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**November
2013**

COUNTY COMMENTS

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

MEETING
Tuesday, November 19, 2013
7:00PM
Public Safety Building
3601 N. DuPont Hwy. (Route 13)
New Castle, DE
AGENDA
Delaware State Treasure Chip Flowers Jr., Esq.

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 consistent with the aims and purpose of the organization.

Advocate these positions.

Founded in 1962, the Civic League is a 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.

Bill Dunn - President

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

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Has the University of Delaware Gone Rogue On Newark? Submitted by Nancy Willing

It's become apparent for the communities of Newark that 1). the University of Delaware plotted to dupe our Council (by Council's own admission) into blindly signing over zoning for a utility scale power plant in the middle of the town. And that 2). City Department heads and the City Manger left loopholes in the January 2013 15-year Electric Service Agreement with University such that it may purchase power generated on the STAR campus as soon as The Data Centers LLC power plant is operational. The University would legally abandon their contract and Newark's revenue will be gutted causing severe cuts in service and spikes in residential and commercial property taxes and utility rates.

1). The Zoning Code:

We now know the University's talking with Newark Planning Department staff and Planning Commission about the STAR campus zoning code was simultaneous with their talking with TDC about a power plant for the site which was not revealed to city staff, Planning Commission or Council.

In the September 2011 minutes of Newark's Planning Commission meeting, the University of Delaware, as represented by attorney Bill Manning and UD Director of Real Estate, Andy Lubin, dance around discussion of a requirement to place all utility lines underground (start on page 15 - <http://www.cityofnewarkde.us/ArchiveCenter/ViewFile/Item/1939>).

Mr. Begleiter: May I suggest that we think of it? If you ever thought of an opportunity, this is it - a 300 acre site that has no above ground utilities on it now for all practical purposes. To start putting them there now would be a shame.

(continued)

Mr. Lopata: *There is a substation. There is a large DP & L substation which is an above ground utility. You mean in addition to that, perhaps?*

Mr. Begleiter: *Anything that isn't built there now. I am asking the question. I think it is a reasonable question to ask. This is a real opportunity and I think we should take it.*

Mr. Lopata: *At this point, Mr. Chairman, on that question, I want to defer to see what the University thinks and then we can discuss it*

Mr. Bill Manning: *I represent the University of Delaware. Mr. Lubin has already introduced himself. Let me speak first to the question that is on the floor right now about utilities. There are above ground utilities on the site now. There are no plans to bury them. What you will likely see is utilities buried underground. There may be a need to get from the aerial utilities that are there now to a particular site. You may see aerial utilities. There will be a disinclination to have aerial utilities but we couldn't agree at this point to a prohibition of them. They will be used sparingly*

Mr. Begleiter: *I think this is an opportunity for the City to take advantage of here. You are requiring the University to meet all kinds of other standards. This is a place to make a difference. To think of this campus being developed - 300 acres - with poles sticking up in front of beautiful building in the middle of grassy areas, in the middle of sidewalks with guy wires attached to the places in the sidewalk where people have to walk. would be a travesty to see that and this is the moment to do it, I think.*

The Commission is poised to make a motion to add an amendment to the city code about burying utilities - reducing visual impact of utility distribution - when Bill Manning jumps in, raising the specter of eminent domain:

Mr. Manning: *The question, who's Zoning Code, is it is a good one because, actually, this one is by the consent of both parties. This is the first time the University has ever come before the City and said we want you to rezone property that is part of the University's campus. We have never done that before, but for the reasons suggested by Roy [Lopata], with so many hybrid uses, hopefully, coming and so many partnerships coming, the thought was we would rather not get into the risk of having on a case - by - case basis, disputes about whether this site or that site or this project or that project is immune from the City's zoning. So, we decided to do something the University has never done before, which was voluntarily subject its campus to zoning restrictions and to the jurisdiction of the City for zoning purposes. But, that zoning classification, all the terms that you see have to be something that is agreed to by the University. The expectation is that the Board of Trustees will consider, simply because it doesn't meet until December, if there has been an amendment approved by this Commission and City Council the University Board of Trustees will ratify it so there is a record that both parties have agreed. And that agreement won't be able to be changed without the consent of both parties. Obviously, you would have to do amendments to the Zoning Code pursuant to your current process which includes this Commission. The University would have to agree to those changes. That is essentially what is going on here tonight. So, Edgar, this is truly historic and is the first time that the University has come to the City and said, let's work together on a zoning amendment that will apply to all. We will agree to subject our property to the Zoning Code, which it has never done before. In return, let's agree ahead of time on the restriction and if they are mutually acceptable, let's do this so that we can promise all those people who might come to the Science and Technology Campus, which is what STC stands for. Years from now we can promise them certainty. We can say to them, we won't have to have a wrestling match over whether this is a traditional academic use or not. We will be able to say, here is the Zoning Code, it permits this use, you have a use as of right, let's go. That will, we think, will dramatically assist the University in attracting the kinds of partners it wants for this Science and Technology Center. It has, as you all know probably better than I, some very exciting plans. So, that is the process by*

which amendments will be made. Assuming this enacted, it will be amended only with the consent of you all and the University.

Mr. Lopata: Just for the record, a least from my standpoint -- not to quarrel with my good friend Mr. Manning -- I am not sure that is correct. What he is saying is the University will go through some kind of process to ratify what, presumably, we will have already adopted. Once we adopt it and it is in Newark's Zoning Code, it is in our Zoning Code.

Mr. Manning: It will clearly be part of your Zoning Code. The bigger question is, is it going to be effective? The University Charter protects it from local zoning codes. The University can waive or not that immunity and will do so and expects to do so.....The question that you all ask, though, is, is this amendment going to be effective and for that, at least, it is our view that there would have to be an agreement with the University.

Mr. Lopata: Absolutely, but that has little or nothing to do with the utility lines being buried.

Mr. Manning: No, and frankly, I can't imagine anyone more in line with that mode of thinking than the University. If anyone cares about the look of this thing, it has got to be the University and it inconceivable to me that anything will remain above ground unless some engineer says you really have to do it that way.

Bill Manning is asked if the UD Trustees are aware of the Zoning document for the "research park":

Mr. Manning: The answer is two-fold. The direct answer is yes, but what I ought to say is your pace and the University's pace don't have to coincide. Right now you have something in front of you that represents an agreement about the standards by which this property should be developed. Go ahead and enact it. You just heard an exchange between me and the Planning and Development Director. The University will take the position that nothing applies until it accepts an amendment to its Charter, which this will represent. And, that will happen as quickly as the Board can consider it.

And (on page 20) the conversation finally shifts to power generation

Mr. Sheedy: One is a question for Roy and one is a suggestion or recommendation. Roy, if someone wanted to put in an on-site power generation system - a wind tower.

Mr. Lopata: Like Bloom.

Mr. Sheedy: That is not in here. It is not in here for this zone, but let's say the University decided to provide a space to IKEA and they wanted to generate electricity on the site.

Mr. Lopata: That is permitted as an accessory use. And that is what Bloom sells. Just like an on-site generator.

Mr. Begleiter: What about nuclear generation?

Mr. Lopata: There is a nuclear testing facility right on campus now

Mr. Begleiter: Do we have zoning for whatever is required?

Mr. Lopata: Laboratories, research. It is listed.

Mr. Begleiter: What if it wasn't for research? What if it was for power generation?

Mr. Lopata: *Any process involving cleaning, manufacturing process and so on. It is permitted now. There are regulators beyond us for that, however*

While in the meantime, we find that the University was meeting with DNREC about an ENORMOUS power plant. Alan Muller's FOIA revealed a November 2011 DNREC Regulatory Advisory Committee meeting with the Data Centers LLC and David Levandoski, Director at 1743 Holdings LLC / University of Delaware about the permitting process for the proposed facility

(<http://www.nonewarkpowerplant.org/wp-content/uploads/2013/09/The-Data-Centers-RAS-Info-Sheet.pdf>)

By January 2012, the STC Zoning document was finalized and released to Council. And Council voted to approve it in March 2012.

A year and a half later, in response to the growing public outrage at the notion of a power plant next to Newark's residential communities, K-12 schools and parks, Council moved to seek an opinion from outside counsel. That opinion in the September 9, 2013 memo from special council Max Walton about the zoning, determined that a power plant MUST be allowed on the STC zoning because the City's utility does not have capacity to provide power for an allowable use (a data center) in the code. That logic is absurd, considering that it ignores that the MI-zoned Chrysler site drew all the power it needed from DP&L (<http://www.nonewarkpowerplant.org/wp-content/uploads/2013/09/2013-09-09-walton.pdf>).

Here is Walton's twisted logic for arguing Legislative Intent

The "golden rule" of statutory interpretation is that unreasonableness of the result produced by one among possible interpretations...is reason for rejecting that interpretation in favor of another which would produce a reasonable result. Consequently, an interpretation of the statutory provisions contrary to the legislative intent must be rejected..

In the STC district, data centers are a permitted use Newark City Code § 32-231(a)(5) (permitting technologically dependent or computer based facilities that are dedicated to the processing of data or the analysis of information). Consequently, the presumed legislative intent is to allow the proposed Data Center in this district.

We are advised that the City cannot (at this time) supply the power necessary for the operation of the Data Center on this particular site. It would be an absurd result indeed if the City Council permitted data centers but at the same time forbid the power generation required for the permitted data center use. By expressly permitting accessory uses in this district, the City Council presumably foresaw that accessory uses (like power plant) might be needed for a data center type use in this district.

Because a contrary interpretation of the accessory use provision in the code would effectively foreclose a large Data Center use, the reasonable interpretation of the accessory use definition is to allow the power plant as an accessory use for the Data Center. A different interpretation under the assumed facts presented would be contrary to the presumed legislative intent and should be rejected.

2). The Electric Service Contract:

On January 23, 2013, an Electric Service Agreement (ESA) was signed between the City utility and the University of Delaware(<http://www.nonewarkpowerplant.org/wp-content/uploads/2013/09/2013-01-28-UD-contract.pdf>). At the October 14th Council meeting, Newark resident Jen Wallace raised the following issues:

Looking over the ESA, I have some concerns that the University can in fact purchase power from

TDC. My concerns are drawn specifically from:

- Number 13 & 14,
- Paragraph 4 on A-1,
- Paragraph 4 on A-2,
- and Paragraph 5 on A-3 of the ESA.

I would also like to point out the Letter of Intent from DEMEC to TDC of Dec. 17, 2012 (<http://www.nonewarkpowerplant.org/wp-content/uploads/2013/09/2012-12-17-demec-letter-of-intent.pdf>) on which the City Manager is listed as having received a copy. In this letter DEMEC expresses their interest in a potential contract between DEMEC and TDC for the purchase of power from TDC.

What I think this means is that as long as the City contracts with TDC via DEMEC, then the University will in fact be able to get their power from TDC.

I would ask that you carefully review these documents. I am concerned that the City has the potential of losing a lot of electrical revenue from the University of Delaware.

Questions for the Newark Mayoral Candidates:

The city put forward a recommendation to the state for a grant to support this project without consulting Council or the community.

How would the new Mayor make sure Council is involved in these types of decisions going forward?

If you had been able to choose to sign or not sign the letter of support to the state, would you have done so

Would you advocate to the legislature for them to remove UD's eminent domain power?

http://www.ipa.udel.edu/localgovt/training/dilgl/20th_content/EminentDomainUpdate.pdf

DRAFT RESOLUTION

submitted by Vic Singer

DRAFT RESOLUTION WITH ADDED TEXT (shown emboldened, italicized and underlined)

WHEREAS: State law (***the Delaware Quality of Life Act, 9 Del. C. 2662***) assigns joint responsibility to New Castle County Council and DelDOT to establish a basis for judging transportation impact of land use intensifications;

AND WHEREAS: County Council and DelDOT established the present system by joint agreement ***long before the UDC was adopted***, in accordance with ***the Delaware Quality of Life Act***;

AND WHEREAS: The system thereby established includes impact limits beyond which further nearby land use intensifications are not to be permitted until improvements and/or mitigations to bring the impacts within the established limits are in place, under construction, or under DelDOT contract for construction;

AND WHEREAS: County Council memorialized that impact evaluation system and the impact limits included therein, by ordinance, as expressed (in part) in the UDC at Article 11, in accordance with State law;

AND WHEREAS: The Oath of Office prescribed by the State Constitution for all public officers except such inferior officers who are by law exempted, requires swearing to uphold the Constitutions of the US and the State of Delaware, and by implication the entire body of laws established thereunder;

AND WHEREAS: The NC County Ethics Commission is empowered to punish ethical violations in several ways, including removal from office;

AND WHEREAS: Members of the Ethics Commission take the same oath of office as other public officers, and cannot lawfully escape acting on a complaint based on violation of the Oath of Office;

AND WHEREAS: DeIDOT has recently adopted its own transportation impact evaluation system which is more permissive than the system memorialized in County Law;

AND WHEREAS: Since DeIDOT is not an elective body or a Court of Law, DELDOT does not have veto authority over Ordinances duly adopted by NC County Council, an elective body;

NOW THEREFORE, The Civic League for New Castle County resolves that:

1. New Castle County Council should regard DeIDOT's recently adopted transportation impact evaluation system as a proposal to re-open the negotiation that produced the system memorialized in County Law **as required by the Delaware Quality of Life Act at 9 Del. C. 2662**;
2. New Castle County Council should not consider re-opening that negotiation without a DeIDOT Cost/Benefit analysis purporting to show that the benefits of its more permissive system are greater than the costs of increased congestion, more frequent and longer delays, more frequent collisions, injuries and deaths from traffic accidents;
3. New Castle County should release for public review any DeIDOT Cost/Benefit analysis submitted in support of its more permissive transportation impact evaluation system, and should require a hearing to receive comments from the public, in addition to the Planning Board Public Hearing normally required of all changes to the UDC.

Newark Residents Not Against Gaining New Jobs

As the representative for more than 20,000 people in the greater Newark area I am obligated to respond, on their behalf, to The News Journal's recent editorial titled the "Sluggish economy in need of better cooperation."

In my opinion the editorial board seems to have strained the boundaries of intellectual honesty when it implies that the legitimate concerns of the residents in the Newark area regarding the power plant proposal for the STAR Campus are "damaging the state's reputation as an attractive place to bring business."

The editorial board goes so far as to attempt to define the authenticity of the proposal as harmless to the residents' concerns while failing to enunciate many of the key circumstances and communications failures that have contributed to this controversy.

Quite frankly, it is disingenuous to imply that the "protests against this proposal and seemingly every other job-creation proposal that has come along in recent months" is to blame for a sluggish economic recovery.

There has been a woeful lack of dialogue with inclusion of the community in the planning of this project with short shrift given to the rights and concerns of the residents as well.

This situation cannot be summed up in the simple statement that "the state has to stop saying no to jobs."

The residents of Newark are not saying no to jobs and they have never said no to jobs although they have publicly expressed skepticism as to the accuracy of the projections that the Data Center has made.

To blame a group of residents for the lack of jobs statewide is convenient but ignores the reality of the post-recession age.

The truth of the matter is that these "job creating" propositions have been developed and agreed to without the inclusion and knowledge of the community.

In fact the community became aware almost two years after the fact.

It became involved because it is an engaged community and has learned many of the untruths presented with no help from the various parties involved.

This suggests a pervasive attitude of indifference and disregard for the rights and opinions of taxpayers and a dismissive tone to regarding allowing them to engage in the conversation prior to rather than after the fact.

The inference of the editorial board and the administration that the Newark homeowners and taxpayers should be held accountable for impeding job opportunities because of their legitimate concerns is myopic and baseless.

It appears that this dialogue disregards the rights of homeowners and residents of given areas to have any say in measuring their quality of life, property values or health threats to their families against business opportunities.

These families seem to be considered some sort of subjugated class of people with no more rights than tenant farmers, who are allowed only to cultivate their neighborhoods at the whim and pleasure of the business community and the administration.

My neighbors and constituents expect me to represent their interests and doing so requires that I respond to your editorial and challenge its "factual" reflections.

Rep. John Kowalko, D-Newark, represents the 25th House District.