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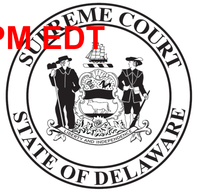

IN THE

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 REPLY BRIEF

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SUMMARY OF ARGUMENT

1. The trial court erred when it reached its own factual findings to reverse the BOA Decision instead of evaluating whether the BOA Decision was supported by substantial evidence, as required under well-settled Delaware law. The trial court then further erred when it relied upon its own factual conclusions—which lack support in the record—to also reject the County's application of the TID Agreement, when questions of fact were not before the trial court for a determination as part of the contract legal issue presented for evaluation on cross-motions for partial summary judgment. This constitutes reversible error and the trial court's Orders on both the writ of certiorari and partial summary judgment should be reversed.

2. Regarding the writ of certiorari Order, Dermody concedes that the trial court never reviewed the BOA Decision (and in turn did not apply the proper substantial evidence standard) but claims that the trial court's reversal of the BOA Decision was nevertheless appropriate because the TID Agreement "nullified" the BOA Appeal. Dermody is wrong. Under Delaware law, principles of contract interpretation do not govern application of zoning requirements. These are two separate and distinct legal questions, subject to separate and distinct legal standards. The BOA Appeal concerned interpretation and application of UDC § 40.11.121.C—not the TID Agreement—and is entitled to legal review pursuant to 9 *Del. C.* §1314 and the substantial evidence appellate standard. Because a contract cannot nullify

the zoning code, the trial court's interpretation of the TID Agreement does not—as a matter of law—negate the need to separately review the BOA Decision that was properly before the trial court on appeal. The trial court's failure to apply the proper appellate standard prior to reversing the BOA Decision was reversible error.

3. Regarding the contract issue presented on cross-motions for partial summary judgment, Dermody's claim that its TID Agreement was a one-off TIS waiver granted specifically for Dermody's project based on a determination that Dermody's project proposed TID-Consistent Traffic Impact is belied by the plain language of the TID Agreement, specifically Section VI.A (which obligates the County to sign a TID Agreement for every project proposed within the geographic boundaries of the Southern New Castle County TID). However, assuming, *arguendo*, that Dermody is correct in how it now frames the TID Agreement, then at the very least, whether there was a mutual mistake regarding TID-Consistent Traffic Impact—as a factual matter—becomes relevant. If there was a mutual mistake when the TID Agreement was signed, then Dermody's TID Agreement should be reformed accordingly under Delaware law.[1] Ultimately, Dermody's

[1] Reformation of contract due to mutual mistake is not a new theory raised by the County in this Reply Brief. The County's position is that Section VI.A of the TID Agreement obligates the County to execute a TID Agreement with all property owners within the geographic boundaries of the TID. There is no specific determination of TID-Consistent Traffic Impact made prior to signing a TID Agreement. However, Dermody asserts in its Answering Brief that such a specific determination was made and that the County must be held to it. For the sake of a

struggle in articulating how the TID Agreement somehow "implements" UDC § 40.11.121.C where the record establishes that Dermody's project does not comply with UDC § 40.11.121.C reinforces the County's point: Dermody is wrong in how it interprets the TID Agreement. The proper interpretation of the TID Agreement is that it implements UDC § 40.11.121.C by limiting a TIS waiver to only those development projects proposing TID-Consistent Traffic Impact. If a project does not propose TID-Consistent Traffic Impact, it is not eligible for a TIS waiver under the TID Agreement. To conclude otherwise would improperly render meaningless the language within the TID Agreement qualifying a TIS waiver based upon consistency with the area-wide study and planned improvements. The trial court sought to reconcile this conflict by simply finding—as a matter of fact—that Dermody's project proposed TID-Consistent Traffic Impact and thus did not violate UDC § 40.11.121.C after all. This errant finding on a material fact led to an incorrect interpretation and application of the TID Agreement and warrants reversal of the trial court's Order on partial summary judgment.

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complete response, the County asserts here that even if Dermody's framing were correct (which it is not) then whether there was TID-Consistent Traffic Impact would form the essence of the contract, and the lack of consistent traffic impact would constitute a mutual mistake warranting reformation of the TID Agreement. Either way, reversal is justified.

4. Dermody's attempt to characterize the trial court's decision as a pure legal conclusion lacks merit. It is not possible to separate the trial court's improper factual findings from its legal conclusions.

5. By ignoring the BOA Decision and the original material within the record relied upon by the BOA, Dermody, like the trial court below, failed to properly apply the substantial evidence standard.

6. Dermody takes liberties in framing the record, law, procedural posture, and parties' positions. For example, Dermody refers in its Answering Brief to its Petition to claim as a "fact" that a "TIS" was performed confirming no failing traffic intersections.[2] But Dermody fails to note the Department's position that this purported "TIS" never followed the Code-required procedure and did not qualify a as a TIS.[3] Nor does Dermody acknowledge that the actual TIS it performed later following the Code-required procedure did indeed identify failing intersections.[4] Moreover, contrary to Dermody's strained inference in its Answering Brief, the conclusions from the three traffic consultants were certainly not "undisputed."[5] And while probably just an error in the timeline, the Department's transportation-related conditions were identified on March 6, 2025 in response to Dermody's above-

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[2] Dermody's Answering Brief ("Ans.Br.") 16.

[3] *See* A693-94.

[4] *See* County Opening Brief ("Op.Br.") 15; *see also*, A121.

[5] Ans.Br. 36; *but see* Op.Br. 12, 21-22.

referenced eventually Code-compliant TIS, not after January 13, 2026.[6] The County submits that the record speaks for itself and cites original material in the record to support its factual assertions so the Court may draw its own conclusions.[7]

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[6] *See* Ans.Br. 18; *but see*, A401-04; *see also*, Op.Br. 15.

[7] Dermody introduced a Notice of Publication in its Appendix (B284) that was not before the trial court and failed to properly describe County Council's January 13, 2026 approval as a **conditional** approval subject to this pending appeal. *See* AR1 (noting, "As Mr. Culver's memorandum states, if the pending Supreme Court appeal relating to the application is decided in favor of New Castle County, approval of the major land development plan proposal would be rescinded until such time as all applicable code requirements are met for the application."). The present appeal was filed well before any statute of repose would apply, and if Dermody makes an argument in the future that any decision issued by this Court on this appeal would be a mere nullity if issued after April 16, 2026, such argument should be rejected.

ARGUMENT

I. A CONTRACT CANNOT NULLIFY THE COUNTY ZONING CODE.

The case before the trial court involved three discrete issues. First, is Dermody's project eligible for a TIS waiver under UDC § 40.11.121.C (a question of County zoning code interpretation)? Second, does Dermody's TID Agreement bar the County from requiring a TIS, regardless of UDC § 40.11.121.C (a question of contract interpretation)? Third, was Dermody's project "deemed approved" under 9 *Del. C.* §1309 (a question of statutory interpretation)?[8]

On the first issue, in New Castle County, questions of zoning code interpretation begin with a Department determination that is thereafter appealable to the New Castle County Board of Adjustment.[9] There is then a statutory right of appeal to the Superior Court, subject to the well-settled standard of review requiring *de novo* review of legal questions and *substantial evidence* review of factual determinations.[10] That process occurred here. The Department issued its zoning interpretation on June 4, 2024 (the Department TIS Determination).[11] Dermody then appealed that zoning interpretation to the Board of Adjustment, which filed its

[8] This question of statutory interpretation is not an issue in the present appeal but is highlighted here for broader context.
[9] *See* UDC §40.30.320 and 9 *Del. C.* §1313(a)(1).
[10] 9 *Del. C.* §1314.
[11] A281-86.

written decision on January 13, 2025.[12] This BOA Decision on the Department's zoning interpretation was then appealed to the trial court, and is the decision that the trial court reversed on November 3, 2025.[13]

The BOA did not consider or issue a decision on the second issue (the contract interpretation question).[14] Instead, that contract issue—along with the third issue—was presented to the trial court through separate but concurrent briefing on partial summary judgment. Dermody's attempt to reframe the procedural posture of this case to "nullify" the zoning code interpretation issue[15] is belied by the record and is legally incorrect.

First, Dermody incorrectly claims that the County conceded during oral argument that both the BOA and Title 9 issues did not survive if the contract question barred a TIS.[16] The actual exchange during oral argument concerned only the relevance of the Title 9 statutory interpretation issue if the Court concluded that "a traffic impact study is not required, period, hard stop . . . ."[17] If the entire case

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[12] A287-320.

[13] Appeal Exhibit A.

[14] *See* A292 (". . . the Board finds that it need not interpret the Recoupment Agreement to resolve this appeal . . . . The Decision before the Board is whether the Department properly found that a TIS waiver was not warranted under UDC § 40.11.121.C. Thus, the Board is only focused on the Department's interpretation and application of the UDC."); *see also*, A537.

[15] Ans.Br. 30-31.

[16] Ans.Br. 31.

[17] A456.

depended only on the contract interpretation question, there would be no practical purpose to concurrently brief the BOA Appeal. That was not the procedural posture of this case or the parties' understanding of the same. Indeed, the trial court made no mention of the contract issue nullifying the zoning interpretation issue in its written decision. To the contrary, the trial court addressed the zoning interpretation issue directly by interpretating UDC § 40.11.121.C and making factual findings regarding TID-Consistent Traffic Impact (i.e., whether Dermody's project proposes traffic impact consistent with the traffic impact anticipated for the Southern New Castle County TID).[18]

Second, as a matter of law, and as addressed in the County's Opening Brief, a contract cannot nullify the zoning code.[19] Indeed, the Court of Chancery held in *Hartman v. Buckson* that, "[i]t 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 contracts**."[20] Thus, Dermody's assertion that the trial

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[18] Ct.Op. 11-12.

[19] *See* Op.Br. 40; *see also*, *Hartman v. Buckson*, 467 A.2d 694, 699-700 (Del. 1983) (noting that zoning is a legislative function exercised under the County's police power for the public welfare that cannot be surrendered through privately bargained agreements).

[20] 467 A.2d at 699-700 (quoting *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131 (N.J. 1952)) (emphasis supplied); *see also Cain v. Sussex Cnty. Council*, 2020 WL 2122775, at *19 (Del. Ch. May 4, 2020); *Port Penn Hunting Lodge Ass'n v. Meyer*, 2019 WL 2077600, at *7 (Del. Ch. May 19, 2019), *aff'd,* 222 A.3d 1044 (Del. 2019) (Table).

court's interpretation of Dermody's TID Agreement (based on principles of contract) "nullifies" the BOA Decision interpreting and applying the County zoning code is contrary to established Delaware law.

Ultimately, the conclusions on the zoning code interpretation and contract interpretation issues are not mutually exclusive. These are two distinct issues that warrant two distinct conclusions. That is why the parties briefed these two issues—in two non-consolidated matters—separately. Interpretation of the County zoning code is a separate question that was properly presented to—and addressed by—the BOA and is entitled to an appellate review applying the well-established substantial evidence standard.

Dermody's concession that the trial court did not review the BOA's findings[21] illuminates the reversible error. The trial court's Order reversing the BOA Decision should itself be reversed.

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[21] Ans.Br. 29-30.

II. THE TID AGREEMENT IS NOT—AND CANNOT BE—A BLANKET TIS WAIVER FOR ALL PROJECTS, OF ANY SIZE TRAFFIC IMPACT, IN PERPETUITY.

The County addressed why the TID Agreement does not provide a blanket TIS waiver for all projects, of any size traffic impact, in perpetuity in its Opening Brief.[22] Dermody does not defend the TID Agreement as a blanket waiver, but instead asserts that Dermody's TID Agreement was a Dermody-specific agreement executed after the Department concluded that Dermody's project proposed TID-Consistent Traffic Impact.[23] Restated, Dermody's position on the TID Agreement appears to boil down to the following: even if Dermody's project does not propose TID-Consistent Traffic Impact, and even if TID-Consistent Traffic Impact is required to qualify for a waiver under the zoning code, that is not Dermody's problem because the County made a mistake when it signed Dermody's TID Agreement in 2021. Dermody's position is wrong for at least two reasons.

First, Dermody's position is contrary to the plain language of the TID Agreement. As addressed in the County's Opening Brief, Section VI.A of the TID Agreement obligates the County to execute a TID Agreement without first

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[22] Op. Br. 37-46.

[23] Ans.Br. 23-24 ("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"); *see also*, Ans.Br. 37 ("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.'").

examining whether there is TID-Consistent Traffic Impact.[24] There is no special determination of traffic impact required before signing a TID Agreement. Contrary to Dermody's claims otherwise,[25] the requirement of Section VI.A. was raised by the County in the proceedings below.[26]

Second, Dermody incorrectly frames the TID Agreement as requiring a mutual understanding that Dermody's project proposed TID-Consistent Traffic Impact prior to signature (to "implement" UDC § 40.11.121.C as Dermody asserts[27]). Dermody then argues (based on this incorrect premise) that even a mistake would not support the County's interpretation of the TID Agreement.[28] Dermody is wrong. Had the TID Agreement required a specific determination on the issue of TID-Consistent Traffic Impact prior to execution, then any mistake as to the lack of TID-Consistent Traffic Impact would have been a mutual mistake. And contrary to Dermody's assertions otherwise,[29] such a mutual mistake would require reformation of Dermody's TID Agreement under Delaware law.[30]

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[24] Op.Br. 38-40.

[25] Ans.Br. 27.

[26] A709.

[27] Ans.Br. 4, 23-25.

[28] Ans.Br. 28 ("Instead, [the trial court] 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.").

[29] *See* Ans.Br. 28.

[30] *See American Bottling Co. v. Crescent/Mach I Partners, L.P.*, 2009 WL 3290729, at *2 (Del. Super. Sept. 30, 2009).

Delaware follows the Restatement (Second) of Contracts on questions of mutual mistake.[31] The Restatement outlines the following test to establish mutual mistake: "(1) both parties were mistaken as to a basic assumption; (2) the mistake materially affects the agreed-upon exchange of performances; and (3) the party adversely affected did not assume the risk of the mistake."[32] "The mistake 'must be as to a fact which enters into, and forms the very basis of, the contract; it must be of essence of the agreement, the *sine qua non* or, as it is sometimes expressed, the efficient cause of the agreement."[33]

If the TID Agreement were a specific implementation of UDC § 40.11.121.C, then whether Dermody's project proposes TID-Consistent Traffic Impact as required by UDC § 40.11.121.C would indeed be the essence of the agreement. Dermody, as the applicant, must present a Code-compliant Plan, and bears the burden of risk where its application falls short.[34] Under Dermody's theory, if the County does not catch **Dermody's** mistake in pursuing approval for a non-Code-compliant Plan prior to signing a TID Agreement implementing the County zoning code, the County then loses the ability to thereafter enforce its zoning code. That position is unreasonable and wrong. Indeed, it is well-established Delaware law that it is the property owner's

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31 *Id.*

32 *Id.* (citing Restatement (Second) of Contracts § 152: Mistake (2009)).

33 *Id.* (citation omitted).

34 *See* Op.Br. 34-35.

responsibility to know the regulations applicable to its land, even if a government actor provides an incorrect interpretation of the applicable municipal codes.[35] Even if Dermody's TID Agreement were a one-off Agreement signed following mutual determination that Dermody's project complied with the requirements of UDC § 40.11.121.C, the mutual error regarding compliance with UDC § 40.11.121.C undermines Dermody's claimed TIS waiver under the doctrine of mutual mistake.

Moreover, if execution of Dermody's TID Agreement required a preliminary determination that Dermody's project proposed TID-Consistent Traffic Impact—as Dermody now asserts—then the factual question of whether there was TID-Consistent Traffic Impact becomes critical to the contract question, despite Dermody's claims otherwise.[36] And regarding the merits of that factual question,

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[35] *Beiser v. Bd. of Adjustment of Town of Dewey Beach,* 1991 WL 236966, at *5 (Del. Super. Oct. 25, 1991) ("the threshold question is whose responsibility is it to know the zoning regulations and how they affect the property in question. In Delaware, it is the property owner's responsibility."); *see also Lowe's Home Ctrs., Inc. v. Old Meadow Props., L.L.C.*, 2001 WL 1729123, at *5 (Del. Super. Nov. 30, 2001) (same); *Voshell v. Bd. of Adjustment of Kent Cnty*., 1995 WL 656802, at *3 (Del. Super. Sept. 5, 1995); *Cheng v. D'Onofrio*, 1994 WL 560866, at *3 (Del. Ch. Sept. 20, 1994); *New Castle Cnty. v. Pike Creek Rec. Services Inc.*, 82 A.3d 731, 765 n.240 (Del. Ch. 2013), *aff'd,* 105 A.3d 990 (Del. 2014) (Table) (citing *Beiser v. Bd. of Adjustment of Town of Dewey Beach,* 1991 WL 236966, at *5 (Del. Super. Oct. 25, 1991) (an invalid permit is invalid ab initio); *Miller v. Bd. of Adjustment of Town of Dewey Beach,* 521 A.2d 642, 647 (Del. Super. 1986) ("A permit issued illegally, or in violation of the law, or under a mistake of fact, does not confer a vested right upon the person to whom it is issued.").

[36] Ans.Br. 35 ("The [trial court's] observations were not, as the County suggests, a freestanding factual determination about the County's made-up consistency test.");

had the trial court applied the proper appellate standard of review in the BOA Appeal, then it would have upheld the BOA's factual finding that Dermody's project did **not** propose TID-Consistent Traffic Impact. That finding would then be binding on the parties under principles of collateral estoppel, as addressed in the County's Opening Brief.[37] Or at the very least, whether there is TID-Consistent Traffic Impact and whether that TID-Consistent Traffic Impact constitutes a mutual mistake would be material facts still in dispute making partial summary judgment on the contract issue improper at this stage under Rule 56(h), as addressed in the County's Opening Brief.[38]

Ultimately, the factual question of whether Dermody's project proposes TID-Consistent Traffic Impact is either relevant to the TID Agreement or it is not. Dermody cannot have it both ways. If it is not relevant, then the trial court's decision

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see also, Ans.Br. 36 ("[t]rying to characterize the court below's decision as factual, rather than legal . . . .").

[37] Op.Br. 25-27. Dermody's claims that the County waived the collateral estoppel argument are without merit. Ans.Br. 33-34. The County articulated that the factual question of TID-Consistent Traffic Impact addressed by the BOA was not before the trial court for determination in the motion for partial summary judgment on the contract question. A793-94. The procedural posture of the case did not raise a collateral estoppel issue until the trial court reached its own factual finding on the TID-Consistent Traffic Impact question—a finding that is disputed on appeal.

[38] Op.Br. 28-30. Dermody's claim that this argument was waived (Ans.Br. 36) lacks merit. The record establishes that the parties did not submit the factual question of whether there was TID-Consistent Traffic Impact to the trial court for decision on partial summary judgment. A793-94.

can only be read to provide a blanket TIS waiver, which is improper for the reasons outlined in the County's Opening Brief.[39]

But if the factual issue of whether Dermody's project proposes TID-Consistent Traffic Impact is relevant—as Dermody now seems to assert—then the trial court committed reversable error when it failed to accept the BOA's factual findings on this issue or, alternatively, when it reached its own factual finding in partial summary judgment on a disputed material issue of fact.

Either way, the trial court's decision on partial summary judgment should be reversed.

Also, regarding interpretation of the TID Agreement, Dermody is wrong to characterize the provisions in Sections I and II of the TID Agreement as mere "recitals."[40] The language addressing application of UDC § 40.11.121.C, the 2013 Study with a base year of 2009 and assumed build out year of 2030, and corresponding improvements enumerated in Exhibit "B" are all within the body of the TID Agreement and are therefore binding provisions.[41] Indeed, the TID Agreement, in Section II, qualifies the TIS waiver by providing:

> In accordance with the aforesaid Section 40.11.121C, and in light of the area wide studies performed by DelDOT, Property Owners shall not be

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[39] Op.Br. 37-46.

[40] Ans.Br. 26

[41] A188-202; *see also*, *New Castle Cnty. v. Crescenzo*, 1985 WL 21130, at *3 (Del. Ch. Feb. 11, 1985) (drawing a distinction between "recitals (or preamble clauses") and the "operative or granting part" of an agreement).

> required to perform traffic impact studies and, in lieu thereof, shall contribute through the SNCC TID Fund.[42]

This qualifying language in the body of the Agreement would be meaningless if deemed to be irrelevant to the Agreement's TIS waiver, violating the principles of contract interpretation.[43]

Notably, the County agrees with Dermody that this language in Section II, in part, "describe[s] why TID participation substitutes for a TIS: area-wide planning achieves the consistency § 40.11.121(C) requires."[44] But what Dermody's position misses is that for these area-wide studies to achieve this Code-required consistency and effectively plan for traffic impacts, the traffic impacts ultimately proposed within the TID must align with the scope and scale of traffic impacts assumed and planned for under the area-wide studies. That is why TID-Consistent Traffic Impact is required under UDC § 40.11.121.C and the TID Agreement. And that is why Dermody, and the trial court, are wrong to read these pivotal requirements out of the TID Agreement.

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42 A189.

43 *See Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1043-44 (Del. 2023) (noting that, in construing contracts, courts "read the contract as a whole and 'enforce the plain meaning of clear and unambiguous language'[;] [i]n doing so, [courts] endeavor 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'").

44 Ans.Br. 26.

Lastly, on the merits of whether there is TID-Consistent Traffic Impact, Dermody mischaracterizes the County's position as an "[a]fter-the-fact reinterpretation."[45] The County has consistently required TID-Consistent Traffic Impact for a TIS Waiver, as required under UDC § 40.11.121.C. For example, the Department asked DelDOT to confirm TID-Consistent Traffic Impact on August 12, 2021 after first reviewing Dermody's project.[46] DelDOT formally informed the Department in an April 20, 2022 memorandum of its view that Dermody's project proposed TID-Consistent Traffic Impact.[47] And DelDOT reinforced the need for TID-Consistent Traffic Impact in its PLUS[48] responses issued to Dermody on October 19, 2021.[49]

The County's interpretation of the relevance of TID-Consistent Traffic Impact never changed. What changed is the County's understanding that Dermody's project **did not** actually propose TID-Consistent Traffic Impact—despite DelDOT's April

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[45] Ans.Br. 23.

[46] A205.

[47] A246-47.

[48] PLUS (the "Preliminary Land Use Service") is the State-level preliminary advisory review of certain pending land development applications under 29 *Del. C.* § 9203 *et seq.*, where State agencies offer preliminary assessments of and recommendations for development projects.

[49] A207 (noting, "Per Section 2.2.2.4 of the Manual, if a development is located in a TID **and is consistent with the planning done for the TID**, DelDOT may require the developer to pay a fee associated with the TID in lieu of doing a TIS and making improvements based on the TIS.") (emphasis supplied).

20, 2022 memorandum.[50] This key factual realization made Dermody's project unapprovable under the County zoning code without a TIS. This is the determination that was upheld by the BOA and is the determination entitled to review by the Superior Court under the substantial evidence appellate standard. But the Court below did not apply the substantial evidence test—and that is reversable error.

[50] A246-47.

III. THE TRIAL COURT'S DECISION WAS NOT LIMITED TO A LEGAL QUESTION ON CONTRACT INTERPRETATION BUT INCLUDED IMPROPER FACTUAL FINDINGS.

Dermody's claim that the trial court's decision was limited to a legal question and did not include factual determinations is wrong.[51] The trial court, citing only Dermody's partial summary judgment **brief** and not the actual studies themselves, held as follows: "Three different traffic studies found that [Dermody's project] had trip generation consistent with the TID: one commissioned by the Department itself, one by DelDOT, and one by DPML."[52] That is a factual finding, and it is not true.

As addressed in the County's Opening Brief, none of the three reports examined whether Dermody's project proposed traffic impact consistent with the 2013 Study.[53] Yet it is the 2013 Study that is the governing study to determine whether a project proposes trip generation consistent with the TID (i.e., TID-Consistent Traffic Impact).[54] Instead, each report incorrectly assumed that the TID had been updated. It had not.[55]

The trial court also found—as a matter of fact—that the County "failed to update the TID"—a point Dermody emphasizes in its Answering Brief.[56] This

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51 Ans.Br. 36-37.
52 Ct.Op. 12.
53 Op.Br. 12 and 22.
54 *See e.g.* A219, A224, and A278.
55 *See* A279.
56 Ct.Op. 13; *see also*, Ans.Br. 15.

finding assumes that the County had an obligation to update the TID. Yet no such obligation exists in the record, in County Code, State Code, or any other rule, regulation, or legal authority.[57]

The point is that—perhaps recognizing the reversible impact of the trial court's factual findings—Dermody's attempt to characterize the trial court's decision as a pure legal conclusion lacks merit. It is not possible to separate the trial court's improper factual findings from its legal conclusions. The trial court resolved application of UDC § 40.11.121.C (and the County-asserted inconsistency with Dermody's interpretation of the TID Agreement) by rendering a factual finding that Dermody's project had TID-Consistent Traffic Impact.[58] And the trial court resolved the inconsistencies in the traffic reports by finding that the County had an obligation to update the TID and that the County failed in that obligation.[59] Such findings were factually inconsistent with the record below and went beyond the scope of the partial summary judgment motions. Reversal is warranted.

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[57] There is no obligation to update the TID, but were the County and DelDOT interested in updating the TID, both the County and DelDOT would have to agree, and any such update must be approved by County Council. *See* UDC § 40.11.310.C.3.

[58] Ct.Op. 12.

[59] *Id.*

IV. DERMODY MISAPPLIES THE SUBSTANTIAL EVIDENCE STANDARD.

The substantial evidence standard of review requires a court to review the **Board's** factual findings to determine whether these findings are such that "a reasonable mind might accept as adequate to support a conclusion."[60] Like the trial court below, Dermody too failed in its Answering Brief to examine the Board's actual findings and the evidence the Board relied upon.[61] Instead, Dermody articulates its personal view of the evidence and why different evidence should have been considered and different conclusions reached.[62]

In presenting its view on the evidence, Dermody ignores the record. Dermody incorrectly asserts that "[e]very expert in the record—JMT, Langan, RKK, and DelDOT—confirmed the Plan's consistency."[63] Not true. None of these three consultants considered whether Dermody's proposed traffic impact was consistent with the traffic impact planned for under the governing area-wide study (i.e., the 2013 Study).[64] Dermody also incorrectly claims that ". . . the 5% test that formed the sole analytical basis for the Department's reversal (and thus, the BOA's decision)

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60 Op.Br. 20 (quoting *Kostyshyn v. Comm'rs of Town of Bellefone*, 2006 WL 1520199, at *2 (Del. Super. Jan 6, 2006)).

61 Ans.Br. 39-40.

62 *Id.*

63 Ans.Br. 39.

64 *See* A228, A264, A262.

has been abandoned on appeal."[65] Not true. The 5% standard is a DelDOT regulation and was referenced as providing guidance in the Department's TIS Determination.[66] This 5% standard was not invented (again, it is a DelDOT regulation referenced for guidance) and has not been abandoned.[67]

Dermody argues that the County did not define "TID-Consistent Traffic Impact."[68] Not true. The County's Opening Brief describes TID-Consistent Traffic Impact as where "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')," as required under UDC § 40.11.121.C.[69] Lastly, Dermody incorrectly claims that, "[t]ime and again, DelDOT confirmed that the 2013 Study did include the Dermody Property, and every expert who examined the question agreed."[70] Again, that's not true. The citation provided by Dermody for

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65 Ans.Br. 40.

66 *See* A282-83 (In its June 4, 2024 TIS Determination, the Department noted, "[f]or **guidance** in this type of situation, the Department also reviewed DelDOT's Development Coordination Manual (DCM). Specifically, DelDOT's DCM § 2.2.2.4.C addresses when a TIS waiver is appropriate under DelDOT's rules and regulations. Specifically, § 2.2.2.4.C looks for one of the following two conditions . . . The traffic entering and existing the subject development would **not result in an increase of more than five percent** in the forecast traffic volume on the adjacent road at any of the development entrances.") (emphasis supplied).

67 *See* Op.Br. 33.

68 Ans.Br. 40.

69 Op.Br. 6.

70 Ans.Br. 40.

support is its own briefing. To the contrary, the original material in the record establishes that the Dermody Property traffic was not specifically accounted for when developing the governing 2013 Study and the associated TID transportation improvements.[71]

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In the final analysis, what may seemingly be a complicated matter is rather simple. Zoning interpretations are made by the Department, appealed to the BOA, and subject to a statutory right of appeal to the Superior Court applying the substantial evidence appellate standard. The trial court committed reversible error when it applied the wrong standard to overturn the BOA Decision.

Had the trial court applied the correct appellate standard and upheld the BOA Decision, including the BOA's factual finding that Dermody's project did not propose TID-Consistent Traffic Impact, it would then have been bound by that factual finding and thus unable to summarily reject the County's arguments on partial summary judgment. At the very least, the trial court would have had to address how the TID Agreement—which by its terms implements UDC § 40.11.121.C—can be interpreted to allow a TIS waiver despite the BOA concluding that Dermody's project violated UDC § 40.11.121.C. The trial court's errors

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[71] *See* A219-222.

undermine both the writ of certiorari Order and the Order on cross-motions for partial summary judgment. Reversal is warranted.

CONCLUSION

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

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