DELAWARE MUNICIPAL LAW
A YEAR IN REVIEW

Max B. Walton, Esquire
October 25, 2007

University of Delaware
Introduction

- Overview of events in Delaware law over the past year.
- The focus will be Delaware land use and municipal governance decisions.
Case 1 – Salem Church

- Probably the most significant land use decision of the past year is *Salem Church (Delaware) Associates v. New Castle County*, 2006 WL 2873745 (Del. Ch. Oct. 6, 2006).

- This is a very comprehensive decision that addresses numerous land use related subjects.
Salem Church - Facts

- The landowner received a rezoning exploratory sketch plan approval in 1974 for a development known as French Park.

- In 1999, the County issued an opinion, indicating that the French Park plan application would be governed under the rules and regulations that existed in 1974.
In 2001, the General Assembly passed a law requiring all land use applications that did not receive final approval within 5 years to comply with current environmental and traffic standards.

The developer sued, making a host of claims, most of which were rejected.
Salem Church – Vested Rights

• This was the first case that substantively applied the Delaware Supreme Court’s new vested rights test articulated in In re 244.5 Acres of Land, 808 A.2d 753 (Del. 2002).

• For vested rights, the Court must balance the nature, extent and degree of the public interest to be served by the ordinance amendment and the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded.

• In the final analysis, “good faith reliance on existing standards is the test” to determine a vested rights claim.
The *Salem Church* Court confirmed that the vested rights analysis requires a balancing of interests -- the public interest served by a particular law's enforcement and the private interests of a plaintiff who has relied on the state of the law at the time it acted.

The Court also held that delay in pursuing development approvals may defeat a vested rights claim in Delaware.
Salem Church – Equitable Estoppel

• The County’s representations in allowing the development to proceed under 1974 standards did not permit an equitable estoppel claim or preclude enforcement of the State law.

• The Court held that it would not enforce the equitable estoppel doctrine unless there are exceptional circumstances which make it highly inequitable or oppressive to enforce the regulations against the property owner.

• The Court held that an equitable estoppel claim could not be asserted against the County for the passage of the State law.
The substantive due process claim by the developer was rejected.

The Court held that the actions of the defendants would be required to “shock the conscience” before a substantive due process claim could be asserted.

“Courts have generally held that even if a municipality is guided by political motivations, unrelated to an application, that is not enough to ‘shock the conscience’ under a substantive due process analysis, particularly where the municipality, as the County here, can justify its actions as related to some legitimate goal.”
Salem Church – Takings

• The Court for the first time held that if a municipality provides an administrative mechanism for deciding takings claims, those administrative appeal mechanisms must be exhausted before a developer can sue.

• The Court also confirmed that unless the governmental action denies the property owner virtually all economically viable uses of the land, there can be no compensable taking.
Case 2 – Farmers for Fairness

• The case of *Farmers for Fairness v. Kent County*, 2007 WL 1413247 (Del. Ch. May 1 2007), is significant because it may drastically impact land use planning.

• The case challenged Kent County’s adoption of the Coastal Zone Protection Overlay Ordinance, which reduced density in sensitive coastal areas.

• Plaintiffs made numerous challenges in an attempt to invalidate the ordinance.
Farmers for Fairness – Uniformity

• The Court held that the overlay zone violated the uniformity requirement in the State Zoning Enabling Act.

• The Court opined that all uses within a particular district must be uniform, and that overlay zoning cannot be used to create different classifications within the same district.
Farmers for Fairness – Uniformity Cont’d.

- If Kent County wanted to adopt the overlay, it would be required to establish different districts and would likely be required to provide notice of any zoning change to affected property owners.

- This case calls into question any zoning action within any district which is not uniform.

- It is likely that there will be legislation considered by the General Assembly to address the uniformity issue.
Case 3 – *Upfront Enterprises LLC v. Kent County (Upfront #1)*

- *Upfront Enterprises LLC v. Kent County*, 2007 WL 1862709 (Del. Ch. June 22, 2007) (“Upfront #1”), is an example of what can happen if statutory procedures are not followed.

- The developer brought a challenge to a moratorium implemented by Kent County on certain land use applications.
Case 3 – *Upfront Enterprises LLC v. Kent County* (Upfront #1) Cont’d.

- The developer claimed that the moratorium ordinance was invalid because Kent County failed to follow 9 Del. C. § 4911(a), which requires any County ordinance changing “any . . . provision of any zoning regulation” to be submitted to the Regional Planning Commission.

- The Court invalidated the moratorium ordinance by holding that the imposition of the moratorium was a change in a zoning regulation, which required an advanced hearing before the Regional Planning Commission.
Case 4 – *Upfront Enterprises LLC v. Kent County* (Upfront #2)

- The Upfront #1 was followed by a second case challenging Kent County’s continued regulation. *Upfront Enterprises LLC v. Kent County*, 2007 WL 2459247 (Del. Ch. Aug. 24, 2007) (“Upfront #2”)

- During the time that Kent County’s moratorium ordinance was in place, it adopted a series of retroactive ordinances known as the adequate public facilities ordinances, which were designed to protect roads, schools, emergency medical services, and central water.
Case 4 – *Upfront Enterprises LLC v. Kent County (Upfront #2) Cont’d.*

- After the moratorium ordinance was invalidated by Upfront #1, the County also passed an Emergency Moratorium Ordinance, which again imposed a moratorium until the Regional Planning Commission could consider the matter.

- The developer claimed that the adequate public facilities ordinances were invalid as applied to it, and that the Emergency Moratorium Ordinance was also invalid.
Upfront 2 – The Holding

- The Court denied the request for preliminary injunction, holding that oddly worded provisions of the County Quality of Life Act only applied if the comprehensive plan required ordinance amendment.

- While the Court questioned whether the Emergency Moratorium Ordinance was properly enacted, the Court did not enjoin enforcement of the ordinance against the developer.
In a later opinion the Court of Chancery certified an interlocutory appeal to the Delaware Supreme Court on the interpretation of the provisions of the Quality of Life Act.

If the developer’s interpretation of the statute is adopted by the Delaware Supreme Court on appeal, essentially any application will allow a developer to proceed with its project based upon the ordinances, standards and regulations in effect at the time the application is filed.
While not specifically a land use case, the case of Cheswold v. Vann, 2007 WL 1201716 (Del. 2007) has important implications for municipal administrative actions.

In Vann, the Town sought to remove its police chief. Vann claimed that members of the Town Council who participated in the hearing were biased.

The Superior Court determined that the members of the Town Council that rendered the decision held an impermissible bias.
Case 5 – *Town of Cheswold v. Vann*

Cont’d.

- The Delaware Supreme Court reversed.
- The Court held that in order to succeed on a due process claim for bias, a party must show specific facts in the record that rebut the presumption of honesty and impartiality.
Case 6 – Wilmington Hospitality


- The developer claimed that the County violated its equal protection rights by failing to grant it variances to open after it built three extra floors on the building.

- The developer argued that other similarly situated developers were granted variances.
Case 6 – Wilmington Hospitality Cont’d.

- The Superior Court denied the County’s motion for summary judgment, holding that the variances granted for other projects were sufficient to allow the jury to hear the equal protection claim.

- The jury ultimately awarded the developer in excess of 7 million dollars.

- This is an important case to watch because, if sustained on appeal, it will be one of the first cases to allow an equal protection verdict based upon differing treatment in granting or denying variances.
Case 7 – *Durkin v. City of Newark*

- *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882 (D. Del. Sept. 22, 2006) and 2007 WL 2710451 (D. Del. Sept. 17, 2007) involves a suit between the City and a contractor who was terminated from a reservoir construction project.

- The contractor claimed that the City breached its contract and that the City violated its constitutional rights by preventing it from engaging in its chosen profession after termination.
Case 7 – *Durkin v. City of Newark* Cont’d.

- The District Court held prior to trial that the City breached its contract with the contractor because it failed to give seven days notice of termination.

- Ultimately, the jury awarded the contractor 36.7 million dollars in damages for breach of contract and civil rights violations on a 9.8 million dollar construction contract.
Case 7 – *Durkin v. City of Newark* Cont’d.

- After trial, the Court sustained the civil rights verdict in an amount of 25 million dollars.
- If the verdict is sustained on appeal, it will be one of the first of its kind, and could subject municipalities to civil rights liability for breach of contract.
Case 8 – *New Jersey v. Delaware*

- *New Jersey v. Delaware* (No. 134, Original) (S.M. Report April 12, 2007) is a dispute between the states over a liquefied natural gas facility which originates in New Jersey but extends into Delaware waters in the Delaware River.

- Delaware has denied the proposed facility because it violates Delaware’s Coastal Zone Act. New Jersey claims that it has riparian jurisdiction over the entire facility and can permit the proposed facility over Delaware’s objection.
Case 8 – New Jersey v. Delaware Cont’d.

- The Special Master in the case has ruled that Delaware has regulatory jurisdiction over the project and that the project cannot be built over Delaware’s objection.

- The case will be argued before the United States Supreme Court on November 24, 2007.