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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| TOWN OF FENWICK ISLAND and SUSSEX COUNTY,<br><br>*Plaintiffs-Below, Appellants,*<br>v.<br>STATE OF DELAWARE and THE HONORABLE MATTHEW S. MEYER, in his official capacity as Governor of the State of Delaware, and RENEWABLE REDEVELOPMENT, LLC.,<br><br>*Defendants-Below, Appellees*. | ) | No. 153, 2026 |

**ON APPEAL FROM DECISION OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

# APPELLANTS SUSSEX COUNTY AND TOWN OF FENWICK ISLAND'S OPENING BRIEF

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DATED: April 30, 2026

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## NATURE OF PROCEEDINGS

Plaintiffs, Sussex County and the Town of Fenwick Island filed suit in the Court of Chancery on December 22, 2025, asserting numerous constitutional and legal challenges to Senate Bill 159 (SB 159), an Act passed by the General Assembly, which, by operation of Senate Bill 199 (SB 199), became effective on January 31, 2026. Both SB 159 and SB 199 were signed into law by Defendant, Governor Matthew S. Meyer, on June 30, 2025, the same day they were passed.

Plaintiffs filed a Motion for a Temporary Restraining Order to prevent the bill taking effect on January 31, 2026, which was denied. The parties agreed that there were no issues of material fact in dispute, and engaged in expedited briefing on cross-motions for summary judgment. Oral Argument was held before the Chancellor on March 16, 2026. On March 25, 2026, the Chancellor issued a telephonic bench ruling, denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment.

Appellants, Plaintiffs-below, filed a timely appeal of the Court of Chancery's decision with this Court on April 15, 2026. This Court, by Order dated April 20, 2026 ordered expedited briefing. This is Appellants' Opening Brief on Appeal.

## SUMMARY OF ARGUMENT

1. The lower court erred in its determination that the legislation, SB 159, did not violate the doctrine of separation of powers. The legislation purports to reverse and overrule a final quasi-judicial case decision lawfully rendered by the Sussex County Council, and is therefore, constitutionally flawed.
2. The lower court further erred in that it found the General Assembly could exercise plenary authority over zoning at any time and on a case-by-case basis, and failed to distinguish the exercise of legislative action from quasi-judicial action. Further, the court below entirely failed to address the retroactive nature of the legislation. While the General Assembly, has authority to grant legislative powers related to zoning to the municipalities and counties, it does not have the privilege to exercise that authority which it has delegated, nor to act in any capacity except as may be granted to it by the Delaware Constitution. Article II, Section 1 of that document establishes that "the legislative power of the State is vested in a General Assembly." Here, the legislature took action which was adjudicatory in nature. Further, even were the General Assembly to be determined to have acted within its power, it cannot do so to retroactively reverse a final, quasi-judicial case decision of a body which had authority to act at the time it did so.

3. The lower court erred in its finding that the bill complied with Article II Section 16 of the Delaware Constitution. This legislation clearly addresses two separate topics, zoning and an energy-related substation. The title of the bill states it is "An Act to Amend Title 26 of the Delaware Code Relating to Public Utilities." While it may be argued that a substation falls within the scope of a public utility, the language of SB 159 makes it clear that this bill is about zoning – it grants a zoning permit, it specifically provides for the reversal of a permit already granted by a zoning authority, and it specifies terms which prohibit the exercise of zoning authority in the future. Even if the title encompasses one of the subjects of the bill, the title does not encompass both, and is therefore not in compliance with the constitutional requirements.
4. The lower court misunderstood the due process argument proffered by Plaintiffs, which was that the due process to which the public is entitled, and which is required both by local ordinances and State law1, was eliminated by the General Assembly when it took it upon itself to "grant" the permit authorized by this legislation. This argument is not about a Fourteenth Amendment claim, but rather the significant importance the courts and State

1 Title 9, Delaware Code, Chapter 69.

have placed on the right of the citizenry to be heard about zoning matters affecting their neighborhood.

5. The Town of Fenwick Island should be found to have standing because if SB 159, which provided for retroactive reversal of a county zoning case decision, is permitted to stand, precedent will be established as to the right of the legislature to invade a municipality's legally protected zoning authority, and impair the security of its zoning determinations.

## STATEMENT OF FACTS[2]

### The 2024 Sussex County Zoning Decision and *Certiorari* Appeal

In 2024, a zoning application was filed by Defendant, Renewable Redevelopment, LLC ("RRLLC" or "Renewable"), a subsidiary of US Wind, Inc., to Plaintiff, Sussex County, for a conditional use permit for placement of a large electrical substation on a parcel [233-2.00-2.01] within Sussex County's jurisdictional limits. This substation was intended to serve as the inland destination for transmission lines, from a proposed offshore wind turbine farm on the Outer Continental Shelf[3].

Electrical substations are permitted only by conditional use in Sussex County. The County, in its duly-adopted Zoning Code, has promulgated ordinances governing the criteria for approval of, and the process by which one can apply for and obtain, a conditional use. Pursuant to those procedures, RRLLC filed an

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2 Because of the expedited proceedings below, there was no "discovery" or factual record developed for this case. The parties agreed there were no disputes of material facts. The factual outline here was presented to the trial court in Plaintiffs' Opening Brief in the summary judgment proceedings (D.I. 30 below, pp.3-9). The underlying facts relating to the passage and implementation of SB 159 are essentially undisputed, although the parties draw different conclusions from those facts.

3 The proposed US Wind windfarm, titled the Maryland Offshore Wind Project, in neither under construction nor fully permitted, due to multiple legal challenges to State and Federal permits unrelated to this litigation. Nor has physical construction begun on the proposed inland substation.

application and the matter ultimately came before Sussex County Council (SCC) for review and public hearing. At County Council's public hearing, held in July 2024, and in the written record, numerous citizens, including Plaintiff, Town of Fenwick Island, through its Mayor, Natalie Magdeburger, participated in the process and filed comments in opposition to the conditional use. Ultimately, on December 17, 2024, Sussex County Council, by a 4-1 vote, denied RRLLC's conditional use zoning application.

Thereafter, on December 26, 2024, RRLLC filed an appeal of County Council's decision, via a writ of *certiorari,* in the Superior Court of Delaware. That matter was actively pending in June 2025, at the time the Delaware Legislature passed, and Defendant Governor Meyer signed, SB 159 and SB 199.

**The 2025 Passage of SB 159 and SB 199 by the Delaware Legislature.**

On June 30, 2025, the Delaware General Assembly passed, and the Governor signed, two bills: SB 159 and SB 199 (copies attached as Exhibits B and C). SB 159 was titled "An Act to Amend Title 26 of the Delaware Code Relating to Public Utilities," and set forth a new proposed Section 910, which provided:

> § 910. Conditional use permit for electrical substations.
> (a) No county shall deny a conditional use permit to any electrical substation, along with any directly related project infrastructure, proposed to be located on unincorporated land within such county where the following conditions apply:

(1) The substation is being proposed to support the operation of a proposed renewable energy generation project of 250 MW or greater;
(2) The proposed substation would be located in a heavy industrial zone;
(3) An electrical substation is an allowed conditional use within the proposed zone; and
(4) The specific zoning district in which the proposed substation would be located already has an electric substation located in such zone with a rating of 230kv or greater as of August 3, 2023.

The conditions listed at Section 910(a), subsections (1) through (4), mirrored and were specifically directed to the RRLLC parcel and project in question -- the very same project which had been denied a conditional use by Sussex County. Although the legislation did not call out Sussex County by name, the targeted nature of the bill as to this parcel and the already-denied conditional use application, was openly acknowledged by the Bill sponsors during debate. It was openly stated that the purpose of the bill was to facilitate the "US Wind" offshore wind Project.[4]

**Retroactivity and the Proposed Operation and Implementation of SB 159.**

SB 159 has two other procedural provisions governing the legal effect of the Act (discussed further *infra*), which also go into effect on the effective date. Section 3 was a sunset clause, later removed when the legislature subsequently passed SB 199. **Section 2** is most critical to the illegalities identified in this appeal and provides as follows:

4 *See* A-125-126; A-135-136; A-140-142.

> **Section 2. This Act shall have *retroactive effect* and *any previous application to a county*, on or after August 3, 2023, for approval of an electrical substation prior to the enactment of this Act that complies with the provisions of this Act *shall be deemed to be approved, notwithstanding any adverse action which a county may have already taken* with respect to such application prior to the enactment of this Act. Further, any action on the part of a county to alter the underlying zoning classification applicable to a previously filed application for a conditional use for an electrical substation or otherwise render an application unqualifying by any means, including changing the underlying zoning or zoning code, is prohibited**.

(emphasis added).

The bill's primary sponsor stated that the legislation was intended to hasten the US Wind Project; that there would be too much "delay" if the pending *certiorari* proceedings in Superior Court were allowed to play out, or if there was a remand, and even complained that further delay might ensue even if RRLLC prevailed on their *certiorari* appeal, since the County would then have the right to appeal to the Delaware Supreme Court. Section 2 of SB 159 further enjoined the County from making future changes to its own zoning code, or rendering the RRLLC project disqualifying "by any means."

Section 2 of SB 159, as written, created a highly unusual "self-executing" feature wherein, upon the law going into effect, "***any previous application*** to a county . . . for approval of an electrical substation prior to the enactment of this Act that complies with the provisions of this Act "***shall be deemed to be approved***." Thus, as written, a conditional use (the required local zoning permit) was being

conferred automatically by nothing more than SB 159 taking effect. Due to the automatic and guaranteed issuance, and further prohibition of "any action" on the part of the county which might be considered adverse to the applicant, the legislation "approved" a conditional use with no possibility of "conditions" being attached to it – constituting an anomalous and unprecedented zoning determination.

During the floor debates regarding SB159, several lawmakers expressed opposition to the bill, and put the bill's sponsors on notice of many of the legal defects now raised in this litigation – such as separation of powers, infringement of delegated zoning authority, retroactivity, and the fact that SB 159 purported to interfere with and potentially conflict with an actively pending judicial matter (the *certiorari* appeal).[5] Notwithstanding these objections, the bill passed with a majority vote in both houses, with the final house vote occurring on June 30, 2025.

Later that same day, June 30, 2025, the General Assembly introduced, passed, and Defendant, Governor Meyer immediately signed into law, another bill -- SB199. SB 199 replaced the prior Section 3 (a sunset clause) with a new: "Section 3. This Act [SB 159] takes effect on January 31, 2026." Thus, the sole effect of SB 199 was to delay the implementation of SB159 until January 31, 2026.

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5 *See* A-123; A-127-130; A-137; A-143-145; A-147-151.

Prior to the effective date, on December 1, 2025, in the *certiorari* appeal, the Superior Court issued an Order which recognized that Senate Bills 159 and 199 "took direct aim at the Council's denial" of the conditional use permit, "essentially overturning [that] denial . . . ." The Superior Court found that if it were to opine on the pending writ – a matter which had already been fully briefed -- "the opinion would be merely advisory in that the Superior Court would not have last authoritative say in the matter effective January 31, 2026." *Renewable Redevelopment, LLC v. Sussex Cnty. Council*, 2025 WL 3443112, at *1 (Del. Super. Dec. 1, 2025). Accordingly, the Superior Court ordered that the writ action should be stayed. The parties have since advised the Superior Court of their agreement that the writ action should remain stayed pending resolution of the claims raised in this challenge to SB 159.

## ARGUMENT

### I. THE STATE'S ENACTMENT OF SB 159 VIOLATES THE DOCTRINE OF SEPARATION OF POWERS IN THE DELAWARE CONSTITUTION, AS IT PURPORTS TO OVERRIDE AND REVERSE A PRIOR, LAWFUL, QUASI-JUDICIAL ZONING DECISION BY SUSSEX COUNTY.

#### A. Question Presented.

Whether the Court of Chancery erred by failing to find that SB 159--which retroactively reversed an administratively final, quasi-judicial zoning decision by Sussex County, denying a conditional use permit--violated the Separation of Powers doctrine of the Delaware Constitution? (Question preserved, D.I. 30 at pp. 10-16; D.I. 36 at pp.3-8).

#### B. Scope of Review.

Whether SB 159 violates the separation of powers doctrine of the Delaware Constitution is a question of law. This Court reviews questions of law *de novo*. *See Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000). This Court reviews issues of constitutional dimension *de novo*. *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

#### C. Merits of Argument.

When a Delaware statute conflicts with the Constitution of Delaware, the Constitution controls. *See, e.g.*, *State* ex rel. *Southerland v. Hart*, 33 Del. 15, 21, 129 A. 691, 694 (1925) ("Nor can there be any doubt that if there is a conflict

between the Constitution and the statute the former must control."); *In re Opinion of Justices*, 575 A.2d 1186, 1188 (1990); *Evans v. State*, 872 A.2d 539, 553 (2005).

It is fundamental that the Delaware Constitution, mirroring the United States Constitution, establishes a tripartite system of government, with an executive, a legislative and a judicial branch. *See Evans, supra,* 872 A.2d at 539 (exploring in depth the history of separation of powers within national and state constitutions). This Court in *Evans* declared:

> 'The doctrine of separation of powers is integral to the fabric of the Delaware Constitution.' The history of Delaware 'admits of no doubt that from the beginning our state government has been divided into the three departments, legislative, executive and judicial. It is likewise true that, generally speaking, one department may not encroach on the field of either of the others.'

*Id* at 547-48 (citations omitted).

In *Evans*, the Delaware Supreme Court entirely invalidated as unconstitutional a piece of legislation which had attempted to declare one of the Court's prior decisions "null and void," and where the bill further stated that the legislature had the right to interpret the "intent" of the underlying law. This scenario is almost identical to the General Assembly's actions here-- where legislators openly stated that the very purpose of SB 159 was to "reverse" Sussex County Council's decision. The *Evans* Court, writing *en banc* and *per curiam*, in no uncertain terms, upheld the primacy of the doctrine of Separation of Powers, holding that

> [w]*here retroactive legislation* . . . requires its own application in a case already adjudicated, [and] *'reverse[s] a determination once made, in a particular case', [t]hat is constitutionally impermissible."*

*Id* at 549 (citations omitted; emphasis added).

It is well-settled that the granting or denial of zoning permits, such as conditional uses, under existing zoning laws, is a quasi-judicial action. *See Delta Eta Corp. v. City of Newark,* 2023 WL 2982180, at *11 (Del. Ch. 2023); *Citizens Against Solar Pollution v. Kent Cnty.*, 2023 WL 6884688, at *6 (Del. Super. 2023), *aff'd,* 339 A.3d 1229 (Del. 2025) ("approving or denying a special use permit application is a quasi-judicial act, subject only to review by writ of *certiorari*"). The Chancellor below correctly agreed with this fundamental principal, finding that County Council's decision was, in fact, quasi-judicial in nature. (Exhibit A (hereinafter "Order") at 25).

SB 159 purports to legislatively, and retroactively, "reverse" Sussex County Council's quasi-judicial decision, which had already gone through evidentiary hearings and review, resulting in the denial of a specific conditional use permit. The General Assembly has no authority to "apply existing laws to a set of facts," or to reverse an adjudicatory decision which has already been made. To do so is an exclusively judicial function. *Evans* at 549. Thus, it is clear that SB 159 violates the fundamental constitutional doctrine of separation of powers, as the legislation has the effect (and, in fact, the *raison d'etre*) of reversing a valid quasi-judicial

zoning decision previously made by an adjudicatory body - Sussex County Council - exercising its duly delegated local zoning authority.

The lower court confuses the authority to legislate with the authority to apply and interpret the law. It queries why Plaintiffs would argue that the "General Assembly's authority to pass legislation governing zoning can abrogate quasi-legislative determinations of subordinate counties or municipalities but not quasi-judicial determinations of those counties or municipalities? . . . Why would the General Assembly's authority be limited to rewriting the rules and not extend to their application?" (Order at 29-30).

The answer to this question is that the General Assembly's authority is limited to writing (or rewriting) the laws, under the Delaware State Constitution, which confers only *legislative* powers to the General Assembly, and not the administration, application or interpretation of the laws that are passed. Indeed, the court below found that the determination by Sussex County regarding the permit request was a quasi-judicial act by the county, not a legislative act (Order at 25), thereby it must be concluded that the decision fell outside the constitutional authority of the General Assembly.

The targeted nature of this legislation on one case renders it unconstitutional. This Court has made clear: "[a] *legislature without exceeding its province cannot reverse a determination once made*, in a particular case; though it may prescribe a

new rule for future cases." *Evans* at 548 (emphasis added, citations omitted). Authorities dating back to Federalist Paper No. 81 have stood for the proposition that the legislature is prohibited from interfering with a "particular case" under the doctrine of separation of powers. *Evans* at 546. SB 159 goes even further. It not only undoes Sussex County's prior lawful decision, but illegally imposes *another*, and contrary, decision (to grant the zoning permit)—which constitutes yet another unconstitutional "judicial" action by the legislative branch. (*See, infra*).

The court below incorrectly refocused Plaintiffs' separation of powers argument by stating that the County objected to SB 159 "because it interferes with the County's quasi-judicial authority to adjudicate" applications. (Order at 19). While this "interference" is true, the most critical element as to the separation of powers violation was not that the bill "interfered" with County activity, but that *the legislature* took it upon itself to *engage in a judicial function* – that is, to reverse a prior case decision, and to actually decide a case or controversy (whether RRLLC was entitled to a zoning permit)[6]. As this Court held in *Evans*, "one department may not encroach on the field of either of the others," without running afoul of the doctrine. *Id* at 548.

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6 *See* Section 2 of SB 159: "*any previous application* to a county . . . for approval of an electrical substation prior to the enactment of this Act that complies with the provisions of this Act *shall be deemed to be approved*, notwithstanding any adverse action which a county may have already taken…." (Ex. B, emphasis added).

Attempting to distinguish *Evans*, the court below also inaccurately claims that the County is asserting that its prior zoning decision deserves the same "deference" as "judicial decisions" from the General Assembly. (Order at 22, 26). Again, this skews the argument. The County is not asking for "deference" – it is arguing that the General Assembly has overstepped its own Constitutional authority by engaging in the conduct of reversing and making *case decisions* (application of laws to facts) which are adjudicatory in nature. It does not matter in which judicial or quasi-judicial body the case decisional authority normally resides. The legislature is not empowered to engage in judicial actions or to make case decisions. (*See* D.I. 36 at 4-5). The Delaware General Assembly possesses only those powers granted to it by Constitution, and has been granted (only) "[t]he legislative powers of this State." Del. Const. Article II, Section 1.

The court further erred by stating (Order at 20) that the County relied only on the *Evans* test for separation of powers and not the one set forth in *Opinion of the Justices*, 380 A.2d 109 (Del. 1977) (assuming *arguendo* that these constitute two different "tests"). Plaintiffs did, in fact, rely on and discuss the 1977 *Opinion,*[7] which held that a hallmark consideration as to whether a violation of separation of powers existed was whether there is "a coercive influence" upon the target body/agency, and

7 D.I. 36 at p. 7.

whether "the objective of the legislature" was to establish its superiority over the issue in question. As the legislative history makes clear, this was the precise objective of SB 159.

Defendants below argued that separation of powers can only occur if the legislature interferes with a *court's* activity, and not the activity of an administrative body with quasi-judicial powers- a proposition which the Court of Chancery appeared to adopt (Order at 22-23[8]). That distinction is not found in *Evans v. State*, or any other caselaw. Many bodies, such as administrative Boards and Commissions, engage in quasi-judicial case decisions without themselves being "courts" of the State of Delaware. This Court has at least implicitly held that the separation of powers doctrine, and the reasoning of *Evans,* applies when considering activity of a quasi-judicial nature. In *Sierra Club v. DNREC*, 2006 WL 1716913, (Del. Ch. 2006), *aff'd sub nom. Sierra Club v. Delaware Dep't of Nat. Res. & Env't Control,* 919 A.2d 547 (Del. 2007), this Court described the separation of powers rule in *Evans v. State* as one which "bars the General Assembly from reversing an *adjudicatory decision* in a particular case." *Id* at *3 (emphasis added).

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8 The decision cited by the court, *Taylor v. George*, 2020 WL 1673697 (Del. Super. 2020) is easily distinguishable, as it merely held that 10 *Del.C.* §1902, which allows for jurisdictional transfers of cases between Delaware "courts", did not apply to allow a transfer of a case to the IAB (a quasi-judicial board). *Taylor* said nothing about the doctrine of separation of powers.

The decision in question in *Sierra Club* was not one of a court, but of the Environmental Appeals Board – a Title 7 board which makes quasi-judicial determinations regarding certain environmental permits. While the Court ultimately found that *Evans* did not apply because (unlike here) the decision in question in *Sierra Club* was not made until after the legislation was adopted, the Court appeared poised to apply the *Evans* analysis, even though the decision in question was one within the purview of a quasi-judicial body.[9]

The court below curiously and erroneously states (Order at 28) that the County is a "subordinate branch" of the General Assembly, but that the EAB (in *Sierra Club*) is part of the "co-equal executive branch" (Order at 28). However, this is not the case. The EAB is an independent entity, created by statute (7 *Del.C.* §§6007-6008) set up to review certain environmental decisions of the DNREC Secretary, but it is not an "arm" of the Secretary or the Executive. It has been vested with powers delegated by statute, including the authority to make quasi-judicial decisions. Similarly, Sussex County, is not an "arm" of the State Legislature – it is a junior sovereign of the State – possessing its own Executive, Legislative and (quasi)

9 "….Section 81 *did not reverse a particular determination made by the EAB*, but rather addressed the EAB's request for additional information from DNREC, and the EAB's implicit request for legislative guidance." 2006 WL 1716913 at *3 (emphasis added). By contrast, SB 159 explicitly reversed County Council's prior case determination.

Judicial functions.

*Sierra Club* does not support the sweepingly broad finding that the court below articulated (Order at 29) -- that the General Assembly could render case decisions as to particular parcels of land "on a case-by-case basis," under the guise of "reclaiming" a portion of its zoning authority. As discussed further herein, zoning authority has been "ceded"[10] and fully delegated to the County. SB 159 did not even purport to reclaim any portion of the County's zoning laws; the legislation actually granted a permit which Sussex County had already adjudicated and denied.

The court also erroneously claims that Plaintiffs argued that the legislature could abrogate "quasi-legislative" actions of the county, but not "quasi-judicial" determinations. Plaintiffs never made such argument or distinction as to "quasi-legislative" acts (which are not even addressed in the briefs, but by which we assume the court meant "ordinances") and do not concede this proposition. In fact, given the wording of Article II, Section 25, the Constitution gives the General Assembly authority to "enact laws *under which the [Counties] may adopt zoning ordinances"* and regulate land use. In other words, the Constitution authorizes a full delegation of zoning authority by the General Assembly to the County, and this is exactly what occurred when the General Assembly's adopted Title 9, Chapter 69. So, Plaintiffs

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10 *Delaware Dep't of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087, 1091 (Del. 2011).

would *not* concede that the GA has the legal ability to "reclaim" portions of this delegated authority on a "case by case" basis, whether as to individual ordinances ("quasi-legislative" acts) or as to case decisions.

The court additionally incorrectly states that it is bound by an "interpretive canon" that an act cannot be declared unconstitutional unless its invalidity is "established beyond a reasonable doubt." (Order at 30). But the caselaw cited below does not establish this evidentiary standard as a "rule" to govern all constitutional challenges. In *Atl. Richfield Co. v. Tribbitt,* 399 A.2d 535, 544 (Del. Ch. 1977), the Court of Chancery was not considering the inherent authority of the legislature to act (such as separation of powers), but rather deciding a case involving claims that certain statutes concerning retail sale of gasoline constituted an "excess of police powers" under the Fourteenth Amendment; "equal protection" violation, a "taking", and an impairment of contracts -- in essence, a policy challenge. In this context, the court appropriately held that "[t]he wisdom of legislative policy is not a matter of judicial review" and, in the context of a police power challenge on an evidentiary record, that a statute "will not be declared void unless its invalidity is established beyond doubt, and the burden of so showing is cast upon the one who challenges it." 399 A.2d at 544.

Here, no facts need be considered or weighed – this Court must simply, and *de novo*, decide whether SB 159 on its face violates the doctrine of separation of

powers, where the General Assembly engaged in judicial conduct by "reversing" a denied zoning permit application, and "approving" that same permit. *See* Ex. B, Section 2.

The court also cited *Blue Beach Bungalows DE, LLC v. State*, 351 A.3d 1007 (Del. 2025), which dealt with a challenge dissimilar to the instant case, wherein the plaintiff claimed it should be entitled to a trial by jury, rather than an administrative hearing, under the Consumer Fraud Act, and alleged that the Act thus violated *Del. Const.* Article 1, Section 4 ("Trial by jury shall be as heretofore"). The Court, in considering that challenge, fount that enactments "like the CFA" receive a strong presumption of constitutionality, and that "[c]onstitutional prohibitions to legislative action must be shown by 'clear and convincing evidence.'" *Id* at 1031. In that case, Plaintiff failed to meet its burden of showing a common law right to jury trial analogous to the CFA, and the Court rejected the challenge. Again, this is dissimilar to this facial challenge to the Legislature's authority to enact SB 159 under the separation of powers doctrine. If the law violates separation of powers, it cannot stand. That question is determined on the face of the legislation, with no need to weigh evidence or assess "reasonable doubt." Further, Plaintiffs have presented ample evidence – as to violations of separation of powers, zoning authority, bill title, and due process - to overcome any presumption of constitutionality with which SB 159 may have been cloaked.

In addition to retroactively reversing a final zoning decision, the Court of Chancery's broader finding that the legislature can retract zoning decisions at will, on a "case by case" basis (Order at 29), sets a dangerous precedent that would allow any land use decision (or any other decision for that matter) by a county or municipal body to be estopped and retroactively subject to reversal, and would allow the State to impose targeted land use or zoning determinations, as to specific parcel(s), at any time, for any reason, to facilitate whatever policy it deemed important at the moment. This would create a legal landscape of uncertainty both for local zoning authorities, such as Plaintiffs, and for landowners and citizens, could impair property rights, and would invite arbitrary, capricious and inequitable outcomes in zoning cases.

## II. SB 159 IS UNLAWFUL AND VIOLATES ARTICLE II, SECTION 25 OF THE DELAWARE CONSTITUTION, AS IT IMPROPERLY INFRINGES UPON THE LOCAL ZONING AUTHORITY THAT HAS BEEN EXCLUSIVELY DELEGATED TO COUNTIES AND MUNCIPALITIES, INCLUDING PLAINTIFFS.

### A. Question Presented.

Did the Court of Chancery err when it failed to find that SB 159 was in violation of Article II, Section 25 of the Delaware Constitution when the General Assembly engaged in zoning activity under powers exclusively delegated to Sussex County and legislatively and retroactively declared a county zoning permit to be "deemed approved"? (Question preserved, D.I. 30 at pp. 16-22; D.I. 36 at pp.9-15).

### A. Scope of Review.

Whether SB 159 violates Sections 25 of Article II of the Delaware Constitution and/or 9 *Del.C.* §6900 *et. seq.* is a question of law. This Court reviews questions of law *de novo*. *See Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000). This Court reviews issues of constitutional dimension *de novo*. *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

### C. Merits of the Argument.

This case presents a significant issue of first impression concerning whether the Delaware General Assembly, having fully delegated zoning authority to Sussex County under Article II, Section 25 of the Delaware Constitution and thereafter, through Title 9, Chapter 69, of the Delaware Code, may then exercise that power, in

a quasi-judicial manner and, particularly, whether it can do so in a way that abrogates and reverses a specific prior zoning decision of Sussex County. SB 159 is not, as Defendants contend, a lawful exercise of the General Assembly's power to delegate, amend or terminate the zoning authority of the County government, but rather, an unconstitutional and retroactive application of that zoning authority itself.

The Delaware Constitution of 1897, Article II, Section I establishes that "the **legislative power** of the State is vested in a General Assembly. . ." (emphasis added). Subsequently, in that Article, there are provisions setting restrictions on, and permissible delegations of, that power. For instance, Section 19 restricts the General Assembly from enacting "local or special laws" relating to fences, ditches, or boundaries of school districts. Directly applicable to this case, Article II, Section 25 authorizes the General Assembly to delegate the authority to regulate land use to the municipalities and counties:

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

The General Assembly implemented that Constitutional authority by enacting 9 *Del.C.* §6902(a) relating to Sussex County:

> The county government may, in accordance with the conditions and

> procedure specified in this subchapter, **regulate the location, height, bulk and size of buildings, parking areas, and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density and distribution of population, the location and uses of buildings, parking areas, and structures for trade, industry, residence, parking, recreation, public activities or other purposes and the uses of land for trade, industry, residence, recreation, public activities, water supply conservation, soil conservation or other similar purposes….**

There is good reason for the General Assembly to delegate authority over zoning to the counties. As this Court noted in *Green v. Sussex County*, 668 A.2d 770, 774 (Del. 1995), "with the increasingly complex and fluid problems arising today which must be resolved by local government, the General Assembly has enacted home rule statutes, which in many cases override pre-existing, specific statutory grants of power, the purpose of which is to give local governments the flexibility required to discharge their functions." Local governments consider factors such as traffic patterns, runoff, setbacks, elevation, height and even hours of operation in making zoning determinations that best fit their communities and comprehensive plans. The General Assembly is not equipped to do that.

The Delaware Supreme Court has previously recognized that the delegation of zoning authority to Sussex County is binding. In *Delaware Dep't of Natural Resources & Environmental Control v. Sussex County*, 34 A.3d 1087 (Del. 2011), this Court invalidated regulations which had been adopted by DNREC that conflicted with county zoning regulations, holding that, because the Delaware

General Assembly had already granted broad zoning powers to Sussex County, DNREC had no authority to implement regulations which conflicted with zoning laws. The Court unequivocably stated:

> The General Assembly through grants of home rule has **ceded primary responsibility for land use control** to county and municipal governments. In this delegation of its power over land use, the General Assembly, in effect, has **surrendered that incident of its sovereignty** to subordinate governmental entities. Thus, the counties, as well as departments of State government, can also claim to be agents of the State in the discharge of the sovereign's power to regulate land use.

*Id* at 1091 (*citing Hayward v. Gaston*, 542 A.2d 760, 766 (Del. 1988)(emphasis added).

Indeed, the Court of Chancery has found, consistent with the ruling in that case, that zoning authority, once it has been delegated, is within local control, noting that a law passed by the General Assembly, the Delaware Land Use Planning Act, did "**not transfer zoning authority from local to state control**." *Concerned Citizens of Cedar Neck, Inc. v. Sussex Cnty. Council*, 1998 WL 671235 (Del. Ch. 1998) (emphasis added). The Court of Chancery correctly found, in that case, that the final zoning decision rested with Sussex County.

The Court below erred, in that it failed to distinguish the General Assembly's power to delegate legislative authority from the fact that it actually ***exercised*** that authority in a quasi-judicial manner, that is, by granting a permit.

The Court noted that SB 159 "authorize[s] Renewable Redevelopment LLC to construct an electrical substation" -- an acknowledgement that the General Assembly exercised the authority to grant a permit. (Order at 3). It then incorrectly found that "regulating the use of Renewable's land" *i.e.* granting a permit, "is undoubtedly within the province of the General Assembly's plenary authority." (Order at 29).

In fact, that plenary authority is limited by statute, specifically 9 *Del.C.* §6923, which provides:

> Whenever any regulations made under authority of this subchapter… impose other higher standards than are required in or **under any other statute** or local regulation, the provisions of **the regulations made under authority of this subchapter shall govern**…. Whenever the provisions of any other statute shall derogate from the provisions of this subchapter, unless it be a statute granting powers to the State Planning Office, the provisions of this subchapter shall govern.

Certainly, the consideration and denial of a permit is imposing "higher standards" than the granting of same. And, in §6923, the General Assembly specifically makes itself subject to the authority of the County to make decisions that may impact the validity of other statutes the General Assembly has passed.

Other cases relied upon by the court can be distinguished. First, none of them involved action by the General Assembly to reverse or grant a zoning permit of any sort. Second, none of them resolved a zoning dispute subsequent and contrary to a

case decision already made by a county with regard to that dispute. Thus, this Court is faced with resolving the question of first impression, which is whether the General Assembly can exercise that power which it has attempted to exercise in this matter, and whether it can do so in the manner with which it acted.

In *City of Lewes v. Nepa*, 212 A. 3d 270 (Del. 2019), this Court determined whether an ordinance adopted by the City of Lewes could establish a stricter setback than state law required. The dispute was regarding competing legislative actions by the state and a municipality, and did not involve a *quasi-judicial* determination made by the municipality and a subsequently enacted state statute. Indeed, the complete sentence from which a portion is quoted by the lower court, is as follows: "The delegated land use regulatory authority typically extends to the outer boundary of the State's authority, subject to any express or implied preemption by other state law." *Id.* at 274. However, citing the municipal equivalent to 9 *Del.C.* §6923, the Court noted that the stricter standard would apply, holding that "although conflicting state statutes typically preempt conflicting laws adopted by municipalities, when the municipality enacts land use ordinances and regulations requiring stricter standards than other state and local laws, *the municipality's stricter standards govern*." *Id* at 274 (emphasis added).

The General Assembly has the authority to modify or terminate the scope of authority to legislate granted by it to subdivisions. That is what it did in *Wilmington*

*Medical Center v. Bradford*, 382 A.2d 1338 (Del. 1986). The General Assembly was held to have properly restricted its delegation of power when it, under Title 9 (§2601), exempted a category of medical facilities from New Castle County's zoning authority.

That is not what the General Assembly did in SB 159. Indeed, even today, Sussex County has full authority to deny or grant any other conditional use application, even for a substation, anywhere in the County, if it chooses*, with the exception of this particular permit.* The decision the County had already reached, after a deliberative process and in accord with the authority it possessed, was reversed by an unlawful exercise of quasi-judicial action by the General Assembly – action which exceeds the scope of the legislative powers granted to the General Assembly by the Delaware Constitution.

Further, the lower court's application of a "hierarchical" analysis was flawed. This Court, in *Hayward*, rejected the analysis of the hierarchy of the government entities in a dispute finding "…the hierarchical approach to land use disputes between competing governmental entities…is both simplistic and archaic." 542 A.2d at 766. The lower court attempted to distinguish *Sierra Club* from the case *sub judice* by characterizing that dispute as between two co-equal branches of government, and noting that the county is a "subordinate branch." (Order at 28). The Court incorrectly applied a hierarchical analysis and found that distinction

"important and fatal". *Id.*

This Court in *DNREC v. Sussex County*, *supra*, 34 A.3d 1087,relied heavily on *Hayward* to invalidate State regulations that infringed upon the zoning powers of Sussex County, as delegated by the General Assembly. In the present case the General Assembly, through SB 159, reversed a specific, lawful zoning decision of Sussex County Council to deny RRLLC's application for conditional use to allow for the placement of an electrical substation. The legislation did not amend or withdraw any of the previously delegated zoning authority granted to the County pursuant to Article II, Section 25 of the Delaware Constitution or Title 9, as it has done in multiple, other cases. Further, even if the State were to act to reserve power over some particular uses or areas by amending Title 9, it still could not do so *retroactively* to overrule a determination that has already been made within the zoning authority of the County.

Accordingly, the precedent established by this Court in *Hayward v. Gaston* and *DNREC v. Sussex County* compels this Court to invalidate SB 159.

## III. THE STATE'S ENACTMENT OF SB 159, AS AN AMENDMENT TO TITLE 26 OF THE DELAWARE CODE ("PUBLIC UTILITIES") VIOLATES ARTICLE II, SECTION 16 OF THE DELAWARE CONSTITUTION.

### A. Question Presented.

Whether the Court erred in finding that SB 159 -- titled "An Act to Amend Title 26 of the Delaware Code Relating to Public Utilities," but which also made a county zoning determination, and further addressed the scope of zoning authority – did not violate Article II, Section 16 of the Delaware Constitution, disregarding that multiple subjects were addressed within the same bill, and that the title of the bill did not properly reflect the scope of the legislation? (Question preserved, D.I. 30 at pp. 22-31; D.I. 36 at pp.16-18).

### B. Scope of Review.

Whether SB 159 violates Sections 16 of Article II of the Delaware Constitution is a question of law. This Court reviews questions of law *de novo*. *See Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000). This Court reviews issues of constitutional dimension *de novo*. *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

### B. Merits of the Argument.

Article II, Section 16 of the Delaware Constitution of 1897 contains two separate provisions. First, a bill may contain only one subject. Second, other than

appropriations bills, that subject "*shall be expressed in its title*." The Supreme Court of Delaware confirmed that the dual requirements of Article II, § 16 were included in the Delaware Constitution of 1897 to "prevent deception of the general public and the members of the General Assembly by titles to bills which give no adequate information of the subject matter of the bills." *Turnbull v. Fin*k, 668 A.2d 1370 (Del. 1994) (*citing Opinion of the Justices*, 194 A.2d 855, 856 (Del. 1963)).

The single-subject and title provisions in Article II, § 16 ensure that the public receives adequate notice of the content of legislation. *Id*. "If a bill contains multiple subjects or the title of the bill is such that it would 'trap the unwary into inaction,' it must be struck down as a violation of this section of the Delaware Constitution." *Id*. (*citing Opinion of the Justices*, 177 A.2d 205, 208 (Del. 1962)). In this earlier *Opinion of the Justices*, the Court wrote, specifically as to the "title" requirement, that "the title of the bill [must be] sufficiently informative so as to put on notice parties interested in the general subject matter in such manner as would lead them to inquire into it. *Opinion of the Justices*, 177 A.2d at 208.

The dissenting opinion in *Turnbull*, by Justice Holland, is instructive, and recounts the history of the single subject and title requirements. Consequently,

> It is important to understand the history and purpose of the two general requirements. The potential problem caused by an omnibus bill, which includes unrelated provisions on heterogenous matters, is an uninformed legislative vote.…the constitution of nearly every state now contains a general requirement that legislation be limited to a

> single subject…[and] requires that the title of a bill adequately express its subject matter.

*Id.* at 1382 (internal citations omitted).

SB 159 violates the title requirement of Article II, Section 16. The General Assembly titled the bill "An Act to Amend Title 26 of the Delaware Code Relating to Public Utilities." However, by the very terms of the statute itself, the bill addresses "conditional use permits," a county zoning function. The text of the Act, beginning with "[n]o county shall deny a conditional use permit . . . where the following conditions apply…", has nothing to do with "Public Utilities" and everything to do with placing limitations on the exercise of local zoning authority. SB 159, by its title and placement within Title 26 of the Delaware Code, did not provide adequate notice of the subject matter of the bill to the public. The legislation did not otherwise address or regulate any aspect of a "public utility". The General Assembly created a provision which overruled a specific local zoning decision of Sussex County, and placed it in Title 26 of the Delaware Code – a Title related to "Public Utilities. While the majority in *Turnbull* did not invalidate a liability cap because it was enacted in the Bond Bill, SB 159 is not an appropriation bill and the single subject requirement applies.

The intent of the "title" provision is to ensure fair and reasonable notice of the subject matter of bills. *See Opinion of the Justices*, 194 A.2d 855, 856 (1963)

("Fundamentally, it is designed to prevent deception of the general public and the members of the General Assembly by titles to bills which give no adequate information of the subject matter of the bills."). *See also Evans, supra*, 872 A.2d at 551 (if a bill contains multiple subjects or the title of the bill would "trap the unwary into inaction," it violates Article II, § 16 of the Delaware Constitution).

SB 159 could serve as the precedent to allow the General Assembly to amend local zoning or home rule authority in ***any title*** of the Delaware Code. The consequence could be that a party interested in watching proposed legislation for incursions on home rule, county authority and/or municipal authority would be tasked with checking *every* bill in every title to see if it affected those areas, and if they needed to comment on it, lobby against it, etc. This is exactly the scenario Article II, Section 16 was intended to prevent when the Constitution enacted the prohibition on "sleeper legislation."

Equally, SB 159 is in violation of the prohibition in Article II, Section 16 against embracing multiple subjects within a bill, not clearly identified by title. As Justice Holland noted in Turnbull, "[t]he two general provisions in Article II, §16 of the Delaware Constitution, that a bill contain only one subject and that the title of the bill express its subject, are distinct requirements. Each has different historical origins. Nevertheless, these two requirements are often combined in a single provision, such as Article II, §16 of the Delaware Constitution, to achieve a common

purpose" (citations omitted). *Turnbull.* at 1382.

There can be no credible claim that this bill does not address zoning. The sponsors and legislators said so. The language of the bill says so. Defendants' arguments below are replete with claims about the State's zoning authority. Zoning provisions and restrictions on the exercise of zoning authority continue into Section 2 of the bill. Even if the determination is made that the bill addresses a matter related to power (however remotely), SB 159 remains clearly in violation of Article II, Section 16. The bill exercises and regulates zoning authority, but only references public utilities in the title.

The clear meaning, intent and purpose of Delaware's Constitution, Article II, Section 16 would be foiled by allowing this bill to stand.

## IV. SB 159 VIOLATES DUE PROCESS BY TRANSFORMING THE COUNTY'S CONDITIONAL USE REVIEW AND PERMITTING PROCESS, INTO AN ARBITRARY STATE GRANT OF A CONDITIONAL USE "AS OF RIGHT," AND ELIMINATING THE NORMAL DUE PROCESS PROCEDURES WHICH THE ZONING AUTHORITY IS OBLIGATED TO PROVIDE.

### A. Question Presented.

Whether the Court of Chancery erred by failing to find that SB 159 violated due process in connection with a zoning application, by deeming a former application "approved," and thereby eliminating evidentiary review, the right to be heard, and the right of the County to impose conditions on a conditional use—effectively turning one particular "conditional use" into a use "as of right." (Question preserved, D.I. 30 at pp. 32-39; D.I. 36 at pp.21-27).

### B. Scope of Review.

Whether the Legislature improperly eliminated due process in connection with a zoning decision is a question of law. This Court reviews questions of law *de novo*. *See Johnson Controls v. Fields*, 758 A.2d 506, 509 (Del. 2000).

### C. Merits of the Argument.

Section 2 of SB 159, states that "any previous [zoning] application to a county," which fits the statutory parameters[11], "shall be deemed to be approved,"

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11 The Bill's sponsors openly admitted that the parameters set forth in 26 *Del.C.* §910(a) were crafted specifically to exactly match the type of "substation" proposed by RRLLC. *See* A-125-126; A-135-136; A-140-142.

notwithstanding any prior adverse action (*i.e.* denial), which a county may have already taken. Thus, the General Assembly literally provided that already-decided county cases (which fit the State's chosen parameters) would be reversed—such that the denial of a conditional use permit shall now be transformed into an approval--*simply by operation of the legislation*. The State did not provide that any scrutiny should be given to the application or the project prior to approval; it did not designate a body to review the application for safety or security concerns; it did not address any site-specific issues. The legislation provides for no discretion. It simply says – in a legislative statement admittedly directed to RRLLC – "your application is granted because we, the State, declare it to be so."

Why this matters is because procedural due process applies to zoning decisions as a matter of both County *and State* law. This is well settled under Delaware law. Zoning determinations in Sussex County, by virtue of Title 9, §6902, *et. seq*., have always been decided by the County (County Council). The Court of Chancery has stated that "[w]hen enacting or amending zoning ordinances, the Council *must provide its citizens with procedural due process*, i.e., adequate notice of the matter to be decided and an opportunity to be heard." *Citizens Coal., Inc. v. Cnty. Council of Sussex Cnty.*, 773 A.2d 1018, 1023 (Del. Ch. 2000) (emphasis added). Power to adopt such both substantive and procedural zoning regulations has

been delegated to the County by Article II, Section 25 of the Delaware Constitution and 9 *Del.C.* §6902(a). These ordinances are codified in Sussex County Code.

County Code specifically provides that certain uses in the county, including substations, are permissible only by conditional use, and further sets up detailed procedural requirements, including an application process and public hearings, by which one can apply for a conditional use permit[12] -- a process that RRLLC itself went through in 2024. *See* Sussex County Zoning Code §115-13 (conditional uses in HI-1 District); Article XXIV, Conditional Uses, §115-173; Article XXVIII, §115-216 (Changes and Amendments, including requirements of ordinance and public hearings before Planning and Zoning Commission and County Council).

Not only that, but *State law* itself mandates that public hearings be held as to conditional uses applications. 9 *Del.C.* §6910(a) specifically provides that "[b]efore the adoption of any zoning proposal or zoning regulations, the county government shall hold a public hearing in accordance with §7002(m) of this title." *See also* 9 *Del.C.* §6911(b) (requirement of at least one public hearing prior to changes to the zoning map). Clearly there are a host of procedural requirements in both State and County law that set forth processes that *must be* followed before zoning changes are made. Given the General Assembly's own statutory declaration that the purpose of

12 https://ecode360.com/8884944

County zoning regulations is to make land use decisions in the public interest and for the "welfare of the present and future inhabitants of Sussex County,"[13] it is clear that adherence to those regulations constitutes procedural due process, which Sussex County, as a government, is obligated to provide and its citizens are entitled to receive.[14]

The court erred by relying on cases which discuss "Fourteenth Amendment" substantive due process claims, and claiming that Plaintiffs cannot show "injury." (Order at 38-39). As the court acknowledges, but does not squarely address, Plaintiffs are not asserting violations of the Fourteenth Amendment in this litigation; they are claiming due process violations under the Delaware Constitution (which does not mirror the language of the Fourteenth Amendment) and violations of zoning mandates delegated to the County by the Constitution via Title 9 Delaware Code Chapter 69.

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13 9 *Del.C.* §6904(a).

14 Defendants and the court below (Order at 38) were incorrect to state that "no member of the public" with an interest in the subject application was a party to these proceedings. In addition to Sussex County having an institutional interest in implementing the due process it is charged by law with providing, the Town of Fenwick Island, through its Mayor Natalie Magdeburger, filed written and verbal comments in opposition to RRLLC's conditional use application when it came before Council in 2024.

The County further respectfully disagrees with the court's conclusion that it has suffered no "injury" by the passage of SB 159. It has in fact suffered an *existential* injury -- in that it is now prohibited from exercising its lawfully delegated powers and ordinances in this arena. In addition, the citizens of Sussex County, who elect and look to members of County Council to act in their interest on local zoning issues[15], have also been unlawfully deprived of their well-settled due process rights to notice and an opportunity to be heard before this (or any) conditional use is granted, as well as being deprived of their right to rely on a zoning decision (denial) that County Council had already lawfully made. Ignoring all existing laws, the General Assembly simply cherry-picked this application, "reversed" a final zoning denial by County Council, eliminated all process, and imposed its own zoning determination by declaring the RRLLC application to be simply "deemed approved."

The court mischaracterizes Plaintiffs argument (Order at 41), when it suggests that Plaintiffs complaint is grounded in a claim that the General Assembly did not

15 Delaware Courts have recognized the need for consideration of the impact of a proposed conditional use "not only on neighboring properties, but on a large section of the county . . . ." *Stephen C. Glenn, Inc. v. Sussex Cnty. Council*, 532 A.2d 80, 81–82 (Del. Ch. 1987). *Glenn* held that "the granting of a conditional use permit is discretionary," and that "Sussex County Council [has] the power to impose certain conditions." *Id*.

"adhere to" Title 9, Chapter 69 "when reaching a determination" on a zoning issue. Plaintiffs' argument is actually that the General Assembly is not empowered to "reach a determination" on a zoning case decision at all (as it did here), because to do so is an adjudicatory action, which is prohibited by the separation of powers. The court goes on to assert that the County "does not have standing to challenge the General Assembly's process in any event," but, again, Plaintiffs complaint is not about "how" they engaged in a "process" of making a zoning determination (ruling on an application), but the fact that they did so at all.

The Delaware Supreme Court has held that rezoning is in the nature of a judicial determination, and that "County Council does not have a free hand to grant rezoning upon request." *Cnty. Council of Sussex Cnty. v. Green*, 516 A.2d 480, 481 (Del. 1986).[16] In SB 159, however, the General Assembly – which possesses no judicial powers -- has apparently conferred this "right" upon itself. If the lower court decision stands, and SB 159 is upheld, the Legislature will now have essentially free rein to eliminate the public's due process rights on any other type of local zoning

16 This Court in *Green* further held that the "rezoning process itself resembles a judicial determination," and that "It must conform with standards established by the General Assembly, ***9 Del.C. § 6901-6923, and due process*** considerations. 516 A.2. at 481 (emphasis added).

application or regulation – in any county or municipality – which it seeks to grant or deny in the future, by virtue of what the court found to be its "case by case" authority.

## V. FENWICK ISLAND HAS STANDING TO CHALLENGE SB 159 AS IT FACES A REAL RISK OF HARM TO ITS DELEGATED ZONING AUTHORITY, RIGHTS AND JURISDICTION BASED UPON THE COURT OF CHANCERY'S FINDING THAT THE STATE CAN ALTER ZONING DECISIONS ON A CASE-BY-CASE BASIS.

### A. Question Presented.

Whether the real and present danger that the Town of Fenwick Island faces as a result of the decision of the Court below finding that the General Assembly can act on a case-by-case, in the exercise of quasi-judicial authority, or to revoke previously delegated authority, even subsequent to the exercise of that delegated authority by a subdivision in a lawfully compliant manner, grants the Town of Fenwick Island standing in this matter? (Question preserved, D.I. 30 at p. 31; D.I. 36 at pp.19-20).

### A. Scope of Review.

This Court reviews questions of law, including standing, *de novo.* *See Albence v. Higgin*, 295 A. 3d 1065, 1085 (Del. 2022).

### C. Merits of the Argument.

The preceding arguments, challenging the multiple constitutional violations of SB 159, lay out precisely why Plaintiff, the Town of Fenwick Island, has standing in this matter. The Town has grave concerns that, if this legislation is permitted to stand, precedent will be established as to the right of the legislature to invade the Town's legally protected zoning authority. As stated above, the authority to hear and determine zoning matters was, long-ago, fully delegated to municipalities by the

General Assembly. To the extent that Defendants argue that Fenwick must show "injury" from the substation, their argument is misplaced. The harm is the intrusion into and infringement of the lawful exercise of the zoning authority that subdivisions of the state have been granted.

The Town of Fenwick Island, like the counties, has been delegated local zoning authority in Title 22 of the Delaware Code, Chapter 3, in language much like that found in Title 9. Pursuant to that authority, the Town has adopted its own zoning ordinances and regulations, and regularly makes zoning determinations. Thus, Fenwick Island is affected in that the exercise of their lawfully delegated authority to make zoning determinations within their jurisdictions is now called into question, rendering any decision the Town makes uncertain and, because the case in question involves retroactive action, those decisions will remain uncertain indefinitely.

The General Assembly, as the Delaware Supreme Court has noted, has ceded the authority to make decisions related to zoning, and cannot then step back in to exercise that authority when it does not agree with a specific decision. That reasoning applies to municipalities as well as to counties.

Fenwick Island has, further, suffered an injury by the deprivation of due process in this matter. The Town's Mayor, Natalie Madgeburder, was an active participant in the zoning proceedings below, filing written and verbal comments with County Council. With the permit now "automatically" granted via SB 159, her right

to be heard, like that of other Sussex County residents, has been eliminated.

For these reasons, the Town of Fenwick Island asserts standing to challenge this statute and the underlying decision of the Chancery Court.

## CONCLUSION

For the foregoing reasons, the Court of Chancery's denial of Plaintiffs' Motion for Summary Judgment was in error. this Court should declare that and permanently enjoin its application. Appellants respectfully request that this Court REVERSE the decision of the trial court and ORDER that SB 159, as enacted by the General Assembly, is unconstitutional and of no force or effect,

Respectfully submitted,


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