



CIVIC LEAGUE
For New Castle County

Informed Citizens for Sound County Growth

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STATEMENT
OF
PRINCIPLE

Monitor and selectively evaluate government actions including laws, regulations and policy.

Provide appropriate forums for informing as well as soliciting input from the public.

Establish positions based on responsible studies and consistent with the aims and purpose of the organization.

Advocate these positions.

Founded in 1962, the Civic League is non-profit volunteer organization, which studies and illuminates County and State government actions concerning comprehensive developments and the quality of life and is a vocal advocate of relevant positions.

County Comments is the official publication of the Civic League for New Castle County.

Chuck Mulholland,
President

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COUNTY COMMENTS

CIVIC LEAGUE FOR NEW CASTLE COUNTY

Informed Citizens for Sound County Growth

MEETING

Wednesday, November 17, 2010

7:00 PM at the Delaware State Police Troop 2 Building
100 La Grange Avenue
(Rte 40 East of Route 896)

AGENDA

Mike McGrath, Delaware Department of Agriculture
with updated information on the cost of community services
as related to residential development.

Proposed Changes to the Intersection of Kennett Pike and Route 82

While one could understand acquiescence by the immediate landowners to subject intersection improvement via their quiet sale of necessary land and, separately, that view of commuters' (from inland residential sprawl) to more easily transition through and onto Rt. 52, as forewarned earlier, successful dedication of Rt. 52 as an Historic Byway could require CONSTRUCTION of access at this intersection. It would be justified to both curtail construction on such intersection improvements and deny inland residential development growth.

Beyond this discussion, are other important matters. This same Campbell/Kirk back road has been a prime, though tortuous, excuse of a major Lancaster Pike and Kennett Pike bypass relief for over fifty years, avoiding the earlier foreseen need of close in paralleling feeder roads to those major interstate routes, including access both onto and through the currently contentious Rt. 141 "beltway". From the Delaware Code, one could reason that the County, and/ or DelDot, has been too long deleterious in establishing necessary feeder routes and to include over/underpasses of Rt. 141. Corrective action to restrict access to this same route 141 would deny heavy commercial traffic from adjacent sites and cause serious hesitation by the County to permit new commercial retailing immediate to 141. Extending the discussion further, the County, by relinquishing and/or denying financial responsibility for major infrastructure costs (boasting of the lowest of taxes Nationally and, happily accommodating land development), prods one to believe, that in cutting back government and reducing both functions and personnel, the County should be incorporated into a Metropolitan form and numerous functions, if that essential, combined under State coordination.

Charlie Weymouth

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Continued

<> A late 2008 application for galvanizing items as large as truck trailers by dipping in tanks of molten zinc (melt point 788 degF). DNREC judged that "The proposed use would not be a 'heavy industry use' because the proposed size and manufacturing characteristics are more like a coating or painting process . . ." and granted the permit.

<> A 2010 application for an investor owned sewage treatment plant south of Route 24 in Sussex County to process and infiltrate into the surface aquifer large quantities of sewage from outside the CZ. An appeal followed DNREC's grant of the permit. See Vic Singer's report to the NC County Planning Board on the processing of the appeal, posted at CivicLeagueforNCC.org.

<> A 2010 application for an investor-owned recycling plant south of Route 24 in Sussex County. This proposal is to "Construct and operate a resource recovery facility which would recover unused protein (blood, feathers and offal) and process it into hydrolyzed feather and poultry meal and feed grade fat." The 10/20/2010 permit hearing evidently reflected a prior Status Decision that the forbidden use is somehow permissible.

The obvious legal question: How can the next applicant for a CZ Permit be denied exactly the same CZA and Reg violation previously allowed for some other permittee?

By Victor Singer
10/28/2010

Chairman's Report to N.C.C. Planning Board On his Recent Service as a Member of the Coastal Zone Industrial Control Board

INTRODUCTION

Soon after the start of my NC County Planning Board duties in 1998, I was surprised by a telephone call from DNREC inviting me to attend a Coastal Zone Industrial Control Board - - CZICB - - hearing in Lewes, at 2pm on a work day. I thanked the caller, noted that I had never before gotten such an invitation, and asked why I got one this time. The caller said it was because I was a member of the Board. My response: No Way! (actually it was a bit more strenuous than that.) So the caller read to me the provision of the Delaware Coastal Zone Act creating the Board, and including among its members the Planning Board Chairmen of Delaware's three counties.

The CZICB meets rarely, almost always to hear and decide appeals from decisions by the Secretary of DNREC on Coastal Zone matters. It has been my practice almost from the beginning of this service to report to the Planning Board on all substantive matters that come before the CZICB. This is one such report.

The CZICB consists of nine members. Five members sat for the current matter. Two others recused themselves, and two more did not participate for other reasons. Following are relevant words from the Coastal Zone Act:

"... Any member of the Board with a conflict of interest in a matter in question shall disqualify himself or herself from consideration of that matter. A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on a permit request."

The Board's counsel and chairman contend that a 1991 decision by the Superior Court justifies regarding a decision of four of the five sitting members as sufficient for both a quorum AND a decision, despite the quoted words from the Coastal Zone Act.

THE ISSUE

DNREC awarded a Coastal Zone permit to Tidewater Environmental Services, Inc. (TESI) to build and operate a large Sewage Treatment Plant (STP) in the Coastal Zone south of Route 24 and west of Route 1 in Sussex County. (Numerous additional permits will be needed before construction can begin, so construction isn't imminent.) The award was appealed, on environmental grounds, to the CZICB by the Sierra Club, the Citizens Coalition Inc, the Citizens Action Foundation Inc, and Southern New Castle County Alliance Inc. TESI also appealed, on procedural grounds.

THE STORY

At the full start of operation, the Wandendale Sewage Treatment Plant (STP) would damage the Coastal Zone (CZ) with deposits of highly treated sewage imported from outside the CZ, with substantial residual quantities of nitrogen and phosphorus pollutants. The offsetting benefit would be the reduction of contributions of sewage with less intensive treatment to Sussex County aquifers outside the CZ. These contributions would eventually reach the CZ anyway, with pollutant concentrations reduced by dissipation, absorption, adsorption, dilution and delay along the way. (Remember that neither DNREC nor local land use regulators object to individual water supply wells as close as 100 feet from individual septic tank-drain field installations.) There has not been a showing by the Applicant or by DNREC that either the eventual or the immediate net impact on the CZ would be beneficial. The Coastal Zone Regulation (the Reg) demands a net benefit to the CZ.

The notion that every bit of production by the STP has a positive impact on the Delaware CZ is not true according to testimony by DNREC expert witness Ronald Graeber. Under my examination (Hearing Transcript pg 198 et seq), he agreed, in summary, that:

- 1)If a dwelling unit (DU) within the CZ connects to the STP, it's a positive impact on the CZ and on Sussex County;
- 2)If a DU remote from the CZ and presently on septic connects to the STP, the continuing flow from prior contributions to aquifers draining to and/or thru the CZ, albeit with dilution, continues for years into the future as a negative impact on the CZ, and the contribution via the STP is an additional negative impact on the CZ, so that while BOTH impacts continue the former septic DU makes the negative impact LARGER than the contribution to the STP;
- 3)For a new DU remote from the CZ, the extent that there's a difference between how large is the negative impact on the CZ, and when the impact is felt in the CZ, if the DU connects to the STP or uses a septic alternative with aquifer flow and aquifer dilution, depends on how close the DU is to the CZ. That the STP is a benefit to Sussex County is undeniable. The impact on the CZ depends on where the sewage originates and how long what's not dissipated on the way to the CZ takes to get there.

The Reg at Section 9.1.3 demands that preferences be given for offsets that are within the CZ and offsets that are felt immediately rather than in the fullness of time. DNREC failed to recognize this distinction. The Reg at Section 9.1.4 demands well-defined and measurable (i.e. quantifiable) offset proposals. DNREC failed to provide such. Both the Applicant and DNREC contended that the STP is its own offset. While this could be correct for Sussex County, it cannot be true for the CZ. Besides, if the STP is its own offset, it fails the Reg 9.1.3 requirement which demands an offset larger

than the negative impact. The STP cannot be larger than itself.

Since geography and the calendar affect how much less than the total flow from new DU's outside the CZ is their impact on the CZ, it follows that when "how much less" is not credibly quantifiable, the total contribution to the CZ from new DU's must be regarded as a negative impact. And even if "how much less" were quantifiable, the IMMEDIATE negative impact would be the total flow because the flow via the septic alternative would be delayed, perhaps for many years, according to geography.

THE DAY OF DECISION

At its Sept. 24, 2010 deliberation and decision meeting, the CZICB decided that neither of two other violations of law or regulation were sufficient, standing one at a time, to warrant denial of the Coastal Zone permit. Careful reading of the meeting transcript verifies that the CZICB did not decide whether the two other violations, considered together, were or were not sufficient. And then the CZICB formally refused to discuss whether or not the negative impact on the Coastal Zone is sufficiently offset by positive impacts, as the Regulation demands.

This final refusal formalized earlier refusals during off-the-record deliberations each time I raised the issue. I had misinterpreted that as agreement. My error became clear when my on-the-record motion to directly address the balance between positive and negative impacts failed to get a second. Immediately thereafter, the Chairman declared the meeting concluded.

Victor Singer - 10/12/2010

Under Attack: Delaware's Coastal Zone Act

Delaware's ocean and bay fronts and adjacent wetlands were long overlooked by industrial developers. About 40 years ago, the builders of ever-larger marine vessels saw the Delaware Bay as the best deep-water port on the East Coast, attractive for major transportation activities and associated heavy industry. Recognizing that refineries and steel mills are important, Russ Peterson (Governor, 1969 to 1973) and many allies insisted that the best use of Delaware's land area would combine environmental preservation, recreation and compatible industrial and commercial activities within the coastal zone, with heavy industry encouraged outside the coastal zone.

The result was the landmark Coastal Zone Act (CZA) and Coastal Zone Regulation (the Reg) therein authorized, which have kept our CZ from following the Marcus Hook to Philadelphia pattern. Numerous court suits challenged the CZA, in Delaware Courts and in the Federal Courts, but the CZA has been upheld. Notably, the US Court of Appeals for the 3rd Circuit found in 1987 that "Section 7003 of the CZA [the absolute prohibitions provision] does not violate the dormant Commerce Clause" of the US Constitution. Thereby, the appeals court upheld a ruling by a lower Federal court that the US Congress, thru its Coastal Zone Management Act and an approval by the Secretary of Commerce, had consented to the Delaware CZA.

The CZA and the Reg allow permitting new manufacturing operations but absolutely prohibit new heavy industry and bulk material transfer operations except as permitted expansions or extensions of activities already ongoing in the CZ on the June 28, 1971 effective date. The CZA and the Reg allow permitting of public sewage treatment plants under the

jurisdiction of "political subdivisions" and public recycling plants owned and operated by "political subdivisions."

There are two key permit process requirements. The first: all negative impacts on the CZ must be more than offset by positive impacts on the CZ. Offsets that start long after the negative impacts, and offsets outside the CZ, are of lesser value. And the second: the process has two steps, the Status Decision to decide whether proposed activity is lawful and whether a permit is required, and the Permit Detailing (and offset evaluation) Procedure. The Reg requires that public comments be solicited at the Status Decision level. The CZA and the Reg both require a public hearing at the Permitting level.

Perturbations that diminish the effectiveness of the permitting process have become conspicuous. DNREC's hierarchy is no less than an accomplice in these perturbations. Most striking are:

<> The ongoing Delaware River Dredging application, circa 2000: For whatever reason, DNREC did not process this application under the CZA even though within a 24 mile stretch of the river adjacent to New Castle County, the State Line is at the Jersey shore.

<> An early 2008 application for a plant in New Castle County to blend sand, polymer fibers, synthetic rubber, wax, and either polyethylene or PVC into a mixture for use as a horse racetrack surfacing material. This resembles mixing concrete, heavy industry according to the NAICS Guide cited in NC County's UDC. DNREC acknowledged that the use was heavy industry but granted the permit.

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