Civic League for New Castle County
WWW.CivicLeagueforNCC.Org

# COUNTY COMMENTS

CIVIC LEAGUE FOR NEW CASTLE COUNTY
Informed Citizens for Sound County Growth

**February 2013**

## MEETING
## Tuesday, February 19, 2013

7:00 PM
Paul J. Sweeney Public Safety Bldg.
3601 N.DuPont Hwy ( Route 13 )
New Castle, DE

## AGENDA

Guest Speaker:
State Representative Michael Ramone

## Emails to Council President Bullock

Date: Fri, 25 Jan 2013
Members of County Council:

The following e-mail, sent to Council President Bullock at 1:52 pm this afternoon, urges a no contest plea by County Council in the about-to-start lawsuit following up your rezoning for the proposed Barley Mill Plaza. You should all be aware that 9 Del. C. 2662 requires that Council consider traffic impact before EVERY rezoning, and that the UDC defines how traffic impact must be studied. And you should all be aware that no such study was done. A no contest plea would acknowledge the truth, and would start on the path to correction of a grievous error. AT LONG LAST ! !
Sincerely,
Victor Singer
---

Subj: about-to-start lawsuit, Barley Mill Plaza re-zoning
Date: 1/25/2013
Dear President Bullock

Perhaps you might remember the 8/21/2012 meeting of Civic League for New Castle County, where you appeared with Renee Taschner and the four hopefuls for the Democrat candidacy for County Executive.

And perhaps you might remember that I asked three questions - - orally - - after a one sentence preface, and after passing hard copies to all six that included the full text of 9 Del. C. 2662 from the "Quality of Life Act" (adopted by the General Assembly in 1988). The preface and questions were:

PREFACE: According to the Oath of Office required by the Delaware Constitution, elective and appointive officeholders swear ALWAYS to uphold the Constitutions of the US and the State.

(continued)

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

WWW.
CivicLeagueforNCC.Org

PO Box 11523
Wilmington, DE 19850
302-529-1529

QUESTION ONE: Do you regard that oath as requiring you to uphold laws duly enacted at both State and Local levels under authority granted by the State Constitution?

QUESTION TWO: Do you regard the recent changes to the Redevelopment provisions of the UDC that allowed the County to rezone WITHOUT a traffic impact study - - NC County Code, §40.08.130.B.6.a thru h - - to constitute refusal to SHARE the burden imposed by 9 Del. C. § 2662, and therefore violations of the Oaths by the relevant legislators and Executive?

QUESTION THREE: Do you regard those Council members and the County Executive who approved a rezoning in violation of 9 Del. C. § 2662 as having violated their Oaths of Office?

Tom Gordon, Bill Shahan and you answered "YES" to all three. Jon Husband and Renee Taschner answered "YES" to the first and "NO" to the 2nd and 3rd. Paul Clark answered "NO" to the second and responded to the others with remarks that I (Vic Singer) am a rocket scientist but not a lawyer.

I'm certain that you have been following media coverage of the SOC lawsuit about the Barley Mill Plaza rezoning lawsuit that is about to start. Yesterday's News Journal seems to report that four members of Council are figuratively wringing their hands about the anticipated expenditure for Council's defense. Today's News Journal included my brief letter-to-the-editor quoting the essence of 9 Del. C. 2662, and pointing out that the rezoning was forbidden by State law.

Council's adoption, some years ago, of the "Redevelopment Ordinance" added to Article 8 of the UDC the following sentence: "A traffic impact study shall only be required if requested by DelDOT." Obviously, that sentence cannot relieve Council of the obligation establishd by 9 Del. C. 2662, by act of the General Assembly and the Governor's signature. Council cannot veto State law. But that sentence validly directs the Land Use Department to base its recommendation on everything else EXCEPT traffic impact. The Planning Board, on the other hand, is required by 9 Del. C. 1304(2) to give recommendations to County Council on zoning map amendments (and other things) whenever it - - the Planning Board - - deems it appropriate. That obligation under State law over-rides the above-quoted sentence.

Since Council's rezoning is not defensible, Council faces two alternatives:
- Enter a "No Contest" plea immediately, acknowledge the prior error and beg the public's forgiveness on a "Nobody's Perfect" premise. That will save the public a lot of money.

- Continue the legal battle, at large public cost, and wait to be disgraced for violating the Oath of Office. That will WASTE a lot of public money.

Your answers last August told the public where you stood. We have seen nothing from you reversing your stated position. Now, as President of County Council, you have an opportunity to lead the effort for Council to do the LAWFUL thing, FINALLY.

Your comments are invited, of course.
Vic Singer

---

Date: Wed, 30 Jan 2013
Subject: Following up prior e-mail

Dear President Bullock

In my e-mail to you several days ago, that I sent later to all other members of County Council, I asked that Council enter a no contest plea in the about-to-begin SOC lawsuit in Chancery Court regarding Council's rezoning for the proposed Barley Mill Plaza.

The reason for such a plea: Council's rezoning decision is prohibited by 9 Del. C. 2662, which demands that Council consider traffic impact BEFORE every rezoning. (The character of that "consideration" is prescribed by


(continued)

Article 11 of the UDC.) All the members of Council are under oath to uphold State law. SOC and now the County Executive seem to share the position that I asked Council to join.

The purpose of today's e-mail is to expose ANOTHER reason for Council to do what the Oath of Office demands.

I was relieved of the duties of Chairman of the NC County Planning Board after 13.5 years because, in Paul Clark's words (quoted in the News Journal on 8/9/2011), "When you've been on these boards for several years, you wind up becoming the professional and not the citizen . . ." Mr. Clark evidently felt threatened when citizens understood the law better than he did.

Subsequent to my removal, I appeared as a private citizen before the Planning Board 1/3/2012 hearing on the Comp Plan Update and submitted a 2/1/2012 written statement before the close of the record. That written statement is below.

The statement focuses on a 1/27/2012 Chancery Court decision (by Vice Chancellor Glasscock, now presiding over the SOC lawsuit) on a case involving the Kent County Comp Plan. In that case, the petitioners, Kent County Landowners, complained that the Kent County Comprehensive Plan adopted in 2008 violated their rights by making zoning changes that reduced the permitted intensity of development on their properties. The county had argued that the lawsuit was premature and should be dismissed because the plan was simply a guide for future land use, and the landowners' property rights would be affected only when ordinances enforcing the plan were adopted.

The Court dismissed Kent County's ripeness argument, finding in Petitioners' favor, on the basis that since by State law, the maps in the Comp Plan have the force of law, they are effectively rezonings. Of course, in the Kent County lawsuit, the issue was a downzoning, so 9 Del. C. 4962 (the Kent County analog of 9 Del. C. 2662) was irrelevant because the rezoning DIMINISHED the potential impact on the transportation system.

I suggested in my 2/1/2012 transmission to the NC County Planning Board that since the CPU maps have the force of law, they are rezonings, just as the Chancery Court had said..Unless the 9 Del. C. 2662 requirement is upheld in the SOC lawsuit, the maps in NC County's draft CPU, that appeared to show locations where a newly named zoning district would enable land uses somehow between the present CN (Commercial, Neighborhood) and CR (Commercial, Regional) Shopping Districts, would effectively be UPZONINGS with INTENSIFIED traffic impact.

The only applicant in sight for these rezonings is the LU Department, acting collectively in behalf of the County and its residents. It follows that by being the only identifiable applicant for these rezonings, the County itself is volunteering to pay for the Traffic Impact Studies required for all rezonings for all the affected parcels, UNLESS THE 9 Del. C. 2662 REQUIREMENT IS UPHELD.

In continuing its argument that its Barley Mill Plaza rezoning was compliant with applicable law, Council is giving quite a substaltial gift to unidentified developers, and quite a burden for other taxpayers.

PLEASE DO WHAT YOUR OATH DEMANDS ! !
Vic Singer

---

To: New Castle County Planning Board
Date: 2/1/2012
Subj: Comprehensive Plan Update (hereinafter, "CPU"), now under way

Folks
At the January 3, 2012 Public Hearing on the CPU, I reminded you that the Land Use Department had projected a schedule at the outset of CPU public meetings over a year earlier. After six months of such meetings, a draft of the CPU (including all the maps therein) was to be prepared by the LU Department and its Consultant, and made available for public review. This was to have been achieved by the end of September.

I and many others who spoke at the PB hearing pointed out that the maps in the released CPU draft were far from legible due to their minuscule size, that detailed methodologies for overcoming this obstacle weren't offered until a few days before the PB Hearing, and that even then, getting down to the parcel level demanded computer skills


(continued)

beyond what most of the interested public enjoys. We pointed out also that the maps in the draft CPU appeared to show locations where a newly named zoning district would enable land uses somehow between the present CN (Commercial, Neighborhood) and CR (Commercial, Regional) Shopping Districts.

I suggested that since the CPU maps have the force of law, they are rezonings. The only applicant in sight for these rezonings is the LU Department, acting collectively in behalf of the County and its residents. It follows that by being the only identifiable applicant for these rezonings, the County itself is volunteering to pay for the Traffic Impact Studies required for all rezonings for all the affected parcels. That's quite a gift to unidentified developers, and quite a burden for other taxpayers.

Traffic Impact Studies, you should remember, are required by both County and State law, that we are all under oath to uphold. The statutory requirement in the NC County Code, at 40.11.000, is that "No major land development or any rezoning shall be permitted if the proposed development exceeds the level of service standards set forth in this Article unless the traffic mitigation or the waiver provisions of this Article can be satisfied."

The statutory requirement in the Delaware Code, at 9 Del. C. 2662, is that while a rezoning is being sought, traffic analyses must be performed that ". . . consider the effects of existing traffic, projected traffic growth in areas surrounding a proposed zoning reclassification and the projected traffic generated by the proposed site development for which the zoning reclassification is sought."

In response, we have been told by the LU Department that this interpretation is wrong, that the zoning district name changes are not really rezonings, but are merely announcements of a desire to entertain a rezoning proposal at some future time.

Fortunately, Delaware's Court of Chancery spoke to precisely this issue in its Memorandum Opinion in Civil Action 4215-VCG, on Jan 27, 2012. The petitioners, Kent County landowners, complained that the Kent County Comprehensive Plan adopted in 2008 violated their rights by making zoning changes that reduced the permitted density of development on their properties. The county had argued that the lawsuit was premature and should be dismissed because the plan was simply a guide for future land use, and the landowners' property rights would be affected only when ordinances enforcing the plan were adopted.

The full text of the Opinion, can be found http://courts.delaware.gov/opinions/download.aspx?ID=167390. The opinion cites as its basis the following text from Title 9 Del. C. Sections 4951 and 4959:

"The land use map or map series forming part of the comprehensive plan as required by this subchapter shall have the force of law, and no development, as defined in this subchapter, shall be permitted except in conformity with the land use map or map series and with county land development regulations enacted to implement the other elements of the adopted comprehensive plan."

"After a comprehensive plan or element or portion thereof has been adopted by County Council in conformity with this subchapter, the land use map or map series forming part of the comprehensive plan as required by this subchapter shall have the force of law, and no development, as defined in this subchapter, 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."

The Court said (at pgs 9 & 10):
"I find that because, by statute, no development of affected properties may take place in a manner inconsistent with the New Land Use Map, the Petitioners' lands (which have suffered a diminution in development density) were effectively rezoned upon adoption of the Comprehensive Plan."

For that reason, the Court dismissed Kent County's ripeness argument. The sections from the Delaware Code cited by the Court of Chancery, 9 Del. C. 4951 and 4959, apply only to Kent County. Identical text applicable to NC County is found at 9 Del. C. 2651 and 2659. Therefore, the opinion from the Court of Chancery also dismisses the LU Department interpretation.



(continued)

You may remember that I reminded you at the PB Hearing that the prior requirement, at 9 Del. C. 2660, that the counties update their comprehensive plans at five year intervals, was changed in 2011 to ten year intervals. The ten year CPU interval had long been required of Delaware municipalities. Some of you may also remember that I advised most of you of that change in State law last summer, from a different seat in a different room.

I also suggested at the PB hearing that for the CPU currently under way, a five year extension of the due date could be granted by the Cabinet Committee on State Planning Issues if only NC County asked for it. Since in the last five years, we have experienced no more than two years of the growth andicipated in the 2008 CPU, asking for a schedule relaxation makes eminently good sense.

Nevertheless, I suggested at the PB Hearing that a PB recommendation of a one year extension should be sufficient to devise corrections of pitfalls thus far discovered, and should allow sufficient time for discovery and correction of others that may yet be lurking in the Draft CPU. Implicitly, I suggested on Jan 3 and I suggest again today that the PB recommend AGAINST adoption Draft CPU now before us.

Victor Singer

---

# Letter to DelDOT

January 25, 2013

Ms. Nicole Majeski Mr. Thomas Brockenbrough Mr. Marc Cote Mr. Brett Taylor
Delaware Department of Transportation
PO Box 778 Dover, DE 19903

Re: Followup to Jan 18 Meeting Draft Traffic Study Regulations

Dear DelDOT Leaders:

Thank you for your time last Friday. We thought it might be helpful to share our reflections on the discussion and possible path forward items.

**Critical Changes Needed to the Draft**

As you explained in our meeting, the public viewpoint on traffic study rules differs by county. We appreciate your agreeing to explore whether these new rules can be separated by county. By way of summary, we see the following changes, at a minimum, as critical to the interests of the citizens of New Castle County.

**1. Non-Residential Rezonings.** The latest draft adds a clause that non-residential rezonings without a specific associated development plan should be CONSIDERED **WITHOUT A TRAFFIC IMPACT STUDY (TIS)** at all, and that the need for a TIS be evaluated when the development proposal is defined (Sec 2.3.1). This is unacceptable to the community. Rezoning actions are one of the keystones of the land use process in New Castle County and the County's own standards for rezoning require consideration of traffic impact.

**2. Existing Conditions.** The latest draft **REMOVED LANGUAGE** that DelDOT will recommend a TIS if development is proposed for a non-rural area where existing conditions are currently below LEVEL OF SERVICE(LOS) D (Sec 2.3.1). Again, this is unacceptable. With New Castle County's population density and congested road conditions, this exception would seem to ensure that existing peak hour service problems will only worsen.

**3. Default Contribution Formula.** As we understand it, the purpose of the formula is to address situations in


(continued)

which a Transportation Improvement District (TID) exists and no formula for developer contributions has been defined. By its very nature, this formula addresses developer contribution to offsetting the impact of their project. We understand your viewpoint that general traffic growth should be funded by the public at large. At the same time, our strong view is that the specific transportation impacts associated with new development ARE CREATED 100% BY THE DEVELOPER AND SHOULD BE PAID FOR 100% BY THE DEVELOPER…. THE TAXPAYER SHOULD NOT SUBSIDIZE THESE PROJECT-SPECIFIC UPGRADES. DelDOT's own criteria for traffic impact analysis recognize the distinction between future traffic growth with and without a development project. The proposed % of total traffic formula must be changed.

**4. 3rd Road Out Rule.** The draft fails to address developments with regional impact to the transportation system. The examples shown in the Jan 18 meeting clearly demonstrate cases where the area of influence extends beyond 3 intersections out. The rule needs to be extended to appropriately address the full area of impact of development. We understand that, in the past, the rule has been 3 signalized intersections; this may be an alternate approach to be considered.

**Other Followup Areas**

We had a healthy discussion about our differing views of DelDOT's role in managing the State's transportation infrastructure, and how upgrades should be funded. Perhaps an appropriate first step in resolving this is to seek an opinion from the State Attorney General on the following questions.

1. Under current law, does DelDOT have the authority to
-require a traffic impact study (TIS) for all meaningful development projects?
-require that the TIS cover the area of influence of the proposed project?
-mandate that the TIS define the transportation impacts from the project and the system improvements, at the entrance and beyond, needed to fully offset these impacts?

2. Under current law, does DelDOT have the authority to
-require developers to make the transportation system improvements, at the entrance and beyond, identified in the TIS?
-require developers to pay 100% of the cost of the system improvements necessitated by their project?
-require that these improvements be made coincident with the build-out of their project?

Would you be agreeable to taking the lead in securing a legal opinion? Please let us know.

We appreciate the opportunity to work with you and look forward to developing a balanced approach that represents the interests of both the development community and the public.

Respectfully,

Tom Dewson, Save Our County, Inc
Chuck Mulholland, President-Civic League for New Castle County & Southern New Castle County Alliance
Bill Dunn, President-Milltown-Limestone Civic Alliance & VP-Civic League for New Castle County

CC: Representative Deborah Hudson
Senator Karen Peterson
Senator Greg Lavelle