



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NEW CASTLE COUNTY, 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,
Appellee.

C.A. No. 509,2025

On Appeal from the Superior Court of
the State of Delaware, C.A. No.
N24M-04-059-CEB and 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,
NEW CASTLE COUNTY
DEPARTMENT OF LAND USE, and
NEW CASTLE COUNTY BOARD
OF ADJUSTMENT,

Respondents Below,
Appellants,

v.

DPML JAMISON CORNER, LLC,

Petitioner Below,
Appellee,

- and -

NEW CASTLE COUNTY BOARD
OF ADJUSTMENT,

Nominal Party
On Appeal/Nominal Appellee.

C.A. No. 508,2025

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

**PLAINTIFF BELOW/APPELLEE DPML JAMISON CORNER, LLC'S
CONSOLIDATED ANSWERING BRIEF**

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INTRODUCTION

For over sixteen years, the Delaware Department of Transportation (“DelDOT”), New Castle County (“County”) its Department of Land Use (“Department”), and private landowners and developers have participated in a system that favors collective infrastructure funding over individual traffic studies in certain defined zones known as Transportation Improvement Districts, or TIDs. After signing TID agreements, and recorded them in the chain of title, landowners and developers within the Southern New Castle County TID (“SNCC TID”) paid millions into a DelDOT-managed fund for planned improvements within the district. In return, they received an express promise running with title: no individual traffic impact study (“TIS”) would be required for each specific development.

Relevant here, the County made that promise to DPML Jamison Corner, LLC (“Dermody”) in October 2021 in a TID agreement (the “TID Agreement”), knowing full well that Dermody planned to build a warehouse near Middletown, Delaware. The County and the Department then spent three years reviewing the Dermody’s plan. They issued six reports, certified it as code-compliant, and told New Castle County Council that TIS requirements were “not applicable.” DelDOT approved the Plan, calculated a \$6 million TID fee, and executed a Recoupment Agreement. For years, the County went along without mentioning a traffic study. Then, in the

midst of an election year, the County changed its mind. The facts, the zoning code, and the traffic conditions remained the same.

The court below saw through it. It held that the County entered the TID Agreement with open eyes, and through that TID Agreement, the County unambiguously waived the County's right to require a TIS. That holding is correct. On appeal, the County does not dispute the Agreement's text or the three years of consistent treatment that preceded its about-face.

Instead, the County changes course from the proceedings below and asks this Court to treat this as a purely administrative law matter. It asks this Court to defer to a Board of Adjustment that lacks jurisdiction over contracts, to credit arguments never raised below, and reverse the trial court based on a bespoke "consistency" standard the County itself has abandoned. None of these arguments has merit.

The Agreement means what it says, the trial court's interpretation is correct, and the decision below should be affirmed.

NATURE OF PROCEEDINGS

This consolidated appeal comprises three actions at the trial court level:

- *DPML Jamison Corner, LLC v. New Castle County, et al.*, C.A. 2024-0403-CEB (Cons.) (Del. Ch.), which involves a complaint for injunctive, declaratory and monetary relief;
- *DPML Jamison Corner, LLC v. New Castle County, et al.*, N24M-04-059 CEB (Cons.), which involves a petition for a writ of mandamus and which was consolidated into the Chancery action; and,
- *DPML Jamison Corner, LLC v. New Castle County, et al.*, C.A. N25A-02-004 CEB, which involves a petition for *certiorari* review of a decision of the New Castle County Board of Adjustment.

Dermody adopts the procedural history listed beginning with the second paragraph of page one of the Appellants' opening brief and ending on page 3 of that brief.

SUMMARY OF ARGUMENT

1. **Denied.** The trial court held that, as a matter of contract law, the TID Agreement (and the County's performance thereunder) barred the County from requiring a TIS. That holding rendered the Board of Adjustment's decision a nullity. The Superior Court did not review or disregard the Board's factual findings.

2. **Denied.** The trial court rejected the County's post-hoc justifications for breaching the TID Agreement. The court below did not make a *sua sponte* factual finding on TID consistency. Additionally, the County's collateral estoppel and Rule 56(h) arguments were not raised below and are waived.

3. **Denied.** The trial court correctly concluded that the TID Agreement implements UDC § 40.11.121(C) by memorializing the Department's 2021 determination — made with full knowledge of Dermody's warehouse plan — that the Plan was TID-consistent and no TIS was required. It distorts the trial court's decision to portray it as providing a "blanket" TIS waiver. The trial court also correctly rejected the County's attempt to rewrite the bargain because the political climate changed.

STATEMENT OF FACTS

A. The Players and the Property

Dermody acquired approximately 229 acres of land zoned Business Park near Middletown, Delaware (“Property”) for \$22 million to develop it with two light industrial warehouse structures totaling approximately two million square feet, to operate as a “LogistiCenter™.”¹ Dermody submitted its development plan (the “Plan”) for the Property in June 2021.²

The Property’s Business Park zoning permits this sort of warehousing use by right, and that use makes sense.³ The Property sits at a strategic location, with the Route 301 interchange only 565 linear feet from the nearest proposed driveway,⁴ and all parties were aware from the outset that the Plan proposed a warehouse LogistiCenter™.⁵ All parties also agree that the Property is within the Southern New Castle County Transportation Improvement District.⁶

¹ Mem. Op. at 2; Pet. ¶¶ 1, 22, 28-29. “Mem. Op.” refers to the Superior Court’s November 5, 2026 Memorandum Opinion, which is part of Exhibit A to the Appellants’ Opening Brief. “Pet.” refers to Dermody’s Amended and Supplemented Verified Petition, which is located at B166 *et seq.*

² Mem. Op. at 2; Pet. ¶¶ 28, 36.

³ Mem. Op. at 2 n.1. *See* Pet. ¶¶ 23, 26 & B056 (letter confirming Property’s zoning).

⁴ Pet. ¶ 29.

⁵ Mem. Op. at 6 n.13.

⁶ *See* Mem. Op. at 6; App. Op. Br. 8.

New Castle County consists of legislative, administrative and quasi-judicial bodies, all with varying authority over zoning laws and permits.⁷ The Department reviews land development applications and determines compliance with Chapter 40 of the County Code, the Unified Development Code (“UDC”).⁸ County Council makes zoning laws and consents to Major Land Development plans.⁹ The County Board of Adjustment (“BOA”) hears variance applications, and some appeals from zoning decisions the Department makes.¹⁰ Except where context requires differentiation, Dermody refers to the appellants as “the County.”

Non-party Delaware Department of Transportation (“DelDOT”) controls and manages state roads and highways, including all transportation planning and infrastructure improvements.¹¹ DelDOT, not the Department, is the entity with expertise and statutory authority over regional traffic impact.¹²

B. The Regulatory Framework

Under the UDC, major development plans typically must include a traffic analysis. If the County and DelDOT agree that a proposed development will generate

⁷ Pet. ¶ 2.

⁸ Pet. ¶¶ 3, 31-32.

⁹ UDC § 40.31.114 (D)(1)(b).

¹⁰ Pet. ¶¶ 138, 188-190.

¹¹ Mem. Op. at 3. *See* Pet. ¶¶ 58-59; B001 (2006 TID MOU); A62-66 (2008 MOA).

¹² Mem. Op. at 12.

significant traffic, a Traffic Impact Study (“TIS”) — a costly, time-consuming review of roads, intersections, and peak-hour traffic — may be required.¹³ If the TIS determines that the Plan will cause studied intersections to dip below certain levels of functionality (in traffic speak, level of service (“LOS”) goals), then those intersections may have to be improved at developer expense for the plan to proceed.¹⁴

But the UDC and state law provide an alternative: Transportation Improvement Districts, or “TIDs.” The County and DelDOT may designate a geographic area in New Castle County as a TID.¹⁵ Within a TID, DelDOT conducts regional traffic studies and plans infrastructure improvements for the entire district. Rather than conducting individual traffic studies, developers pay fees into a DelDOT-managed fund.¹⁶ Through the TID system, comprehensive, area-wide planning replaces piecemeal traffic analysis and project-by-project improvements.

The UDC provides that a TIS “will be waived” when “the Department finds” that “[t]he proposed development is located within and has trip generation consistent with a TID.”¹⁷ Relevant here, the County granted DelDOT authority to administer

¹³ Mem. Op. at 3-4. *See* UDC § 40.11.120.

¹⁴ *See* UDC § 40.11.120.

¹⁵ Mem. Op. at 4. *See* UDC § 40.11.310.

¹⁶ Mem. Op. at 4-5; Pet. ¶¶ 58-59, 67, 79.

¹⁷ Mem. Op. at 6. *See* UDC § 40.11.121(C).

the SNCC TID, within which the Property is located.¹⁸ And the Department admitted, “the UDC does not specifically address what it means to have a trip generation consistent with a TID” so it “typically relies on a determination from DelDOT that projects and plans are consistent with the trip generation in the TID.”¹⁹

C. The TID Agreement

DelDOT has administered the SNCC TID (within which the Property sits) since the SNCC TID’s creation in 2014.²⁰ On October 19, 2021, a few months after Dermody’s predecessor submitted the Plan, Dermody’s predecessor, DelDOT, and the County executed a written TID Agreement, which was recorded against the Property’s title on November 4, 2021.²¹ All parties signing the TID Agreement were aware of Dermody’s Plan and specifically that it would be a warehouse.²²

The “*sine qua non* of the TID Agreement” is the agreement that Dermody would pay into the TID fund rather than conduct a TIS for the Plan.²³ Indeed, the TID Agreement repeats this central purpose three separate times. The Preamble provides that DelDOT will establish a fund “to help fund the planned transportation

¹⁸ Pet. ¶¶ 56, 59.

¹⁹ Mem. Op. at 12; A281-82.

²⁰ Mem. Op. at 2, 6; Pet. ¶¶ 56-57.

²¹ Mem. Op. at 6. The TID Agreement is located at A188-202.

²² Mem. Op. at 6 n.13.

²³ *Id.* at 10.

improvements in lieu of preparing a traffic impact study.”²⁴ Section II mandates that “Property Owners shall not be required to perform traffic impact studies and, in lieu thereof, shall contribute through the SNCC TID Fund.”²⁵ And Section V.B states that, “No Individual Traffic Study will be required as a separate cost for individual developments participating in this agreement, as a condition of approval by DeIDOT or NCC.”²⁶ After paying TID fees, Dermody “shall have no further obligations under this Agreement” except executing the Recoupment Agreement.²⁷

Based on these express provisions, the court below held that a TIS “was specifically waived under the [TID] Agreement.”²⁸

D. Three Years of Consistent Treatment

After the Plan was submitted, the Department spent two years reviewing it for UDC compliance.²⁹ During that period, the Department issued six written Review Reports examining every aspect of the Plan — stormwater, landscaping, parking,

²⁴ A188.

²⁵ A189.

²⁶ A193.

²⁷ A191-92 (TID Agreement, § IV(C)(1)). *See* Mem. Op. at 7.

²⁸ Mem. Op. at 10.

²⁹ *Id.* at 7.

architecture, and transportation.³⁰ Not one of these reports, spanning from September 2021 through January 2023, mentioned any requirement for a TIS.³¹

The Department's only transportation-related conditions were execution of the TID Agreement and obtaining DelDOT approval — both of which occurred.³² DelDOT issued a Letter of No Objection on September 19, 2022, approving the Plan without requiring a traffic study.³³ DelDOT has never withdrawn that approval.³⁴

On November 1, 2022, the Department issued its Conditional Plan Approval.³⁵ The only transportation condition required DelDOT approval, which had already been obtained. No TIS was mentioned. In January 2023, Dermody executed a twenty-two-page Land Development Improvement Agreement establishing a \$4.7 million escrow.³⁶ That agreement detailed numerous requirements, none involving a TIS.

³⁰ Pet. ¶ 40.

³¹ Mem. Op. at 7-8.

³² *Id.*

³³ Mem. Op. at 7. *See* B090.

³⁴ Mem. Op. at 12.

³⁵ B062 *et seq.*

³⁶ *See* B133 *et seq.*

By November 2023, the Department certified the Plan as UDC compliant and transmitted it to County Council for approval.³⁷ The Plan stood one Council vote away from approval.

To get to that point, both the County and Dermody put substantial time, expense, and effort into the review process.³⁸ Across two and a half years, the Department reviewed the Plan through multiple rounds of submissions, consistently treating it as any other development within the SNCC TID, with no requirement for a traffic impact study.³⁹

This treatment was not unique to Dermody. Over sixteen years, the County processed 42 developments within the SNCC TID — including projects larger than Dermody’s, projects generating more traffic, and projects not specifically named in the 2013 Study the County now relies upon — all without requiring a single TIS.⁴⁰ Indeed, the Department has never required a TIS of any project located within the TID.⁴¹

³⁷ Mem. Op. at 7.

³⁸ *Id.*

³⁹ *Id.* at 6 & 13 n.32.

⁴⁰ *Id.* at 13 n.32. See Pet. ¶¶ 169-72.

⁴¹ Mem. Op. at 13 n.32. See also A757-58 (DPML PMSJ Reply Br. at 34-35 (detailing sixteen years of identical treatment across 42 developments, including projects not specifically named in the 2013 Study)).

E. The County’s Pattern of Diversion and Delay

Instead of the required approval, Dermody was thrown into a morass of administrative disfunction and political wrangling that led to this litigation.

Under the UDC, once the Department certifies a plan as compliant and transmits it to Council, the process should be mechanical: Council can either approve the plan or refer it back to the Department with “specific questions relating to [the plan’s] technical compliance” up to two times.⁴² Council cannot vote against a compliant plan.⁴³ The Department must respond to any referral questions within twenty days, with Title 9 imposing a forty-five-day deemed approval deadline.⁴⁴

On December 6, 2023, two Councilmembers referred the Plan back with seven questions, including whether the Plan “is technically compliant with the Southern New Castle County Traffic Improvement District.”⁴⁵ The Department responded the next day. Its answer was unequivocal: the Plan “is compliant with the Southern New Castle County Transportation Improvement District as confirmed by DelDOT.”⁴⁶ In

⁴² Mem. Op. at 7; UDC § 40.31.114(D)(1)(b)).

⁴³ For the first time on appeal, the County characterizes this vote as allowing some exercise of discretion wherein Council is “reviewing” a major land development plan. App. Op. Br. at 10 (*citing* UDC § 40.31.114.D.). That gloss is invented, devoid of support in the record below, and contrary to the text, which limits Council’s role to “consent” only.

⁴⁴ Pet. ¶¶ 34-35, 161.

⁴⁵ Mem. Op. at 10. *See* B115-116.

⁴⁶ Mem. Op. at 10-11. *See* A250-53.

response to a separate question, the Department stated that “Section 40.11.120 of the UDC (requiring a TIS) is not applicable because the plan is located within the SNCC TID and has a trip generation consistent with the TID.”⁴⁷ That was the Department’s stated position as of December 7, 2023.⁴⁸

The same two Councilmembers referred the Plan back a second time on December 27, 2023, with three questions.⁴⁹ None of these questions challenged the Department’s prior answer about the TIS.⁵⁰

Then, as the trial court found, “there followed a long silence.”⁵¹ The Department did not respond for months. Dermody’s counsel made written demand on the County Attorney, noting missed deadlines.⁵² The Department did not respond.

During this period of inaction, three separate traffic analyses confirmed that the Plan presented no intersection problems: one by JMT (DelDOT’s consultant, received January 29, 2024), one by Langan (Dermody’s consultant, delivered

⁴⁷ Mem. Op. at 11 (emphasis in original). *See* A250-53.

⁴⁸ Mem. Op. at 11. *See also* A623-625 (DPML PMSJ Op. Br. at 14-16 (discussing and reproducing the Department’s responses to both referrals)).

⁴⁹ Mem. Op. at 8, 11. *See* B115-116

⁵⁰ Mem. Op. at 8, 11.

⁵¹ *Id.* at 8.

⁵² *See* A727-730 (DPML PMSJ Reply Br. at 4-7 (documenting the chronology of the Department’s delay, including at least four broken promises to respond)).

February 12, 2024), and one by RK&K (the Department’s own consultant, reporting March 11, 2024).⁵³ These “[t]hree different traffic studies found that the Plan had trip generation consistent with the TID” and that “[n]one of these reports concluded that the DPML Plan was not consistent with the TID.”⁵⁴ The Department’s own consultant confirmed the Plan would cause “no issues” with intersection performance.⁵⁵

Also during the silence, on March 25, 2024, DelDOT executed the Recoupment Agreement, establishing Dermody’s TID fee at \$5,953,343.50 and detailing required road improvements — without mentioning or requiring any traffic study.⁵⁶ The County did not object.

F. The County’s About-Face

On April 12, 2024, Dermody filed suit. The purported TIS requirement first appeared not in any administrative document but in the County’s May 17, 2024 answer to Dermody’s petition.⁵⁷

After crafting this litigation position, the Department issued an administrative decision to match. On June 4, 2024 — 159 days after the second referral — the

⁵³ Mem. Op. at 12; Pet. ¶¶ 112-14.

⁵⁴ Mem. Op. at 12.

⁵⁵ See A228 (RK&K report).

⁵⁶ Mem. Op. at 8. See B133 *et seq.*

⁵⁷ Mem. Op. 9.

Department announced that Dermody must submit a TIS.⁵⁸ The trial court found this “reversal of positions” to be “not only factually inexplicable” but “legally indefensible.”⁵⁹ The basis the County offered was that the SNCC TID had not been updated with information from a 2013 traffic analysis study—a failure the County admitted was its own.⁶⁰ The County conceded “there was evident confusion among DelDOT, Dermody (DPML), and various consultants related to the pending but not yet approved TID update.”⁶¹ The trial court held that “[a]n incorrect assumption regarding the TID is not a risk assigned to DPML under the TID or the Agreement” and that the County “cannot retract its waiver of a TIS because it failed to update the TID and made an incorrect assumption.”⁶²

The Department’s June 4 decision also acknowledged the unprecedented nature of what it was doing. It admitted it had never required a TIS of any project within the SNCC TID and characterized Dermody’s situation as a “novel issue for the County.”⁶³ To justify the demand, it invoked a “5% test” appearing nowhere in

⁵⁸ Mem. Op. at 9; A281-86.

⁵⁹ Mem. Op. at 11.

⁶⁰ Mem. Op. at 13; A281-86.

⁶¹ Mem. Op. at 13.

⁶² Mem. Op. at 13. *See also*, A730-733 (DPML PMSJ Reply Br. at 7-10 (demonstrating through DelDOT emails and expert analyses that the 2013 Study did account for the Property’s trip generation)).

⁶³ Mem. Op. at 13 n.32; A281.

the UDC, DeIDOT regulations, or sixteen years of prior practice.⁶⁴ (Notably, the County's 5% test also does not feature in its Opening Brief.)

Throughout this period, DeIDOT never wavered. It did not withdraw its Letter of No Objection. It did not suggest the TID fund could not handle the Plan's impact. It did not require a TIS. "There is nary a whimper from DeIDOT that the TID fund cannot handle the traffic impact from the development."⁶⁵

Dermody submitted a TIS within seven days of the Department's unprecedented demand.⁶⁶ The study confirmed what every prior analysis had shown: no intersections required improvements beyond what the Recoupment Agreement already provided.⁶⁷ The Department, however, refused to review it.⁶⁸

G. The BOA Proceedings

Dermody appealed the Department's TIS decision to the Board of Adjustment out of an abundance of caution, uncertain whether the County might argue the

⁶⁴ Pet. ¶¶ 176, 178; A281-86. *See also* A511-512 (DPML Cert. Op. Br. at 19-20, 32-35 (demonstrating the 5% standard derives from non-UDC sources the BOA lacked jurisdiction to apply and that the Department presented no expert support for the standard)).

⁶⁵ Mem. Op. at 12.

⁶⁶ Pet. ¶ 127.

⁶⁷ Pet. ¶ 132.

⁶⁸ Pet. ¶¶ 128-31.

decision was reviewable only through administrative channels.⁶⁹ The BOA held a hearing on September 12, 2024, just two days after Delaware’s primary elections.⁷⁰

At that hearing, the County presented no expert witnesses and entered no expert reports — not even the RK&K report it had commissioned. Nor did the County offer testimony on its new “5%” test. The only expert testimony and reports in the record supported Dermody’s position that the Plan was consistent with the TID and that no TIS was required.⁷¹ The Department itself had admitted the Board could not interpret the TID Agreement.⁷² The BOA nonetheless ruled in the County’s favor on October 10, 2024, issuing its written decision on January 13, 2025.⁷³ Thereafter, Dermody timely petitioned for *certiorari* review.⁷⁴

H. The Superior Court’s Decision and Subsequent Developments

By stipulation of the parties, the Superior Court focused on two questions: (1) whether the County could condition Dermody’s Plan approval on submission of a

⁶⁹ Mem. Op. at 9.

⁷⁰ See App. Op. Br. at 2.

⁷¹ Mem. Op. at 12. See also, A763-764 (DPML PMSJ Reply Br. at 40-41 (noting the absence of any expert support for the County’s position before the BOA)).

⁷² See B146 *et seq.* See also, A506-511 (DPML Cert. Op. Br. at 14-19 (detailing the BOA’s lack of jurisdiction over contract interpretation under *Richeson* and the UDC)).

⁷³ App. Op. Br. at 2. See A287-320.

⁷⁴ A060 at D.I. 1.

TIS, and (2) whether the Plan was “deemed approved” under Title 9 of the Delaware Code due to the County’s delays.⁷⁵

On the first question, the Superior Court granted partial summary judgment in Dermody’s favor. It held that the TID Agreement unambiguously waived the County’s right to require a TIS; that three traffic studies confirmed trip generation consistent with the TID; and that the County’s reversal was legally indefensible.⁷⁶ On the second question, the trial court declined to rule, finding it unnecessary and expressing concern that a broad ruling could affect other administrative proceedings beyond this dispute.⁷⁷

After the Superior Court’s decision, County Council approved the Plan on January 13, 2026.⁷⁸ The Department then imposed two new transportation-related conditions on accepting the second TIS that Dermody submitted under protest. Dermody has appealed that decision.

⁷⁵ Mem. Op. at 9; A664.

⁷⁶ *Id.* at 10-13.

⁷⁷ *Id.* at 14-15.

⁷⁸ *See* B284 (publication approval).

ARGUMENT

I. THE TID AGREEMENT UNAMBIGUOUSLY WAIVES THE COUNTY'S RIGHT TO REQUIRE A TIS, AND THE TRIAL COURT'S INTERPRETATION IS CORRECT.

A. Question Presented

Does the TID Agreement, which states three times that TID fees are paid in lieu of a TIS, preclude the County from requiring a TIS as a condition of Plan approval?

This argument was addressed directly in Dermody's briefing before the court below, both in the questions presented⁷⁹ and the substance of the argument.⁸⁰

B. Standard and Scope of Review

Dermody agrees with the County that this Court conducts *de novo* review of a trial court's contract interpretation.

C. Merits of Argument

1. The TID Agreement unambiguously waives any requirement that Dermody submit a TIS.

Under Delaware law, contract interpretation begins and ends with the agreement's plain language, which is enforced as written.⁸¹ This is an objective test, asking what a reasonable person in the position of the parties would have understood

⁷⁹ A632 (DPML PMSJ Op. Br. at 23).

⁸⁰ A634 (DPML PMSJ Op. Br. at 25 *et seq.*)

⁸¹ *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

the language to mean.⁸² Sophisticated parties, like the County, are held to their bargains — even if they later wish the agreement had different terms.⁸³

Here, the TID Agreement deploys substitution language three times. The Preamble provides that DelDOT will establish a fund “to help fund the planned transportation improvements in lieu of preparing a traffic impact study.”⁸⁴ Section II mandates that “Property Owners shall not be required to perform traffic impact studies and, in lieu thereof, shall contribute through the SNCC TID Fund.”⁸⁵ And Section V.B states, “No Individual Traffic Study will be required as a separate cost for individual developments participating in this agreement, as a condition of approval by DelDOT or NCC.”⁸⁶ A reasonable person reading these provisions would understand them to mean one thing: TID fees replace traffic studies.

Section V(1)(c) reinforces this conclusion. After paying the TID fee, a property owner “shall have no further obligations under this Agreement.”⁸⁷ The County agreed to this language — no exceptions, no reserved rights, and no

⁸² *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014).

⁸³ *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006). And government entities enjoy no special exemption when those entities enter contracts. *See Div. of Child Support Enf’t v. Smallwood*, 526 A.2d 1353, 1355 (Del. 1987).

⁸⁴ A188.

⁸⁵ A189.

⁸⁶ A193.

⁸⁷ A190-92.

conditions. Reading this clause to permit the County to impose a TIS after fee payment would strip it of all meaning — precisely the result Delaware law prohibits.⁸⁸

The trial court agreed. It found the Agreement “exquisitely clear” and the TIS waiver “likely the *sine qua non* of the TID Agreement in the first place.”⁸⁹ That conclusion is correct and consistent with the TID Agreement’s language.

2. Three years of consistent conduct confirms all the parties understood the TID Agreement as Dermody does.

Delaware courts recognize that how parties perform an agreement is objective evidence of what they understood it to mean.⁹⁰ On the other hand, “neither a party’s legal theory nor a party’s decision to change its legal theory during litigation reveal that party’s intention when it drafted or signed an agreement.”⁹¹

Here, the County’s conduct uniformly reflected the understanding that TID participation replaced traffic studies. The Department issued six review reports over two years. None mentioned a TIS. It issued Conditional Plan Approval with no TIS condition. It certified the Plan as UDC compliant in November 2023. And on

⁸⁸ See *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (rejecting interpretations that render contractual provisions “mere surplusage.”).

⁸⁹ Mem. Op. at 6, 10. See A405 (Oral Argument Transcript) at 41:1-2.

⁹⁰ See *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997).

⁹¹ *AT&T Corp. v. Lillis*, 970 A.2d 166, 174 (Del. 2009).

December 7, 2023, in response to a direct Council question about TID compliance, it stated that “Section 40.11.120 of the UDC (requiring a TIS) is not applicable because the plan is located within the SNCC TID and has a trip generation consistent with the TID.”⁹² And further, the Department reaffirmed the plan as compliant with the UDC.⁹³ That was the Department’s considered position after two years of review — *i.e.*, until it started delaying the Plan and ended up in litigation.

Tellingly, too, DelDOT’s interpretation was identical. It issued a Letter of No Objection without requiring a TIS, never withdrew it, and executed the \$5,953,343.50 Recoupment Agreement two months before the County’s litigation reversal — with no mention of a TIS. Indeed, “[t]here [wa]s nary a whimper from DelDOT that the TID fund cannot handle the traffic impact from the development.”⁹⁴

Nor was this approach unique to Dermody. Over sixteen years, 42 other developments within the SNCC TID — including projects larger than Dermody’s and projects not named in the 2013 Study — proceeded without a TIS.

Against this background, the County’s assertion that its contradictory 2024 interpretation is the only reasonable one is both unsupported and “legally

⁹² Mem. Op. at 11. *See* A250-53.

⁹³ *See* A53.

⁹⁴ Mem. Op. at 12.

indefensible.”⁹⁵ Property owners and developers are entitled to advance notice of the restrictions that affect their property interests, “as well as strict construction of such restrictions.”⁹⁶ After-the-fact reinterpretation like this would defeat both.⁹⁷ Moreover, “[i]n the zoning context, . . . when an ambiguity is present, the interpretation that favors the landowner controls.”⁹⁸

Thus, the County’s unbroken course of conduct reinforces that Dermody’s reading (which the County shared until this litigation) is correct.

3. The TID Agreement reflects a specific bargain about a known development project, not a blanket waiver.

The County attempts to reframe the Memorandum Opinion as creating “a blanket TIS waiver for all projects in all circumstances.”⁹⁹ That mischaracterizes both the TID Agreement and the holding.

The TID Agreement was executed in October 2021 — four months after Dermody submitted the Plan. As a result, the trial court concluded that all parties knew the project would be the LogistiCenter™ warehouse.¹⁰⁰ The County does not

⁹⁵ See Mem. Op. at 11.

⁹⁶ See *Benner v. Council of Narrows Ass’n of Owners*, 2014 WL 7269740, at *8 (Del. Ch. Dec. 22, 2014).

⁹⁷ See *id.*

⁹⁸ *Jack Lingo Asset Mgmt., LLC v. Bd. of Adjustment of City of Rehoboth Beach*, 282 A.3d 29, 33–34 (Del. 2022) (quotation omitted; citing sources).

⁹⁹ App. Op. Br. at 37.

¹⁰⁰ Mem. Op. at 6 n.13.

meaningfully argue otherwise (much less establish that it was plainly wrong). So, contrary to the County’s new framing, this is not a hypothetical future developer springing a surprise use on the County; nor is it a blanket waiver.

4. The TID Agreement implements UDC § 40.11.121(C); it does not supersede the UDC.

The County also argues that TID Agreement cannot override the UDC’s “consistency” requirement.¹⁰¹

But that is a strawman because the TID Agreement does not override § 40.11.121(C). It implements it. Section II of the TID Agreement expressly states it operates “in accordance with” that section. The Department applied § 40.11.121(C) in 2021, found the Plan consistent with the TID, and committed that determination to a binding, recorded contract.

At oral argument, the trial court understood the point. The best reading of “in accordance with” is “arguably just a statement that here’s where we think we have the power to give away the obligation of doing a traffic impact study.”¹⁰² Conversely, the County’s reading — that “in accordance with” creates a perpetual, independently adjudicable condition — would transform an explanatory reference into an escape

¹⁰¹ App. Op. Br. at 40-41.

¹⁰² A405 (Oral Argument Transcript) at 42:15-18.

clause. That reading also contradicts the three operative provisions stating no TIS is required.

The County’s “contract zoning” argument fails for the same reason. TID Agreements are not private deals circumventing zoning. UDC § 40.11.310 expressly authorizes them, and they implement the UDC’s own alternative compliance mechanism.¹⁰³

Again, the County’s conduct undercuts its position shift. The County has participated in the TID system for more than sixteen years. As shown at oral argument, it strains credulity for the County to assert that it has executed, recorded, and administered illegal “form” contracts for years.¹⁰⁴

¹⁰³ The County’s position that it can require a TIS within the SNCC TID faces an additional statutory bar that the trial court did not reach. Under UDC § 40.11.310(C)(1), when the County adopts a Land Use and Transportation Plan (“LUTP”) for a TID, “the traffic study requirements established in Sections 40.11.110, 40.11.120 and 40.11.121 do not apply.” The County adopted an LUTP for the SNCC TID and posted it on its website. *See* Pet. ¶¶ 61-62; B007 *et seq.* The Department defended the Plan as LUTP-compliant in its December 7, 2023 response to Council’s first referral, *see* A250-253, and the County has never required a TIS from any developer within the SNCC TID. Because the TID Agreement independently resolves this dispute, Dermody raises the LUTP as an alternative ground for affirmance should this Court reach the issue. *See* A487 (DPML Cert. Op. Br. at 29-32)).

¹⁰⁴ *See* A405 (Oral Argument Transcript) at 43:14-19.

5. The County’s “Superfluous Language” argument reads the TID Agreement backward.

The County claims the trial court’s reading renders the references to § 40.11.121(C) and the 2013 Study “meaningless and superfluous.”¹⁰⁵ The opposite is true.

Those references are explanatory predicates. They describe why TID participation substitutes for a TIS: area-wide planning achieves the consistency § 40.11.121(C) requires. Thus, they set the stage for the waiver rather than condition it.

Another problem with the County’s position is that recitals may “provide background [or] can offer insight into the intent of the parties[,]” they “are not substantive provisions”¹⁰⁶ Or, as the trial court observed the “whereas clauses” in the TID Agreement “don’t bind a party to do anything.”¹⁰⁷

Last, under the County’s reading, the three “in lieu of” provisions and the “no further obligations” clause would all become meaningless. And that is far more surplusage than the County claims Dermody’s reading creates.

¹⁰⁵ App. Op. Br. at 43-46.

¹⁰⁶ *Urdan v. WR Capital Partners, LLC*, 2019 WL 3891720, at *15 (Del. Ch. Aug. 19, 2019), *aff’d*, 244 A.3d 668 (Del. 2020).

¹⁰⁷ See A405 (Oral Argument Transcript) at 40:15-18.

6. The County’s remaining arguments are waived, meritless, or both.

The County’s “Catch-22” argument — that Section VI.A obligated it to sign TID Agreements and therefore signing cannot constitute a waiver¹⁰⁸ — was not raised below and is waived.¹⁰⁹ Even on the merits, it proves our point. If the County must sign TID Agreements containing “in lieu of” language with every developer in the TID, then the TIS waiver is a feature of the system, not a defect. The County built this architecture.¹¹⁰

Similarly, The County’s argument that DelDOT’s obligations are limited to nine Exhibit B projects¹¹¹ is a dispute between the County and DelDOT about their respective obligations. It does not give the County the right to breach its contract with Dermody. The County’s proper path, if it believes DelDOT’s planning is insufficient, is to take that up with DelDOT (which the County has never done). But the County cannot simply use that as an excuse to breach the TID Agreement with, or to impose new conditions on, a developer who performed its end of the bargain.

¹⁰⁸ App. Op. Br. at 38-40.

¹⁰⁹ See Supr. Ct. R. 8.

¹¹⁰ Separately, requiring developers to pay TID fees *and* conduct a TIS *and* perform any improvements the TIS identifies raises concerns under *Sheetz v. County of El Dorado, Cal.*, 601 U.S. 267 (2024) (traffic impact fees subject to the rough proportionality test under the Takings Clause). The County did not object to the TID fee assessment, and it cannot now have it both ways.

¹¹¹ App. Op. Br. at 41-43.

Lastly, the County’s “applicant bears the burden” argument mischaracterizes the trial court’s holding.¹¹² The court below did not shift the burden of code compliance. Instead, it held the County to its contract and found that the County’s own “incorrect assumption” about the TID update was not a risk assigned to Dermody.¹¹³

In sum, Dermody satisfied every requirement the County identified for three years. And the trial court correctly rejected Dermody’s attempt to retroactively and unilaterally impose new requirements on Dermody and then blame Dermody for noncompliance.

¹¹² *See id.* at 35.

¹¹³ *See Mem. Op.* at 13.

II. THE TRIAL COURT PROPERLY RESOLVED THIS DISPUTE AS A CONTRACT QUESTION; IT DID NOT REVIEW, REPLACE, OR DISREGARD THE BOA’S FINDINGS.

A. Question Presented

Did the trial court err by interpreting the TID Agreement as a matter of contract law rather than deferring to the BOA’s factual finding on TID consistency?

This issue was raised at A549-50.

B. Standard and Scope of Review

The County asks this Court to apply a substantial evidence standard that is deferential to the BOA.¹¹⁴ But the trial court was not reviewing an administrative finding directly. Rather, it was interpreting a contract — the TID Agreement — as a threshold issue and as agreed by the parties.¹¹⁵ So the substantial evidence standard does not apply. As stated above, contract interpretation is reviewed *de novo*.

C. Merits of Argument

1. The BOA Decision is immaterial because the TID Agreement precluded the decision that lead to the BOA appeal.

The sequence of events matters. The County first asserted a TIS requirement in its May 17, 2024 litigation pleading.¹¹⁶ The Department then issued a self-serving, administrative decision on June 4, 2024.¹¹⁷ Dermody appealed that decision to the

¹¹⁴ App. Op. Br. at 17.

¹¹⁵ *See id.* at 2-3.

¹¹⁶ Mem. Op. at 9 & n.22; Pet. ¶ 10.

¹¹⁷ Mem. Op. at 9; A281-86.

BOA out of caution (and fear of gameship).¹¹⁸ The BOA upheld the Department's decision,¹¹⁹ leading to Dermody's *certiorari* petition.

The trial court then held — correctly, for the reasons stated in Argument I — that the TID Agreement barred the County from requiring a TIS.¹²⁰ That holding did not review or replace the BOA's factual findings. Rather, it nullified the predicate for them.¹²¹

Simply put, because the County lacked the contractual authority to require a TIS in the first place, then the Department's June 4 decision demanding one breached the contract. The BOA's decision upholding that improper demand is a nullity. There is nothing to defer to because there was nothing lawful to uphold.

The County's own counsel conceded this logic at oral argument. When the court below asked whether the BOA and Section 1309 issues survive if the contract

¹¹⁸ Mem. Op. at 9.

¹¹⁹ A287-320.

¹²⁰ Mem. Op. at 10.

¹²¹ See *New Cingular Wireless PCS v. Sussex Cnty. Bd. of Adjustment*, 65 A.3d 607, 609 (Del. 2013) (“A Board’s decision based upon the proper legal standard is a prerequisite to the court’s performance of a review to determine the existence of substantial evidence.”) (quoting *Hellings v. City of Lewes Bd. of Adjustment*, 734 A.2d 641, 1999 WL 624114, at *2 (Del.1999)).

bars a TIS, the County’s counsel answered: “No.”¹²² The County’s counsel agreed that if the trial court found the contract enforceable, “that’s the last remaining condition and the department would then have to then move it forward to [C]ounty [C]ouncil.”¹²³ The County cannot now demand deference to a proceeding its own counsel told the trial court would be mooted by an adverse contract ruling.

Separately, to the extent the BOA reached legal conclusions — about what § 40.11.121(C) requires, what “consistency” means, or whether the Department had authority to impose a TIS — those conclusions receive no deference from any court. Delaware law is settled on this point. Courts review questions of statutory interpretation *de novo* and owe no deference to administrative agencies on legal questions.¹²⁴ As this Court has observed, “it would be anomalous for this Court to accord a higher level of deference to legal rulings of an administrative agency than that applied to trial courts subject to our appellate jurisdiction.”¹²⁵ The BOA’s interpretation of the UDC, its application of (or refusal to apply) § 40.11.310, and its conclusion that the Department could require a TIS are all legal determinations

¹²² See A405 (Oral Argument Transcript) at 53:15-19.

¹²³ *Id.* at 53:20-22.

¹²⁴ *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382-83 (Del. 1999).

¹²⁵ *Id.* at 381.

subject to plenary review. The substantial evidence standard protects factual findings, not legal conclusions dressed as facts.

Thus, the County's argument fails.

2. The BOA is also owed no deference because the BOA lacks jurisdiction to adjudicate contractual matters, like those attendant to the TID Agreement.

The County's argument also runs headfirst into this Court's decision in *New Castle County v. Richeson*.¹²⁶ There, this Court held that administrative boards lack jurisdiction over contracts and deed restrictions.¹²⁷

The UDC also confirms this limit. The BOA's jurisdiction is confined to “[a]ppeals in zoning matters where error is alleged in any order, requirement, decision or determination made by an administrative officer or agency in the enforcement of any zoning ordinance, code, regulation or map.”¹²⁸

The Department itself admitted the BOA could not interpret the TID Agreement.¹²⁹ The BOA's own decision stated it “need not interpret the Recoupment Agreement to resolve this appeal.”¹³⁰ Yet the BOA's analysis necessarily required

¹²⁶ 347 A.2d 135 (Del. 1975).

¹²⁷ *Id.* at 136-37.

¹²⁸ UDC § 40.30.320(A).

¹²⁹ *See* B149 (County's September 5, 2024 submission to the BOA).

¹³⁰ A292.

determining whether the TID Agreement’s waiver applied — a contract question it had no jurisdiction to resolve.¹³¹

Moreover, as other states have recognized, allowing a board, like the BOA, to make findings to bind courts on contract questions would create structural problems. Government bodies (like the County) could route contract disputes through their own boards (like the BOA) — whose members the body selects — and obtain deferential review of self-serving findings.¹³²

Such a result is both unworkable and contrary to law settled long ago in *DiPasquale*.

3. The County’s collateral estoppel argument was not raised below and fails on the merits.

The County argues for the first time on appeal that the BOA’s factual finding should bind the trial court under the four-part collateral estoppel test.¹³³

This argument was also never presented to the trial court. Below, at most, the County argued that the consistency question was “outside of the scope of these

¹³¹ See also A591-596 (DPML Cert. Op. Br. at 14-19) (addressing the matter in greater detail).

¹³² See, e.g., *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 612 (9th Cir. 2020) (refusing to defer to city’s regulatory findings in a contract dispute because such deference “would effectively create an escape hatch for the government to walk away from contractual obligations if political winds shift”).]

¹³³ See App. Op. Br. at 25-28.

Cross-Motions for Partial Summary Judgment.”¹³⁴ The County never invoked collateral estoppel by name, never cited the governing test, and never argued the BOA’s finding was legally binding. The argument is waived.

The argument also fails on the merits. Collateral estoppel requires, among other things, a valid, final judgment from a tribunal with jurisdiction.¹³⁵ But, here, the contract claim itself — the dispositive question — was never properly before the BOA. The County’s attempt to require a TIS was void from the outset, and past that, BOA lacked jurisdiction over the contract question.¹³⁶ A body without jurisdiction cannot produce a preclusive finding. That proceeding involved a different question, different standard, and different tribunal.

Estoppel would not apply, even if the County had properly raised it.

4. The trial court did not make a “sua sponte” factual finding in rejected the County’s defense.

The County also complains the trial court “rendered its own finding” on TID consistency.¹³⁷ This is another strawman that mischaracterizes the decision below.

¹³⁴ See A793-94.

¹³⁵ *Ingram v. Thorpe*, 2014 WL 4805829, at *3 (Del. Sept. 26, 2014).

¹³⁶ *Richeson*, 347 A.2d at 136-37.

¹³⁷ App. Op. Br. at 24, 30.

The trial court’s holding was that the TID Agreement waived the TIS requirement.¹³⁸ In reaching that conclusion, the court below considered the County’s defense that an “incorrect assumption” about the TID update justified the reversal.¹³⁹ The trial court observed that three traffic studies confirmed consistency, that DelDOT never withdrew its approval, and that the Department itself had certified consistency in December 2023.¹⁴⁰

These observations served a specific analytical purpose: demonstrating that the County’s justification for breaking the contract failed on the County’s own terms. The Memorandum Opinion’s framing and structure make this clear. Section I(1) of the Analysis held the TID Agreement controls. Section I(2) asked “on what basis does the Department justify its reversal now?” and explained why the County cannot escape it.¹⁴¹ The traffic-study references appear in Section I(2), in the course of rejecting the County’s defense. The observations were not, as the County suggests, a freestanding factual determination about the County’s made-up consistency test.¹⁴²

¹³⁸ Mem. Op. at 10.

¹³⁹ *Id.* at 13.

¹⁴⁰ Mem. Op. at 11-12.

¹⁴¹ *Id.* at 12.

¹⁴² Below, and before the BOA, the Department tried to justify its TIS demand through a “5% test” created solely for, and applied only to, Dermody, its Plan and its Property, after Dermody sued. Under this test, if a development’s projected trips exceeded by more than 5% the traffic volume a 2013 study estimated for adjacent roads, the Department claimed authority to require a TIS. *See* A283. This standard

In short, the parts of the Memorandum Opinion to which the County objects are a rejection of its defense, not substitution of administrative judgment.

5. The County’s Rule 56(h) argument is materially reframed from below and meritless

Trying to characterize the court below’s decision as factual, rather than legal, the County relatedly argues that the court below violated Rule 56(h) by resolving a disputed material fact on summary judgment.¹⁴³

That is a different argument than what was presented to the trial court. Below, the County cited Rule 56(h) only in its standard-of-review section and never developed this argument with the supporting case law it now deploys for the first time on appeal.

Regardless, the argument fails. The facts the trial court cited — three traffic studies, DelDOT’s unwavering approval, the Department’s December 2023 certification, the Recoupment Agreement executed without a TIS — were undisputed. The County does not dispute that these events occurred or that the

appears nowhere in the UDC. It had never been applied to any development in the SNCC TID’s sixteen-year history. And, worse of all, because the County also asserts that the 2013 traffic volume for the Property was zero projected trips, the County essentially constructed a test that would cause the Plan to fail. The County’s Opening Brief implicitly recognizes the problems with this test, preferring to mention “consistency” without acknowledging the actual test the County invented. The County’s abandonment of its own analytical framework effectively concedes it had no true framework at all.

¹⁴³ App. Op. Br. at 28-30.

conclusions were reached. What the County really disputes is whether it can use its post-hoc “consistency” argument to unbind itself from the TID Agreement. That is a question of contract, not a factual dispute precluding summary judgment.

The County’s argument also distorts the trial court’s analysis and holding. The trial court pointed to the traffic studies and DeIDOT approval to emphasize the magnitude of the County’s reversal, not to directly issue findings about consistency. That was the court below’s whole point: The County agreed that the Plan was consistent when it entered the TID Agreement months after the Plan was filed, and the County’s back-tracking was “legally indefensible.”¹⁴⁴ The Court also acknowledged that, even if the County’s new position on consistency was correct, the County would still lose because the County, not Dermody, must bear the burden of the change of position.¹⁴⁵

In sum, the parties stipulated to resolve the contract question on cross-motions.¹⁴⁶ The trial court decided exactly what that stipulation contemplated, and this Court should affirm.

¹⁴⁴ Mem. Op. at 12.

¹⁴⁵ *Id.* at 13.

¹⁴⁶ *Id.* at 9-10. *See* App. Op. Br. at 2-3; A664.

6. Even under a substantial evidence standard, the record supports the trial court.

Again, the question before the court below, and the question decided by the court below, was a contract question. The trial court answered that question correctly when it concluded that, under the TID Agreement, the County could not require Dermody to perform a TIS as a condition of Plan approval.

Using the County's (inapplicable) "substantial evidence" standard would reach the same result. Initially, the substantial evidence standard has no application to the summary judgment briefing in the consolidated Chancery-mandamus action; it only applies to the *certiorari* action. That alone further undermines the standard's utility.

In the context of the *certiorari* action, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁴⁷ That standard is deferential, but not limitless. "[O]n appeal, a reviewing court must ensure that the 'evidence is legally adequate to support the

¹⁴⁷ *Snyder v. New Castle Cty.*, 135 A.3d 763, 2 (Del. 2016) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

Board’s factual findings.”¹⁴⁸ For example, substituting opinion for unrefuted expert testimony, unchallenged by cross-examination, is error.¹⁴⁹

Start with the evidence. The County presented no witnesses at the BOA hearing. It entered no expert reports — not even the RK&K report it had commissioned, which found “no issues” with intersection performance.¹⁵⁰ Every expert in the record — JMT, Langan, RK&K, and DelDOT — confirmed the Plan’s consistency.¹⁵¹ The County’s position rests entirely on its counsel’s reinterpretation of reports whose authors reached the opposite conclusion. No reasonable mind would not accept that as adequate.

This is especially true given the County’s own prior determinations. On December 7, 2023, the Department told County Council that the Plan was compliant, did not require a TIS, and posed no traffic issues.¹⁵² That determination came after two years of review, six written reports, and Conditional Plan Approval — none of which mentioned a TIS. The County also acknowledge to the BOA that 42 other

¹⁴⁸ *New Cingular Wireless PCS*, 65 A.3d at 614 (Strine, C., concurring) (quoting *Weiss v. Del. Dep’t of Health & Soc. Servs.*, 2003 WL 21769007, at *3 (Del. Super. July 30, 2003)).

¹⁴⁹ *Cf. Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008).

¹⁵⁰ *See* A228 (RK&K report).

¹⁵¹ Mem. Op. at 12.

¹⁵² *Id.* at 11. *See* A250-53.

developments in the SNCC TID proceeded without a TIS requirement.¹⁵³ And the County never requested a TIS of a property in the SNCC TID before this one.¹⁵⁴

Consider, too, the standard that the County invented, then abandoned. As explained above, the 5% test that formed the sole analytical basis for the Department's reversal (and thus, the BOA's decision) has been abandoned on appeal. The County now argues for "TID-Consistent Traffic Impact" without defining what that means, how a traffic engineer would measure it, or what standard replaces the one it discarded. Even under a substantial evidence standard, this Court should not reverse a trial court holding based on an undefined standard the County itself does not meaningfully defend.

Last, examine the factual premise. The County's core claim is that the 2013 Study "did not account for traffic from development of the Dermody Property."¹⁵⁵ The record contradicts this,¹⁵⁶ and the County cannot manufacture "substantial evidence" by repeating a falsity it wishes were true. Time and again, DeIDOT confirmed that the 2013 Study did include the Dermody Property, and every expert who examined the question agreed.¹⁵⁷

¹⁵³ Mem. Op. at 13 n.32.

¹⁵⁴ *See id.*

¹⁵⁵ App. Op. Br. at 9.

¹⁵⁶ *See* A730-734 (DPML PMSJ Reply Br. at 7-10).

¹⁵⁷ *See id.* *See also*, Mem. Op. at 12.

CONCLUSION

For all of these reasons, Appellee DPML Jamison Corner, LLC respectfully requests that the Court affirm the decisions of the Court of Chancery in C.A. No. 2024-0403-CEB (Consolidated) and the Superior Court in C.A. No. N25A-02-004 CEB.

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