IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAVE OUR COUNTY, INC.; BARBARA FURBECK; LAWRENCE GIORDANO; JAMES GRAVES; THOMAS S. NEUBERGER, Plaintiffs, v. NEW CASTLE COUNTY; COUNTY COUNCIL OF NEW CASTLE COUNTY; BARLEY MILL, LLC, Defendants.	)	*Civil Action No. 7151-VCG*

MEMORANDUM OPINION

Date Submitted: April 22, 2013
Date Decided: June 10, 2013

Jeffrey S. Goddess, of ROSENTHAL MONHAIT & GODDESS P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Sidney S. Liebesman, Lisa Z. Brown, and Richard M. Donaldson, of MONTGOMERY MCCRACKEN WALKER & RHOADS LLP, Wilmington, Delaware, Attorneys for Defendant New Castle County.

Robert J. Katzenstein and Kathleen M. Miller, of SMITH KATZENSTEIN & JENKINS, LLP, Wilmington, Delaware, Attorneys for Defendant County Council of New Castle County.

Christian D. Wright, John E. Tracey, and William E. Gamgort, of YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, Wilmington, Delaware, Attorneys for Defendant Barley Mill, LLC.

GLASSCOCK, Vice Chancellor

May County Council enact a zoning amendment to permit construction of a large shopping center in New Castle County without considering the results of the Traffic Operational Analysis which the developer has committed to produce?

The roles of the Council, and of this Court in review, could not be more distinct. Council members are elected officials charged to bring their judgment to bear on those legislative matters delegated by the General Assembly. Should the Court overstep, and intrude on this deliberative process by overturning a result that is neither arbitrary and capricious, nor outside the law, the result would be a kind of judicial tyranny, with the Court as super-legislature. Conversely, should the Council's legislative action exceed the discretion provided to it by the General Assembly or otherwise be outside the law; or should it act arbitrarily, without being subject to correction, another sort of tyranny would result. This Court's role in review of the Council's actions, therefore, is both important and necessarily narrow in scope.

In light of the circumscribed nature of the appropriate judicial review, I address the question: must the Council review a traffic study before approving a rezoning and development plan that will bring large-scale changes to the property, its surroundings and the roads that service it? Whatever the aspirational answer from a good-government perspective, the legal answer is "no," so long as such consideration is not required by law and so long as Council's decision to forgo a

traffic study is not arbitrary and capricious. This post-trial Opinion considers the rezoning of Barley Mill Plaza in the absence of such a traffic study. I find that neither the applicable statutes nor New Castle County's own code require the Council to consider a traffic study in connection with the Barley Mill rezoning. However, because I find that at least one of the Council Members' votes was arbitrary, and because that vote was necessary for the ordinance to pass, I find that the vote of Council approving the Barley Mill rezoning is a nullity.

I. BACKGROUND

Barley Mill Plaza (the "Property") is an office complex situated on a collection of parcels of land covering approximately 92 acres at the intersection of State Routes 141 (Centre Road) and 48 (Lancaster Pike).[1] Once the site of DuPont Airport,[2] the Property has been used as an office park since the 1980s.[3] Currently, the Property contains over one million square feet of low-rise office space, approximately 80% of which was leased as of December 2009.[4]

Defendant Barley Mill, LLC (the "Developer")[5] purchased the Property in September of 2007.[6] In 2008, the Developer submitted an application to the New

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[1] Pls.' App. to Op. Br. Supp. Mot. Summ. J. at A-613 (hereinafter "Pls.' App").
[2] Paul Freeman, *Northern Delaware*, Abandoned & Little-Known Airfields, http://www.airfields-freeman.com/DE/Airfields_DE_N.htm (last updated Feb. 14, 2013).
[3] Compl. ¶ 15.
[4] Pls.' App. at A-713-14.
[5] For clarity's sake, I refer to both Barley Mill LLC and certain related entities with plans to develop properties in New Castle County as "the Developer."

Castle County Department of Land Use (the "Planning Department") to redevelop the Property.[7] This development plan (the "First Plan") contemplated demolishing all existing office buildings and constructing approximately 700,000 square feet of residential space, 675,000 square feet of retail space, and 1,485,000 square feet of office space.[8] New buildings would be up to ten stories high.[9] This mixed-use development was consistent with the Property's then-existing zoning status as Office Regional ("OR"), so no rezoning would be necessary for the Developer to proceed with the First Plan.[10] Shortly after the First Plan application was submitted, the Delaware Department of Transportation ("DelDOT") notified the Developer that the Developer would be required to coordinate with DelDOT to conduct a Traffic Operational Analysis ("TOA") in connection with the First Plan.[11]

From its inception, the First Plan generated substantial public resistance. Members of the local community voiced their opposition to the First Plan at public

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[6] Compl. ¶ 16.
[7] Defs.' App. to Op. Br. Supp. Mot. Summ. J. at B-1-16 (hereinafter "Pls.' App").
[8] Defs.' App. at B-64.
[9] Pls.' App. at A-158.
[10] Because no rezoning would be required in connection with the First Plan, the Developer has referred to it as a "by-right" plan which could be developed without any discretionary vote of the County Council. However, that designation is somewhat controversial. The Plaintiffs, among other opponents of the First Plan, dispute that the Developer could actually proceed with the First Plan without encountering any other legal obstacles.
[11] Defs.' App. at B-17.

hearings held in 2008 and 2009.[12] Moreover, the development of Barley Mill Plaza was not the only point of contention between the Developer and certain citizens of New Castle County. Besides the First Plan for the development of Barley Mill Plaza, the Developer and its affiliated entities had submitted three other large development projects that, like the First Plan for Barley Mill Plaza, had met with considerable opposition from the local community.[13] Between 2008 and 2010, numerous citizens' organizations cooperated to oppose the Developer's plans to advance these projects.[14] The community opposition, represented by an umbrella organization called Citizens for Responsible Growth ("CRG"), and the Developer, with the assistance of the then-County Executive, eventually came to a negotiated solution in 2010, whereby the Developer agreed to submit revised plans with reduced development and with deed restrictions in exchange for an agreement by CRG not to oppose the revised plans.[15]

In accordance with its agreement with CRG, the Developer created a new plan (the "Second Plan") for Barley Mill Plaza. The Second Plan eliminated the residential component of the development, reduced the planned commercial space by 221,000 square feet, and reduced the planned office space by 285,000 square

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[12] Pls.' App. at A-615.
[13] *See* Pls.' App. at A-193-94 (summarizing efforts of citizens' groups to block "four large and jarring projects in the Greenville area").
[14] *Id.*
[15] Pls.' App. 195-96; Defs.' App. 187-89.

feet.[16] The compromise also required the Developer to record voluntary restrictions on future development (the "Deed Restrictions") at the conclusion of the development process.[17]

On March 24, 2011, the Developer submitted the Second Plan to the Planning Department.[18] Because the Second Plan no longer contained a residential component, its approval was contingent on New Castle County rezoning approximately 37 acres of the Property from OR to Commercial Regional ("CR").[19] The Second Plan for the rezoned section of the Property included a regional shopping mall and free-standing pad sites for restaurants and other businesses.[20]

The Planning Department[21] and the Planning Board[22] held a public hearing concerning the Second Plan on June 7, 2011.[23] Those attendees who spoke in opposition to the Second Plan voiced their concerns over the increased traffic impact that the Second Plan would have on State Routes 141 and 48, as well as the

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[16] Pls.' App. A-570.
[17] Pls.' App. A-567-69.
[18] Defs.' App. B-46.
[19] Defs.' App. B-58.
[20] *See* Pls.' App. at A-46 (Revised Plan drawing).
[21] The Department of Land Use is an administrative agent of the executive branch of New Castle County. New Castle Cty. C. § 40.30.110, 310.
[22] The Planning Board is a nine-member administrative board that makes recommendations to the County Council on rezoning decisions. New Castle Cty. C. § 40.30.110, 310.
[23] Pls.' App. at A-52.

Tyler McConnell Bridge.[24] In response to those concerns, the attorney for the Developer stated that the Developer, in coordination with DelDOT, would perform a TOA on the proposal and the results of that study could lead to highway improvements.[25] Opponents to the rezoning also cited other objections, including that the Second Plan would cause additional stormwater runoff problems and that further development would be inconsistent with the character of the neighborhood.[26]

Ultimately, the Planning Board recommended against the rezoning,[27] but the Planning Department recommended that the rezoning be approved. In making its recommendation, the Department acknowledged "that much debate has occurred over traffic issues and whatever improvements might be necessary to accommodate the rezoning. In order for this project to be approved and recorded, this issue will ultimately need to be resolved with the cooperation of DelDOT."[28] At the June 7 public meeting, the Manager of the Planning Department, David Culver, stated that DelDOT's traffic analysis and its decisions on how to mitigate the traffic impact of the Second Plan would be made available to the County Council only at the record-plan stage of the approval process; that is, *after* the

[24] Defs.' App. at B-87.
[25] Pls.' App. at A-117-18.
[26] Pls.' App. at A-74.
[27] Pls.' App. at A-152-153 (minutes of Planning Board meeting, with five members voting against the rezoning, two voting in favor, and two abstaining).
[28] Pls.' App. at A-134.

Council's discretionary vote on the rezoning ordinance.[29] The Department, in its recommendation, also indicated that it believed that the Second Plan satisfied the relevant statutory factors that ought to be considered in a rezoning.[30]

Once the Planning Department and the Planning Board had made their recommendations for and against the approval of the Second Plan rezoning application, the County Council considered the rezoning at the meeting of the Council's Land Use Committee on October 4, 2011.[31] The attorney for the Developer presented the Second Plan for the Council's consideration and made the following representation concerning traffic issues:

> The property is surrounded on three sides by transportation routes without any neighboring properties directly abutting this property. Other traffic [considerations are] not relevant for this part of the analysis, given the Council's conscious decision to adopt the two-step process as opposed to the three step process which pushes the traffic component to the end.[32]

The Developer's attorney also indicated that the Developer was being required by DelDOT to perform a TOA of 15 different intersections in the vicinity of the Property, and "the improvements or other requirements that are generated by [the TOA] will ultimately be implemented and required as part of the record plan

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[29] Pls.' App. at A-142-43.
[30] Pls.' App. at A-135.
[31] Pls.' App. at A-157.
[32] Pls.' App. at A-166.

process."[33] Later, when asked about the Planning Board's decision to recommend against the project, the Developer's attorney said "the Planning Board vote was 5-2 against the recommendation. The members that spoke against it . . . had traffic concerns *which as Council knows is not part of the equation for this type of analysis*."[34] The Developer's Attorney and County Council members discussed many other aspects of the project, including stormwater runoff and drainage,[35] landscaping,[36] the deed restrictions,[37] construction codes and specification,[38] and local employment.[39] However, there were no substantive questions from Council members to the Developer concerning traffic issues.

When the meeting became open for public comment, Councilman Smiley said,

> I just want to get on the record based on some of the recent e-mails that I've been getting; I know we say this time and time again . . . when it comes to the traffic, when it comes to the entrances, the exits, the lights, the turning lanes, the merging lanes, the traffic volume . . . New Castle County Council does not handle that. That is DelDOT. The developer works with DelDOT on meeting the criteria that they set and once and if the County gets the letter of no objection from DelDOT then that's what it is. I just want to clear that up,

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[33] Pls.' App. at A-166.
[34] Pls.' App. at A-173 (emphasis added).
[35] Pls.' App. at A-173-78. The Developer's engineer, Mr. Davies, testified that, though the planning was in the preliminary stages, "we will have less water leaving the site then [sic] leaves the site today." *Id.* at A-178.
[36] Pls.' App. at A-180.
[37] Pls.' App. at A-181-82.
[38] Pls.' App. at A-184-85.
[39] Pls.' App. at A-186-87.

> because . . . . I really don't want everyone spinning their wheels with losing 15 minutes or five minutes of their talk time on traffic when this isn't where it needs to be.

Notwithstanding the Councilman's warning, members of the public did voice concerns that the traffic impact of the Second plan would be severe.[40] Later in that same meeting, members of the County Council engaged in a discussion with David Culver, head of the Department of Land Use, concerning the role of DelDOT's traffic study and how that study relates to the Council's approval process. Culver explained his view that DelDOT was responsible for deciding issues such as which roads need to be improved in determining whether to issue a letter of no objection, which would be necessary for the Second Plan to be approved.[41] Culver also represented that the role of the County Council at that time was to determine whether a rezoning was appropriate under the appropriate statutory criteria in New Castle County's Unified Development Code ("UDC").[42] Several members of the County Council then expressed frustration that they lacked information about the road improvements that would be necessary to mitigate the increased traffic arising

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[40] *See, e.g.*, Pls.' App. at A-197 (questioning by Debbie Hudson, opposing the rezoning, asking, "[h]ave you reviewed the notes from the Tyler McConnell Bridge Working Group from many years ago? It's significant. Next, have you reviewed the state transportation document about the 141 Boulevard Corridor, the one that was recently repaired? That suggests that it's build out as it is now. Next, are you satisfied with the traffic information that is supposedly coming to you from the State that will be a [traffic impact study] or a TOA? Personally I'm not satisfied with it.")

[41] Pls.' App. at A-226.

[42] Pls.' App. at A-227. *See also* New Castle Cty. C. § 40.31.410.

from the development plan.[43] This meeting concluded without any vote of the County Council on the rezoning.

Traffic issues arose again at the next meeting of the County Council on October 11, 2011.[44] Councilman Weiner and the Developer's counsel (Mr. Tracey) had the following exchange concerning the ongoing traffic study from DelDOT:

> Mr. Weiner: And when do you think you'll be told how much of a fair share contribution do you need to make to whatever improvements DelDOT would recommend.
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> Mr. Tracey: We have to give DelDOT the data, the traffic generation data which they have to review. They'll come back then with the scoping letter. I would expect plus or minus three months.
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> Mr. Weiner: And are you able to state what sorts of modifications or improvements would be made to the roadway system?
>
> Mr. Tracey: I can't state definitively right now because DelDOT hasn't had the opportunity to comment. I would suspect that there are going to be road improvements that we are physically going to have to

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[43] *See, e.g.*, Pls.' App. at A-228 (Councilman Street saying to Culver "it's not your fault, but I just have a problem in this case . . . because to me it is blind faith. You are depending on the State [and] DelDOT in good faith . . . to do right . . . in terms of the roads after we voted and don't have any information prior to it"); Pls.' App. at A-230 (Councilman Weiner saying "I was concerned . . . that we lost the opportunity to have an understanding of traffic improvements which could be committed to be made at the time that the rezoning was being granted as a condition [to] that rezoning"); Pls.' App. at A-231 (Councilman Weiner asking "[can we] change the process so that we are not making a rezoning vote until we have a commitment [for] additional roadway improvements?").

[44] Although the County Council originally planned to vote on the rezoning during its October 11, 2011 meeting, the Council ultimately tabled the matter because it was still considering incorporating the Deed Restrictions into the rezoning ordinance. Pls.' App. at A-366-67.

> make. I would expect that there are road improvements that we will probably [have] to contribute towards.[45]

When the County Council voted on the rezoning at its October 25, 2011 meeting, Councilman Weiner voted in favor of the rezoning, despite his uncertainty concerning the traffic impact of the rezoning. Shortly before voting, he said,

> I just want to echo the sentiment expressed by many of the speakers about the lack of traffic data. It's a shame that in an inadvertent byproduct of moving from the three-step to the two-step approval process we lost the traffic data and commitment to needed traffic improvements at the time we exercise our discretionary rezoning authority. That's at the time of the rezoning vote. When it comes back to us for a record plan approval we'll only have administerial authority which means we can only vote yes once we are convinced that there's been compliance with all the technical requirements of the code. . . . What we are left with is a dependence on Land Use Department and the State Department of Transportation to work together in our interests. But what we lose is that we who are elected officials . . . don't really have a chance to sit at that table. I recognize that [Citizens for Responsible Growth] does have an agreement where it's negotiable that they will sit at the table and basically CRG and [the Developer] have agreed to disagree and to fight it out within the issues of traffic. Whatever that means, you know, it sounds hopeful. But the better would have been for us to [have] traffic impact data and a commitment to needed improvements at the time we sit here for a rezoning. But that's a battle that's been lost. . . .[46]

When casting his vote, Councilman Weiner mentioned the First Plan and the possibility that a larger development could be constructed on the Property as

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[45] Pls.' App. at A-263.

[46] Pls.' App. at A-553-54. I discuss below, in Section II.B.1, the UDC Amendment to which Mr. Weiner referred when he mentioned "moving from the three-step to the two-step approval process."

justification for his vote.[47] At the conclusion of the October 25, 2011 meeting, the County Council voted to approve the rezoning, with seven members voting in favor and six members voting against.[48] The rezoning application subsequently became law without the signature of the County Executive.[49] The Plaintiffs filed this action on December 27, 2011. On October 1, 2012, the Plaintiffs moved for summary judgment, and the Defendants moved for judgment on the pleadings and cross-moved for summary judgment. The parties then agreed that further factual development was unnecessary, and they submitted this matter for a decision on the merits. This Opinion is my post-trial decision.

II. ANALYSIS

The Plaintiffs offer two theories under which I could invalidate the County Council's Vote. First, the Plaintiffs argue that the vote was unlawful because 9 *Del. C.* § 2662 and the UDC required the Council to consider traffic before voting on the Rezoning Proposal. Second, the Plaintiffs argue that, even if the vote was lawful, I should invalidate the vote because it was arbitrary and capricious under our law. I consider these arguments in turn.

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[47] Pls.' App. at A-561.
[48] Pls.' App. at A-561.
[49] Defs.' App. at B-71-2.

In conducting my analysis, I am conscious that the judicial role in reviewing a legislative process is limited.[50] When the Council makes a rezoning decision, it is acting in a legislative capacity.[51] The County Council's power to create zoning regulations is derived from a delegation of the legislature under state statutes.[52] Because its power is derived from a grant of power from the state legislature, the Council's power "may be exercised only in accordance with the terms of its delegation."[53] Thus, the role of the judiciary in reviewing the legislative acts of the County Council is to review whether the Council's rezoning decisions are in accordance with the statutes enabling the Council's legislative function.[54] The Council may not violate the express terms of state statutes, nor act in a way that is arbitrary and capricious.[55] Because the relevant statutes grant broad power to the Council and leave Council a great deal of discretion, "the decisions of Council carry a presumption of validity and the burden of rebutting that presumption is placed upon the challenging the party."[56]

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[50] *See New Castle Cty. Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989).
[51] *Id.* at 1275.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1275-76 ("[W]hen the validity of a zoning regulation is judicially challenged the standard for review is whether the action is in compliance with applicable statutes.").
[55] *Id.* at 1275.
[56] *Id.* at 1275-76.

A. The Vote of the County Council was not Contrary to State Statute or County Ordinance.

1. 9 *Del. C.* § 2662 does not require the Council to Consider Traffic.

The relevant text of 9 Del. C. § 2662 provides that "[t]he County Council shall not approve any proposed change in the zoning classification for land (i.e., any "rezoning request") without first complying with [certain] procedures."[57] Those procedures include the County Council's entering into an agreement "to provide a procedure for analysis by DelDOT of the effects on traffic of each rezoning application."[58] The purpose of the agreement is "to ensure that traffic analyses are conducted as part of the zoning reclassification process within the

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[57] 9 *Del. C.* § 2662. The text of the statute consists of the following:

> The County Council shall not approve any proposed change in the zoning classification for land (i.e., any "rezoning request") without first complying with the following procedures:
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> (1) As soon as possible . . . the County Council, through its designated planning agency, shall establish an agreement with the Delaware Department of Transportation (DelDOT) to provide a procedure for analysis by DelDOT of the effects on traffic of each rezoning application.
>
> (2) Each such agreement shall be approved by a resolution or ordinance, consistent with County procedures, and shall establish traffic level of service suitable to the County and DelDOT.
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> (3) The purpose of the agreement shall be to ensure that traffic analyses are conducted as part of the zoning reclassification process within the County.
>
> (4) The agreement shall provide for the review of traffic impacts according to nationally recognized traffic criteria and shall, at a minimum, consider the effects of existing traffic, projected traffic growth in areas surrounding a proposed zoning reclassification and the projected traffic generated by the proposed site development for which the zoning reclassification is sought. 9 *Del. C.* § 2662.

[58] 9 *Del. C.* § 2662(1).

County."[59] The statute also imposes minimum qualifications for the agreement, including criteria and scope for studying the traffic impacts of the proposed rezoning.[60]

The plain language of the statute imposes an obligation on the County Council to enter into an agreement with DelDot concerning traffic.[61] The County Council entered into such an agreement in 1990 (the "1990 MOU"), which the Plaintiffs have not challenged. Instead, the Plaintiffs argue that Section 2662 obliges the County Council to *consider* a traffic study from DelDOT before conducting its discretionary vote on the rezoning proposal. Yet, Section 2662 does not impose any affirmative obligation on the County Council to obtain a traffic study or even to consider traffic. Rather, the statute only provides a mechanism to make traffic information available "as part of the zoning reclassification process within the County."[62] Because Section 2662 imposes no affirmative obligations on the County Council to *consider* traffic in its rezoning

[59] 9 *Del. C.* § 2662(3).
[60] 9 *Del. C.* § 2662(4).
[61] Consulting canons of statutory construction is inappropriate under these circumstances because the plain language of the statute is unambiguous. *Marine v. State*, 607 A.2d 1185, 1203 (Del. 1990).
[62] 9 *Del. C.* § 2662(3).

votes, the County Council's failure to do so is no breach of the statute. The vote did not violate Section 2662.[63]

2. The UDC does not Require the Council to Consider Traffic.

The Plaintiffs also contend that rezoning ordinance is invalid because the Council violated the UDC in adopting the rezoning ordinance. Specifically, the Plaintiffs point to Article 11 of the UDC, which provides that developers must prepare a Traffic Impact Study ("TIS") in coordination with DelDOT for all major plans and rezoning unless certain exceptions apply.[64] Because the Developer and the County Defendants concede that there was no TIS conducted as part of the First or Second Plans to develop Barley Mill Plaza, the issue is whether or not the Second Plan is exempt from the general requirement for a TIS. The Developer contends that both the First and Second Plans qualify as "redevelopment plans,"[65]

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[63] Because I find the Plaintiffs' arguments unsuccessful, I need not consider the Defendants' argument that the Plaintiffs lack standing to challenge the Quality of Life Act or that the Plaintiffs' failure to join DelDOT is fatal to the claim. *See Christiana Town Ctr., LLC v. New Castle Cty.*, 2009 WL 781470, at *12 (Del. Ch. Mar. 12, 2009) (holding that the plaintiff failed to state a claim for relief under 9 *Del. C.* § 2662 because it had not shown that it was an intended third-party beneficiary of the 1990 agreement between the DelDOT and New Castle County, and because it had not joined DelDOT as a party to the litigation) *aff'd*, 985 A.2d 389 (Del. 2009). *But see Deskis v. Cty. Council of Sussex Cty.*, 2001 WL 1641338, at *9 (Del. Ch. Dec. 7, 2001) (stating, in dicta, that 9 *Del. C.* § 6962—Sussex County's version of § 2662—requires the County Council to consider traffic analysis from DelDOT before deciding whether or not to rezone).

[64] New Castle Cty. C. §§ 40.11.120.A.

[65] New Castle Cty. C. § 40.08.130.B.6.b. A redevelopment plan is one of several ways that a landowner can develop a property which is classified as a "Nonconforming Situations" under the UDC. New Castle Cty. C. § 40.08.130. A Nonconforming Situation is "[a] building/structure or the use of a lot or building/structure lawfully existing at the time this Chapter or a subsequent

and that a TIS is therefore not required unless one has been requested by DelDOT.[66] The Plaintiffs disagree and argue that the Developer's interpretation of the redevelopment exception is contrary to the text of the ordinance. As explained below, I find that the Second Plan was properly classified as a redevelopment, and that the County Council's approval of the rezoning ordinance was consistent with the UDC.

To qualify as a redevelopment plan, the site for a proposed development must be "(i) designated as a Brownfield; (ii) developed under the Former Code [prior to December 31, 1997];[67] (iii) developed prior to the adoption of New Castle County development regulations; *or* (iv) [consist of] former or existing extractive use sites."[68] These appear to be the *sole* requirements for a property to be considered a redevelopment, and thus exempt from the TIS requirement. The Developer maintains that the Second Plan qualifies as a redevelopment under part (ii).

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amendment to this Chapter became effective which does not conform to the dimensional and/or use requirements of the district in which it is located." New Castle Cty. C. § 40.33.300. The Second Plan indicated that it would bring Barley Mill, a Nonconforming Situation, into compliance with UDC minimum requirements concerning, among other things, the "number of parking spaces, bicycle parking, [and] parking lot plan units . . . ." Defs.' App. at B-51.

[66] New Castle Cty. C. § 40.08.130.B.6.e.7.

[67] The UDC defines "Former Code" as "The New Castle County Code and Comprehensive Development Plan Update in existence as of December 31, 1997, prior to the adoption of this Chapter and prior to any Comprehensive Development Plan Update amendments adopted by County Council on December 31, 1997." New Castle Cty. C. § 40.33.300.

[68] New Castle Cty. C. § 40.08.130.B.6.b (emphasis added).

The Plaintiffs disagree and argue that the language quoted above, which defines the "applicability" of the redevelopment exception, must be read in light of "purpose" section of the ordinance. The UDC explicitly states that the purpose of the redevelopment exception is "to facilitate and encourage the continued viability of previously developed land by granting a credit for both extractive use sites and Brownfields;[69] and for sites with legally existing gross floor area (GFA) that has been demolished by more than fifty (50) percent of its GFA."[70] The Plaintiffs maintain that allowing the Developer the benefit of the redevelopment exception is inappropriate, because Barley Mill Plaza is neither a Brownfield, an extractive use site, or a site where 50% of the buildings have been demolished. The Plaintiffs argue the plain language of the "purpose" section of the ordinance puts limits on the scope of the redevelopment exception. The Plaintiffs also contend that if the redevelopment provisions are interpreted as applying to *all* development constructed before 1998 under the Former Code—including buildings which are functional and occupied, such as those at Barley Mill Plaza—the exception is so

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[69] Under the UDC Definitions, a Brownfield is "[a]ny vacant, abandoned or underutilized real property the development or redevelopment of which may be hindered by the reasonably held belief that the real property may be environmentally contaminated and as defined under 7 *Del. C.* Ch. 91 (Hazardous Substance Cleanup Act)." New Castle Cty. C. § 40.33.300. To qualify a site as a Brownfield, an applicant must submit documentation from DNREC identifying and confirming the Brownfield site prior to any review. *Id.*

[70] New Castle Cty. C. § 40.08.130.B.6.a. The 50 percent requirement was added in 2008 to replace language stating that the relevant buildings would be partially or completely demolished. I assume that the 50 percent threshold was intended to resolve some ambiguity in what it meant to be partially or wholly demolished.

broad as to appear unrelated to the purposes expressed. Accordingly, the Second Plan should have been designated a development, rather than a redevelopment, and an approved TIS should have been a requirement before rezoning.

The Defendants counter by pointing to the plain language of the "applicability" section, which indicates that the redevelopment exception is available to properties developed under the Former Code, which undoubtedly includes Barley Mill. The Defendants also contend that the County's designation of the Second Plan as a redevelopment is entirely consistent with the purpose of the redevelopment exception. Though redevelopment plans are exempt from the traffic-study requirement, such plans must still achieve code compliance by improving "design elements such as . . . parking, buffers, landscaping, access, setbacks, stormwater management, impervious cover, off-site transportation improvements/capacity, or mitigation of damage to or enhanced protection for existing natural/environmental resources."[71] That was the situation in *Christiana Town Center LLC v. New Castle County* ("*CTC*"), a case in which the parties did not contest that the relevant plan qualified as a redevelopment. The plan in *CTC* was to develop an office park which was built before the UDC was enacted and,

[71] New Castle Cty. C. § 40.08.130.B.6.e.

like Barley Mill Plaza, was not compliant with then-current code.[72] The proposed plan improved the property and brought it into compliance with the UDC.[73] In the instant case, the County has similarly designated the Second Plan as a redevelopment plan, both benefited and burdened as described above. The benefit, of course, is that the Developer was able to avoid providing a TIS for approval by the Planning Department.

Taking the above sections of the UDC into account, it seems clear that the purpose of the redevelopment exception was to encourage owners to bring non-code-compliant properties up to code. I see nothing in the ordinance indicating that the County Council intended the redevelopment exception to be used sparingly; as the Court noted in *CTC*, the exception for redevelopment may be purposely broad to encourage the redevelopment of existing properties.[74] "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."[75] By providing incentives to private parties, the UDC provides a mechanism for slowly bringing properties in

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[72] *See Christiana Town Center, LLC v. New Castle Cty.*, 2009 WL 781470, at *2 (Del. Ch. Mar. 12, 2009) (hereinafter "*CTC*") ("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 ago.") *aff'd*, 985 A.2d 389 (Del. 2009).
[73] *Id.*
[74] *Id.* at *7.
[75] *Id.*

the County up to uniform standards, without spending government resources to make such improvements.[76] "Streamlining the redevelopment plan approval 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."[77] It is a reasonable interpretation that the UDC exception for redevelopment was intentionally drafted broadly to fulfill these policy objectives.

Thus, there are (for the Plaintiffs) at best two reasonable interpretations of the statute: one which limits redevelopment to Brownfields, extractive sites, or properties that have suffered a 50% demolition; and one which supplies a far broader remedy. Even assuming that the Plaintiffs' reading is reasonable, I can resolve any ambiguity concerning the possible scope of the redevelopment exception by turning to the County's interpretation of its own ordinance. This Court has held that:

> [W]hen the County Council rezones property, its authority is equivalent to that of an administrative agency. 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.[78]

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[76] *See id.* (providing stormwater systems as an example).
[77] *Id.*
[78] *Id.* at *8.

Based on these principles, because the County Council's position is reasonable, I defer to their interpretation. Here, the County clearly chose to treat the Second Plan as a redevelopment, thereby adopting a literal reading of the "applicability" section, notwithstanding the ordinance's stated "purpose." Thus, I find that the "purposes" of the Section do not limit its applicability to the Second Plan. Accordingly, as Barley Mill was developed under the Former Code prior to December 31, 1997, the second Plan qualifies as a redevelopment under the UDC, and no TIS was required.

B. The Vote of the County Council was Arbitrary and Capricious.

Having found that the actions of the County Council were in compliance with law, I must next turn to the Plaintiffs' argument that enacting a zoning change to permit a large shopping mall, without the benefit of a traffic analysis, represents an arbitrary and capricious act of legislation which is not entitled to recognition. The record indicates that the County Council was well aware that it lacked traffic study data. At the time the County Council voted on the rezoning ordinance, at least one of the Council members believed that procedural rules prevented the Council from obtaining a traffic study from the Developer and DelDOT *and* expressed on the record that information from the study was material to his vote. Before I can resolve the question of whether this action is arbitrary and capricious, I must first consider whether the Councilman's understanding of the law was

accurate. That is, *was there* a legal barrier preventing the County Council from considering traffic information? The answer to that question is no.

1. There Was No Legal Barrier Preventing the County Council from Considering Data From a Traffic Study

The assertions made by the Developer's attorney and by the Department Manager, David Culver, as provided to the Council prior to the rezoning vote, that traffic considerations were not to be considered by the County Council, stems from a mistaken understanding of the Jan 1, 2010 amendments to the UDC. As noted above, the Developer's attorney represented to the Council's Land Use Committee on October 4, 2011 that "the Council's conscious decision to adopt the two-step process as opposed to the three-step process . . . pushes the traffic component to the end."[79] The Department Manager also represented that traffic was not to be considered prior to the County Council's vote on the rezoning ordinance.[80] However, at oral argument on the current motion, counsel for the Developer did not dispute that this view was in fact legally incorrect, and that there was no legal barrier preventing the Council from delaying its vote on the rezoning until after the

[79] Pls.' App. at A-166.
[80] Pls.' App. at A-144.

completion of a traffic study or from considering that study as part of its deliberations.[81]

Furthermore, my own review of the UDC amendments leads me to conclude that any assertion that the County Council was legally barred from considering traffic information in advance of a vote on the rezoning ordinance was incorrect. It is true that the 2010 amendment to the UDC did seek to "improve and simplify the current three-step plan review process for major plans and rezonings with a two-step review process that includes a first-step public hearing and comment."[82] However, the changes consisted primarily of combining the "Exploratory Sketch Plan" and the "Rezoning/Preliminary Plan"[83] stages into one phase, the "Exploratory Plan Review Phase."[84] The amendments do not require traffic information to be considered *only* after a rezoning vote of the County Council. On the contrary, Article 11 contemplates the possibility that a traffic study may be submitted to the Department of Land Use and DelDOT even before the exploratory

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[81] *See* Oral Arg. Tr. 159:17-165:11 (discussing whether a statement from Councilman Hollins clarifies Councilman Weiner's "misapprehension" of law on account of "the two-step/three-step misstatement").
[82] Preamble to New Castle Cty. Ordinance No. 09-066 (accessed at http://stateplanning.delaware.gov/plus/projects/2009/2009-08-06.pdf.)
[83] New Castle Cty. C. § 40.31.110 (pre-2010 UDC, accessed at http://www2.nccde.org/documents/code/SLDProcessPriorToJanuary2010.pdf).
[84] New Castle Cty. C. § 40.31.110.

plan review phase.[85] Furthermore, both the pre-2010 UDC and the post-2010 UDC provide that the County Council may "table the rezoning ordinance for the purpose of obtaining more information."[86] In short, I find nothing in the Jan 1, 2010 UDC amendments to support the statements of Culver and the Developer's counsel that the County Council was prohibited from considering traffic as part of its vote. The effect of removing consideration of traffic impacts to "the end of the process" was to remove consideration of the effect of the development on traffic from Council's deliberations in the discretionary exercise of its rezoning authority. There is simply no support for the Developer's contention—made to the Council but *not* in this action—that such consideration was prohibited.

2. Standard of Review of County Council Rezoning Decisions

I now consider the question of whether the County Council's decision should be overturned as arbitrary and capricious. "[A] rezoning ordinance is usually presumed to be valid unless clearly shown to be arbitrary and capricious because it is not reasonably related to the public health, safety, or welfare."[87] The opponent of the rezoning bears the burden of rebutting the presumption of

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[85] New Castle Cty. C. § 40.11.120.B ("In order to expedite the review of [required traffic information], the applicant may, at its option, provide it to the Department and DelDOT in advance of the scheduled preapplication conference.").
[86] New Castle Cty. C. § 40.31.113.G.
[87] *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).

validity.[88] In order for this Court to properly discharge its duty to review the decisions of the County Council, our Supreme Court has held that the acts of the Council must be based on an adequate record.[89] The purpose of my review is not to second-guess the legislature, but only to determine whether its acts are supported by "record of substantial evidence."[90]

The Council members approved the Rezoning Proposal by a bare majority vote of 7 to 6. Therefore, if at least one of the affirmative votes was arbitrary and capricious, the Rezoning Proposal would fail to have the majority of votes needed to approve the plan, and the vote would be invalid.[91]

1. The Arbitrary and Capricious Standard

Although the phrase "arbitrary and capricious" appears to imply a conjunctive standard, in reality it is a unitary term implying an unreasoned, irrational or unfair process.[92] There are several ways in which a legislative act of the County Council can be overturned as arbitrary and capricious.[93] For example,

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[88] *Wildel Realty, Inc. v. New Castle Cty.*, 281 A.2d 612, 614 (Del. 1971).
[89] *New Castle Cty. Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989).
[90] *Gibson v. Sussex Cty. Council*, 877 A.2d 54, 65 (Del. Ch. 2005).
[91] New Castle Cty. C. § 40.31.113.G.
[92] I ultimately find the Councilman Weiner's vote was arbitrary and capricious, because he admittedly and explicitly voted without information material to his vote that he mistakenly believed was unavailable to him. It is fair to say this was arbitrary, but there is no hint of caprice—acting upon mere whim—in the Councilman's deliberative process. It is clear from the record he himself created that he was troubled, under his mistaken understanding of the law, by having to take an uninformed decision.
[93] *Willdel Realty, Inc. v. New Castle Cty.*, 270 A.2d 174, 178 (Del. Ch. 1970), *aff'd*, 281 A.2d 614 (Del. 1971).

the action can be "whimsical or fickle" or "not done according to reason."[94] This Court may find an action arbitrary is if it was "unconsidered" or "taken without consideration of and in disregard of the facts and circumstances of the case."[95] The County Council must also act "rationally and fairly apply its zoning code and regulations . . . and not in an arbitrary fashion that subjects some property owners . . . to unwritten, subjective restrictions that the Council is not willing to impose on similarly situated property owners."[96]

In *Harmony Construction, Inc. v. State Department of Transportation*, a case involving the award of a contract following a public bidding process, this Court noted that the deference granted to the County Council under the "arbitrary and capricious" standard is akin to that granted to directors under the business judgment rule.[97] "The purpose of both review standards is to prevent 'second guessing' by courts of decisions that properly fall within the competence of a governmental (or corporate) decision-making body, so long as those decisions rest upon sufficient evidence and are made in good faith, disinterestedly, and with appropriate due care."[98] Continuing with this analogy, the Court noted that one assumption of the arbitrary and capricious standard is the premise that the agency

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[94] *Id.* at 178.
[95] *Id.* at 178.
[96] *Gibson*, 877 A.2d at 57.
[97] *Harmony Const., Inc. v. State Dept. of Transp.*, 668 A.2d 746, 751 (Del. Ch. 1995).
[98] *Id.* at 751.

has employed a decision-making process "rationally designed to uncover and address available facts and evidence that bear materially upon the issue being decided."[99] It follows that any decision without such a process "would be arbitrary by definition."[100]

2. Traffic Data was Relevant to the County Council's Decision to Rezone: Weiner's Lament.

In this case, traffic issues were certainly relevant to the rezoning ordinance being decided by the County Council. State statutes and county ordinances provide for numerous procedures so that the County Council may consider traffic before voting on a rezoning. For instance, Section 2662 requires County Council to enter into agreement concerning traffic with DelDOT *before* any rezoning decision.[101] The UDC contains an entire article dedicated to traffic.[102] According to that article, its purpose is to "ensure that development occurs *only* where there are adequate transportation facilities in place, or programmed for construction."[103] Major developments require a TIS to be submitted to the Department and DelDOT (absent the redevelopment exception) before the Department renders its recommendation to the County Council. The UDC also provides, expressly, that

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[99] *Id.*
[100] *Id.*
[101] 9 *Del. C.* § 2662 ("The County Council shall not approve any proposed change in the zoning classification for land (i.e., any "rezoning request") without *first* complying with the following procedures . . .")(emphasis added)).
[102] New Castle Cty. C. § 40.11.
[103] New Castle Cty. C. § 40.11.000.

the County Council shall consider "Consistency with the character of the neighborhood" and the "Affect [sic] on nearby properties" when considering a rezoning proposal, which implies consideration of the effect of the development on traffic.[104] In light of these statutes and ordinances, it is evident that the legislature and Council itself intended for traffic information to be *available* to the County Council. That the County Council is not required to utilize traffic data in its analysis by law does not reduce the relevance and materiality of such data to the Council's exercise of its legislative rezoning function.

Furthermore, the record here indicates that *all* concerned parties—citizens, the Planning Board, the Planning Department, the Developer and, most significantly, the County Council itself—regarded traffic as one of the most important considerations for this particular rezoning ordinance. Traffic issues were discussed at every public meeting for which a transcript is available. At the public meeting of the Planning Board and the Planning Department, on June 7, 2011, many attendees expressed their concern that a regional mall would make the peak-hour traffic commute worse at the intersection between State Routes 141 and 48. The Planning Board's decision not to recommend the rezoning was largely based

[104] New Castle Cty. C. § 40.31.410.A, F.

on traffic concerns.[105] The Developer and the Planning Department also acknowledged the importance of traffic issues to the planning process, although they maintained that consideration of the TOA to be conducted by DelDOT must be postponed until after the vote of the County Council.[106]

Most importantly, the County Council itself considered traffic information to be highly relevant to its decision to approve the rezoning ordinance. At least two Council members expressed their desire for traffic information at the October 4, 2011 meeting of the County Council's Land Use Committee, despite the fact that the Developer's attorney asserted that "traffic [is] not relevant" to the County Council's decision.[107] At that meeting, both Councilmen Street and Weiner expressed frustration that the two-step approval process, in their view, prevented them from considering the impact of traffic before they voted on the rezoning ordinance. Councilman Weiner engaged Culver in an extensive discussion over possible amendments that the County Council could make to the UDC that could allow the County Council to obtain commitments from a developer for improvements before the Council approved a rezoning.

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[105] *See* Pls.' App. at A-137 ("[The rezoning] will have a significant negative affect [sic] on nearby properties and the whole corridor. 141 as many people said is a unique corridor . . . having institutional and office uses throughout the length from Concord Pike to Faulkland Road. And to put a commercial regional development in the middle of that I think will lead to the destruction of the entire corridor."); *id.* at A-173 ("[T]he Planning Board vote was 5-2 against the recommendation. The members that spoke against it . . . had traffic concerns.").

[106] I discuss the possible legal basis for this view in more detail below.

[107] Pls.' App. at A-166.

At the October 25, 2011 meeting of the County Council, when it came time for the Council to vote on the rezoning ordinance, Councilman Weiner reiterated his desire for "traffic impact data" and the Developer's "commitment to needed improvements."[108] He also lamented the fact that the County Council was deprived of that information as "an inadvertent byproduct of moving from the three-step to the two-step approval process."[109] Despite those reservations, Councilman Weiner voted in favor of the rezoning because he concluded that the First Plan would have a worse traffic impact than the Second Plan.[110]

3. Weiner's Vote in Favor of the Rezoning was Arbitrary and Capricious Because (1) There Was No Legal Impediment to Considering Traffic Data, and (2) Weiner Expressed that Traffic Data Would Have Been Material to His Vote to Rezone.

I find that the County Council's decision to rezone is "arbitrary and capricious" under our law, because the dispositive vote of Councilman Weiner was cast in the absence of information, in the form of a traffic study, that the Councilman believed was material and potentially dispositive, and which the Councilman could have obtained, were it not for his misunderstanding of the law (presumably based on the incorrect advice on the part of the Planning Department and the Developer).

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[108] Pls.' App. at A-553-54.
[109] Pls.' App. at A-553-54.
[110] Pls.' App. at A-561.

As noted above, it is beyond doubt that the information that the County Council could have gleaned from a traffic study, even in the form of a TOA, could have been material to the vote on the rezoning ordinance. The record indicates that the *only* reason that Councilman Weiner voted without this information is because he was under the mistaken impression that there was no legal way for him to get the information at that stage of the plan approval process. Despite statements from Department Manager Culver and the Developer's attorney to the contrary, it would have been possible for the County Council to have tabled the vote on the rezoning ordinance until DelDOT had produced its traffic study. Because that information was, in Weiner's own view, highly relevant, and because there was no reason why the information could not have been provided to the County Council, I find that Councilman Weiner's vote was made in the absence of substantial facts, and it was therefore arbitrary and capricious.

Though the phrase "arbitrary and capricious" in its ordinary sense may seem inappropriate, or even unfair, as a description of Councilman Weiner's decision-making process, it is an accurate description under Delaware law.[111] Our Supreme Court in *Tate v. Miles* held that the County Council has the obligation to create a record establishing the Council's reasons for effecting a rezoning, so that a

[111] I note the irony that Weiner's conscientious, emphatic insistence on traffic data now forms the basis for overturning his vote as arbitrary and capricious. Whether this makes Weiner, to paraphrase Charlie Brown, the hero or the goat of this tale, is, I suppose, a matter of perspective.

reviewing court can understand whether or not the Council acted lawfully.[112] It is my task to examine that record and to determine whether the stated rationales of the Council Members who voted in favor of the rezoning show that the decision was not arbitrary and capricious. Unlike some prior cases,[113] the alleged defect here is not that the County Council has failed to create a record supporting its decision. On the contrary, the County Council's decision has been chronicled adequately. The problem for the County Council is that the record reflects that at least one Councilman's justification for his vote, since clearly uninformed,[114] was *not* reasonably related to the County's health, safety, and welfare.

The word "reason" connotes a process of reaching a conclusion through logical thinking. The Councilman's stated rationale for voting as he did was that he, and the rest of the Council, had no legal way to obtain the results of a traffic study before voting on whether or not to approve the rezoning ordinance. As explained above, that premise was false. Because of that mistake, the record reflects that there was no basis to support Councilman Weiner's decision to vote on

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[112] *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).
[113] *See, e.g.*, *New Castle Cty. Council v. BC Dev. Assocs.*, 567 A.2d 1271 (Del. 1989).
[114] The analogy of *Harmony*, 668 A.2d at 751, between the duties of the County Council and the duty of care of corporate fiduciaries, further illustrates why Weiner's vote was problematic. In the corporate context, "directors must consider all material information reasonably available," when making business decisions. *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). Weiner's failure to consider material, reasonably available information in the form of a traffic study violates his obligation, as a member of the County Council, to act in a manner reasonably related to the health, safety, and welfare of New Castle County.

the rezoning ordinance without legally obtainable information that *Weiner himself* considered material and potentially dispositive. In the absence of logical support for that decision, I must conclude that the vote was arbitrary and capricious.

The Defendants make two arguments why I should uphold the vote, notwithstanding the relevance of the traffic study. First, they contend that Councilman Weiner's vote was *actually* based on his opposition to the First Plan, and that any data concerning the traffic impact of the Second Plan would not have altered his vote. I disagree. Though it is true that Councilman Weiner did refer to the "more adverse traffic impact and land use impact" of the First Plan when he cast his vote in favor of the rezoning ordinance, I cannot ignore the Councilman's statements, made just minutes earlier at the Council meeting on October 25, 2011, that "it's a shame that . . . as an inadvertent byproduct of moving from the three-step to the two-step approval process we lost the *traffic data* . . . ." and "I recognize that . . . CRG and Stoltz have agreed to . . . fight it out within the issue of traffic. Whatever that means, you know, it sounds hopeful. But . . . better would have been for us to [have] had *traffic impact data* . . . ."[115] Councilman Weiner's later statement that he believed the Second Plan would be less harmful than the First Plan does not change the fact that he obviously wanted to consider a traffic study. His statements make clear that it was conceivable that actually seeing the traffic

[115] Pls.' App. at A-553-54 (emphasis added).

data concerning the Second Plan could have led to him changing his vote. His subsequent explanation for his vote—which he was legally required to provide in accordance with the Supreme Court's decision in *Tate*—does not contradict his earlier statements. In fact, the record is silent as to any data or expert opinion that the mixed-use First Plan would have produced worse traffic problems than the all-retail Second Plan. Weiner was only forced to draw such a conclusion, in the *absence* of evidence, because of his misapprehension that traffic studies for either plan were legally unavailable to him.

The Defendants' second argument is similar to the first: Councilman Weiner's vote in favor of the rezoning ordinance was essentially a knowing waiver of the traffic data, in light of Councilman Hollins' statement that,

> Mr. President I just have to respond to the fact that we've gone from the three-step to the two-step does not stop any member of the Council from voting *against* the rezoning because you use your discretion. If you are concerned about the traffic you simply vote no.[116]

The Developer cites this language for the proposition that had Councilman Weiner really been concerned about the traffic impact of the Second Plan he could have simply voted against the rezoning ordinance. I find this argument, too, unpersuasive. Again, the Councilman's earlier statements indicate that he wanted more traffic data. Furthermore, the Defendants fail to appreciate that what

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[116] Pls.' App. at A-555 (emphasis added).

Councilman Weiner sought was the ability to cast an *informed* vote. Voting no, and thereby rejecting the rezoning proposal, would have been just as uninformed as his voting yes. Accordingly, the fact that Councilman Weiner could have simply voted no does not affect my analysis. Once again, Weiner, through his misapprehension of law, was forced to choose between the First and Second Plans, based on traffic concerns but without traffic data.

I note that nothing in this decision should be construed to mean that a rezoning by County Council without the benefit of a traffic analysis, or indeed any expert testimony or evidence concerning the effects of the rezoning and the resulting development on traffic, is *per se* arbitrary and capricious. While consideration of available traffic analysis strikes me as a prudent exercise of legislative information gathering, I cannot say that in a given set of circumstances, a legislative decision to eschew such information may not be warranted. Such a decision, so long as not arbitrary and capricious, is a matter for County Council, acting within the authority delegated by the General Assembly.

My decision today is based on the unusually clear record in this case, which establishes that at least one member of the County Council desired traffic data, because he believed that the traffic data would be material to his decision whether or not to vote in favor of the rezoning ordinance. Notwithstanding his explicit statements that he considered this information highly relevant to his decision, and

notwithstanding the fact that he *could have* obtained that information, he voted in favor of the rezoning ordinance under the misapprehension that the UDC prohibited its consideration. Under our law, such a refusal to consider relevant information means that the vote was arbitrary, and therefore invalid.

III. CONCLUSION

Because his vote was invalid, a majority of the County Council did not vote to approve the Barley Mill Plaza rezoning ordinance. The parties should confer and submit an appropriate order.