

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FRANK E. ACIERNO, )  
)  
Petitioner, )  
)  
v. )  
)  
NEW CASTLE COUNTY, a political )  
subdivision of the State of Delaware; )  
NEW CASTLE COUNTY )  
DEPARTMENT OF LAND USE, a )  
department of the New Castle County )  
government; and NEW CASTLE )  
COUNTY BOARD OF )  
ADJUSTMENT, an administrative )  
board of the New Castle County )  
government, )  
)  
Respondents. )

C.A. No. 09A-02-005 MMJ

*CERTIORARI*

Submitted: August 3, 2009  
Decided: September 17, 2009

Upon Petitioner’s Writ of Certiorari. **DENIED.**  
Upon Petitioner’s Appeal of a Decision of the New Castle County Board of  
Adjustment. **AFFIRMED.**

**MEMORANDUM OPINION**

Richard L. Abbott, Esquire, Abbott Law Firm LLC, Hockessin, Delaware,  
Attorney for Petitioner.

James H. Edwards, Esquire, Assistant New Castle County Attorney, New Castle,  
Delaware, Attorney for Respondents.

**JOHNSTON, J.**

## INTRODUCTION

Before the Court is Petitioner Frank E. Acierno's appeal of the New Castle County Board of Adjustment's decision, which upheld the Department of Land Use's determination that Petitioner's land development application was not eligible for redevelopment under the Unified Development Code ("UDC"). Upon review of the record in this appeal, the Court finds that the Board's decision was free from legal error and was supported by substantial evidence. Therefore, the Board's decision is **AFFIRMED**.

## FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2007, Petitioner filed an application with the New Castle County Department of Land Use (the "Department") seeking to rezone approximately fifty-one acres of property. The property is currently zoned as S (Suburban)<sup>1</sup>, which is a medium density residential zoning category. The

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<sup>1</sup> UDC § 40.02.232 characterizes a (S) Suburban District as:

- A. This district permits a wide range of residential uses. This district includes all the newly developing areas designated as growth areas in the Comprehensive Development Plan.
- B. This district permits moderate to high density development and a full range of residential uses in a manner consistent with providing a high quality suburban character. Significant areas of open space and/or landscaping shall be provided to maintain the balance between green space and buildings that characterize suburban character. The highest densities are permitted in designed communities, hamlets and villages.
- C. This district is not intended to be used for fully developed areas. Fully developed areas are zoned Neighborhood Conservation (NC). The Suburban District is used to in-fill tracts containing at least five (5) acres or where New Castle County seeks to redevelop the area to suburban character.

application requests that the property be rezoned to CR (Commercial Regional)<sup>2</sup>, which is a transitional suburban commercial zoning category.

Additionally, the application seeks approval of Petitioner's Major Subdivision Land Development Plan (the "Plan"). The Plan proposes to develop a 345,000 square foot commercial shopping center on the rezoned acreage. The acreage consists of all or a portion of five separate tax parcels with different or no development: two parcels are .55 acres and each bears a single residential home; one parcel is .55 acres and is undeveloped; one parcel is 1.5 acres<sup>3</sup> and is undeveloped; and one parcel is 48 acres<sup>4</sup> and holds a dairy barn. The Plan states that the two residential homes and the dairy barn constitute legally existing Gross Floor Area ("GFA") on the site. Under the Plan, most if not all of the GFA would be demolished and rebuilt upon the site.

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<sup>2</sup> UDC § 40.02.225 characterizes a CR (Commercial Regional) District as:

- A. This district is intended to provide for community and regional commercial services. Its character is suburban transition.
- B. Design controls are intended to promote circulation by foot and automobile within contiguous commercial or office areas. These design features are intended to lessen congestion on roads and create large commercial complexes rather than development strips.
- C. Mixed uses are permitted to provide residential customers within the development. Transit facilities are also required.
- D. The new areas to be zoned for this use should be large and deep. Small shallow frontages shall not be designated for this type of use.

<sup>3</sup> The 1.5 acres is a sliver of a larger undeveloped 70 acre parcel that Petitioner seeks to sever for utilization in the Plan.

<sup>4</sup> The 48 acres is a portion of a larger parcel of relatively undeveloped farmland that Petitioner owns. Petitioner seeks to divide the parcel and utilize the portion with the dairy barn for the Plan.

On March 18, 2008, Petitioner wrote to the Department requesting that it review the Plan as one for redevelopment under Article 8 of the UDC. Petitioner explained that the Plan qualified for redevelopment because “three of the parcels that form the basis for the application currently contain buildings or structures which are proposed to be demolished pursuant to the [P]lan.” Petitioner informed the Department that his engineer would submit a UDC table to illustrate the Design Element Improvements (“DEI”) achieved by the Plan in accordance with the UDC’s redevelopment requirements.

Thereafter, the Department informed Petitioner’s engineer that it would not meet to discuss the Plan’s redevelopment potential or to go over Petitioner’s UDC table. On April 10, 2008, Petitioner wrote to the Department requesting that it either meet with Petitioner or convert the Plan as requested. Enclosed with the letter, Petitioner included a copy of his UDC table.

On June 2, 2008, the Department informed Petitioner that the Plan does not qualify for redevelopment. The Department determined that Petitioner had “not demonstrated that the property contains nonconformities and therefore does not have the ability to propose improvements accordingly.”<sup>5</sup>

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<sup>5</sup> The Department specifically explained its conclusion as follows:

- a. The applicant proposes a 100% credit for providing street trees. Please note that the current agricultural use does not require street trees. Additionally, the frontage of the residential properties appear to contain adequate existing vegetation to meet the planting requirement;

On June 6, 2008, Petitioner wrote to the Department disputing its conclusions. Petitioner asserted that an evaluation of DEI must be made under the assumption that existing development was being proposed under the UDC and that the UDC grants DEI credits for other nonconformities. Additionally, Petitioner requested that this issue be forwarded to the Department's general manager "so that he may issue a final decision."

### *Final Decision of the Department*

On August 26, 2008, the Department issued a final decision on Petitioner's application. The Department found that Petitioner's application did not qualify as a redevelopment plan. The Department asserted that Petitioner's attachment of two residential half-acre parcels to contiguous undeveloped farmland and two undeveloped parcels does not render the Plan eligible for redevelopment.

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- b. The applicant proposes a 50% credit for off-site transportation improvements. Please note that the existing agricultural use and two residential properties are not required to address levels of service and is therefore not considered a nonconforming issue;
  - c. The applicant proposes a 200% credit for quantity and quality stormwater management. Please note that the applicant has not demonstrated that the properties are nonconforming with respect to required stormwater management. Stormwater management is not required for the current use of the parcels;
  - d. The applicant proposes a 300% credit for improving building setbacks. Please note that the applicant has not demonstrated that the existing buildings are nonconforming with respect to required setbacks. Additionally, the applicant can not obtain credit beyond 100% for any one category. Finally, any nonconforming setbacks would be subject to a proportional improvement;
  - e. The applicant proposes a 100% credit for increasing lot area. Please note that the applicant has not demonstrated that the existing lot areas are nonconforming. The existing lot areas appear to be permitted by the current county regulations;
  - f. The applicant proposes a 100% credit to increase the lot width. Please note that the current county regulations permit reduced and zero lot width frontages. The existing lots would not be considered nonconforming with respect to lot width;
  - g. The applicant proposes a 100% credit to provided sidewalks. The existing use of the property is not nonconforming with respect to required sidewalks.

The Department concluded that “[i]f the purchase of residential land contiguous to a [farm] or other open space rendered the combination parcel “redevelopment,” the standards and protections of the [UDC] essentially would be nullified for a majority of undeveloped parcels.” The Department stressed that such a result would be contrary to the purposes of redevelopment in New Castle County and would lead to an absurd result.

Additionally, the Department reviewed the site’s nonconformities to determine whether the property would meet the redevelopment standards, assuming *arguendo* that the plan qualified for redevelopment. The Department concluded that the Petitioner “failed to demonstrate that sufficient nonconformities exist and that the proposed improvements satisfy the redevelopment standards.” The Department asserted that Petitioner had failed to present any tangible evidence to show the existence of nonconformities and of the DEI. The Department stated that Petitioner’s correspondence, summarizing his understanding of the issues, is insufficient to meet the UDC’s proof requirements.

***Petitioner’s Appeal to the New Castle County Board of Adjustment***

On September 15, 2008, Petitioner filed an appeal with the New Castle County Board of Adjustment (the “Board”). Petitioner asserted that the Department erred in its determination that the Plan does not qualify for

redevelopment. Petitioner reiterated the arguments previously made to the Department and provided the Board with a copy of his UDC Table.

On December 18, 2008, the Board conducted a hearing. At the hearing, Petitioner urged that the term “site,” as used within the UDC, means “an area that’s proposed for development.” Petitioner asserted that the Department erred when it failed to consider the parcels and their development together as a single site.

Petitioner argued that the Plan, when the parcels are combined and viewed as a single site, qualifies for redevelopment under the UDC. Petitioner asserted that the site qualifies for redevelopment because the site was previously developed, the site contains legally existing GFA, the Plan calls for a GFA demolition and rebuild of over 50%, and the Plan includes DEI greater than 400%. To support his contentions, Petitioner provided exhibits detailing the site and the structures upon the different parcels. Additionally, Petitioner presented Mr. Gaza Csoltko, Petitioner’s project engineer, to explain the DEI achieved by the Plan. Mr. Csoltko testified that the Plan would provide a 950% DEI.

In opposition, Respondents asserted that the Department did not err in its conclusions and that the Plan does not qualify for redevelopment under the UDC. Respondents emphasized that the Plan is contrary to the legislative intent of the statute – to promote the revitalization of vacant, abandoned, or under-utilized properties while preserving open spaces.

Respondents argued that the Plan would “lead to an absurd result.”

Respondents asserted that Petitioner cannot “bootstrap” two small developed residential parcels to one undeveloped parcel and a large tract of farmland with a dairy barn to qualify for redevelopment. Respondents asserted that under Delaware law the zoning boards may not regulate farmland and, therefore, “barns cannot get you into the redevelopment provisions of the code.” Additionally, Respondents asserted that even if the Plan fell under the redevelopment provisions, Petitioner failed to prove the nonconformities necessary to meet the 400% DEI requirement.

### ***Final Decision of the Board***

At the close of testimony, the Board voted 5 to 1 to deny the appeal. The Board found that the UDC’s use of the term “site” was ambiguous. The Board found that the legislative intent of the UDC is to provide incentives for the redevelopment of previously developed land while preserving open spaces. The Board concluded that based on the legislative intent, the Plan did not meet the requirements for redevelopment.

Prior to the vote, the Board Chairman stated that he believed Petitioner had failed to meet his burden of showing that the Department erred in concluding that the Plan does not meet the 400% DEI requirement. However, the Board Chairman noted that “[i]f we reach the first one [and Petitioner] does not qualify under the

redevelopment ordinance, [] then we never even get to that second point” that the Plan fails to meet the 400% DEI requirement.

On February 3, 2009, the Board Chairman issued the written decision on behalf of the Board. The Board found that the term “site” within the relevant UDC provisions was undefined and ambiguous. The Board determined that “the dictionary definition, as applied in this context, is unavailing.” The Board asserted that in such an instance the UDC directs that the reviewing body look to the intent of the UDC. The Board held that based upon the clear legislative intent – to revitalize previously developed property and preserve open spaces – the Plan does not qualify for redevelopment treatment because it achieves neither of the those purposes.

Additionally, the Board found that even if the Plan qualified as a redevelopment plan, Petitioner “failed to demonstrate existing nonconformities” and failed “to provide sufficient evidence of the proposed improvements.” Therefore, the Board determined that Petitioner is not eligible for the advantages offered in the redevelopment provisions.

### ***Petitioner’s Appeal to the Superior Court***

On February 10, 2009, Petitioner filed a *Complaint In Certiorari* with the Court appealing the Board’s decision. Petitioner asserts that the Board committed legal error in affirming the Department’s conclusion that the Plan does not qualify

for redevelopment or meet the 400% DEI requirement. Additionally, Petitioner asserts that the Board Chairman erred by unilaterally determining the 400% DEI issue in the written decision, when the Board never reached a conclusion on such issue. Petitioner also claims that the Board erred by interpreting the term “site,” despite the fact that it is unambiguous.

The Court issued the *Writ of Certiorari* to the Respondents and requested that the record of the proceedings below be handed-up. The Court received a copy of the record of the proceedings on March 5, 2009.

Petitioner filed his opening brief on April 22, 2009. Respondents filed their answering brief on May 18, 2009. On June 4, 2009, Petitioner filed his reply brief. The Court heard oral argument on August 3, 2009.

### **STANDARD OF REVIEW**

This Court reviews a decision of the Board to determine if substantial evidence exists to support the Board’s factual findings and to determine whether the Board’s decision is free from legal error.<sup>6</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>7</sup> It is not the Court’s role to make credibility decisions or to

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<sup>6</sup> *CCS Investors, LLC v. Brown*, 2009 WL 2054551, at \*16 (Del.).

<sup>7</sup> *Rivera v. Arthur Jackson Co., Inc.*, 2009 WL 418303, at \*1 (Del. Super.) (quoting *Del. Alcoholic Beverage Control Comm’n v. Newsome*, 690 A.2d 906, 910 (Del. 1996)).

independently weigh the evidence.<sup>8</sup> Where the Court determines that the record supports the Board's findings, the Court must accept those findings even if the Court would have reached a different conclusion.<sup>9</sup>

### **ISSUES PRESENTED**

There are two issues presently before the Court: (1) whether the Board committed legal error in its interpretation of the applicable provisions of the UDC regarding the qualification of the Plan; and (2) whether the Chairman of the Board erred when he wrote a decision on behalf of the entire Board on whether the Plan met the DEI requirements of the UDC.

### **RELEVANT UDC REDEVELOPMENT PROVISIONS**

The UDC provides the framework and requirements for developing and redeveloping properties within New Castle County. UDC § 40.08.130(B)(6)(a) states the purpose of redevelopment.

Redevelopment is intended to facilitate and encourage the continued viability of previously developed land by granting a credit for both extractive use sites and Brownfields; and for sites with legally existing (GFA) that has been demolished by more than (50) percent of its GFA. New construction may be configured or located elsewhere on the site although rehabilitation or restoration of existing structures is highly recommended.<sup>10</sup>

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<sup>8</sup> *CCS Investors, LLC*, 2009 WL 2054551, at \*16.

<sup>9</sup> *Id.*

<sup>10</sup> UDC § 40.08.130(B)(6)(a).

Redevelopment is not available for every site. UDC § 40.08.130(B)(6)(b)

defines when redevelopment is available.

The standards of this section shall apply only to sites that have been designated as a Brownfield, developed under the former code, developed prior to adoption of New Castle County development regulations, or former or existing extractive use sites....The applicant shall be permitted to utilize all of the legally established square footage for the site provided that said square footage is existing or existed (or was approved for the site) on the site. For office or commercial sites that are currently used for residential purposes and abut residentially zoned property, the applicant must provide the entire required buffer against the residential land....In lieu of this section, an applicant may choose to redevelop the site in full compliance with the UDC.<sup>11</sup>

Even if a plan qualifies for redevelopment, a developer can only take advantage of the redevelopment provisions if the developer can show that the property contains nonconformities and that the plan will have DEI of at least 400%.<sup>12</sup> UDC § 40.08.130(B)(6)(e)(1) provides developers with a table that must be filled out and submitted to the reviewing body to calculate the proposed improvements. The applicant also must submit an exploratory sketch plan of the property to identify and quantify the existing nonconformities on the property.

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<sup>11</sup> UDC § 40.08.130(B)(6)(b).

<sup>12</sup> UDC § 40.08.130(B)(6)(e)(1).

## **ADVANTAGES OF REDEVELOPMENT**

The UDC provides significant advantages to encourage developers to reutilize previously-developed or under-utilized property. Under the UDC, if an applicant's plan qualifies for redevelopment, the developer is entitled to certain benefits.

These benefits include: (1) a recognition of legally existing floor area for the site; (2) the legally existing floor area may be reconfigured and moved around the site; (3) any associated rezoning is not subject to the tri-annual rezoning process; (4) major plans without rezonings are not subject to preliminary plan submissions and a hearing; (5) applicants receive increased limits for Minor Plans (from 20,000 existing sq. ft. to 50,000 sq. ft.); (6) applicants are provided with the greater of either a density bonus of 25% of the maximum GFA allowed on the site or 25% of the legally established non-residential GFA on the site; (7) applicants are not required to perform a traffic study, unless requested by DELDOT; (8) applicants can be relieved from complying with DEI (such as: landscaping relief, parking, access, etc.); (9) applicants do not have to conduct a site resource capacity analysis; and (10) applicants' impact fees are waived.<sup>13</sup>

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<sup>13</sup> UDC § 40.08.130(B)(6).

## **MEANING OF THE TERM “SITE” UNDER THE UDC**

The UDC does not specifically define the term “site.” However, in the definitional section, it provides that “words not defined in this Article shall have the meaning given in other New Castle County Code Chapters or Webster’s Unabridged Dictionary.”<sup>14</sup> The Webster’s Unabridged Dictionary defines the term “site” as “the spatial location of an actual or planned structure or set of structures,” and “a space of ground occupied or to be occupied by a building.”

The term “site” as used within the UDC could be ambiguous. It is unclear whether site means a parcel or lot, or an entire consolidated property that is sought to be redeveloped. Both “parcel” and “lot” are defined terms within the UDC. Those terms could have been used if that is what County Council had meant.

The Court interprets that the term “site” as referring to a consolidated property as a whole. Such an interpretation is consistent with the underlying public policy of redevelopment – to revitalize established communities; make efficient use of existing infrastructures; redevelop Brownfields into viable businesses; encourage reinvestment in underutilized areas; resuscitate previously developed property; promote the reuse of vacant and abandoned properties; all while preserving open spaces and providing an alternative to greenfield developments.

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<sup>14</sup> UDC § 40.33.300.

## REVIEW OF THE BOARD'S DECISION

The Board did not commit legal error when it upheld the Department's determination that the Plan does not qualify for redevelopment under the UDC. Under the Plan, Petitioner seeks to rezone and combine five separate parcels to create a single site for redevelopment. The parcels consist of two half-acre lots with single residential homes, a 48-acre farm with a dairy barn, and two undeveloped lots. It is contrary to the clear language and purpose of the UDC to permit redevelopment of previously-undeveloped farmland and two undeveloped parcels by combining or annexing adjacent residential parcels, when the residential parcels constitute approximately 2% of the total "site" for redevelopment.

It is also clear that County Council intended to preserve farmland. UDC § 40.02.200 specifically states that "[i]t is County Council's intent to encourage agricultural preservation in all New Castle County zoning Districts."<sup>15</sup> Here, the bulk of the acreage, the 48 acre parcel with a dairy barn, is not only farmland but also mainly open space. Therefore, the Court finds that the Board did not commit legal error when it determined that the Plan did not qualify for redevelopment based upon the clear legislative intent of County Council to preserve open spaces.

The Court recognizes that County Council could have clarified the definition of the term "site" and whether farmland may or may not be joined to other

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<sup>15</sup> UDC § 40.02.200.

developed parcels for purposes of redevelopment, and if so, under what circumstances.<sup>16</sup> Here, the percentage of developed land (which does not appear to be nonconforming) is so *de minimus* that it is outside the plain language and clear intent of the UDC. Therefore, as the Board found, Petitioner cannot avail himself of the significant advantages of redeveloping a vacant, under-utilized or nonconforming property.

Having found that the Board did not err in rejecting the Plan for redevelopment, the Court need not reach the issue of the procedural propriety of the Board Chairman's written decision as to whether the 400% DEI threshold had been met.

## CONCLUSION

The Court finds that Board did not commit legal error when it upheld the Department's finding that the Plan does not qualify for redevelopment. Petitioner is not barred from developing the property.<sup>17</sup> Petitioner simply is not entitled to the advantages of redevelopment under the UDC.

**THEREFORE**, the petition for writ of certiorari is hereby **DENIED**. The Decision of the Board affirming the Department's denial of Petitioner's application

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<sup>16</sup> For example, County Council could have established that contiguous farmland could be joined to developed residential or commercial parcels or lots, for redevelopment purposes, when the farmland represents no greater than a certain percentage of the property.

<sup>17</sup> See UDC § 40.08.130(B)(6)(b) (providing that where an application does not meet the redevelopment requirements "an applicant may choose to redevelop the site in full compliance with the UDC").

for redevelopment is hereby **AFFIRMED**. However, the Court has not considered and neither affirms nor reverses the Board's decision on the 400% DEI rule.

**IT IS SO ORDERED.**

/s/ *Mary M. Johnston*  
The Honorable Mary M. Johnston