

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: February 4, 2013

Decided: February 11, 2013

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Re: *Save our County, Inc., et al. v. New Castle County*,
Civil Action No. 7151-VCG

Dear Counsel:

This case is proceeding in a manner reminiscent of Hogan's famous goat.

Trial in this matter was originally scheduled for Tuesday, January 8, 2013. At 10:11 pm on Friday, January 4, 2013, Defendant New Castle County sent me a letter (revised by a letter sent the following day) advising me, for the first time, that it had abandoned its earlier position on the merits of the case and appropriate relief.¹ In their joint opening brief, both New Castle County and Barley Mill, LLC argued that "the County has clearly complied with the plain language of Section

¹ Letter Concerning Matter to be Heard Before Vice Chancellor Glasscock 1, Jan. 4, 2013; Corrected Letter to Vice Chancellor Glasscock 1, Jan. 5, 2013.

2662” of Delaware’s Quality of Life Act.² In their reply brief, the Defendants also supported the actions of the Department of Land Use and its manager, David Culver, as legal and proper.³

However, in his letter dated January 5, 2013, Mr. Merritt informed me that the County had come to the opinion that although “County Council was legally entitled to vote as it determined appropriate on the rezoning for [Barley Mill Plaza] New Castle County declines to endorse the decision and recommendation for rezoning by the Department of Land Use.”⁴ Furthermore, the County took the position that I should grant the Plaintiffs’ request for an injunction against the further development of Barley Mill Plaza until the County Council had the opportunity to consider a traffic study and vote again on the rezoning.⁵ In response to the County’s letters, I received a letter from Mr. Wright on behalf of Defendant Barley Mill, LLC arguing that I should disregard the County’s change of position as improper and untimely, and also raising the issue that the County, despite its change of position, was still bound by a Joint Defense Agreement providing for the

² Defs.’ Op. Br. Supp. Mot. J. on the Pldgs. & Summ. J. 20.

³ See Def. Barley Mill, LLC’s Reply Br. Supp. Mot. J. on the Pldgs. & Summ. J. 27-29. See also Letter to Vice Chancellor Glasscock Regarding the Surreply Brief 1, Dec. 5, 2012 (“Please be advised County Defendants will rely upon Defendant Barley Mill LLC’s Reply Brief in Support of Defendant’s Motion for Judgment on the Pleadings and for Summary Judgment and Surreply Pretrial Brief in lieu of submitting their own brief.”).

⁴ Corrected Letter to Vice Chancellor Glasscock 1, Jan. 5, 2013.

⁵ *Id.* At the January 8, 2013 hearing, I learned that the County’s change in position was precipitated by the election of a new County Executive, who took office in November. Trial Hr’g Tr. 31, Jan. 8, 2013.

protection of confidential information shared between the County Defendants and Barley Mill.⁶

At the would-be trial on January 8, 2013, when I asked whether the County Law Department could continue to represent the County Council and Mr. Culver given the County's change in position, Mr. Merritt reiterated his view that "the County Council has done nothing wrong. The County Council was entitled to take the action that it took with the information that it had."⁷ The new head of the New Castle County Law Department, Mr. Pepukayi, also conveyed his view that though there existed a perception of a conflict, there was no actual conflict in the representation.⁸ Mr. Pepukayi repeated the County's position that the vote of the County Council was legal, but that the recommendation of the Department of Land Use was problematic.⁹ Mr. Pepukayi then took the unusual position that I should grant the injunctive relief requested by the Plaintiffs, setting aside the rezoning, despite the fact that the County Council had done nothing wrong.¹⁰ Mr. Pepukayi also represented that the County did not intend to "introduce any new arguments"

⁶ See Letter to Vice Chancellor Glasscock from Christian Douglas Wright in Response to Letters Filed by One of the County Defendants on January 4 and 5, 2013, at 6, Jan. 7, 2013 ("As of the submission of this letter, the [Joint Defense Agreement] is still in effect . . . but now Barley Mill finds itself in a situation where the County no longer shares a common interest with Barley Mill . . . Barley Mill does not know what the County has done with the Confidential Information, whether it has shared the Confidential Information with anyone, and what steps it is going to take to protect and not make any further use of the Confidential Information.").

⁷ Trial Hr'g Tr. 4.

⁸ *Id.* at 5.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6-7.

in favor of its new position, but it simply wanted to alert me to the fact that its position had indeed changed.¹¹

Ultimately, I decided that the County's new position created a conflict that prevented me from hearing the matter at that time.¹² I continued the trial until the County could clarify its new position, address any conflict in the representation by the County Law Department of both the County Council and the County Executive, and until the County Council could decide how to respond.¹³ I also gave the other parties opportunities to respond.¹⁴ I told the parties that once these steps had been accomplished I would convene an office conference.

Shortly after the January 8, 2013 hearing, Defendants New Castle County, the Department of Land Use, and David M. Culver (collectively, the "Executive Branch Defendants") hired outside counsel to represent them, as did the County Council. On January 15, 2013, I received a letter from Mr. Liebesman, the new attorney for the Executive Branch Defendants, contending that there no longer existed any conflict of interest for the attorneys of the various branches of New Castle County government.¹⁵ Mr. Liebesman also elaborated on the County's new theory of the case—that is, the "new" new theory of the case that the County

¹¹ *Id.* at 35.

¹² *Id.* at 43.

¹³ *Id.* at 44.

¹⁴ *Id.*

¹⁵ *See* Letter to The Hon. Sam Glasscock III in Response to Instructions at Jan. 8, 2013 Hr'g 2-3, Jan. 15, 2013.

formulated post-January 8—stating that the County was of the opinion that “the *County Council vote* on the rezoning for the Barley Mill Plaza project *violated the Unified Development Code* and was based on a flawed process which excluded County Council’s consideration of a completed traffic study—a fundamental failure under the circumstances.”¹⁶ On January 25, I also received a letter from Mr. Katzenstein, the attorney representing the County Council, asking me to promptly reschedule the matter for trial and objecting to any presentation of new arguments by the Executive Branch Defendants.¹⁷ On January 29, the Executive Branch Defendants filed a motion seeking leave to amend their Answer and Affirmative Defenses.¹⁸ On January 30, Defendant Barley Mill filed a letter opposing the Executive Branch Defendants’ Motion to Amend and opposing the introduction of any new arguments.¹⁹ On February 1, the County Council filed a letter to similar effect—opposing the Defendants’ Motion to Amend and any effort to further argue in favor of the Plaintiff’s position.²⁰

In response to the arguments of the County Council and Barley Mill, the Executive Branch Defendants submitted a reply letter on February 1.²¹ In that

¹⁶ *See id.* at 4 (emphasis added).

¹⁷ *See* Letter to Vice Chancellor Glasscock from Robert J. Katzenstein 3, Jan. 25, 2013.

¹⁸ *See* Defs.’ Mot. Am. Answer and Affirmative Defenses 1.

¹⁹ *See* Letter to The Honorable Sam Glasscock, III from Christian Douglas Wright 1, Jan. 30, 2013.

²⁰ *See* Def. The County Council of New Castle County’s letter to Vice Chancellor Glasscock 1, Feb. 1, 2013.

²¹ *See* Letter Reply to the Honorable Sam Glasscock, III, at 1, Feb. 1, 2013.

letter, Mr. Liebesman suggested bifurcating the case so that I could address the legal issue of whether the County Council violated Delaware's Quality of Life Act separate.²² In so doing, Mr. Liebesman advanced another new position, now fully adopting the legal arguments of Plaintiff Save our County and contending that the County Council violated 9 *Del. C.* § 2662 by voting on a rezoning without having first conducted a traffic study.²³ Mr. Liebesman also restated his position that the Executive Branch Defendants ought to be able to amend their Answer and participate in the hearing on the merits.²⁴

I was prepared to address allof these issues—including whether to allow the Executive Branch Defendants to amend their Answer, whether I should hear new substantive arguments from the Executive Branch Defendants, and whether the proceedings should be bifurcated as Mr. Liebesman requested—at the office conference scheduled to take place on Monday, February 4, 2013. Instead, that conference was diverted by yet another unexpected development. Mr. Liebesman revealed that he had recently discovered evidence of discovery abuses and possible criminal conduct, related to this case, on the part of his client, the office of the County Executive, and had forwarded this evidence to the Attorney General for his review.

²² *Id.* at 2.

²³ *Id.* Mr. Liebesman also reiterated his argument from his January 15 letter that the County Council violated the UDC. *Id.*

²⁴ *Id.* at 10.

I write now to clarify my instructions to the parties on how this matter will proceed.

In light of Mr. Liebesman's revelations, he suggested that the matter be stayed, presumably because any revision of discovery responses necessitated by his client's prior discovery violations—which would be necessary in order to proceed—could impede an investigation by the Department of Justice. He also suggested that I appoint a Special Master to address the potential discovery violations. No party objected to a stay under these circumstances, and I entered a stay, with the exception that I directed the parties to supplement the briefing on the narrow issue of whether section 2662 is unambiguous, and if so, whether the actions of any Defendant have violated that section. I encouraged the parties to simply designate existing briefing on this issue to the extent appropriate, and to otherwise proceed by informal memoranda. I also allowed the Executive Branch Defendants to file a memorandum addressing that narrow question only.

On oral motion of the Plaintiff, I dismissed the Department of Land Use and Mr. Culver as Defendants, without prejudice, as unnecessary parties to this proceeding, since any order binding New Castle County would bind the Department of Land Use as well as its general manager. An Order accompanies this letter.

I also declined to hear argument on the Motion to Amend the County's Answer. After filing the new Answer, the County intends to re-brief the issues here, despite the outstanding case-scheduling order. In order to demonstrate that the Motion to Amend should be granted, the County will have to overcome the manifest untimeliness of its change of position as well as the prejudice to other parties, including the costs of responding to the County's change of position. This is a tough row to hoe. Should I ultimately grant the County's request, I will entertain motions for fee shifting. In any event, I will take no action on this request until the stay is lifted and the Motion is renoticed.

With respect to the duration of the stay and the proposed appointment of a Special Master, I can make no decision without a review of the documents submitted to the Office of the Attorney General. If there is some ethical or practical reason why these documents should not be submitted for in camera review, the parties should so inform me promptly. Otherwise, the documents should be provided to me in camera on Monday, February 18, 2013.

To the extent the foregoing requires an order to take effect, IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III