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Case No. Multi-case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

UPFRONT ENTERPRISES, LLC, a Delaware limited liability company, on its own behalf and on behalf of all others similarly situated, Petitioner,	:	
v.	:	**C.A. No. 2678-VCN**
THE KENT COUNTY LEVY COURT, the governing body of Kent County, Delaware; P. BROOKS BANTA; ALLAN F. ANGEL; HAROLD BRODE; ERIC BUCKSON; BRADLEY S. EABY; and RICHARD E. ENNIS, in their official capacities as members of the Kent County Levy Court, Respondents.	:	

IN RE KENT COUNTY ADEQUATE PUBLIC FACILITIES ORDINANCES LITIGATION	:	**CONSOLIDATED** **C.A. No. 2921-VCN**

MEMORANDUM OPINION

Date Submitted: July 12, 2007
Date Decided: August 9, 2007
Revised: August 24, 2007

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NOBLE, Vice Chancellor

After recognizing—some might say belatedly—the adverse effects of rampant development in Kent County, Delaware, its government decided not merely to slow the subdivision approval process but, instead, to bring it to a full stop. On January 16, 2007, the Levy Court adopted a moratorium ordinance (the "Initial Moratorium Ordinance") that precluded the County's Department of Planning Services (the "Planning Office") from accepting applications for subdivision approval. This Court set that ordinance aside because the Levy Court, in its haste, had failed to submit the ordinance to the Kent County Regional Planning Commission (the "Planning Commission") as required by 9 *Del. C.* § 4911(a).[1]

Within a week, the Levy Court reimposed the moratorium; this time, the Levy Court concluded that an "emergency" existed and proceeded to adopt the Emergency Moratorium Ordinance under the police powers conferred upon it by the General Assembly enabling it to respond to "a public emergency affecting life, health, property or the public peace."[2] Another longer term moratorium ordinance, the New Moratorium Ordinance, was also introduced and has been submitted to the Planning Commission for consideration. The Levy Court expects to consider the New Moratorium Ordinance within the next several weeks.

[1] *See Upfront Enters., LLC v. The Kent County Levy Court*, 2007 WL 1862709 (Del. Ch. June 20, 2007).
[2] 9 *Del. C.* § 4110(j).

During the months spanning adoption of the Initial Moratorium Ordinance, the Levy Court enacted a series of ordinances known as the Adequate Public Facilities Ordinances (or "APFOs"). The rapid pace of development in Kent County had strained the capacity of various public service providers to meet the needs of the citizenry. The APFOs address matters such as schools, central water, emergency medical services, and roads.[3] The Levy Court through the years generally imposed new burdens on developers on a prospective basis. In this instance, however, it deviated from that tradition and made the APFOs retroactive to June 13, 2006 (when first introduced).

The Petitioners, landowners and developers in Kent County whose reasonable economic expectations have been frustrated by the Levy Court's actions, now move to enjoin preliminarily the County from (1) enforcing the Emergency Moratorium Ordinance and (2) giving retroactive effect to the APFOs.[4]

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[3] The APFOs addressing emergency medical services and central water were adopted before the Initial Moratorium Ordinance was put in place. The Levy Court adopted the other two APFOs in March 2007.

[4] The challenge to the APFOs is presented through C.A. No. 2921-VCN, a consolidated action. The attack on the Emergency Moratorium Ordinance is by way of C.A. No. 2678-VCN. Between the two actions, there are approximately 43 petitioners. To provide a factual backdrop against which the "developer" side of the dispute can be measured, the Court draws upon the experiences of Petitioner Upfront Enterprises, LLC ("Upfront") which has taken the lead in challenging the County's recent land use actions and is the only petitioner to have provided the Court with a sufficient factual platform for the necessary analysis.

The Respondents are the Kent County Levy Court and its members. The Planning Commission and its members also are respondents in C.A. No. 2921-VCN.

Because the Petitioners have not demonstrated a reasonable probability of success on their claim that the APFOs may not be applied retroactively, their challenge directed toward the APFOs must be rejected. Because the Petitioners have not shown that they are willing and able to comply with the APFOs, they are unable to demonstrate that the Emergency Moratorium Ordinance will cause them irreparable harm in the absence of interim relief. Simply, they cannot satisfy the existing and presumed valid requirements of the APFOs, and the denial of an opportunity to submit a subdivision application that fails to meet the applicable regulatory requirements cannot constitute the irreparable harm needed to support the issuance of preliminary injunction.

I. BACKGROUND

In March 2002, the County revised its comprehensive plan with a minimal reference to the notion of conditioning land use approvals on adequate and available public services.[5] One of its recommendations was to "[r]eview a possible (police, fire, schools, transportation etc.) Ordinance to ensure these services are in place before approving new area subdivisions."[6] A few years passed and, on November 29, 2005, the Levy Court introduced an amendment to Chapter 187 (Subdivision and Land Development) of the Kent County Code, known as the

[5] The Kent County Comprehensive Plan Update, dated March 23, 2002 (the "Comprehensive Plan") appears as Ex. 1 to App. to the Pet'rs' Opening Br., filed in C.A. No. 2678-VCN.
[6] *Id.* at 31.

"Original APFO." Successful negotiation of the subdivision approval process would be dependent upon adequate public services and facilities; the emphasis was on police and fire protection, schools, emergency medical services, central water, and roads. In early 2006, the Levy Court again discussed the APFO, but nothing was accomplished at the time to move forward with the ordinance.

On May 3, 2006, Upfront purchased, in accordance with an agreement of sale, dated April 20, 2006, a large tract in Kent County for which it could reasonably anticipate approval to construct as many as three single-family dwellings per acre.[7]

On June 13, 2006, the Levy Court revisited the question of how to assure that new developments would have essential and adequate public services available. The Original APFO was divided into four separate ordinances: roads, schools, emergency medical services, and central water.[8] The Planning Commission held a public hearing on the APFOs on July 19, 2006, and recommended their adoption.

In the meantime, Upfront had been working on its subdivision plans. On July 17, 2006, it submitted to the County an application, together with a fee of $5,100, for the extension of public sanitary sewer service to its project. On

[7] One of the Petitioners' underlying concerns is that the Levy Court is on course to reduce the allowable density for residential subdivisions.
[8] Respectively, the separate Adequate Public Facilities Ordinances ("APFOs") were designated as #LC-06-27, #LC-06-28, #LC-06-29, and #LC-06-30.

September 26, 2006, it paid the County $250 and submitted an application (a concept plan) to develop its project under the Transfer of Development Rights Program. The Planning Office held a "pre-application" meeting with Upfront, approved the concept plan, but never informed Upfront that its project might be subject to the APFOs then under consideration. The County's Department of Public Works issued a technical feasibility study on October 5, 2006, and a revised study on November 21, 2006. Upfront's project was proceeding through the County land use process as the developer had anticipated.

On October 17, 2006, the Levy Court held a public hearing on the central water APFO and, in response to a question asked by a Levy Court commissioner regarding the retroactivity of the ordinance under consideration, the County Attorney responded: "It is always made clear, that if you have an application pending, then any change in the law would not be applicable to you." The Levy Court, at that meeting, adopted the central water APFO. The emergency medical services APFO was passed by the Levy Court, after a public hearing on October 24, 2006.[9]

Shortly thereafter, Upfront submitted revised concept plans to the Planning Office seeking approval of three separate subdivisions for a total of approximately

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[9] The emergency medical services APFO provided that it would not become effective unless and until the General Assembly enacted specific legislation allowing imposition of certain fees, legislation not adopted until May 2007.

450 single-family homes. The Planning Office accepted the plans and Upfront's fee in the amount of $750.

After another preliminary conference on December 5, 2006, addressing Upfront's revised concept plans, the Planning Office authorized Upfront to submit its application for preliminary subdivision plan approval. Again, the Planning Office did not warn Upfront that the APFOs might be applicable to its project. The next day, the County Sewer Advisory Board held a public hearing and approved Upfront's sewer service extension application.

December 19, 2006, is the date that marks the beginning of Upfront's problems. At its regularly scheduled business meeting, a Levy Court commissioner introduced a moratorium ordinance that would prevent the Planning Office, for a 270-day period, from "accept[ing] or consider[ing] applications for major subdivision sketch plan review, major subdivision preliminary plan review, site plan review, and conditional use review." A revised version of the ordinance (it had been expanded to encompass cluster developments as well) was provided at the Levy Court's January 2, 2007 meeting. Without referring the ordinance to the Planning Commission, it was scheduled for consideration at the Levy Court's January 16, 2007 meeting, at which time it was approved. The Initial Moratorium Ordinance recited that it was "enacted for the purpose of completion and possible adoption of . . . amendments to Kent County Code designed to insure provision of

adequate public facilities in conjunction with new residential subdivision developments; and . . . a new comprehensive plan." Although the Levy Court had a tradition of "grandfathering" those projects already in the "pipeline," it provided no comparable exemption from the effect of the moratorium ordinance for projects already under way.

The Levy Court approved Upfront's sewer service extension application on January 30, 2007. Upfront, with that approval, could file its application for preliminary subdivision approval. On February 8, 2007, Upfront filed three applications for preliminary subdivision approval, but those applications were eventually rejected because of the moratorium ordinance.

The APFOs addressing roads and schools were scheduled by the Levy Court for a public hearing on March 27, 2007. At that meeting, following the public hearing, the ordinances were considered, amended (without any public input into the substance of the amendments), and approved. Importantly, the Levy Court did not "grandfather" the ordinances; instead, the ordinances were made "retroactive to the date of introduction," or June 13, 2006.

By Letter Opinion of June 20, 2007, followed by Order of June 22, 2007, the Court declared that the Initial Moratorium Ordinance was "not effective" because of the Levy Court's failure to refer the ordinance to the Planning Commission for

its prior review.[10] Upfront immediately attempted to resubmit its preliminary subdivision applications; again, it was rebuffed—this time because the applications would not satisfy the APFOs. Less than an hour later, the County moved to stay this Court's order pending appeal.

Late in the afternoon of June 26, 2007, the Court convened a Chambers conference during which it denied the County's motion for a stay pending appeal of its decision invalidating the Initial Moratorium Ordinance because, among other reasons, the Court was not persuaded that any harm would befall the County absent "some decision [adverse to the County] on the application for a preliminary injunction with regard to the Adequate Public Facilities Ordinance."[11]

A few hours later, at its regularly scheduled meeting, the Levy Court enacted, without any public input, the Emergency Moratorium Ordinance. The agenda for the meeting had been revised on June 22, 2007, to include the New Moratorium Ordinance and, when the meeting began, the agenda was amended again to include the Emergency Moratorium Ordinance.[12] No separate statement of reasons accompanied the Levy Court's enactment of the Emergency Moratorium Ordinance. Similarly, there was no separate explanation as to why the Levy Court did not follow its routine procedures. The justification, thus, for the

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[10] *See Upfront Enters., LLC*, 2007 WL 1862709, at *4.

[11] Transcript of Office Conf. (June 26, 2007) at 34.

[12] The Emergency Moratorium Ordinance is designated #LC-07-18. The New Moratorium Ordinance is #LC-07-17.

ordinance, as an emergency enactment, must be found within the text of the ordinance itself:

> This ordinance is enacted as an emergency ordinance pursuant to 9 Del. C. §4110(j) to meet a public emergency affecting the life, health, property and the public peace of Kent County. The Kent County Levy Court finds that such a public emergency exists based on the announced intentions of developers to file numerous applications for subdivision approval and/or planned unit developments that will add an estimated 2,000 additional building lots. Such applications will overwhelm the currently short-handed Planning Services staff and the Regional Planning Commission during times when ordinances and regulations mandated by the Delaware General Assembly to protect the life, health, property, and public peace demand immediate attention from Planning Staff and the Regional Planning Commission. Such development applications will hinder the preparation of the update to the Comprehensive Plan and subsequent ordinances and regulations mandated by the Delaware General Assembly and irreparably destroy the integrity of the rule-making process through the application of 9 Del. C. §4959(c). Any application filed or submitted before the adoption of the amendment to the comprehensive plan will arguably not be subject to the new comprehensive plan or the ordinances, standards, procedures and regulations adopted to implement the Comprehensive Plan amendment. Thus, instead of achieving smart growth over the next five years, the growth will not be properly regulated to insure the adequacy of roads, schools and emergency medical services and the protection of critical environmental areas. This emergency ordinance imposes a temporary moratorium while the Regional Planning Commission and the Levy Court consider a longer-lasting moratorium ordinance.

The Emergency Moratorium Ordinance extended the prior moratorium until August 22, 2007, by which time the New Moratorium Ordinance introduced at the June 26 meeting (and added to the agenda for that meeting on June 22, 2007) will

likely be in effect. The new moratorium is projected to remain in effect until late April 2008.

II. CONTENTIONS

The Petitioners ask the Court to enjoin preliminarily both the Emergency Moratorium Ordinance and the retroactive application of the APFOs. The Petitioners contest the retroactivity of the APFOs on only one ground: 9 *Del. C.* § 4959(c), which provides:

> Any application for a development permit filed or submitted prior to adoption or amendment under this subchapter of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application.[13]

In order to prevail on this argument, the Petitioners must show that the APFOs are "elements" of the County's Comprehensive Plan and that the approvals which they now seek would be issued under, in the words of the statute, "any application for a development permit filed or submitted."

Their attack on the Emergency Moratorium Ordinance involves a larger number of contentions. First, they assert that the County failed to comply with statutorily prescribed procedures, including those of the Freedom of Information Act, that county governments must generally satisfy in adopting ordinances, and

[13] Petitioners' complaint presents other challenges to the County's decision to apply the APFOs retroactively. Those other grounds, not addressed at this time, range from reasonable reliance on the County's well-established practice of "grandfathering" projects in the "pipeline" to the vested rights doctrine.

those statutes specifically applicable to the adoption of land use regulations. Second, they raise the fundamental argument that the County is without the power or authority to impose a moratorium on land use permitting activities. Finally, they contend that, even if the County could impose a moratorium on an emergency basis, no emergency exists and the Levy Court made no record to support a finding of an emergency.

The County, as to the question of whether 9 *Del. C.* § 4959(c) precludes retroactive application of the APFOs, asserts that the APFOs are not elements of its Comprehensive Plan (and did not amend the Comprehensive Plan). It also points out that the Petitioners (actually Upfront because only its factual background is well-enough developed for judicial consideration) has not filed for final subdivision approval and, thus, whether any interim step may be protected by the statute does not much matter because final approval may be conditioned on compliance with the APFOs. With respect to the Emergency Moratorium Ordinance, the County justifies its deviation from the procedural norm by invoking the emergency. It says that the Levy Court concluded that there was an emergency; that ends the debate and it is not for some court to second guess the exercise of legislative authority. Also, it contends that the right to impose a moratorium, one concededly not expressly authorized, is inherent in the general grant of police powers to it and in the more specific grant of land use regulatory

control. In addition, the County insists that the Petitioners have fallen short of demonstrating that irreparable harm would result to the Petitioners in the absence of provisional injunctive relief. Finally, the County contends that a balancing of the equities and considerations of the public interest as determined by the public's elected representatives clearly support denial of the motions in order that the residents of future developments in the County have reasonable access to essential public services and that those new residents of the County do not compete with existing residents of the County for those services.

III. ANALYSIS

A. *The Preliminary Injunction Standard*

The Petitioners, in order to obtain a preliminary injunction, must demonstrate: (1) a reasonable probability of success on the merits of their claims; (2) that they will suffer irreparable harm in the absence of interim injunctive relief; and (3) that the harm that would result from not granting an injunction would outweigh the harm that the opposing parties would suffer if an injunction is issued.[14]

B. *The APFOs*

The County regulates land use by virtue of delegation of authority by the General Assembly. Therefore, in carrying out that function, it must carefully

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[14] *See, e.g.*, *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 2007 WL 2058733, at *6 (Del. Ch. July 12, 2007).

comply with the standards prescribed by the General Assembly.[15] One such standard is 9 *Del. C.* § 4959(c), which deals with the retroactive application of certain land use requirements. It is worth repeating:

> Any application for a development permit filed or submitted prior to adoption or amendment under this subchapter of a comprehensive plan or element thereof shall be processed under the comprehensive plan, ordinances, standards and procedures existing at the time of such application.

This subsection of relatively few words has engendered a number of interpretative debates. First, the parties dispute whether the APFOs constitute "elements" of the County's Comprehensive Plan. Second, they disagree over whether Upfront has made a "final" application or merely an "interim" application and whether the statute would only protect those applications in the final stage of securing any particular development permit. Finally, the County notes that the APFOs were not adopted under 9 *Del. C.* ch. 49, subch. II and, thus, the APFOs, in any event, would not satisfy the "under this subchapter" statutory threshold.

The Court, thus, is required to read the statute, ascertain its meaning and the intent of the legislature, and apply that understanding to the facts of this matter.

> The goal of statutory construction is to ascertain and give effect to the intent of the Legislature. If a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls. Generally, a statute is considered ambiguous if it is reasonably susceptible of two interpretations. Ambiguity may also

[15] *See, e.g., Farmers for Fairness v. Kent County*, 2007 WL 1413247, at *5 (Del. Ch. May 1, 2007).

be found if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the Legislature.[16]

The legislative restriction on retroactive land use ordinances is limited to amendments of a comprehensive plan and to amendments of "elements" of the comprehensive plan. The term "comprehensive plan" is defined as a "plan that meets the requirements of [9 *Del. C.* ch. 49 subch. II (The Quality of Life Act)]."[17] The term "element" is not defined by the statute.[18] Section 4956, titled in part, "Requirements and optional elements of comprehensive plan," lists ten specific elements to be included in the comprehensive plan[19] and authorizes the addition of elements of "as may be peculiar to and/or necessary for the area concerned and as are added by the governing body upon the recommendation of the local planning

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[16] *Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003) (citations and internal punctuation omitted); *see also Newtowne Vill. Servs. Corp. v. Newtowne Road Dev. Co., Inc.*, 772 A.2d 172, 175-76 (Del. 2001); *Weiss v. Weiss*, 2007 WL 522290, at *3 (Del. Ch. Feb. 15, 2007).

[17] 9 *Del. C.* § 4952(2) ("Whenever in this subchapter [The Quality of Life Act], land use regulations are required to be in accordance with the comprehensive plan, such requirements shall mean only that such regulations must be in conformity with the applicable maps or map series of the comprehensive plan."). *See also Hudson v. County Council of Sussex County*, 1988 WL 15802, at *3 (Del. Ch. Feb. 24, 1988) ("The comprehensive development plan is not a precise delineation of appropriate land uses. It is a general statement of policies, objectives and standards and a projection of appropriate patterns of future development. Its separate elements include a land use plan, a transportation plan, an open space plan, a housing plan, and a facilities plan.").

[18] Outside of chemistry, "element" has the commonly understood meaning of "one of the constituent parts." WEBSTER'S THIRD NEW INT'L DICTIONARY 734 (1993).

[19] 9 *Del. C.* § 4956(g). The ten enumerated elements are: future land use plan, mobility, water and sewer, conservation, recreation and open space, housing, intergovernmental coordination, recommended community design, historical preservation, and economic.

agency."[20] The word "element" appears many times in 9 *Del. C.* ch. 49 subch. II.[21] For example, at 9 *Del. C.* § 4958(d), the County is required to submit an annual report to the Governor's Advisory Council on Policy Coordination that requires an assessment and evaluation of the success or failure of "the comprehensive plan or element or portion thereof," including "[t]he condition of each element in the comprehensive plan at the time of adoption and at date of report."[22]

The General Assembly set forth a purpose of 9 *Del. C.* ch. 49, subch. II, as follows: "to utilize and strengthen the existing role, processes and powers of county governments in the establishment and implementation of comprehensive planning programs to guide and control future development."[23] This explication of the purpose for a comprehensive plan is consistent with other expressions of legislative purpose, such as "to plan for [the County's] future development and growth."[24]

With this brief tour of the statute completed, the Court turns to the question of whether the APFOs can fairly be characterized as elements of the

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[20] 9 *Del. C.* § 4956(h).

[21] The Petitioners counted: "a total of 65 occasions, 37 of which appear outside the confines of 9 *Del. C.* § 4956(g). Additionally, on at least 8 of those 37 occasions, the word element or elements is used interchangeably with the word portion or portions." (internal punctuation omitted).

[22] 9 *Del. C.* § 4958(d)(2). Also, in 9 *Del. C.* § 4956(b), the legislature determined that "coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process."

[23] 9 *Del. C.* § 4951(a).

[24] 9 *Del. C.* § 4953(a)(1).

Comprehensive Plan or as County legislative enactments with the effect of amending the elements of the Comprehensive Plan. The Court concludes that the legislative use of the phrase "element thereof" is not ambiguous. The Petitioners have not advanced a plausible interpretation of the subchapter, when read as a whole, that supports a reading of "element" of the comprehensive plan to include the APFOs. Although one can quibble with certain word usage, no reason exists for deviating from the commonly understood meaning of the word "element": component or portion.[25]

Other factors support this conclusion. First, 9 *Del. C.* § 4956 focuses on "element" of the comprehensive plan. That provision identifies policy components of a policy document. The other references to the term "element" throughout the subchapter are best read in the light of either those elements specifically identified in § 4956 or those elements which the County has the discretion to implement in accordance with § 4956(h). Second, the County's land use ordinances and its Comprehensive Plan, while sharing common goals, are separate and distinct from one another. The APFOs, as well as the other provisions of the County Code,

[25] One can argue that the use of the phrase "comprehensive plan or element or portion thereof," 9 *Del. C.* § 4958(d), creates uncertainty because, if "element" and "portion" carry the same meaning, then the statute is redundant and the word "portion" cannot be ascribed any separate purpose. *See, e.g.*, *Lloyd v. State*, 534 A.2d 1262, 1266 (Del. 1987); *DiSabatino v. Ellis*, 184 A.2d 469, 473 (Del. 1962) ("[U]nder familiar principles of statutory construction, effect must be given, if possible, to every part of the statute so that no part will be inoperative."). That, in a different context, might be a fair argument, but it fails here because there is no plausible alternative meaning to be assigned to either element or portion.

carry the force of law. The Comprehensive Plan is of limited direct regulatory impact: only "the land use map or map series forming part of the comprehensive plan," not implicated in this action, are said to have the force of law.[26] Third, after adoption of the APFOs, the Comprehensive Plan remained unchanged. The Petitioners cannot point to anything in the Comprehensive Plan (including its elements) that was specifically altered by the adoption of the APFOs.[27]

The Petitioners canvass the various elements prescribed by 9 *Del. C.* § 4956(g) in an effort to demonstrate that those elements have been changed by the APFOs. For example, 9 *Del. C.* § 4956(g)(3) lists "water and sewer" as a required element. The Comprehensive Plan[28] refers to the importance of an adequate supply of water and observes that the concentration of "most development in and around existing urban areas lends itself well to providing public water systems for virtually all urban development in the future." It goes on to recognize that there is "adequate justification for planned development of public water systems where urban densities are planned." The central water APFO may be viewed as implementing these policy goals by requiring that "[a]ll proposed residential subdivisions involving more than ten (10) lots shall be served by a central water

[26] *See* 9 *Del. C.* 4959(a).
[27] The question of whether the revisions to the comprehensive plan now under way will result in changes that would satisfy the requirements of § 4959(c), of course, is not now before the Court.
[28] Comprehensive Plan at 94-96.

system . . ." The Petitioners contend that the central water APFO must be viewed as an amendment to the Comprehensive Plan and its water and sewer element because it imposes specific criteria (*e.g.*, a development with more than ten residential lots must have central water). The Petitioners, however, fail to acknowledge the difference between amending the Comprehensive Plan and its water and sewer element (which would satisfy the statutory standard) and implementing the Comprehensive Plan or one of its elements by the adoption of new ordinances (which the legislature chose not to include). New land use ordinances implementing an existing comprehensive plan element could have been the legislatively prescribed trigger for a prohibition on retroactive application. That, unfortunately for the Petitioners, was not the legislative choice, and the Court may not engraft an additional protection on this statutory standard that is limited to amendments of the comprehensive plan or elements of the comprehensive plan. Merely amending a land use ordinance does not amend the comprehensive plan—even the particular elements of the comprehensive plan specifically addressed by the new ordinance. Perhaps the Comprehensive Plan should have been amended; perhaps it will be amended; for present purposes, the important point is that neither it nor, in this example, its water and sewer element has been amended.

Accordingly, the Petitioners have failed to demonstrate a probability of success with respect to their contention that retroactive application of the APFOs is precluded by 9 *Del. C.* § 4959(c).[29]

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[29] Because the APFOs do not amend the Comprehensive Plan or any of its elements, the Petitioners cannot establish a reasonably probability of success under 9 *Del. C.* § 4959(c). There is, however, another topic of disagreement with respect to that statutory provision that deserves mention. The statute, if otherwise applicable, assures that "[a]ny application for a development permit" filed before amendment of the Comprehensive Plan or one of its elements will be processed under the Comprehensive Plan and ordinances in place when the application was filed. Upfront had sought, in February 2007, to file for preliminary subdivision approval but was prevented by the Initial Moratorium Ordinance. It argues that its application should be deemed filed as of that date, and that, given the subdivision ordinance and the Planning Office's practices, preliminary subdivision approval is part of the continuum including the final application that leads to issuance of the subdivision approval. Upfront also contends that it would be incongruous to "grandfather" an application for preliminary subdivision approval; to grant preliminary approval; and then to tell the applicant that it was all for naught because the regulatory environment had changed in the interim. The County, on the other hand, insists that preliminary subdivision approval and final subdivision approval are separate and distinct steps in the process, each constituting to a separate approval. Moreover, "development permit" is defined to include "any building permit, zoning permit, subdivision approval, rezoning, certificate of occupancy, special exception, variance or any other official action of local government having the effect of permitting the development of land." (9 *Del. C.* § 4952(8)). The County asserts that preliminary subdivision approval is not "subdivision approval" and does not have the "effect of permitting the development of land." It, in essence, takes the position that any application protected by 9 *Del. C.* § 4959(c) must have been the "final" application. In perusing the County's subdivision ordinance (Kent County Code, ch. 187), instances can be found that support the view that "preliminary" application is just a staging label for part of the final application process (*e.g.*, § 187-24B ("Every [final] record plan shall be substantially in accordance with the approved preliminary plan . . .) or that preliminary and final applications are indeed distinct steps with independent significance in the subdivision process (*e.g.*, § 187-12A (The Planning Commission is the agency designated to "review and render decisions on all applications for *either* preliminary *or* final approval of subdivision . . . plans." (emphasis added))). It is not necessary that the Court resolve the debate; it is sufficient to note that it presents yet another obstacle that the Petitioners would have to surmount in order to be successful in this effort.

The Petitioners also invoke a provision of the Comprehensive Plan (at 4) that may be read to address the retroactive application of new land use ordinances adopted in accordance with the Comprehensive Plan:

> Pending implementation of the Comprehensive Plan Update by ordinances to be adopted by the Levy Court, the Department of Planning Services shall inform the Levy Court whenever, in the Department's opinion, a proposed rezoning may

It is difficult—and perhaps unnecessary—to assess irreparable harm when the merits-based arguments fail, but, in this context, whether irreparable harm could be found likely turns on the nature of the rights, if any, taken away by governmental action.[30] Without the deprivation of right—whether conferred by constitution or statute—it is difficult to characterize the consequences of regulatory conduct of a governmental entity as causing actionable irreparable harm. When enhanced regulation makes regulated conduct—such as land development—more expensive, more time-consuming, or otherwise more burdensome, harm results, and it is a harm that frequently cannot be fully remedied, sometimes because of the difficulty in obtaining damages from regulatory entities. To some extent, this case stands as an example of a primary risk inherent in land development efforts: the vagaries of sometimes unpredictable local land use regulation. The project delay and perhaps the project modifications encountered by the Petitioners are, in a

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> conflict with the policies and goals set forth in the comprehensive plan. However, the Department shall not delay or withhold its approval of any requested subdivision or land development plan that otherwise meets all lawful standards and requirements in force at the time when such application was made.

This provision of the Comprehensive Plan does not assist the Petitioners because: (1) the Comprehensive Plan does not have the force of law; and (2) the APFOs do have the force of law. Moreover, the APFOs' retroactivity provisions do not conflict with this provision of the Comprehensive Plan which only instructs the Department of Planning Services not to delay, as a matter of its own volition, the processing of applications. This provision does not purport to limit the ability of the Levy Court to modify the flow of applications. The question of whether this provision would aid the Petitioners in an argument that the County is estopped from deviating from its practice of "grandfathering" projects already proposed at the time new ordinances are adopted is not fairly presented by the Petitioners' pending motion.

[30] The difficulty in finding irreparable harm in this context is perhaps best exemplified by the failure of Petitioners' Opening Brief in Support of Their Motion for Preliminary Injunctive Relief challenging the APFOs to address irreparable harm.

sense, irreparable, but, standing alone, especially without a merits-based argument likely of success, a preliminary injunction will not issue.[31]

Accordingly, the Petitioners' motion to enjoin preliminarily the Respondents from applying the APFOs retroactively must be denied.

C. *The Emergency Moratorium Ordinance*

The Petitioners contend that the Emergency Moratorium Ordinance was improperly adopted because it was not adopted for a statutorily recognized emergency. By 9 *Del. C.* § 4110(j), the procedures that the County generally must follow in adopting ordinances may be avoided in order to "meet a public emergency affecting life, health, property, or the public peace." Also, certain requirements of the Freedom of Information Act are not applicable to "any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety . . ."[32]

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[31] Because of the lack of a probability of success on the merits, there is no need here to undertake a balancing of the equities. It is sufficient to note that the equities favor neither side in this debate by any appreciable margin. The Petitioners are suffering real and palpably economic harm; the County has imposed standards addressing primary public service needs that the APFOs achieve through the imposition of standards that the Petitioners do not challenge substantively. They, more or less, concede that the requirements of the APFOs are within the reasonable exercise of the Levy Court's legislative powers; they simply do not want the standards imposed upon them. The APFOs benefit the public and, therefore, the Levy Court can properly argue that depriving the public of the benefits of the APFOs as soon as possible would work a substantial harm on the County and the citizenry whom the Levy Court represents.

[32] 29 *Del. C.* § 10004(e)(1). The standard set forth in the Freedom of Information Act is arguably more exacting because it expressly contains an express requirement of "immediacy." The failures under the Freedom of Information Act, unless excused by the emergency nature of the Levy Court's legislative action, include: posting public notice of a change to the agenda less than six hours in advance of the meeting without notice; not holding a public hearing with the

The County's determination that an emergency existed, one warranting enactment of an emergency ordinance, is, of course, a legislative act. As such, it is cloaked with the presumption of validity and is entitled to deference. The County argues that there is no role for judicial review, especially because the County purported to act under the broader delegation of police powers by 9 *Del. C.* ch. 41 and not by the arguably more restrictive provisions of 9 *Del. C.* ch. 49 which governs certain land use matters.

Although the scope of judicial inquiry is limited, the County may not avoid the various procedures imposed upon it by the General Assembly that govern its legislative process by merely declaring an emergency.[33] The Court accepts the factual grounds asserted for implementing an Emergency Moratorium Ordinance; whether those factors, however, constitute an emergency within the meaning of the applicable provisions of Delaware law remains a question for the courts.

The only factual grounds to sustain an emergency are found in the ordinance.[34] Two reasons were adduced. First, the Planning Office would be

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opportunity for public comment; and not providing copies of the ordinance under consideration to the public.

[33] *See generally Salem Church (Delaware) Assocs. v. New Castle County*, 2006 WL 2873745, at *7 n.62 (Del. Ch. Oct. 6, 2006).

[34] During the course of the earlier litigation involving the Initial Moratorium Ordinance, the County eschewed the opportunity to contend that any emergency motivated the imposition of that moratorium.

unduly burdened by the work.[35] Second, the absence of an Emergency Moratorium Ordinance would preclude "smart planning." No near-term impact, other than on the Planning Office, was identified.[36]

The Court, thus, turns to the question of whether the Petitioners have demonstrated a reasonable probability of success on their claims that the procedures employed by the County in enacting the Emergency Moratorium Ordinance cannot be sanctioned on the basis of any "emergency." This task requires the Court again to engage in statutory analysis.[37] The first step is ascertaining the General Assembly's intent when it conferred certain "emergency" powers on the Levy Court. The statutes do not define "emergency," but there is no reason to believe that the General Assembly intended any meaning beyond its

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[35] Although the County accepts the Levy Court's factual conclusions, it appears that the County Administrator does not share fully his employer's perceptions. *See* Dep. of Michael J. Petit de Mange at 163-71.

[36] It should also be noted that the County has a built-in pressure relief valve to protect the subdivision approval process. By an ordinance (#LC-06-58), only three subdivision applications can be considered by the Planning Commission each month. *Id.* at 163. This limitation slows the pace of subdivision approval, but it also encourages applicants to rush to get in line.

One questions whether the County may invoke an emergency of its own creation, one that can be said to exist only as the result of the County's own delay in addressing promptly the land use problems which it has finally recognized. That the rapid pace of development in Kent County carried adverse consequences hardly qualifies as news. Moreover, by directing the Planning Office not to accept subdivision applications, the Levy Court disrupted the regular (albeit, not necessarily orderly) pace of subdivision applications, thereby causing a log jam that, when the barrier to filing is removed, will likely result in the proverbial flood of applications.

[37] *See supra* note 16 and accompanying text.

prevailing definition: "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[38]

However one grapples with the meaning of "emergency," the following concepts emerge: unforeseen, immediate, and carrying, in fact or potentially, drastic consequences. A rush of subdivision applications, even if it would seriously burden the Planning Office, cannot fairly be viewed as satisfying these criteria. That more applications would be forthcoming was not unforeseen and carries no immediate impact on actual development. Vague notions of "smart growth" do not represent the immediacy needed to sustain the exercise of emergency power. Moreover, the impact on the Planning Office is not a matter of "life, health, property, or the public peace."[39]

In brief, the General Assembly gave the County the power to deal with emergencies without having to follow the procedures generally designed to protect the rights and interests of the public in regular governmental action. Those powers are to be used sparingly and only when essential to address an "emergency." The

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[38] WEBSTER'S THIRD NEW INT'L DICTIONARY 74 (1993). The Levy Court purported to exercise its emergency powers in the course of adopting the Emergency Moratorium Ordinance. The dictionary also defines "emergency power" as: "the power granted to or used or taken by a public authority to meet the exigencies of a particular emergency (as of war or disaster)." *Id.* It is not easy to view the filing of numerous subdivision applications as having the impacts and consequences comparable to those of wars or natural disasters. Certainly, the Court's denial of the County's motion to stay its order invalidating the Initial Moratorium Ordinance does not begin to approach that standard.

[39] The long-term consequences of continued development might quality as "affecting life, health, property, or the public peace," but, as noted, they are neither unforeseen nor immediate.

Levy Court, in enacting the Emergency Moratorium Ordinance, identified no emergency within the scope of that term's statutory meaning and, thus, as a matter of law, adoption of the Emergency Moratorium Ordinance without compliance with applicable statutory requirements provides the Petitioners with adequate grounds to meet their burden of demonstrating a reasonable probability of success on the merits.[40]

An essential prerequisite to the granting of a preliminary injunction is the likelihood that the movants will suffer irreparable harm in the absence of interim relief. Irreparable harm, a concept not readily susceptible to easy definition, is said to be "that rare species of harm, whether great or small, that in the absence of injunctive relief would result in 'denial of all relief sought in the action to which the party upon the showing made by him otherwise, would be entitled.'"[41]

Upfront's (and, presumably, the other Petitioners') harm is the frustration of their reasonable, investment or economic expectations resulting from the County's decision to halt the subdivision process and the associated economic losses. Upfront argues that only the Emergency Moratorium Ordinance interferes with its

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[40] With the conclusion that the Petitioners have a reasonable probability of success on their claim that the steps taken by the County cannot be sustained under the guise of an emergency, the remainder of the Petitioners' substantive challenges to the Emergency Moratorium Ordinance need not be addressed.

[41] DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-2[b][4][i] at 10-17 (2007) (quoting SPELLING, A TREATISE ON THE LAW GOVERNING INJUNCTIONS, § 39, at 87).

ability to file its subdivision application.[42] During the brief interval without a moratorium ordinance following the Court's setting aside of the Initial Moratorium Ordinance, Upfront attempted again to submit its applications. This time, it was turned down because the applications did not satisfy the APFOs. Upfront, however, points out that nothing in the subdivision ordinance allows the Planning Office to reject an application for that reason.

Regardless of whether the Planning Office has the right to reject Upfront's applications on this ground, it is for this reason—that its applications do not satisfy the APFOs—that Upfront and the other Petitioners have failed to demonstrate that the Emergency Moratorium Ordinance has caused, or will cause, them cognizable harm, irreparable or otherwise. The obstacle confronting the Petitioners is their inability to satisfy the APFOs.

The denial of a right to file an application that, on its face, fails to satisfy the applicable regulatory criteria (*i.e.*, the APFOs) is, at least without more, not the type of adverse effect that rises to irreparable harm. The "extraordinary" relief conferred by a preliminary injunction should not be granted to facilitate a meaningless act. An order encouraging the filing of a null application is itself a

[42] Upfront also argues that, as a consequence of the setting aside of the initial moratorium ordinance, its efforts to file a subdivision application in February 2007 should be honored and its application deemed filed and accepted as of that date. That argument is not currently before the Court; a return to that contention may become necessary.

null order, one of no practical effect or purpose.[43] In short, in order to earn interim equitable relief, the harm to be avoided must be of consequence.[44] The Petitioners' desire to file doomed—at least at this moment—applications does constitute irreparable harm.

Finally, the Court comes to a balancing of the equities. The Petitioners have shown that their reasonable economic expectations have been impaired by the County's actions and they have shown a reasonable probability of success with respect to their claim that the County did not comply with applicable state law in adopting the Emergency Moratorium Ordinance. As regulated parties and citizens of Kent County, they have the right to expect their County's government to comply with applicable law. On the other hand, the members of the Levy Court, as the elected representative of the citizens of Kent County and exercising in good faith

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[43] Upfront does not dispute that its applications do not satisfy the APFOs. (If the applications met the standards of the APFOs, it would not have been necessary to challenge the retroactive effect of the APFOs.). If the Petitioners had prevailed on their challenge to the retroactive application of the APFOs, it is possible that this analysis might have turned out differently.

[44] The Court acknowledges that the mere filing of an application can carry some benefit of uncertain measure. *See supra* note 36. If the real debate is about where an applicant is in line, that is a problem which can be fairly remedied by final injunctive order and would not be impaired by the mere passage of the time required for final resolution of this action. *See City Capital Assocs. Ltd. P'ship v. Interco Inc.*, 551 A.2d 787, 795 (Del. Ch. 1988) (Applicant seeking interim injunctive relief must demonstrate "the threat of an injury that will occur before trial which is not remediable by an award of damages or the later shaping of equitable relief."). The potential benefit of final relief with respect to the Emergency Moratorium Ordinance is, of course, illusory. By the time final relief could be awarded, that ordinance likely will have been supplemented by the New Moratorium Ordinance. It should be noted that, with multiple petitioners, there may be conflicts among them, especially if this is nothing more than a contest among the petitioners as to where they fall in the queue leading to the subdivision approval process. That, however, is not a concern that must be (or, indeed, can be) addressed at this time.

their best judgment as to what serves the needs of the citizens of Kent County, have concluded that an emergency ordinance was necessary. On the whole, the balancing of these interests tends slightly to favor the Petitioners, although the Petitioners' valid arguments are tempered by recognition that ultimately their inability to comply with the APFOs presents a major stumbling block to any immediate development effort.

Accordingly, even though they have demonstrated a reasonable probability of success on the merits and a balancing of the equities slightly in their favor, the Petitioners' application for interim relief precluding enforcement of the Emergency Moratorium Ordinance must be denied because, after balancing the various considerations, the absence of irreparable harm convinces the Court, in the exercise of its discretion, that interim relief is not appropriate.

IV. CONCLUSION

For the foregoing reasons, the Petitioners' motions for preliminary injunction are denied. Implementing orders will be entered.