

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITIZENS AGAINST SOLAR :
POLLUTION, a Delaware unincorporated :
nonprofit association, DONALD LEE :
GOLDSBOROUGH, TRUSTEE UNDER :
REVOCABLE TRUST AGREEMENT OF :
DONALD LEE GOLDSBOROUGH :
DATED 12/22/10, and KELLIE ELAINE :
GOLDSBOROUGH, TRUSTEE UNDER :
REVOCABLE TRUST AGREEMENT OF :
KELLIE ELAINE GOLDSBOROUGH :
DATED 12/22/10, :

Plaintiffs, :

v. :

C.A. No. :

KENT COUNTY, a political subdivision :
of the State of Delaware, KENT COUNTY :
LEVY COURT, the governing body of :
Kent County, FPS CEDAR CREEK :
SOLAR LLC, a Delaware limited liability :
company, and THE PINEY CEDAR :
TRUST, JAMES C. KNOTTS, JR., :
CHERYL A. KNOTTS, DE LAND :
HOLDINGS 1 LLC, a Delaware limited :
liability company, AMY PEOPLES, :
TRUSTEE OF THE PINEY CEDAR :
TRUST, and RICHARD A. PEOPLES, :
TRUSTEE OF THE PINEY CEDAR :
TRUST, :

Defendants. :

VERIFIED COMPLAINT

The Plaintiffs bring this action for Preliminary Injunction, Permanent Injunction, and Declaratory Judgment against the Defendants to challenge a Zoning approval, based upon the following:

THE PARTIES

1. Plaintiff Citizens Against Solar Pollution (“CASP”) is a Delaware unincorporated nonprofit association under 6 *Del. C.* Ch. 19, whose head is George A. Kolodi. Mr. Kolodi resides with his wife Lorraine D. Materese, who is also a member of CASP, in close proximity to the lands at issue in this action. Specifically, Mr. Kolodi and Ms. Materese live at 2192 Lighthouse Road, Smyrna, Delaware.

2. Plaintiff Donald Lee Goldsborough, Trustee Under Revocable Trust Agreement Of Donald Lee Goldsborough Dated 12/22/10 (“Donald”) is a one-half Tenant In Common owner of certain real estate known as 668 Lighthouse Road, Smyrna, DE 19977, Kent County Tax Parcel No. 1-00-00300-01-1900-000, Duck Creek Hundred, Kent County containing about 342 acres (the “Goldsborough Property”). Donald is a member of CASP.

3. Plaintiff Kellie Elaine Goldsborough, Trustee Under Revocable Trust Agreement Of Kellie Elaine Goldsborough Dated 12/22/10 (“Kellie”) is the other one-half Tenant In Common owner of the Goldsborough Property. Kellie is a member of CASP.

4. Defendant Kent County (the “County”) is a political subdivision of the State of Delaware created, empowered, and limited by 9 *Del. C.* Ch. 41. The County has certain zoning power and authority, as provided for 9 *Del. C.* Ch. 49 and the County’s Zoning Code, Chapter 205 of the Kent County Code (the “Zoning Code”).

5. Defendant Kent County Levy Court (the “Levy Court”) is the governing body of the County, authorized to carry out and put into effect all powers of the County. These powers include the authority to make zoning decisions applicable to lands pursuant to 9 *Del. C.* Ch. 49.

6. Defendant FPS Cedar Creek Solar LLC (“FPS Cedar”) is a Delaware limited liability company which is the equitable owner of land located in the County’s land use jurisdiction containing approximately 528+/- acres (the “Property”) zoned AC (Agriculture Conservation) and was an applicant for a Conditional Use with Site Plan Approval in County File #CS-21-019 dated 10/12/21 regarding the Property (the “Conditional Use Application”). The Property is adjacent to the Goldsborough Property.

7. Defendant The Piney Cedar Trust (“Piney Cedar”) is a Delaware Trust that is the legal owner of two parcels of land containing approximately 33 acres and 136 acres located on the north side of Lighthouse Road and Woodland Beach Road in Smyrna, Duck Creek Hundred, Kent County, Delaware (the “Piney Cedar Property”), which is part of the Property and was an applicant for the Conditional

Use Application. The Piney Cedar Property is further identified as County Tax Parcel Nos. 1-00-00300-01-1600-00001 and 1-00-00300-01-2800-00001.

8. Defendant James C. Knotts (“James”) is a Delaware resident living at 1234 Paddock Road, Smyrna, DE 19977. James was an applicant for the Conditional Use Application and he is partial owner of an approximately 359 acre parcel of land located on Lighthouse Road and Woodland Beach in Smyrna, Duck Creek Hundred, Kent County, Delaware (the “Knotts Property”), which is part of the Property. The Knotts Property is identified as County Tax Parcel No. 1-00-00300-01-1400-0001.

9. Defendant Cheryl A. Knotts (“Cheryl,” and jointly with James the “Knottses”) is the other partial owner of the Knotts Property and was an applicant for the Conditional Use Application.

10. Defendant DE Land Holdings 1, LLC (“DE Land”) is a Delaware limited liability company, which may also be the legal or equitable owner of the Knotts Property and an applicant for purposes of the Conditional Use Application.

11. Defendant Amy Peoples, as a Trustee of The Piney Cedar Trust (“Amy”), may have an equitable or legal interest in the Piney Cedar Property and be an applicant for the Conditional Use Application.

12. Defendant Richard A. Peoples, as a Trustee of The Piney Cedar Trust (“Richard,” and jointly with Amy the “Peopleses”), may have an equitable or legal

interest in the Piney Cedar Property and be an applicant for the Conditional Use Application.

JURISDICTION

13. This Court has jurisdiction over this action based upon its designation as this State's Court of Equity pursuant to Article IV, § 10 of the Delaware Constitution. In addition, this action seeks equitable relief and there is no adequate remedy at law, and, therefore, this Court has jurisdiction pursuant to the provisions of 10 *Del. C.* §§ 341 and 342. Finally, this Court has traditionally exercised jurisdiction over actions challenging zoning decisions, including Conditional Use Zoning determinations, even including "Zoning" cases on its standard form Supplemental Information Pursuant To Rule 3(A) Of The Rules Of The Court Of Chancery.

THE FACTS

A. The 1st Application Is Disapproved, A Lawsuit Is Filed & Voila – The Conditional Use Application Allegedly Gets Approved

1. The 1st Application Goes Down To Defeat But Legal Action Causes A Rise From The Ashes

14. The Goldsborough Property is located on the north and south side of Lighthouse Road, adjacent to and near the intersection of Lighthouse Road and Woodland Beach Road east of the Town of Smyrna, Delaware.

15. The Goldsborough Property is located directly adjacent to the Property.

16. The Defendants pursued the Conditional Use Application – technically referred to as an application for a Conditional Use with Site Plan Approval - regarding a proposed 200+ acre solar power electric generation facility (“Solar Electric Generation Facility”) in or about Summer of 2021 (the “1st Application”). The 1st Application went down to defeat before the Levy Court by a vote of 3 in favor and 4 against in September 2021.

17. Undaunted by the defeat of the 1st Application, the Defendants lawyered up and sued. On October 12, 2021, FPS Cedar, the Knottses and Piney Cedar filed a Verified Complaint in this Court against the Levy Court challenging the disapproval of the 1st Application in an action identified as Case No. 2021-0881 (the “FPS Cedar Lawsuit”).

18. The FPS Cedar Lawsuit requested relief including, *inter alia*, a Permanent Injunction or Declaratory Judgment granting the 1st Application or, in the alternative, requiring “that a new vote be taken in accordance with the evidence in the record and the law.” The FPS Cedar Lawsuit effectively achieved the outcome sought in the alternative prayer for relief, as explained hereinafter.

19. By all accounts, the FPS Cedar Lawsuit never proceeded forward because on the date thereof, October 12, 2021, a new Conditional Use Application was filed with the County (the “Conditional Use Application”). The Conditional Use Application was for all intents and purposes the same as the 1st Application.

20. According to reports regarding the Conditional Use Application, the development proposed thereby would include: 1) installation of 230,000 photovoltaic solar panels covering the entirety of approximately 260 acres of the Property; and 2) cause almost 50% impervious cover on the Property, far in excess of the Zoning Code's 23% maximum in § 205-51.

21. It is believed and therefore averred that the FPS Cedar Lawsuit was filed in order to place pressure on the Levy Court to conduct a new vote and for one of the previous 4 "No" votes to switch their vote to "Yes," in order to obtain approval of the Conditional Use Application. The timing of the Conditional Use Application and the filing of the FPS Cedar Lawsuit was probably not coincidental – it was a "double barrel shotgun" approach to either intimidate the Levy Court into approving the Conditional Use Application or attempt to obtain approval from the Courts (since political persuasion had not succeeded on the 1st Application).

2. The Phoenix Rises With A Little Litigation Assist, But It Crashes & Burns

22. The Levy Court took up consideration of the Conditional Use Application at a public hearing conducted by it on December 21, 2021 (the "First Meeting"). After considerable comment by representatives of FPS Cedar and members of the public into late hours of the night, the public hearing on the Conditional Use Application was declared closed.

23. Public comment in opposition to the Conditional Use Application made at the First Meeting included objections based upon: (1) inconsistency with the Comprehensive Plan; (2) environmentally dangerous toxic metals in the solar cells; (3) excessive impervious cover in contravention of the 23% coverage limit permitted under Zoning Code § 205-51 (4) inconsistency with the rural, agricultural, conservation character of the area in which the Property is situated; and (5) detrimental impacts on farming in the vicinity of the Property and in the State as a whole.

24. Nearby and abutting landowners voiced their objections at the First Meeting about the sun glare, unsightliness, and other negative visual effects of the proposed Solar Electric Generation Facility. Objections were also lodged by the Delaware Farm Bureau regarding the adverse impacts to farming in Kent County and the State of Delaware from the proposed Solar Electric Generation Facility.

25. The official Levy Court Agenda for the First Meeting confirmed that there was no written legislation, either in the form of an Ordinance or Resolution, for the Conditional Use Application. Instead, the Agenda merely referenced Application No. CS-21-09/FPS Cedar Creek Solar and indicated that the proposed use was for a “Solar Facility/Public Utility.”

26. Later proceedings confirmed no written legislation was considered or voted upon by the Levy Court regarding the Conditional Use Application. Only Oral Motions dealt with the subject.

27. The next procedural development at the First Meeting was a verbal motion to table the Conditional Use Application, which failed for lack of a majority due to a vote of 3 “yeas,” 3 “nays,” and 1 absent. According to the official minutes of the meeting kept by County Clerk of the Peace Brenda A. Wootten, who serves as Clerk of the Levy Court, the motion to table failed.

28. Having failed to table the Conditional Use Application at the First Meeting, the Levy Court could then only proceed to approve or disapprove it. The next vote would decide its fate.

29. An additional motion was made at the First Meeting to deny the Conditional Use Application, which was defeated by a Roll Call vote of 3 “yeas,” 3 “nays,” and 1 absent, thereby resulting in the Clerk’s declaration that the motion “failed” (the “First Defeat”).

30. No counter-motion was made at the First Meeting to approve the Conditional Use Application. Therefore, the Conditional Use Application went down to defeat based upon lack of a majority vote of approval by the Levy Court.

31. Pursuant to the First Defeat, the Conditional Use Application was rendered legally moribund. Only a new application could be filed and pursued now that a 4-vote approval by Levy Court was not obtained at the First Meeting.

3. The Levy Court Invalidly Tries To Grab Victory From The Jaws Of The First Defeat & Fumbles Badly

32. After the First Defeat, however, the Levy Court purported to make a motion to table the Conditional Use Application. The purported tabling of the already defeated Conditional Use Application received a vote of 5 “yeas,” 1 “nay,” and 1 absent. But the tabling was null and void as a matter of law; the First Defeat was final and conclusive.

33. The Levy Court next purported to consider the already defeated Conditional Use Application at its meeting on January 25, 2021 (the “Second Meeting”). The procedural morass that occurred at the First Meeting was only to be outdone by the messy process carried out at the Second Meeting.

34. At the Second Meeting, the Levy Court proceeded to debate the defunct Conditional Use Application and a motion was made and defeated by a vote of 3 “yeas” and 4 “nays” to disapprove it. But the Levy Court then quickly made a second motion to approve the dead Conditional Use Application.

35. While the second motion received a vote of 4 “yeas” and 3 “nays,” it was officially declared via the Levy Court Meeting Minutes to have been defeated for lack of a majority. Because the minutes legally constitute the official, final act

of the Levy Court, they therefore provide that the Conditional Use Application was defeated for a second time (the “Second Defeat”).

36. The 4 Levy Court Commissioners that voted in favor of the Conditional Use Application at the Second Meeting did not explain their votes pursuant to any valid land use rationales; some of them voted without comment or with no legitimate reasoning.

37. The Second Defeat was based on a motion that approved the Conditional Use Application with all Waivers requested by the applicants and with no conditions recommended by the County Department of Planning Services (“Department”) and the County’s Regional Planning Commission (“Commission”).

38. To add to the procedural miscues, the Levy Court next proceeded to take another vote after the Second Defeat. That vote purported to approve the Conditional Use Application *sans* two Waivers requested and *avec* multiple conditions.

39. The official Second Meeting Minutes reflect that a unanimous 7 to 0 vote gave approval to the Conditional Use Application (the “Third Vote”). No motion was made to reconsider any previous votes or to amend prior votes.

40. The Third Vote was procured from the Levy Court based upon legally erroneous advice from the County Solicitor. In response to a question from the Levy Court President asking whether the Third Vote was on a separate matter or regarding

the Conditional Use Application, the County Solicitor wrongly advised that it was a separate and distinct question in spite of the fact that there was no motion that so provided.

41. The Third Vote was for the Conditional Use Application, minus two Waivers requested by the applicants and with numerous conditions recommended by the Department and the Commission. No reasons for the Third Vote were articulated by the Levy Court.

42. By letter dated January 26, 2022, the Levy Court notified FPS Cedar that the Conditional Use Application had allegedly been approved, subject to multiple conditions. To the best of the Plaintiffs' knowledge, however, FPS Cedar has not yet commenced any construction and expenditures in reliance upon the purported approval of the Conditional Use Application. But that could occur any time now.

B. The Procedural & Substantive Law Is Broken In Numerous Respects, Rendering The Conditional Use Application Legally Invalid

43. Pursuant to Rule 8 of the "Business Meeting Rules Of Procedure For The Levy Court Of Kent County, Delaware" dated January 5, 2021 ("Levy Court Rules"), the County Clerk of the Peace is responsible for preparing minutes of Levy Court meetings, which are to be subsequently approved or modified by the Levy Court and become a part of the official journal of Levy Court proceedings. In

addition, Rule 8 provides that the minutes shall include “[a]ll motions voted upon and the results of said motions.”

44. Rule 9 of the Levy Court Rules also establishes that the journal containing the approved minutes of meetings shall constitute the official record of Levy Court proceedings.

45. Levy Court Rule 10 provides that written Ordinances may be introduced by a Commissioner at any meeting, which must be formally introduced, publicly advertised and noticed by publication in a newspaper of general circulation in the County, subjected to a Levy Court public hearing, and then voted upon by the Levy Court.

46. The Levy Court Rules also mandate the Commissioners voting in favor of a motion or Ordinance “shall give specific reasons for their vote on any issue requiring a public hearing.” Decisional law authority also requires articulation of valid land use reasons for a vote.

47. In addition, 9 *Del. C.* § 4110(h) provides that “[a]ll actions of the county government which shall have the force of law shall be by ordinance.” And 9 *Del. C.* § 4110(i)(1) requires that “[e]very proposed ordinance shall be introduced in writing and in the form required for final adoption.”

48. Further, 9 *Del. C.* § 4110(i)(2) requires that the Levy Court Clerk advertise notice of a proposed Ordinance in at least one newspaper of general

circulation in the County and identify the time and place for the public hearing to be conducted thereon, which may not take place less than 7 days after the publication of said notice.

49. Relatedly, 9 *Del. C.* § 4911(a) requires that the Levy Court submit any proposed changes to permitted uses within any zoning district to a Commission, which is known as the Kent County Regional Planning Commission. § 4911 subsections (b) and (c) provide the procedure and public advertising and notice requirements, which includes the mandate that the Levy Court public notice contain a description of the proposed change and the time and place of the public hearing where it will be considered at least 15 days prior to finally granting such approval.

50. Any vote of the Levy Court which impacts the Kent County Comprehensive Plan (“Comp Plan”), such as the Levy Court’s vote on the Conditional Use Application, is an action which has the force of law since once the Comp Plan was adopted by the Levy Court “the land use map or map series forming part of the comprehensive plan...shall have the force of law.” 9 *Del. C.* § 4959(a). In addition, § 4959(a) provides that “no development...shall be permitted except in conformity with the land use map or map series and with the land development regulations enacted to implement the other elements of the adopted comprehensive plan.” Lastly, this Court has previously held that a Conditional Use approval carries the force of law, both directly and by virtue of its zoning character.

51. The Comp Plan designates the Property and surrounding and nearby lands for miles around as Low Density Residential. In turn, the Comp Plan defines Low Density Residential as agriculture conservation uses, single family detached dwelling development, and local commercial. The Comp Plan does not permit a Solar Electric Generation Facility like that requested for the Property via the Conditional Use Application.

52. The Property is also located outside of the Growth Zone Overlay District established by the Comp Plan. The Property is situated in an area that is virtually 99% open land that is regularly tilled for agricultural purposes for miles in every direction.

53. The electric generation and transmission structures and buildings associated with the Conditional Use Application are at direct variance with the agricultural uses in the area the Property is located on. The Solar Electric General Facility is an industrial use which is only permitted in or near municipalities which form the core for Growth Overlay Zones in the County under the Comp Plan – *e.g.* Town of Smyrna, City of Dover, Town of Harrington, and the like. Indeed, Kent County previously approved a small 10 acre solar power generating facility just outside of the Town of Harrington limits and the City of Dover has approved a small-scale solar electric generation facility within its boundaries (are a far cry from the rural outpost that the Property is situated in).

54. The Conditional Use Application was erroneously processed and supposedly approved under the guise of it constituting a “Public Utility” use. Such a use is permitted as a conditional use under Zoning Code § 205-48, subject to the Conditional Use provisions of Zoning Code Article XXI.

55. The definition of the term “Public Utility” contained in Zoning Code § 205-6, however, does not apply to FPS Cedar; it is not “[a]n organization supplying...electricity...to the public, operated by a private corporation under government regulation... .” FPS Cedar does not: (1) supply electricity directly to the public (a la Delmarva Power or Delaware Electric Cooperative); or (2) supply any electricity to the public “under government regulation” (FPS Cedar is not regulated by the Delaware State Public Service Commission or the Federal Energy Regulatory Commission).

56. Even assuming *arguendo* that the County Administrator had discretion under Zoning Code § 205-4 and/or § 205-15C. to determine if the Conditional Use Application proposed a use not listed in any zoning district, the guide that must be utilized is the Standard Industrial Classification Manual (“SICM”).¹ The “major use division” in which the use is located in the SICM must be relied upon to determine which Zoning Code use the unidentified use would be most akin to.

¹ Zoning Code § 205-432 similarly provides.

57. Pursuant to the SICM description for “4911: Electric Services,” which applies based upon the Solar Electric Generation Facility’s generation of electric power, an evaluation of the Zoning Code must be conducted to see which zoning district permits, by right, the Major Use of “Transportation, Communications, Electric, Gas, And Sanitary Services.” So even if the proposed Solar Electric Generation Facility was found to constitute a Public Utility, it could only be located in a zoning district that permits a Public Utility as a matter of right, not based upon a conditional use. Zoning Code § 205-15C.

58. A Public Utility is only permitted by right in the IG (General Industrial) district pursuant to Zoning Code § 205-199A. So the Conditional Use Application was improvidently granted since any interpretation that determined it constituted a Public Utility use would only permit such use in the IG zoning district, not in the AC zoning district that the Property is situated in.

59. An applicant for a Conditional Use permit bears the burden to prove satisfaction of the requisite standards contained in a County’s Zoning Code and must establish approval is consistent with all legal factors. Zoning Code § 205-251 provides that the four (4) standards for approval of a Conditional Use are: (1) the location is appropriate and not in conflict with the Comp Plan; (2) public health, safety and general welfare will not be adversely affected; (3) adequate off-street parking facilities will be provided; and (4) necessary safeguards will be provided for

the protection of surrounding property and persons. In addition, § 205-251 provides that all zoning district dimensional requirements generally apply unless otherwise specified.

60. For purposes of judicial review, a Conditional Use is treated the same as a zoning change. This is particularly so in terms of the legal prerequisites regarding public notice, advertisement, and the like.

61. In order for a zoning decision such as the Conditional Use Application to be reviewed by this Court, there must be sufficient record evidence to ascertain the rationale for the affirmative votes of the members of the Levy Court that approved it. And approval of zoning matters must be made pursuant to the adoption of a written Ordinance by the Levy Court. Neither was present in this instance.

62. The Levy Court's approval of the conditional Use Application is invalid on the following grounds:

- (1) Inconsistency with the Comprehensive Plan in violation of 9 *Del. C.* § 4959.
- (2) Inconsistency with the Comprehensive Plan Low Density Residential designation of the Property in violation of Zoning Code §§ 205-78 and 205-251.
- (3) Failure to approve the Conditional Use zoning approval by written Ordinance as required by law.

- (4) Failure to provide adequate public notice and advertising as required by law.
- (5) Failure to properly post the subject lands with signage as required by law.
- (6) Erroneous legal advice which misled Levy Court members on the Third Vote, in contravention of *Barley Mill, LLC v. Save Our County Inc.*, 89 A.3d 57 (Del. 2014).
- (7) Violation of Notice, Advertising, Posting, and Procedural requirements of the Levy Court Rules.
- (8) Failure of a majority of Levy Court to articulate valid grounds to support their votes in favor of the Conditional Use Application.
- (9) Improper procedure utilized during the voting process conducted by the Levy Court, which resulted in no valid vote being conducted.
- (10) Failure of the Solar Electric Generation Facility to qualify as a Public Utility under the Zoning Code.
- (11) Failure to satisfy the four (4) criteria for Conditional Use approval.
- (12) Failure to amend the Comp Plan and obtain State approval to amend the Comp Plan as required by 29 *Del. C.* Chs. 91 and 92.

(13) All other legal errors and infirmities described hereinbefore, including those mentioned via public comment at the First Meeting.

COUNT I - PRELIMINARY INJUNCTION

63. The contents of paragraphs 1. through 62. are hereby restated as if fully set forth herein.

64. The Plaintiffs have a substantial likelihood of success on the merits of their claims challenging the validity of the Conditional Use Application. They have pointed out multiple procedural and substantive defects with the Levy Court's alleged approval of the Conditional Use Application. Chief among them is lack of approval via written Ordinance.

65. The Conditional Use Application was also unlawfully approved on the grounds that it ran directly counter to the Comp Plan in violation of 9 *Del. C.* § 4959 and the Zoning Code.

66. Notice and advertising requirements mandated by the State Code and the Zoning Code were also contravened. And the procedural and legal infirmities abound, as set forth in preceding paragraphs herein.

67. In addition, the Conditional Use Application was not subjected to the Preliminary Land Use Service ("PLUS") process as required by provisions of 29 *Del. C.* § 9103 and the Memorandum of Understanding agreement entered into

between the County and the Delaware Office of State Planning Coordination. Relatedly, the County failed to comply with the requirements of 29 *Del. C.* § 9203 *et seq.* and 9 *Del. C.* § 4960, which mandate that it seek review, approval, and certification to the extent the Levy Court effected a *de facto* Comp Plan amendment.

68. Further, to the extent that legitimate health, safety and welfare considerations such as negative affect on quality of life of abutting and nearby properties and farms were raised and unaddressed in any reasoning provided by the Levy Court, the decision to approve the Conditional Use Application constitutes an arbitrary and capricious government decision. Nothing in the record of proceedings established that a determination of the issues was “fairly debatable.”

69. The Plaintiffs will suffer irreparable harm if intermediate injunctive relief is not granted pending the final hearing on the merits of their claims. Absent prompt entry of an order enjoining reliance upon the challenged Conditional Use Application approval, the Solar Electric Generation Facility may be constructed. This would leave the Plaintiffs with no adequate remedy at law, since: (1) the governmental defendants are immune from suit under the principle of sovereign immunity and the provisions of the County and Municipal Tort Claims Act, 10 *Del. C.* Ch. 40; (2) the non-government defendants would not be liable for money damages since they did not grant approval; and 3) the non-government Defendants

may be able to prove Equitable Estoppel based on County approvals and representations.

70. It is therefore necessary for the Court to enter an order enjoining reliance upon the Levy Court's supposed approval of the Conditional Use Application in order to maintain the *status quo ante*.

71. The balance of the harms weighs in favor of the Plaintiffs and against the Defendants. The process with respect to the Property has gone on for over 9 months now. Therefore, additional delay of 6 to 9 months will not add any significant time to the overall process. And the Property is the subject of Farm Lease whose term is believed to run to the end of 2022, which may bar construction activities for 6 to 9 months.

72. In contrast, the Plaintiffs would be harmed as described above by the ability of the Defendants to proceed with development of the Property to a point that would moot the challenge to the Conditional Use Permit approval. Thus, the Plaintiffs would be left remediless despite the unlawfulness of the alleged Conditional Use Application approval.

COUNT II – PERMANENT INJUNCTION

73. The contents of paragraphs 1. through 72. are hereby restated as if fully set forth herein.

74. The Plaintiffs can establish actual success on the merits of their claims. No written Ordinance granting approval was used, as required by law.

75. The Conditional Use Application was also contrary to the Comp Plan in violation of the State Code and the Zoning Code.

76. Procedural irregularities caused the Conditional Use Application to be disapproved, but the County erroneously alleges it was approved.

77. And the lack of the required PLUS review and any evidence in the record supporting satisfaction of Conditional Use criteria establishes that the Conditional Use Application approval was arbitrary and capricious.

78. Additional notice deficiencies and legitimate health, safety and welfare concerns which went un rebutted are also grounds for overturning the supposed approval.

79. Lastly, the wide array of other procedural and substantive law violations render the alleged Levy Court approval invalid.

80. The Plaintiffs will suffer irreparable harm if permanent injunctive relief is not granted. They can have no claim for money damages against the governmental Defendants due to the County and Municipal Tort Claims Act and principles of sovereign immunity. And they have no claim for money damages against the non-governmental Defendants. The only method by which Plaintiffs can redress the harm caused to them by the improvidently granted approval of the Conditional Use

Application is pursuant to the entry of a Permanent Injunction barring any reliance upon it.

81. The balance of the harms weighs heavily in favor of Plaintiffs and against the Defendants. If a Permanent Injunction is entered, then the Defendants will merely be required to comply with the law – *e.g.* mandatory requirements of decisional law authority, State and County Code provisions, and health, safety, and welfare concerns. In direct contradistinction, the Plaintiffs would be irreparably harmed since they are remediless absent entry of a Permanent Injunction barring reliance upon the unlawful Conditional Use Application approval.

COUNT III - DECLARATORY JUDGMENT

82. The contents of paragraphs 1. through 81. are hereby restated as if fully set forth herein.

83. This Court has the authority to determine the legality of governmental actions pursuant to the Declaratory Judgment Act, 10 *Del. C.* Ch. 65.

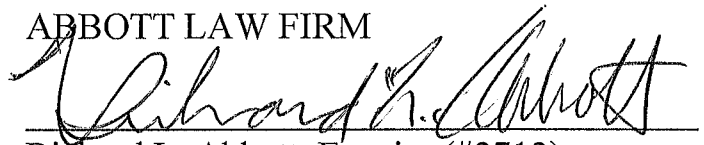
84. The Levy Court's approval of the Conditional Use Application via a defective process and in violation of substantive laws and principles adopted by the State, County, and Courts is fatal to its approval. Approval was invalid as a matter of law on the grounds that, *inter alia*: 1) it was not granted by written Ordinance; 2) it violates the Comp Plan; 3) proper public notice and advertisement was not provided; 4) it was not subjected to the legally required PLUS process; 5) it

contravened the requirements of the Delaware Code which require a final State certified amendment to the Comp Plan; 6) numerous other health, safety, and related issues were never adequately addressed in order to make it “fairly debatable”; and (7) a litany of other defects set forth in this Verified Complaint.

85. The Court should enter a Declaratory Judgment establishing that the alleged Conditional Use Permit approval granted by the Levy Court on January 25, 2022 is invalid as a matter of law.

WHEREFORE, the Plaintiffs respectfully request that this Court enter judgment in their favor and against the Defendants, declaring that the Conditional Use Application approval is legally invalid and prohibiting any reliance by any of the Defendants on such approval on an interim and permanent basis pursuant to this Court’s injunctive powers, and that the Court award the Plaintiffs their attorneys fees, court costs, and any such other and further relief the Court deems just and equitable.

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