



IN THE
Supreme Court of the State of Delaware

NEW CASTLE COUNTY, a political subdivision of the State of Delaware,
DAVID CULVER, in his official capacity as the Manager of the New Castle
County Department of Land Use, and AARON GOLDSTEIN, in his official
capacity as the New Castle County Attorney
Defendants-Below, Appellants,

v.

DPML JAMISON CORNER, LLC
Plaintiff-Below, Appellees.

No. 509, 2025

On Appeal from the Court of Chancery of the State of Delaware
C.A. No. 2024-0403-CEB (Consolidated)

NEW CASTLE COUNTY, a political subdivision of the State of Delaware, and
NEW CASTLE COUNTY DEPARTMENT OF LAND USE
Respondents Below, Appellants

v.

DPML JAMISON CORNER, LLC
Petitioner Below, Appellee

and

NEW CASTLE COUNTY BOARD OF ADJUSTMENT
Nominal Party on Appeal, Nominal Appellee

No. 508, 2025

On Appeal from the Superior Court of the State of Delaware
C.A. No. N25A-02-004 CEB

APPELLANTS' CONSOLIDATED OPENING BRIEF

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NATURE OF PROCEEDINGS

This procedurally convoluted case is rooted in a simple question: as required under the County Code, must a land use project’s **proposed** traffic impact be consistent with the Traffic Improvement District’s (“TID”) **anticipated** traffic impact for that project to qualify for a traffic impact study waiver? The answer is yes.

DPML Jamison Corner, LLC (“Dermody”) initiated these proceedings through multiple filings in different forums. On April 12, 2024, Dermody filed a Petition for *Writ of Mandamus* in the Superior Court seeking to compel New Castle County to approve Dermody’s land development project. Dermody then filed a companion action in the Court of Chancery on April 17, 2024 seeking, *inter alia*, to enjoin the County from expiring Dermody’s application. On June 10, 2024, the Court of Chancery approved a stipulated *Status Quo* Order which stayed expiration of Dermody’s project. The Superior Court and Court of Chancery actions were then later consolidated (the “Civil Action”).

On June 14, 2024, Dermody filed administrative appeals to both the New Castle County Board of Adjustment (“BOA”) and the New Castle County Planning Board challenging the New Castle County Department of Land Use’s (the “Department”) determination that a Traffic Impact Study (“TIS”) was required under UDC §40.11.121.C before Dermody’s project could proceed to County Council for

approval (the “Department’s TIS Determination”). The Parties stipulated to stay the Planning Board appeal. The BOA held a public hearing on September 12, 2024. Following a formal hearing, the BOA unanimously upheld the Department’s TIS Determination on October 10, 2024. The BOA issued its written decision on January 13, 2025. A287-320. Dermody then appealed the BOA’s decision to the Superior Court (the “BOA Appeal”).

In the Civil Action, Dermody filed its First Amended Complaint on November 20, 2024, and the County moved to dismiss Dermody’s Complaint on December 11, 2024. Dermody then filed its Second Amended Complaint on February 10, 2025, and the County again moved to dismiss on March 14, 2025. Dermody did not respond to—and the Court did not decide—the County’s Motion to Dismiss.

Instead, Dermody moved to consolidate the BOA Appeal and the Civil Action on March 18, 2025. The County opposed Dermody’s motion, averring that the BOA Appeal should be decided first because it is subject to a different appellate legal standard that does not apply to the Civil Action.

Following a status conference with the trial court on April 2, 2025, during which the Court expressed its preference to hear the BOA Appeal and contract claim issue in the Civil Action at the same time, the Parties agreed to a stipulation. That stipulation submitted two legal questions for determination on partial summary judgment concurrently with the BOA Appeal: (1) whether, under Title 9 of the

Delaware Code, Dermody's major land development plan is deemed approved; and (2) whether, as a matter of contract, the County can condition approval of the Dermody plan on submission of a TIS. A664.

The Court heard oral argument on the issues raised in the concurrent briefing on September 16, 2025 and issued an Opinion on November 3, 2025. On December 8, 2025, the trial court issued a final Order reversing the BOA's October 10, 2024 decision and a separate Order granting partial summary judgment in favor of Dermody on the contract issue.

The County appealed both December 8, 2025 Orders to this Court on December 16, 2025. Thereafter, the Parties filed a stipulated Motion to Consolidate both appeals, which was granted by this Court on December 23, 2025. This is the County's Opening Brief on appeal.

SUMMARY OF ARGUMENT

1. In deciding the BOA Appeal, the Superior Court is required to determine whether the board's decision is free of legal error and supported by substantial evidence. The trial court committed reversible error in the BOA Appeal when it substituted its own factual findings for the board's instead of reviewing the record to determine whether the board's findings were supported by substantial evidence.

2. Where the BOA Decision is supported by substantial evidence, the trial court is precluded from substituting its own factual findings when considering the cross-motions for partial summary judgment, specifically on the issue of whether there was TID-Consistent Traffic Impact, defined *infra*. Even if the trial court could substitute its own factual findings for the BOA's, it erred as a matter of law when it granted partial summary judgment on a disputed material issue of fact that was not presented to the trial court for decision on the merits. Also, even if the disputed traffic impact issue was properly before the trial court for decision on a preponderance of the evidence standard (and it was not), the trial court misapplied the law in rendering its finding, and its finding also lacks support in the factual record.

3. The trial court erred as a matter of law when it interpreted the TID Agreement to allow a blanket TIS waiver in all circumstances for all development

within the Southern New Castle County TID (“SNCCTID”), contrary to the plain language of the TID Agreement and the County Code.

STATEMENT OF FACTS

A. **Origins of the SNCCTID.**

Recognizing the importance of coordinating improvements to traffic infrastructure, the County and DelDOT executed a Memorandum of Agreement on April 20, 2008 establishing, *inter alia*, baseline expectations for when a Traffic Impact Study (“TIS”) is required to approve a project. A64. This Agreement included the mutual understanding that a TIS would generally not be required for development projects that are located within a TID **so long as** the project’s proposed traffic impact is consistent with the traffic volume projected from that property during the identified TID study period (and thus accounted for in the planned TID transportation improvements) (i.e., where there is “TID-Consistent Traffic Impact”). A64.

A TID is a “geographic area defined for the purpose of securing required improvements to transportation facilities in the area.” A68. “TIDs are created by agreement between DelDOT and the relevant Delaware local (town, city, or county) governments.” A77. According to DelDOT, one benefit of a TID is that, “[f]or **development consistent with the planning done for the TID**, it eliminates the need for Traffic Impact Studies (TIS) and thus accelerates the plan approval process.” A79 (emphasis supplied), *see also* A69. Restated, a TID provides the benefit of a TIS waiver where there is TID-Consistent Traffic Impact.

The SNCCTID was created in August 2014 following a “lengthy planning study.” A72 and A279. Specifically, the Traffic Analysis for the Southern New Castle County TID Technical Report was prepared in November 2013 (the “2013 Study”) to identify transportation improvements within the SNCCTID necessary to support adequate traffic capacity through a planning year of 2030, **based on the traffic impact projected in the 2013 Study.** A83-89, A223, and A279. Thereafter, the County and DelDOT developed a Southern New Castle County Transportation Improvement District Infrastructure Recoupment Agreement (the “TID Agreement”) to establish a mechanism to fund the planned transportation improvements identified in the 2013 Study for the SNCCTID. A140-153, A223, and A279.

The first TID Agreement was executed on August 22, 2014 for the Whitehall development, formally establishing the SNCCTID. A154-168 and A224. Section VI.A of this first TID Agreement **obligates** the County and DelDOT to execute subsequent TID Agreements as a condition of approval for any future development of property within the SNCCTID: “NCC shall inform the Other Property Owner of the existence of this agreement and **require participation in this agreement** as a condition of the rezoning, subdivision or redevelopment project.” A145 (emphasis supplied) and A159-160 (emphasis supplied). Accordingly, the developer of **each**

project proposing development within the SNCCTID since the Whitehall development in August 2014 has executed a TID Agreement. A279.

B. SNCCTID Update.

Prior to 2021, DelDOT engaged its consultant, JMT, to update the SNCCTID analysis for a new planning year of 2040 (instead of the existing 2030 planning year under the 2013 Study). A205, A219-22, and A279. To date—over four years later—this updated analysis has not been completed and no report has been finalized. A224 and A279. Thus, the 2013 Study—and its 2030 planning year—remains the governing analysis and study period for the SNCCTID. A279.

C. Dermody’s Warehouse Project.

The present matter concerns an approximately 229-acre parcel within the SNCCTID currently owned by Dermody (the “Dermody Property”). In August 2021, an application was submitted for the Dermody Property proposing approximately 2.4 million square feet of warehouse building space.

On October 19, 2021, OA Parcel H South LLC—a predecessor owner of the Dermody Property—executed a TID Agreement for the Dermody Property as required under Section VI.A of the TID Agreement for any property located within the SNCCTID proposing new development. A188-202. Notably, upon receiving plans for Dermody’s proposed development, the County asked DelDOT whether there was TID-Consistent Traffic Impact, given that the 2013 Study did not

specifically account for development of the Dermody Property. A205; *see also* A219-222. In response, DelDOT noted that Dermody’s proposed development had been incorporated into the updated SNCCTID analysis that was “finishing up.” A205.

DelDOT—in its October 19, 2021 PLUS comments for Dermody’s project—reiterated that TID-Consistent Traffic Impact was required as a condition for a TIS waiver. A207. And on April 20, 2022, DelDOT opined that Dermody’s project was eligible for a TIS waiver due to TID-Consistent Traffic Impact, noting: “[Dermody’s project] is located in the SNCCTID, and the trip generation of the proposed development is sufficiently similar to the trip generation used in the **TID traffic analysis.**” A246-47 (emphasis supplied). In the spring of 2024, DelDOT confirmed that the “TID traffic analysis” used to determine whether there was TID-Consistent Traffic Impact was the 2013 Study. A278. However—as the Department would later learn—the 2013 Study did not account for traffic from development of the Dermody Property. A219-22.

D. County Council Referrals.

The New Castle County Unified Development Code¹ (“UDC”) includes a final step mechanism in the land development approval process to confirm that an applicant has met its burden to provide a Code-compliant major land development

¹ New Castle County Code, Chapter 40.

application.² Once the Department completes its reviews and deems a project ready for approval, the Department forwards the application to County Council for its review and consent.³ County Council may either approve the application or refer it back to the Department, no more than twice, for specific review of technical compliance with applicable codes and regulations.⁴ If the Department determines that the application does not comply with the applicable regulatory requirements, the Department is obligated under the County Code to rescind its previous approval of the application, even where the Department previously (albeit mistakenly) concluded that the application was approvable.⁵

This process was followed in the case of Dermody’s project. After the Department initially determined that Dermody’s project was ready for approval, a hearing was scheduled before County Council for a final step compliance review. Following a public hearing, Councilmembers Bell and Carter referred Dermody’s project back to the Department for technical compliance review and memorialized their questions in a December 6, 2023 letter to the Department. A248-49. The Department responded the next day—December 7, 2023—reaffirming its prior approval determination. A250-53.

² UDC §40.31.114.D.

³ *Id.*

⁴ UDC. §40.31.114.D.1.b.

⁵ UDC §40.31.114.E.2.

Councilmembers Bell and Carter referred Dermody’s project back to the Department a second time on December 12, 2023, again memorializing their referral by letter dated December 27, 2023 (“Council’s Second Referral”). A254-55. Council’s Second Referral included a focus on whether Dermody’s project adequately accounted for traffic impact and addressed traffic requirements. *Id.* On March 15, 2024, Councilman Bell sent an additional letter further articulating his concerns regarding compliance with traffic requirements. A226-27.

This second referral prompted the Department to undertake a closer analysis of Dermody’s compliance with the UDC’s traffic-related requirements. A281-86. County Council was clear in its concern over traffic impact and associated compliance with UDC traffic standards, and the Department concluded that a response based on objective traffic data was important to confirm compliance. Accordingly, the Department engaged consultant RK&K to review various traffic-related submissions concerning Dermody’s project and to provide its feedback on regulatory compliance. A228-277. This material reviewed by RK&K included a memorandum prepared by Dermody’s traffic consultant—Langan—and a memorandum prepared by DelDOT’s consultant—JMT—addressing Dermody’s proposed traffic impacts. *Id.*

E. Department of Land Use Referral Review and Determination.

The Department realized that there was a compliance issue with Dermody’s project after reviewing RK&K’s March 11, 2024 memorandum. Specifically, the RK&K memorandum incorrectly observed that, “[t]he TID **approved in 2021** assumed 2,400,000 SF of Industrial Park development for the [Dermody] property.” A228 (emphasis supplied). As noted above, the TID update has never been approved. Similar material mistakes were then observed in the JMT memorandum (e.g. “Currently, the SNCCTID analyzed intersections within the TID boundary for the projected year **2040** and has developed recommendations based on that full build out year” (A264 (emphasis supplied)), and in the Langan memorandum (e.g. “[t]he JMT traffic analysis indicates that the TID originally contemplated 2,400,000 square feet of industrial park for the subject site (parcel H)” (A262). Quite simply—in determining Code compliance—the Department could not rely upon the submitted analyses that were by their own terms based on data, conclusions, projections and assumptions from the **unapproved** TID update.

This realization prompted the Department to engage DelDOT directly to better understand its position on why there was TID-Consistent Traffic Impact and to determine compliance based on the SNCCTID analysis that, as noted above, was approved and still governing—the 2013 Study. *See* A278-80. Initially, the Department sent DelDOT a list of seven questions related to the SNCCTID to assist

it in determining whether Dermody’s project proposed TID-Consistent Traffic Impact. *Id.* After receiving DelDOT’s responses, the Department then sent two additional questions, which DelDOT answered soon thereafter. *Id.* The Department completed its review and issued its response to County Council on June 4, 2024. A281-86.

The Department ultimately concluded that—when considering the governing analysis for the SNCCTID (the 2013 Study)—Dermody’s project was not eligible for a TIS waiver because its traffic impact was not consistent with the traffic impact anticipated and evaluated in the SNCCTID for planning year 2030. A281-282. Because the Dermody project’s traffic impact is not consistent with the traffic impact considered in the 2013 Study for planning year 2030, the planned transportation improvements for the SNCCTID did not account for Dermody’s project. Thus, the UDC requires completion of a TIS to confirm the presence of adequate transportation infrastructure. Dermody’s project was ineligible for a TIS waiver under UDC §40.11.121.C. A283.

F. Board of Adjustment Reviews Department’s Determination.

Dermody appealed the Department TIS Determination to the BOA. On October 10, 2024, the BOA unanimously rejected Dermody’s appeal, filing its written decision on January 13, 2025. A287-320. The BOA rejected Dermody’s assertion that it lacked jurisdiction to hear the appeal and upheld the Department’s

interpretation of the UDC’s Article 11 requirements governing traffic impact studies, specifically that a TIS waiver was not available for Dermody’s project as proposed. *Id.* The BOA also rejected Dermody’s contention that the Department’s TIS Determination was untimely. *Id.* The BOA appropriately did not consider Dermody’s contract claims in the appeal. *Id.*

G. The UDC’s TIS Requirement.

The rationale behind the Department’s TIS Determination was simple: a TIS is required because Dermody’s project did not qualify for a TIS waiver under the UDC. A282. Thus, to satisfy the UDC’s Article 11 requirements, Dermody must complete a UDC-compliant TIS.⁶ If a UDC-compliant TIS confirms compliance with the UDC’s traffic standards, then Dermody’s project may proceed based on the planned and approved SNCCTID improvements and associated contributions. A283. As the Department noted in its TIS Determination: “should a required TIS not identify transportation improvements beyond those anticipated in the TID, then the Applicant would only be responsible for its TID-related contributions under the TID Agreement.” *Id.*

H. Traffic Impact Study Confirms Traffic Concerns.

On September 13, 2024, Dermody, the Department, and DelDOT met to scope a TIS for Dermody’s project. A321-336. During this TIS Scoping Meeting,

⁶ See UDC §40.11.122 *et seq.*

Dermody asserted that its project would support a warehouse use (ITE Land Use Code (LUC) 150). This TIS Scoping Meeting resulted in a corresponding DelDOT-approved TIS on February 6, 2025, after the BOA decision. A337-400.

The DelDOT-approved TIS identified three failing intersections requiring improvements under the UDC. *Id.* Improvements to one of these intersections are planned under the SNCCTID and have been planned since the 2013 Study. *See* A121. Accordingly, Dermody’s participation in the SNCCTID, and payment of the associated TID fee, absolves it from an obligation to complete these improvements.

The remaining two failing intersections, however, require improvements **that are not planned per the 2013 Study**. *See* A121. DelDOT, however, has a separately planned project to address these two failing intersections, among other improvements. Accordingly, the Department conditionally **approved** Dermody’s February 6, 2025 TIS on March 6, 2025. A401-404. The Department’s two conditions of approval are: (1) that Dermody’s proposed use be what Dermody asserted it would be in the TIS (i.e., a warehouse use); and (2) that timing of DelDOT’s improvements to address the two failing intersections identified in Dermody’s TIS complies with UDC §40.11.210.A.1.b.iii. *Id.* Dermody has rejected these two conditions as onerous—despite being specifically required by County Code. A423-24. Thus, the litigation continues.

I. The Trial Court's Decision.

The trial court articulated its reasoning in a single November 3, 2025 Memorandum Opinion. This decision includes only one reference to the BOA, when it acknowledged that the BOA both heard an appeal and decided in favor of the County. Exhibit A (Court Opinion 9 (“Ct.Op.”)). Otherwise, the trial court focused its analysis entirely on the contract issue and reached its own factual conclusions to support its analysis.

The trial court concluded that neither the County nor DelDOT may require a TIS under the TID Agreement (defined *infra*). Ct.Op. 10. Concluding that the TID Agreement waived a TIS **in all circumstances**, the trial court opined that, “to the extent the warehouse project had a traffic impact, mitigation of the impact would be handled by the fund administered by DelDOT.” *Id.* While the Court agreed with the County (and the BOA) that a TIS waiver was only available under County Code where a project’s traffic impact was consistent with the underlying TID—seemingly undermining its earlier interpretation that consistency is irrelevant—the trial court disregarded the BOA’s factual findings and simply deferred to DelDOT’s prior conclusion on the issue of consistency with the TID. Ct.Op. 12.

ARGUMENT

I. THE BOA’S DETERMINATION THAT DERMODY’S TRAFFIC IMPACT IS INCONSISTENT WITH THE SNCCTID PARAMETERS IS ENTITLED TO DEFERENCE UNDER THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW.

A. Question Presented.

Did the trial court err when it failed to apply the substantial evidence standard of review when reversing the BOA’s October 10, 2024 decision? This issue was raised below at A549-50.

B. Standard and Scope of Review.

“When reviewing the [Board of Adjustment’s] decision, [the Supreme Court applies] the same standard that must be applied by the Superior Court[:] [the Court] review[s] the Board’s decision for errors of law and to determine whether substantial evidence exists to support the Board’s findings of fact and conclusions of law.”⁷ The Court “will not weigh the evidence, determine questions of credibility, or make [its] own factual findings.”⁸ The Superior Court’s legal determinations, including questions of statutory interpretation, are reviewed *de novo*.⁹

⁷ *Bd. of Adj. of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 329 (Del. 2012) (citing *CCS Invs., LLC v. Brown*, 977 A.2d 301, 319-20 (Del. 2009)).

⁸ *Id.*

⁹ *Id.*

C. Merits of the Argument.

While the Superior Court correctly interpreted UDC §40.11.121.C to require TID-Consistent Traffic Impact for a TIS waiver, it committed reversible error by disregarding the BOA’s well-reasoned factual findings that Dermody’s project did **not** propose TID-Consistent Traffic Impact.

1. The BOA Correctly Interpreted UDC §40.11.121.C.

As recognized by the BOA and the trial court, the plain language of UDC §40.11.121.C is unambiguous. *See* A295 and Ct.Op. 11-12. To qualify for a TIS waiver under the UDC, a developer must establish that the proposed development is **both** located within a designated TID **and** proposes trip generation consistent with the TID.¹⁰ While the BOA and the trial court interpreted UDC §40.11.121.C the same way, the trial court rendered a different factual finding regarding the issue of whether there was TID-Consistent Traffic Impact.

Notably, both the BOA and the trial court rejected—whether directly or implicitly—Dermody’s argument that UDC §40.11.310.C.1 exempts Dermody from the UDC §40.11.121.C required TID-Consistent Traffic Impact. Simply, UDC §40.11.310.C does not apply to the SNCCTID. *See* A559. The SNCCTID was created when the first TID Agreement was signed in August 2014. A279. UDC §40.11.310 was enacted by County Council almost five years later in May 2019

¹⁰ *See* UDC §40.11.121.C.

through Council's adoption of Ordinance No. 19-005. A169-187. Ordinance No. 19-005, *inter alia*, created a new UDC §40.11.310 to establish standards for the development of **new** TIDs in New Castle County.¹¹

Because the SNCCTID was created before the County adopted the UDC §40.11.310 standards and processes governing creation of new TIDs, the SNCCTID—in its current form—is grandfathered from complying with Section 310 standards and processes until such time that it is updated by County Council. Restated, the SNCCTID is a valid and operating TID despite not being formed in compliance with the UDC §40.11.310 standards and processes; standards and processes that did not exist at the time the TID was created.

Since the SNCCTID is not subject to the processes established in Division 40.11.300, and further because UDC §40.11.121.C requires TID-Consistent Traffic Impact for a TIS waiver, the core issue to resolve in Dermody's appeal of the BOA's decision is simply whether the BOA's **factual finding** that Dermody's proposed trip generation **was not consistent** with the SNCCTID is supported by substantial evidence. The Superior Court, in error, never applied the substantial evidence standard.

¹¹ UDC §40.11.310.A.1.

2. Substantial Evidence Supports The BOA's Factual Determination That Dermody's Inconsistent TID Traffic Impact Requires A Traffic Impact Study Under UDC §40.11.121.C.

If the BOA's decision is free from legal error, then the Court's responsibility when reviewing the BOA's decision is to determine whether the evidence is legally adequate to support the Board's factual findings.¹² Such "[s]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³ "If the [BOA's] decision is supported by *substantial evidence*, the Court must sustain the decision of the Board, even though it would have decided otherwise had it come before it in the first instance."¹⁴ "Only where there is no satisfactory proof in support of the factual findings of the Board, may the Superior Court or the Supreme Court overturn it."¹⁵

The trial court gave no deference to the BOA's factual findings. In its fifteen-page Memorandum Opinion, there is only **one** reference to the BOA and its decision: "The Board ruled in favor of the County—that is, that the Department *could* condition approval of the Plan on provision of a new TIS." Ct.Op. 9. Despite over

¹² See *Verleysen*, 36 A.3d at 329.

¹³ *Kostyshyn v. Comm'rs of Town of Bellefonte*, 2006 WL 1520199, at *2 (Del. Super. Jan. 6, 2006) (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

¹⁴ *Holowka v. New Castle Cnty. Bd. of Adj.*, 2003 WL 21001026, at *3-4 (Del. Super. Apr. 15, 2003) (citations omitted).

¹⁵ *Id.* at *4 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965)).

3,000 pages of material in the BOA record, the trial court’s decision includes **no discussion or analysis** of the record below or whether the BOA’s decision was supported by substantial evidence.

Instead, the trial court looked to DelDOT and observed that, “DelDOT, the subject matter specialist on traffic impact, has not withdrawn its Letter of No Objection to the planned development[;] [t]here is nary a whimper from DelDOT that the TID fund cannot handle the traffic impact from the development.” Ct.Op. 12. The trial court conducted no analysis of the BOA’s findings and failed to explore whether a reasonable mind might accept the record below as adequate to support the BOA’s findings. Thus, the trial court committed reversible error under Delaware law by failing to apply the correct legal standard on appeal.¹⁶

Moreover, reversal of the trial court’s decision is appropriate on the merits of the substantial evidence standard. The record contains much more than sufficient relevant evidence that a reasonable mind can accept as adequate to support the BOA’s decision. For example, regarding the status of the TID update, the record supports the Department’s conclusion that the analysis prepared by JMT, Langan,

¹⁶ See *Cooch’s Bridge Civic Ass’n v. Pencader Corp.*, 254 A.2d 608, 609 (Del. 1969) (reversing the Superior Court’s reversal of a Board of Adjustment decision noting, “[t]he Board’s finding of fact was reviewable by the Superior Court only to the extent of determining whether there was substantial evidence to support it”); see also, *Holowka*, 2003 WL 21001026, at *3-4.

and RK&K all incorrectly assumed that the pending TID update had been approved. Because the TID update has not been approved, the Department was obligated to compare Dermody's proposed trip generation to the trip generation anticipated under the 2013 Study when determining whether Dermody proposed TID-Consistent Traffic Impact. As the BOA correctly held, ". . . the relevant question is the consistency of the [Dermody project's] trip generation compared to the 2013 Study." A295. The BOA concluded that the Department did not err in its interpretation and application of UDC §40.11.121.C. A295-96.

The evidence also supports the Department's and the BOA's decision to discount as unsupported by the record the former DelDOT Secretary and current DelDOT TID Coordinator's generic assertions regarding TID-Consistent Traffic Impact. In former Secretary Majeski's February 2024 letter to Councilman Carter, she noted that "[the 2013 Study] analyzed the future potential land use, as determined by New Castle County, and trip generation of each parcel; and determined the transportation improvements needed to support the development." A223. Contrary to the former Secretary's statement, however, the 2013 Study did not analyze the future potential land use and trip generation of each parcel.

Indeed, there is no mention in the 2013 Study of considering the future land use of every parcel in the SNCCTID and otherwise assigning trip generation for each parcel. When the Department asked for data concerning the assumed trip generation

under the 2013 Study, the DelDOT TID Coordinator directed the Department to the 2013 Study, noting that she is “only aware of the trip generation in the 2013 [Study], including that reflected in the traffic volume diagrams in the appendices.” A278.

Regarding the DelDOT TID Coordinator’s April 2022 memorandum generically concluding that Dermody’s project proposed TID consistent trip generation—again in response to questions from the Department—the DelDOT TID Coordinator confirmed that her review was based on the 2013 Study. A278. But this generic conclusion is contradicted by an exhibit the DelDOT TID Coordinator prepared in 2021 confirming that Dermody’s proposed trip generation is higher than that accounted for in the 2013 Study. A222.

The BOA’s decision was the product of a well-reasoned, comprehensive analysis of a lengthy record, following a full and fair public hearing where Dermody—through legal counsel—presented volumes of evidence and extensive argument. The BOA got it right based upon the record. Accordingly, Delaware law requires deference be given to the BOA’s thoughtful factual findings. The trial court’s decision should be reversed.

II. THE COURT OF CHANCERY ERRED IN CONCLUDING *SUA SPONTE* THAT DERMODY’S PROJECTED TRAFFIC IMPACT IS CONSISTENT WITH THE SNCCTID PARAMETERS.

A. Question Presented.

Whether the trial court erred in finding that Dermody’s project had TID-Consistent Traffic Impact despite the BOA reaching a different factual finding on the consistency issue? This issue was raised at A793-94.

B. Standard and Scope of Review.

Application of Rule 56(h) of the Court of Chancery Rules of Civil Procedure and the principles of issue preclusion are questions of law reviewed by the Supreme Court *de novo*.¹⁷ The Supreme Court reviews factual findings of the trial court to determine whether there was *clear error*.¹⁸

C. Merits of the Argument.

Whether Dermody’s proposed traffic impact is consistent with the traffic impact anticipated under and planned for in the SNCCTID is a quintessential issue of fact. Dermody argues that traffic impact consistency is irrelevant under the TID Agreement. A638-39 and A643. Restated, Dermody incorrectly contends that—under the TID Agreement—the mere fact that a development is proposed within the SNCCTID is alone sufficient to obligate the County to grant a TIS waiver. *See id.* Dermody’s interpretation is contrary to the plain language of the UDC—which only

¹⁷ *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

¹⁸ *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 59 (Del. 2022).

allows a TIS waiver where there is TID-Consistent Traffic Impact. A643. Thus, because Dermody’s interpretation of the TID Agreement would violate the UDC, it is both unreasonable and improper as a matter of law. A705-06. The correct interpretation—which does not violate the UDC—is that a TIS waiver is available under the TID Agreement to the extent that a development proposes traffic impact consistent with the traffic impact anticipated under and planned for the SNCCTID.

The trial court agreed with the Department (and the BOA) that UDC §40.11.121.C requires TID-Consistent Traffic Impact to support a TIS waiver. Ct.Op. 11-12. However, the trial court rejected the County’s interpretation of the TID Agreement after finding that Dermody’s project proposed TID-Consistent Traffic Impact and was thus actually eligible for a TIS waiver under the UDC.

By rendering its own finding on a material issue of fact, the trial court failed to give proper deference to a binding administrative finding on the same material issue, and further improperly ignored the case’s stipulated procedural posture.

1. The BOA’s October 10, 2024 Decision That Dermody’s Traffic Impact Is Inconsistent With The SNCCTID Parameters Is Binding On The Parties.

The trial court committed reversible error when it failed to give proper deference to the BOA’s factual finding that Dermody’s project did not propose TID-Consistent Traffic Impact when deciding the cross-motions for partial summary judgment. Under the collateral estoppel doctrine, the trial court is bound by the

factual finding from another proceeding where: (1) the subject issue is the same in both proceedings; (2) the prior determination was a valid and final judgment; (3) the party against whom the doctrine is invoked was the same party in the prior proceeding; and (4) the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issue in the prior proceeding.¹⁹

“Collateral estoppel extends not only to issues decided by courts, but also to issues decided by administrative agencies acting in a judicial capacity where the parties had a full and fair opportunity to litigate.”²⁰ Accordingly, decisions from the BOA, as an administrative board acting in a judicial capacity where the parties have a full and fair opportunity to litigate, may have a binding effect for purposes of collateral estoppel.

Here, the issue of TID-Consistent Traffic Impact that was decided by the BOA on October 10, 2024 is identical to the issue addressed by the trial court when it rejected the County’s interpretation of the TID Agreement. In addition, Dermody was a party in both proceedings, and the TID-Consistent Traffic Impact issue was vigorously litigated during a full and fair public hearing before the BOA, resulting in the BOA’s well-reasoned findings. *See* A287-320. Lastly, the BOA’s October

¹⁹ *See Ingram v. Thorpe*, 2014 WL 4805829, at *3 (Del. Sept. 26, 2014); *see also Hernandez v. Baird Mandalas Brockstedt & Federico, LLC*, 315 A.3d 1183, 1188 (2024), *aff’d*, *Hernandez v. Baird Mandalas Brockstedt & Federico, LLC*, 341 A.3d 473 (Del. 2025) (Table).

²⁰ *Hernandez*, 315 A.3d at 1188.

10, 2024 decision represented a valid and final determination from that body that, as addressed in Section I, *supra*, should have been upheld by the trial court on appeal.

Given the above factors relevant to the collateral estoppel doctrine, the trial court was not free to reject the BOA's factual findings and thus committed reversible error when it substituted its own factual finding to reject the County's interpretation of the TID Agreement. Notably, the preclusive impact of the BOA's finding on the TID-Consistent Traffic Impact issue highlights why the briefing on the Cross-Motions for Partial Summary Judgment and the BOA Appeal were presented to the trial court concurrently for decision.

The trial court created a procedural quagmire when it disregarded the BOA's findings and instead substituted its independent judgment for the BOA's. Indeed, should this Court reverse the trial court's decision in the BOA Appeal—which was submitted to the trial court for decision concurrent with the cross-motions for summary judgment—then the parties would be bound by the BOA's factual finding that Dermody's project did not propose TID-Consistent Traffic Impact under the doctrine of collateral estoppel. This binding factual finding, in turn, would similarly require reversal of the trial court's decision on partial summary judgment since its decision rejecting the County's interpretation of the TID Agreement relied upon the trial court's errant finding on the material issue of TID-Consistent Traffic Impact.

2. The Parties Did Not Stipulate To An Independent Factual Finding on the Issue of TID-Consistent Traffic Impact In The Cross Motions For Partial Summary Judgment.

Alternatively, were the trial court not bound by the BOA’s factual findings, it still committed reversible error when it rendered a decision on summary judgment despite there being material facts in dispute. The parties intentionally briefed the legal issue of contract interpretation separately from the BOA’s conclusion that the Dermody project’s inconsistency with the SNCCTID rendered it ineligible for a TIS Waiver under the UDC. Both issues were before the trial court concurrently for decision, but importantly only in their respective different contexts.

Court of Chancery Rule 56(h) provides that,

Where the parties have filed cross motions for summary judgment **and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion**, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.²¹

When interpreting and applying this rule, this Court has held that, “[c]ross-motions for summary judgment are not the procedural equivalent of a stipulation for decision on a paper record.”²² Rather, the Court may only deem cross motions to be the equivalent of a stipulation for decision on the merits where the parties “have not

²¹ Ct. Ch. R. 56(h) (emphasis supplied).

²² *Telxon Corp.*, 802 A.2d at 262 (citing *Empire of Am. Relocation Servs., Inc. v. Com. Credit Co.*, 551 A.2d 433, 435 (Del. 1988); see also *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

presented argument to the Court that there is an issue of fact material to the disposition of either motion.”²³ “Summary judgment will not be granted . . . when the record reasonably indicates that a material fact is in dispute”²⁴

The County has consistently maintained that the trial court was bound by the factual finding of the BOA on the issue of TID-Consistent Traffic Impact, and that this factual finding was material to whether the County breached the TID Agreement with Dermody. Aside from asserting that the BOA Appeal be briefed separately—but concurrently—with the briefing on cross-motions for partial summary judgment,²⁵ the County specifically objected to Dermody’s attempts to nevertheless present the TID-Consistent Traffic Impact issue to the trial court for decision on partial summary judgment. In its Reply Brief, the County noted, “Dermody’s assertions concerning whether, as a matter of fact, its Project proposes trip generation consistent with the SNCCTID was addressed during the BOA hearing

²³ Ct. Ch. R. 56(h).

²⁴ *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *6 (Del. Ch. Mar. 29, 2007); *see also United Vanguard Fund*, , 693 A.2d at 1080 (noting that the trial court is obligated to determine whether there is a genuine issue of material fact before granting summary judgment unless a party “specifically waive[s] the existence of these factual disputes”) (citation omitted).

²⁵ During oral argument on September 16, 2025, in response to a question from the trial court on whether the contract issue resolves the entire case, counsel for the County responded, “Your Honor, I believe that the Cert petition and the reason that these are together matters materially to the contract issue and the issues that were decided by the board of adjustments, so I think they need to be decided in tandem.” A408-09.

and in the companion briefing for the BOA Appeal and **is outside of the scope of these Cross-Motions for Partial Summary Judgment.**” A793-94 (emphasis supplied).

Delaware law is clear: summary judgment is inappropriate where the trial court’s decision depends on a factual finding on an issue of disputed material fact.²⁶ Here, the trial court rejected the County’s arguments by rendering an independent factual finding that Dermody’s project proposed TID-Consistent Traffic Impact. Ct.Op. 12. Nothing in the record supports the conclusion that the issue of whether there was TID-Consistent Traffic Impact was before the trial court for determination on summary judgment. Quite simply, outside of the context of the BOA Appeal, this material issue of fact remains very much in dispute—even if the BOA’s findings are set aside. Thus, the trial court’s factual finding on this issue was reached in error, and its decision should be reversed.

3. In the Alternative, the Court of Chancery's Factual Determination That Dermody's Traffic Impact Is Consistent With The SNCCTID Parameters Is Incorrect.

Alternatively, even if the trial court was permitted to render a factual finding on the issue of TID-Consistent Traffic Impact, reversal is still necessary because the

²⁶ See *Reserves Mgt. Corp. v. R.T. Properties, LLC*, 80 A.3d 952, 956 (Del. 2013); see also *Empire of Am. Relocation Servs., Inc.*, 551 A.2d at 435 (noting, “[i]t is imperative that the court consider whether there is a genuine issue of material fact each time such motions are presented.”) (citations omitted).

trial court’s factual finding is legally incorrect and clearly erroneous. First, the trial court erred as a matter of law when it dismissed the County’s conclusions on traffic impact as being outside of the County’s relevant expertise. In its decision, the trial court noted, “. . . DelDOT, the subject matter specialist on traffic impact, has not withdrawn its Letter of No Objection to the planned development” Ct.Op. 12. The Court further observed, “[i]t is at least ironic that now, despite approval by DelDOT concerning the traffic impact, the Department—whose expertise is in zoning and land use—has decided that the traffic impact is a debilitating concern.” *Id.*

There is nothing ironic or improper about the County exercising its Code-required authority to determine whether Dermody’s application complies with governing regulations, including the UDC’s Article 11 concerning traffic matters. The Superior Court previously held in *Golf Course Assoc, LLC v. New Castle County*—a decision affirmed by this Court following an *en banc* review²⁷—that “state law, the applicable provisions of the UDC as well as judicial precedent vest the county with final authority to decide whether traffic issues warrant denial of a land use permit.”²⁸ While the County often looks to DelDOT for guidance on traffic

²⁷ *Golf Course Assoc., LLC v. New Castle Cnty.*, 152 A.3d 581 (Del. 2016) (Table).

²⁸ 2016 WL 1425367, at *7 (Del. Super. Mar. 28, 2016); *see also Toll Bros., Inc. v. Wicks*, 2006 WL 1829875, at *5-6 (Del. Ch. June 21, 2006); 29 *Del. C.* § 9206.

matters, the County is not bound by such guidance—or lack of guidance—but is instead charged under the law to satisfy itself that an application is approvable on its own merits.²⁹ The trial court’s conclusion that the County was bound by DelDOT’s April 20, 2022 determination because DelDOT is the subject-matter expert on traffic matters is wrong as a matter of law.

Second, the trial court’s decision is particularly troubling where its—and DelDOT’s—factual conclusion that Dermody’s project proposes TID-Consistent Traffic Impact is clearly erroneous on the record. To support its factual finding, the trial court noted that, “[t]hree different traffic studies found that the Plan had trip generation consistent with the TID” Ct.Op. 12. That conclusion is belied by the record. None of the three analyses referenced addressed the operative question of whether Dermody’s proposed traffic impact was consistent with the traffic impact anticipated under the 2013 Study. Instead, each review evaluated Dermody’s project against the pending **but not approved** TID update. *See* A228, A262, and A264.

The record is teeming with evidence supporting the County’s conclusions that the 2013 Study is the relevant document to determine whether trip generation is consistent with the SNCCTID and that Dermody’s trip generation is not consistent with the 2013 Study. For example, former DelDOT Secretary Majeski, in a January 2024 letter to Councilman Carter, noted that, “[the 2013 Study] served as the basis

²⁹ *See e.g.* UDC § 40.31.114.

for creating the TID agreements to determine the developer's financial contribution, DelDOT's financial contribution and timeframe for these improvements to be incorporated into DelDOT Capital Transportation Program." A223. Former Secretary Majeski also observed that, "[the 2013 Study] has been the basis of the 20 plus other TID Agreements that have been entered into between DelDOT, NCC and developers since 2014." A224. And, "[w]hile DelDOT is undertaking additional analysis of the SNCCTID for horizon analysis year 2040, that study is ongoing and has not been completed and no report has been finalized." *Id.* Similarly, the DelDOT TID Coordinator, in response to questions from former Department General Manager Patibanda on the applicable traffic plan governing the SNCCTID confirmed, "[y]es, it was the 2013 [Study] that was relied on and referred to in the April 20, 2022 memo [addressing the Dermody project's trip generation consistency with the SNCCTID]." A278.

As to consistency with the 2013 Study, the record establishes that Dermody's proposed traffic is an outlier representing approximately 15-percent of the 2030 forecast PM Peak Hour volume for Jamison Corner Road (i.e., the adjacent road at the Dermody Project's entrances), which far exceeds both the zero trips specifically assigned to Dermody's Property under the 2013 Study, and a 5-percent difference allowed under the DelDOT regulations. *See* A283 and A295. Again, the BOA

affirmed this factual conclusion, and the decision is supported by substantial evidence. *See* A287-320.

For its part, the trial court did not address this conflicting evidence undermining DelDOT's generic assertions that Dermody's project proposes TID-Consistent Traffic Impact.³⁰ The trial court did not address the evidence in the record establishing that the 2013 Study is the operative study for purposes of determining whether there is TID-Consistent Traffic Impact, and it did not articulate how the pending but not approved TID update can support a conclusion on the consistency question. The trial court also failed to address how Dermody's project could propose TID-Consistent Traffic Impact where no single item in the record suggests that Dermody's project proposes traffic consistent with the traffic impact anticipated for the SNCCTID under the 2013 Study.

Instead, the trial court simply observed that to the extent there was an error in DelDOT's and the County's prior conclusions on whether there is TID-Consistent Traffic Impact, the County bore the risk of that error. According to the trial court, "[a]n incorrect assumption regarding the TID is not a risk assigned to [Dermody] under the TID or the Agreement" Ct.Op. 13. The trial court was again wrong as a matter of law; under settled Delaware law, the applicant—not the County—

³⁰ *See Geronta Funding*, 284 A.3d at 59 (noting that factual findings are not clearly erroneous where they are "sufficiently supported by the record and are the produce of an orderly and logical deductive process") (citation omitted).

bears the burden to know the regulations and to submit and process a Code-compliant plan.³¹

The County does not dispute that the Department's TIS Determination represented a change in position on whether Dermody's project satisfied the elements required for approval. However, this change was required under the County Code. As the County noted in its decision letter, its review on referral from County Council under UDC §40.31.114.D.1.b "is not just a rubber stamp." A220. It is obligated under the Code to review a developer's application and confirm compliance with the UDC. The County cannot approve a project that does not comply with the Code.³²

Yet this is what the trial court concluded must occur in this case. Despite overwhelming evidence in the record supporting the County's—and the BOA's—conclusion that Dermody's project was not Code-compliant, the trial court did not address this evidence and instead expressed frustration over the timing of the

³¹ *Ocean Bay Mart, Inc. v. City of Rehoboth Beach, Del.*, 285 A.3d 125, 138-41 (Del. 2022); *see also Lowe's Home Ctrs., Inc. v. Old Meadows Props., L.L.C.*, 2001 WL 1729123, at *5 (Del. Super. Nov. 30, 2001); 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 69:20 (4th ed. 2025) (providing, "[t]he general rule is that a permit issued for a use or structure which is not permitted or is specifically prohibited by an ordinance is beyond the power of the officer to issue; consequently, it has no legal status, it is invalid, and it is entirely without power to clothe its holder with any legal rights thereunder"); *see also Beiser v. Bd. of Adj. of Town of Dewey Beach*, 1991 WL 236966, at *5 (Del. Super. Oct. 25, 1991); *Cheng v. D'Onofrio*, 1994 WL 560866, at *3 (Del. Ch. Sept. 20, 1994).

³² *See* UDC §40.31.114.

County's conclusion. Ct.Op. 13. While the County strives to get it right the first time, the County's obligation to hold development applications to compliance with the Code and related regulations does not change because the County's review occurs during the final compliance check step of the development approval process. The trial court's decision to set aside and not address the record in favor of deference to DelDOT's unsupported generic prior statements, and to assign the burden of Dermody's failure to meet the Code requirements to the County, is reversible error.

III. CONSISTENT WITH UDC §40.11.121.C, A TIS IS ONLY WAIVED UNDER THE TID AGREEMENT WHERE DERMODY'S TRAFFIC IMPACT IS CONSISTENT WITH THE SNCCTID PARAMETERS.

A. Question Presented.

Whether the SNCCTID Agreement waives a TIS in all circumstances for all property located within the SNCCTID even if it is in violation of the County Code?

This issue was raised at A704.

B. Standard and Scope of Review.

The Supreme Court reviews questions of contract interpretation *de novo*.³³

C. Merits of the Argument.

The SNCCTID Agreement—per its plain language—does not provide a blanket TIS waiver for all projects in all circumstances. Instead, the SNCCTID Agreement provides a TIS waiver only for those projects whose traffic impact was anticipated under the governing TID analysis (i.e., the 2013 Study) and for which transportation improvements were identified and planned to maintain adequate level of service through planning year 2030.

The County's position on the interpretation of the SNCCTID Agreement is therefore straightforward: to take advantage of the benefits outlined in the SNCCTID Agreement, a project must propose traffic impact consistent with the assumptions underlying the SNCCTID. Where projects within the SNCCTID propose

³³ *Thompson Cap. Partners IV, L.P. v. Sonova United States Hearing Instruments, LLC*, 340 A.3d 1151, 1165 (Del. 2025).

development with traffic impact consistent with the traffic impact assumptions in the SNCCTID, a fee is paid in lieu of a TIS. But where projects propose development with inconsistent traffic impact, a TIS is required to either confirm adequate transportation capacity or to identify additional transportation improvements necessary to maintain adequate traffic capacity within the TID.

Contrary to UDC §40.11.121.C, the 2008 MOA between the County and DelDOT, and the plain language of the TID Agreement, the trial court incorrectly eliminated what is otherwise an integral component of a TID when it held that the TID Agreement operates to preclude the County and DelDOT from requiring a TIS in all circumstances, regardless of whether the development proposes TID-Consistent Traffic Impact. Ct.Op. 10. According to the trial court, a TIS is not required in the SNCCTID because mitigation of traffic impact is handled by the TID fund administered by DelDOT. *Id.* The trial court's decision is wrong as a matter of law and should be reversed.

- 1. The Trial Court's Decision Incorrectly Expands The TID Agreement To Waive A TIS For All Property Within The SNCCTID In All Circumstances.**
 - a. The TID Agreement, Section VI, Obligates The County To Execute Future TID Agreements For All Property Located Within The SNCCTID.**

The TID Agreement at issue here is not a one-off agreement signed by the County after analyzing and confirming that a project proposes TID-Consistent

Traffic Impact. Rather, the County is obligated under the original TID Agreement from 2014—regardless of the proposed traffic impact—to sign a subsequent TID Agreement with any property owner proposing development within the SNCCTID. Section VI.A of the TID Agreement provides, “[o]nce a development proposal for the Property is advanced to NCC, NCC shall inform the Other Property Owner of the existence of this agreement and require participation in this agreement as a condition of the rezoning, subdivision or redevelopment project.” A159-60. Thus, the County had no discretion under the SNCCTID Agreements it entered with other property owners to refuse to sign a TID Agreement with Dermody when it proposed development of the Dermody Property in 2021.

The trial court’s decision creates a Catch-22 for the County. On the one hand, the County would breach its obligation under Section VI.A of the TID Agreement if it refuses to sign a subsequent TID Agreement with a developer. But on the other hand, because the trial court held that signing the TID Agreement bars the County from requiring a TIS, signing the TID Agreement would prohibit the County from applying the traffic impact evaluation required under UDC §40.11.121.C. Restated, the trial court’s decision forces the County to either breach the prior TID Agreements by not signing a subsequent Agreement or violate the County Code.

Aside from being impractical, the trial court’s decision is legally incorrect and should be reversed for two main reasons: *first*, as a matter of law, the TID Agreement

cannot be read to contradict UDC §40.11.121.C; and *second*, the Court’s decision improperly shifts the burden of implementing **all** transportation improvements to DelDOT contrary to the plain language of the TID Agreement limiting DelDOT’s obligation to the nine improvements identified under the 2013 Study.

b. The TID Agreement Cannot Supersede UDC §40.11.121.C.

The Court’s interpretation renders the TID Agreement void as an *ultra vires* contract. If the TID Agreement were interpreted to supersede and replace the UDC, such an act would be akin to “contract zoning,” which is prohibited in Delaware.³⁴ Indeed, “[c]ontract zoning occurs when a landowner and a zoning authority agree to alter zoning to the landowner’s benefit in exchange for other promises.”³⁵ As the Court in *Hartman v. Buckson* observed, quoting a decision from a New Jersey case:

Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts³⁶

The UDC Article 11 traffic study requirements are zoning regulations—and they may not, by law, be superseded and replaced by a contract.³⁷

³⁴ See, e.g., *Pike Creek Rec. Servs., LLC v. New Castle Cnty.*, 238 A.3d 208, 216 (Del. Super. 2020), *aff’d*, 259 A.3d 724 (Del. 2021); see also *Port Penn Hunting Lodge Ass’n v. Meyer*, 2019 WL 2077600, at *7-8 (Del. Ch. May 9, 2019).

³⁵ *Port Penn*, 2019 WL 2077600, at *7.

³⁶ 467 A.2d 694, 699-700 (Del. Ch. 1983) (internal citations omitted).

³⁷ 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 44:11 (4th ed. 2025) (observing that “[i]llegal contract zoning is disfavored by courts because

The TID Agreement was drafted to implement UDC §40.11.121.C, consistent with the 2008 MOA. *See* A64. Both of these sources include a requirement that a project’s trip generation be consistent with the assumptions underlying the TID, not perpetually evolving assumptions that may or may not result in new improvements beyond nine identified projects. The County’s interpretation of the TID Agreement—that a TIS waiver is available to the extent the development proposes TID-Consistent Traffic Impact—acknowledges this fact, avoids illegal contract zoning, requires no absurd result, and gives full effect to the TID Agreement’s specific references to UDC §40.11.121.C. The County’s interpretation should stand and the trial court’s decision should be reversed.

c. DeIDOT Has No Obligation Under The TID Agreement To Improve Intersections Within The SNCCTID To Support Development That Is Inconsistent With SNCCTID Parameters.

The trial court erred when it concluded that, “to the extent the warehouse project had a traffic impact, mitigation of the impact would be handled by the fund administrated by DeIDOT.” Ct.Op. 10. Restated, the trial court interpreted the TID Agreement as shifting the burden to study traffic and implement necessary

of the risk of fraud, corruption and undue influence but is disapproved of largely on the basis of the principle that a local government may not contract away its police power to regulate on behalf of the general welfare” (internal citations omitted); *see also Cain v. Sussex Cnty. Council*, 2020 WL 2122775, at *19-20 (Del. Ch. May 4, 2020).

infrastructure improvements—**all** infrastructure improvements—to DelDOT.

However, Section II of the TID Agreement expressly contradicts this conclusion.

Section II of the TID Agreement provides as follows:

To insure an adequate Level of Service is maintained throughout the development of the SNCCTID, traffic capacity of the roads and intersections identified in this agreement will be monitored by DelDOT. Should any road or intersection **contained in the list of 9 projects in Exhibit B of this agreement** approach Level of Service E, it shall be DelDOT's responsibility to immediately prioritize the improvement project designed to improve the Level of Service by programming the project construction in the next Capital Transportation Program (CTP). A189 (emphasis supplied).

The plain language of the TID Agreement provides that DelDOT's obligation is to prioritize and implement **the nine projects identified in Exhibit B**; DelDOT has no obligation under the TID Agreement to identify and implement **new projects** necessary to maintain adequate traffic capacity within the SNCCTID due to changing trip generation assumptions within the TID.

The TID Agreement allows an exception to the TIS requirement but only because all associated studies have already been completed and necessary improvements identified and planned. So long as land within the TID is developed consistent with the trip generation assumed within those studies, then the nine road improvements identified in Exhibit "B" that DelDOT is obligated to monitor and prioritize will be sufficient to maintain adequate transportation capacity within the SNCCTID.

A TID does not exist to shift the burden to DelDOT to **react** to changing development assumptions but is instead a **proactive** tool to plan for future traffic impacts. The TID Agreement reflects this proactive nature of the SNCCTID. The Court’s decision improperly ignored this core characteristic of the SNCCTID when it interpreted the “*sine qua non*” of the TID Agreement to be a blanket TIS waiver.

2. The Court Of Chancery's Decision Improperly Renders The UDC §40.11.121.C and TID Agreement Consistency Requirements Meaningless And Superfluous.

Dermody maintains that the TID Agreement waives all traffic studies, in all circumstances, for all property located within the SNCCTID. A638-39. To support its position, Dermody leans heavily on the enumerated “Property Owner Benefits” in Section V, which notes, *inter alia*, that “[n]o individual Traffic Study will be required as a separate cost for individual developments participating in this agreement” *See* A193. Dermody’s argument, however, fails to reconcile conflicting language elsewhere in the Agreement—such as in Section II—indicating that the Property Owner Benefits of Section V are available only so long as the development proposes traffic impact consistent with the traffic assumptions forming the basis for the SNCCTID.

Here, the trial court’s decision includes no explanation for the multiple references in the TID Agreement to UDC §40.11.121.C and the planning efforts behind the SNCCTID—references that are superfluous under the trial court’s

reading that the TID Agreement operates to waive a TIS regardless of traffic impact. That is reversible error.³⁸

As this Court has outlined, the “goal [of contract interpretation] is to give effect to the intent of the parties[,]” and a contract’s construction should be objective.³⁹ “An interpretation is unreasonable if it ‘produces an absurd result’ or a result ‘that no reasonable person would have accepted when entering the contract.’”⁴⁰ Courts “will read the contract as a whole and ‘enforce the plain meaning of clear and unambiguous language.’”⁴¹ “In doing so, [courts] endeavor ‘to give each provision and term effect’ and not render any terms ‘meaningless or illusory.’”⁴²

The County’s interpretation gives meaning and effect to each word in the TID Agreement, as required by law. For example, Section I, “Geographic Area Covered by this Agreement,” provides:

DelDOT and NCC, **in accordance with** the 2006 Memorandum of Agreement, this agreement and the aforesaid [UDC] **Section 40.11.121C**, have established a Transportation Improvement District known as the Southern New Castle County Transportation Improvement District. A189 (emphasis supplied).

³⁸ See *NAMA Hldgs., LLC v. World Market Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. July 20, 2007), *aff’d*, 945 A.2d 594 (Del. 2008) (Table) (“Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.”)

³⁹ *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023).

⁴⁰ *Id.* (quoting *Manti Hldgs., LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021)).

⁴¹ *Id.* (quoting *Manti Hldgs.*, 261 A.3d at 1208).

⁴² *Id.* (quoting *Manti Hldgs.*, 261 A.3d 1208).

Merriam-Webster Dictionary defines “in accordance with” as “in a way that agrees with or follows (something, such as a rule or request).”⁴³ By using the phrase “in accordance with,” the TID Agreement does not provide that the SNCCTID was created to replace or supersede UDC §40.11.121C, but instead that it was created to follow and implement the requirements of UDC §40.11.121.C. As addressed *supra*, UDC §40.11.121.C requires TID-Consistent Traffic Impact for a TIS waiver.

Also, regarding the area wide studies, the TID Agreement plainly anticipates waivers only for projects consistent with “individual traffic studies completed for development proposals planned at the time the SNCCTID was formed.” A189. “The purpose of this study was to identify the combined impact of all proposed developments and to determine what transportation improvements were needed to meet future traffic demand.” *Id.* “The most recent update of this area wide study uses a base year of 2009 and an assumed build out date for all currently planned development of 2030.” *Id.* “The list of projects identified from this study is included in Exhibit ‘B’.” *Id.*

The trial court’s decision renders all of this language meaningless, contrary to the principles of contract interpretation. The plain language of the TID Agreement openly contemplates that for a TIS waiver to be available, UDC §40.11.121.C must

⁴³ *In accordance with.* Merriam-Webster, <https://merriam-webster.com/dictionary/inaccordancewith> (last accessed January 26, 2026).

be satisfied. Simply, the Property Owner Benefits under Section V of the TID Agreement all flow from (and do not negate) the Dermody's project's consistency with Section II of the TID Agreement. The trial court's failure to give meaning and effect to these provisions was reversible error.

CONCLUSION

Appellants request that the decisions of the Court of Chancery and Superior Court be reversed.

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