**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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|---|---|---|
| CATHERINE G. O'NEILL, VINCENT J. O'NEILL and PATRICIA A. POTTS, | : | |
| Plaintiffs, | : | |
| v. | : | **C.A. No. 1069-N** |
| TOWN OF MIDDLETOWN, a Delaware municipal corporation, MAYOR & COUNCIL OF MIDDLETOWN, 301 WEST VENTURES, LLC, a Delaware limited liability company, KOHL, L.L.C., a Delaware limited liability company, DELAWARE DEPARTMENT OF TRANSPORTATION, an agency of the State of Delaware, DELAWARE OFFICE OF STATE PLANNING COORDINATION, an agency of the State of Delaware, and WAL-MART STORES, INC., a Delaware corporation, | : | |
| Defendants. | : | |

**MEMORANDUM OPINION**

Date Submitted: July 25, 2005
Date Decided: January 18, 2006

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Jos. Scott Shannon, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware, Attorney for Defendants Town of Middletown and Mayor & Council of Middletown.

William E. Manning, Esquire and Richard A. Forsten, Esquire of Klett Rooney Lieber & Schorling, Wilmington, Delaware, Attorneys for Defendant 301 West Ventures, LLC.

Chad M. Shandler, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorney for Defendant Kohl, L.L.C.

Frederick H. Schranck, Esquire of the Delaware Department of Justice, Dover, Delaware, Attorney for Defendant Delaware Department of Transportation.

John B. Hindman, Esquire of the Delaware Department of Justice, Dover, Delaware, Attorney for Defendant Delaware Office of State Planning Coordination.

Margaret F. England, Esquire of Eckert Seamans Cherin & Mellott, LLC, Wilmington, Delaware, Attorney for Defendant Wal-Mart Stores, Inc.

NOBLE, Vice Chancellor

A tract of land in Middletown, Delaware was rezoned and received subdivision approval to allow for the construction of a Wal-Mart Supercenter. This action was brought to contest those decisions. Among the questions framed by the pending motions to dismiss or for summary judgment are: (1) whether the rezoning was to a use consistent with the municipality's comprehensive plan which manifests the policy judgment that the appropriate use of the land is for manufacturing and office purposes; (2) whether and to what extent citizen-plaintiffs may challenge the actions of the Delaware Office of State Planning Coordination during the municipal land use approval process; (3) whether and under what conditions citizen-plaintiffs have standing to challenge a municipal subdivision approval; (4) whether and under what circumstances citizen-plaintiffs may challenge the Delaware Department of Transportation's entry into agreements with private developers regarding payment for infrastructure improvements; and (5) whether and under what circumstances citizen-plaintiffs may challenge the decisions of the Delaware Department of Transportation not to require a site-specific traffic impact study.

The parties have filed cross-motions for summary judgment.[1] For the reasons that follow, the Court concludes that the record of the rezoning does not set forth a sufficient basis for any conclusion that it was consistent with the controlling comprehensive plan, but the Court conditions award to Plaintiffs of summary judgment on their subsequent cure of the lack of a properly supported record to demonstrate their standing to challenge the rezoning. With the determination that the rezoning was invalid, the Plaintiffs' challenge to the subdivision approval becomes moot. All of the Plaintiffs' other claims are dismissed.

## I. PARTIES

Plaintiffs Catherine G. O'Neill, Vincent J. O'Neill and Patricia A. Potts, reside in Middletown, Delaware near the site of the proposed Wal-Mart Supercenter.

Defendant Kohl, L.L.C. owns a parcel of land located on the northwest side of U.S. 301, south of Bunker Hill Road and SR 299, in Middletown, Delaware (the "Kohl Property"). Defendant 301 West Ventures, LLC ("Ventures") is purchasing the Kohl Property with the intent to develop 25 acres of it for a Wal-Mart Supercenter and the balance for a

[1] The State defendants have also moved to dismiss the claims against them under Court of Chancery Rule 12(b)(6).

mix of office and commercial uses. The municipal defendants are the Town of Middletown, a Delaware municipal corporation, and the Mayor and Council of Middletown, who govern the Town of Middletown (collectively, the "Town"). Two entities of state government also have been named as defendants: the Delaware Department of Transportation ("DelDOT") because of its responsibility for public highways, and the Delaware Office of State Planning Coordination ("OSPC") because of the responsibilities assigned to it by the General Assembly to coordinate the State's response to local land use initiatives. During the course of briefing of the pending motions, Wal-Mart Stores, Inc. was added as a defendant because it or one of its affiliates expects to acquire title to the 25-acre parcel.

## II. BACKGROUND[2]

### A. *The Kohl Property*

The Kohl Property consists of approximately 98 acres on the northwest (sometimes referred to as the north) side of U.S. 301 in the southwest part of the Town. It was annexed into the Town on June 4, 2001,

[2] For convenience, references to exhibits in Plaintiffs' Appendix to Opening Brief in Support of Their Motion for Summary Judgment will be as "PX"; references to Appendix to Defendants Town of Middletown, Mayor and Council of Middletown Opening Brief in Support of Summary Judgment will be as "TX"; references to Appendix to Defendant 301 West Ventures, LLC's Opening Brief in Support of its Motion for Summary Judgment will be as "VX"; and references to Appendix to Defendants Delaware Department of Transportation and Office of State Planning Coordination's Opening Brief for Motion to Dismiss and Alternative Motion for Summary Judgment will be as "SX."

and placed in the manufacturing-industrial (MI) zoning category. On December 6, 2004, it was rezoned to a combination of commercial (C-3) and office park (OP). The Town's decision to rezone the Kohl Property to C-3 spawned this litigation.

B. *The Town's Comprehensive Plan*

The Town, in 1997, adopted a comprehensive plan (the "1998 Plan")[3] and, in 2001, revised it (the "2001 Update").[4] The 1998 Plan reflected the recognition of the Town's leaders that the coming decade would bring massive development to Middletown.[5]

The 1998 Plan was adopted, in part, to provide "a basis for making annexation, zoning and subdivision decisions."[6] It recommended "the expansion of manufacturing and industrial areas" and designated "an area west of existing industrial development along U.S. 301 as a location for

[3] Even though the comprehensive plan was adopted in 1997, it is generally referred to as the "1998 Plan." Excerpts of the 1998 Plan appear at TX 1, VX 25, & PX 7.

[4] Excerpts of the 2001 Update appear at TX 2, VX 26, & PX 6. Comprehensive plans must be reviewed at least once every five years. 22 *Del.C.* § 702(e). Indeed, since argument on the pending motions, the Town has revised its comprehensive plan, presumably to embrace the use challenged in this action. The Court, however, must assess the challenged rezoning based upon the comprehensive plan in effect at the time of the rezoning.

[5] For example, on a 210-acre tract immediately to the north of the Kohl Property are a 317-unit age-restricted townhouse community, a 306-unit traditional community, and 39 acres destined for commercial use. On the other side of U.S. 301 is a 135-acre commercial property on which a Home Depot may be built. To the south, a 1,900-home community is planned; also, a 460-home golf course community is under construction.

[6] 1998 Plan at 14.

industrial development."[7] A table, captioned "Proposed Industrial Park Expansion Properties,"[8] included the following entry:

| Property | Location | Size | Land Use Recommendations and Comments |
|---|---|---|---|
| Kohl Property | South of U.S. 301 and east of SR 15 | 111 acres | Manufacturing and industrial with a designed overlay for natural areas |

The "Kohl Property" identified in the table as being on the south side of U.S. 301 is generally known as the "Kohl South Property" and is not the "Kohl Property" at issue in this proceeding.[9] Indeed, the 1998 Plan does not expressly identify the Kohl Property, the one at issue, as a site for industrial expansion.[10]

Instead, the 1998 Plan designated an area within two miles of the 1996 Town boundaries as the "intergovernmental coordination area." Within this area were several parcels, including the Kohl Property, projected

[7] 1998 Plan at 97-98.

[8] 1998 Plan, Table 16 at 98. *See* 1998 Plan, Map EC-1 and Map LU-3 (Def. Ventures' Reply Br. at Exs. H & I).

[9] "The plan recommends that the area west of the existing industrial park *and south of U.S. 301* be designated as an industrial site. The designation of this area for industrial uses will provide sites for small, medium, and large manufacturing and fabrication uses . . . . [T]he long-term financial health of Middletown will rely on attracting high quality employers to town which will continue a balance between housing and jobs and provide for a diverse tax base." 1998 Plan at 128 (emphasis added).

[10] The 1998 Plan also recommended that "properties near the U.S. 301 and SR 299 intersection which are currently zoned C-3 and MI should be rezoned as regional employment and retail commercial areas." *Id.* at 122.

for immediate or mid-range development. The lands would be annexed into the Town, thereby divesting New Castle County of direct land use jurisdiction and allowing them to be governed under the Town's land use ordinances.

The 2001 Update established a goal of "preservation of options for the U.S. 301 corridor [and] development of an employment center,"[11] and its general land use and growth management objectives included "[f]acilitat[ing] a mix of uses through the provision of adequate sites for industrial, office, commercial, residential and community services uses" and "[p]rovid[ing] for sufficient industrial office park sites with sufficient supporting infrastructure to attract economic development."[12]

A map attached to the 2001 Update[13] depicts, *inter alia*, the intergovernmental coordination zone and, as a separate category, an "area proposed for industrial development." The area shown for industrial development lies to the south of U.S. 301 and includes the Kohl South Property. The Kohl Property, in contrast, falls within the intergovernmental

[11] 2001 Update at 2.
[12] 2001 Update at 26. Another goal expressly set forth in the 2001 Update was to "[c]oordinate with New Castle County and the State of Delaware on land use and annexation decisions to implement the [1998] Middletown Plan and 2001 Update, the 1997 New Castle Comprehensive Plan and 1999 UDC [New Castle County's Unified Development Code] and the 1999 State Strategies." *Id*.
[13] 2001 Update, Map LU-2.

coordination zone to the north of U.S. 301.[14] Another map attached to the 2001 Update shows the Kohl Property lying within a "proposed growth area."[15]

The 2001 Update, however, acknowledged "private sector requests for land zoned for office and industrial uses" and, in contrast to the 1998 Plan, recommended that the "western edge of Town along US 301 . . . be an industrial and office use that transitions to preserved agricultural land."[16] This designation encompassed the Kohl Property.[17] Thus, as a result of the 2001 Update, the Town's comprehensive plan projects industrial and office uses for those lands, which include the Kohl Property.[18]

Also recommended was the establishment of an office park zoning district to separate "office park development from retail commercial uses. This action [would] limit[] the possibility of property zoned in anticipation

[14] The text of the 2001 Update describes the delineation as follows: "In the southwest of Town the expansion of the industrial park is recommended. Areas to the immediate west and north of the Town limits [which at the time would have included the Kohl Property] were designated for intergovernmental coordination." 2001 Update at 28.

[15] Most of the area marked for industrial development on the LU-2 map is, on this map, under the heading of "Current Growth."

[16] 2001 Update at 30.

[17] Even though the Kohl Property remained in the Intergovernmental Coordination Zone, its anticipated uses (*i.e.*, industrial and office) were identified in the text of the 2001 Update.

[18] The Town maintains that "[t]he area around the Kohl Property in dispute in this litigation is designated for the creation of an 'employment center' by the 1998 Comprehensive Plan and 2001 Update." TX 36 (Aff. of Kenneth Branner (the Town's Mayor)) at ¶ 10.

of employment uses being developed as a commercial site."[19] Therefore, the 2001 Update sets forth a policy of avoiding commercial rezonings that would diminish the area available for "employment uses," such as offices and manufacturing facilities.

C. *The Annexation*

In May 2000, Kohl initiated its efforts to bring the Kohl Property into the Town. Kohl sought MI zoning. Its goal, one supported by the State of Delaware, was to establish a site suitable for a computer chip manufacturing facility.[20] Recognizing its need for additional areas for manufacturing activities, the Town approved the annexation on June 4, 2001, and bestowed the sought-after MI classification.

D. *PLUS Review and the Rezoning*[21]

On August 20, 2004, Ventures requested an opportunity to make a zoning and concept plan presentation at the Town Council's September 13, 2004 meeting. On August 30, 2004, Ventures sent a Preliminary Land Use

[19] 2001 Update at 36. It went on to suggest that rezoning from a manufacturing/industrial use to an office park designation could be appropriate.
[20] TX 36 (Aff. of Kenneth Branner) at ¶ 11. That project was ultimately abandoned.
[21] The Plaintiffs vigorously opposed the rezoning. The Plaintiffs also make reference to a Memorandum of Understanding (MOU) entered into between the Town and the OSPC. PX 29. The Plaintiffs contend that the MOU "required the Town to conduct a pre-application meeting with [the developer]" to determine if the proposed rezoning would be subject to PLUS review. *See* Pls.' Op. Br. in Supp. of their Mot. for Summ. J. ("PO") at 9.

Service ("PLUS") form to OSPC.[22] The PLUS form described the project as one involving commercial uses with a floor area of one million square feet.[23] The application sought review of both the proposed rezoning of the parcel from "MI Industrial" to "C-3 Commercial/Employment," as well as review of the proposed subdivision of the parcel.[24]

At the September 13, 2004 Town Council meeting, the proposed development of the Kohl Property, which would require several years for build-out, was described as one with 500,000 square feet of office space and 500,000 square feet of commercial space, including a hotel, movie theaters, and commercial stores. The project would include the allocation of 25 acres

[22] VX 4. Under 29 *Del.C.* §§ 9203, 9204, certain land use proposals are first submitted to OSPC to allow for coordination of comments from various state agencies, such as the Delaware Department of Natural Resources and Environmental Control, the Delaware Economic Development Office ("DEDO"), and DelDOT. PLUS review is required, *inter alia*, for projects which involve: (i) "any non-residential subdivision involving structures or buildings with a total floor area exceeding 50,000 square feet . . ."; and (ii) "applications for rezoning if not in compliance with the local jurisdiction's comprehensive plan . . . ." 29 *Del.C.* § 9203(a)(2)&(5). A local land use planning jurisdiction, such as the Town, may also enter into an MOU with OSPC that may modify the scope of the PLUS review. The Town and OSPC, in April 2004, entered into an MOU (PX 29) which provided that the "following land use planning actions are and shall remain subject to State review under Title 29, Chapter 92 *Delaware Code*: . . . (2) any non-residential subdivision or site plan involving new construction of structures or buildings with a total floor area equal to or exceeding 50,000 square feet. (3) any application for rezoning or annexation that is inconsistent with the land use recommendations set forth in the current certified Town of Middletown Comprehensive Plan." *Id.* at ¶ B.

[23] The Defendants argue that PLUS review is not required for the rezoning because the rezoning was consistent with the comprehensive plan. They concede that PLUS review was necessary for the subsequent subdivision approval because of the gross floor area in excess of 50,000 square feet.

[24] *See* VX 4.

for a Wal-Mart store that would be the first improvement constructed. The Town Council, after hearing the presentation, suggested that a portion of the Kohl Property be rezoned specifically for an office park ("OP").

On September 14, 2004, the OSPC informed the Town of its conclusion, without any explanation, that the proposed rezoning was, in its view, consistent with the Town's comprehensive plan.[25] The OSPC later set forth its reasoning in a letter to Plaintiffs' counsel on November 29, 2004:

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[25] VX 7. In its September 14, 2004, letter, the OSPC transmitted the comments of DEDO which reviewed the annexation and planning history of the Kohl Property and focused on the importance of manufacturing jobs:

> A few years ago, Delaware Economic Development Office (DEDO) was very supportive of the annexation of the Kohl Property along with several other adjacent farms into the Town of Middletown which were zoned light industrial for the purpose of creating an employment center for Middletown. At that time, DEDO was actively marketing our State as a location for a computer chip manufacturer. Middletown was very supportive of the effort to attract a major employer to the town at that time. Both DEDO and the Town believed that from an economic development perspective it was important that Middletown create new job opportunities that could provide citizens of Middletown with quality jobs (*i.e.* jobs that are full time and pay the sustainable wage level for New Castle County as well as offer benefits including health insurance). Traditionally, manufacturers are the type of employers, which create these types of quality jobs in a community and once these jobs are in place in the community the commercial employers usually grown in the community based on the buying power of the citizens employed in these quality jobs.

*Id.*

OSPC also reported DEDO's concerns about the zoning proposal. DEDO recommended that the Town "review [its] economic development strategy . . . before approving the rezoning of [the Kohl Property] from industrial to commercial." *Id.* Among DEDO's questions were:

> Will the town still have enough properly zoned land available for a large manufacturing/light industrial user if this property is rezoned C-3 Commercial? If this property is rezoned, could the town replace the 98 acres of industrial zoned property somewhere else within the City Limits

> To determine comprehensive plan consistency we looked at the maps and text of the plan to get a sense of the community's expectations with regard to land uses. In our review we saw nothing in the proposed zoning classification that contradicted the 2001 comprehensive plan. A couple of the more salient points in this regard included:
>
> - The area in question is consistent with the map designation for this area as the property is located in the "Proposed Growth Area" as shown on the 2001 Update map.
>
> - In the text portion of the plan, development expectations are discussed for areas along the town's western boundary. Such possibilities include the likes of industrial parks, offices, flex space and light industrial uses. The plan goes on to talk about promoting the development of mixed uses like industrial, office, commercial, residential and community service use for the purpose of creating communities to provide opportunities to work, shop and live in close proximity.
>
> Thus, it was the Office of State Planning Coordination's determination that the rezoning request is consistent with the 2001 Comprehensive plan. Therefore, in accordance with State law, the Town of Middletown does not need to amend their 2001 comprehensive plan.[26]

An ordinance to rezone the Kohl Property had been introduced during the Town Council's September 13, 2004 meeting and was reintroduced on November 1, 2004. It proposed 78 acres for the C-3 classification and 20

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> to allow for future development of a large light industrial-based business opportunity? . . . If the new rezoning is approved, can the property be dedicated to the attraction of corporate businesses that would provide full-time quality jobs and not just retail jobs with mostly part-time employment opportunities?

*Id.*

[26] PX 42.

acres for the OP classification. The Town's Planning Commission recommended the rezoning following a public meeting on November 18, 2004. At the Town Council's December 6, 2004 meeting, the rezoning ordinance was unanimously approved.

E. *The Infrastructure Agreements*

Recently annexed western portions of the Town, commonly known as Westown, have experienced rapid growth, and such growth is expected to continue. In recognition of the area's changing infrastructure needs, the Town and DelDOT negotiated the terms of three-party agreements to be entered into with developers in the area. The agreements were intended to coordinate growth in Westown, thereby enhancing administrative efficiency and the delivery of services, as well as spreading burdens among the parties to be benefited. For individual developers, the incentive to enter into such agreements included exemption from certain procedures routinely imposed by the Town and DelDOT in approving new development.[27]

In February 2004, Ventures entered into the Middletown Transportation Infrastructure Development Agreement (the "Development

[27] Participation was voluntary. Developers opting not to participate would be subject instead to the routine procedures employed by the Town and DelDOT in considering new projects.

Agreement") with DelDOT and the Town.[28] The Development Agreement sets forth the responsibilities of each party, specifying, for example, the Town's oversight and review responsibilities, DelDOT's responsibilities with respect to "providing the road design standards" and review and inspection of work done, and Ventures' responsibilities in acting as "project coordinator for the planning and construction of the [n]ew [i]nfrastructure."[29] The agreement sets forth significant responsibilities for Ventures in its capacity as coordinator, but also reserves oversight authority for DelDOT and the Town.[30] In addition, the Development Agreement creates a "Middletown Transportation Fund," to be administered by the Town, in order to "pay for all design and construction costs under [the

[28] *See* VX 29, Ex. B. In describing the purposes underlying the agreement in its preamble, the Development Agreement provides that "the Town would prefer that the infrastructure for the various projects including road improvements and other transportation-related changes be designed and constructed in a coordinated fashion (or 'master-planned'), so as to make the infrastructure as efficient and least expensive as possible . . . ." *Id.* Significantly, the preamble explains that

> certain road improvements will be called for by the cumulative effect of the various projects, but no one project could sustain the cost for such improvements, nor would it be fair for one project to shoulder the burden alone; and . . . by coordinating the infrastructure related to several projects at once, DelDOT will be able to 'master-plan' the road improvements in a way that would not be possible on a traditional project-by-project basis . . . .

*Id.*

[29] *Id.*

[30] For example, the Development Agreement provides that Ventures "shall . . .[,] with the concurrence of DelDOT and the Town, select the civil engineers and other consultants necessary to design the [n]ew [i]nfrastructure . . . ." *Id.* at Clause 3(A)(ii).

agreement]."[31] The proceeds for the Fund are to provided by "contributions from [Ventures] and other property owners . . ., and the balance of the funds required to complete the [specified] road improvements . . . shall by contributed to the Fund by DelDOT."[32]

In addition to the provisions described above, the Development Agreement provides that DelDOT will "issue timely letters of 'no objection' consistent with [funding provisions] of this Agreement for projects located in the study area . . . ."[33] Importantly, the Development Agreement states that "[t]o the extent that permits are required from DelDOT or the Town for the [n]ew [i]nfrastructure, that party shall cooperate in the permit application and approval process, it being understood, however, that all permits shall meet all applicable standards."[34]

[31] *Id.* at Clause 5.
[32] *Id.* The Development Agreement sets out the amounts and timeframes for Ventures' contributions in an attached exhibit. *See id.* at Ex. B. The schedule provides for a contribution of $375,000.00 from the owner of the Kohl North property [*i.e.*, the "Kohl Property"]. *See id.* In addition, the agreement states that "[Ventures] shall pay into the Middletown Transportation Fund up to the amounts specified on [the contributions schedule] to pay the consultant and design professionals necessary to design the [n]ew [i]nfrastructure, and [Ventures] shall receive a credit for such payments against any other fees required by [the agreement]." *Id.* at Clause 3(A).
[33] *Id.* at Clause 2(xii).
[34] *Id.* at Clause 6.

DelDOT, the Town, and Kohl also entered into the Middletown Transportation Infrastructure Recoupment Agreement (the "Recoupment Agreement"),[35] which provides that

> DelDOT shall . . . waive any requirement of traffic impact studies ["TIS"] to determine impact of the project on levels of service at intersections or on other roads or traffic infrastructure, and (provided the project meets Town of Middletown development standards and is not inconsistent with the transportation plan developed under the [Development Agreement]) shall provide a no objection letter *or, if inconsistent with the transportation plan or if there are internal site issues,* a letter stating objections with specificity with respect to the project on the [Kohl Property], within a reasonable period . . . .[36]

The Recoupment Agreement recites that its terms are, in part, "[i]n recognition of the traffic impact studies completed to date, the traffic analyses performed in conformance with the [Development Agreement] and the traffic improvements to be made under the [Development

[35] On purchase of the Kohl Property, Ventures will be bound by the terms of the agreement as Kohl's successor-in-interest. *See* VX 29 at Clause 13(c). Moreover, it was represented in the Recoupment Agreement that Ventures had already entered into its own recoupment agreement, with the same terms. *See id.* at Clause 15. To the extent that the Recoupment Agreement conflicted with the Development Agreement, the Recoupment Agreement controlled. *See id.*

[36] *Id.* at Clause 3(a) (emphasis added). The agreement also provides that, should other property owners fail to enter into a comparable recoupment agreement, they would be required to adhere to routine approval procedure (including, if necessary, performing a TIS). *See id.* at Clause 3(b).

Agreement] . . . ."[37] The Recoupment Agreement incorporated the Development Agreement, with some minor changes—however, the contribution by the owner of the Kohl Property was to remain $375,000.00.[38]

As alluded to by the terms of the Recoupment Agreement, a master TIS was to be performed for Westown where the infrastructure improvements are to occur.[39] Under more common circumstances, developers would have been required to perform a site-specific TIS in order to satisfy DelDOT procedure. Instead, DelDOT elected to pursue an area-wide, comprehensive TIS because the agency believed the comprehensive approach to be a superior method relative to the site-specific alternative.[40]

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[37] *Id.* at Clause 6(a). Furthermore, the Recoupment Agreement states that "review of plans and applications for development of the [Kohl] Property . . . shall be conducted expeditiously, and DelDOT shall provide a no-objection letter, *or* a letter stating objections with specificity . . . ." *Id.* at Clause 6(b) (emphasis added).

[38] *See* VX 29 at Ex. C.

[39] Other developers had executed agreements similar to the Development Agreement and the Recoupment Agreement.

[40] *See* VX 39 at 12-14 (deposition of Theodore Bishop). The Plaintiffs focus on DelDOT's decision to forego its normal practice of site-specific traffic impact studies in favor of a comprehensive, area-wide approach. In response to Plaintiffs' counsel's questions on this matter, Bishop explained in his deposition that:

> In fact, we're doing a master TIS. Now, what we did was, we'll get the same results, all of our requirements will be the same to look at the impacts, to look at traffic, volumes, distributions and so forth.
>
> The only difference is rather than looking at it property by property, parcel by parcel, development by development, we're looking at all of these as part of one large study. So, in fact, we have not—we have not dismissed or in any way eliminated any of our normal requirements or regulations. It's doing it differently.

*Id.* at 12-13.

F. *The Subdivision and Land Development Plan Approvals*

In its letter of September 14, 2004, the OSPC did note, however, that PLUS review would be conducted "to discuss the site plan and give State agency comments regarding that site plan."[41] A PLUS review meeting for the site plan, pursuant to 29 *Del.C.* § 9203(a)(2), was held after proper public notice.[42] The OSPC then provided to the Town and Kohl a compilation of the comments derived from the meeting.[43]

On May 2, 2005, the Town granted approval of the subdivision and land development plans for construction of a Wal-Mart Supercenter on a portion of the Kohl Property. The Plaintiffs point out that the plans were not submitted to the Town's Subdivision Review Committee, thereby allegedly violating the Town's subdivision regulations.[44] Comments regarding these

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[41] SX G; PX 32.

[42] The statute provides, in pertinent part, that:

> [a]ll projects meeting any 1 of the following criteria shall undergo a pre-application meeting and review process as set forth in this chapter: . . . (2) Any non-residential subdivision involving structures or buildings with a total floor area exceeding 50,000 square feet, excluding any previously approved and recorded non-residential subdivision regardless of floor area size, or any site plan review involving structures or buildings with a total floor area exceeding 50,000 square feet, excluding any previously approved and recorded non-residential site plan review regardless of floor area size.

29 *Del.C.* § 9203(a)(2).

[43] SX H; PX 39.

[44] *See* Amended Compl. at ¶ 68; PX 2 at 121-22.

plans, however, were provided by the Town's consultant, KCI Technologies, which the Town views as satisfying the review requirement.[45]

## III. CONTENTIONS

The Plaintiffs assert numerous claims in this litigation. Chief among them is the Plaintiffs' challenge to the Town's rezoning of the Kohl Property as inconsistent with the municipality's comprehensive development plan—the Plaintiffs contend that, as a consequence, the rezoning is invalid for having been approved without prior amendment of the comprehensive plan.[46] The Plaintiffs also argue that the Town's decision to rezone should not have occurred absent the performance of a site-specific TIS and "[DEDO-]recommended economic study." Furthermore, the Plaintiffs challenge the subdivision approval as invalid because of the Town's failure to comply with its subdivision regulations[47] and the Town's reliance in granting the approvals on the planned construction of a road itself not properly approved. Lastly, the Plaintiffs seek to bring an action against the Town for its alleged failure to "conform[ ] with the recommendations to

[45] PX 2 at 121-22; PX 76; PX 77. The Town has not had a "Subdivision Review Committee" for years. Instead, the function is now performed by its consulting engineer. The Plaintiffs have shown no harm from this process and have abandoned this particular challenge.

[46] Additionally, the Plaintiffs contend that the Town's rezoning constitutes illegal contract zoning, spot zoning, and piecemeal zoning. These separate claims are without merit and have not been seriously argued by the Plaintiffs.

[47] These are different regulations from those promulgated by DelDOT, which are discussed in detail below.

receive DelDOT review and approval of access and traffic issues as required by its own consulting engineering company."[48]

Furthermore, the Plaintiffs claim that, given the alleged inconsistency of the rezoning with the Town's comprehensive plan, the OSPC's failure to require, and subsequently review, a proposed amendment to the comprehensive plan violated Delaware law. The Plaintiffs also argue that the OSPC's conclusion that the rezoning was consistent with the plan was made in an arbitrary and capricious manner. Moreover, the Plaintiffs claim that the Town, Kohl, and Ventures unlawfully failed to respond to the OSPC's PLUS report, and that no rezoning may take place until those parties' responses are submitted.

Finally, with respect to DelDOT, the Plaintiffs contend that the agency unlawfully failed to require a TIS with respect to the specific rezoning at issue here. The Plaintiffs also assert that DelDOT illegally delegated its traffic review authority under its contracts with the Town and the developers, in this instance, Kohl and Ventures, in contravention of its duties under controlling statutes and regulations.

The Town and Ventures argue that the rezoning was consistent with the comprehensive plan and furthered its policies and goals. Emphasizing

[48] Amended Compl. at ¶ 68.

the deference that this Court routinely gives to a municipality's zoning decisions, they urge the Court to reject the Plaintiffs' claim. The Defendants also broadly contend that the Plaintiffs lack standing to present their claims and that some of the claims which they seek to assert are not judicially cognizable.

The Plaintiffs, the Town, Kohl, and Ventures have moved for summary judgment.[49] DelDOT and the OSPC have moved not only for summary judgment but also to dismiss the claims against them.

## IV. ANALYSIS

### A. *Applicable Standards*

#### 1. Summary Judgment

Under Court of Chancery Rule 56, summary judgment may be granted only when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.[50] When deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists.[51] A party opposing summary judgment, however, "may not rest upon the mere allegations or

[49] Wal-Mart has also joined in the summary judgment motions of the other defendants.
[50] Ct. Ch. R. 56(c); *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).
[51] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005) (citing *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979)).

denials of [his] pleading, but . . ., by affidavits or as otherwise provided in [Court of Chancery Rule 56] must set forth specific facts showing that there is a genuine issue for trial. If [he] does not so respond, summary judgment, if appropriate, shall be entered against [him]."[52] In the context of the cross-motions for summary judgment addressed in this memorandum opinion, the material facts are not in dispute.[53]

2. Motion to Dismiss

The standards guiding the Court in its consideration of a motion under Court of Chancery Rule 12(b)(6) are not in dispute:

> A motion to dismiss will be granted where, under any set of facts that could be asserted to support the claim, the plaintiff would not be entitled to relief. The necessary analysis assumes the truth of the well-pled facts contained in the plaintiff's complaint, and requires that all reasonable inferences arising from pled facts be drawn in favor of the plaintiff. At the same time, however, the court does not give weight to conclusory allegations unsupported by any underlying allegation of fact.[54]

B. *Review of Agency Conduct: Consideration of General Principles*

Before turning to the merits of the Plaintiffs' claims, the Court must first answer the threshold question of whether the Plaintiffs have the right to maintain this litigation. Namely, this inquiry involves, first, whether a right

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[52] Ct. Ch. R. 56(e).
[53] *See* Ct. Ch. R. 56(h). There is one issue, the standing of the Plaintiffs to pursue their challenge to the rezoning, for which supplementation of the record is necessary.
[54] *State, ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 523 (Del. Ch. 2005) (citing *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 326 (Del. 1993)).

of action exists for each claim and, second, whether, in the event rights of action do exist, these Plaintiffs have standing sufficient to assert their claims.

The Plaintiffs' claims are premised on a broad array of alleged violations of statutory and regulatory provisions by governmental entities.[55] The Plaintiffs' challenges to governmental conduct may, for analytical purposes, be categorized as (1) a challenge to agency action that constitutes "gap" conduct (*i.e.*, conduct that may neither be characterized as a "case decision" or regulation promulgation),[56] (2) a challenge to agency action that potentially constitutes a "case decision" (but where the agency is not made expressly subject to review of such conduct under Delaware's Administrative Procedures Act),[57] and (3) a challenge to municipal zoning-action.[58] These categories of claim are each addressed in the analysis that follows.

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[55] The Plaintiffs' claims necessarily implicate actions taken by, or on behalf of, the private parties. A claim against Ventures and Kohl is addressed in Part IV(E), below.

[56] The notion of "gap" conduct will be described more in Part IV(B)(3), below. This notion is implicated in the Plaintiffs' challenges to the conduct of the OSPC. *See* Part IV(C)(1), below.

[57] The common law right to review of certain agency action nominally exempt from "case decision" review under the APA is discussed at Part IV(B)(2), below. This notion is implicated in the Plaintiffs' challenges to DelDOT's conduct with respect to the comprehensive TIS. *See* Part IV(C)(2), below.

[58] The right to review of municipal conduct with respect to zoning implicates a separate line of inquiry, discussed below at Part IV(D). This involves the Plaintiffs' challenge to the Town's approval of the rezoning as inconsistent with the comprehensive plan.

The Plaintiffs also assert a claim against DelDOT for unlawful agency subdelegation in entering into the Development and Recoupment Agreements with the Town and the private developers. This claim is addressed below at Part IV(C)(2)(b).

The parties rely on various theories with respect to the three types of claim summarized above that present fundamental questions of judicial authority. The Plaintiffs contend that, even in the absence of an express statutory right of review, they may challenge statutory and regulatory violations by governmental entities under general taxpayer standing principles. The Plaintiffs, in essence, argue in favor of a general right of judicial review enabling private parties to challenge governmental conduct whenever a plaintiff can demonstrate noncompliance with law,[59] no matter what (or whose) interest(s) are putatively protected by such law. A critical question, as the Court views it, is whether the Plaintiffs may bring their claims under recognized taxpayer standing principles, or whether maintenance of such claims would impermissibly expand the scope of claims recognized under taxpayer standing doctrine in Delaware (thereby not only eviscerating traditional notions of standing analysis where challenges to governmental conduct are concerned, but also undermining certain principles of separation of powers, as well).

The Defendants, on the other hand, contend that, where no express statutory grant of judicial review may be found, private plaintiffs are

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[59] "Law" here is used in its most general sense, to indicate even self-prescribed, internal procedures governing the day-to-day functioning of agencies.

relegated to overcoming the heavy burden of demonstrating the existence of an implied private right of action to challenge governmental conduct.[60] The Defendants maintain that, on application of the implied private right of action doctrine, it is clear that the Plaintiffs have no right of action through which they may present their claims. As a preliminary matter, however, the Court must determine whether implied private right of action doctrine is ever applicable to challenges by private plaintiffs to governmental conduct; and, on answering the first question in the affirmative, whether the implied private right of action doctrine provides the proper lens through which to view the claims of these Plaintiffs. Although the Court concludes that the implied private right of action doctrine does have a place in this analysis, it is not the first doctrine to which the Court must look—instead, the Court must first consider whether a right of review has been recognized under Delaware precedent and whether principles of statutory construction speak helpfully to the question of rights of review.

Both the Plaintiffs and Defendants have staked out positions at the opposite ends of the continuum of potential arguments in support of their claims—however, much of the analysis requires an approach lying somewhere in between. Ultimately, as explained in greater detail below, the

[60] The Defendants also challenge the capacity of the Plaintiffs to maintain their claims on standing grounds.

Court concludes that a common law right of review has been recognized in our precedent for conduct of agencies constituting "case decisions," even when such agencies are not expressly subject to state APA provisions which set forth a right of review for such conduct. Also, agency conduct that constitutes neither a "case decision" nor a "regulation"—so-called "gap" conduct—is not subject to judicial review, under traditional principles of statutory construction, unless otherwise mandated by statute, constitutional principles, or the taxpayer standing doctrine. Finally (and relatedly), the Court reiterates that the taxpayer standing doctrine applies to a relatively narrow set of circumstances, generally involving either challenges to the handling of public moneys or use of lands in the public trust.

1. The "Neutral" Presumption of Reviewability Existing at Common Law

A good starting point is the common law view of the judiciary's power to review administrative conduct. The answer to this inquiry will provide the foundation for an understanding of modern administrative review at the state level.

a. *Comparison of the Federal APA to the State APA*

It is paramount to bear in mind the distinction between the sweeping right to judicial review mandated by the express terms of the federal

Administrative Procedures Act,[61] and the more narrow rights to judicial review expressly set forth in the Delaware APA.[62]

The federal APA grants review for "[a]gency action made reviewable by statute and [for] final agency action for which there is no other adequate remedy in a court . . . ."[63] Such review is available to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ."[64] The federal APA defines "agency action" to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[65] This definition has effectively been interpreted liberally to apply to a broad spectrum of potential agency conduct, with certain principles of administrative and statutory law being applied as a matter of second-order analysis then to remove specific types of conduct from judicial purview.

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[61] *See* 5 *U.S.C.* § 500 *et seq.*
[62] *See* 29 *Del.C.* § 10101 *et seq.*
[63] 5 *U.S.C.* § 704.
[64] 5 *U.S.C.* § 702.
[65] 5 *U.S.C.* § 551(13). *See generally* 5 *U.S.C.* § 551 (defining terms employed in definition of "agency action").

The strong presumption favoring judicial review of agency conduct at the federal level was advanced by the United States Supreme Court in *Abbott Laboratories v. Gardner*,[66] which held that the federal APA

> embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," so long as no statute precludes such relief or the action is not one committed by law to agency discretion.[67]

The Court explained that "[t]he [federal APA] provides specifically not only for review of '(a)gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court.'"[68] Therefore, under the federal APA, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[69] Though the Court since may have stepped back to an extent from the strength of its assertions in *Abbott*

[66] 387 U.S. 136 (1967).
[67] *Id.* at 140 (citations omitted).
[68] *Id.* (citations omitted).
[69] *Id.*

*Laboratories*,[70] the presumption of reviewability remains in force for nearly all agency actions at the federal level.[71]

The broad presumption of reviewability accorded persons challenging conduct of federal agencies is to be contrasted with the more narrow right of review conferred by the express terms of Delaware's APA. The initial provision of the state APA explains that, among the purposes underlying enactment of the statutory regime, "[t]he policy of [the APA] is . . . to specify the manner and extent to which action by [agencies subject to the APA] may be subjected to . . . judicial review."[72] The state APA defines "agency action" to mean "either an agency's regulation or case decision . . . ."[73] Therefore, it is evident that the state APA is intended to

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[70] *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985) (setting forth rebuttable presumption of *unreviewability* for agency decision not to enforce); *Webster v. Doe*, 486 U.S. 592 (1988); 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.7 (4th ed. 2002). *But cf. Franklin v. Massachusetts*, 505 U.S. 788, 814-823 (1992) (concurring opinion suggesting narrow interpretation of prior holdings that arguably restricted presumption).

[71] *See, e.g.*, *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 152 (1st Cir. 1987) (Breyer, J.).

[72] 29 *Del.C.* § 10101 (emphasis added).

[73] *Id.* at § 10102(2). The subsection, in full, provides that "'[a]gency action' means either an agency's regulation or case decision, which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind or the grant or denial of relief or of a license, right or benefit by any agency or court, or both."

A "case decision" is defined to "mean[] any agency proceeding or determination that a named party as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of a law or regulation, or is or is not in compliance with any existing requirement for obtaining a license or other right or benefit. Such administrative adjudications include, without limitation, those of a declaratory nature respecting the payment of money or resulting in injunctive relief requiring a named party

subject to judicial review only agency conduct that may be fairly characterized as "regulations" or "case decisions"—and this conclusion is confirmed by subchapter V of the state APA, which authorizes judicial review only of "regulations"[74] and "case decisions."[75] The express language employed in these provisions is therefore strongly demonstrative of an intent to erect a more limited scheme of judicial review (relative to the scope of review foreseeable under the express terms of the federal APA), as discussed further, below.

Significantly, the Delaware Supreme Court, in *Free-Flow International, Inc. v. Department of Natural Resources and Environmental Control*,[76] held that not all agency conduct comes within the scope of

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to act or refrain from acting or threatening to act in some way required or forbidden by law or regulation under which the agency is operating." *Id.* at § 10102(3).

A "regulation" is defined to "mean[] any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court. Such statements do not include locally operative highway signs or markers, or an agency's explanation of or reasons for its decision of a case, advisory ruling or opinion given upon a hypothetical or other stated fact situation or terms of an injunctive order or license." *Id.* at § 10102(7).

Finally, "agency" is defined to "mean[] any authority, department, instrumentality, commission, officer, board or other unit of the state government authorized by law to make regulations, decide cases or issue licenses. Agency does not include the General Assembly, courts, municipalities, counties, school districts, the University of Delaware, Delaware State University, Delaware Technical and Community College and other political subdivisions, joint state-federal, interstate or intermunicipal authorities and their agencies." *Id.* at § 10102(1). This memorandum opinion focuses on the availability of judicial review of the conduct of state agencies.

[74] *See* 29 *Del.C.* § 10141.

[75] *See id*. at § 10142.

[76] 861 A.2d 1233 (Del. 2004).

"regulations" or "case decisions." On the contrary, the Court held that there exists a category of agency conduct that "operate[s] outside the scope of the APA."[77] A third category (or "gap") of potential agency conduct therefore exists beyond the conduct subject to the review provisions of the state APA. As explained below, the decision of the General Assembly not to provide for judicial review of "gap" conduct is indicative of legislative intent—especially because it is clear that the legislature knows how to provide for such review when it so desires.[78]

b. *The Presumption of Unreviewability Existing at Early Common Law*

The notion that a right of judicial review does not exist for the entire spectrum of potential agency conduct should not come as a surprise. Indeed, the decision in *Abbott Laboratories*, providing for a broad presumption of reviewability of federal agency conduct, "announced a major doctrinal change in the law governing review of agency action . . . ."[79] At early common law, only a very narrow right of review of agency activity was

[77] *Id.* at 1236 ("We disagree with the premise that all of what an agency does must culminate in a regulation or a case decision.").
[78] An additional category of agency conduct discussed in this memorandum opinion, *see* Part IV(B)(2), *infra*, is action by agencies exempted by 29 *Del.C.* § 10161(b) from certain provisions for judicial review set forth in the state APA, but that falls under the definition of "case decision" found in 29 *Del.C.* § 10102. *See also* 29 § 10161(b) (providing that definitions in Subchapter I of state APA apply to "exempted" agencies).
[79] 3 Pierce, *supra* note 70, § 17.6.

recognized.[80] Contrary to the holding in *Abbott Laboratories*, courts generally applied a presumption of *unreviewability* in addressing challenges to agency action.

The presumption of non-reviewability was first articulated in the seminal decision of the United States Supreme Court, *Marbury v. Madison*,[81] which established judicial review as a necessary feature of separation of powers, holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[82] The Court, however, also explained that

> [t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions . . . which are, by the constitution and laws, submitted to the executive, can never be made in this court.[83]

Thereafter, "[t]hroughout the nineteenth century, the Court resolved questions of reviewability of agency actions by applying a presumption of *unreviewability*."[84]

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[80] *See id*. § 17.5.
[81] 5 U.S. (1 Cranch) 137 (1803).
[82] *Marbury*, 5 U.S. at 177.
[83] *Id.* at 170. This excerpt's restriction to "[q]uestions . . . submitted to the executive" should, of course, not be read as necessarily limiting the scope of its applicability. Indeed, it conforms with the early understanding that agency action was an exercise of executive power, independent agencies having been unknown to early administrative law.
[84] 3 Pierce, *supra* note 70, § 17.5. *See also Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827).

Toward the middle of the century, the Court, in *Decatur v. Paulding*,[85] reaffirmed its commitment to the presumption by denying that it had jurisdiction to review a decision of the Secretary of the Navy. Significantly, the Court explained that "[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."[86]

c. *The Shift in Doctrine: The "Neutral" Presumption of Reviewability Existing Until Enactment of the Federal APA*

This presumption of *unreviewability* continued in force until the beginning of the twentieth-century, when a less constricted view of administrative law was necessary to fulfill the needs of an industrialized nation increasingly governed by a burgeoning bureaucratic regime. In *American School of Magnetic Healing v. McAnnulty*,[87] the Supreme Court ruled that an order of the Postmaster General could be subjected to judicial review, as it was "a clear mistake of law . . . and the courts, therefore, must have power in a proper proceeding to grant relief."[88] The Court premised its jurisdiction on the notion that, to rule otherwise, would subject "the

[85] 39 U.S. (14 Pet.) 497 (1840).
[86] *Id.* at 516.
[87] 187 U.S. 94 (1902).
[88] *Id.* at 110.

individual . . . to the absolutely uncontrolled and arbitrary action of a public and administrative officer . . . and is in violation of the rights of the individual."[89]

Although the Court did not, in *McAnnulty*, expressly overrule its prior adherence to the presumption against reviewability, the Court nevertheless found a right of review to exist in subsequent cases with significant frequency.[90] The Court thereafter recognized a right of judicial review on an *ad hoc* basis until its (federal-APA-based) opinion in *Abbott Laboratories*, reaching the merits of certain claims without setting forth a new presumption doctrine. Ultimately, the best conclusion to be drawn from the case law of the era between the decisions in *McAnnulty* and *Abbott Laboratories* is that the Supreme Court "applied no presumption either way"—*i.e.*, a "neutral" presumption.[91]

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[89] *Id.*

[90] *See generally* 3 Pierce, *supra* note 70, § 17.5.

[91] *Id.* § 17.6, at 1258. Commentators have varied in the conclusions they have drawn with respect to the presumption in existence pre-*Abbott Laboratories*. The modern view (perhaps tempered with the passing of time) is that a "neutral" presumption existed at common law. *Compare id.*, *with* 5 Kenneth Culp Davis, *Administrative Law Treatise* §§ 28:1, 28:4 (2d ed. 1984) (earlier edition of same treatise contending that presumption favoring review existed at common law); *accord* Louis L. Jaffe, *Judicial Control of Administrative Action* 339-53 (1965).

2. Judicial Review of § 10161(b)-Agency Conduct That Constitutes "Case Decisions"

It is against this backdrop that the Court analyzes the issues presented here. The Delaware General Assembly, through enactment of the state APA, has expressed its intent that certain, specified agencies be subject to the full gamut of rules governing agency conduct provided for in the APA (including rules with respect to promulgation of regulations, issuance of licenses, method of rendering case decisions, and, of course, extent of judicial review). Agencies not identified in 29 *Del.C.* § 10161(a)[92] are, under 29 *Del.C.* § 10161(b), exempted from the bulk of APA governance provisions.[93] Among the provisions to which these agencies ("§ 10161(b) agencies")[94] are not subject is the state APA's grant of a right of judicial review for agency "case decisions."[95] Section 10161(b) agencies, however, are subject to, *inter alia*, the APA's provisions for limited judicial review of agency regulations.[96]

[92] Neither DelDOT nor OSPC is listed in § 10161(a).

[93] Section 10161(b) provides, "[a]ll agencies which are not listed in subsection (a) of this section shall only be subject to subchapters I and II of this chapter and §§ 10141, 10144 and 10145 of this title."

[94] This memorandum opinion does not address rights of judicial review with respect to § 10161(b) agencies that are otherwise subject to statute-specific appeal regimes.

[95] *See* 29 *Del.C.* §§ 10161(b), 10142(a) ("Any party against whom a case decision has been decided may appeal such decision to the [Superior Court].").

[96] *See* 29 *Del.C.* §§ 10161(b), 10141 ("Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the [Superior Court] for declaratory relief.").

Arguably, then, the General Assembly's decision to exempt § 10161(b) agencies from the formal process of judicial review established by the state APA with respect to "case decisions" provides some evidence of the legislature's intent to preclude judicial review of such agencies' conduct which may be fairly characterized as a "case decision."[97] Indeed, reasons of public policy favoring efficiency of administrative action, especially where litigation may create significant cost externalities for which the judiciary is perhaps ill-equipped to account, may establish persuasive grounds on which it would be reasonable for this Court to conclude that judicial review of these agencies' "case decisions" was precluded by the intent manifest in the terms and statutory scheme of the state APA.[98] Such a conclusion accords

[97] As one legal encyclopedia recites, "There are well-recognized areas in which the legislature can statutorily delegate powers to an administrative agency that a court cannot review. . . . Since the legislature has discretion to grant or withhold judicial review of administrative actions, it may statutorily preclude review, or may commit the challenged action entirely to unreviewable administrative discretion." 73A C.J.S. *Public Administrative Law and Procedure* § 313 (2005) (citations omitted).

[98] Such a conclusion may also find support in the relatively increasing reluctance of the federal courts to find a right of judicial review. *See* 3 Pierce, *supra* note 70, § 17.7 ("Partial Erosion of the Presumption").

Of course, judicial review of agency conduct premised on both federal and state constitutional claims should, and must, always be recognized. *See generally id*. at § 17.9 (discussing required presumption of reviewability under constitutional-fact doctrine (*i.e.*, claims involving First Amendment violations) and under general constitutional challenges).

with the understanding that a legislature may "statutorily delegate powers to an administrative agency that a court cannot review . . . ."[99]

Moreover, such a result would be in harmony with traditional principles of statutory construction, especially when viewed from the perspective of common law "neutrality" lingering in the background of administrative law principles exclusive of the federal regime with respect to a presumptive right of review. Rules of statutory construction provide that the General Assembly's decision to exclude by express language certain agencies from judicial review of "case decisions" under the APA "must [be] ascribe[d] a purpose . . ., if reasonably possible."[100] Such a purpose, it is reasonable to conclude, would be to deny judicial review in this instance.[101]

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[99] *See Del. Dept. of Corr. v. Worsham*, 638 A.2d 1104 (Del. 1994). This is, of course, subject to certain limitations. A right of judicial review exists to review alleged violations by agency conduct of constitutional rights held in the plaintiff. *See* 3 Pierce, *supra* note 70, § 17.9 ("The Presumption of Reviewability When Constitutional Rights Are at Stake"); *see also* 73A C.J.S. *Public Administrative Law and Procedure* § 313 (expressing view that legislature may statutorily delegate judicially unreviewable powers to agency, but also suggesting indelible right to review where constitutional rights are implicated).

In addition, Delaware case law has recognized certain narrow grounds on which private plaintiffs may always challenge government action—*e.g.*, taxpayer standing doctrine.

[100] *See Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) ("The General Assembly passed the pertinent statutes as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce a harmonious whole. . . . Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning and courts must ascribe a purpose to the use of statutory language, if reasonably possible.") (citations omitted).

[101] *Cf. Chalawsky v. Sun Refining & Mktg. Co., Inc.*, 733 F. Supp. 791, 799-800 (D. Del. 1990) ("This Court will not presume the Delaware legislature intended remedies it did

Nevertheless, significant precedent has resolved this question in favor of a right to judicial review of "case decisions," giving effect to equitable principles recognizing a need for judicial involvement when meaningful review is otherwise unavailable in any other judicial forum. This Court has effectively recognized that a right to judicial review of "case decisions" may lie for agency conduct, even absent express indications of statutory intent to permit such review. As this Court explained in *Holland v. Zarif*,[102] "[t]he Delaware case law is replete with situations when the actions of administrative agencies or bodies have been reviewed, in the absence of any statutory method of judicial review."[103]

It should be noted, however, that in *Holland*, recognition of judicial review was arguably premised on the goal of avoiding violation of fundamental constitutional rights of the plaintiff. In *Holland*, the plaintiff sought review of refusal by the Delaware Department of Labor to permit her to file a claim of sex-discrimination against her employer. Though certain

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not include in the statute."). *But see Choma v. O'Rourke*, 300 A.2d 39, 41 (Del. Ch. 1972). The decision in *Choma* has been questioned by this Court in at least one decision on the grounds that it failed to address specifically the question of the existence of subject matter jurisdiction. *See Jones v. Bennett*, 1981 WL 15106, at * 3 - *4 (Del. Ch. Dec. 16, 1981).

[102] 794 A.2d 1254 (Del. Ch. 2002). In *Holland*, this Court explained that, even though the common law writ of certiorari would perhaps have been available, it would ultimately be meaningless as there was no "paper record" to review and there exist cases where the party needs an opportunity to develop facts and circumstances. *See id.* at 1267 n.38; *see also Couch v. Delmarva Power & Light Co.*, 593 A.2d 554,, 560-61 (Del. Ch. 1991).

[103] *Holland*, 794 A.2d at 1267. *Cf. AFSCME Locals 1102 & 320 v. City of Wilmington*, 858 A.2d 962, 967 (Del. Ch. 2004).

provisions of Delaware's Discrimination in Employment and Handicapped Persons Employment Protections Act potentially precluded review of the agency's decision,[104] denial of an opportunity for judicial review would likely have violated the plaintiff's rights to due process of law. In order to avoid such a result, the statute was therefore construed to permit review.[105]

Though *Holland* may not control in the context of general challenges to § 10161(b) agency conduct, the Court is, nevertheless, unwilling to reject rights of review for private plaintiffs of "case decisions" directly affecting their rights.[106] While potentially persuasive arguments may be offered that no such review should exist for § 10161(b) agencies not otherwise subject to a statute-specific review-scheme, it is unnecessary, as well as imprudent, to reach that conclusion here. The weight of authority, therefore, compels the Court to accept that such a right of review exists, at Delaware common law, in part because the parties have advanced no arguments sufficiently persuasive to overcome prior precedent.

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[104] It should be noted that the Department of Labor and review board were not subject to the review provisions of the state APA, but rather to statute-specific provisions for appeal and review under the discrimination legislation cited above.

[105] *Accord* 3 Pierce, *supra* note 70, § 17.9.

[106] *Cf. Cannon v. State*, 807 A.2d 556, 564-65 (Del. 2002) (Steele, J., dissenting) (explaining that, where no statutory standards for administrative decision and no agency-adopted substantive or procedural safeguards, judicial review "is the *only* protection the [landowners] have against an exercise of unbridled administrative discretion").

As a consequence, the Court holds that conduct of § 10161(b) agencies arguably falling within the definition of "case decisions" may be subject to a common-law right of judicial review, notwithstanding the potential that the state APA's statutory exemptions may evince an intent to the contrary—provided that no other statute acts to preclude such review. While it may be within the legislature's power to mandate that certain agency conduct be judicially unreviewable (except as to certain constitutional violations), recognizing a right to judicial review of § 10161(b) agency "case decisions" for arbitrary and capricious behavior, in substance a concept grounded in notions of due process, is an outcome that accords with the understanding developed at Delaware common law.[107]

3. Review of Agency Conduct that Constitutes "Gap" Conduct

a. *General Principles of Review*

The Court now turns to the question of whether a right of judicial review exists for agency conduct that is neither a "case decision" nor a "regulation"—*i.e.*, "gap" conduct.[108] In answering this question, the Court refers back to the "neutral" presumption of reviewability present at common law.

[107] Of course, a plaintiff would have to demonstrate standing to assert such a claim, as well. The test for standing in this context is described below, in Part IV(C)(2)(a).

[108] As explained above, the state APA provides for an express right of review of regulations applying to all agencies. *See* 29 *Del.C.* § 10161(a), (b). This may exist in conjunction with a specific agency's enabling statute.

As explained above, traditional principles of statutory construction, when applied in concert with the common law's "neutral" presumption of reviewability, arguably indicate legislative intent to deny a right to judicial review for "case decisions" of certain statutorily-exempt agencies.[109] Yet, these arguments are overcome by the weight of precedent establishing a limited common law right to review of such conduct. With respect to "gap" conduct, however, no similar line of Delaware precedent exists.

The "neutral" presumption of reviewability at common law denotes a policy favoring neither recognition, nor denial, of a right to review. Therefore, because precedent fails to provide guidance with respect to this issue, traditional principles of statutory construction should be employed to determine whether the statutory terms and scheme help with the question of whether a right of review was fairly intended by the legislature. Indeed, the application of such doctrine set forth in the prior Part applies with even greater effect to agency conduct outside the scope of the state APA.

Well-settled principles of statutory construction mandate that the decision of the state legislature to constrict the scope of APA applicability[110]—applying, by its express terms, to a much narrower universe

[109] As explained above, such a denial of judicial review would necessarily apply only to claims outside the sphere of constitutionally protected rights.
[110] *See Free-Flow Packaging*, 861 A.2d at 1236.

of agency conduct than under the federal APA—must be accorded its reasonable meaning. To hold a right of judicial review to be generally available for agency conduct falling outside the bounds of "case decisions" and "regulations" would undercut the careful delineations drawn in the state APA.[111]

This analysis, in combination with the "neutral" presumption of reviewability, compels a conclusion that judicial review is generally precluded with respect to administrative agency "gap" conduct. Such a result follows, however, regardless of one's view of where the common law presumption of reviewability lies. It should be readily acknowledged that, traditionally, it was assumed that the common law presumed reviewability in the absence of express statutory mandate otherwise.[112] The modern view, however, appears to have shifted toward a recognition that the United States Supreme Court's last meaningful pronouncements on administrative review at common law, now largely superseded by enactment of the federal APA, demonstrated neutrality toward a presumptive right to judicial review.[113]

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[111] *See Oceanport Indus.*, 636 A.2d at 900 ("[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning . . . ." (citing *In re Estate of Smith*, 467 A.2d 1274, 1280 (Del. Ch. 1983)).

[112] *See, e.g.*, 5 Davis, *supra* note 91, §§ 28.1, 28.4; Jaffe, *supra* note 91, at 339-53.

[113] *See* note 91, *supra*. The more measured approach adopted by modern observers is perhaps the result of the presumption's widespread acceptance under the federal APA. At the time many of the early works were authored, this concept was arguably only tenuously rooted in federal administrative law principles.

Regardless, though, the common law's presumption (whether of "neutrality" or of reviewability) was intended to interpose the judiciary as a check on agency conduct directly affecting the individual. Conduct only indirectly affecting the individual (impinging neither constitutional freedoms, nor other personal benefit or status) implicates only the functioning of government, over which private individuals have no presumptive rights of review.[114] To permit such a right of review would tread dangerously into the realm of political questions better left to resolution by other means.

Of course, no rule is without its exceptions—and this instance is no different. A right to judicial review must, as previously discussed, be recognized for claims of violations of certain of plaintiffs' constitutional rights. Moreover, Delaware has recognized certain limited instances in which a generalized challenge may be asserted to governmental conduct by a citizen—so-called "taxpayer standing."[115] Finally, the rejection of a right to judicial review of "gap" conduct must give way where a statute-specific appeals regime mandates otherwise.

Therefore, where challenged agency conduct fails to fall within the categories of "case decision" or "regulation"—*i.e.*, where the conduct falls

[114] This memorandum opinion does not address the extent to which governmental entities may have access to judicial review as a means of challenging the conduct of other governmental entities.

[115] This doctrine is discussed in greater detail in Part IV(B)(5), below.

within the "gap" of the state APA—no judicial review is available (unless otherwise provided by statute, constitutional mandate, or taxpayer standing).[116]

b. *Agency Violations of Its Rules & Regulations: Constitutionally Mandated Review Under the Accardi-Doctrine, and Review Granted Under Delaware Case Law*

While no well-established line of precedent exists recognizing a right of judicial review of agency "gap" conduct, that is not to say no such case law may be found. The primary example is *Couch v. Delmarva Power & Light Co.*,[117] which arguably provides for a plenary right to judicial review in certain instances (specifically, where an agency violates its own rules or regulations).[118]

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[116] One could argue that this conclusion is inconsistent with certain prior decisions, such as *James Julian, Inc. v. Del. Dep't of Transp.*, 1991 WL 224575 (Del. Ch. Oct. 29, 1991) (subjecting Department of Labor to judicial review of agency decision regarding certain prevailing wage rates to be included in contract bids). The opinion in *James Julian* could be read to set forth a broad right of review over agency conduct, arguably including "gap" conduct, as well. *See id.* at *7. But *James Julian* is better understood as representing application of administrative law principles to the long line of case law permitting challenges to conduct relating to low-bid contracts—effectively a subset of taxpayer standing suits. *See id.* at *1 ("Plaintiffs sue in their capacities as both contractors and taxpayers . . . ."). *See also Harmony Const., Inc. v. Del. Dep't of Transp.*, 668 A.2d 746 (Del. Ch. 1995); *Wahl v. City of Wilmington*, 1994 WL 13638 (Del. Ch. Jan. 10, 1994); *A-Del Const. Co., Inc. v. Del. Dep't of Transp.*, 1992 WL 127531 (Del. Ch. June 5, 1992).

[117] 593 A.2d at 558.

[118] Significantly, the decision in *Couch* has been relied on in numerous opinions as a guide to certain principles of administrative review. *See, e.g.*, *Holland*, 794 A.2d at 1263 (citing *Couch* as an example of "precedent suggesting that this court retains the authority to review discretionary decisions of administrative agencies when no other adequate form of judicial review is available and no legislative intent to preclude review exists"); *Sierra*

In *Couch*, a private plaintiff sought review of a DelDOT decision not to deviate from its usual method of placement of utility poles in its rights of way. Although not statutorily required, DelDOT had promulgated regulations that such deviations would only occur on a showing of "extreme hardship." DelDOT determined that this standard was not met and therefore refused to alter course. Significantly, the Court assumed, without deciding, that judicial review could be obtained by the plaintiff in order to determine if, *inter alia*, DelDOT's decision was in compliance with its regulations.[119] The court reasoned that constitutional grounds mandated judicial review, remarking that "it has long been recognized that administrative arms of government are bound by the federal constitution to abide by their own rules and regulations."[120] The court held that "[w]hen the government violates its own rules, without a justifying emergency, persons who are adversely affected by that action have avenues of relief."[121]

Although the decision in *Couch* arguably establishes an independent right to judicial review for any alleged violation by an agency of its own

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*Club v. Dep't of Natural Res. & Envtl. Control*, 2005 WL 3359113, at *3 (Del. Ch. Dec. 2, 2005).

[119] *Couch*, 593 A.2d at 560-62.

[120] *Id.* at 561 (citing *United States v. Nixon*, 418 U.S. 683, 694-96 (1974); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

[121] *Id.* (citing *Service v. Dulles*, 354 U.S. 363, 388 (1957)).

rules (provided that the plaintiff demonstrates "adverse effect"),[122] the opinion is better viewed as articulating support for the principle that judicial review must be granted where constitutionally mandated. *Couch* only assumed a right of review to exist on its facts, premised on the notion that the right arises from both the federal and state constitutions,[123] and instead addressed the merits of the case. As is explained below, however, a right to judicial review of violations by agencies of their own rules is constitutionally mandated in certain limited circumstances—*i.e.*, where procedural safeguards established by the agency are violated, thereby implicating due process concerns, and where important individual rights are affected. Moreover, the requirement that agencies abide by their own rules has been adopted in Delaware, but this doctrine does not set forth an independent right to review beyond that which is constitutionally mandated. Viewed in this light, *Couch* may be read as doing no violence to the holding

[122] It is unlikely that DelDOT's conduct would be considered a "case decision" in *Couch*, since the decision was with respect to a right of way held by DelDOT and the plaintiffs were only adjoining landowners.

[123] *Couch*, 593 A.2d at 561.

It should be acknowledged that the court in *Couch* also noted that a right of review might arise from common law, as well. *See id.* ("Both the common law and our federal and state constitutions create enforceable rights as well."). This Court's holding here is in accord with this language, in that agencies must abide by their own rules which affect substantial rights where a right to judicial review is found to exist.

above—*i.e.*, that no right of review exists for agency "gap" conduct, with certain narrow exceptions.[124]

In *Couch*, the assumed existence of a right to review is premised on the federal doctrine of administrative law known colloquially as the "*Accardi*-doctrine," which is derived from the opinion of the United States Supreme Court in *United States ex rel. Accardi v. Shanghnessy*.[125] With respect to this doctrine, it has been explained that

> [a]side from interpreting statutory terms in ways that shaped the procedures the agency must follow, courts have also developed doctrines that can operate to require agencies to follow more elaborate procedures than statutes would otherwise require. The most important of these is the doctrine that requires agencies to follow their own rules. This doctrine constrains an agency's action when no other source of law would do so.[126]

Implicit in this excerpt is the understanding that, at the federal level, the *Accardi*-doctrine has broad applicability; however, at the state level, the doctrine's potential federal constitutional burdens are more confined. Although the United States Supreme Court, in *Board of Curators v.*

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[124] The Court in *Couch* also noted that a right to review could occur if the decision of the agency was "motivated by an impermissible consideration; or was otherwise a violation of plaintiffs' rights to due process of law." *See id.* (citations omitted). This is in accord with the Court's analysis here, providing for a right to review where constitutional claims are set forth (and standing is satisfied).

[125] 347 U.S. 260 (1954).

[126] M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. Chi. L. Rev. 1383, 1434-44 (2004). This passage by Professor Magill alludes to the fact that the *Accardi*-doctrine's reach extends over agencies that have adopted regulations purportedly binding their discretion, even when the agencies were originally under no obligation to adopt such regulations.

*Horowitz*,[127] suggested that *Accardi*-principles are not applicable to state entities as a matter of federal law, remarking that "[*Accardi*] . . . enunciate[s] principles of federal administrative law rather than constitutional law binding upon the States,"[128] its subsequent opinion in *United States v. Caceres*[129] likely revived the doctrine's mandated applicability in limited instances implicating due process concerns.[130]

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[127] 435 U.S. 78 (1978).

[128] *Id.* at 92 n.8. *Compare Bates v. Sponberg*, 547 F.2d325, 330 (6th Cir. 1976) (reasoning that source of *Accardi*-doctrine "is not . . . the Due Process Clause, but rather a rule of administrative law"); *accord Coastal States Gas Corp. v. Dep't of Energy*, 495 F. Supp 1300, 1307 (D. Del. 1980); *Tyler v. Children's Home Soc'y*, 35 Cal. Rptr. 2d 291 (Cal. Ct. App. 1994) ("*Morton v. Ruiz* applied a statutory sanction under federal administrative law. Here, plaintiffs cite no state administrative law imposing a similar sanction."), *with Couch*, 593 A.2d at 561 ("Such an action arises directly from the Fourteenth Amendment to the United States Constitution and from Section 9 of Article 1 of the Delaware Constitution (1897)."); *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 35 (D.D.C. 1998). Of course, the conclusion that review may not be mandated by the federal constitution does not end the analysis. Review may be available by virtue of either the state constitution or state administrative law (either by statute or by case law).

It should also be noted that the Delaware Constitution, providing that "every person . . . shall have . . . justice administered according to . . . the law of the land," *Del. Const.* art. I, § 9, incorporates the rights protected by the Due Process Clause of the United States Constitution. *See Aprile v. State***,** 143 A.2d 739 (Del. Super. 1958), *aff'd*, 146 A.2d 180 (Del. 1958); *In re Carolyn S. S.***,** 498 A.2d 1095 (Del. 1984).

[129] 440 U.S. 741 (1979).

[130] See generally Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 678-86 (1992), in which the author explains that

> *Accardi* and its sequelae simply did not present the question whether the Due Process Clause required agency adherence to regulations. Whatever the original doctrinal basis, the enactment of the APA made it unnecessary to struggle with this issue in any action for judicial review of federal agency action under that statute, at least when an agency had violated a legislative rule. The role of the Due Process Clause accordingly has been explored in cases that fall outside this zone: a challenge to state agency action allegedly taken in violation of self-imposed rules, *Board of Curators v. Horowitz*, [435 U.S. 78 (1978),] and a criminal case, *United*

Although the boundaries of the *Caceres*-corollary to the *Accardi*-doctrine are arguably not clearly delineated,[131] the Delaware Supreme Court has recognized the applicability of *Accardi/Caceres* to state agency conduct to the extent necessary to protect important individual rights and due process safeguards.[132] In *Dugan v. Delaware Harness Racing Commission*,[133] the Delaware Supreme Court, citing the decision in *Caceres*, held that

> once an agency does adopt . . . regulations, "it does not necessarily follow . . . that the agency has no duty to obey them. 'Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.'" If an agency rule is designed "to afford . . . due process of law by providing safeguards against essentially unfair procedures," the action which results from the violation of that rule is invalid.[134]

It is clear, therefore, that *Accardi/Caceres*-principles mandate recognition of a narrow exception to the notion of limited judicial review of state agency conduct—*i.e.*, where "the rights of individuals are affected" and "an agency

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> *States v. Caceres*, [440 U.S. 741 (1979),] in which a violation of agency regulations was urged as a basis for invoking the exclusionary rule.

*Id.* at 681. Professor Schwartz views the Supreme Court's subsequent ruling in *Caceres* as partially supplanting "*Horowitz*'s blunt and unqualified *ipse dixit*" with respect to the doctrine's applicability to states. *Id*. at 683.

[131] *See id.* at 686. In his article, Professor Schwartz interestingly contends "it is most plausible to interpret *Caceres* to require a showing of prejudice and reliance only when the Due Process Clause is invoked to provide estoppel-like relief to a party harmed by an agency violation of its own rules." *Id.*

[132] *See Dugan v. Del. Harness Racing Comm'n*, 752 A.2d 529, 531 (Del. 2000); *In re Buckson*, 610 A.2d 203, 218-19 (Del. Jud. 1992) (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970)).

[133] 752 A.2d 529.

[134] *Id.* at 531 (citing *United States v. Caceres*, 440 U.S. 741; *Morton v. Ruiz*, 415 U.S. 199; *Accardi*, 347 U.S. 260; *Vitarelli v. Seaton*, 359 U.S. 535 (1959)).

rule is designed 'to afford . . . due process of law by providing safeguards against essentially unfair procedures,'" agency conduct claimed to be in violation of the rule must be subject to judicial challenge by a plaintiff possessing standing to pursue such a claim (regardless of whether such conduct may be classified as "gap" conduct, a "case decision," or a "regulation").[135]

The foregoing, of course, should not be read to trample on the general principle that agencies are to abide by their own rules and regulations; instead, recognition of the principle should not be read to expand the right to judicial review of agency conduct unless otherwise based on constitutional or other law.[136] Indeed, where a right to review of agency conduct is

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[135] *Cf. Sierra Club*, 2005 WL 3359113, at *3 (recognizing procedural protections described in text above, but ultimately denying claim for injunctive relief premised on harm to procedural right of appeal).

The Court notes that the language employed in *Dugan* may be read either to be limited in its applicability to "due process safeguards" (with the preceding sentence acting as modifier), or to apply both where "individual rights are affected" and where due process safeguards are implicated. *See* 752 A.2d at 531. However, the cases cited by the Supreme Court as authority suggest adherence to the latter interpretation. *See id.* (citing *Caceres*, 440 U.S. at 751 n.14; *Morton*, 415 U.S. at 235; *Accardi*, 347 U.S. 260; *Vitarelli*, 359 U.S. at 539). *Cf.* Glen T. Harrell, Jr., *Recurrent Themes in Recent Administrative Law Cases*, 39 Md. B.J. 33 (2006) (describing application of Accardi-doctrine to state agencies in Maryland).

The Court also notes that a plaintiff seeking to maintain a claim under the *Accardi*-doctrine is traditionally required to demonstrate that the agency's violation of its rules caused her prejudice, as well, before the agency's conduct will be subjected to review.

[136] *Cf. Bates*, 547 F.2d at 330-31 ("It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights."); *Coastal States Gas Corp.*, 495 F. Supp. at 1308.

recognized, then failure to abide by agency rules and regulations may provide grounds for judicial relief. [137]

4. Right of Review Arising from Other Law (*i.e.*, Private Right of Action Doctrine)[138]

Inquiry into the existence of a right of review of agency conduct, however, does not end with the traditional administrative law principles discussed above. In the instance when a potential claimant is denied a right of review under the analysis set forth above, a question remains as to whether she may seek to force agency compliance with law under a theory of implied private right of action. This is the question to which the Court next turns.

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[137] *See, e.g.*, *Korn v. New Castle County*, 2005 WL 396341 (Del. Ch. Feb. 10, 2005). In *Korn*, this Court held that county government "must abide by its own rules," *see id.* at *1, *7, but it should be recognized that the decision was rendered in the context of a taxpayer standing suit. *But cf. Am. Farm Lines*, 397 U.S. at 538 (denying application of doctrine where "rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion"); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 680 (1985) (noting that regulations obligating agency to act may not provide law to apply unless intended to create enforceable rights). The Court in *American Farm Lines* explained that "it is always within is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable *except upon a showing of substantial prejudice* to the complaining party." *Id.* at 538-39. *See also In re Buckson*, 610 A.2d at 218-19 (emphasis added) (applying *American Farm Lines*).

[138] Although there may be some inevitable overlap, it is perhaps helpful to consider two general paths to judicial oversight of administrative action: one is by "judicial review," the traditional approach to judicial consideration of administrative decisions; the other is by separate civil action, one which may be premised upon an implied right of action.

a. *Applicability of Private Right of Action Analysis*

At the outset, it should be noted that implied private right of action analysis is generally employed to determine whether a right of action exists for one private party against another private party alleged to have violated statutory or regulatory law over which an agency or other governmental entity has power of enforcement.[139] Yet, as will be seen, implied private right of action analysis has a broad scope that also includes potential rights of action against the government for failure to comply with statute (or regulations promulgated under statutory authority).

Delaware case law has recognized, on several occasion, the existence of an implied private right of action for plaintiffs, even where no such right of action may be found in the express provisions of the statute. In conducting inquiry as to the existence of implied private rights of action, Delaware courts have adopted the three-prong test first articulated by the United States Supreme Court in *Cort v. Ash*.[140]

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[139] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (denying plaintiffs implied right of action for damages against accountants under § 17(a) of Securities Exchange Act); *Brett v. Berkowitz*, 706 A.2d 509, 512-13 (Del. 1998) (rejecting plaintiff's argument that criminal statute also gave rise to civil implied right of action); *Couch*, 593 A.2d at 557-60 (rejecting plaintiffs' attempt to enforce privately a statute against one state agency where another state agency was granted enforcement authority).

[140] 422 U.S. 66 (1975). This Court notes that, in *Cort*, the Supreme Court laid out a four-prong test for determination of the existence of an implied private right of action. *Id.* at 78. Only three of the prongs, however, are applicable at the state level. *See Lock v. Shreppler*, 426 A.2d 856, 864 (Del. Super. 1981) (later superseded by statute).

The three-prong test for implied private rights of action was most succinctly described in this Court's decision in *Couch*,[141] providing that inquiry into the existence of an implied private right of action

> involves a three-part inquiry: (1) Is Plaintiff a member of a class for whose special benefit the statute was enacted; (2) Is there any indication of legislative intent to create or to deny a private remedy for violation of the act; and (3) If there is no such indication, would the recognition of an implied right of action advance the purposes of the act?[142]

This formulation of the test for an implied private right of action has gained widespread acceptance in Delaware case law. It remains something of an open question as to whether private right of action analysis is helpful in answering the question of whether a private plaintiff has a right of action to force compliance by a governmental entity with statutory mandate.[143]

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With respect to Delaware opinions employing implied private right of action analysis, see, for example, *Schuster v. Derocili*, 775 A.2d 1029, 1036 n.42 (Del. 2001) (indicating continued approval of three-part test of *Cort v. Ash*); *Brett*, 706 A.2d at 512; *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1064-66 (Del. 1986) (adopting test in *Cort v. Ash* for private damages remedy analysis of federal securities law). See also *Miller v. Spicer*, 602 A.2d 65, 67-68 (Del. 1991) (addressing whether Delaware Equal Accommodations Act allowed for implied private right of action for damages in private civil suit). *Cf. Oceanport Indus.*, 636 A.2d at 899 ("Under traditional standards, a law that creates a duty to the general public does not give rise to privately enforceable rights." (citing *Cort*, 422 U.S. at 78; *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964))).

There is some question as to whether the most recent formulations of the implied private right of action analysis have been adopted in Delaware, over the older *Cort v. Ash* formulation. See generally the discussion in Part IV(B)(4)(b), below.

[141] 593 A.2d 554. It should be noted that *Couch* addressed both the issues of *Accardi*-doctrine, *see* Part IV(B)(3)(b), *infra*, as well as implied private rights of action.

[142] *Id.* at 558-59 (listing and applying the elements of *Cort v. Ash*). *See also Schuster*, 775 A.2d at 1036 n.42 (describing test, but not applying it).

[143] Although the opinion in *Couch* does involve enforcement of statute against a state agency, it presents the unusual procedural posture of an individual's attempting to

Indeed, little case law exists interpreting the question of whether implied private right of action doctrine is intended to apply to actions against a governmental-defendant.[144] The First Circuit, in *NAACP v. Secretary of Housing and Urban Development*,[145] persuasively explained the reason behind this lack of guidance. In that case, the court rejected the contention that analysis of whether a right of action against the Secretary of Housing and Urban Development (HUD) to ensure compliance with civil rights statutes exists must be performed under the three-prong test. The court held that, where the APA is applicable, implied right of action analysis is inappropriate. The court reasoned that

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employ the enforcement powers granted one agency against another agency. *See* 593 A.2d at 558. Thus, while the defendant in *Couch* was a governmental entity, the case is more akin to pursuit of a private attorneys-general remedy than what is known colloquially as a citizen-suit or an agency-forcing suit. *See, e.g.*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 97 (2005).

[144] David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 407 n.276 (2004) ("*Cort v. Ash* cases typically involves claims against private defendants. . . . In more than twenty-five years since *Cort*, there have been only two cases in which the Supreme Court has unambiguously applied the *Cort v. Ash* approach to claims for injunctive relief against government officers." (citing *Alexander*, 532 U.S. 275 (2001); *California v. Sierra Club*, 451 U.S. 287 (1981))).

Even though the Supreme Court, as observed in the article cited above, has applied *Cort* against certain government officials, it perhaps should be noted that in each case the challenge involved application of *federal* law against *state* actors. Therefore, the holdings in these cases are fundamentally distinguishable from the questions presented by this litigation—essentially whether *Cort* applies to determine if government may implicitly create a private right of action against itself (*i.e.*, application of *Cort* to challenges where the statutory right and violation arise outside the context of federalism).

[145] 817 F.2d 149 (1st Cir. 1987) (Breyer, J.); *accord Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 605-07 (1st Cir. 1989).

> it is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the *federal* government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for conformity with statutory obligations without any such "private right of action."[146]

The court pointed to the "'presumption' of judicial reviewability, now codified in the [APA,]" as the rationale underlying its rejection of private right of action analysis in these circumstances.[147] The court reflected that

> it is not surprising that cases discussing a "private right of action" implied from a federal statute do not involve a right of action against the federal government. Rather, they typically involve statutes that impose obligations upon a *nonfederal person* (a private entity or a nonfederal agency of government). The statute typically provides that the federal government will enforce the obligations against the nonfederal person. The "private right of action" issue is whether Congress meant to give an injured person a right himself to enforce the federal statute directly against the nonfederal person or whether the injured person can do no more than ask the federal government to enforce the statute.[148]

The First Circuit concluded that the dearth of federal case law on this issue arises from the broad applicability of the federal APA, thereby foreclosing

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[146] 817 F.2d at 152 (citing *Abbott Labs. v. Gardner*, 387 U.S. at 140 ("judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"; *Am. School of Magnetic Healing*, 187 U.S. at 110; 5 K. Davis, *supra* note 91, § 28.1, at 254-56; L. Jaffe, *supra*, note 91, 339-53 (emphasis in original)).

[147] 817 F.2d at 152. Although the language quoted in the text above is somewhat ambiguous, *see infra*, the modern view is that a neutral presumption of reviewability existed under the pre-APA common law of federal administrative review. *See also supra*, note 91.

[148] *Id.* (emphasis in original).

the need to demonstrate implied private rights of action in order to challenge agency behavior.[149] These passages, then, aptly frame the question placed before this Court: what is the extent to which implied private right of action analysis is applicable, if at all, to private suits brought in state courts seeking review of state agency conduct?

The First Circuit proposed a limited number of potential circumstances under which implied private right of action analysis would be useful as an analytical framework for review of enforcement actions against the federal government. The court remarked that "[o]ne can imagine a few instances in which a court might, notwithstanding the APA, wonder whether Congress meant to create a private right of action against the federal government."[150] From among a narrow set of foreseeable possibilities, the opinion selects the circumstances when "a court might have to decide whether Congress implicitly means a statute to provide a party with a 'private right of action' against one of the few federal bodies exempted from

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[149] *See id.* (reasoning that where APA remedy is available, implied right of action is neither warranted nor necessary). *See also Cousins*, 880 F.2d at 606 ("[W]hen a plaintiff seeks to enforce a federal statute against a federal regulatory agency, there is normally no *need* for an 'implied private right of action.' The general provisions for judicial review of agency action, as embodied in the APA, offer adequate relief."); *Glacier Park Found. v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981) (concluding that "[r]egardless whether a statute implies a private right of action, administrative actions thereunder may be challenged under the APA unless they fall within the limited exceptions of that Act"). *See also Miller*, 602 A.2d at 68 (finding regime where means of appeal already exists as strongly indicative that implied private right of action is inappropriate).

[150] *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d at 153.

the APA's coverage."[151] The court cited as examples "Congress, federal courts, territorial and District of Columbia governments, and certain military bodies."[152]

Though, as the opinion in *NAACP* makes clear, private right of action doctrine has only limited potential applicability in suits against the federal government, the potential effect of such analysis is magnified when applied at the state-level in instances when the review provisions of the state APA are not comprehensive. This conclusion results when viewed in light of the understanding that private right of action analysis is intended to apply to the open space between statutory provisions for judicial review of administrative conduct.[153]

Some case law finds implied private right of action analysis inapplicable to questions of a private individual's capacity to maintain agency-forcing suits—instead, purporting to revert to principles of

[151] *Id.* at 153.
[152] *Id.* (citing 5 *U.S.C.* § 701(b)(1)).
[153] The scope of Delaware adherence to the holding in *Cort v. Ash*, and its progeny, is not fully settled. Yet, the Delaware Supreme Court's adherence to subsequent United States Supreme Court opinions interpreting *Cort v. Ash* suggests that the full range of federal *Cort v. Ash* doctrine is to be considered persuasive for state law purposes, as well.

Support for the reasoning of the text above is also to be found in *Women's Equity Action League v. Cavazos*. 906 F.2d 742 (D.C. Cir. 1990) (Ginsburg, J.) (ultimately rejecting implied private right of action against federal agency). The court's reasoning contemplates the applicability of implied private of action doctrine against the federal government. *See id.* at 747-48. Moreover, the court's analysis placed significant reliance on the United States Supreme Court's opinion in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), implicitly suggesting the Supreme Court's approval of applying the doctrine to agency-forcing suits, as well. *See Cavazos*, 906 F.2d at 748-50.

administrative law present at common law prior to enactment of the APA. In *District of Columbia v. Sierra Club*,[154] the appeals court for the District of Columbia interpreted the First Circuit's analysis in *NAACP* to mean that "[j]udicial reviewability of agency action does not depend on the creation of a private right of action in the statute sought to be enforced."[155] The court held that the availability of the right was to be presumed, "absent some clear and convincing evidence of legislative intention to preclude review."[156] The court's analysis was premised on its understanding that "the right to judicial review existed at common law prior to the APA's enactment . . . ."[157] In support of its reasoning, the court cited the United States Supreme Court's decision in *Abbott Laboratories*; however, as discussed above, the opinion in *Abbott Laboratories* staked out the presumption contained in the federal APA and marked a "major doctrinal change in the law governing review of agency action."[158]

Moreover, the language quoted by the District of Columbia court describes the Supreme Court's liberal interpretation of the APA's "generous

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[154] 670 A.2d 354 (D.C. Ct. App. 1996).
[155] *Id.* at 359 (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230-31 n.4 (1986)). The court held that *Cort v. Ash* did not provide the "proper analytical framework" for determining whether a challenge to agency action for failure to comply with its statutory mandates lies. *Id.*
[156] *Id.* at 361 (citing *Japan Whaling Ass'n*, 478 U.S. at 231 n.4).
[157] *Id.*
[158] 3 Pierce, *supra* note 70, § 17.6.

review provisions."[159] Although the court in *Sierra Club* explicitly acknowledged the inapplicability of the federal APA, or any commensurate district-level administrative regime, the court relied heavily on federal administrative case law decided under the APA in delineating the scope of judicial review—an inconsistent approach employed throughout the opinion.[160]

Most significantly, however, the court did not address the First Circuit's guidance in *NAACP* that instances may exist at the federal level in which private right of action analysis is warranted in suits against "federal bodies exempted from the APA's coverage."[161] As noted above, this statement becomes important when considered at the state level where, as here, the state APA's coverage is not as comprehensive as at the federal level.[162]

In light of the foregoing, the Court concludes that the implied private right of action analysis is applicable to the issue of private rights of action

[159] *See Abbott Labs.*, 387 U.S. at 140-141.
[160] As indicated in the footnotes above, for example, the court placed heavy emphasis on *Japan Whaling Association*, which does not purport to address common law principles of administrative review.
[161] *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d at 153.
[162] In *Dist. of Columbia v. Sierra Club*, the court also sought to distinguish additional federal case law applying private right of action analysis in a mandamus action against the federal government on the grounds that it related to a "core executive responsibility." *See Dist. of Columbia v. Sierra Club*, 670 A.2d at 360 (citing *Gonzalez v. Immigration and Naturalization Service*, 867 F.2d 1108, 1109 (8th Cir. 1989) (dismissing petition for mandamus by alien under implied private right of action analysis)). *But cf. Giddings v. Chandler*, 979 F.2d 1104, 1107 n.18 & n.22 (5th Cir. 1992).

against state agencies, where no other such right of review is available (especially in the case of "gap" conduct). Ultimately, the scope of access to judicial review of agency conduct not implicating any of the special exceptions described throughout should remain a decision of the legislature, not the judiciary.[163]

b. *Modern Implied Private Right of Action Doctrine*

In order to be complete, the Court should also address the United States Supreme Court's current implied private right of action doctrine because Delaware courts have historically hewn closely to the analyses of the United States Supreme Court in this context.[164] Therefore, it is essential to recognize that a recent decision of the Supreme Court limited its prior holding in *Cort v. Ash*. In *Alexander v. Sandoval*,[165] the Court held that

> [t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[166]

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[163] This conclusion does not implicate an individual's capacity to maintain challenges to agency action by asserting violation of her constitutional rights (*e.g.*, claims that the agency's actions are substantially arbitrary and capricious on the grounds that the agency decision is unfounded in fact or unfair for pursuit of an improper purpose).
[164] *See infra*, note 140.
[165] 532 U.S. 275 (2001).
[166] *Id.* at 286-87 (citations omitted).

Consequently, in determining the existence of implied rights of action, the focus is now to be placed on the second prong of the three-prong test articulated in *Cort v. Ash*. Though the Delaware Supreme Court has yet to adopt *Alexander*, this Court assumes it will continue to be guided by United States Supreme Court case law in these matters.[167]

5. Taxpayer Standing Doctrine: Applied to Plaintiffs' Claims Against the OSPC and DelDOT

The Plaintiffs seek to utilize taxpayer standing in maintaining these actions. They cite this Court's previous holding in *Wahl v. City of Wilmington*,[168] as supportive of their claim.[169] In Delaware, however,

[167] The Court's past references to and application of post-*Cort* decisions of the United States Supreme Court convincingly suggest that *Alexander* should now be considered the governing case law on implied private rights of action. *See, e.g.*, *Brett*, 706 A.2d at 512 (describing test in terms similar to *Alexander*—"Our task here is one of statutory construction limited solely to determining whether or not the General Assembly intended to create the private right of action asserted by [the plaintiff]. When a statute does not expressly create or deny a private remedy, the issue is whether or not the requisite legislative intent is implicit in the text, structure or purpose of the statute." (citations omitted)). *But see Schuster*, 775 A.2d at 1036 n.42 (subsequently and implicitly confirming continued applicability of *Cort v. Ash* test).

[168] 1994 WL 13638 (Del. Ch. Jan. 10, 1994).

[169] *See* Pls.' Ans. Br. in Opp. to State Defs.' Mot. to Dismiss or for Summ. J. ("PA") at 9-11. The Plaintiffs blur the distinction between typical challenges to agency actions and maintenance of suits based on taxpayer standing, by conflating the analysis of *Couch* with that of *Wahl* (and *Plumbers & Pipefitters Local Union 74 v. Gordon*, 2000 WL 1152434 (Del. July 26, 2000), an action seeking mandamus relief, which is a remedy not implicated here). *See* PA at 9-11. In *Wahl*, this Court permitted the plaintiffs to challenge the city's low-bidder contract process on taxpayer standing grounds. 1994 WL 13638, at *2 - *3 (citing *City of Wilmington v. Lord*, 378 A.2d 635, 638 (Del. 1977). Low-bidder contract claims are an acknowledged subset of taxpayer standing actions in Delaware; the Plaintiffs' arguments in this litigation, however, effectively seek to expand taxpayer standing well-beyond the narrow category of permissible claims already recognized.

taxpayer standing is reserved for a narrow set of claims involving challenges either to expenditure of public funds or use of public lands.[170] The Plaintiffs claims here implicate neither basis for taxpayer standing. Perhaps it could be argued that an indirect effect on the public lands or finances may result, but such a broad and permissive view of taxpayer standing would, in effect, swallow the rule of standing generally, granting plaintiffs permission to challenge any government conduct on the most tenuous of standing grounds. In effect, the Plaintiffs' claims against the OSPC and DelDOT are premised merely on a desire to see general compliance with the laws of the state, which is insufficient, by itself, to merit standing.[171]

6. Some Conclusions Regarding General Principles of Review under Administrative Law

The foregoing should not be read as circumscribing an individual's right to judicial review of agency conduct directly affecting the individual's rights or interests. Of course, this memorandum opinion does not purport to address all contexts in which a right to review of agency conduct may arise.

[170] *See, e.g.*, *Lord*, 378 A.2d at 638 ("[T]he line of cases granting taxpayer standing to sue to enjoin the misuse of public monies or public property sets forth the better rule of law."); *Korn*, 2005 WL 396341, at *8.

[171] *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1114 (Del. 2003); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) (discussing rule that standing may be denied where harm sought to be shown is to "common concern for obedience to law"); 3 Pierce, *supra* note 70, § 16.4.

It does, however, point to traditional notions of statutory construction useful in determining whether a right to review should be reasonably recognized.

The "generous review provisions" of the federal APA clearly evince an intent that a right of review exist for a broad spectrum of agency conduct; the more restricted provisions of the state APA do not. The federal APA codified congressional intent that a right of judicial review be presumed. Such indications of congressional intent, however, should not be mistaken for the character of the presumption existing at common law outside the realm of the federal APA. Though, admittedly, the presumption has clearly changed over time—from a presumption against review at early common law to a neutral presumption in the years leading up to enactment of the federal APA—it does not necessarily follow that the common law presumption has completed its travel through the spectrum and adopted the view of the federal APA. While there are no indications that the common law presumption regarding right of review should be viewed as calcified at the moment just prior adoption of the federal APA (which thereby statutorily occupied the field of common law administrative review at the federal level and subsumed the need to answer such questions), no indication exists that the presumption has shifted a great deal, either.

Regardless of where the presumption of review should lie, evidence of legislative intent in this respect, in the absence of express legislative directives, should control in the absence of well-established precedent. The state APA provides that in certain instances (which describe most scenarios in which individuals have meaningful interaction with state agencies) the agency action shall be subject to a right of judicial review—"case decisions" and "regulations." Delaware case law has, moreover, found a common law right of review for "case decisions" of § 10161(b) agencies, as well. This roughly describes the extent of the right to common law judicial review of agency conduct under administrative law principles in Delaware—unless a plaintiff makes a colorable claim of a violation of the plaintiff's constitutional rights (for which courts have routinely presumed a right of review to exist) or the plaintiff is capable of maintaining the challenge on taxpayer standing grounds. As a consequence, "gap" conduct of state agencies, not implicating any of the exceptions noted above, is left to the discretion of the agency by legislative mandate. This is not an unreasonable policy choice of the legislature, and one that must be observed by the courts.

C. *Right of Action and Standing Analysis for the Claims Against the State Defendants*

1. Plaintiffs' Right of Action Against OSPC

The Plaintiffs contend that the OSPC violated statutory law by failing to require PLUS review of the Kohl property and amendment of the Town's comprehensive plan before any rezoning.[172] Specifically, the Plaintiffs argue that the OSPC violated 29 *Del.C.* §§ 9103, 9203, and 9204. First, the Plaintiffs contend that the OSPC's failure "to require the Town to amend" its comprehensive plan constituted a violation of 29 *Del.C.* § 9103. Second, the Plaintiffs argue the rezoning was subject to PLUS review under 29 *Del.C.* § 9203(a)(5), because the "rezoning . . . was inconsistent with the Town's comprehensive plan."[173] The Plaintiffs assert that "the OSPC's failure to abide by its responsibility to insure that a PLUS review was conducted with respect to the proposed Kohl Property rezoning" therefore violated the OSPC's duties to ensure "compliance with the PLUS review procedure" set forth in 29 *Del.C.* § 9204(a).[174]

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[172] *See* PA at 12.

[173] PO at 38.

[174] *Id.* The Plaintiffs also assert that the terms of the Memorandum of Understanding ("MOU"), *see* PX 29, between the Town and the OSPC required that the rezoning be subjected to pre-application PLUS review. *See* PO at 38. They contend that, "[t]herefore, the OSPC's failure . . . to insure that a PLUS review was conducted with respect to the proposed Kohl Property rezoning constituted a violation of the OSPC's legal obligations . . . ." *See* PO at 38. This claim fails because the Plaintiffs were neither party to the agreement, nor were they intended beneficiaries of the agreement. As a

OSPC responds by pointing to the absence of an express right of action conferred on private individuals to enforce the provisions of Chapters 91 and 92, which the Plaintiffs allege were violated.[175] Furthermore, OSPC, relying on the analysis of *Couch*, contends that no implied private right of action for the enforcement of the statutes can be inferred from the text and structure of those statutes.[176] OSPC argues that, where no express right is provided, "if there be any such right, it must arise by implication."[177] As a consequence, where neither an express nor implied right of action is found to exist, the OSPC contends, plaintiffs shall not be permitted to maintain a suit for private enforcement.

The crux of the OSPC's argument is that implied private right of action analysis should be applied to the question of whether a private individual may seek judicial review of agency action for noncompliance with duties arising from statute or regulation. The Plaintiffs seek to challenge conduct of the OSPC that may neither be characterized as a "case decision," nor as a "regulation."[178] As explained above, where state agency

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consequence, they may not sue to enforce its provisions. *See Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL406268, at *5 (Del. Ch. Apr. 17, 2001); *Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at *4 (Del. Ch. Nov. 9, 2004).

[175] *See* SO at 12-13. The Plaintiffs' allegations can be found in their Amended Complaint at ¶¶ 25, 30, 32, 49, 55 and 60.

[176] SO at 12-13.

[177] *Id.* at 12.

[178] The OSPC is a § 10161(b) agency.

"gap" conduct is challenged, generic review under administrative law principles is not permitted, unless an exception is found to apply. The Plaintiffs have pointed to no violation of their constitutional rights, nor have they demonstrated that taxpayer standing should exist for this claim. Moreover, conduct of the OSPC is not subject to a statute-specific appeals regime, as was the case in *Holland v. Zarif*, described above. Therefore, in order to challenge the conduct of the OSPC, the Plaintiffs must demonstrate existence of a private right of action, which, as I explain below, the Plaintiffs have failed to show.

OSPC is correct in its contention that implied right of action analysis applies to the Plaintiffs' claim against the agency in this context. Because the Plaintiffs point to no express right of action under which they assert their claims, the Court must determine whether an implied right of action exists under Chapters 91 and 92 by employing the reasoning of *Alexander*. Therefore, the Court must "interpret the statute [the legislature] has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative."[179]

[179] *Alexander*, 532 U.S. at 286 (citations omitted).

The statute fails to create a private right in the Plaintiffs sufficient to satisfy the requirements of the test. At most, Chapters 91 and 92 can be said to create merely a general interest in seeing agency compliance with the law that the Plaintiffs seek to vindicate; but such an interest is far too broad and vague to permit a finding of an implied private right of action. In *Touche Ross & Co. v. Redington,*[180] the United States Supreme Court held that, with respect to a statute that

> by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful . . . [and] legislative history does not speak to the issue of private remedies [under the statute] . . ., the inquiry ends there: The question whether [the legislature], either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.[181]

Similarly, as the Supreme Court remarked in *Cannon*, "a statute declarative of a civil right will almost have to be stated in terms of the benefited class" (*i.e.*, "phrased in terms of the persons benefited") in order to confer a private right.[182] The Court commented further that it "[had] been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large."[183]

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[180] 442 U.S. 560. The Delaware Supreme Court has signaled its approval of *Touche, Ross & Co. See, e.g., Brett*, 706 A.2d at 512.
[181] *Touche Ross & Co.*, 442 U.S. at 576.
[182] *Cannon*, 441 U.S. at 690 n.13.
[183] *Id.*

Chapter 91 fails to evince any intent to confer a private right on these Plaintiffs or any private plaintiffs. To the contrary, these provisions employ nothing that could rationally be considered rights creating language, at least in the context of the Plaintiffs' claims. The provisions instead create a planning regime for the benefit of the state and, arguably, municipal governments to aid in inter-governmental coordination and land-use planning.[184] Similarly, Chapter 92 stands with Chapter 91 in its lack of rights creating language, with the narrow exception of brief references to certain commercial land interests—none of which support the Plaintiffs' challenge here.[185]

Moreover, even if a private right were to be found, the statutes under which the Plaintiffs assert their claims do not "display[] an intent to create . . . a private remedy."[186] The portions of the statutes the Plaintiffs

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[184] *See, e.g.*, 29 *Del.C.* §§ 9101(g) & (h), 9103(a) & (c), 9203(a), 9204(a). Significantly, 29 *Del.C.* § 9103(a) provides that the purposes underlying the comprehensive plan certification and review process are to "[attain] compatibility and consistency among the interests" of the various levels of state government and to "properly address the potential burdens on the state government . . . caused by local land use actions."

[185] *See id.* Section 9201, setting forth the purposes underlying Title 92, does mention the interests of "private investment" and "private enterprise," in addition to those of the government. These brief statements of purpose, however, do not implicate the interests of these Plaintiffs; nor do they rise, without more, to the level of rights conferring language of the sort recognized by the Supreme Court. *See also Alexander*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'").

[186] *Alexander*, 532 U.S. at 286. Intent to create both a private right *and* a private remedy must be found. Indeed, the old adage, *ubi jus, ibi remedium* (*i.e.*, where there is a right, there is a remedy), does not always hold true—especially in this context.

claim were violated "focus[] neither on the individuals protected nor even on the [entities] being regulated, but on the agenc[y] that will do the regulating."[187] As the Supreme Court noted in *Alexander*, "[w]hen this is true, '[t]here [is] far less reason to infer a private remedy in favor of individual persons.'"[188] Therefore, the Court can find no private right of action to exist permitting the Plaintiffs to maintain their challenge against the OSPC in this context.[189]

This result is sensible in light of the obvious intent underlying the statutory scheme embodied by Chapters 91 and 92. The challenge to the decision-making authority of the OSPC the Plaintiffs seek to assert would, if

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[187] *Id.* Section 9203(a) merely sets forth the projects for which PLUS review is required. In regard to § 9204(a), the Plaintiffs only seek to challenge the OSPC's actions with respect to the first sentence of that subsection. PO at 38 ("Such PLUS review is required to be conducted and concluded prior to the formal submission of any document to commence a local jurisdiction's land use review for a rezoning, subdivision, or site plan application.").

[188] 532 U.S. at 289 (quoting *Cannon*, 441 U.S. at 690-91).

[189] The result would be no different under *Cort v. Ash* analysis. Although *Alexander* analysis focuses on the second prong of *Cort*, the first- and third-prongs similarly point to denial of a private right of action for the Plaintiffs in this context. The statutory scheme erected by Chapters 91 and 92 fails to indicate it was enacted for the "special benefit" of these Plaintiffs, nor would recognition of an implied right "advance the purposes of the act." *See Couch*, 593 A.2d at 558-59. On the contrary, recognition of such a right would unnecessarily interject private citizens such as these into a statutory regime created largely, if not exclusively, for the benefit of the government. *See id*. at 559. ("The statute is a reasonably precise administrative directive aimed at the internal operation of the departments and agencies of state government. . . . It would, in my opinion, constitute a gross intrusion into the narrow purpose of this statute to infer that private citizens were implicitly granted rights by this statute to bring actions directly for judicial review of administrative actions alleged to violate [the provision at issue]."). Furthermore, the absence of a mandatory requirement for public hearings (the statute only refers to "meetings") favors denial of an implied private right of action. *See* 29 *Del.C.* § 9204(b); *cf. Couch*, 593 A.2d at 559.

permitted, undermine the efficient coordination of land use planning and development these provision were enacted to promote.[190]

2. Plaintiffs' Right of Action Against DelDOT

The Plaintiffs contend that Paragraph 3(a) of the Recoupment Agreement[191] guarantees that, "by making their contribution to the Middletown Transportation Fund," the developers will not have to perform a TIS and will receive a Letter of No Objection from DelDOT.[192] Furthermore, the Plaintiffs argue that the provisions of the Development Agreement[193] place all of the burdens associated with the development's compliance with the statutes and regulations on the Town and DelDOT, while "[a]ll the developers have to do is write a check."[194]

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[190] This reasoning is underscored by the non-binding effect of the OSPC's recommendations to municipalities. *See* 29 *Del.C.* §§ 9103(f), 9206.

Even assuming, *arguendo*, that a right of action could be demonstrated, the Plaintiffs have provided no evidence of harm sufficient to merit standing. *But cf. LeMay v. New Castle County*, 1992 WL 101136, at *6 (Del. Ch. May 6, 1992) (implicitly adopting implied right of action analysis as test for standing), *aff'd*, 610 A.2d 726 (Del. 1992) (TABLE). However, the Court declines to address here what would be required to satisfy standing in the context of the claims dismissed if a right of action had been found to exist. *Cf.* Robert A. Anthony, *Zone-free Standing for Private Attorneys General*, 7 George Mason L. Rev. 237, 256 n.96 (1999) ("*Data Processing* and [*Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)] involved review under the APA, and the illustrations given in *Clarke* dealt neither with a private attorney general statute nor with review of agency action, but rather with implied private rights of action under statutes that did not expressly confer a right of action, citing the well-known non-administrative-law cases of [*Cort* and *Cannon*].").

[191] VX 29.

[192] PO at 35.

[193] VX 28.

[194] PO at 36.

Ultimately, the Plaintiffs argue that these agreements, taken together, constitute an illegal waiver of the requirement that a TIS be performed.[195] The Plaintiffs' claim has two discrete components: (i) that as a matter of regulation, DelDOT was prohibited from acting as it did and (ii) that DelDOT impermissibly "contracted away" or relinquished its regulatory authority through its agreements with the Town, Kohl, Ventures and perhaps other developers.

a. *Plaintiffs' Challenge for Allegedly Failing to Follow Regulations Requiring a Site-Specific TIS*

The Plaintiffs point to § 15 of DelDOT's Rules and Regulations for Subdivision Streets (the "Subdivision Regulations") as the source of the requirement for a site-specific TIS. The regulations state that "[i]t shall be the responsibility of the Division of Highways, PS & E Section to determine when a Traffic Impact Study (TIS) should be done . . . ."[196] Part II of § 15 sets forth certain instances in which a TIS "will be recommended."[197] The

[195] *See* Amended Compl. at ¶¶ 34, 35; PO at 36.
[196] Section 15 (Part I) ("Authority & Responsibility").
[197] *Id.* Part II states: "Bases for Recommending a TIS:

A. When in a local zoning process, the Division of Highways finds that a proposed change in zoning could result in a development exceeding the relevant ADT volume shown in Table 1; or
B. When in local zoning process, the Division of Highways finds that a proposed change in zoning could result in a roadway or intersection operating or continuing to operate below level of service D; or
C. When in the review of a Major Subdivision or Land Development Plan, the Division of Highways determines that further traffic information is needed to review the plan; or

Plaintiffs contend that two of the conditions described in Part II were met,[198] and therefore, DelDOT unlawfully failed to require a proper, site-specific TIS. First, the Plaintiffs argue that, because the Average Daily Traffic volume listed in Table 1 of § 15 will be exceeded at the site, a TIS is required under Part II(A). They also contend that Part II(B) requires the performance of a TIS for the property, because evidence exists that the Level of Service for the Kohl Property intersection would fail to satisfy the "minimum acceptable benchmark for TIS purposes."[199] Though DelDOT did, in fact, require the preparation of a TIS for the Westown area, the Plaintiffs charge that a site-specific TIS should instead have been performed.

The Plaintiffs argue that "[n]othing in the State Code nor the [Subdivision] Regulations" authorizes deviation from normal procedure with

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> D. When in the opinion of the Department of Transportation, it is in the public interest to obtain further traffic information on a proposed development being reviewed by a process not covered in A, B, or C above, a TIS will be recommended.

*Id.* The Plaintiffs contend that 17 *Del.C.* § 146, grants DelDOT the effective authority to "impose its recommendations as requirements.**"** *See* Pls.' Reply Br. in Supp. of Their Mot. for Summ. J. ("PR") at 7.

[198] The Plaintiffs point to Table I and Table II of § 15 of the Subdivision Regulations for the source of this requirement. *See* PO at 33-34, 36.

[199] *See* PO at 33-34. The Plaintiffs state that "DelDOT's traffic engineer has confirmed" these claims. *See id.*; PX 72 (deposition of Thomas Brockenbrough, Jr.). The Plaintiffs also cite as evidence a PLUS response letter provided the Plaintiffs by the OSPC. PX 39. Additionally, the Plaintiffs rely on references that the Recoupment Agreement provides that the developer will not have to conduct a TIS, but instead contribute funds under the agreement for the performance of a comprehensive infrastructure review and TIS. The letter states that this is "in lieu of the standard DelDOT Rules and Regulations with respect to the land development process, which would have required a traffic impact study for each individual development." *Id.*

respect to the TIS. In sum, they assert that DelDOT failed to comply with its own regulations. In addition, the Plaintiffs allege that DelDOT impermissibly waived "its discretionary review requirement to provide the Town with a letter of no objection . . . ."[200] Thus, the Plaintiffs also argue that DelDOT has "attempted to contract away its authority and discretion to review and decide upon traffic impacts and access considerations . . . ."[201] Consequently, the Plaintiffs challenge DelDOT's actions as having unlawfully offered "approvals for sale" to Ventures and that such actions constituted an "illegal delegation of [DelDOT's] discretionary authority to a private entity."[202]

Once again, the Defendants' urge that the Plaintiffs can demonstrate no right of action to challenge DelDOT's decision to require a comprehensive, instead of site-specific, TIS.[203] As with the OSPC, DelDOT

[200] PO at 37. The Plaintiffs also allege that "DelDOT's actions also run directly counter to the policies it has adopted with respect to U.S. 301 under its corridor capacity preservation program." *Id.* (citing 17 *Del.C.* § 145). The Plaintiffs appear to have waived this contention, because the Kohl Property is not located within the corridors identified by the program.

[201] PO at 37. In addition to the Subdivision Regulations, the Plaintiffs also identify 17 *Del.C.* §§ 131(i), 141(a), & 146(a), as sources of the requirement that DelDOT perform the reviews outlined above. These are all provisions of general scope and provide no mandatory, detailed instructions for DelDOT action; therefore, they cannot be said to create a private right of action. *Cf. James Julian*, 1991 WL 224575, at *7 (granting review but on low-bidder, taxpayer standing basis).

[202] *See* Amended Compl. at ¶¶ 44-45.

[203] *See* SO at 10-12 (analyzing both pertinent statutes and regulations).

is an agency not subject to the full review provisions of the state APA.[204] Specifically, DelDOT insists that the Plaintiffs' claim must be dismissed, because no implied right of action exists for these Plaintiffs to enforce the regulation.[205] The Court concurs that the enabling statutes granting authority to create the regulations[206] fail to set forth either an express or implied private right of action for enforcement of such regulations.[207]

As a preliminary matter, however, the decision of DelDOT to require or not to require a TIS could ultimately be characterized as a "case decision."[208] A "case decision" includes "any agency . . . determination that a named party as a matter of past or present fact . . . is or is not in violation of a law or regulation, or is or is not in compliance with any existing requirement for obtaining a . . . right or benefit."[209] The determination of DelDOT with respect to the developer's compliance with the agency's TIS regulations, and whether or not DelDOT will grant approvals (on which the rezoning was conditioned), may be fairly described as a "case decision."

[204] Therefore, the Administrative Procedures Act, 29 *Del.C.* § 10101, *et seq.*, does not provide for judicial review of DelDOT's "case decisions." *See* 29 *Del.C.* § 10161 (providing that only Subchapters I and II and §§ 10141, 10144, & 10145 apply).
[205] SO at 9-10.
[206] *See* 17 *Del.C.* § 131 & 508; *see also* Subdivision Regulations §1 ("The authority for these 'Rules and Regulations' is set forth in the Delaware Code. Applicable sections include: Title 17, Chapter 1, Section 131 [&] Title 17, Chapter 5, Section 508").
[207] DelDOT denies that the Subdivision Regulations required that it perform a site-specific TIS.
[208] *See* 10161(b) (providing that, *inter alia*, Subchapter I (which includes definition of "case decision") applies to all state agencies).
[209] 29 *Del.C.* § 10102(3).

Therefore, review of the agency's conduct in this respect may be obtained by the "regulated" party (usually, on final decision of the agency). Because the Plaintiffs are not "regulated" parties, they do not qualify for review under this principle.[210]

[210] *Cf. Citizens' Coal., Inc. v. County Council of Sussex County*, 1999 WL 669307, at *5 (Del. Ch. July 22, 1999) (holding that plaintiff-organization failed to demonstrate injury-in-fact or that injury was redressable with respect to challenge for failure to require TIS). It should be noted that any party seeking to maintain a common law "case decision" challenge would still have to demonstrate standing.

Because the foregoing generalized analysis with respect to judicial review of "case decisions" of § 10161(b)-agencies found a right effectively coterminous with the right to review of "case decisions" expressly arising under the state APA, the test for standing sufficient to permit such review should be analogous, as well. Therefore, the Court looks to the provisions of the state APA for guidance in determining the test for standing for review of § 10161(b)-agency "case decisions." The state APA grants standing to parties for review of "case decisions" only to a "party against whom a case decision has been decided . . . ." 29 *Del.C.* § 10142(a). This is more restrictive than the "aggrieved person" standard of 29 *Del.C.* § 10141, providing for a right of review of regulations applying to all agencies. This indicates a statutory intent to restrict "case decision" standing to a set of claims more narrow than the "Article III constitutional-minimum" that the "aggrieved person" standard articulated for challenges to agency regulations. A determination of whether an individual is "aggrieved" essentially requires application of general standing principles as applied in Delaware. *See, e.g.*, *Newark Landlord Ass'n v. City of Newark*, 2003 WL 21448560, at *6 n.33 (Del. Ch. Jun. 13, 2003) (explaining that statutory grant of standing to "aggrieved persons" in context of Federal Fair Housing Act 'has been interpreted to be 'as broa[d] as is permitted by Article III of the Constitution'") (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (alteration in original)). While "aggrieved person" standing has been restricted somewhat in the context of land use cases, *see, e.g.*, *Healy v. Board of Adjustment of City of New Castle*, 2003 WL 21500330, at *2 (Del. Ch. Jun. 30, 2003) (holding that "definition of 'aggrieved person' should be construed to encompass a broad spectrum of individuals potentially affected by the Board's action," but also requiring land ownership for appeal of Board action), it still reaches a greater range of potential plaintiffs than that permitted under the "case decision" appeal provision. The decision of DelDOT in this respect, then, is clearly not "against" the Plaintiffs, and they may not, therefore, assert a challenge to DelDOT's decision under general principles of state agency administrative review.

Nor can the Plaintiffs demonstrate a claim under the *Accardi*-doctrine.[211] The Plaintiffs are unable to demonstrate that the alleged violations of the Subdivision Regulations violated Due Process (*i.e.*, the Plaintiffs' constitutional rights to Due Process) or affected any other important individual right that they held. They make no mention of any violations of Due Process safeguards in their Amended Complaint or briefs. Moreover, the Plaintiffs have identified no interest affected by DelDOT's conduct cognizable under *Accardi*-review principles. Instead, they contend that failure by the agency to adhere to its rules, without more, always confers upon them a right to judicial review. This is incorrect.[212]

As a result, the Plaintiffs must show existence of a private right of action, express or implied, in order to maintain their claims against DelDOT for allegedly failing to follow the Subdivision Regulations. First, the Court notes that examination of the Subdivision Regulations proper for intent to

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[211] *See* PA at 9-10; PR at 19.

[212] Neither can the Plaintiffs demonstrate that a potential estoppel claim exists, as Professor Schwartz conjectures is perhaps available under *Accardi*-doctrine. *See supra*, note 131.

Indeed, the *Accardi*-exceptions articulated in *American Farm Lines*, 397 U.S. at 538, discussed above, seem applicable to these claims. *See id.* ("[I]t is always within is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."); *see also In re Buckson*, 610 A.2d at 218-19 (applying *Black Ball Freight*). The Plaintiffs also cite *Korn v. New Castle County*, 2005 WL 396341, *7 (Del. Ch. Feb. 10, 2005), as support for their claim. As discussed above, however, *Korn* is inapposite as it is premised on taxpayer standing—a basis for litigation the Plaintiffs have not demonstrated exists here.

create an implied right of action is unnecessary. The regulations do not purport to create an express right of action enabling enforcement by the Plaintiffs; yet, the presence or absence of language tending to create such a right of action, whether express or implied, bears no weight on the question of whether such a right exists in this context. On the contrary, when the text and structure of the statutes under which the regulations have been promulgated permit no finding of an implied right of action, judicial inquiry for the existence of an implied right of action is at its end. Such is the case here.

This line of reasoning was clearly set forth in *Alexander*, in which the United States Supreme Court held that where statutory authority fails to create a private right of action, related regulatory authority may not create one in its stead. As the Court explained, "[l]anguage in a regulation may invoke a private right of action that [the legislature] through statutory text created, but it may not create a right that [the legislature] has not."[213] The Court elaborated on this theme, stating that

> when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private

[213] 532 U.S. at 291 (citing *Touche Ross & Co.*, 442 U.S. at 577 n.18).

> cause of action that has not been authorized by [the legislature].[214]

Therefore, the Court must examine the statutes for an implied right of action. The statutes enabling DelDOT to create the Subdivision Regulations are to found at 17 *Del.C.* § 131 & § 508.[215] Section 131 provides, in pertinent part, only that "[t]he general jurisdiction conferred upon the Department by this section shall be exercised by it by the establishment and supervision of any and all policies which may be necessary or appropriate to implement such jurisdiction."[216] Furthermore, § 508 states, *inter alia*, that "[i]n order to carry out the purpose of this section, the Department shall make and publish rules, regulations, standards and/or specifications for planning, designing, constructing and maintaining any new road or street."[217] These provisions address only the power of the agency to adopt regulations and fail to indicate any intent to create either a right or remedy in the Plaintiffs. Similarly, the remaining provisions of § 131 focus only on the

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[214] *Id.* The Supreme Court also remarked that regulations enforcing a statutory provision for which an implied right of action exists, "if valid and reasonable, authoritatively construe the statute itself . . . ." *Id.* at 284. The Court explained that in that instance, "it [would] therefore [be] meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Id.*

The Court noted an alternative scenario in which it was possible that a statute could "display an intent to create a freestanding private right of action to enforce regulations promulgated under [the statute]." *Id.* at 293; *see also Owner-Operator Independent Drivers Ass'n, Inc. v. New Prime, Inc.*, 250 F. Supp. 2d 1151, 1154-56 (W.D. Mo. 2001) (applying latter analysis).

[215] *See* Subdivision Regulations, § 1.

[216] 17 *Del.C.* § 131(d).

[217] *Id.* at § 508(d).

regulating agency, setting forth directives as to DelDOT's operation. The provisions do not focus on either individuals potentially protected or those subject to regulation, therefore affording persuasive grounds to deny implication of a private right of action.[218] Section 508, though addressing regulated individuals and entities, fails to display an intent to confer rights or remedies, either.[219] Moreover, § 508(f) sets forth an enforcement scheme by which DelDOT may enforce compliance with § 508, making even less likely a finding of an implied private right of action in favor of these Plaintiffs.[220] Taken together, these considerations leave the Court unable to conclude that the Plaintiffs possess a private right of action against DelDOT arising from the statutory provisions implicated here.[221]

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[218] *See Alexander*, 532 U.S. at 289.

[219] *See id.* ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981))).

[220] *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

[221] The outcome would be no different under *Cort v. Ash* analysis. No provision of the Subdivision Regulations or statutes could be reasonably said to display either an intent that the Plaintiffs are the special beneficiaries of the statute or advance the purposes of the statutes. In fact, recognition of an implied private right of action in this context would likely hinder the purposes underlying the provisions. DelDOT employs special skills in making its determination of whether to require the performance of a TIS. Its experience with the details of highway planning and its engineering expertise weigh heavily in favor of denying judicial review of the agency's decisions in this respect. Indeed, decisions of this type, involving detail and the use of special expertise, not having been made in a judicial or quasi-judicial forum, and not subject to mandatory public hearings with formal notice and opportunity to comment, do not, at least on these facts, permit a finding that recognition of an implied right of action would advance the purposes of the regulations or the pertinent statutes. On the contrary, recognition of such a right would likely impede the efficiency of DelDOT in the performance of its delegated tasks.

b. *Plaintiffs' DelDOT Challenge for Improper Relinquishment of Regulatory Authority*

The Plaintiffs also present a claim that DelDOT "contracted away" or relinquished its regulatory authority over traffic impact studies and highway entrance permits for the development contemplated for the Kohl Property.[222] The most generous characterization of the Plaintiffs' claims would be to describe them as premised on a downstream variant of the nondelegation doctrine.[223] The pertinent rule here holds that, in general, administrative officers and agencies may not abdicate, alienate, or abridge powers and duties delegated to them, or functions that under law may only be exercised by them.[224] In the absence of statutory or constitutional provisions providing

[222] *See* Amended Compl. at ¶¶ 44, 45 & 59; PO at 35-37.

[223] *See* 1 Pierce, *supra* note 70, § 2.6. In their briefs, the Plaintiffs in later briefing as support for their claims both taxpayer standing and the *Accardi*-doctrine. *See* PA at 9-10, PR at 19-20. These methods of analysis are inapposite in this context, however. Indeed, the Plaintiffs failed to cite any precedent in support of their claim in their Opening Brief. *See* PO at 35-37.

[224] *See, e.g.*, *Anderson v. Grand River Dam Auth.*, 446 P.2d 814, 818 (Okl. 1968); *Application of N. Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095, 1115-16 (N.J. 1980) ("'[A] power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends.' This is especially true when the agency attempts to subdelegate to a private person or entity, since such person or entity is not subject to public accountability." (citations omitted)); *Gaddis v. Cherokee County Road Comm'n*, 141 S.E. 358, 360 (N.C. 1928) ([A]dministrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law, in the performance of public duties . . . ."); *Med. Soc'y of State v. Serio*, 800 N.E.2d 728, 869 (N.Y. 2003); *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 653-54 (Tex. 2004) (citing *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997)). *See generally* 73 C.J.S. *Public Administrative Law and Procedure* § 56 (1983); 1 Pierce, *supra* note 70, § 2.7, at 115-16. *Cf. Marta v. Sullivan*, 248 A.2d 608 (Del. 1968) (finding unlawful city's delegation of zoning authority to neighborhood

otherwise, functions that are discretionary or quasi-judicial in nature, or require the exercise of judgment, therefore, may not generally be voluntarily circumscribed.[225] Not all relinquishments of delegated authority have been held invalid, however. It has been recognized that some degree of subdelegation by an agency may be necessary in the course of its operation.[226] As a consequence, sharing of authority has been permitted, even in the absence of express statutory approval, where a reasonable basis exists to imply the power to delegate.[227]

Nonetheless, complete abdication by an agency of its delegated authority is not permitted. Actions leaving an agency without meaningful capacity to fulfill its discretionary and quasi-judicial functions are clearly invalid. To bind an agency *ex ante* such that it may no longer exercise its delegated powers would be violative of the legislative purpose underlying its creation and imbuement with power. Moreover, special concerns arise

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residents to be exercised by plebiscite); *Orsini v. New Castle County Bd. of Adjustment*, 1995 WL 161968 (Del. Super. Mar. 31, 1995).

[225] It should be noted that, in addition to being permitted where statutory or constitutional law allows, the delegation of agency authority is also generally permitted with respect to ministerial duties. *See, e.g.*, *Vanderveer v. Vanrouwendaal*, 392 N.Y.S.2d 216, 218 (N.Y. Sup. Ct. 1977).

[226] *Cf. Bell v. Bd. of Trs. of Lawrence County Gen. Hosp.*, 296 N.E.2d 276, 278 (Ohio 1973).

[227] *See, e.g.*, *State v. Imperatore*, 223 A.2d 498, 353-54 (N.J. Super. 1966). *Compare Application of N. Jersey Dist. Water Supply Comm'n*, 417 A.2d at 1115-16 (requiring indication of legislative intent in statute to permit subdelegation), *with Warren v. Marion County*, 353 P.2d 257, 261, 264 (Or. 1960) (setting forth more relaxed "reasonable basis" standard).

where the subdelegation is to a private individual or entity, including, *inter alia*, the consequentially less direct (and therefore diminished) checks of "public accountability"[228]—and such considerations will be factored into judicial analysis.

The foregoing explanation of subdelegation doctrine, however, should not be read as unnecessarily restrictive of agency conduct. Conduct in furtherance of agency goals (*e.g.*, reliance on the specialized expertise of outside analysts and mutually-beneficial agreements in cooperation with both public and private entities) is to be encouraged. Indeed, the agreements entered into between DelDOT, the Town, and private developers, and on which the Plaintiffs base their claims, are prime examples of agency conduct that enhances the public good while retaining the agency's discretionary powers.

Even assuming that the Plaintiffs satisfy standing requirements with respect to the claim,[229] they failed to present facts sufficient to support their

[228] *Application of N. Jersey Dist. Water Supply Comm'n*, 417 A.2d at 1115-16.
[229] *Cf. City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D. D.C. 2002) (explaining that "any party injured by an agency acting pursuant to an unconstitutional delegation of authority has standing to raise the [federal] non-delegation doctrine" and that prudential elements of standing are inapplicable in this context (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *I.N.S. v. Chada*, 462 U.S. 919, 935-36 (1983)), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003).

illegal waiver-of-authority challenge.[230] The terms of the Development Agreement, without more, permit no reasonable inference that approvals were "for sale" by DelDOT.[231] Contrary to what the Plaintiffs argue, the contract does not guarantee issuance of permits in return for money. The only clause that could remotely be construed to create such rights merely provides that "DelDOT shall . . . (xii) issue timely letters of 'no objection' consistent with paragraph 5 of this Agreement for projected located in the study area . . . ."[232] Paragraph 5 sets forth the funding mechanism for the project, specifically providing, *inter alia*, the developer's required contribution amount. The provision regarding issuance of letters, however, is properly interpreted to mean that, where "no objection" letters are merited, they shall be timely issued. Such an interpretation is clearly correct in light of paragraph 6, which provides that "[t]o the extent permits are required from DelDOT or the Town for the [infrastructure project], that party shall

[230] The material "facts" cognizable under Count of Chancery Rule 56 are not in dispute.

DelDOT also points to certain provisions of a recent bond bill, *see* § 122 of H.B. 550 (the FY05 Bond Bill, 74 *Del.Laws*, c. 308), as ratifying DelDOT's actions in entering into the Westown Joint Development Agreements. DelDOT views this legislation as merely reiterating prior authority granted to the agency by the previously cited statutes. Indeed, in the Bond Bill, the General Assembly points to the agreements challenged by the Plaintiffs as the recommended model for future DelDOT projects. Specifically, the Bond Bill provided that DelDOT is "authorized and directed" to enter into joint development agreements for infrastructure development in southern New Castle County that "adhere to the tenets of the model joint development agreement executed . . . between the developers of Westown, the Town of Middletown, and [DelDOT]." *Id.*

[231] PX 88.

[232] *Id.* at ¶ 2 ("DelDOT Responsibilities").

cooperate in the permit application and approval process, *it being understood, however, that all permits shall meet all applicable standards*."[233]

With respect to the Recoupment Agreement, executed some eight months after the Development Agreement, the Plaintiffs contend that the agreement's provisions impermissibly waive the requirement that a TIS be performed for the Kohl Property and also guarantee the issuance of a Letter of No Objection. The Plaintiffs argue that this is to occur in return for certain contributions of money by the developer—thereby constituting the basis for their "approvals for sale" argument. Indeed, the agreement does provide that no site-specific TIS need be performed by the developer, and it does provide for the developer's contribution toward the expenses of a comprehensive TIS conducted for the entire area.[234] The Plaintiffs are incorrect in their assertion, however, that the Recoupment Agreement guarantees issuance of Letters of No Objection. The agreement merely provides that

> DelDOT . . . (provided the project meets the Town of Middletown development standards and is not inconsistent with the transportation plan developed under the [Development

[233] *Id*. at ¶ 6 ("Permitting") (emphasis added).
[234] PX 78. The area is referred to in the agreement as the Recoupment Area, which is comprised of properties located on the western edge of Middletown, also referred to as "Westown."

> Agreement]) shall provide a no objection letter or, if inconsistent with the transportation plan or if there are internal site issues, a letter stating objections with specificity with respect to the project on the Property, with a reasonable period following application therefore. . . .[235]

Like the clause concerning timely issuance in the Development Agreement, discussed above, this provision merely delineates the time period for certain responses, and does not prevent DelDOT from objecting to "site issues." The clear language of the contract, therefore, does not establish an "approvals for sale" or "illegal delegation" regime as the Plaintiffs allege. The touchstone is the developer's compliance with the standards developed under DelDOT auspices for the Westown area.

In sum, the Kohl Property is one parcel among several that is under development in the active 301 corridor on the west side of the Town. DelDOT, reasonably and rationally, concluded that a comprehensive study of traffic impact and the necessary infrastructure improvements for this rapidly growing area would be the most effective. The Plaintiffs have offered no compelling, or even persuasive, reason why such an approach should be the target of judicial opprobrium. DelDOT, with its consultant, has seen to the necessary studies. It has not given an open ticket to Ventures or any other developer. Instead, traffic access to the Kohl Property will be

[235] PX 78.

allowed if Ventures complies with the standard imposed for the area under the comprehensive study approved by DelDOT. Thus, DelDOT concluded that no separate traffic impact study for the Kohl Property would be useful. Whether that is a good or bad exercise of administrative expertise is not a question for the Court to answer. For present purposes, it is sufficient that it is rational and reasonable and is not the product of any improper relinquishment of regulatory authority.

D. *Plaintiffs' Challenge to the Rezoning as Inconsistent with the Town's Comprehensive Plan.*

1. Whether Plaintiffs May Challenge the Rezoning

Although the Town contends that no right of action exists for private enforcement of 22 *Del.C.* § 702, the Town's argument ultimately is not persuasive. To the contrary, the Court concludes that a right of action does exist for these Plaintiffs to assert a claim for enforcement of the General Assembly's command that "no development shall be permitted except as consistent with the plan."[236]

[236] 22 *Del.C.* 702(d).

The question of whether a right of action for private enforcement of 22 *Del.C.* § 702 exists appears to be an issue of first impression for this Court. While county comprehensive plans have carried the force of law since the passage of the Quality of Life Act of 1988, *see* 66 *Del. Laws* c. 207, § 1, municipal comprehensive plans only lately achieved equivalent status. *See* 71 *Del. Laws* c. 477 (enacted July 17, 1998). The Court of Chancery recently had occasion to examine the merits of a claim that a rezoning violated 22 *Del.C.* § 702(d), *see Lynch v. City of Rehoboth Beach*, 2005 WL 2000774, at *3 (Del. Ch. Aug. 16, 2005) (adopting Master's Report, 2005 WL 1074341 (April 21,

The Plaintiffs claim that the rezoning of the Kohl Property to C-3 was inconsistent with the comprehensive plan of the Town in effect at that time, thereby violating 22 *Del.C.* § 702(d). The text of the statute, however, does not expressly prescribe who may enforce its provisions. The Town makes only brief mention of its argument as to why no implied right of action exists for private enforcement of § 702(d), pointing to 22 *Del.C.* § 710 as indicative, if not dispositive, of the legislature's intent that no right of action be inferred.[237] Section 710 provides only that, on petition of the planning commission, the Court of Chancery shall have jurisdiction and enforcement powers for matters related to Chapter 7 of Title 22.[238]

The Town's reliance on § 710 in support of its defense is of no avail, as that section merely provides a mechanism by which the planning commission may enforce Chapter 7 and is not indicative in this context of legislative intent to deny private enforcement as a necessary consequence.[239]

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2005)), but that opinion did not squarely address the issue of the existence of a right of action, a question which the defendants did raise.

[237] *See* Town Reply Br. in Supp. of Summ. J. at 2.

[238] More specifically, 22 *Del.C.* § 710 states that "[t]he Court of Chancery shall have jurisdiction on petition of the planning commission established hereunder to enforce this chapter and any ordinance or bylaws made thereunder and may restrain by injunction violations thereof."

It should be noted, here, that municipalities are expressly exempted from application of all provisions of the state APA. *See* 29 *Del.C.* § 10102(1) (providing that municipalities are not included in definition of "agency").

[239] *But cf. Alexander*, 532 U.S. at 289-90 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). This

Moreover, § 702, imposing the critical change that comprehensive plans carry "the force of law" and that "no development shall be permitted except as consistent with the plan," was a stand-alone amendment to Chapter 7.[240] Previously, municipal comprehensive plans were mere advisory planning documents.[241] When a statute is enacted singly to replace, in full, a prior statute, the surrounding statutory provisions are of less moment in attempting to infer legislative intent with regard to the new enactment. Therefore, the Court finds the Town's arguments involving § 710 unpersuasive, especially in light of the analysis that follows.

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reasoning from *Alexander* would be persuasive but for the strong Delaware precedent finding a private right of action in this context.

[240] *See* 71 *Del. Laws*, c. 477, § 1 (enacted July 17, 1998).

[241] *See*, former 22 *Del.C.* § 702, which provided that:

> [a] planning commission established in any incorporated city or town under this chapter shall make a comprehensive development plan for the development of the entire area of such city or town or of such part or parts thereof as said commission may deem advisable. Such comprehensive development plan shall show, among other things, existing and proposed public ways, streets, bridges, tunnels, viaducts, parks, parkways, playgrounds, sites for public buildings and structures, pierhead and bulkhead lines, waterways, routes of railroads and buses, locations of sewers, watermains and other public utilities, and other appurtenances of such a plan, including certain private ways. Such plan shall be adopted and may be added to or changed from time to time by a majority vote of such planning commission and shall be a public record.

It should be noted that former 22 *Del.C.* § 702 was enacted contemporaneously with § 710, further mitigating the persuasive force of arguments that § 710 speaks meaningfully to the question of whether a right of action exists for the more recently enacted, current § 702. *See* 49 *Del. Laws*, c. 415, § 1 (enacted July 15, 1953); *see also Pettinaro Enters. v. Stango*, 1992 WL 187625, at *6 (Del. Ch. July 24, 1992) (applying former 22 *Del.C.* § 702).

Instead, the Court is persuaded that application of implied right of action analysis is unnecessary with respect to the Plaintiffs' challenge to the rezoning as inconsistent with the comprehensive plan. Delaware precedent provides clear guidance that claims of this type constitute cognizable rights of action in this Court.[242] In crafting its defense, the Town argues from a distinct disadvantage. The only real source of contention as to whether particular plaintiffs may assert claims in this context arises from questions relating to the sufficiency of plaintiffs' standing. Indeed, the analysis employed by the court in *Couch* acknowledges the distinction between zoning-related cases and other instances of private statutory enforcement, explaining that "[i]n the zoning cases . . . the statutory requirement of public notice and public hearings render it plausible to conclude, as the zoning cases regularly do, that private persons have cognizable interests in zoning changes that substantially affect their property."[243] Moreover, that it is well-

[242] This result comports with the foregoing analysis, which has been fundamentally premised on the confluence of precedent, constitutional requirements, and certain notions of statutory construction.

[243] *Id.* at 560 (elaborating that the statute at issue in *Couch* "is not . . . a regulatory statute affecting the interests of specific classes of persons"). In addition to § 702(d)'s mandate that the plan carry the force of law and that no development inconsistent with the plan be permitted, § 702(c) holds that "[t]he comprehensive plan shall be the basis for the development of zoning regulations as permitted pursuant to Chapter 3 of [Title 22]." Similarly, § 303 requires that all zoning regulations "shall be made in accordance with a comprehensive plan . . . ." *See also* 22 *Del.C.* § 310(1) (enacted after § 702 and pertinent provisions of Subchapter I, and demonstrating General Assembly's understanding and intent that Chapter 3 requires adoption of formal comprehensive plan). Therefore, the comprehensive plan is made a part of—indeed, the framework for—the municipality's

established in Delaware that a cause of action lies to challenge county rezonings as inconsistent with comprehensive plans counsels strongly in favor of permitting similar actions for municipal residents.[244] The Court knows of no policy favoring a distinction now.[245]

Consequently, if the Plaintiffs demonstrate they possess sufficient standing, then they may pursue their challenge to the rezoning as inconsistent with the Town's comprehensive plan. The Court next addresses the issue of Plaintiffs' standing.[246]

2. Analysis of Plaintiffs' Standing to Bring Rezoning Challenge Based on Violation of Comprehensive Plan

Before turning to the merits of the Plaintiffs' claims, the Court must first address the issue of whether the Plaintiffs have standing to bring an

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zoning laws. These factors counsel strongly in favor of a private right of action in this context, especially since Chapter 3 provides that "[municipal zoning] regulations, restriction or boundary," or amendments thereto, are effective only upon a public hearing, properly noticed, with opportunity for public comment. *See* 22 *Del.C.* §§ 304, 305.

[244] Note that references to "municipalities" in this opinion refer only to incorporated cities and towns, to the exclusion of the broader definition sometimes attributed to "municipal" as including counties, as well.

[245] Though *Cort* and *Alexander* may not be applicable here, the outcome would likely be the same should such analysis be applied. Though the lessons of *Alexander* teach that emphasis is to be placed on the second prong of *Cort*, certainly the first and third prongs of the traditional *Cort*-approach remain to inform the analysis in questionable cases. *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Rule of Administrative Agencies*, 91 Va. L. Rev. 93, 104-05 (2005). *Cf. Brownscombe v. Dept. of Campus Parking*, 203 F. Supp. 2d 479, 484 (D.Md. 2002) (holding that prior ruling finding implied right of action survived *Alexander* even though procedures to enforce regulation were same as procedures in *Alexander*, which had found absence of implied right for a different regulation).

[246] I do not address all of the Plaintiffs' other claims against the Town. My analysis of the Plaintiffs' claim that the rezoning was inconsistent with the comprehensive plan renders moot these other claims.

action for failure to comply with the provisions of the comprehensive plan.[247] This inquiry requires that the Court consider the Town's contentions that, even if a private right of action exists for violations of 22 *Del.C.* § 702, the Plaintiffs do not have standing sufficient to bring such an action.[248]

In the absence of a specific statutory grant of review, the test for standing, set forth most recently in *Dover Historical Society v. City of Dover Planning Commission*,[249] provides that "a plaintiff or petitioner must demonstrate first, that he or she sustained an 'injury-in-fact'; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected."[250] The Delaware Supreme Court explained that this requires that

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[247] This is an issue of some importance, since county residents are potentially granted express standing by statute, while commensurate language is absent from the corresponding municipal statute. *Compare*, *e.g.*, 22 *Del.C.* § 308, *with* 9 *Del.C.* §§ 2609(d), 4919(b) & 6919(d).

[248] Because the Court does not employ the implied private right of action doctrine with respect to the Plaintiffs' comprehensive plan challenge, it needs only to apply traditional standing analysis. It is an interesting question, however, whether a finding of an implied right of action perforce requires a finding of standing, or whether standing would have to be demonstrated even after demonstrating such a right of action. Under the implied right of action analysis mandated by *Cort*, the first prong (*i.e.*, whether the plaintiff is a member of the special class for whose benefit the statute was enacted) would appear to determine the scope of standing, as well. *Cf. LeMay*, 1992 WL 101136, at *6 (implicitly adopting implied right of action analysis as test for standing). Under the abbreviated (though stricter) test of *Alexander*, however, the question for a court is really whether *any* plaintiff could enforce a statute through a private right of action.

[249] 838 A.2d 1103 (Del. 2003).

[250] *Id.* at 1110. This statement of the law of standing is known colloquially as the "*Data Processing* test." *See Oceanport Indus.*, 636 A.2d at 903 (citing *Assn. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970)). The Court in *Oceanport*

> (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[251]

The Town relies, in large part, on the Delaware Supreme Court's description, in *Oceanport Industries*, of its ruling in *Stuart Kingston* that, "in order to achieve standing, a plaintiff must have an interest distinguishable from the greater public."[252] However, the Town's heavy reliance on this prudential element of standing analysis is misplaced.

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*Industries* explained that, "[n]ormally, this test applies only in the absence of a specific statutory grant of review." 636 A.2d at 903.

[251] *Dover Historical Soc'y*, 838 A.2d at 1110 (quoting *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)). This language, adopted by the Delaware Supreme Court, is the Third Circuit's summary of the United States Supreme Court's refinement of the "*Data Processing* test" in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). While these statements of the law of standing arise out of Constitution's Article III "case or controversy" requirement, which does not extend to state court claims, Delaware has traditionally recognized the federal test for standing "as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'" *Dover Historical Soc'y*, 838 A.2d at 1111 (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)). It should be noted, however, that some exceptions to Delaware's borrowing of the federal standing requirements may exist. *See Dover Historical Soc'y*, 838 A.2d at 1111 (citing *Oceanport Indus.*, 636 A.2d at 904) ("This Court has recognized that the *Lujan* requirements for establishing standing . . . are *generally* the same as the standards for determining standing to bring a case or controversy within the courts of Delaware." (emphasis added)).

[252] *Oceanport Indus.*, 636 A.2d at 900 (citing *Stuart Kingston*, 596 A.2d 1378).

The Town argues for an interpretation that would effectively deny all municipal residents the opportunity to maintain an action simply because the residents share a relatively equivalent interest in planned growth within a municipality in adherence with its comprehensive plan.[253] Yet, in *Dover Historical Society*, the Court adopted the view of *Society Hill Towers Owners' Association v. Rendell*,[254] in which the Third Circuit

> aptly noted that if the residents of the historic district in the City of Philadelphia did "not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this UDAG grant. If that is the case, the requirement for public hearings, and public input would be little more than a meaningless procedural calisthenic [sic] that would provide little or no protection to those most directly affected by the governmental action--the people who live in the vicinity of a federally funded project and who lives are most directly impacted by the expenditure of UDAG funds."[255]

The concern that, absent a finding of standing, the requirements associated with modifications of a comprehensive plan (including public hearings) would be "meaningless procedural calisthenics," applies with equal force to

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[253] *Dover Historical Soc'y*, 838 A.2d at 1114 ("That interest by the general public, however, does not render those same aesthetic concerns any less concrete and particularized as to the landowners/residents within the Historic District. In this case, as the United States Court of Appeals for the Fourth Circuit held in [*Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001),] the injuries asserted by owners of land in the Historic District of Dover do not arise from a ''common concern for obedience to the law' but from individual concerns about the integrity and cohesiveness of historical sites in their own backyard.'").

[254] 210 F.3d 168.

[255] *Dover Historical Soc'y*, 838 A.2d at 1112-13.

the claim the Plaintiffs seek to assert here. If this Court were to deny these Plaintiffs standing, thereby effectively limiting enforcement to the express provisions of § 710, then there would exist no reasonable expectation of enforcement of 22 *Del.C.* § 702. It is unreasonable to expect planning commissions to institute enforcement actions against municipalities, in essence bringing suit against themselves.

Delaware courts' recognition of the requirement that plaintiffs possess an interest differing from that of the general public, if not establishing a permanently low threshold, is at least context-specific. The mere fact that the Plaintiffs perhaps hold an interest only incrementally distinguishable from that of their neighbors will not necessarily result in a finding of the absence of standing in this context. Where a plaintiff points to a "concrete and particularized injury," the fact that it is widely shared will not bar a finding of standing.[256]

The Plaintiffs live within the Town's zoning jurisdiction, as well as nearby to the Kohl Property, and therefore have legitimate claim to being members of the class for whose benefit the statute was enacted. The

[256] *See Fed. Election Comm'n*, 524 U.S. at 23-25. The facts presented here are analogous to those of *Dover Historical Society*, in which the Delaware Supreme Court found standing to exist for plaintiffs residing within an historical district to challenge a planning commission's determination that an architectural review certificate be granted. 838 A.2d at 1114. As the Court explained, "the fact that a grievance is widely held does not make it abstract and not judicially cognizable if individual plaintiffs can demonstrate a concrete and particularized injury." *Id.* at 1113.

statement of purpose in § 702 shows legislative intent that municipal residents are among the intended beneficiaries of the chapter's provisions. That subsection provides, *inter alia*, that "[i]t is the purpose of this section to encourage the most appropriate uses of the physical and fiscal resources of the municipality. . . ."[257] Furthermore, in listing the required elements of comprehensive plans, the section states that plans "shall also contain . . . such other elements which in accordance with present and future needs, in the judgment of the municipality, best promotes the health, safety, prosperity and general public welfare *of the jurisdiction's residents*."[258]

Zoning-related challenges comprise a traditionally unique category of potential causes of action.[259] Moreover, Delaware case law is replete with challenges to comprehensive plans by plaintiffs similarly situated. The Court need not decide whether, for instance, individuals residing on the far side of the municipality would possess an interest sufficiently

[257] 22 *Del.C.* § 702(a). Section 702 also clearly demonstrates an intent to promote coordination among municipalities, counties, and the State in making land use decisions; however, this purpose does not necessarily exclude the purpose detailed in the text above. On the contrary, both purposes coexist within the meaning and structure of statute.

[258] 22 *Del.C.* § 702(b) (emphasis added). This clause specifically applies to municipalities with populations of greater than 2,000, which criterion the Town satisfies.

The Town's contention that § 710 indicates legislative intent that individual plaintiffs not be granted standing to bring these types of claims is of no avail, either, for the same reasons listed above with respect to right of action analysis, especially in light of the treatment afforded zoning-related matters.

[259] Standing analysis with respect to these cases does not always fit neatly with generalized standing principles. *Cf. Data Processing*, 397 U.S. at 151 (though providing seminal guidance on questions of standing, acknowledging that "[g]eneralizations about standing to sue are largely worthless as such").

distinguishable to maintain this claim. The Plaintiffs reside within the sphere of potential zoning impact satisfying their burden if this statute is to have any reasonable prospect of private enforcement. The benefits of § 702(d) are intended to inure to municipal residents through promotion of wise growth in conformity with long-range, deliberative planning in which residents have an opportunity to participate. Certainly, these are benefits on which the statute intended residents to rely.

Given the foregoing considerations, viewed in conjunction with the substantial body of case law recognizing individual plaintiffs' capacity to maintain litigation challenging comprehensive plans, this Court is unwilling to conclude that a "concrete and particularized injury" does not exist to support challenges by municipal residents to enforce the statutory mandate that their comprehensive plans have the force of law. Therefore, the Court must now examine whether the Plaintiffs have sufficient standing under the remaining elements of the test outlined in *Dover Historical Society*.[260]

[260] *Cf. Cave v. New Castle County Council*, 2003 WL 21733076, at *2 (Del. Super. July 21, 2003) *aff'd*, 854 A.2d 1158 (Del. 2004) (TABLE); *Citizens for Smyrna-Clayton First v. Town of Smyrna*, 2002 WL 31926613, at *5 (Del. Ch. Dec. 24, 2002). Both of these cases are inapplicable to the claims alleged by the Plaintiffs. *Cave* merely held that the statute granting the "force of law" to the New Castle County comprehensive plan, 9 *Del.C.* § 2659, did not create a private right of action with respect to a non-zoning issue. *See Cave*, 2003 WL 21733076, at *2. The decision in *Citizens for Smyrna-Clayton First*, denying plaintiffs standing to challenge approval of a site plan, requires that plaintiffs first demonstrate an "interest distinguishable" from the general public. *See Citizens for*

It must first be determined whether the Plaintiffs have suffered an injury-in-fact. Such injury may not have been to *any* legally protected interest in order to confer standing; instead, it must have been to an interest within the "zone of interests" the statute that the Plaintiffs claim was violated was intended to protect.[261] The purposes underlying the requirement that development within municipalities be consistent with the comprehensive plan are, *inter alia*, to ensure planned growth and wise use of municipal resources, as well as to "promote the health, safety, prosperity and general public welfare of the jurisdiction's residents."[262] As residents of the Town's zoning jurisdiction in the areas close-by the rezoned site at issue here, the Plaintiffs clearly have an interest in nearby growth proceeding according to land-use plans adopted with long-term goals for the municipality as a whole in mind. Although, on the one hand, it is not generally the place of the court to engage in detailed review of the policies underlying individual municipal land-use decisions, on the other hand, in enacting 22 *Del.C.* § 702 the General Assembly acknowledged that citizens of municipalities have an interest in rational municipal development

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*Smyrna-Clayton First*, 2002 WL 31926613, at *5. However, a challenge to site plan approval is very different from the issue presented here.

[261] *See Oceanport Indus.*, 636 A.2d at 904 (explaining that the two prongs of the *Data Processing* test had "folded" into the first prong of the *Lujan* test).

[262] *See* 22 *Del.C.* § 702(a), (b).

consistent with comprehensive plans, as well as in participation of adoption and revision of those plans.

In this instance, the Plaintiffs argue that the Town violated the statutory requirement of conformity with its comprehensive plan—thereby not only denying them their interest, recognized by statute, in reliance on the plan and in the opportunity to participate in the amendment process, but also creating exactly the potential detriment to safety and the public welfare comprehensive plans were intended to account for and ameliorate. The Plaintiffs' claims of harm resulting from failure to comply with 22 *Del.C.* § 702, and of future harm from drastic increases in traffic to and from the site, are both real and within the category of interests the statute was enacted to address—and therefore appear to satisfy the policies underlying this element of Delaware's standing requirements.[263] Furthermore, these harms are concrete and particularized to the extent contemplated by standing requirements. Although these harms may not be of the direct sort normally present in actions before the Court, the test for injury-in-fact is often context-specific, depending on the nature of the interest sought to be protected. The Plaintiffs' ability to anticipate growth in close-by areas being in conformity with the plan, as well to participate in planning future growth

[263] *See* Amended Compl. at ¶¶ 56, 65 & 66.

in those areas through the process of public comment, coupled with drastic increases in traffic in close-by areas certain to result from the inconsistent rezoning, is sufficiently concrete and particularized for standing purposes here.[264] Similarly, the injuries are both actual and imminent; the rezoning has occurred, allegedly in violation of statute, and development continues apace. With respect to the anticipated increase in traffic, it is in no way hypothetical or conjectural other than as a matter of degree.[265]

As to the second and third prongs of the standing analysis, the Court need address them only briefly. The inconsistent development of the property, with the attendant harms discussed *supra*, is directly traceable to the alleged improper rezoning. Without the rezoning to commercial use, the development could not occur.[266] Furthermore, if this Court finds the Town did permit development inconsistent with its comprehensive plan, injunctive relief may be ordered to redress the violation of statute. Moreover, the

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[264] *Cf. Dover Historical Soc'y*, 838 A.2d at 1113; *Oceanport Indus.*, 636 A.2d at 900 ("An interest is sufficient for the purposes of standing if 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" (quoting *Data Processing*, 397 U.S. at 153-54)).

[265] *Cf. Dover Historical Soc'y*, 838 A.2d at 1112 ("While it is true that such a benefit hardly can be quantified, this is not to say that it is thereby so insufficient that loss of it will not support a finding of standing." (quoting *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323, 1332 (S.D.N.Y. 1975))).

[266] It should also be noted that considerations of ripeness do not disqualify the Plaintiffs' claim. Requiring that actual construction begin in order to violate the prohibition on inconsistent "development" contained in 22 *Del.C.* § 702 would impose a hypertechnical interpretation on the statute; rezoning is certainly the first (and a necessary) step to such development.

Town's recent amendment of the Comprehensive Plan does not render moot the claim asserted. Amendment of the Comprehensive Plan in order to arrive at consistency with the challenged rezoning *ex post* may, in a sense, ultimately "result in the Plaintiffs arriving at the same point at which they currently find themselves" as the Town contends,[267] but this argument carries no weight for standing purposes. That the Town has amended the Comprehensive Plan and may now properly rezone the Kohl Property, resulting in Plaintiffs again facing the prospect of a major commercial center nearby, does not obviate the Town's duty to observe procedural requirements in arriving at that outcome. Mere amendment of the Comprehensive Plan does not, of itself, moot the claims of the Plaintiffs.

The Defendants have, however, correctly objected to a finding of standing for the Plaintiffs on the grounds that they have failed to submit affidavits sufficient to demonstrate the factual basis for the Court's analysis that meet the requirements of this Court's rule governing summary judgment.[268] Therefore, the Plaintiffs will be afforded an opportunity to submit such affidavits in order to satisfy standing requirements.

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[267] Town's Reply Br., at 4.

[268] The Town urges that the Plaintiffs' failure to provide separate affidavits demonstrating harm is fatal to the Plaintiffs' standing inquiry. *See* Town's Reply Br., at 3-4. Though the Plaintiffs have arguably presented enough facts in the record to find harm sufficient for standing purposes, *cf. Tate v. Miles*, 503 A.2d 187, 190 (Del. 1986) (permitting standing in zoning challenge where harm inferred from record and uncontradicted), the Court

It would be ironic to deny the Plaintiffs capacity to bring this action essentially for the reason that its injuries are shared by too many residents of the municipality, when such generalized harms are, at its core, what the statute is designed to prevent. To rule otherwise here, when the Plaintiffs are close-by municipal residents of the rezoned site and will clearly experience detriment to interests protected by the statute, would effectively deny standing to any private municipal citizen to bring an action of this type, thereby in essence rendering a statute purportedly carrying "the force of law" mere hortatory language.

3. Judicial Review of Rezonings for Consistency with a Comprehensive Plan

As a condition on their exercise of zoning power delegated by the State, municipalities enacting zoning ordinances are expected to prepare and adopt comprehensive plans,[269] which provide the basis for municipal zoning

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acknowledges that presentation only of allegations of injury is insufficient to merit a finding of standing. *See Cave*, 2003 WL 21733026, at *2 n.23. *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823-24 (Del. 1997) (holding that mere assertion of increased traffic is insufficient to warrant standing). The complaint and the amended complaint are not verified. At this point, the factual record is, at best, unclear. The better approach, at least in this context, is to allow the Plaintiffs to supplement the record and, then presumably, there will be a sufficient factual basis upon which the Court can reasonably rely.

[269] "Comprehensive plan means a document in text and maps, containing at a minimum, a municipal development strategy setting forth the jurisdiction's position on population and housing growth within the jurisdiction, expansion of its boundaries, development of adjacent areas, redevelopment potential, community character, and the general uses of land within the community, and critical community development and infrastructure issues." 22 *Del.C.* § 702(b).

regulations and thereby serve as guides for future growth.[270] Once adopted, "[a] comprehensive plan shall have the force of law and no development shall be permitted except as consistent with the plan."[271] The requirement that development be "consistent" with the comprehensive plan "is, of course, no mere technicality . . . ."[272] To the contrary, this is a "fundamental feature" of the scheme of delegation of zoning authority to municipalities by the State.[273]

Comprehensive plans are intended as "large scale and long term" planning documents, and therefore "cannot . . . serve unyieldingly as guide[s] to detailed questions of zone designation."[274] A comprehensive plan "necessarily addresses many issues of land use that inevitably involve

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[270] *See* 22 *Del.C.* § 702. Zoning power is granted to the counties by the State in accordance with 9 *Del.C.* Ch. 26, 48 & 69. It is delegated to other municipalities (*i.e.*, cities and towns) by 22 *Del.C.* Ch. 3.

[271] 22 *Del.C.* § 702(d).

[272] *Lawson v. Sussex County Council*, 1995 WL 405733, at *4 (Del. Ch. June 14, 1995) (analyzing zoning requirements prescribed by similar statutory language, although applicable to counties). Delaware's grant of zoning authority to the counties establishes that, after they adopt comprehensive plans, the plans have the force of law. *See, e.g.*, 9 *Del.C.* §§ 2651, 2659. These statutes provide, in pertinent part, that "the land use map or map series forming part of the comprehensive plan . . . shall have the force of law, and no development . . . shall be permitted except in conformity with the land use map or map series and with land development regulations enacted to implement the other elements of the adopted comprehensive plan." 9 *Del.C.* § 2659(a). For the purposes of determining the general legal standard, the distinction in language used by the statutes referring to county comprehensive plans does not diminish the applicability of case law with respect to municipal comprehensive plans. Interestingly, the Delaware Code provides only that "the land use map or map series" have the force of law with respect to county plans, while a municipality's *entire* comprehensive plan carries the force of law. *Compare, e.g.*, *id.*, *with* 22 *Del.C.* § 702(d).

[273] *See Lawson*, 1995 WL 405733, at *4.

[274] *Id.*

tension among inconsistent though desirable goals and thus lead to conflict . . . ."[275] It is further recognized that "[t]rade-offs between the various goals of managing development are contemplated by, and therefore consistent with, the Plan."[276] As a result, challenges to zoning decisions as not consistent with the comprehensive plan must be reviewed with an eye toward flexibility; yet, the legislature's mandate that comprehensive plans are to carry "the force of law" militates against analysis so flexible as to render such plans a nullity. Courts must balance these considerations in crafting an appropriate standard of review.

In order for plaintiffs to prevail on claims that the rezoning of property is inconsistent with a comprehensive plan, plaintiffs generally must demonstrate that the rezoning "fails to strike a reasonable balance between [the plan's] various goals."[277] The Court will find a balance reasonable "if it represents a conclusion supported by substantial evidence."[278] Where the decision to rezone is supported by substantial evidence, the Court will not

[275] *Id.*
[276] *Glassco v. County Council of Sussex County*, 1993 WL 50287, at *6 (Del. Ch. Feb. 19, 1993).
[277] *Lawson*, 1995 WL 405733, at *4 (quoting *Glassco*, 1993 WL 50287, at *6).
[278] *Id.* It is an open question as to whether a finding of substantial evidence sufficient to support rezoning should be determined on the basis of whether a municipality "rationally" or "reasonably" concluded that the rezoning was in conformity with the comprehensive plan. *Compare, e.g.*, *Lynch*, 2005 WL 2000774, at *3, *with Citizens' Coal., Inc. v. Sussex County Council*, 2004 WL 1043726, at *5, *6 (Del. Ch. April 30, 2004) (mentioning both standards), *aff'd*, 860 A.2d 809 (Del. 2004) (TABLE). This Court need not resolve this question at present, given that the exception to the general rule, described *infra*, is applicable.

substitute its judgment for that of the legislative body charged with primary zoning authority.[279]

[279] It should be noted that analysis of whether a decision to rezone property is consistent with a comprehensive plan is distinct from analysis of whether the rezoning was "arbitrary and capricious because not reasonably related to the public health, safety, or welfare." *See generally Lawson*, 1995 WL 405733, at *2-*6. Thus, the presumption of validity arising in the latter analysis, rebuttable only on a clear showing of arbitrariness and capriciousness, *see Tate v. Miles*, 503 A.2d 187 (Del. 1986), is not directly applicable to questions involving a comprehensive plan. Instead, such questions should be resolved on the basis of whether "substantial evidence" exists to support a finding of consistency with the plan's goals. *See also Green v. County Council of Sussex County*, 508 A.2d 882, 890 (Del. Ch. 1986) (explaining significance of distinction between requiring consistency with "the" plan, as opposed to "a" plan), *aff'd*, 516 A.2d 380 (Del. 1986).

Similarly, there exists some tension as to whether a "fairly debatable" decision by a zoning authority that rezoning is consistent with the comprehensive plan must be upheld. *See, e.g.*, *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *8 (Del. Ch. Dec. 7, 2001) (citing *Tate*, 503 A.2d at 191). Implicit in the reasoning of other decisions, however, has been the holding that the "fairly debatable" standard is inapplicable to questions of consistency with the comprehensive plan. This is likely a result of the issue being understood not as whether the rezoning is "reasonably related to the public health, safety, or welfare," but rather as whether the act of the zoning authority was arbitrary and capricious for failure to comply with the law (*i.e.* the comprehensive plan), thereby exceeding the statutory delegation of zoning authority to the council. *See Shevock v. Orchard Homeowners Ass'n, Inc.*, 621 A.2d 346, 349 (Del. 1993); *see also Green*, 508 A.2d at 890; *cf. Gibson v. Sussex County Council*, 877 A.2d 54, 74 n.68 (Del. Ch. 2005).

Courts applying the "fairly debatable" standard, with its attendant presumption of validity, to questions of consistency with comprehensive plans have generally relied on the principles of zoning analysis outlined in *Tate*. *Tate*, 503 A.2d at 191 (citing *Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (1971) (citing *McQuail v. Shell Oil Co.*, 183 A.2d 572, 578-79 (Del. 1962))). In *Pettinaro Enters.*, 1992 WL 187625, the Chancellor reasoned that the "fairly debatable" standard applies to questions of whether zoning authority (*i.e.*, governmental power) was exercised in a constitutionally valid manner, requiring only "consistency with a 'rational plan or purpose' . . . ." *Id.*, at *6 - *7 (applying *Willdel Realty* to determine constitutionality only, while implying that *Green*'s analysis would control where compliance with a formal comprehensive plan was at issue); *see also Green*, 508 A.2d at 890 ("The distinction is critical and renders *McQuail* inappropriate here."); Charles M. Harr, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154, 1168-73 (1955). *Pettinaro Enterprises* involved the question of whether a municipal zoning decision failed to comply with the city's comprehensive plan. In reaching his decision that the "fairly debatable" standard applied, the Chancellor relied on the fact that municipalities, unlike counties at that time, were not required to adopt formal comprehensive plans. *See* former 22 *Del.C.* § 303. The Chancellor's analysis strongly suggests that the analysis might have been different if the City had been

Notwithstanding the notion that comprehensive plans are viewed as long-term planning tools, there are instances when the comprehensive plan is "sufficiently unambiguous and specific with respect to a particular matter that it can be critically employed in judicial review of zoning decisions," regardless of such decisions' otherwise comportment with the plan's general statement of policy goals.[280] When such circumstances arise, the Court must respect the legislature's affirmative command that comprehensive plans carry "the force of law" and proscribe development that is "fundamentally

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required to enact a formal comprehensive plan. *Pettinaro Enters.*, 1992 WL 187625, at *6. Significantly, the Delaware Code, 22 *Del.C.* Ch. 7, was amended in 1998 both to require adoption of formal municipal comprehensive plans and to require that development be consistent with such plans. *See* 71 *Del. Laws*, ch. 477, § 1.

On the other hand, the potentially divergent analytical approaches pointed out above may carry a distinction without a difference. Important here is the notion that comprehensive plans mean something, as evidenced by the "force of law" assigned to them by statute. (It may be appropriate to note that the "force of law" language was added to the counties' zoning statutes after *Green*.) The issue of which methodology is correct, or even whether the distinction has real significance, is probably, in itself, "fairly debatable;" but this academic question need not be resolved here. As demonstrated *infra*, the language of the Town's comprehensive plan, making clear its policy favoring certain industrial and office uses, at the expense of conversion to commercial (retail) zoning designations, fails to raise a "fairly debatable" question, supported by substantial evidence, of the rezoning's consistency with the plan.

[280] *See Lawson*, 1995 WL 405733, at *5 (explaining the import of the Court's analysis in *Green*, 508 A.2d 882). Very similar to the facts presented here, *Green* involved the rezoning of a parcel to a designation that could only be understood to permit development of a type the plan expressly discouraged. *Green*, 508 A.2d at 891. Compare the result in *Green* with *Hudson v. County Council of Sussex County*, 1998 WL 15802 (Del. Ch. Feb. 24, 1988), where the Chancellor declined to extend the reasoning of *Green* to the facts of *Hudson*, pointing out that merely because "the Plan is *silent* concerning [the lands at issue] surely cannot be read to imply that it contemplates no such development over the years while it is in place." *Id*. at *4 (emphasis added). However, as in *Green*, the Town's comprehensive plan does address policies necessarily involved in the challenged rezoning, as discussed more *infra*.

inconsistent with the basic thrust" of the comprehensive plan, as perceived through the specific pronouncements of plan policy.[281]

4. Consistency Between the Comprehensive Plan and the Rezoning

A comprehensive plan is just that: a plan. It is not a rigid prescription of an inherently unknowable future. A community's aspirations and expectations frame the land use decision process. Frequently, the goals will be in conflict. The perhaps inevitable tension among the values embraced in a plan should not deprive the municipality's governing body of the flexibility necessary to address changing circumstances. Indeed, this Court has predicted that successful challenges to rezonings based on

[281] *Green*, 508 A.2d at 892 (holding zoning decision "fundamentally inconsistent," thereby trumping general acknowledgement that "the inherent limitations of planning are such that a long-term plan must be read sympathetically so as to permit necessary flexibility when the idealized plan is implemented by concrete development"); *see also Concerned Citizens of Cedar Neck, Inc. v. Sussex County Council*, 1988 WL 761235, at *5 - *6 (Del. Ch. Aug. 14, 1998) (implicitly acknowledging exception in holding that plaintiff must "demonstrate that the re-zoning decision is inconsistent with the Comprehensive Plan *or* that it does not serve the goals of the Plan." (emphasis added)).

The courts regularly grant deference to agencies' interpretations of their own regulations. *See, e.g.*, *Couch*, 593 A.2d at 562 ("[I]t is basic that courts should defer to judgments of an administrative agency as to the meaning or requirements of its own rules, where those rules require interpretation or are ambiguous."). However, at times, that deference is limited. *See, e.g.*, *Cheswold Aggregates, LLC v. Board of Adjustment of the Town of Cheswold*, 2000 WL 33108801, at *4 (Del. Super. Nov. 1, 2000) ("Ordinarily this Court is deferential to municipal zoning decisions as it should be. But when the Board's decision is not supported by substantial evidence or is contrary to the applicable law, it is the Court's duty to reverse the Board."). *Green* fittingly warned that courts "must guard against any inclination to permit appropriate deference to degenerate into blind acceptance of [a] Council's findings." 508 A.2d at 891. *Cf. Udell v. Haas*, 235 N.E.2d 897, 901 (N.Y. 1968) (in applying more permissive New York provision, the Court explained that "courts must require local zoning authorities to pay more than mock obeisance to the statutory mandate that zoning be 'in accordance with a comprehensive plan.'").

inconsistencies with the comprehensive plan will be rare,[282] but rarely, of course, does not equate with "never." Comprehensive plans, as the General Assembly has made clear, carry the "force of law." The purposes of a comprehensive plan would be thwarted if it were judicially reviewable as aspirational only, devoid of substance and effect.

The Town's comprehensive plan is not—and one should not expect it to be—precise.[283] The maps of the 2001 Update expressly designate the lands across U.S. 301 from the Kohl Property for industrial development. The Kohl Property, however, is not given such express treatment. Yet, the 2001 Plan identifies the area of the Kohl Property as destined for industrial and office development. The plan speaks of industrial uses transitioning to agricultural preservation. No mention is made of a commercial buffer between the industrial area and the agricultural lands. The maps in the 2001 Update label the Kohl Property variously as "proposed growth area" and "intergovernmental development zone." This merely informs the reader that the Kohl Property will be developed for some unspecified use and that the Town expects input from other public entities to inform its decision-making process.

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[282] *Lawson*, 1995 WL 405733, at *5.

[283] This may be attributable in part to the fact that the 2001 Update does not replace the 1998 Plan. Instead, with the 2001 Update, the Town revised the 1998 Plan; thus, to the extent that it was not superseded by the 2001 Update, the 1998 Plan survives.

Because the maps in the 2001 Update do not designate any projected use for the Kohl Property, it is necessary to consider the text of the plan.[284] Nothing in the Town's comprehensive plan indicates that its treatment of the Kohl Property would be consistent with a rezoning to commercial. Indeed, the 2001 Update espouses the policy of "limit[ing] the possibility of property zoned in anticipation of employment uses being developed as a commercial site."[285] One might, as a matter of experience, conclude that a large retail establishment would provide significant employment opportunities.[286] The 2001 Update, however, does not consider commercial zoning as supportive of the employment which it seeks to encourage generally. Instead, it squarely counsels against transforming manufacturing and office parcels to commercial.[287]

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[284] As noted in note 272, *supra*, the pertinent statutory provisions grant the *entire* municipal comprehensive plan the force of law. As a result, the Court must look to the text of the plan, in addition to the maps, in order to discover what the comprehensive plan envisioned for the property.

[285] 2001 Update at 36. This policy is identified within the plan's discussion of the SR 299 corridor, but that policy concern is one of general applicability. A similar view was also expressed in the context of office uses in the Greenbelt (establishing the goal of preventing conversion of lands annexed for office purposes to major commercial uses). *Id*. at 33.

[286] The Wal-Mart Supercenter proposed for the Kohl Property has been projected to generate more than 400 jobs.

[287] The reasoning behind this line of thought is not developed in any detail. This perception may be somewhat at odds with the stated "purpose of the C-3 district regulations to create local, neighborhood, community and regional shopping and employment opportunities . . . ." Middletown Zoning Code, § 4(H) (App. to Town Defs.' Answering Br., Ex. 40). The Town, however, may have had a concern about a lack of sufficient area for manufacturing activity if lands otherwise appropriate for industrial use

The Town Council did not directly confront these issues. Instead, the Town Council, in approving the rezoning, referred to the OSPC's conclusion that the Town's comprehensive plan and the proposed rezoning were consistent.[288] The OSPC identified two reasons for its determination. First, it relied upon a map in the 2001 Update designating the Kohl Property as a "Proposed Growth Area."[289] That, however, begs the question: what kind of growth? Any development—from single-family homes on large tracts to manufacturing—could be viewed as constituting growth. Reliance on one map, however, ignores the text of the plan and specifically overlooks the policy determination that the area of the Kohl Property should be reserved for industrial and office development, *i.e.*, a particular form of future

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were converted to retail purposes, or the Town may have believed that manufacturing (or office) jobs are somehow "better" (for the Town's growth purposes) than jobs typically found in the commercial (*e.g.*, retail) setting. The wisdom of this policy judgment is not for the Court to review.

The position of the Plaintiffs with respect to the status of the Kohl Property as an employment center has not been consistent. In their Amended Complaint, at ¶ 27, they allege that it was intended to be an employment center. In their Answering Brief to the Town's Motion for Summary Judgment, at 10, they argue that the comprehensive plan does not designate the Kohl Property as an employment center. The question raised by a detailed review of the comprehensive plan is the Town's preference for certain zoning classifications because of the nature of the jobs that they might provide.

[288] Although zoning authorities may rely upon input from state agencies in certain instances, *see*, *e.g.*, *Deskis*, 2001 WL 1641338, at *6 (County Council may rely upon DelDOT traffic impact assessment), the question of consistency of a proposed rezoning with the comprehensive plan is ultimately a decision which the Town Council must make under its comprehensive plan and its zoning code.

[289] PX 42. A representative of OSPC testified in his deposition as follows:

> Q. Well, let's talk about proposed growth area. If you're a proposed growth area, any type of use would be consistent?
>
> A. Correct.

Dep. of Herbert Inden, PX 13 at 62.

growth. Although the map's designation alone would allow for broad discretion, it does not eliminate the need to assess the impact of the comprehensive plan's text.

Second, the OSPC did review the text of the plan and recognized that development along the Town's westerly boundary would "include the likes of industrial parks, offices, flex space and light industrial uses."[290] It then looked to the general language of the 1998 Plan, which the OSPC described as "promoting the development of mixed uses like industrial, office, commercial, residential, and community service use for purpose of creating communities to provide opportunities to work, shop and live in close proximity."[291] The problem arising from OSPC's reliance upon this language is that it was derived from the plan's general statement of the Town's objectives and does not accommodate the specifically projected use of the Kohl Property set forth in the 2001 Update. Such broad language—describing the goals of the municipality as a whole—cannot alone supersede the specific concepts set forth for the Kohl Property and other tracts in the vicinity. In short, it would appear that, under the OSPC's view, a general reference to a mix of uses throughout the municipality would allow any use

[290] PX 42.

[291] As discussed in greater detail, *infra*, this characterization of the plan is less than accurate.

in any location regardless of whether or not the plan has projected certain uses for certain areas. It may well be that there are good reasons for deviating from the recommendations of a plan to accommodate a different use. It requires something more, however, than mere reference to very generalized goals for such a deviation to be permitted, especially where specific goals have been established and the plan advises against the very rezoning attempted by the municipality.

It is necessary also to address here the sufficiency of the record relied on by the Town in making its decision to rezone the Property. In this instance, the Town failed to create a record from which the Court can effectively review its rezoning decision. In voting to rezone property, a statement of facts by the municipality must be sufficient to constitute "substantial evidence" that the rezoning will be consistent with the comprehensive plan.[292] Where the municipality fails to satisfy this requirement, the Court must void the challenged decision.

The creation of a sufficient factual record is not a requirement to be honored more in its breach than observance. Given the great deference normally accorded zoning decisions, compliance with this rule is necessary

[292] *See, e.g.*, *Lynch*, 2005 WL 2000774, at *3; c*f. New Castle County v. BC Dev. Assocs.*, 567 A.2d 1271, 1276-77 (Del. 1989) (outlining heightened requirements where county Council seeks to rely on record in lieu of findings of fact).

to protect parties' interests from arbitrary and capricious determinations by municipalities. Without a sufficient record from which the Court may conduct meaningful review, the Court's ability to determine whether a violation of law, and therefore an arbitrary and capricious exercise of power, occurred is significantly circumscribed.[293] As a consequence, this Court will not acquiesce in a rezoning if the municipality's findings fail to satisfy the substantial evidence standard.[294]

It should be noted that the burden of creating a sufficient evidentiary record is not a particularly demanding one.[295] However, zoning decisions relying, as a practical matter, on conclusory statements[296] and flawed agency findings do not meet the minimum requirements of this standard.[297] The

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[293] *Cf. New Castle County v. BC Dev. Assocs.*, 567 A.2d 1271, 1276-77 (Del. 1989) (holding that where Council placed substantial reliance on record rather than statement of findings, "the record must prove to be an adequate substitute for a more formal explanation. Thus, the Council's reasons must be clear from the record. If several possible explanations for a given decision appear on the record, the review court must not be left to speculate as to which evidence the Council favored"). The Supreme Court found significant the lack of direct explanation for reasons underlying the Council members' votes other than the Council president. *See id.* at 1277.

[294] *Cf. Tate v. Miles*, 503 A.2d at 191; *Hudson*, 1988 WL 15802, at *6 (also noting that rezoning may stand where reasons are "obvious from the record" (quoting *Hutchins v. County Council of Sussex County*, 1986 WL 14523, at *4 (Del. Ch. Dec. 18, 1986), *aff'd*, 526 A.2d 930 (Del. 1987))).

[295] *See BC Dev. Assocs.*, 567 A.2d at 1277-78.

[296] *See id.* at 1277 (addressing insufficiency of conclusory statements by Council members).

[297] *Cf. Citizens for Smyrna-Clayton First*, 2002 WL 31926613, at *4 (Del. Ch. Dec. 24, 2002) (defining substantial evidence as "more than a scintilla, if less than a preponderance**"**), *aff'd*, 818 A.2d 970 (Del. 2003) (TABLE). The evidence presented by the Town fails, however, to satisfy this relatively low standard. While evidence constituting "substantial evidence" may, in some instances, require relatively little in

Town, in making its decision, based its finding of consistency largely on opinion letters from the OSPC. While agency recommendations and findings may serve as evidence for municipal rulings,[298] permissible reliance on such findings is not without limits in the context of comprehensive plan review. Where an agency's input was contested on reasonable grounds or where rendering its opinion did not require possession and use of special skills by the agency, this Court is less apt to view predominant—indeed, arguably exclusive—reliance on agency findings as constituting substantial evidence.

The Mayor and Council addressed the question of whether the rezoning was consistent with the Town's comprehensive plan. The Mayor read, and agreed with, the OSPC's November 29, 2004 letter. The Mayor and Council, but only in conclusory fashion, stated that the rezoning would be consistent with the comprehensive plan.[299] As Councilman Faulkner put it: "Everybody's opinion we have, other than [counsel for the Plaintiff], is that this meets our Comprehensive Plan . . . . I was here when we wrote the Comprehensive Plan. I sat through hours and hours and hours of meetings

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order to satisfy judicial review requirements, where consistency with the comprehensive plan is not obvious, prudence dictates that municipalities create a full record.

[298] *See, e.g.*, *Deskis*, 2001 WL 1641338, at *16 (holding reliance on agency permissible, especially where little or no opposition was voiced and agency had relevant expertise in subject matter).

[299] TX 25 (Tr. of Rezoning Hrg.) at 75ff.

writing that Comprehensive Plan. And I know what we intended, and this is what we intended with it. So I'm in favor of this."[300] No member of Council explained how a commercial zoning classification would be consistent with the comprehensive plan's projected use of the Kohl Property for manufacturing or office use or how it would be consistent with the goals established by the plan. It was cursorily mentioned that the Town's solicitor had apparently expressed his view of consistency, but it is not disclosed how he arrived at that position.[301] Councilman McGhee concluded that the rezoning would satisfy the consistency requirement "because the [OSPC] had said that we're in compliance . . . ."[302] The Mayor and Council set forth no other findings to support their conclusion.[303]

The Town gave great weight to the letters from OSPC, dated September 14, 2004,[304] and November 29, 2004.[305] The September 14 letter recites a number of questions for the Town from the Delaware Economic Development Office (DEDO), pointing to many reasons why the rezoning is

[300] *Id*. at 82.
[301] *Id*. at 76.
[302] *Id*. at 82.
[303] *See BC Dev. Assocs.*, 567 A.2d at 1277 ("The fact that the record provides evidence that a given theory could have supported Council's decision does not allow us to conclude confidently that Council actually relied upon that theory.").
[304] TX 16.
[305] PX 42.

potentially inconsistent without expressly saying as much.[306] After listing DEDO's concerns, the OSPC wrote without explanation that, "[i]n conclusion, since this rezoning would be consistent with your current comprehensive plan, the State has no objections to this rezoning."[307] A conclusory statement of this nature, especially in light of the reservations

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[306] After quoting DEDO's recitation of the history and policy decisions underlying the zoning plans for the area, OSPC quotes DEDO as writing:

> DEDO suggests that Middletown review the economic development strategy for their town before approving the rezoning of this property from industrial to commercial. The town should consider the following:
>
> 1. Will the town still have enough properly zoned land available for a large manufacturing/light industrial user if this property is rezoned C-3 commercial? If this property is rezoned, could the town replace the 98 acres of industrial zoned property somewhere else within the City Limits to allow for future development of a large light industrial based business opportunity?
>
> 2. If the new zoning is approved, can the property be dedicated to the attraction of corporate businesses that would provide full time quality jobs and not just retail with mostly part-time employment opportunities?
>
> 3. Is Middletown dedicating an appropriate amount of commercially zoned land within the Town or is the development of this new commercial zoned property going to create abandonment of other existing shopping centers and potentially create vacancy blight in their adjacent neighborhoods? Also, how will competition with the Kohl Property, if rezoned commercial, impact the downtown development emphasis that has been part of Middletown's Main Street Program for revitalization?
>
> 4. How will Middletown assist in the marketing of this change in type of opportunity for employment? DEDO would like to encourage the land owner to include the property in the real estate data base used by DEDO and New Castle County . . ., so that potential office users and other interested job creation businesses will have the opportunity to review the site as they are comparing available real estate properties in the region.

TX 16.

[307] TX 16.

implicit in DEDO's questions, cannot, by itself, constitute substantial evidence.

The November 29 letter adds some substance to the inquiry, stating that OSPC had "looked at the maps and text of the plan to get a sense of the community's expectations with regard to land uses."[308] The letter explains that "[the OSCP] saw nothing in the proposed zoning classification that contradicted the 2001 comprehensive plan."[309] To support its conclusion, the letter provides that the Property was located in a "Proposed Growth Area" on the 2001 Update map. As discussed *supra*, this designation has little or no evidentiary value—it is a title without substance. Second, the OSPC explains that the rezoning conforms to "development expectations" for the area encompassing the Kohl Property.[310] In support of this, the letter recites that the plan "goes on to talk about promoting the development of mixed uses . . . ."[311] Although the plan does, in fact, purport to promote mixed use development, this reference is found in the overall policy goals outlined for development across the entire municipality.[312] Certainly, such a broad statement of goals was not intended to apply to each individual lot—this would contradict the entire reason for designating exclusive zoning

[308] PX 42.
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *See* TX 2, at 26.

classifications in the first place. Instead, to determine the use the plan envisions for the Property, review must be made of the substantive text of the plan, itself.[313] Significantly, the letter states that the plan, in referring to potential uses anticipated for the area, provides that "[s]uch possibilties include the likes of industrial parks, offices, flex space and light industrial uses."[314] If true, this would be meaningful evidence of the plan's anticipated use of the Property. The language referenced here, however, is derived from the 2001 Update, which, on closer inspection, states something much different. Instead, the plan provides that the Property "shall be an area proposed for the industrial park and properties designed for office, flex space, and light industrial uses along US 301."[315] The plan anticipates an industrial park, and closely related uses, as the designation for this area, not a wide variety of uses that would merely include those listed. The distinction is crucial. The OSPC's summary of the plan's language thus alters its meaning, thereby unduly expanding the uses permitted on the Kohl

[313] Among the general policy goals listed in the 2001 Update, and relied upon by the OSPC in its November 29 letter, is the goal set by the Plan to "[p]rovide sufficient industrial and office park sites with sufficient supporting infrastructure to attract economic development." *Id.* This further illustrates the need to look to the substantive text of the plan itself, instead of relying on its broad statements of overarching policy goals for the municipality.
[314] PX 42.
[315] TX 2, at 33.

Property in such a way that industrial parks would be merely one potential use among many.

In resting its decision almost exclusively on input from the OSPC, the Town failed to carry its burden of providing substantial evidence supporting its conclusion of consistency.[316] The Town has the ultimate responsibility to determine whether the rezoning is consistent with its comprehensive plan.[317] In this instance, the Town essentially yielded its role as decision-maker to the OSPC. While that, alone, might not be fatal to a rezoning, it is in this instance in light of the fact that the OSPC's finding of consistency is not

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[316] Cases sustaining governmental actions have pointed to a much higher showing as constituting substantial evidence. *See, e.g., Lynch*, 2005 WL 2000774, at *3 ("There were several items of evidence . . . ."); *Deskis*, 2001 WL 1641338, at *8 (eleven findings of fact). For example, in *Lynch*, the Court identified four broad categories of detailed evidence presented to the Commissioners. *See Lynch*, 2005 WL 2000774, at *2, *3 n.18. See the Master's Report, at 2005 WL 1074341, at *6 n.10 (Del. Ch. April 21, 2005) for a full exposition of the evidence presented.

It should be noted that some additional points were made at the rezoning hearing, as pointed out *supra*. Yet, conclusory statements of personal belief in the consistency of the rezoning, as well as statements regarding the remembered intent of the plan's drafters, are not relevant for this inquiry. Of greater significance was a presentation to the Town Council by Ventures' counsel. *See* TX 25, at 8-13. He, like the Town Council, pointed to the OSPC letters as weighty evidence of the rezoning's consistency. In addition, he addressed the questions raised by DEDO, providing his opinion as to why they were of little concern. His presentation was countered not only by Plaintiffs' counsel, but also by members of the public. Therefore, this, too, fails to boost the evidence presented to the level of substantial evidence, especially where the Town Council failed to make findings of fact other than those listed above. *Cf. Green*, 1994 WL 469167, at *3 (holding that mere conclusory statements of council members that conditional use was consistent with law was insufficient, and that court could not rely on testimony at hearing as evidence of council's reasoning where opposing testimony was offered).

[317] *See* 22 *Del.C.* § 702(d); 29 *Del.C.* § 9206(a).

only too conclusory, but also unsupported, when read in conjunction with the expressed intent of the plan.

The Town argues that manufacturing and office uses are simply types of commercial use and, thus, the distinctions among industrial/office use and commercial uses are of little moment. In a general sense, manufacturing activity and office operations are commercial in nature. Commercial, however, in the zoning and land use planning context has a more specific and commonly accepted meaning: one encompassing businesses, such as retail establishments, banks, and some restaurants.[318]

The viability of the rezoning of a portion of the Kohl Property to C-3 turns on, as the tests have been variously framed, (a) whether it is "fairly debatable" that the rezoning was consistent with the comprehensive plan, (b) whether the consistency of the rezoning with the comprehensive plan is supported by substantial evidence, or (c) whether the rezoning is consistent with the goals and policies of the comprehensive plan. The conclusion, under any of these formulations, is that the rezoning has not been shown to

[318] The Town also asserts that the comprehensive plan holds no significance for the rezoning because the Kohl Property was not within the municipal boundaries when the plan was adopted. The Kohl Property, at the time of the rezoning, was, of course, within the Town's boundaries and, thus, its rezoning was subject to the provisions of the comprehensive plan. Indeed, the initial zoning of MI (as was sought by the owner) was precisely within the plan's goal of having the Kohl Property meet the Town's needs for industrial and office development. The Town's position, ultimately and unacceptably, reduces to one under which recently annexed lands may be rezoned without any consideration of the comprehensive plan.

be consistent with the Town's comprehensive plan. The plan projects manufacturing and offices uses for the Kohl Property, a prescribed range of potential uses that allows for many development options. Directing the evolution of the Kohl Property toward manufacturing or office uses is also fully consistent with the map designations of "Future Growth Area" and "Intergovernmental Coordination Zone."

The 2001 Update, moreover and significantly, does not stop with an affirmative recommendation of potential uses for the Kohl Property; it also announces a general reluctance, if not formal opposition, to rezoning from manufacturing and office uses to commercial uses. Without that "negative" policy limitation, the flexibility routinely given municipal authorities during judicial review of their rezoning decisions might have allowed this rezoning to prevail. Here, however, the rezoning was done in the face of two policy choices embodied in the comprehensive plan: the goal of encouraging manufacturing and industrial uses for the Kohl Property and an articulated municipal policy against converting land designated for such uses to commercial uses. Most importantly, the rezoning was done without any explanation, other than in the most conclusory fashion, by the municipal officials as to why their action was, in fact, consistent with the policies and

goals of the Town's comprehensive plan.[319] In sum, the Plaintiffs have met their burden of demonstrating the insufficiency of the record supporting the Town's conclusion that the rezoning was consistent with the comprehensive plan. To hold otherwise would ignore the legislative mandate to accord municipal comprehensive plans the "force of law" and would constitute that "blind acceptance of [a zoning authority's] findings" about which this Court has warned.[320]

E. *The Failure of Certain Defendants to Respond to Comments by State Agencies as Part of the Process Established by 29 Del.C. Ch. 92*

One final claim of the Plaintiffs must be addressed. The Plaintiffs have challenged the failure of the private defendants, Kohl and Ventures, to respond to the comments of state agencies transmitted by OSPC during the course of the pre-application review process under 29 *Del.C.* Ch. 92, which establishes the grounds for PLUS review.[321] By 29 *Del.C.* § 9204(d), "[f]ollowing the pre-application review process and upon filing of an application with the local jurisdiction, the applicant shall provide to the local

[319] The Court also notes that, regardless of precise formulation of the standard to be applied (*see* discussion at note 279, *supra*), whether the rezoning was consistent with the plan fails to raise a "fairly debatable" question based on the sufficiency of the record, and, therefore, the rezoning must be held invalid. Given the plan's opposition to the specific type of rezoning attempted here, as discussed at length *supra*, and in the face of the analysis employed in *Green*, the Court is unable to accord the Town the benefit of deference it normally receives.
[320] *Green v. County Council of Sussex County*, 508 A.2d 882,, 891 (Del. Ch. 1986).
[321] *See* Amended Compl. at ¶ 62.

jurisdiction and the [OSPC] a written response to comments received as a result of the pre-application review process, noting whether comments were incorporated into the project design or not and the reason therefore." On October 8, 2004, the OSPC provided comments from state agencies for the Kohl Property.[322] No response was forthcoming. The Plaintiffs, therefore, contend that no rezoning could take place until the private defendants made a written response to this report satisfying the requirements of § 9204(d).[323]

As discussed in the Court's analysis of the Plaintiffs' claims against the OSPC, the statutes on which the Plaintiffs base their claims grant neither a right, nor a remedy, that may be vindicated by private suit. The purpose underlying § 9204(d) is to encourage compliance with OSPC recommendations and to aid the state and the municipalities in discovering whether such compliance has occurred and, if not, why not. The intended beneficiary of the statute is the government, not the private plaintiffs. The clear text of the statute may only be read to create a right in the divisions of government that are to receive the required reports. Without a private right, then, no private remedy may be said to exist in the Plaintiffs to compel the private defendants' compliance with the terms of the statute. Moreover,

[322] *See* Amended Compl., Ex. 5; PX 39.

[323] *See* Amended Compl. at ¶ 62. While this claim may have been waived by the Plaintiffs, it should be noted that, in addition to the analysis that follows, the Plaintiffs have failed to demonstrate an injury-in-fact sufficient to merit a finding of standing for this claim, as well.

even assuming, *arguendo*, that such a right were to exist, no plausible argument can be made that the statue's language and context evinces an intent to create a private enforcement *remedy* in the Plaintiffs. The statutes sets forth a detailed procedural scheme for furtherance of state planning goals; reading an implied private enforcement right into this structure is entirely unwarranted.[324]

In *Alexander*, the Supreme Court made clear that the core test for an implied right of action is whether statutory intent to create both a right *and* a remedy exists.[325] The Plaintiffs have failed to satisfy this test with respect to 29 *Del.C.* § 9204(d), as they have with all of their claims arising from alleged violations of Chapters 91 and 92.[326]

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[324] The framework for determining the existence of a private right of action is set forth in Part IV(B)(4), *supra*.

The Court also notes that the Plaintiffs' Amended Complaint seeks to challenge failure by the Town to respond to respond to the OSPC report, as well. *See* Amended Compl. at ¶¶ 39, 62. The Plaintiffs fail to cite authority for this claim (see ¶39, 62) and fail to pursue it in the briefs submitted in support of their motion for summary judgment. Nevertheless, assuming, *arguendo*, that such failure was in violation of statute, analysis of the Plaintiffs' capacity to pursue such a claim against the Town would be largely the same as that described in the text above since the claim raises none of the other grounds for recognition of a private right of action discussed during the course of this memorandum opinion.

[325] *See Alexander*, 532 U.S. at 286-87.

[326] Indeed, no evidence of statutory intent to create either a private right or remedy in any section of Chapters 91 and 92 has been presented during the course of this litigation.

It should be noted that, were the claim asserted against the OSPC to compel enforcement of the statutory provision, the analysis would be the same since it raises no other grounds for the grant of a private right of action. An alternative light in which to view the Plaintiffs' claim is as an impermissible attempt to intrude on the enforcement discretion (a policy widely recognized under traditional administrative law principles) of the governmental actors holding power to enforce the provisions of 29 *Del.C.* § 9204(d).

## V. CONCLUSIONS

But for its conflict with the Town's comprehensive plan, the rezoning appears to be the product of rational, reasonable, and prudent land use decisions by various public officials. The Plaintiffs' claims of spot zoning, piecemeal zoning, and contract zoning are devoid of merit as are their unsupported allegations of supine conduct on the part of public officials. Circumstances changed after the 2001 Update and the annexation of the Kohl Property. No chip manufacturer came to Middletown. No replacement manufacturing operation has been found. The use of the Kohl Property for commercial purposes makes sense. Continuing to reserve the land for manufacturing use, especially next to a new high school, may make little sense. Unfortunately, the 2001 Update, perhaps infected with too much optimism about the anticipated chip manufacturing facility, was written in a fashion that denied the public officials the flexibility that they wished they had. The Town could have chosen sooner to amend its comprehensive plan to accommodate the changed circumstances. It did not do so before the rezoning, and the Court must measure the rezoning against the comprehensive plan in effect at the time of the rezoning, even though

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The decision of neither the OSPC nor the Town to complain of the private defendants' failure to respond to the PLUS report, therefore, should end the inquiry. *See also Woznicki v. New Castle County*, 2003 21499839, at *3 (Del. Super. June 30, 2003).

obviously outdated but one still carrying the force of law. The record does not support the rezoning of a portion of the Kohl Property to C-3 as consistent with the policies, goals, and terms of the comprehensive plan.

In conclusion, for the reasons set forth above, the rezoning of a portion of the Kohl Property to C-3 fails, and the Plaintiffs, upon demonstrating the factual basis supporting their standing to assert this challenge, are entitled to partial summary judgment declaring[327] that the rezoning was (and any development under it would be) inconsistent with the Town's comprehensive plan.[328] With the conclusion that the rezoning is invalid, the Plaintiffs' challenge to subdivision approval is moot.[329] The balance of the Plaintiffs' claims, including those against DelDOT and the OSPC, are also dismissed.

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[327] The Plaintiffs, in part, seek declaratory relief. Declaratory relief must be premised upon an actual controversy: one that involves the rights or other legal relations of the party which seeks declaratory relief; one in which the claim of right is asserted against one who has an interest in contesting the claim; one between parties whose interests are real and adverse; and one in which the issue is ripe for judicial determination. *Gannett Co., Inc. v. Bd. of Mgrs. of Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003). The Court, assuming that Plaintiffs adequately supplement the record before the Court, will enter a declaratory judgment as to the invalidity of the rezoning. The parties, however, will first be given the opportunity to comment on the effect, if any, that should be given by the Court to the Town's new comprehensive plan before the Court determines whether permanent injunctive relief is warranted.

[328] It follows that the cross-motions of those Defendants who sought summary judgment on this issue must be denied, unless the Plaintiffs are unable to satisfy their evidentiary burden.

[329] The Court does not understand any Defendant to contend the subdivision approval can survive an adverse determination of the rezoning question.

An order will be entered to implement this memorandum opinion.[330]

[330] The relief granted here is by way of summary judgment. Although OSPC and DelDOT also moved to dismiss, the Court considered matters well beyond the Amended Complaint and, thus, summary judgment, appropriate because of the absence of any dispute as to the material facts, resulted.