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Re: In re Kent County Adequate Public Facilities Ordinances Litigation  
Consolidated – C.A. No. 2921-VCN  
Date Submitted: September 17, 2007

Dear Counsel:

Petitioners have moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal of the Order implementing this Court's Memorandum

Opinion of August 9, 2007.<sup>1</sup> I write separately to set forth the reasons for the accompanying order that certifies the interlocutory appeal.

The Order denied Petitioners' motion for a preliminary injunction, based solely on 9 *Del. C.* § 4959(c), to prevent the retroactive application of Respondent Kent County's recently adopted Adequate Public Facilities Ordinances ("APFOs"). A motion for reargument was denied on August 29, 2007.<sup>2</sup> The Petitioners have asserted several grounds for precluding the retroactive application of the APFOs—ranging from questions of law to intense and individual factual claims.

The only claim for which the Petitioners seek an interlocutory appeal involves the interpretation of 9 *Del. C.* § 4959(c). In rejecting the claim, the Court concluded that the Petitioners had not shown a reasonable probability of success in their effort to demonstrate that the APFOs constitute "elements" of the County's Comprehensive Plan or that the adoption of the APFOs amended the Comprehensive Plan. The Court did not address, because it did not need to address, the County's argument that the various approvals which Petitioners had in

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<sup>1</sup> *Upfront Enters., LLC v. Kent County Levy Court*, 2007 WL 2459247 (Del. Ch. Aug. 9, 2007).

<sup>2</sup> *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2007 WL 2565566 (Del. Ch. Aug. 29, 2007).

hand and upon which they premised their “grandfathering” contentions constituted the necessary “development permits” within the meaning of § 4959(c).<sup>3</sup>

The proper interpretation of 9 *Del. C.* § 4959(c), in this context, has not previously been addressed by the courts of Delaware. The Petitioners’ arguments are not devoid of merit. A prompt resolution of the dispute between the Petitioners and the County over the application of the APFOs generally to the Petitioners’ projects might have been facilitated if the Court had reached a different conclusion. If the APFOs are “elements” of the County’s Comprehensive Plan, then this Court, properly so instructed, could return to the balance of the arguments under § 4959(c), thereby possibly obviating the need to resolve the many other issues remaining for decision in this matter and the need to dispose of the numerous appeals pending in the Superior Court from the County’s administrative decisions rejecting individual Petitioner’s vested rights claims. In sum, although a final determination of whether the APFOs are “elements” of the County’s Comprehensive Plan would, to some extent, be beneficial to the future course of

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<sup>3</sup> Thus, even if the Court’s conclusions with respect to whether the APFOs are “elements” of the Comprehensive Plan or their adoption constituted an amendment of the Comprehensive Plan are wrong, the Court would be required to address further the question of whether § 4959(c) precluded retroactive application of the APFOs.

the litigation, in light of the quantity of other issues that remain for resolution and the facts unique to individual Petitioners, appellate review would likely be cumbersome and piecemeal. It would, therefore, appear that the circumstances here are neither “exceptional” nor “extraordinary,”<sup>4</sup> and, thus, that interlocutory review would not be appropriate.

With that background, I now turn to consideration of the factors set forth in Supreme Court Rule 42, an effort that leads to a result different from the one foreshadowed by the preceding text. Before this Court may certify an interlocutory appeal, it must first conclude that its order (1) determines a substantial issue; (2) establishes a legal right; and (3) satisfies at least one of the criteria enumerated in Supreme Court Rule 42(b)(i)-(v). Unless all of these three elements are satisfied, certification is inappropriate.

First, an order, to be deemed to have resolved a “substantial issue” under Supreme Court Rule 42, “must address and resolve one or more substantive legal issues between the parties.”<sup>5</sup> Although it was in the context of a preliminary

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<sup>4</sup> DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14-4, at 14-6 (2007).

<sup>5</sup> *Id.* § 14-4[a], at 14-7.

injunction proceeding, the Court nevertheless resolved the legal issue of whether the Petitioners could sustain their vested rights claim by invoking 9 *Del. C.* § 4959(c). Specifically, the Court concluded that the APFOs are not “elements” of the Comprehensive Plan. That conclusion of law constitutes the resolution of a “substantial issue.” Second, a “legal right is established where the Court determines an issue essential to the position of the parties regarding the merits of the case.”<sup>6</sup> The merits of the Petitioners’ case claiming rights under 9 *Del. C.* § 4959(c) were, as a practical matter, resolved against them through the Court’s conclusions of law set forth in the Memorandum Opinion.<sup>7</sup> Accordingly, the Order did establish a legal right in the County as to the potential for 9 *Del. C.* § 4959(c) to limit the retroactive application of the APFOs.<sup>8</sup> Finally, Rule 42(b)(i) refers to the criteria of Rule 41(b). One of those criteria identifies a question of law that is

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<sup>6</sup> *Id.* § 14-4[b], at 14-9. That the Petitioners may have other grounds for eventually prevailing does not preclude the Order from establishing a legal right.

<sup>7</sup> There are no facts that could be brought forth at trial that would alter that conclusion. There may be factual issues involved if it becomes necessary to determine the status or sufficiency of the Petitioners’ various development permits.

<sup>8</sup> If the Petitioners are delayed or incur additional costs because of the inappropriate retroactive application of the APFOs, their ability to recover any losses may be limited. On the other hand, the current moratorium ordinance limiting the filing of new land use applications may trump the APFOs as the ultimate source of the Petitioners’ frustration.

one of first instance in Delaware.<sup>9</sup> Interpretation of 9 *Del. C.* § 4959(c) has not been attempted before by any court. Thus, this Court's decision necessarily involved a question of law of first instance.

Accordingly, the Petitioners have satisfied the standards of Supreme Court Rule 42(b), and an order certifying an interlocutory appeal will be entered.<sup>10</sup>

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

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<sup>9</sup> *See id.* § 14-4[c], at 14-11. It is tempting to read into the enumerated criteria of Supreme Court Rule 41(b) that rule's introductory language referring to the need for the existence of "important and urgent reasons for an immediate determination by [the Supreme Court]." No such reason exists. The text of Rule 42(b), however, speaks of the "criteria" of Rule 41(b); the sense of urgency reflected in the introductory language of Rule 41(b) is distinct from the objective and delineated criteria.

<sup>10</sup> For the reasons set forth earlier in this letter, the Court is skeptical that these proceedings will benefit from an interlocutory appeal. The decision to certify an interlocutory appeal, of course, is committed to the Court's discretion. When fair consideration of the criteria of Supreme Court Rule 42 leads to the conclusion that the Order should be certified, it is appropriate for the trial judge to do so. The exercise of discretion by the appellate court, of course, may bring about a different result.

It may also be useful to note that the Court has set an expedited schedule for resolution of other aspects of Petitioners' vested rights claims. The parties' cross-motions for summary judgment are scheduled to be heard on December 10, 2007.