



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHRISTIANA TOWN CENTER, LLC, )  
CTC PHASE II, LLC, and )  
CTC EAST, LLC, )  
)  
Plaintiffs, )  
)  
v. )  
)  
NEW CASTLE COUNTY, )  
SEARS, ROEBUCK AND CO., and )  
KRC ACQUISITIONS, INC., )  
)  
Defendants. )

C.A. No. 4044-VCS

MEMORANDUM OPINION

Date Submitted: December 18, 2008

Date Decided: March 12, 2009

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**STRINE, Vice Chancellor.**

## I. Introduction

This case is about whether defendant New Castle County properly rezoned forty-five acres located in an unincorporated area of New Castle County (the “Property”) as part of defendants Sears, Roebuck and Company’s and KRC Acquisition, Inc.’s plan to redevelop the Property from a warehouse and appliance center to a 447,000 square foot shopping center (the “Redevelopment Plan”).

The plaintiffs, Christiana Town Center, LLC, CTC Phase II, LLC, and CTC East, LLC (collectively “CTC”), argue that New Castle County did not sufficiently consider the traffic effects of adding a new shopping center to an already crowded area.<sup>1</sup>

Specifically, CTC contends that in rezoning the Property, New Castle County violated the bright-line legal requirements for its actions because: (1) the New Castle County Unified Development Code (the “UDC”) mandated that a traffic impact study (“TIS”) be performed in this instance because even though the plan portion of the Redevelopment Plan was exempted from the TIS requirement, the rezoning was a separate request that needed a TIS; (2) even if a TIS was not required, the UDC mandated that traffic at intersections near the Property be at a minimum of level of service (“LOS”) that could not be attained; (3) the UDC obligated New Castle County to enforce the Delaware Department of Transportation (“DelDOT”)’s regulations, which New Castle County did not do; or (4) an agreement between New Castle County and DelDOT required that a

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<sup>1</sup> CTC is itself a large shopping complex in the same area, and is, one assumes, affected by traffic conditions in a couple of ways. First, if the area becomes too congested that might deter shoppers from going to CTC. Second, if the Redevelopment Plan is approved and developed, that might affect CTC’s plans, if they exist, to further expand by making CTC’s own ability to secure approval more difficult.

minimum LOS be achieved for all rezonings. Accordingly, CTC argues that the rezoning was invalid.

In this post-trial opinion, I find that the Redevelopment Plan did not need to comply with any of these requirements and thus was valid.

First, I find that the UDC did not require a TIS in this instance. In a section addressing redevelopments, the UDC exempts “major plans” from the TIS requirement. None of the parties dispute that this would exempt a major redevelopment plan from the TIS requirement. Rather, the question is whether this exception also exempts a rezoning request needed to implement such a plan. New Castle County’s interpretation of the UDC is that the UDC’s exemption for major redevelopment plans was intended to create an incentive to promote older properties to come into code compliance, and promote redevelopment rather than encourage sprawl. To that end, the UDC relaxed the TIS mandate, even for redevelopment plans that require a rezoning. This is a reasonable interpretation of what I find to be an ambiguous statute, embraced by the elected officials who are responsible for adopting, amending, and administering the implementation of that statute. Thus, I defer to that interpretation.

Turning to CTC’s second argument, I conclude that the UDC’s exemption of major plans from the requirement to get a TIS also exempts the Redevelopment Plan from the process that the UDC establishes for the consideration of the TIS’s results. Because the article of the UDC addressing the need to maintain certain LOS standards only sensibly applies if a TIS is required in the first instance, that article does not apply to the Redevelopment Plan.

Similarly, CTC asserts that the UDC requires that New Castle County independently enforce DelDOT's regulations, which CTC interprets as requiring a TIS and the attainment of LOS D in this instance. But, the UDC does not require that New Castle County second guess DelDOT's application of its own regulations. The UDC only requires that New Castle County give DelDOT the opportunity to independently analyze traffic effects and apply its own regulations. New Castle County did so in this case, and thus it complied with the UDC.

Finally, I turn to CTC's argument that an agreement between New Castle County and DelDOT mandates that any proposed rezoning in New Castle County be denied if it will result in traffic conditions that do not result in at least LOS D. CTC is not a party to that agreement, and thus cannot enforce it. CTC has also not bothered to join DelDOT as a party in pressing this critical question. Because DelDOT has a vital interest in the interpretation of its own agreement, I find that DelDOT is a necessary party for this claim and that CTC cannot bring this challenge without joining DelDOT. And, even if CTC could join DelDOT at this late juncture, the agreement does not mandate that every rezoning in New Castle County result in traffic conditions that meet LOS D level service.

## II. Factual Background

After a trial on a stipulated paper record, I have found the following facts.

### A. Sears Applies To Have The Property Rezoned And Its Plan Approved

The Property was originally zoned Business Park, a status meant for “office, manufacturing, light industrial, warehousing, and uses that support them.”<sup>2</sup> In line with that designation, the Property houses a warehouse and an appliance sale center. Sears and KRC (generally referred to hereafter singularly as “Sears”), however, hope to replace the warehouse and appliance center with a 447,000 square foot shopping center to be called the Promenade at Christiana.<sup>3</sup> As the first step in that process, in July 2007, Sears submitted an exploratory sketch to the New Castle County Department of Land Use.<sup>4</sup> The exploratory sketch set out Sears’ plan for the Property. On the same form that Sears submitted with the exploratory sketch, Sears also requested that the Property be rezoned Commercial, Retail, which would make the Property appropriate for “community and regional commercial services” (i.e. shopping malls).<sup>5</sup>

The Redevelopment Plan has certain positive attributes for New Castle County. In addition to the beneficial economic effects of redeveloping the Property, the Redevelopment Plan would bring the Property into conformity with land use requirements that did not exist when the Property was first developed over forty years

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<sup>2</sup> New Castle County, UNIFIED DEVELOPMENT CODE (“UDC”) § 40.02.226.

<sup>3</sup> Originally, Sears only planned to build a 417,000 square foot shopping center, but the project has since expanded. The current building is 286,000 square feet. JX-4.

<sup>4</sup> JX-4. In New Castle County, a plan like the one at issue goes through a three-step review process: an exploratory plan, a preliminary plan, and a final plan.

<sup>5</sup> UDC § 40.02.225.

ago. In particular, the defendants stress that the Property currently has no stormwater management system, which contributes to problems on the land downstream from the Property. This would be fixed under the Redevelopment Plan, which would bring the Property into full compliance with the UDC. And, as part of the Redevelopment Plan, Sears proposes expanding Eagle Run Road, which the Property borders, so that Eagle Run Road connects Routes 273 and 7. This would presumably improve traffic flow in an already congested area.

But, the additional traffic to the Promenade at Cristiana would also generate more traffic on roads that are already strained. As early as 1997, a study by DelDOT, New Castle County, and the Wilmington Area Planning Council found that the nearby intersection of Eagle Run Road, Route 273, and Chapman Road (the “Eagle Run/273 Intersection”) had a failing LOS and needed improvements to run satisfactorily.<sup>6</sup> By all accounts, the ensuing years have not seen an improvement in the traffic situation, and CTC stresses that adding another large shopping center to the area would only put more pressure on the already failing Intersection.

Of course, the UDC’s adoption in 1997 was in large measure inspired by concerns about the traffic and other adverse effects of development in New Castle County.<sup>7</sup> Thus, it is not surprising that the UDC has specific provisions designed to address the traffic effects of proposed development. Normally, the UDC, per Article 11, does this by requiring a TIS from any applicant filing a plan that could “generate significant traffic

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<sup>6</sup> JX-1 (Churchman’s Crossing Study (Apr. 1, 1997)).

<sup>7</sup> UDC § 40.01.015(D)(1) (stating that the assurance of an adequate transportation system was one of the purposes of the UDC).

impacts.”<sup>8</sup> As set out by the UDC, a TIS is an inquiry into whether the roads surrounding proposed development can support the traffic the new project will generate.<sup>9</sup>

Specifically, a professional engineer is required to estimate how much additional traffic the new site will generate and then determine if the intersections around the proposed development are equipped to handle the extra volume.<sup>10</sup> These results are then analyzed by grading the projected LOS of the nearby intersections on an A, B, C, D, E, F scale.

The resulting grade must meet the UDC’s guidelines. For a parcel like the Property, a LOS of “D” would be the minimum; the UDC considers anything less “unacceptable.”<sup>11</sup> In the case of an unacceptable LOS, development is not permitted unless an applicant either obtains a LOS waiver or enters into agreements to mitigate the adverse traffic effects.<sup>12</sup>

This process, however, is not required in certain instances. Article 8 of the UDC creates certain special rules for “Nonconforming Situations.”<sup>13</sup> One such situation is when a property owner seeks to redevelop an existing property and promises to bring the property into greater harmony with the overall objectives of the UDC.<sup>14</sup> By encouraging the revitalization of existing properties, the incentive for sprawl is reduced and properties that were developed before the UDC’s adoption can be brought up to code. Thus, as to

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<sup>8</sup> UDC § 40.11.120.

<sup>9</sup> UDC § 40.11.130.

<sup>10</sup> *Id.* The UDC also requires that DelDOT review the report. UDC § 40.11.140.

<sup>11</sup> UDC § 40.11.210. The standard for areas without sewer service is slightly higher, requiring LOS C or better. *Id.*

<sup>12</sup> UDC § 40.11.000.

<sup>13</sup> UDC § 40.08.

<sup>14</sup> UDC § 40.08.130(B)(6)(e) (setting out an abbreviated review process for redevelopment plans and requiring that all such plans create greater code compliance).

an application like Sears' Redevelopment Plan, which promises to bring the Property into compliance with the UDC, Article 8, § 130(B)(6)(e) of the UDC relaxes a number of ordinarily applicable requirements. Most notably for this case, § 130(B)(6)(e)(7) provides that:

An operational analysis may be required for major plans. *A traffic impact study shall only be required if required if requested by DelDOT.* Proposed development is subject to DelDOT transportation impact standards, and the County may limit or restrict development to less [existing gross floor area] if that is recommended by DelDOT. DelDOT may also require transportation improvements as a condition of its letter of no objection.<sup>15</sup>

When it considered the Redevelopment Plan, New Castle County's Department of Land Use interpreted this provision as meaning that because Sears' proposal was a major plan within the meaning of the UDC, only an operational analysis was required, not a TIS, unless DelDOT asked for a TIS.<sup>16</sup> But, DelDOT never requested a TIS on the effects of the Redevelopment Plan.<sup>17</sup> DelDOT did choose, however, to request "an analysis that [would] resemble a TIS."<sup>18</sup>

DelDOT's request was satisfied by a traffic operational analysis ("TOA") forecasting the effects of building the Promenade at Christiana and another project. The TOA was performed by engineers in March 2008 and reviewed by DelDOT in late

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<sup>15</sup> UDC § 40.08.130(B)(6)(e)(7) (emphasis added).

<sup>16</sup> E.g., JX-10 (e-mail from John Janowski, Transportation Planner, New Castle County Department of Land Use, to Thomas Brockenbrough, Jr., County Coordinator (Sept. 10, 2007)).

<sup>17</sup> JX-12 (letter from T. William Brockenbrough, Jr., County Coordinator, to John P. Janowski, Transportation Planner, New Castle County Department of Land Use (Dec. 7, 2007)) at 1 ("[W]hile we will require a traffic operational analysis and will likely require off-site improvements, a contribution toward such improvements, or both, we do not require that the analysis take the form of a TIS as described in the [UDC].").

<sup>18</sup> JX-10 (e-mail from T. William Brockenbrough, Jr., County Coordinator, to John P. Janowski, Transportation Planner, New Castle County Department of Land Use (Dec. 3, 2007)).



April.<sup>19</sup> Based on the TOA, DelDOT found that building the Promenade at Christiana and extending Eagle Run Road would result in the Eagle Run/273 Intersection going from a LOS that was only below D on weekdays to a LOS that was at F all week long.<sup>20</sup> Several other nearby intersections were also projected to have failing LOSs.

These results were also analyzed to see if anything could be done to achieve better LOSs. Even with a variety of surrounding road improvements — including the connection of Eagle Run Road and Route 7 — DelDOT concluded that LOS D could not be achieved at all of the surrounding intersections.<sup>21</sup> The only scenario in which DelDOT did find that a LOS D could be achieved was if, in addition to the surrounding road improvements, Old Baltimore Pike was closed.<sup>22</sup> But, there is no record evidence that closing Old Baltimore Pike is likely. Although DelDOT had been contemplating that option and thought that this step was sufficiently likely to be examined in the TOA,<sup>23</sup> no decision to close the road has been made.

Finally, in its report, DelDOT recommended that Sears pay for the improvements that the TOA estimated would improve traffic conditions around the Property. But, DelDOT noted that the Promenade at Christiana was not the only development that

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<sup>19</sup> JX-17 (Traffic Operational Analysis for The Promenade at Christiana and The Market Place at Christiana (Mar. 2008)); JX-19 (letter from T. William Brockenbrough, Jr., County Coordinator, to John P. Janowski, Transportation Planner, New Castle County Department of Land Use (Apr. 29, 2008)).

<sup>20</sup> JX-19 table 1.

<sup>21</sup> JX-19 table 1. The road improvements include adding a third through lane each way on Route 273, adding a second through lane each way on Old Baltimore Pike, and installing traffic signals and turning lanes to some of the surrounding intersections. JX-19.

<sup>22</sup> JX-21 (e-mail from John Janowski to George Haggerty (Aug. 1, 2008)).

<sup>23</sup> JX-19 at 2.

would add to the traffic surrounding the Property. Accordingly, DelDOT recommended that Sears only be required to pay for part of the surrounding road improvements.<sup>24</sup>

#### B. New Castle County Approves The Rezoning

In the meantime, the Redevelopment Plan had obtained most of its approvals. By the time the TOA was finished, the New Castle County Planning Board and the Department of Land Use had already approved Sears' preliminary plan and recommended that the New Castle County Council approve the rezoning. After DelDOT issued its recommendations, restrictions were added to Sears' proposed plan conditioning any building permits on Sears entering into an agreement with DelDOT to fund part of the cost of constructing the surrounding road improvements.<sup>25</sup>

CTC became involved at this juncture. On June 5, CTC sent a letter to the County Council urging the Council not to approve the rezoning. In the letter, CTC took a two-track approach. It first argued on pure policy grounds that the Eagle Run/273 Intersection was already "failing and highly dangerous" and that constructing a new shopping center on Eagle Run Road would only make the problem worse.<sup>26</sup> And, CTC pointed out that even if money were no issue, it would take a long period of time to make the improvements, and that, in the interim, the Intersection was unequipped to handle the expected levels of traffic.

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<sup>24</sup> JX-19 at 4-5.

<sup>25</sup> JX-32.

<sup>26</sup> JX-24 (letter from Richard Abbott, Abbott Law Firm, to New Castle County Council and Council members (June 5, 2008)) at 1-2.

For its second track, CTC argued that the Property could not legally be rezoned on the current record. CTC asserted that the UDC mandated that a rezoning like the one Sears was asking for be subject to a TIS. And, CTC pointed out that, even if all the improvements were made, the Eagle Run/273 Intersection would still not achieve LOS D.

CTC then had an opportunity to present its argument to the County Council in person at the Council's July 22 meeting, when the Council considered the rezoning. In addition to making remarks before the Council, CTC's counsel submitted the letter CTC had already sent and summarized the letter's argument. But, CTC failed to convince the County Council, which rejected CTC's argument and voted unanimously to rezone the Property to Commercial, Regional.<sup>27</sup>

In response, CTC filed this lawsuit against Sears, KRC, and New Castle County. CTC asks this court to invalidate the rezoning ordinance that CTC failed to convince the County Council not to pass. CTC argues that the County Council acted outside its authority by approving a rezoning that was never the subject of a TIS and that would result in an unacceptable LOS. To remedy that perceived wrong, CTC has petitioned this court for a permanent injunction barring reliance on the rezoning and preliminary plan approvals, as well as a declaratory judgment that the rezoning and the preliminary plan approvals were invalid.

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<sup>27</sup> JX-22. No party submitted a transcript or other record of the Council's hearing as part of the stipulated trial record.

### III. Legal Analysis

At bottom, CTC has argued that there are two separate reasons why the rezoning is invalid: (1) no TIS was performed; and (2) the LOS at the Eagle Run/273 Intersection was projected to be below LOS D after the Redevelopment Plan was completed. Importantly, CTC is not arguing that the County Council made an unwise policy choice or that the rezoning was arbitrary in the traditional sense, meaning that the Council made an irrational and capricious decision. Instead, CTC argues that the County Council violated bright-line requirements for its actions, most of which CTC argues stem from the UDC, but one of which also allegedly came from a 1990 agreement between DelDOT and New Castle County (the “1990 Agreement”).

Although the County Council has a great deal of discretion in using its powers, it must comply with the law when exercising that discretion.<sup>28</sup> Accordingly, if the County Council did not comply with the law when it approved the rezoning, the rezoning is invalid.<sup>29</sup>

#### A. The Redevelopment Plan Did Not Require A TIS

CTC’s main beef with the rezoning, and the one which has taken up the most time and briefing in this action, is that the County Council violated the UDC by never making Sears submit a TIS.<sup>30</sup>

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<sup>28</sup> *Shevock v. Orchard Homeowners Ass’n*, 621 A.2d 346, 349 (Del. 1993).

<sup>29</sup> *See id.* at 350 (affirming a trial court’s finding that a zoning decision was invalid because it was made in contravention of the law).

<sup>30</sup> Sears also makes the novel, and factually unsupported, argument that, to the extent that New Castle County did not comply with the UDC, the County Council can be viewed as simply having amended or waived the UDC. But, defendant New Castle County itself refused to

Normally, when an exploratory sketch shows that a rezoning or land development will cause “significant traffic impacts,” the Department of Land Use is supposed to require that the applicant submit a TIS.<sup>31</sup> But, as we have already seen, in its article dealing with “nonconforming situations,” the UDC relaxes several requirements for redevelopment plans that would bring properties that are exempt from UDC provisions into significantly greater compliance. Most importantly for this action, § 40.08.130(B)(6)(e)(7)<sup>32</sup> provides that in such a situation:

An operational analysis may be required for major plans. A traffic impact study shall only be required if requested by DelDOT. Proposed development is subject to DelDOT transportation impact standards, and the County may limit or restrict to less [gross floor area] if that is recommended by DelDOT. DelDOT may also require transportation improvements as a condition of its letter of no objection.<sup>33</sup>

Although both parties concede that § 40.08.130(B)(6)(e)(7) would exempt a major plan from needing a TIS, they disagree about which components of the Redevelopment Plan fall within this exception; specifically, they dispute whether the exemption extends to a

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embrace this argument. Counsel for the County denies that its client, the County Council, had decided to override the UDC in approving the rezoning. Rather, the County takes the position that the Council believed itself to be applying the UDC, as the Council understood it. If New Castle County wanted to amend the UDC, it was capable of doing so, provided, of course, that it complied with the statutory prerequisites for amending the UDC. *See 9 Del. C. § 2607* (detailing the procedure by which New Castle County may change its zoning regulations). New Castle County cannot, however, amend its zoning regulations inadvertently. *See Welldon v. Capano Realty, Inc.*, 225 A.2d 486, 490 (Del. Ch. 1966) (holding that a zoning code cannot be amended by “a casual disregard of an unambiguous provision therein”). Simply put, because the New Castle County Council did not intend to amend its zoning regulations, it did not do so. Rather, the County Council had to follow the UDC, as it believed itself to have been doing anyway.

<sup>31</sup> UDC § 40.11.120.

<sup>32</sup> The section headings in question correspond to: (1) Nonconforming Situations, (2) Alteration/enlargement/extension, (3) Nonconforming building, structure or situation, (4) Redevelopment and Brownfields, and (5) Design element improvements.

<sup>33</sup> UDC § 40.08.130(B)(6)(e)(7).

rezoning in a situation like this one, where a rezoning is a necessary step for getting a major plan approved.<sup>34</sup> In CTC's reading, a rezoning is a separate requirement from general plan approval, and thus even when plan approval is exempted from the requirement for a TIS, the separate request for a rezoning triggers the mandatory production of a TIS. Sears stresses, however, that the rezoning it sought was simply a necessary part of its Redevelopment Plan. New Castle County concurs in that argument and, more generally, in Sears' remaining arguments.

Adopting the line of reasoning that a TIS was not needed for the rezoning, the Department of Land Use determined that under § 40.08.130(B)(6)(e)(7) Sears was not required to submit a TIS unless DelDOT asked for one.<sup>35</sup> And, the County Council concurred in this judgment by passing the rezoning ordinance despite CTC's argument that the County Council had to first obtain a TIS. Under the Department of Land Use's and the County Council's reading of the UDC, all major plans, including major plans that include a rezoning, do not require a TIS unless DelDOT requires that a TIS be filed, which DelDOT did not do.

CTC argues, however, that New Castle County misinterpreted its own Code. Specifically, CTC argues that the term "major plan" only applies to the actual plan portion of a proposal and does not include a rezoning that may be needed as part of the

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<sup>34</sup> Sears also argues that the UDC exempts all redevelopment plans, major or not and regardless of whether or not a rezoning is needed. But, because, as explained below, I find that the rezoning was part of the major plan and thus exempted, there is no need for me to reach the question of whether anything besides major plans are also included in the exemption.

<sup>35</sup> *E.g.*, JX-10 (e-mail from John Janowski, Transportation Planner, New Castle County Department of Land Use, to Thomas Brockenbrough, Jr., County Coordinator (Nov. 26, 2007)) ("Because this is a 'redevelopment plan' the County can only ask for an operational analysis not a TIS.").

approvals for a major plan. Thus, if a rezoning is needed, CTC argues that the rezoning is not exempted from the need to obtain a TIS and there must be a TIS addressing the effects of the rezoning. Neither Sears and New Castle County nor CTC has identified a definition within the UDC that clarifies whether or not the term major plan also includes, as a component part, a rezoning necessary for the plan's implementation.

In the absence of such a definition, each side keyboarded a lot of brief pages arguing that public policy reasons and other text in the UDC make it clear that its preferred interpretation is the superior one. As to the latter point, the UDC is not entirely consistent in its treatment of whether the term major plan includes a required rezoning. For example, the UDC explicitly differentiates between major land development plans without rezonings and major land development plans with rezonings in § 40.08.130(c)(2)(b), where the UDC only exempts a major land development plan without a rezoning from having to file exploratory sketches.<sup>36</sup> That the drafters of the UDC felt the need to specify that they were only referring to a major plan without a rezoning would support Sears' and New Castle County's argument that the UDC treats a major plan as including any annexed rezoning request.

But, when discussing the review process for redevelopment plans, the UDC makes this inclusion explicit:

All major redevelopment plans, including sites that qualify as a Brownfield and any plan that is also requesting a rezoning as part of the submission shall follow the review procedures of Article 31, except that a rezoning may

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<sup>36</sup> UDC § 40.08.130(c)(2)(b).

be acted upon by the County Council at any time and is not subject to the triannual rezoning dates.<sup>37</sup>

If, as Sears and New Castle County argue, a major plan implicitly includes a necessary rezoning, then there would arguably be no need to refer to “any plan that is also requesting a rezoning.” The fact that rezonings are explicitly included when discussing the review process suggests that the UDC does not consider major plans to include any rezoning needed for such plans.

This split in how the UDC treats the term major plan suggests that the UDC is ambiguous as to whether the term “major plans” also encompasses rezonings that are submitted in conjunction with major plans.

Furthermore, both sides have advanced legitimate policy arguments supporting their contrary interpretations. For their part, Sears and New Castle County argue that the exception for major plans is purposely broad and designed to encourage the redevelopment of existing properties. By creating incentives for the reuse of existing development, the UDC limits pressure for sprawl, a phenomenon that has adverse transportation effects, increases infrastructure costs, and destroys precious open spaces. And, in a case like this one, where a parcel will be brought into greater code compliance, redevelopment furthers the policy objectives that a comprehensive plan is designed to achieve. Important emerging issues like stormwater management are difficult to address in a comprehensive way if there are properties that are, by grandfathering, exempt from important new requirements for decades. Streamlining the redevelopment plan approval

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<sup>37</sup> UDC § 40.08.130(d).



process helps address this problem by giving developers an incentive to bring property into code compliance. In this way, the UDC can influence properties that it would ordinarily be unable to regulate. Finally, by this approach, which differentiates between a redevelopment, on the one hand, and a new development, on the other, New Castle County is, in some sense, vindicating the sentiment among property owners that they have a right to use roads that have been serving their properties for years, instead of leaving owners unable to develop their property because of the adverse effects of later arising development on previously undeveloped land.

Sears and New Castle County also note that CTC is basing its argument on a distinction that does not exist in practice. When Sears submitted its first exploratory sketch, it did not submit two applications, one for plan approval and one for a rezoning. Sears simply checked off the box for a “Planning Land Development &/or Rezoning Review” and filled in the blank for “Proposed Zoning Change (if applicable).”<sup>38</sup> Both the rezoning and the plan approval were part of a single request which was processed in one integrated way by the County.

But, CTC rightly points out that there is a plausible policy-based explanation for why the UDC might treat redevelopment plans and rezoning requests distinctly. A rezoning is not simply a change in intensity of use, it is a change in the nature of the use. And, because the change in the rezoning context is arguably more fundamental, there is more of a chance that important traffic effects will result. Accordingly, CTC stresses that when a rezoning is required for a redevelopment plan’s success it makes policy sense not

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<sup>38</sup> JX-3.

to give redevelopers an exemption from the TIS process and thereby permit them to develop land without providing any assurance that the surrounding roadways can handle the additional traffic.

Faced with an ambiguous statute and two plausible ways to interpret it, this court's duty is to make a decision. In this context, deference to the political branches is the sensible approach to reaching an outcome, as it enforces the basic accountability structures of our polity.<sup>39</sup> Consistent with this reasoned approach, our Supreme Court has recognized that, when the County Council rezones property, its authority is equivalent to that of an administrative agency.<sup>40</sup> And, "it is basic that courts should defer to judgments of an administrative agency as to the meaning or requirements of its own rules, where those rules require interpretation or are ambiguous."<sup>41</sup> Here, the County Council, which

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<sup>39</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that in the case of an ambiguous statute, "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do"); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 194 (2006) (arguing for broad deference because it has the "dual advantages of simplifying the operation of regulatory law and giving policymaking authority to institutions that are likely to have the virtues of specialized competence and political accountability"); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L. J. 2580, 2589 (2006) ("For state and local officers, just as for federal officials, statutory ambiguities often cannot be resolved without judgments of policy. Those judgments should likewise be made by agencies with technical expertise or political accountability."); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242-45 (2001) (arguing that deference should be afforded when decisions are made by politically accountable officials).

<sup>40</sup> *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1275 (Del. 1989) ("[I]n the realm of rezoning, the power of Council is analogous to that of an administrative agency, since the fundamental power to regulate land use rests with the General Assembly.").

<sup>41</sup> *Couch v. Delmarva Power & Light Co.*, 593 A.2d 554, 562 (Del. Ch. 1991); see also *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995) ("[A]n administrative agency's interpretation of its rules and regulations will not be reversed unless clearly erroneous."); *O'Neill v. Town of Middletown*, 2006 WL 205071, at \*32 n.281 (Del. Ch. Jan. 18, 2006) ("The courts regularly grant deference to agencies' interpretations of their own regulations."); *Green v. Sussex County*, 668 A.2d 770, 775 (Del. Super. 1995) ("The Court

enacted the UDC, determined that in a situation like this one, where a major plan involves a rezoning, a TIS is not required. As described above, the UDC is ambiguous, and New Castle County's interpretation is a reasonable reading of its requirements. Thus, I defer to New Castle County's interpretation and accordingly I find that a TIS was not required as part of rezoning the Property.

B. The Rezoning Is Not Invalid For Failing To Require LOS D

CTC's second line of argument runs into the same problem as its first. Here, CTC makes in passing the type of forceful argument that one would expect to be the centerpiece of CTC's litigation strategy, specifically that, even if no TIS is required, LOS D is still a minimal legal standard that must be met despite the fact that a TIS is the threshold inquiry that sets up the LOS D requirement in the UDC. But, that is, at best, a strained interpretation of the UDC, and even if it were a reasonable reading of the UDC, as in the TIS context, I defer to the County's own reasonable reading of the UDC.

To make its argument that LOS D was required, CTC points to the purpose section of Article 11, which addresses "transportation impact." In pertinent part, that purpose section provides:

The purpose of this Article is to ensure that developing occurs only where there are adequate transportation facilities in place, or programmed for construction. . . . No major land development or any rezoning shall be permitted if the proposed development exceeds the level or service standards set forth in this Article unless the traffic mitigation or the waiver provisions of this Article can be satisfied.<sup>42</sup>

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should also give deference to the Sussex County Council's interpretation of its own ordinance, at least in respect to divining its intent when it was adopted.").

<sup>42</sup> UDC § 40.11.000.

Read in isolation, this might seem to require that LOS D be attainable unless there is an applicable exemption under Article 11. And, if the UDC did impose such an unvarying requirement, then when the County Council approved the rezoning despite the absence of the minimal LOS D, the County Council acted outside its authority and the rezoning ordinance it passed is invalid.

But, that is not the best reading of Article 11. When all of Article 11 is viewed in context, it is more plausible to read the TIS requirement as the threshold mandate that raises the LOS question in the first instance.<sup>43</sup> That is, unless a plan is subject to the gateway requirement of a TIS, the remainder of Article 11 is without force. The reason for this is that the preparation of the TIS is necessary to the subsequent process required to consider the implications of the TIS's results. If the UDC exempts a redevelopment from the TIS requirement it also, therefore, exempts the redevelopment from the rest of the Article 11 process that logically follows the results of the TIS itself. In this regard, it is important to note that Article 11 contains two subsections. The first, titled “[t]ransportation capacity,”<sup>44</sup> is devoted to setting out when a TIS is needed and outlines what that inquiry must look like.<sup>45</sup> The second subsection, titled “[a]dequate level of service,”<sup>46</sup> sets forth what is the acceptable level of service and when it is mandated.<sup>47</sup>

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<sup>43</sup> See *Coleman v. State*, 729 A.2d 847, 851 (Del. 1999) (“Statutory enactments must be read as a whole and not in parts.”).

<sup>44</sup> UDC § 40.11.100.

<sup>45</sup> *Id.*

<sup>46</sup> UDC § 40.11.200.

<sup>47</sup> *Id.*

Read together, these sections create a two-step process: (1) a TIS is required; and (2) the results of that analysis are applied to see if the acceptable service standards are met.

As we have already seen, no TIS was needed for the Redevelopment Plan, and thus the first subsection is inapplicable. At base, CTC's argument is that even though this threshold inquiry is not needed, the second step, applying the results, should be implemented and development denied whenever LOS D cannot be met.

But, New Castle County interprets the second step as dependent on the first. Which is to say that unless the TIS contemplated by Article 11 is required in the first instance, the LOS inquiry is not needed. Given that Article 11 sets out a two-step process, the County's analysis is a more persuasive reading of the Code than the one advanced by CTC.

New Castle County's interpretation has the virtue of giving actual weight to the TIS exemption in § 40.08.130(B)(6)(e)(7). Under CTC's reading of the UDC, the County Council would still need to have something like a TIS in front of it before it could rezone property in order to know that LOS D could be met. This would essentially read the TIS waiver for major plans out of existence. As we have already seen, the UDC makes a policy choice that developers should have an incentive to redevelop property in a way that brings development up to code. As a result, the UDC relaxes certain regulatory requirements when developers propose to do exactly that. Among these exemptions is the requirement that developers perform a TIS to explore traffic effects.

Under CTC's reading, however, even if not formally required, a TIS, or something very much like it, would be needed in all instances to make sure that development meets

LOS D. This would circumvent the purpose of waiving the TIS requirement in the first place.

That reading also makes no procedural sense. Although in this case a TOA indentifying the LOS implications of the Redevelopment Plan was prepared, in other redevelopment situations one could imagine that without a TIS, no LOS information would be available. And, because the Article 11 process all flows from the initial preparation of a TIS, that process does not sensibly apply in the absence of a TIS. In other words, the exemption from preparing a TIS is best read, as New Castle County reads it, as an exemption from the other Article 11 requirements.

CTC's reading also ignores the reality that Article 11 allows the Council to waive both the TIS mandate or even if a TIS is prepared, any need to meet a particular LOS.<sup>48</sup> Absent a requirement to create a TIS in the first instance, how or why would an applicant like Sears seek to secure either waiver?

Finally and critically, even if the UDC is ambiguous, I am bound to defer to New Castle County's reasonable interpretation of the statute.<sup>49</sup>

C. The UDC Does Not Require That New Castle County Second Guess DelDOT's Application Of DelDOT's Own Regulations

CTC also argues that, even if the UDC did exempt the Redevelopment Plan from the TIS and LOS D requirements, those requirements still had to be satisfied because DelDOT's regulations mandate compliance. CTC, notably, has not advanced that argument by bringing a claim against DelDOT alleging that it violated its own

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<sup>48</sup> UDC §§ 40.11.121; 40.11.230.

<sup>49</sup> *State Farm*, 659 A.2d at 220.

regulations. And with good reason, as this court has held that no private right of action permitting such a claim exists.<sup>50</sup> Instead, CTC's argument is that the UDC somehow incorporated DelDOT's regulations, and thus New Castle County had a duty to ensure DelDOT's compliance with DelDOT's own regulations.

This line of reasoning centers on the now familiar § 40.08.130(B)(6)(e)(7), which, in addition to exempting major plans from the need for a TIS, provides that “[p]roposed development is subject to DelDOT transportation impact standards.”<sup>51</sup> CTC reads “DelDOT transportation impact standards” as a reference to DelDOT regulations supposedly requiring a TIS and the attainment of LOS D. And, CTC asserts that even though DelDOT chose not to require a TIS and did not object to the likely traffic effects of the Redevelopment Plan despite evaluating the TOA, DelDOT's own regulations nevertheless required a TIS and the attainment of LOS D. CTC asserts that New Castle County had to enforce these regulations in DelDOT's stead.

In essence, because the General Assembly has not created a private right of action against DelDOT, CTC is trying to get around that policy judgment by bringing its complaints about the enforcement of DelDOT regulations against New Castle County as a stand-in for DelDOT.

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<sup>50</sup> See *O'Neill*, 2006 WL 205071, at \*24 (holding that there is no private right of action against DelDOT for failure to require a TIS).

<sup>51</sup> UDC § 40.08.130(B)(6)(e)(7).

But, in making this argument, CTC advances an unreasonable construction of the UDC.<sup>52</sup> In its entirety, § 40.08.130(B)(6)(e)(7) provides that:

An operational analysis may be required for major plans. A traffic impact study shall only be required if requested by DeIDOT. Proposed development is subject to DeIDOT transportation impact standards, and the County may limit or restrict development to less [gross floor area] if that is recommended by DeIDOT. DeIDOT may also require transportation improvements as a condition of its letter of no objection.<sup>53</sup>

The first two sentences of the provision exempt major plans, like the one at issue, from the UDC's Article 11 TIS process. But, under CTC's reading, the next sentence would totally reverse course, requiring that every major plan receive a TIS and not cause worse than LOS D service because those requirements are, allegedly, part of DeIDOT's regulations. And, § 40.08.130(B)(6)(e)(7) would provide a private right to enforce these regulations indirectly by suing the County in a situation when DeIDOT itself cannot be sued directly for failure to comply with these regulations. In short, CTC's argument that it can sue to enforce DeIDOT regulations relies on a reading of § 40.08.130(B)(6)(e)(7) that would exempt a plan from TIS and LOS D requirements under one half of a paragraph only to reimpose the same standards under the second half of that same paragraph. This is an unreasonable interpretation of the UDC that would undo the UDC's policy judgment that redevelopment should be encouraged.

Instead, the more reasonable reading of § 40.08.130(B)(6)(e)(7) is that it is reiterating that, notwithstanding the UDC's exemption of major plans from the Article 11

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<sup>52</sup> Cf. *Daniels v. State*, 538 A.2d 1104, 1110 (Del. 1988) (“[E]ach part of the statute must be read in context to produce a harmonious whole.”).

<sup>53</sup> UDC § 40.08.130(B)(6)(e)(7).



TIS process, DelDOT may still regulate development in line with its own regulations. Therefore, § 40.08.130(B)(6)(e)(7) explicitly allows DelDOT to require a TIS, a reduction in gross floor area, or transportation improvements. But, these provisions do not envision New Castle County independently enforcing DelDOT regulations; they contemplate a partnership in which DelDOT applies its own requirements and provides input to the County for the County's use in its decisionmaking. In line with this dichotomy, the requirement that "DelDOT transportation impact standards" be observed just reiterates that DelDOT may impose greater requirements if *it* so chooses. DelDOT had the opportunity to evaluate the Redevelopment Plan. It chose not to require a TIS and it did not recommend against the rezoning. Having given DelDOT the opportunity to pass on the rezoning, New Castle County fulfilled its burden under the UDC. It was for DelDOT to apply its own regulations.<sup>54</sup>

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<sup>54</sup> Even if I could reach the question of whether DelDOT correctly applied its regulations, I would be chary about doing so. Both because of the fact there is no private right of action against DelDOT and because we are outside of the statute of repose, DelDOT cannot be joined in this litigation. *See* 10 *Del. C.* § 8126 (providing a 60-day statute of repose for an action challenging an ordinance related to zoning); *S. New Castle County Council Alliance, Inc. v. New Castle County Council*, 2001 WL 855434, at \*1 (Del. Ch. July 20, 2001) (holding that indispensable parties to an action could not be joined outside the statute of repose provided for in 10 *Del. C.* § 8126). DelDOT has an obvious interest in a judicial determination of whether it properly applied its own regulations. *See* Ct. Ch. R. 19(a)(2)(i) (requiring that a person who is subject to service be joined if she has an interest in the action and not participating in that action may "impair or impede the person's ability to protect that interest"). Making this determination would be prejudicial to DelDOT and thus inappropriate in DelDOT's absence. *See* Ct. Ch. R. 19(b) (requiring that a court decide in "equity and good conscience" whether an action can go forward without an absent party); *see also* *Liborio II, L.P. v. Artesian Water Co., Inc.*, 621 A.2d 800, 803 (Del. Super. 1992) (holding that the Public Service Commission was a necessary party in an appeal from one of its rulings).

D. The 1990 Agreement Between DelDOT And New Castle County Does Not Require LOS D

Finally, CTC argues that a 1990 Agreement between DelDOT and New Castle County obligated New Castle County to only approve rezonings that will not cause a LOS worse than D. CTC is not a party to that Agreement, which resulted from a legislative mandate over twenty years ago. DelDOT and New Castle County entered into it at the prompting of 9 *Del. C.* § 2662, which was adopted in 1988 and required that DelDOT and the County Council agree on procedures for analyzing the traffic impacts of rezonings. The resulting Agreement sets out a detailed process for evaluating the traffic effects of rezonings. It does not, however, explicitly require that every proposed rezoning result in traffic conditions of at least LOS D.

But, CTC's problem is even more fundamental than the fact that the 1990 Agreement does not require the invariant attainment of LOS D. CTC has not even tried to show that it is a third-party beneficiary who is entitled to sue to enforce the Agreement.<sup>55</sup> Nor has CTC argued that the General Assembly intended to change this default rule by creating a private right of action to enforce the 1990 Agreement.<sup>56</sup> In short, CTC has provided no basis for this court to conclude that it has standing to enforce that Agreement.

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<sup>55</sup> *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007) (“As a general rule, only parties to a contract and intended third-party beneficiaries may enforce an agreement’s provisions.”).

<sup>56</sup> *Cf. O’Neill*, 2006 WL 205071 at \*24 (holding that there is no private right of action against DelDOT for failure to require a TIS).

And, despite the fact that it is suing based on an agreement between DelDOT and New Castle County, CTC has not joined DelDOT in this action. As one of only two parties to the 1990 Agreement, DelDOT has a strong interest in the meaning and enforcement of that Agreement.<sup>57</sup> Making a judicial determination about what DelDOT and New Castle County promised each other without DelDOT being a party to this action would be prejudicial to DelDOT's interest in the bargain it struck with New Castle County. It would thus not be proper for me to decide the meaning of the 1990 Agreement in DelDOT's absence.<sup>58</sup>

Even if CTC could address those formidable procedural problems, CTC does not provide any rational evidentiary basis for this court to conclude that any party to the 1990 Agreement ever interpreted the Agreement as establishing an unvarying, mandatory LOS D requirement. Indeed, if the Agreement did actually mandate that every rezoning not result in worse than LOS D, then New Castle County's later adoption of Article 11 of the UDC would have been unnecessary. Why set up a statutory scheme if, under the 1990 Agreement, New Castle County already had a freestanding obligation to condition approval on compliance with LOS D in all instances?

The UDC also contains specific provisions that allow the Council to waive compliance with the UDC's TIS and LOS D requirements. But, if New Castle County has a freestanding obligation under the 1990 Agreement that can be enforced by private

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<sup>57</sup> See Ct. Ch. R. 19(a)(2)(i) (requiring joinder, if feasible, when a party has an interest in an action and adjudicating the action without the party would "impair or impede the person's ability to protect that interest.").

<sup>58</sup> See Ct. Ch. R. 19(b) (providing for the dismissal of actions against a party when the action cannot "in equity and good conscience" proceed without the indispensable party).

parties, then all of these provisions would be meaningless. Even if an owner got a LOS waiver under the UDC or was exempted from needing a TIS in the first place, New Castle County would violate the 1990 Agreement if it rezoned the property without ensuring compliance with LOS D. These realities suggest that neither of the governmental bodies who were party to the 1990 Agreement understood it to mean what CTC now says it does. The text of the 1990 Agreement suggests why.

The 1990 Agreement states that LOS D “will be used for the purpose of evaluating the traffic impact study and for the purpose of suggesting possible mitigation measures.”<sup>59</sup> The Agreement goes on to provide that if LOS D is not achievable, recommendations will be made about how to reach LOS D. In other words, under the Agreement, LOS D appears to be employed as a benchmark goal, not an absolute mandate.<sup>60</sup>

For all these reasons, the 1990 Agreement provides no basis for granting relief to CTC.<sup>61</sup>

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<sup>59</sup> JX-2 at 4.

<sup>60</sup> See *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (“Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.”).

<sup>61</sup> CTC also argues that its interpretation, which is not supported by the text of the 1990 Agreement, is required because that is the only way that the 1990 Agreement would satisfy 9 Del. C. § 2662. Under that section of the Delaware Code, DelDOT and the County were supposed to “establish a traffic level of service suitable” to both parties. 9 Del. C. § 2662. CTC argues that this means that the parties had to establish an enforceable minimum LOS and that because LOS D is referred to in the Agreement, the LOS D standard must be the legally-enforceable minimum that CTC reads § 2662 as requiring. But, CTC has not pointed to any part of the 1990 Agreement that actually establishes this purported requirement. Nor has CTC alleged that the Agreement as it is written does not comply with § 2662 or, for that matter, that CTC has a private right of action to challenge whether or not New Castle County complied with § 2662. Cf. *O’Neill*, 2006 WL 205071 at \*24 (holding that there is no private right of action

#### IV. Conclusion

For the foregoing reasons, CTC's Verified Complaint is dismissed. Each side shall bear its own costs. **IT IS SO ORDERED.**

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against DeIDOT for failing to require a TIS). Section 2662 is a mandate by the General Assembly that two administrative agencies take an action; there is no reason to believe that the General Assembly intended to give private individuals the right to sue to enforce this provision. *Id.* (holding that “the Plaintiffs must show existence of a private right of action, express or implied, in order to maintain their claims”). And, to the extent that the parties did not fulfill the General Assembly’s wishes, the General Assembly has had over twenty years to make it clear that § 2662 was intended to require that DeIDOT and New Castle County establish a mandatory LOS requirement for all rezonings in New Castle County. The fact that the General Assembly has not done so suggests that the purpose of § 2662 was not as stark as requiring a rigid LOS mandate for all rezonings. Rather, it implies that the General Assembly only intended for DeIDOT and New Castle County to develop a benchmark for transportation standards and work cooperatively to attain that benchmark. In any event, this court may not convert § 2662 into a new mandate in a case where the state has not even been given a chance to address the arguments advanced.