that the study was, thus, deficient, and the rezoning that relied upon the placement of a traffic signal was invalid.

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[13] Defs.' Ans. Br. Ex. G. The Plaintiffs explained the perceived dilemma:

> In the case at bar, Cheswold had to prepare a new TIS since the one it prepared for the original rezoning that this Court struck down was based upon the factually incorrect assumption that a secondary point of access for the Parcel was available via Simms Wood Road. The new TIS, however, contained a similarly mistaken premise. This time Cheswold proceeded under the unproven assumption that it could obtain DelDOT approval for the installation of a traffic signal directly into the site from Route 13. Since DelDOT has not, and may never, approve a traffic signal to provide access to the Parcel, the TIS is invalid on the grounds that it relies upon a speculative assumption.

Pls.' Opening Br. at 10.

[14] *See* Manual on Uniform Traffic Control Devices (the "Manual"). Defs.' Ans. Br. Ex. J.

[15] *See* Defs.' Ans. Br. Ex. D.

The warrants not considered were: Warrant 4, pedestrian volume; Warrant 5, school crossing; Warrant 6, coordinated signal system; Warrant 7, crash experience; and Warrant 8, roadway network. Those criteria and standards simply are not applicable (or only minimally applicable) to U.S. Route 13 in the vicinity of the proposed traffic signal. The Plaintiffs have been unable to explain the wisdom of performing a warrants analysis that has no application. For example, the Plaintiffs have not suggested what a study of a school crossing, where there is no school crossing in the vicinity, would accomplish. Accordingly, the "incomplete" warrants analysis does not defeat the reasonableness of the County's reliance on the TIS accepted (or perhaps reviewed and not rejected after ample opportunity to comment) by DelDOT.[16]

The Plaintiffs also point to a DelDOT planning study from 2004 that does recommend against the installation of traffic signals along U.S. Route 13 near the

[16] Defs.' Ans. Br. Ex. C at 55. *See Blake v. Sussex County Council*, 1997 WL 525844, at *5 (Del. Ch. July 15, 1997) (acknowledging a county may reasonably rely upon DelDOT's analysis of traffic impacts from potential rezoning).

Property.[17] It proposes, in general, that signals should only be installed for existing roadways or for new roadway systems serving multiple developments. The Plaintiffs do not, however, explain how a planning document, such as the one upon which they rely, would supersede the standard protocols for TIS analysis set forth in the Manual or why the aspirations of a planning document should be taken as a regulatory absolute. In short, the DelDOT policy document does not preclude the rezoning.

Finally, the Plaintiffs seem to insist that a traffic signal must be guaranteed or, perhaps, even authorized by DelDOT before a rezoning may be approved. That is neither practicable nor, more importantly, required. Traffic signals are evaluated and, if appropriate, approved by DelDOT during the site planning or subdivision process. Advancing DelDOT's efforts to the rezoning stage of land development would serve no apparent purpose.

Accordingly, the Plaintiffs have failed to provide a viable challenge to the rezoning based on traffic considerations.

[17] U.S. 13 Access Study, from Dover to Smyrna, App. to Pls.' Opening Br. Ex. 21.

2. PLUS Review[18]

The rezoning, before its first approval, received favorable PLUS review. There was no separate PLUS review with respect to the County's second consideration of the rezoning (and comprehensive plan amendment). The Plaintiffs note that the proposed project has changed and that approximately two years passed between the favorable PLUS approval and the second rezoning. This, they say, mandates a new PLUS review.[19] The scope of the project and the

[18] "PLUS" refers to the Preliminary Land Use Service consideration of a rezoning (or comprehensive plan amendment) conducted by the OSPC, as the coordinating representative for interested state agencies. *See* 29 *Del. C.* Ch. 92.

[19] I put aside the question of whether the General Assembly intended for the Plaintiffs to have a private right of action to assert such a claim—which it did not. *See O'Neill v. Town of Middletown*, 2006 WL 205071, at *22 (Del. Ch. Jan. 18, 2006).

Also, the OSPC concluded that no additional PLUS review was required. During the public hearing, Michael J. Petit de Mange, the County's then-Director of Planning Services, informed the Levy Court of OSPC's position (Defs.' Ans. Br. Ex. C at 4, 42); after the public hearing and before the Levy Court's meeting to vote on the rezoning, Constance C. Holland, Director of the Office of State Planning Coordination, in a letter dated May 3, 2006, confirmed Petit de Mange's statements to the Levy Court: "We understand that the County is re-reviewing this project. This project is not required to be reviewed through PLUS again. The PLUS review does not expire. The comments in our letter, dated June 18, 2004 [the original PLUS review comment letter] still stand." Defs.' Ans. Br. Ex. T. The Plaintiffs object to the Court's consideration of the OSPC letter as not properly part of the administrative record of the rezoning process. In general, a court reviewing an administrative decision is limited to the record before the agency. *See, e.g.*, *Carrion v. City of Wilmington*, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006). Here, however, the information set forth in the letter had been transmitted verbally to a County official who, at the public hearing in April, reported it to the Levy Court. The letter, thus, was, as most,

boundaries of the lands to be rezoned have changed since the PLUS review. Change from initially considered proposals can, of course, be substantial or material and, therefore, justify (or, perhaps, require) additional PLUS review. The changes, to the extent that there are any, are minimal; the Plaintiffs cannot fairly argue that they are material.[20] Indeed, to accept the Plaintiffs' view would unduly and unnecessarily make rigid a design and development process that is best accomplished on an evolving and fluid basis.[21] Thus, the minimal changes proposed by the Owner do not require PLUS reconsideration.

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cumulative. *See Woznicki v. New Castle County*, 2003 WL 21499839, at *3 (Del. Super. June 30, 2003). Second, the challenge raised by the Plaintiffs arises, assuming that it arises at all, under the PLUS legislation; it does not go to the sufficiency of the administrative record developed by the County to support its exercise of the police powers delegated to it by the State. Instead, it involves a distinct claim. The Plaintiffs seek not review of the zoning decision on its merits but of failure of the County to comply with a separate state statute. The facts upon which the Defendants rely to demonstrate compliance—PLUS approval during the first rezoning effort—are, indeed, part of the administrative record. In addition, as to the question of whether a second PLUS review is required, the views of the agency charged with responsibility for administering the statute are entitled at least to some deference if the statute is "arguably ambiguous." *See, e.g., In re Arons*, 756 A.2d 867, 872 (Del. 2000), *cert. denied*, 532 U.S. 1065 (2001).

[20] The parties dispute the scope of any modifications. *Compare* Pls.' Opening Br. at 13 *with* Defs.' Ans. Br. at 3 & n.2. As an example of a change, the area to be rezoned from IL to BG decreased, between the first and second efforts, from 28.3 acres to 27.2 acres.

[21] This approach leaves open the question: how much change from an initial proposal is too much? That is an important question, one best addressed in the first instance in the regulatory arena and, more importantly, one not fairly presented in this action.

The Plaintiffs also point to the passage of time since the first rezoning. In the roughly two years between the rezonings, there, of course, may have been changes. Substantial change could, as set forth above, require reconsideration, but the mere passage of time under the PLUS statute does not invalidate a prior approval,[22] especially where the applicant has been delayed through no fault of its own.[23]

In sum, the Plaintiffs have no basis under the PLUS process for setting aside the rezoning.

3. Comprehensive Plan Amendment and Lack of State Certification

The rezoning is dependent upon a valid amendment of the County's Comprehensive Plan. A portion of the lands, identified as industrial in the

[22] The statute does not prescribe a temporal limitation for PLUS approval. The General Assembly, of course, could easily have imposed one.

[23] The Plaintiffs also assert that a DelDOT "funding crisis" that has been recognized in the interim should require reconsideration of the PLUS approval. Whether funding will be available for a public project is always a consideration; even if funds are available, there may well be debate about how to prioritize allocation among various projects. Courts should endeavor to avoid involvement with the allocation of funds by other branches of government. In short, the Court will not speculate about whether DelDOT will be able to make the improvements likely to be necessary to support the anticipated project.

Comprehensive Plan before the effort to amend it, was rezoned to commercial, a use inconsistent with an industrial designation. The amendment of the Comprehensive Plan, if effective, resolved that problem.

The Plaintiffs challenge the amendment of the Comprehensive Plan by observing that the County did not obtain state certification in accordance with 29 *Del. C.* § 9103(e) & (f). The County concedes that it obtained no "certification."[24]

The fundamental premise of the Plaintiffs' argument changed significantly during the period between the filing of their two briefs. Initially, the Plaintiffs contended that the Comprehensive Plan amendment was invalid simply because it had neither been submitted for certification nor certified under 29 *Del. C.* § 9103(e) & (f).[25] In essence, the Plaintiffs asserted that every comprehensive plan amendment must first be certified. That claim readily fails under the plain language of § 9103(e) which authorizes the Governor to "certify the

[24] The Court again, for the moment, puts to the side the question of whether the statute provides for a private right of action in this context—which, again, it does not. *See O'Neill*, 2006 WL 205071, at *22.
[25] Pls.' Opening Br. at 14.

comprehensive plan or return the comprehensive plan to the . . . county for revision." The County is not required to accept any recommendations and retains final decision-making authority as to the fate of any proposed plan amendment. Accordingly, it is clear that the initial argument of the Plaintiffs (*i.e.*, that there must be certification) is without support in the controlling statute.

In their second attack, the Plaintiffs insist that no plan amendment can be effective without its first having been considered by the Governor's Advisory Council on Planning Coordination (the "Advisory Council").[26] The proposed Comprehensive Plan amendment was not submitted to the Advisory Council because of a policy which it had adopted. In essence, the Advisory Council delegated to OSPC the responsibility for making the initial decision as to whether or not a proposed plan amendment would conflict with established state policies.[27]

[26] Pls.' Reply Br. at 15-18. The Court also puts to the side its concerns that this argument was not fairly made in the Plaintiffs' opening brief and first appeared in any recognizable form in the reply brief.

[27] Thus, the Plaintiffs are left with a challenge to the manner in which the State reviews a proposed comprehensive plan amendment. The absence of the State as a party here—to defend its conduct—has spawned a procedurally awkward context for review of the Plaintiffs' arguments. *See* CT. CH. R. 12(b)(7) & 19.

In 2004, the OSPC reviewed the Comprehensive Plan amendment, along with the rezoning, and concluded that it was consistent with the State's goals, policies, and strategies.[28] Accordingly, it was not submitted to the Advisory Council under 29 *Del. C.* § 9103(e).

The Plaintiffs argue that the terms of 29 *Del. C.* § 9103 make it mandatory that the Advisory Council consider the proposed plan amendment. The Advisory Council, however, decided to delegate to the OSPC the duty to determine which matters would in fact be submitted for its review. In substance, if OSPC concludes that a proposed amendment would be consistent with the State's goals, policies, and strategies, there would be no need to expend the resources of the Advisory Council. [29]

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[28] Since February 2004, OSPC has performed approximately 21 PLUS reviews of rezonings in the County, all accompanied by revisions to the Comprehensive Plan. Each time, there was only one "review" for both the rezoning and the plan amendment. Aff. of Constance C. Holland, Defs.' Ans. Br. Ex. R at ¶ 5. Thus, as a matter of standard practice, OSPC's review of the proposed rezoning included review of the attendant comprehensive plan modification.

[29] Holland reviewed the process for review of comprehensive plan amendments:

> Since February 14, 2004, whenever the OSPC has reviewed comprehensive plan amendments for various local jurisdictions proposed in connection with proposed rezonings (and not in connection with general, periodic updates to the comprehensive plans themselves) and, where those proposed amendments have been found to be in compliance with state goals, policies and strategies and not in

The Advisory Council's meeting minutes from February 14, 2005, report the following:

> [It was] pointed out that House Bill 255, passed in 2001, indicated that the Governor's Advisory Council on Planning Coordination could waive the review of municipal comprehensive plans if the Office of State Planning Coordination determined that the plan met the requirements outlined in State law and was consistent with the Strategies for State Policies and Spending.
>
> However, the Advisory Council never formally—as recorded in meeting minutes—agreed to waive review and delegate it to the Office of State Planning Coordination.
>
> . . .
>
> Mayor Connor made a motion to reaffirm that the Advisory Council could waive the review of undisputed comprehensive plans. Ken Murphy seconded the motion. It was approved by voice vote.[30]

> conflict with the plans of other jurisdictions, those amendments have not been submitted to the Council or the Governor; it being OSPC's interpretation and administration of the statutes that for minor amendments to plans, the entire plan need not be resubmitted to the Council and Governor for re-certification.

Id. at ¶ 8.

The Comprehensive Plan must be reconsidered by the County every five years. The results of those reviews are submitted to the Advisory Council. *Id.* ¶ 3; *see* 9 *Del. C.* § 4960(d).

[30] Defs.' Ans. Br. Ex. V at 3-4. These minutes bear a heading that refers to "municipal" plans. There is no basis to conclude that the Advisory Council did not intend for the resolution to apply to counties (which are sometimes viewed as municipalities even though the statute does refer to "counties and municipalities").

Thus, the Advisory Council delegated to the staff of the OSPC the power to determine which comprehensive plan amendments for individual projects deserved its consideration. Those amendments, as determined by the OSPC, that are consistent with the State's goals, plans and strategies are not submitted to the Advisory Council.[31]

The Plaintiffs, however, argue that the Advisory Council is required by statute to consider every plan amendment. By 29 *Del. C.* § 9103(e), OSPC, following its review of a proposed plan amendment "shall submit a final comprehensive plan report and recommendation to the Advisory Council . . . for its consideration." Then, "[t]he Council shall consider the report submitted by the [OSPC], appropriate state land development goals and strategies, comments submitted by any impacted jurisdiction, and such other information as it may determine to be appropriate and in the public interest." Use of the word "shall" is frequently understood to reflect the mandatory nature of a legislative directive.[32]

[31] The General Assembly did provide that the staff of the OSPC would assist the Advisory Council in the performance of its functions. 29 *Del. C.* § 9102(f).

[32] Although principles of statutory construction generally teach that the term "shall" creates a mandatory duty, "in some instances it must be read in a non-mandatory sense." *Wooters v.*

The Advisory Council, however, chose not to consider plan amendments which are consistent with State goals, plans and strategies. The General Assembly, however, instructed that the Advisory Council could not hold a hearing on those amendments which are consistent with "the state goals, plans and strategies." Thus, the Advisory Council, in substance, concluded that it would not consider those matters for which it could not hold a public hearing. In essence, it elected to draw a line for matters that it would review different from the one prescribed by the General Assembly.[33]

On the other hand, the Advisory Council performs neither an adjudicatory nor a rule-making function. It coordinates inputs from various governmental agencies and provides guidance without any binding effect (because the final land

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Jornlin, 477 F. Supp. 1140, 1145-46 (D. Del. 1979). Moreover, when addressing action by government employees, "the word 'shall' may be given a merely directory meaning, if the law's purpose is the protection or organization of the government by guidance of its officials rather than the granting of rights to a private person." *Heaney v. New Castle County*, 1993 WL 331099, at *4 (Del. Super. July 8, 1993), *aff'd*, 672 A.2d 11 (Del. 1995). Because the statute creating the Advisory Council serves an intergovernmental coordination function, this principle may be applicable in this instance.

[33] Also, under the policy adopted by the Advisory Council, the initial decision as to whether the amendment is consistent with the State's goals, plans and strategies became one for OSPC and not for the Advisory Council.

use decision remains with the County). With seventeen members, allocating its resources and efforts to those matters which it believes would benefit from its input, an objective reasonably achievable through the screening function assigned to OSPC, is a prudent and reasonable approach. The Advisory Council apparently recognized that, if the staff of the OSPC determined that there was no deviation from State goals, plans and strategies, it was so unlikely that it would disagree with that conclusion that it made further review beyond OSPC's consideration unnecessary and unduly burdensome.

Whether the delegation to the OSPC of a "gate-keeping" function is consistent with statutorily prescribed procedures ultimately is not a question that the Court must resolve. The comprehensive plan review process established by 29 *Del. C.* § 9103(a) "is intended to compare planning goals and development policies among levels of government for the purpose of attaining compatibility and consistency among the interests of state, county and municipal governments." The State, including its various agencies, and the County are apparently satisfied that the amendment of the Comprehensive Plan (and approval of the rezoning) will not

impair their ability to provide necessary public services and that it would be consistent with their policies for development. The process is an advisory one—one without the capacity to resolve or determine, in a formal sense, any land use question. The statutory purpose ultimately was to give the State input into the local land use process and to assure that its concerns were adequately addressed. There is, however, no support for the proposition that the General Assembly intended for the statute to be enforced through private actions. Thus, for the reasons set forth in *O'Neill*,[34] the Court concludes that, regardless of whether the delegation to the OSPC was proper, the Plaintiffs have no basis for setting aside the Comprehensive Plan amendment under 29 *Del. C.* § 9103.[35]

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[34] *O'Neill*, 2006 WL 205071, at *22. *See also Greylag 4 Maint. Corp. v. Lynch-James*, 2004 WL 2694905, at *8 (Del. Ch. Oct. 6, 2004) (citation omitted):

> The mere existence of a violation of a code or statute does not automatically confer on the victim the right to bring a law suit. Instead, the right to bring a private action to remedy such a violation is "available only if legislative intent to provide such a remedy is present."

[35] Of course, the reactions of the OSPC and the Advisory Council are beyond the control of any party to this proceeding. Neither the Owner nor the County could (or should be expected to) coerce the Advisory Council into providing what likely would have been nothing more than perfunctory consideration in light of the OSPC's analysis.

4. Lack of Proper Notice for the May 23, 2006, Meeting

The opportunity for public participation in the zoning process is of critical importance.[36] A failure to comply fully with the applicable notice for comments will provide a basis for invalidating a rezoning.[37]

The April 25, 2006, public hearing of the Levy Court to consider the rezoning and Comprehensive Plan amendment was duly noticed. Thus, a proper public hearing was held. There was a public hearing that evening and the public hearing record was closed. When the rezoning and Comprehensive Plan amendment were called for a vote, the motion was tabled, and the public in attendance was informed that the matter would be considered at the next regularly scheduled Levy Court meeting during the fourth week in May. The public, however, was apparently not told expressly that the public hearing would be reopened. No notice by newspaper publication was given with respect to consideration of the rezoning at the May meeting.

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[36] Before it can make a zoning change, "the county government shall hold a public hearing thereon, at least 15 days notice of the time and place of which shall be given at least 1 publication in a newspaper of general circulation in the County." 9 *Del. C.* § 4911(c).

[37] *See, e.g., Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179, 1181-82 (Del. 1982).

When the Levy Court reconvened to consider the rezoning, it received a letter from Holland to Petit de Mange that largely confirmed what he had told the Levy Court at the April public hearing about OSPC's view that no additional PLUS review was required.[38]

The County's actions arguably raise several questions. Did the May 23, 2006, meeting constitute a "public hearing" within the meaning of 9 *Del. C.* § 4911?[39] If so, was fifteen days notice by newspaper publication statutorily required? Was a general reference during the April meeting that the matter would be considered at the May meeting sufficient notice? Does it matter that the "public hearing" was "closed" during the April meeting?

The answers to these questions—or, more specifically, the reasons why they do not need be answered—can be found in the nature and purpose of the information received by the Levy Court from the OSPC. The legislation, 29 *Del. C.* chs. 91 & 92, was designed to foster a cooperative relationship between

[38] *See supra* note 19.
[39] The Plaintiffs do not question that the Levy Court's meeting was properly noticed. Their challenge is based upon notice requirements specifically applicable to public hearings for rezonings.

state and local governments as they address complex and difficult land use issues. The concern of the County—or at least of the Levy Court member who sought further guidance[40]—was about the State's position as to whether the County could proceed with the rezoning without offending the State and its interests. The additional input was not to persuade (or otherwise influence) the Levy Court with respect to its efforts to assess the proposed rezoning on the merits. The purpose—as a matter of comity and good intergovernmental relations—was to confirm the position of the State as to the State's procedures. As such and as limited, the review of Holland's letter did not constitute a public hearing (or the re-opening of a public hearing) within the meaning of 9 *Del. C.* § 4911, especially because it did nothing more than confirm Petit de Mange's statement to the Levy Court during

[40] The question, as best gleaned from the record, was more focused on the State's view of whether anything else was needed from the State than on whether the State was properly interpreting its legal obligations.

the public hearing in April.[41] It follows that, under these facts, no statutory notice requirement was violated.[42]

* * *

For the foregoing reasons, the Plaintiffs' motion for summary judgment is denied, and the Defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[41] *See Del. Alcoholic Bev. Control Comm'n v. Alfred I. du Pont Sch. Dist.*, 385 A.2d 1123, 1127 (Del. 1978). That the Levy Court offered the public a limited opportunity to comment on the materials presented at the meeting did not convert it into a "public hearing."

[42] The Plaintiffs suggest that the County's course of conduct was designed to deny the opportunity for public participation and observation. *See* Verified Compl. ¶ 18 (agenda for May meeting posted "suddenly and without any notice"; Plaintiffs "discovered the . . . agenda by happenstance."). To the contrary, it was transparent. The concerns were identified at the April meeting; at that meeting, it was indicated that the matter would be considered at the May meeting. They then were addressed at the May meeting. The information received from the State was fully disclosed to the public at that meeting. Indeed, the Plaintiffs should have understood that a letter from OSPC confirming Petit de Mange's description of its position was likely to be obtained and considered. A primary reason for the inquiry was Plaintiffs' counsel's questioning of the accuracy of Petit de Mange's reporting of OSPC's position. *See* Defs.' Ans. Br. Ex. C (Meeting Transcript) at 39, 43.