OPINION ON NEW CASTLE COUNTY COUNCIL POWER OVER LAND USE

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OPINION ON NEW CASTLE COUNTY COUNCIL POWER OVER LAND USE

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INTRODUCTION

From 2006 to 2009, I tried to help protect the residents around the old Hercules Golf Course "back nine" from the airborne pollution that would be caused by the building of Greenville Overlook by Toll Brothers. A committee of local scientists, supported by a national expert, felt the earth-moving activities would release chemicals that had been used on the course and brought onto it by flooding. We knew arsenic had already caused damage to a child who lived at the edge of the course and much lead was present among other pollutants not being considered in the cleanup plans. Neither DNREC nor the County had required measures that would adequately protect the neighbors—especially the children. The following memo is based on legal research done for the two lawsuits that were begun in conjunction with the case. Both cases were dismissed before the courts were briefed on the issues, so no ruling was obtained on the central question of one--whether the Council had the power to require the Department of Land Use to do more to insure the neighbors' safety. The Subdivision Record Plan was approved by Council with the usual excuse they had no choice but to approve it because the General Manager of the Land Use Department approved it. Two courageous Council members dissented—Stephanie McClellan, who taught planning courses at the U.of Del., and Jea Street, who could not be intimidated by anyone and voted his conscience.

Council's lawyer has insisted for several years that the Land Use planners cannot demand changes that would reduce the units in a subdivision plan because developers are entitled to get all that is possible under the zoning classification and the regulations in the Unified Development Code. That's called "development by right," but I believe they have carried that common law rule beyond the intent of the courts and ignored directions in the State Code and even the intent of the UDC in the process. I was so appalled by the helplessness of informed, intelligent, and organized neighbors to protect their homes and families against callousness, ignorance, and greed that it made me sick. The neighbors have been subjected to contaminated dust so thick they could taste it. Promises to use controls on the dust were broken. This is America. No one should be allowed, in a democracy with a great Constitution, to destroy their neighbors' health and property to make a buck. Our politicians should not be turning the electorate into powerless masses. We must reform New Castle County government to stop those who would operate it for their own benefit and that of their "friends."

This is written to help citizens understand what faces them when they try to fight a problem development.[1] The Civic League will seek sponsors for state legislation in 2011 to attempt to correct some of the problems described here.

DELEGATED POWER CARRIES WITH IT RESPONSIBILITY

SUMMARY: As a legislative body, Council has the power delegated from the State Legislature and, therefore, the responsibility and duty to protect the citizens it governs. It must oversee and correct where necessary unlawful, inadequate, incompetent, or unreasonable actions of the Department of Land Use.

An analysis of the powers of the Council in the area of land use must begin with the Delaware Constitution, Article II, Section 25 entitled "*Laws permitting zoning ordinances and the use of land.*" It reads:

[1] See the County web site for the entire code. www.nccde.gov

"The General Assembly may enact laws under which municipalities and the County of Kent, the County of Sussex, and the County of New Castle may adopt zoning ordinances, laws or rules limiting and restricting to specified districts and regulating therein buildings and structures according to their construction and the nature and extent of their use, as well as the use to be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State."

The General Assembly, therefore, delegated some of its police power to the county government. The power is exercised by the Council when it enacts ordinances, regulations or resolutions on the subject of planning or land use. The 1997 code of land use ordinances known as the Unified Development Code for New Castle County[1] recites that its intent or purpose is to protect the health, safety, and general welfare of the people that is the foundation of "police" power. UDC 40.01.015.

"…'[P]olice power,' in its original and most comprehensive meaning," is "the power of government in every sovereignty, as embracing the power to govern men and things; it is an inherent attribute of sovereignty, necessary to the effective conduct and maintenance of government." …. "[P]olice power is inseparable from legislative power." [2]

All three counties of the State were delegated broad legislative power and specific powers over land use in Title 9 of the Delaware Code. (You can find the Del.Code on the State web site by clicking on the General Assembly, then Publications then Delaware Code.) Only Kent County has retained the Levy Court form of governance that all three once had.

After discussing relevant sections of Title 9, Chapters 13 and 26 in a New Castle County zoning case, the Delaware Supreme Court concluded: "These empowering statutes leave Council with a great deal of discretion to determine how best to promote the goals announced by the General Assembly." Justice Walsh also said: "It is true that the delegation of the General Assembly's authority to the counties of Delaware is broadly cast." Whether power is inherent or delegated, a government must have it to provide for the essential needs of the people it governs and to order their conduct in the areas for which it has responsibility. County government action can only be taken within the limits or guidelines of the delegation as spelled out by the General Assembly.[3]

Consideration of the power of the New Castle County Council does not stop with a discussion of its <u>specific</u> power over land use because other powers can be brought to bear in the land use arena as needed. Section 1101 of Title 9 of the Delaware Code was passed as part of the reorganization of County governments that was enacted in the mid-1960s and produced the County Executive/Council form in New Castle and Sussex that essentially still exists today. The powers delegated therein were broader still:

"1101. General powers

The government of New Castle County as established by this Chapter shall assume

[2] *Dunn v. Mayor and Council of Wilmington*, 212 A.2d 583,585 (Del. Super.1965) is a criminal case, but it contains a lengthy discussion of government power and useful citations to McQuillin on Municipal Corporations and to Blackstone.

[3] *New Castle County Council v. BC Development Ass'n,* 567 A2d 1271,1275 (Del.Supr. 1989)

> and have all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration, and which are not denied by statute…."

Section 1101 then limited the broad power granted in the first clause to exclude the power to create felonies or to write laws governing civil relationships. Recently further amendments were made relating to agricultural interests. To illustrate the emphasis the Legislature put on Council's ability to fully govern, the 1960s original version of Section 1157 of Title 9 stated that it can adopt emergency ordinances to protect public health if they declare an emergency exists. Such ordinances can be passed at the same meeting at which they are introduced. This is a strong indication that the Legislature was granting some of its sovereignty to the County to function as a home rule government—not just an agency of the State.

The new Council immediately used its emergency power to maintain the *status quo* on issuing building permits for land owners seeking rezonings while it considered an ordinance that would forbid a use that had been granted to a landowner by the former Levy Court. The action was upheld, although the Supreme Court was troubled by the vacillation on a land use matter. *Willdell Realty, Inc. v. New Castle County,* 281 A.2d 612 (Del.Supr. 1971). So in 1971, their power was fully understood.

Section 1146 of Title 9 says:

> "All legislative powers of the County shall be vested in the County Council…and the **County Council shall provide** for the exercise thereof and **for the performance of all duties and obligations imposed on the County by law."**

Since one of the duties of the County is to adopt:

> "Procedures for insuring that the arrangement of the lots or parcels of land or improvements thereon shall conform to the existing zoning at the time of recordation and that **streets**, or rights-of-way, **bordering** or within **subdivided land** shall be of such widths and grades and in such locations as may be deemed necessary to **accommodate prospective traffic**, that adequate easements or rights-of-way shall be provided for drainage and utilities, that reservations of areas designed for their use as public grounds shall be of suitable size and location for their designated uses, that sufficient and suitable monuments shall be required, **that land which might constitute a menace to safety, health or general welfare shall be made safe for the purpose for which it is subdivided**, and that adequate provision for water supply is made;…." (T.9 Del.C. Sec.3004)

it is clear that the Council has a duty to see that the performance of the County in these areas of critical importance to health and safety is carried out as the law requires without arbitrary and capricious decision-making. Therefore, when needed, Council must do its duty to protect its residents rather than avoiding a duty to exercise its discretion in land use matters. These State laws do not give them a license to be a rubber stamp for approvals passed by the Department of Land Use. Quite the opposite, as we see in Sec.1521,Title 9:

> "(a)(1) In addition to the powers elsewhere conferred upon the New Castle County Council and without limiting their generality, the New Castle County Council shall have general jurisdiction over all matters pertaining to the County, its business, finances and general welfare, ... including the power to act upon all matters

pertaining to the…**general supervision of county offices**, ….”

That clearly includes the Department of Land Use. (formerly the Department of Planning). Thus, the Council cannot divest itself of “police powers” over land use constitutionally authorized and lawfully delegated. Its attempt to do so with regard to approving final record subdivision plans is meaningless because State law controls.[4]

Another section of the Delaware Code that indicates where the real power lies in land use decisions is Section 2607 of Title 9 entitled “Changes in zoning district, plan or regulations; procedure.” It states:

> “(a) The County Council may, from time to time, make amendments, supplements, changes, …., but no such changes shall be made or become effective until the same shall have been proposed by or be first submitted to the Department of Land Use.
> (b) With respect to any proposed changes, the Department of Land Use shall hold at least 1 public hearing, ,,,,
> (c) **Unless such Department of Land Use shall have transmitted its report upon the proposed changes within 45 days after the submission thereof to it, the County Council shall be free to proceed to the adoption of the changes without further awaiting the receipt of the report of the Department of Land Use. In any event, <u>the County Council shall not be bound by the report of the Department of Land Use</u>.** Before finally adopting any such changes, the County Council shall hold a public hearing thereon, at least 15 days notice of the time and place of which shall be given by at least 1 publication in a newspaper of general circulation in the County. “

There is no doubt, therefore, that the Council can overrule the Department.

THE *ASHBURN* DECISION SUPPORTS POWER OF COUNCIL TO CONDITION APPROVALS

In 2008, an important decision of the Kent County Superior Court was overturned by the State Supreme Court in an appeal brought by Tony Ashburn, a developer. The decision was heavily influenced by a number of “friend of the court” briefs submitted by lawyers for developers, engineers, subcontractors, and even the National Homebuilders Association. [Del.Supr.No. 68, 2008 C.A.No. 07A-05-001, Op. Dec. 5, 2008 *en banc* overturned *Ashburn v. Kent County Planning Commission, et.al* (Del. Super, Jan. 30, 2008, CA 07A-05-001)]’ It ruled that the Kent County Planning Commission and Levy Court could not flatly deny a subdivision application based on State agency concerns when the developer’s subdivision plan otherwise met all their standards. **The majority of the Justices felt that the correct and allowable action the Commission should have taken was to add conditions to their decision that would force the developer to mitigate adverse impacts pointed out by the State agencies worried about roads, schools, and water.** In dissent, Justice Henry duPont Ridgely pointed out that the statute at issue gave the Kent Planning Commission the specific authority to “disapprove” a subdivision plan. The majority bent the English language to get

[4] A redelegation of delegated powers must be accompanied by clear guidelines as to how the receiving party is to exercise the discretion inherent in the power. When it redelegates quasi-judicial power, it must attach standards. This was not done in the Unified Development Code when it was later amended to give the General Manager of the Land Use Department power to waive many regulations. In the original UDC he could only exercise such power when it would result in the creation of at least 1,000 new permanent jobs.

around that. A total denial of approval of any plan—if it were a permanent decision—would entitle an owner to compensation for a "taking." An owner is entitled to some beneficial use of his land at the very least. The problem may have been in the wording of the Kent County statutes. I don't know those, but I know they were amended right after this decision was announced. In New Castle County, a plan must also comply with State and federal law, so a State agency can require changes in a plan.

It's likely that as a resident of Kent County, Justice Ridgely knew the seriousness of the impact of 216 new homes on land with little infrastructure planned for its future. Mostly Amish farmers live in the area. Kent County still has a lot of good farm country. He may have considered that the Commission or the Levy Court forcing Ashburn to submit another plan acceptable to the State agencies would have been a reasonable decision. The majority seemingly never thought about that possibility. Without the cooperation of local planners, the State agencies that have legitimate and serious concerns in their fields of expertise and responsibility cannot control land use. To keep the Amish safe from over 400 new cars on the narrow back roads, DelDOT will wind up having to widen a lot of roads, for example, but they lack the money to do so.

Justice Ridgely also recognized the flaw in the Court's use of cases from one jurisdiction to decide issues in another. The systems and laws differ. The Court used a town case as precedent, and there were major factual differences that made it unsuitable--especially as the basis for such an important decision. Their position was no doubt influenced also by the *Rappa* line of cases. (See discussion below.) This flaw will make it possible to "distinguish" this case from future cases in New Castle County if need be.[5]

The majority's rationale that a planning agency should be able to envision all potential problems with any given development that might threaten a community; and that it can only protect the community by planning and zoning regulations that always put the landowner on notice of what specifically he can and cannot do is somewhat unrealistic and idealistic. Undoubtedly, the industry briefs argued this point of view. Realistically, building has always been a risky business that frequently presents unanticipated problems. Someone must have authority to deal with those.

The certainty the Supreme Court believes land speculators need is a wonderful economic goal, but developers who gamble on the future are not entitled to greater protection than existing residents of a community. The right to use one's land as one desires has always been limited at the point that it causes harm to neighboring landowners. That is the underlying premise of all planning and zoning laws--as any good property law textbook points out. The central question is what is best for the public interest, and that requires careful and impartial balancing of all the interests involved. The County needs economic investment, but decision-makers should ask if the benefit of that in any particular project will be offset by the future costs to the taxpayers. They wind up paying for the full impact of

[5] To distinguish a case is to show the court how a rule developed for a certain set of facts is not applicable to another case in which the facts are considerably different and the use of the same rule is, therefore, not appropriate.

land development on every aspect of our lives in this State. These are tough decisions that start with the Dept. of Land Use, but that sometimes need real serious review by Council. Our Comprehensive Planning needs more attention to such questions and a formula for cost-benefit analysis should be adopted. Schools, sewer systems, highways, back roads, flood control, fire and police safety, social services, courts, snow removal in developments and all the activities of government grow more expensive as the population expands.

THE DIFFERENCES & CHANGES IN COUNTY PROCEDURES

Each County has its own unique scheme of government and in each one, changes have been made over time in their fundamental structure and in land use planning and zoning ordinances. The towns are governed by individually approved charters from the State and State laws in Title 22 of the Delaware Code. For these reasons, legal cases in one jurisdiction cannot always be used as precedent for cases in another; but there are some broad common law rules relating to administrative law, planning and zoning law, and constitutional rights that can be applied universally. For example, on "takings" we look to the United States Supreme Court for precedents.

In this County, regional planning was first undertaken through a Planning Department. An appointed citizen Planning Commission with authority to make the initial decisions was a part of the original scheme. Some of the Delaware Code sections that set up that arrangement have never been amended, leading to some confusion for researchers. [See T.9, Ch.30 of Del. Code at end of this.]

When operating as levy courts, the land use hearings in all counties were formerly adversarial. *Conner v. Shellburne, Inc.,* 281 A.2d 608 (Del. Supr. 1971). The levy courts had to provide full due process in all planning and zoning hearings. That requires a decision by an impartial panel, and that created difficulty for members elected to represent constituents. Chief Justice Herrmann explained in *Conner, supra,* that when the Legislature changed New Castle to a county council from a levy court form of government, adversarial hearings were no longer required--reversing the Chancery Court holding below. Justice Herrmann had to advise Chancery Court on remand that the *Allen* ruling was no longer applicable and legislative hearings would suffice. [Referring to *Allen v. Donovan*, Del.Supr., 239 A.2d 227(1968).] That illustrates why lawyers who wish to win cases must know the history of the counties and their processes to know which cases are no longer good as precedents.

Only the Quality of Life Act in the 1980s codified in Title 9 was uniform for all three counties.

Dozens of Delaware cases on rezonings or mixed rezonings for subdivisions have been decided, but only a few for just subdivisions. Many of those were pleas to completely overturn a subdivision approval and most were lost before a court hearing. Civic umbrella groups are often thwarted by procedural problems such as missing Section 8126, a County statue of limitations located in Title 10 rather than 9. No ordinance relating to land use can be challenged after 60 days and it often takes longer than that to understand grounds for a lawsuit, or to find lawyers. There is also a statue of limitations of only 30 days to file for a *writ of certiorari* against the Council. (That is the standard

complaint for a court appeal from Council's approval of a final record plan.) Sometimes there is a failure to name an indispensable party or litigants run out of money during prolonged discovery.

In the lower counties, both county planning commissions make the initial decisions on applications and they can add conditions to a plan and the Levy Court and Sussex Council can do the same. The Kent Levy Court hears subdivision appeals from their Commission (9 Del.C. 4811), but Sussex and Kent governing bodies can act without waiting for their Commissions if the commissions fail to submit a report in 45 days after receiving an application (9 Del. C. 6911 and 4910). Does New Castle County Council have less power than its peers?--of course not. Do the residents of this county have less power than their peers to the South? Yes. Only in New Castle County has a citizen planning commission with real authority in zoning and subdivision matters been eliminated. A Planning Board still exists, but it is primarily advisory. (Department of Land Use planners still share its public hearings so that they can question members of the public after they testify.) Only in New Castle have the elected representatives on County Council been denied the right to genuinely participate in final subdivision decisions!

A Kent Commission subdivision denial on the basis of health and safety concerns was remanded in 2007. The Chancery Court found an inadequate record to review and sent it back, but it did not question the propriety of the action as based on such concerns. [6] This was decided a few months before *Ashburn*.

Pronouncements by the courts reflect the routine utilized at the time the cases were decided, and must be read with an understanding of the process in each jurisdiction at the time of the decision. Dozens of cases dealing with these issues have been listed on the final page sorted by jurisdiction.

DECADES OF CASE LAW WRONGLY BASED ON *RAPPA V. BUCK*

What I have learned through extensive research is an embarrassment to the Delaware legal community. That it could happen in a State known for capable judges is truly disappointing, but I

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[6] *JNK, LLC, v. Kent County Regional Planning Comm.*, Del. Ch. C.A. No.06C-03-066 (May 5, 2007 (RBY) :
" In undertaking its assigned duties, the power exercised by the Commission is largely administrative. Indeed, at least one treatise has stated that if "the plat conforms to the requirements of the regulations, it must be approved." FN13 However, that does not mean the Commission exists merely to rubberstamp every application that comes before it. The Commission necessarily must possess some quasi-judicial power, "since subdivision control involves the specific application of the applicable general standards to the particular facts of a proposed subdivision." FN14 Thus, the Commission's possession of this quasi-judicial power means that it transcends a merely ministerial role. It is vested with limited discretion.
B. The General Assembly Established an Appellate Procedure for Review of the Decisions of the Commission.
Once a preliminary subdivision plat has been submitted, the Commission may, in its discretion, determine that the plat must be approved, conditionally approved, **denied** or tabled.FN15 The Statute provides that, following the Commission's recordation of its decision, any approval or disapproval may be appealed to the Levy Court within 30 days.FN16 The Levy Court may then affirm or deny, in whole or in part, the decision of the Commission, or remand the matter for further proceedings.FN17 The appellate determination of the Levy Court is then appealable to the Superior Court of Kent County. FN18 The plain language of the Statute indicates that the General Assembly intended the foregoing provisions to create a two-tiered appellate procedure for reviewing the subdivision decisions of the Commission. This procedure is unique to Kent County, in that it provides a statutory right to a direct appeal to the Kent County Superior Court of the County's subdivision decision; whereas, a *writ of certiorari* is needed for the Superior Court to review subdivision decisions made by the New Castle and Sussex County governments.FN19"
FN15. 9 *Del. C.* § 4811; FN16.*Id.;* FN17.*Id;* FN18.§4818. FN19. *Hundley v. O'Donnell*, 1998WL842293 at*3, n.7 (Del.Ch.).

realize that legal research was once an arduous task. What can be retrieved in seconds today, once took days to find if one even had access to unreported opinions at all. Law clerks could miss cases or misread them. Let's start with background information to put the *Rappa* case in context.

In order to analyze land use cases, one must understand the difference in how rezoning applications are processed and how subdivision plan applications are processed. That has been reduced to a table in the UDC. Generally speaking, once a rezoning is accomplished, a landowner can develop his property for any of the uses permitted in the zoning category to which his land has been assigned. When he plans a use, he must submit a plan that meets the subdivision regulations (the UDC) and state and federal laws. By both State and County law, the plan should have no serious adverse impacts on neighboring properties. 9 Del.C.2603 & 3003.

Rezonings are not granted as a matter of right; therefore, they present an opportunity for citizens to affect decisions about the future of their area. They have major implications for infrastructure capacity (roads, sewers, drainage systems including creeks, water availability, schools, and environmental viability) and for neighboring properties. Thus, it is at the rezoning stage that the Council plays its major legislative and policy role. The public should, of necessity, be more fully involved to protect its interests. (Most residents do not know this and fail to comment on the 5-year Comprehensive Plans that were mandated to protect the future interests of residents. 9 Del.C., c.26. Rezonings of large parcels are major decisions, but few homeowners look at the Council and Land Use news in the large ad the County runs in the News Journal every Saturday. The traffic increases they cause impact the whole State because all major roads lead to I-95 and the entire region has been growing.) There are common law standards for a rezoning and specific ones in the UDC. There should be some need for the proposed uses in the area. It should not work as a detriment to the community in any serious way. Even a dimunition of property values from poor aesthetics has been allowed to block a rezoning because it can decrease the tax base. If the County rezones property without a hearing, the citizens have been denied their due process rights, but just not wanting a new development in their neighborhood is not a sufficient reason for the County to deny it. To fight a rezoning, citizens must show how the project does not meet the standards and describe any serious adverse impacts it will cause in detail.

. On the other hand, once a major subdivision plan reaches the final approval stage without the need for a rezoning, if everything has been properly handled, Council should be able to defer to the Department. Once when it did not, the case of *State ex rel Rappa v. Buck,* 275 A.2d 795 (Del.Super. 1971) made it clear that "development by right" is the prevailing rule. This case has been regularly and <u>erroneously</u> cited for the proposition that the Council has no discretion to decide against the advice of the planners that a site record plan should not be approved. Judge Storey reasoned: **"Whether the approval of Council is ministerial or discretionary depends on the circumstances of each case."** (in other words, whether the Council should rubber stamp a plan approved by the

Land Use Department or use its discretion to decide if critics of the plan are correct that it is too flawed to approve as is) Without giving a reason, the Council had voted against Rappa's plan in spite of Departmental approval. The discrimination against him was clear. **<u>The County</u> argued that either the planners or the Council has the discretion to find noncompliance in a plan**; so in 1971, the County Attorney understood the Council's power. However the Court had before it a *writ of mandamus* and a wronged plaintiff. In order to do justice, it had to decide that the Council was functioning in a ministerial capacity in this particular instance in order to provide relief to the plaintiff. W*rits of mandamus* cannot compel legislative acts in which discretion can be exercised. (A *writ of mandamus* is a special type of complaint that brings the case to court in the interest of the public as well as the plaintiff.) Realizing its reasons could be misunderstood in the future, the Court confined its decision to the precise facts of the case before it:

> "This Court does not deem it necessary in the resolution of this case to decide whether or not the Reorganization Act, and specifically 9 Del.Code, Sec. 1345, reduced the role of the County Council under 9 Del.Code, Sec. 3007(a) to that of a rubber stamp. [Sec.1345 later repealed] …. **No evidence to the contrary was presented to the County Council nor did the County Council assert that petitioners had in any way failed to comply with any regulations. Under these circumstances**, **the granting of approval by County Council became a ministerial act which a writ of mandamus may properly compel**. Respondents' motion to dismiss is denied."

Id.

For a long time, this very narrow ruling which the Court **did <u>not</u> want used as precedent** has been cited nonetheless and used incorrectly. In fact, the Court insisted that it was not to be used as precedent because the conclusion that should be drawn from their rationale was that when the situation was the very opposite, the consideration by Council would **not** be a ministerial act, but a discretionary one. The difference was whether or not there were complaints that the plan was not in compliance with the law or the Department had not properly balanced the private and public interests. The law gave the Department of Planning the power to require changes to stop serious problems (adverse impacts) the plan would produce. (See the kinds of concerns that were to guide the planners at the end of this memo in Section 3004(2). Eventually, the directive in the *Rappa* decision was ignored or missed by lawyers citing the case in a way that would accommodate developers. Council did not mind being reduced to rubber stamps because it kept them from getting blamed for many controversial land use decisions. They subsequently wrote into the County Code that they could not overrule the Planning (now Land Use) Department on the approval of subdivision Final Record Plans.

A few years after *Rappa*, the Supreme Court described the process of approval of subdivisions this way in *Acierno v. Folsom*, 337 A.2d 309 (Del. Supr. 1975) which was the third case arguing over one shopping center on Rt 273:

> To summarize for the purposes of this case, we view the statutory and regulatory scheme controlling subdivision plans as follows: The Department of Planning was given the primary power to approve subdivision plans. (9 Del.C. s 1345). If there was an approval, there was no further review. If, however, the Department disapproved a proposed plan, the 'aggrieved'

> subdivider could appeal to the Planning Board which had the power to 'reconsider' the matter and to approve or to affirm disapproval. (Regulation Sec. 8.31). If the Planning Board approved the plan, its decision was final and the Department Director was obliged to register its approval in accordance with the mandate of the Board; but if the Board also disapproved the plan, the disappointed subdivider had recourse on appeal to the County Council which, like the Planning Board, had the power to 'reconsider' and to approve or to affirm the disapprovals. (Regulation Sec. 8.32). The County Council was not given the authority to disapprove an approved plan. Indeed, **by necessary implication**, such authority was denied to the County Council by the Regulation. [Section numbers refer to repealed County Planning Code.]

The Court in *Acierno* felt the combination of a State requirement that subdivision applications must be approved as per County regulations and the County Council passing regulations that did not specifically permit it to deny approved plans left it without the authority to do so. We disagree that the duty of a legislative body could be abdicated whether by implication or a County enactment contrary to State law regarding its responsibilities. The Court's conclusion ignored the delegated powers which included the general supervision of county offices that certainly included the Planning Department. The Court failed to realize that plans approved by either the Department or the Board could be called up and examined should anyone have provided information to the Council to make them think such oversight was necessary. It erroneously based the decision on a misreading of the *Rappa* case.[7] In this *Acierno* case, there was public opposition to the huge commercial subdivision located contrary to the Comprehensive Plan and certain to cause traffic problems. The narrow rule of *Rappa* limited by the Court which said that it should apply only in the absence of evidence that a subdivision presents problems was erroneously used to tie Council's hands in spite of the *Rappa* court's admonition. (Section 2606 referred to in this case was repealed in 1998, so it cannot control what happens today.) The Court undoubtedly foresaw the difficulty using their decision would cause and suspected the corollary rule their holding suggests might be missed, but they did not discuss it in the decision.

This 3-layered process of the 70s was eventually ended—perhaps due in part to the fact that a member of the Planning Board failed to recuse himself from this *Acierno* case on which he had spoken prejudicially before Council. (With quasi-judicial powers, the Board's members needed to be impartial.) His willful action caused a victory for Acierno, and a loss of power to the Planning Board.

In the UDC, Council delegated its power to the General Manager of Land Use to approve subdivisions and so it continues to play a rubber stamp role on purpose. The wording of the relevant UDC section today says Council is to review the Record Plan and it is entitled to ask the Land Use Department to answer questions explaining matters about which they have some doubts. This implies that Council has some discretion under circumstances where they doubt the compliance with regulations or find some law has been violated, but UDC Section 40.31.114 states they must approve the Final Plan after Land Use responds. An ordinance passed by a previous Council can be overturned by a later one especially when that section conflicts with controlling State law. The section

does not say what the Council is to do if they are not satisfied with what Land Use has done. What is the purpose of the review if they can do nothing? While they may want to go ahead and approve the plan, surely they can call upon legislative powers to fashion some remedy when they are certain the public health and safety have not been protected by Land Use. (Also, per *Ashburn*, they can add their own conditions for an approval given the power they were delegated.) Only convincing evidence that the Plan will have serious adverse impacts can cause the Council to call upon its power to add conditions to a Record Plan. Simple opposition by neighbors to a development they do not like is not enough to invoke that power. *East Lake Partners v. City of Dover Planning Commission,* 655 A.2d 621 (Del. Super, 1994) Judge Terry recognized the right of Dover to refuse 108 apartment units in a growth zone, but upheld its permitting 48 instead. Chancery Court even permitted the New County Council under previous laws to downzone an Acierno property forcing the loss of an approved subdivision because the traffic congestion would overwhelm the neighborhood. *Acierno v. Folsom*, 313 A.2d 904, 905 (Del.Ch. 1973). These are cases the Supreme Court could ignore when reaching its decision, but they do demonstrate the balancing of interests that should be taking place in the planning process and the recognition of the Council's power before *Acierno* '75.

All three counties have the essential elements of the power needed to deal with the welfare of its citizens in the face of rapid development. Regulating land use has always involved balancing private property rights against the welfare of the community. Not all problems a development might cause can be anticipated when a rezoning occurs without a plan. That is why final decisions on a Record Plan belong with a legislative body. The Constitution permitted the police power to be delegated to the County governments. County government in Section1101 referred to the Council.

BACKGROUND AND HISTORY OF THE DEVELOPMENT PROCESS

Zoning has been characterized as a legislative process in many court cases, and approving subdivisions as a ministerial function; but in reality, analyzing subdivisions requires the use of judgment and discretion over and over. Planners cannot simply look at a plan and look at a regulation and see if they match and stop there. The treatment of dozens of factors will impact neighboring lots, areas downhill or downstream, and sometimes the entire community. Traffic safety has always been a problem because the County does not pave roads and does not consider the expense to the State of extreme growth. Stormwater drainage is a complicated and major issue these days. Simplistic code sections are misleading. (UDC 40.22.230 for example)

Developers go through a multi-step planning process with the County planners. Up until 2009, their concept could be sent back to be reworked at an exploratory plan stage, a preliminary plan stage, and a final stage. If a subdivision was not in compliance with regulations, the planners would explain what had to be done to improve it at each stage. Previously, the rezoning that accompanied a plan might be voted down by the Planning Commission or County Council and the entire subdivision opposed. [See for example, *New Castle County v. BC Development Ass'n*, 567 A.2d 1271 (Del.

Supr. 1989).] There was a great deal of citizen participation under the previous development laws because they could be heard at the Commission or Council level and impact the votes since a rezoning was often part of the process. By the 1990s, the Planning Board had little power. If the majority cast a negative advisory vote, that caused the Council to need one extra vote to pass a rezoning. (It could also consider use variances.[8]) Nevertheless, development had become so contentious that the lawyers for a project would meet with neighboring developments to pitch their clients' plans in order to avert opposition. The Council could override the Planning Department with a two-thirds vote--1 member--on rezonings. [9 Del C. 2614 (68 Del.Laws,c. 272, Sec.1.1.)][9]

The UDC's Hidden Secret – Rezonings *En Masse*

In 1997, huge changes were made in New Castle County's governance of land use. Some State laws were changed and the entire planning and development code was rewritten and presented to Council as a package called the Unified Development Code. The entire County zoning map had to be redrawn to match the new names for zones and permitted uses in them. What few people understood was the real changes being made. In the remapping that took place, many properties—some huge parcels--were being radically rezoned to permit office and commercial uses not previously permitted on them. Such changes are supposed to go through a full hearing process where neighboring property owners have a chance to comment on the effect of such changes. A few protests were made at hearings, but ignored. Many of these changes were made under protest from this member of the Planning Board who was only allowed to talk about 4 of them in her 5 allotted minutes. The Board was told they had to adopt the map as a whole or the UDC could not be implemented. Since there had been a moratorium in effect for 6 months, we felt it would be irresponsible not to approve the

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[8] § 1304. Functions of Planning Board.

The Planning Board shall perform the following functions:

(1) Consult with the general manager concerning the performance of such of the functions of the Department as either the Board or the general manager shall deem appropriate. To this end, the general manager shall keep the Board informed concerning the work of the Department and shall, at the request of the Board, furnish it such information as it may reasonably require in the performance of this function.

(2) Review the proposed comprehensive development plan, proposed zoning plan changes, proposed subdivision regulations, and all amendments thereto, and upon completion of its consideration of any of these, the Board shall **recommend** to the County Council such action as the Board shall deem appropriate. (9 Del. C. 1953, § 1343; 55 Del. Laws, c. 85, § 2; 71 Del. Laws, c. 401, § 59.)

[9] § 2614. Changes in zoning.

(a) Unless the Department of Land Use recommends approval of a rezoning, the County Council shall not change the zoning for any parcel of land without the County Council approving such change in zoning by a concurrence of two thirds of all members elected to the County Council.

(b) Any rezoning which is approved subject to restrictions shall require a two-thirds vote of all members elected to the County Council to release, remove or change such restrictions, unless the Department of Land Use recommends approval of the release, removal or change of said restrictions, in which case a simple majority of all members elected to the County Council shall be required. (68 Del. Laws, c. 272, § 1; 69 Del. Laws, c. 27, § 1; 71 Del. Laws, c. 401, §§ 15, 85.)

maps at that time. The work had been almost overwhelming for all concerned. Some of the most experienced planners retired or left to avoid the stress, and I suspected to avoid working under the individual who was in control behind the scenes. No rationale was offered to the objecting Members of the Planning Board by the Department except that these parcels were headed toward such uses eventually. (Astra Zeneca's huge additions on land purchased from the Nemours Foundation, the golf course and train station at Delaware Park, and office zoning for the golf course at the DuPont Country Club were three examples.) These radical changes were made by an Administration that was elected to clean up County government and protect the environment and the public from overdevelopment. It took a while for some people to realize that far more subdivisions now came through the process speedily without the need for a rezoning to enable them to be built. (Only people affected learned that the General Manager of Land Use could approve a subdivision of a major parcel like the Hercules Research Center from its own golf course. No one but insiders could follow the many supposed "corrections" to the maps passed in Council lumped together in batches of dozens at a time listed only by parcel numbers. Anything could have been approved then.) Residential uses were now commonly adjacent to office or even industrial uses with only mandatory plantings to separate them. That has proven to be totally inadequate as "Greenville Overlook" will show. Future residents will be so close to a chemical lab that they could be exposed to accidental releases if it continues to operate.)

Council was kept busy with major subdivision approvals in a period of extra rapid growth and development through the 90s and up until 2007 when the real estate market slowed. "Development by right" was passed as an amendment to the UDC. Speed was built into the process with deadlines that kept plans moving, and a technical review hearing was set up earlier in the process utilizing the Planning Board.[10] In the 90s as Land Use planners studied and developed the basis for transfer of development rights (TDRs) and better drainage systems and tied more density to open space, some subdivisions were redesigned to meet the new regulations voluntarily. This continued because more houses could be built per parcel after mapping for the UDC. Density bonuses for cluster subdivisions, work force housing, over 55 housing, etc. added to the TDR units enabled more housing to be built on less land. Municipalities, however, annexed more County land so they could develop their areas even faster without all the conservation controls the County required. **The radical changes sold to the public to control development thus opened the floodgates to more rapid development with little citizen impact.**

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[10] § 1309. **Presumption of approval**.
In the case of any matter required to be submitted to the Department or to the Planning Board, approval shall be presumed by the Department or Planning Board unless the Department or Planning Board shall have acted within 45 days of receipt thereof, unless a longer time shall have been allowed by the County Council. (9 Del. C. 1953, § 1348; 55 Del. Laws, c. 85, § 2; 71 Del. Laws, c. 401, § 59.)

In a desperate effort to affect the land use process, many residents called for increasing the size of Council. The assumption was made that each Council member would know more about the neighborhoods that would be impacted by his or her decisions if he had fewer constituents. The Council was doubled by dividing districts, so that no members would be challenged for reelection. Instead of sharing assistants, all Council members now had their own, so the cost rose drastically. The building trades unions saw the opportunity in this and elected several members to Council, so the idea backfired. Impartiality is critical in decisions about development, and that has been lacking since the increase took effect. (One Council Member, Sheldon, was recently heard on the Council floor to say something about representing his building trades union instead of his constituents and four others started first-pumping. This was reported to me third-hand, so the story may be embellished somewhat, but the allegiance has been clear from the beginning.) Now residents have begun to realize if the Council cannot make important decisions about neighborhoods that need their attention, of what good was the increase? We have not heard of any improvement in constituent service, but the jury is out on that. Civic leaders know that some of the assistants are very sharp and helpful.

A LARGER COUNCIL, A NEW THEORY—SMART GROWTH

In the last Comprehensive Plan Update (2007) the Land Use planners and the Coons Administration adopted “Smart Growth”—a planning theory that may not be entirely suitable to New Castle County with its many streams and wetlands. The concept is built around high density in order to make mass transit affordable. They have made it easier to infill in older neighborhoods, so safeguards against a serious loss of property values are needed now more than ever. Mixed use is another principle that must be applied carefully. They passed a Redevelopment Ordinance that bypasses all meaningful hearings in which neighbors can participate with the information they need about a plan. They adopted two ordinances in 2009 that opened up more development opportunites that should be of concern to all citizens. O09-036 permits hamlets to be built on 50 acres. Check the County GIS zoning maps and see how many of those exist in your neighborhood. This new town concept could drastically increase the traffic in an older area where the roads might be unable to handle it. The first hamlet rezoning has been put on the new sewer line the County must pay for below the Canal, and the roads there are going to be inadequate. How DelDOT intends to respond when a plan is filed will be something to watch. O09-066 further shrunk the hearing process for subdivision approvals. This is not a Council that cares what the public thinks about what they do, and with a County Executive married to a developer’s attorney, we are going to be living in a dictatorship unless we take political action.

In the recent past, when even intolerably adverse impacts were projected to result from a plan, the Land Use planners have not been willing to ask any developer to reduce the number of residential units he can get per acre. Operating this way totally ignores State law and the intent and purposes in our Codes. (Drainage may be one area in which a change of attitude will occur due to federal law.)

Therefore, principles set out in the latest Comprehensive Plan to make it easy to redevelop land can wreck the quality of life in a region. The beauty of some of our neighborhoods with large tracts of open space designed to connect trails for the survival of wildlife is threatened. Implementing Smart Growth—which is justified as an environmental protection tool--with the sensitivity required to make it work well can only be done with the collaboration of residents, planners, Council Members and developers. The trust needed between these groups has been totally destroyed.

In the atmosphere of rushing plans through the new system when development was hot, our part-time Council members were not in a position to challenge the professionals on every plan. That has never been needed, but the possibility of reviewing and changing bad plans has. Clearly, the days of rushing by necessity have ended. There are obstacles to making Smart Growth work in New Castle County. Ours is a county with a great number of private and charter schools as well as public schools that are not on bus routes. Children travel long distances to choice schools. Many working parents must have the flexibility to travel by car at all times in case their children are sick or hurt. Many employees of local industries live in surrounding states or counties with no efficient mass transit connection. We cannot achieve a grid for ease of cross connections anywhere but the City of Wilmington and circulation without a road system containing more bridges and secondary roads through difficult terrain is inefficient. Some planning ideals may never be realized for practical reasons having to do with our size and geography, but civic activists see no realization of such problems in the developer-friendly planning the Administration carried out.

With the loss of several major industries, political leaders are so worried about jobs that they are willing to sacrifice everything—including health and safety--to getting the building industry moving again. While everyone sympathizes with the need for jobs, a rational approach is needed to make development sustainable and to do no long term harm to current and future residents.

WHAT LAWS HAVE BEEN IGNORED?

Minimizing adverse impacts of development is a requirement mentioned in state law as well as the County Code. UDC Section 40.20.230 A requires that subdivision streets be planned in relation to existing streets…public convenience and safety. UDC Section 40.31.440 requires that an Environmental Impact Assessment Report identify any impacts on users of adjoining public or private roads. The point of the EIA is to minimize or mitigate adverse impacts. Section 2603 of Title 9 of the Delaware Code mandates that County regulations promote safety, and Section 3004 requires planning for roads adjacent to a new subdivision to accommodate prospective traffic—not just an intersection and an entrance. (How can they do that without a Traffic Impact Study—even though those are done by firms employed by the developers?) Section 40.01.015 of the UDC says the intent of the code is to minimize development impacts on current property owners and to protect the safety of all citizens. Acting upon traffic safety concerns is clearly within the purview of County Council.

Now that we know what is happening, ask yourself, "Is there any rationale for limiting Council's power during what should be a routine matter, if nonroutine problems exist?" What is Council's duty in the face of problems for citizens caused by land development? See Section 2651 of Title 9.[11] **While Land Use has the responsibility to make sure the plans comply with the law, if they ignore the law and fail to minimize the adverse impacts of a new subdivision as they are currently doing, on whom should the duty fall for correcting their oversight if not County Council? Without the protection of the Council's ability to overrule the General Manager of Land Use (an employee protected by the Merit System), the checks and balances inherent in American democracy are missing.**

Planners have admitted that "record plans" not in perfect compliance are sent through Council all the time. *Concord Towers, Inc. v. McIntosh Inns, 1997 WL 525860 (Del.Ch.) quoting LeMay v. NCCo., C.A.12462 (Del.Ch.1992).* Must the citizens tolerate inadequate performance when it has serious implications for their safety? **Must the courts become the standard route of appeal for lack of Council's ability to act to insure public safety and to oversee Land Use to make sure they follow the mandates of State law and their own regulations?** The other counties and towns do not use the courts in such a fashion. They provide a route of appeal, and they recognize the power of their Planning Commissions, Council or Levy Court to add conditions to subdivision plans to mitigate adverse impacts.

If County Council has no power to delay a subdivision approval or condition it on vitally necessary improvements in safety, the critically important and essential delegated "police" power of County government by which it is to protect its citizens—especially in the matter of land use—is impermissibly limited and constrained. Their vote on a Final Record Plan must be meaningful or County government will continue to operate free of public influence.

THE STATE ROLE IN LAND USE—OVERBURDENED AND UNDERFUNDED

In 1988, the Legislature passed a Quality of Life Act to try to bring better coordination to State services and land development. Recently that process has been strengthened by empowering the State Planning Office to play a stronger role in the Comprehensive Planning process for counties and

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[11] § 2651. Short title; intent and purpose.
(a) This subchapter shall be known and may be cited as the "Quality of Life Act of 1988." It is the purpose of this subchapter **to** utilize and **strengthen** the existing role, processes and **powers of County Councils** in the establishment and implementation of comprehensive planning programs to guide and control future development. It is the intent of this subchapter to encourage the most appropriate use of land, water and resources consistent with the public interest **and to deal effectively with future problems that may result from the use and development of land within their jurisdictions**. Through the process of comprehensive planning, **it is intended that units of County Council can preserve**, promote and improve **the public health, safety**, comfort, good order, appearance, convenience, law enforcement and fire prevention and general welfare; facilitate the adequate and efficient provision of transportation, water, sewage, schools, parks, recreational facilities, housing and other requirements and services; and conserve, develop, utilize and protect natural resources within their jurisdictions.

towns. Today they review major changes in zoning and subdivisions in a coordinated way. Under the PLUS process they have evaluated every jurisdiction's compliance with their own local comprehensive plans. The technical review that experts from State agencies give subdivision plans is channeled now through the State Planning Office where a separate hearing is held. Great emphasis is placed on agreed upon Growth Areas where roads can be improved and sewers provided. But comprehensive plans change every 5 years allowing the County to engage in more County-initiated multiple rezonings. Affected neighbors seldom take notice of these unexpected changes. The news media has never helped them to comprehend the reasons they have lost control of the risks to their homes--for many their largest investment. Therefore, the importance of the Council as the last line of defense for communities is more important than ever. It must not be limited to ministerial or administrative action when considering a subdivision approval. The need is there for it to act in its legislative capacity when faced with a problem outside the course of normal plan review.[12]

One of the real problems in land use that the public may not realize is that underfunded state agencies like DelDOT must leave it up to the counties to deal with problems over which the State has jurisdiction. The County has up front impact fees, but the State can never recoup all its potential long term expenses caused by development because they constantly recur and expand. The County can demand that certain road improvements be made by the developer in conjunction with a development, but the public winds up paying for the new or improved State-built roads and schools that development eventually causes. Non-capital costs escalate as well, and Delaware never really raises general taxes to pay for services that are provided. The State police still have jurisdiction in New Castle County in spite of our County Police patrolling the roads that are not main highways. Our private hospitals are impacted as we have no publicly-funded hospital system as such. (They do get public funds to reimburse them for the indigent they serve on an emergency basis.) Teachers salaries are largely paid by the State. Most social service agencies are funded through the State, and our correctional system is State run.

THE COUNTY COUNCIL HAS A DUTY TO GET TRULY INVOLVED

A right of appeal to a court is not provided in the County Code for citizens who object to the approval of a subdivision that will have serious adverse impacts. A *writ of certiorari* to Superior Court will not suffice to change anything if there is substantial evidence on which to base a decision that the plan complies with County regulations—even if substantial evidence is not enough to insure public safety. Judges will be reluctant to overrule planning experts. That leaves the public, to whom Council

[12] "It must be remembered that land use and regulation is not an exact science. The innumerable factors involved and the interplay of those factors does not allow for a rigid and static approach to zoning. …. However, the price of this flexibility must be greater diligence in protecting against the arbitrariness the exercise of this discretion may invite. *Blake v. Sussex County Council* , 1997 WL 525844 (Del Ch.). Deference to the Council as a legislative body requires that I uphold their decision if substantial evidence in the record at the time supports a conclusion their decision is in accordance with the Plan. *Id."*

owes a duty, basically unable to be protected by the judicial branch. That means government in this county has sometimes failed the people and will continue to do so.[13] That is unacceptable.

Members of County Council handle the kinds of property rights matters that inflame passions and bring angry people to their doorsteps. For some time they have escaped the worst aspect of their job by hiding behind Land Use planners. Constituents arguing before Council have heard over and over after they testify that the Council can do nothing but approve subdivision plans that Land Use certifies as being in compliance. While this may be true in most instances where problems do not exist, Council Members must learn to handle those cases in which it is not true. They can teach their constituents the difference. They have a duty to the citizens of this County that they were elected to represent. A couple of them courageously recognized that when voting against the Greenville Overlook Record Plan in defiance of the advice of counsel and we have seen signs others are starting to get this message. If changes are not made by the County itself, civic activists will urge the Legislature to clarify their duties and responsibilities so that in the future, vacant landowners have some predictable certainty and their neighbors have some hope that their problems with a development plan will be given adequate consideration—if not from Land Use, DNREC, or DelDOT, then by Members of Council. Development has a price. It should not be fast-tracked at the risk of human life or the destruction of property values.

WHAT CAN WE DO ABOUT ALL THIS?

In 2010, Democracy is dead in New Castle County. New laws are needed to bring an appropriate balance of the public interest and private property rights back into the planning, zoning, and subdivision approval process. The public must support the lawmakers who put their interests first. The Civic League will give State legislators a few tests in the 2011 session. Stay tuned.

[13] When residents around Greenville Overlook attempted to sue, the Clerk of Council informed them that the vital CD recording of the Council meeting at which the Final Record Plan was approved was not made that night due to some malfunction in the equipment—a story so transparently suspicious that it was breathtaking in its audacity—we could not prove that the President of Council shut the machine off or erased the recording. We were denied our right to seek redress by either an accident or tampering with evidence. We will never know which.

APPENDIX

CHAPTER 30. SUBDIVISION AND LAND DEVELOPMENT

§ 3001. Definitions.

As used in this chapter, unless otherwise expressly stated:

(1) "Commission" means Regional Planning Commission of New Castle County in § 3003 of this title but shall mean the Department of Land Use in all other sections.

(2) "County" means New Castle County. ….

§ 3002. Power to regulate.

In order to provide for the orderly growth and development of the County, to promote the health, safety, prosperity, and the general welfare of the present and future inhabitants of the County, to insure the conservation of property values and natural resources, including the protection of the County's agricultural lands, water resources, and industrial potential, and to afford adequate provisions for public utilities, water supply, drainage, sanitation, vehicular access, educational and recreational facilities, parkland and open space, among other and related activities, the Commission [Dept. of Land Use] may regulate the subdivision of all land in the County not within the corporate limits of any city or town. (9 Del. C. 1953, § 3002; 55 Del. Laws, c. 49.)

§ 3003. Land subdivision regulations.

In order to carry out the provisions of this chapter, the Commission shall adopt and administer regulations in accordance with the following procedures:

(1) Within 1 year from May 4, 1965, the Commission shall propose regulations pursuant to the purposes specified in this chapter, and shall hold at least 1 public meeting, notice of which shall have been given by publication at least 15 days before said meeting in a newspaper of general circulation in the County. Copies of the proposed regulations shall be available to the public without charge at a place or places stated in said notice. Within 120 days after said meeting, the Commission may adopt the regulations as proposed or may make any amendment, change or addition thereto, except that prior to the adoption thereof the same procedures shall be followed;

(2) Prior to the adoption by the Commission of any subsequent amendment, change or addition to said regulations, the same procedures shall be followed;

(3) No regulation adopted by the Commission shall become effective unless and until approved by the County Council. (9 Del. C. 1953, § 3003; 55 Del. Laws, c. 49; 71 Del. Laws, c. 401, § 15.)

§ 3004. Content of land subdivision regulations.

Any regulations adopted and approved under this chapter shall include, but not be limited to, the following provisions:

(1) Varying procedures for insuring the processing of land subdivision plans, within a reasonable period of time, relative to the number of lots or parcels and the extent of improvements required;

(2) Procedures for insuring that the arrangement of the lots or parcels of land or improvements thereon shall conform to the existing zoning at the time of recordation and that streets, or rights-of-way, bordering or within subdivided land shall be of such widths and grades and in such locations as may be deemed necessary to accommodate prospective traffic, that adequate easements or rights-of-way shall be provided for drainage and utilities, that reservations of areas designed for their use as public grounds shall be of suitable size and location for their designated uses, that sufficient and suitable monuments shall be required, that land which might constitute a menace to safety, health or general welfare shall be made safe for the purpose for which it is subdivided, and that adequate provision for water supply is made;

(3) Procedures for encouraging and promoting flexibility and ingenuity in the layout and design of subdivisions and land development, and for encouraging practices which are in accordance with contemporary and evolving principles of site planning and development. (9 Del. C. 1953, § 3004; 55 Del. Laws, c. 49.)

CHAPTER 26. ZONING

§ 2601(a) reads: "**Power of county government; area subject to regulation**. The county government may, in accordance with the conditions and procedures specified in this subchapter, regulate the location, height. bulk and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density and distribution of population, the location and uses of buildings and structures, for trade, industry, residence, recreation, public activities, water supply, conservation, soil conservation or other similar purposes, in any portions of New Castle County which lie outside of incorporated municipalities, provided, however …. (then exempts non-profit hospital property)" (To compare other counties and towns see 9 Del.C. 4901 & 6902 & 22 Del.C. 301.)

§ 2602. **Zoning plan and regulations.** (a) For any or all of the purposes specified in § 2601 of this title the County Council may divide the territory of New Castle County into districts or zones of such number, shape, or area as it may determine, and within such districts, or any of them, may regulate the erection, construction, reconstruction, alteration, and uses of buildings and structures and the uses of land.

(b) All such regulations shall be uniform for each class or kind of buildings throughout any district, but the regulations in one district may differ from those in other districts. (48 Del. Laws, c. 321, § 2; 9 Del. C. 1953, § 2602; 55 Del. Laws, c. 85, §§ 18A, 18C; 71 Del. Laws, c. 401, § 15.) "

§ 2603. **Purposes of regulations**.

(a) Regulations adopted by the County Council, pursuant to the provisions of this subchapter, shall be in accordance with a comprehensive development plan adopted pursuant to this title, and shall be designated and adopted for the purpose of promoting the health, safety, morals, convenience, order, prosperity or welfare of the present and future inhabitants of this State, including, among other things, the lessening of congestion in the streets or roads or reducing the waste of excessive amounts of roads, securing safety from fire and other dangers, providing adequate light and air, preventing on the one hand excessive concentration of population and on the other hand excessive and wasteful scattering of population or settlement, promoting such distribution of population and such classification of land uses and distribution of land development and utilization as will tend to facilitate and provide adequate provisions for public requirements, transportation, water flowage, water supply, drainage, sanitation, educational opportunities, recreation, soil fertility, food supply, protection of the tax base, securing economy in governmental expenditures, fostering the State's agricultural and other industries, and the protection of both urban and nonurban development.

(b) The regulations shall be made with reasonable consideration, among other things, of the character of the particular district involved, its peculiar suitability for particular uses, the conservation of property values and natural resources and the general and appropriate trend and character of land, building and population development. (48 Del. Laws, c. 321, § 3; 9 Del. C. 1953, § 2603; 55 Del. Laws, c. 85, § 18A; 66 Del. Laws, Sp. Sess., c. 199, § 1; 66 Del. Laws, c. 207, § 1; 70 Del. Laws, c. 270, § 1; 71 Del. Laws, c. 401, § 15.)

Chart of case law will be appended later. Recent additions need to be made.