IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MULBERRY KNOLL ASSOCIATES, LLC and J.G. TOWNSEND, JR. & CO.,	)	
Plaintiffs,	)	
v.	)	C.A. No. _____
SUSSEX COUNTY COUNCIL, the governing body of Sussex County, Delaware	)	
Defendant.	)	

VERIFIED COMPLAINT

Plaintiffs Mulberry Knoll Associates, LLC and J.G. Townsend, Jr. & Co., by and through their undersigned counsel, hereby state and aver as follows:

Introductory Statement

1. Plaintiff Mulberry Knoll Associates, LLC has spent more than two-and-a-half years and over $3.5 million preparing a proposed rezoning for a large, commercial project along a commercial corridor in an area designated by the County's Comprehensive Plan as a "commercial area." The Office of State Planning Coordination, in reviewing the proposal stated it had "no objections." The County's Planning & Zoning Commission recommended in favor of the rezoning and associated plans. The County's Department of Planning identified no deficiencies with the proposed plans for the project. And yet, Sussex County Council rejected the rezoning. It did so for reasons inconsistent with the County's Code and the

applicable traffic requirements. More specifically, and only after the public record was closed, a Councilmember claimed (erroneously) that the rezoning must be rejected because it was missing a "key requirement" required for approval – a housing/residential component. No one prior to that – not the Sussex County Department of Planning, not state agencies conducting reviews of the proposal, not the Planning & Zoning Commission, and not even any County Council member during the public hearing which preceded its vote – questioned or suggested that the proposed rezoning was fatally flawed for lack of a residential component. Similarly, despite Mulberry's careful adherence to the requirements of the Transportation Improvement District (TID) requirements applicable to the property and transportation district (requirements carefully designed so that property owners developing their properties within the designated transportation district (a district created because growth is anticipated to occur within the district) could be assured that traffic impacts would not be a basis for denial of their projects), Council wrongfully rejected the rezoning proposal because, it now claims, the traffic improvement schedule called for in the TID Agreement (to which the County is a party) is unacceptable. Furthermore, Council claimed that the Traffic Impact Study (TIS) performed for the rezoning indicated that a number of intersections would "fail" and they could not agree to such failure – but, under the TID Agreement, some of these intersections will be improved so as not to "fail," and, as to the balance, the

TIS calls for Mulberry to make improvements to those intersections so that they don't fail. In other words, the TIS was designed and performed to identify the improvements which Mulberry must make – and Mulberry has committed to doing so. In sum, the Council's denial is based on a misapprehension of the applicable law and facts, and must therefore be reversed and remanded for a new hearing and vote.

The Parties

2. Mulberry Knoll Associates, LLC is a Maryland limited liability company and the equitable owner of 73.457 acres +/-, designated as Tax Parcels 334-12.00-46.00 & 334-12.00-47.00, located on the northwest side of John J. Williams Highway (Route 24) approximately 400 feet south of Plantation Road and extending to the northwest corner of Mulberry Knoll Road in Sussex County, Delaware (the "Property").

3. J.G. Townsend, Jr. & Co. is a Delaware corporation and the legal owner of the Property.

4. Sussex County Council is the governing body of Sussex County, a political subdivision of the State of Delaware.

Jurisdiction

5. This Court has jurisdiction pursuant to 10 *Del. C.* §341; *see also Reinbacher v. Conly*, 141 A.2d 453 (Del.Ch. 1958).

Facts

6. The Property is designated as a "commercial area" in the County's Comprehensive Plan (which was adopted in 2019), and the plan describes such areas, in part: "Commercial Areas include concentrations of retail and service uses that are mainly located along arterials, and highways. As opposed to small, traditional downtown areas that are often historic and pedestrian-friendly, Commercial Areas include commercial corridors, shopping centers, and other medium and large commercial vicinities geared towards vehicular traffic." The plan goes on to state that: "[i]n addition to primary shopping destinations, this area would also be the appropriate place to locate . . . other medium and larger scale commercial uses not primarily targeted to the residents of immediately adjacent residential areas." The proposed C-4 zoning designation is consistent with the Comprehensive Plan's description of "commercial areas," while the current AR-1 zoning does not allow for retail and service uses, let alone "shopping centers, and other medium and large commercial vicinities geared towards vehicular traffic."

7. Prior to submitting its rezoning application to the County, and consistent with the review process for rezoning applications under State law, Mulberry first submitted an application to the Office of State Planning Coordination for a "PLUS" (Preliminary Land Use Service) review. The PLUS review consists of a meeting at which various state agencies (DelDOT, DNREC, SHPO, etc.), after reviewing the proposal, offer their thoughts and comments on the proposal taking

into account applicable regulations and consistency with the County's Comprehensive Plan and State Strategies Maps (i.e., the planning maps developed by the Office of State Planning Coordination to guide state spending and investment in infrastructure).

8. On June 21, 2024, the Director of the Office of State Planning Coordination issued a letter summarizing the comments of the various state agencies, which letter stated in part: "The State has no objections to this project" (a copy of the letter is attached as Exhibit A). The letter went on to observe that the project is located in a "Level 2 investment area" noting that "Investment Level 2 reflects areas where growth is anticipated by local, county and state plans in the near-term future." As required by the PLUS review process, the applicant then writes a response letter back to the Office of State Planning Coordination (a copy of this response is attached as Exhibit B).

9. Following the PLUS review, on September 6, 2024, Mulberry submitted an Application for Zoning Map Amendment (the "Application") with Sussex County to rezone the Property from AR-1 (Agricultural Residential) to C-4. A copy of the Application is attached as Exhibit C.

10. Thereafter, the Application was filed with the County and the project underwent extensive review and analysis, including but not limited to, a traffic impact study which was reviewed and approved by the Delaware Department of

Transportation ("DelDOT") as well as review by the County's planning professionals in the County's Department of Planning & Zoning.

11. In accordance with the Sussex County Zoning Code, the Sussex County Planning and Zoning Commission conducted a public hearing on the Application on September 17, 2025. At its October 15, 2025 public meeting, the Planning and Zoning Commission voted 4-1 to recommend approval of the rezoning to Sussex County Council. A copy of the October 15, 2025 meeting minutes is attached as Exhibit D. In recommending approval, the Commission noted, among many reasons, that "this is not sprawl or uncontrolled growth. Instead, it follows Sussex County's long-term planning goals, designating this as an appropriate area for commercial growth and development."

12. In accordance with the Sussex County Zoning Code, Sussex County Council then conducted its own public hearing on the proposed rezoning on October 21, 2025. At its January 13, 2026 public meeting, Council voted to deny the proposed rezoning.

13. However, in voting against the rezoning, only one Councilmember (Jane Gruenebaum) spoke as to why she thought the rezoning inappropriate, giving only two reasons for her vote. She claimed (erroneously) that: (i) the rezoning could not be approved because "it has no provision for housing and thus misses a "key requirement" for C-4 zoning; and (ii) the rezoning violated the terms of the

Transportation Improvement District Agreement applicable to the Property and the surrounding vicinity.

14. Thereafter, the four other Councilmembers also voted against the application. Three said they were voting against the application based on unspecified testimony at the public hearing and for the reasons offered by Councilwoman Gruenebaum. One simply said he was voting against the rezoning for unspecified testimony at the public hearing.

15. To the extent that any Councilmember based their "no" vote on unspecified testimony at the public hearing, such unspecified reasoning fails as a matter of law, and invalidates the vote. *See, e.g., Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, 63 (Del. 2014) (rezoning reversed because councilmember misapprehended the applicable law); *New Castle County v. BC Development Associates*, 567 A.2d 1271, 1276 (Del. 1989) (reviewing court must not be left to speculate as to basis for Council's decision).

16. To the extent that any Councilmember based their "no" vote on the reasons given by Councilwoman Gruenebaum, their votes also fail (as does Ms. Gruenebaum's vote) for the reasons further specified below.

C-4 zoning does *not* require a residential component

17. As to Councilwoman Gruenebaum's statement that the zoning code *requires* a residential component in a C-4 zone, such statement is simply not true. The Code merely says that the zoning classification "may" contain a residential component. Councilwoman Gruenebaum's statement is inconsistent with the actual requirements of C-4 zoning as set forth in the County's Zoning Code and cannot stand as a reason for the denial.

18. The Sussex County Zoning Code states that the purpose of C-4 zoning is: "to encourage carefully planned large-scale commercial, retail, and mixed-use developments." Code, §115-88.24. Thus, the purpose is for "carefully planned" "large-scale" "commercial," "retail," and "mixed use developments." If, as the Councilwoman suggested, all C-4 zoning projects were required to include housing, then the purpose section would have not included the references to "commercial" and "retail" and would have simply said the purpose was to "encourage carefully planned large-scale mixed use development." The references to "commercial" and "retail" were not inadvertent, and to adopt Ms. Gruenebaum's interpretation that all C-4 development must be "mixed use" would render the words surplusage, which is a violation of the canons of statutory construction. *See, e.g., Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (legislative acts are not to be interpreted in a way which creates surplusage). Moreover, Ms.

Gruenebaum's interpretation is at odds with the interpretation of the County's planning professionals in the County's Department of Planning and the interpretation of the Planning & Zoning Commission members, none of whom indicated that a residential component was required or a "key requirement" of a C-4 project.

19. In addition, the next section of the Code, §115-88.25, sets forth the "Minimum District Requirements" for C-4 zoning. Consistent with the C-4 purpose language, nothing in this section *requires* a housing component.

20. Instead, the requirements section simply states that: "The district *may* have a maximum of 40% of its developable area consist of duplexes, townhouses or multifamily dwellings." §115.88.25.E. Significantly, there is no requirement that there be any housing at all, whether single-family, duplexes, townhouses or multifamily dwellings. If housing were required, the section would have used the word "must" and would have said "up to" between the words "of" and "40%."

21. No one from the Sussex County Planning Department, during their long and comprehensive review of the project ever suggested the Zoning Code requires a residential component as part of every project developed under the C-4 zoning designation.

22. No one from the Office of State Planning Coordination or any state agency offering comments on the project during the PLUS review ever suggested that the Code requires a residential component.

23. No one on the Planning & Zoning Commission, including the sole member who recommended against the project, ever suggested that the Code requires a residential component.

24. And, finally, during the public hearing before Council, no Councilmember stated that the Code requires a residential component and that the proposed project was fatally flawed for lack of a residential component.

25. In short, at no time during the nearly two-year review process, with Mulberry spending several million dollars in preparing plans, performing studies, and otherwise going through the process, did anyone ever state that a residential component was *required* for C-4 zoning until after the close of the record for the public hearing, when County Council voted to reject the rezoning on the mistaken belief that a residential component was a "key requirement."

26. Yet, if a residential component is a "key requirement," why did none of the County's professional staff, the Planning & Zoning Commission, and the various state agencies raise any questions about the lack of this now-alleged "key requirement"? Why did no member of the Planning & Zoning Commission question Mulberry or Sussex County planning staff about this issue? Why did Council wait

until after the close of the public hearing and suddenly announce that housing is *required* for C-4 zoning?

27. The land use approval process is not a game of "gotcha."

28. Fundamental fairness informs us that local governments can't wait until the record is closed and then claim that there is a deficiency in an application without giving the applicant a chance to address the issue.

29. Fundamental fairness informs us that there is a reason why no one from the Department of Planning, state agencies, or the Planning & Zoning Commission raised the issue – because there is no such requirement.

30. Zoning codes, being in derogation of the common law, are strictly construed in favor of property owners. *See, e.g., Jack Lingo Asset Management, LLC v. Board of Adjustment of City of Rehoboth Beach*, 282 A.3d 29, 34 (Del. 2022); *Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 310 (Del. 2010) ("[T]o the extent that there is any doubt as to the correct interpretation, that doubt must be resolved in favor of the landowner."); *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972) ("[W]e must keep in mind that zoning laws are to be interpreted in favor of the occupants of the land."). Even if one wanted to try and interpret the Sussex Zoning Code to require housing in every

C-4 zone, the interpretation which favors the landowner is the interpretation which controls, meaning that there is no such *requirement*.

31. Here, it was error to reject the Application on the basis that every C-4 rezoning must include a residential component.

32. If Council wants a residential component as part of *every* C-4 rezoning, then it needs to amend its Code; but, what Council can't do is deny a plan at the eleventh hour claiming that C-4 zoning *requires* a residential component when, in fact, the Code does not. In denying the rezoning on the basis that C-4 *requires* residential zoning, Council erred as a matter of law. Further, its decision to wait until the record was closed, without raising the issue at all during the public hearing process is the epitome of arbitrary and capricious behavior.

The rezoning complies with the requirements of the Traffic Improvement District

33. Council similarly erred on the issue of traffic.

34. In 2020, Sussex County and the Delaware Department of Transportation (DelDOT) entered into the Henlopen Transportation Improvement District Agreement (TID Agreement) regarding how traffic issues would be handled for new development of properties located in the area identified within the TID, such as the Property here.

35. In creating the TID Agreement, the County and DelDOT estimated the traffic to be generated by the development of all of the various properties located in

the TID, and, provided that so long as such property did not exceed the estimate, all the property owner would need do is pay a traffic impact fee and there would be no need to do any traffic studies or make any off-site improvements. The TID contains a list of transportation improvements that would be constructed to address the impact of the estimated traffic to be generated by the various development projects and provides that full build out of all the improvements would occur by 2045.

36. The TID Agreement, however, does not limit property owners to the traffic estimated to be generated by their properties. In a case where a property owner wants to develop a project that generates greater traffic, the property owner must conduct a traffic impact study (TIS), to be reviewed and approved by DelDOT, and, if the TIS identifies "failing" intersections or the need for additional traffic improvements as a result of the additional traffic from the property, then the property owner must commit to making those additional improvements, or the TIS will not be approved and the project may not proceed under the TID Agreement.

37. Here, the traffic to be generated by Mulberry's proposed development of the Property is greater than the traffic estimate in the TID Agreement, and so, consistent with the TID Agreement, DelDOT required Mulberry to perform a traffic impact study pursuant to a scope and assumptions set forth by DelDOT.

38. The TIS identified 28 intersections that would "fail" as a result of the additional traffic and set forth the improvements necessary to keep those intersections from "failing."

39. The TID Agreement will result in a number of these intersections being improved with the traffic impact fees paid by property owners; for the balance of such intersections (i.e., the ones that would not fail but for Mulberry's project), Mulberry will be required to make the necessary improvements so those intersections will not "fail."

40. On May 1, 2025, DelDOT issued a letter approving Mulberry's traffic impact study.

41. Notwithstanding Mulberry's obligation, Councilwoman Gruenebaum stated that one of her reasons for voting against the rezoning was that a number of intersections would fail – yet, in making this statement, she failed to acknowledge Mulberry's obligation to improve those intersections, an obligation which would be one of the conditions of approval of the rezoning.

42. Because the intersections would not fail as a result of the rezoning, but would be improved by Mulberry or DelDOT under the TID Agreement, it was error for Ms. Gruenebaum to base her denial on her apparent misunderstanding that the intersections would not be improved so as to avoid failure.

43. Councilwoman Gruenebaum also claimed that because all of the traffic improvements called for by the TID Agreement might not be fully constructed until 2045, such delay justified a "no" vote; but, if this were true, then *no* projects should be allowed to move forward until all the improvements are in place. Sussex County, having agreed to the 2045 timeframe, cannot now use its own agreement as a basis to deny projects.

44. For the foregoing reasons, Councilwoman's Gruenebaum's statements about traffic as a basis to deny the rezoning must be rejected. Mulberry has complied with the TID Agreement, and DelDOT has approved the Traffic Impact Study, meaning that DelDOT agrees that the improvements to the intersections as set forth in the TID Agreement and the additional improvements by Mulberry as set forth in the traffic impact study are appropriate.

The rezoning complies with the Comprehensive Plan and the County is in violation of its Comprehensive Plan by failing to rezone the Property in a manner consistent with the Comprehensive Plan

45. Under the Delaware Code, once a county adopts a Comprehensive Plan, it is required to rezone all property in that county to a zoning classification consistent with the Comprehensive Plan. *See* 9 *Del.C.* §6960(e) ("Within 18 months of the date of adoption of the county comprehensive plan or revisions thereof, Sussex County shall amend its official zoning map or maps to rezone all lands in accordance

with the uses and intensities of uses provided for in the future land use element for the County.").

46. Here, the County's Comprehensive Plan identifies the Property as "commercial," yet the Property remains zoned AR-1 – a classification inconsistent with the "commercial" designation because it does not allow for commercial or retail uses. It has been well more than 18 months since Sussex County adopted its Comprehensive Plan in 2018, and, as a result, the County is not in compliance with State law.

47. Moreover, under Delaware law, the land use map of Sussex County's Comprehensive Plan has the "force of law." 9 *Del.C.* §6959(a) states in part:

> After a comprehensive plan . . . has been adopted by County Council . . . the land use map or map series forming part of the comprehensive plan as required by this subchapter shall have the force of law, and no development, as defined in this subchapter, shall be permitted except in conformity with the land use map or map series . . .

Because the County's AR-1 zoning classification does not permit commercial and retail development, it is impossible to develop the Property in accordance with the Comprehensive Plan's land use map, which, as noted, has the "force of law."

Count I – Permanent Injunction

48. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

49. Plaintiffs lack an adequate remedy at law.

50. Plaintiffs will be irreparably harmed in the absence of injunctive relief.

51. The vote taken to deny the rezoning of the Property should be permanently enjoined and a new vote ordered because Council erred in both its reasons for denying the rezoning: (i) a residential component is not required as part of every C-4 project; and (ii) the project complies with the terms of the Transportation Improvement District. Council was wrong on both grounds, although it is sufficient that Council be wrong on just one, as Council gave both reasons for denying the rezoning request and not as alternative reasons.

Count II – Declaratory Judgment

52. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

53. Pursuant to 10 *Del.C.* §6501 *et.seq.*, plaintiffs request a declaration that the vote taken by Sussex County Council in denying the requested rezoning is arbitrary, capricious and not supported by the record or applicable law.

WHEREFORE, for all the reasons set forth herein, plaintiffs pray that this Court:

a. issue a permanent injunction enjoining the January 13, 2026 Sussex County Council vote denying the requested rezoning and ordering that a new vote be taken in accordance with the evidence in the record and the plain language of the Zoning Code;

b. declare that the vote taken by Sussex County Council on January 13, 2026 denying the requested rezoning is invalid and that a new vote must be taken in accordance with the evidence before the Council; and

c. award such other relief as the Court deems appropriate.

Respectfully submitted,

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