

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

KAPPA ALPHA EDUCATIONAL )  
FOUNDATION, INC., )  
Plaintiff, )  
 )  
v. ) C.A. No. N19M-10-175 ALR  
 )  
CITY OF NEWARK, a municipal )  
corporation of the State of Delaware, )  
Defendant. )

Submitted: December 10, 2019  
Decided: December 17, 2019

**ORDER STAYING LITIGATION**

This matter is before the Court on the Motion to Stay All Proceedings and Discovery filed by Defendant, City of Newark, and the response in opposition thereto by Plaintiff, Kappa Alpha Educational Foundation, Inc. (“KA”), as well as KA’s Motion to Stay Defendant’s Motion to Stay and Motion to Dismiss. In consideration of the relevant statutes, especially *22 Del. C. § 702*; the Delaware Rules of Civil Procedure; applicable decisional law; the parties’ submissions and oral argument; and the entire record, the Court finds as follows:

1. KA owns property located at 19 Amstel Avenue, Newark, Delaware (the “Property”). The Property has approximately 20 bedrooms and has historically been used as a fraternity house for the Kappa Alpha fraternity for students at the University of Delaware affiliated with KA. In 2019, the University of Delaware suspended the Kappa Alpha fraternity for four years.

2. The parties disagree regarding the current zoning designation for the Property and also disagree regarding the appropriate and/or legally required zoning designation.<sup>1</sup> According to the record, the following are among the possible current designations:

- the Property is zoned “RS,” a residential housing designation,<sup>2</sup> in the City of Newark Municipal Code but has operated as a legally existing, nonconforming use;
- the Property is zoned “UN/RS” pursuant to City of Newark Ordinance 78-30, codified at City Zoning Code § 32-6;
- the Property is zoned “UN,” a University designation, according to the 1978 City of Newark Zoning Map;
- the Property is zoned “RS” on the City of Newark Zoning Map; and/or

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<sup>1</sup> For the limited scope of the motions before the Court, it is not necessary to address—and the Court does not address—the purported zoning designations, the proper and/or legally required zoning designation; and/or whether the nonconforming use of the Property as a fraternity house was lost once the University issued a suspension of the Kappa Alpha fraternity.

<sup>2</sup> Designation as “residential” limits occupancy to no more than 3 unrelated individuals.

- the Property is zoned University (or “UN”)<sup>3</sup> according to the Comprehensive Development Plan (“Comp Plan”), adopted by the City of Newark on or about September 26, 2016, pursuant to the requirements of 22 *Del. C.* § 702.

3. KA’s mandamus petition seeks to have the Court compel the City of Newark to change the zoning of the Property to “UN” or “UN/RS.”

4. A review by the City of Newark of the zoning designation for the Property is underway. On November 4, 2019, the Newark City Council passed Resolution 19-HH, directing the City’s Planning Commission to review an ordinance to change the Comp Plan designation for the Property from “University” to “Residential, Low Density” (“Proposed Ordinance”). The Planning Commission is scheduled to consider and provide its recommendations regarding the Proposed Ordinance at the January 7, 2020 Planning Commission meeting.

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<sup>3</sup> The Comp Plan defines “University” as parcels “having institutional use but distinguished for use as part of the University of Delaware or public university campus, including classrooms, dormitories, laboratories, University offices, and University recreation and commercial facilities, but excluding off-campus University owned single-family homes having residential uses.”

5. The Court has the “inherent power to stay proceedings in control of its docket after balancing competing interests.”<sup>4</sup> Delaware courts will stay an action that may be mooted by the occurrence of external events in the interest of judicial economy.<sup>5</sup> A proceeding may become moot “if the legal issue in dispute is no longer amenable to a judicial resolution.”<sup>6</sup>

6. Zoning and comprehensive plan amendments are legislative acts.<sup>7</sup> And, under Delaware law, local jurisdictions (such as the City) have final say regarding all land use planning actions.<sup>8</sup> There is no vested right to any comprehensive plan designation or zoning classification.<sup>9</sup> The City has the authority to manage its own

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<sup>4</sup> *Homeland Ins. Co. of N.Y. v. Corvel Corp.*, 2016 WL 1423047, at \*2 (Del. Super. Ct. Apr. 6, 2016).

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> *AIU Ins. Co. v. Am. Guarantee & Liab. Ins. Co.*, 2013 WL 154263, at \*2 (Del. Jan. 15, 2013).

<sup>7</sup> *Willis v. City of Rehoboth Beach*, 2005 WL 1953028, at \*5 (Del. Super. Ct. June 24, 2005) (quoting *Dukes v. Shell Oil Co.*, 177 A.2d 785, 790 (Del. Ch. 1962)); see also *Farmers for Fairness v. Kent Cty. Levy Court*, 2012 WL 295060, at \*3 (Del. Ch. Jan. 27, 2012) (holding that a comprehensive plan change which amends a use classification is effectively a rezoning).

<sup>8</sup> *Toll Bros. v. Wicks*, 2006 WL 1829875, at \*6 (Del. Ch. June 21, 2006); see also 29 Del. C. § 9206.

<sup>9</sup> See *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 821–22 (Del. 2018); *Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *Acierno v. Cloutier*, 40 F.3d 597, 620 n.17 (3d Cir. 1994); *Mayor & Council of New Castle v. Rollins Outdoor Advert., Inc.*, 475 A.2d 355, 360 (Del. 1984); *Reinbacher v. Conly*, 141 A.2d 453, 457 (Del. Ch. 1958); see also *Rinker v. Dubuque Cty. Bd. of Supervisors*, 2016 WL 1682960, at \*5 (Iowa Ct. App. Apr. 27, 2016) (“[N]o property owner has

land use regulations which “should be progressive, not static; they should be sufficiently flexible to adjust to changed conditions in the interest of the public welfare.”<sup>10</sup>

7. Plaintiff’s claims will be moot if the Proposed Ordinance to amend the Comp Plan designation of the Property is adopted.

8. The question of appropriate zoning designation for the Property is best addressed within the political process in the City of Newark. While there are circumstances under which the court system might properly address those issues—and, indeed, this Court may eventually do so here—it is not in the interest of judicial economy to litigate the question of the Property’s zoning at this time when the Court’s answer might soon be rendered moot by the political process.

9. For these reasons, the Court shall exercise its discretion to stay this litigation, including discovery and litigation of pending dispositive motions, for a

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a vested right in the continuation of a particular zoning classification.” (quoting *Quality Refrigerated Serv., Inc. v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998))).

<sup>10</sup> *Willdel Realty, Inc. v. New Castle Cty.*, 281 A.2d 612, 614 (Del. 1971) (“Zoning is a legislative action presumed to be valid unless clearly shown to be arbitrary and capricious because not reasonably related to the public health, safety, or welfare.”); see also *Lynch v. City of Rehoboth Beach*, 2005 WL 1074341, at \*1, 6 (Del. Ch. Apr. 21, 2005), *aff’d*, 984 A.2d 407 (Del. 2006) (upholding a zoning change of property from a commercial designation to a residential designation).

reasonable amount of time to allow the City of Newark to complete the political process underway.

**NOW, THEREFORE, this 17th day of December 2019, this litigation is hereby STAYED. The City of Newark shall file a status report no later than January 10, 2020, notifying the Court of the outcome of the January 7, 2020 Planning Commissioner meeting; identifying the next step, if any, in the zoning process; and stating whether the City of Newark seeks an additional stay and for how long. KA may respond no later than January 17, 2020. Thereafter, the Court will notify the parties whether the stay shall remain in effect or be lifted.**

**IT IS SO ORDERED.**

*Andrea L. Rocanelli*  
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The Honorable Andrea L. Rocanelli