Civic League for New Castle County
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May
2014

COUNTY COMMENTS

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

MEETING
Tuesday, May 20, 2014
7:00PM

Public Safety Building
3601 N. DuPont Hwy. (Route 13)
New Castle, DE

AGENDA
General Business Meeting

SUPREME COURT SUGGESTS THE LEGISLATURE CLARIFY 2662

In the Barley Mill, LLC v. SOC opinion, the Court suggested that the Legislature clarify the Section of Title 9 of the Delaware Code whose meaning was an issue raised by the plaintiffs in the case. The plaintiffs read the section to require that the Council see a traffic analysis before voting on a rezoning. The Council read it to mean they could wait and see it after voting at the record stage. Past court decisions have taken the plaintiffs' point of view and that is the way the County handled the matter for decades.

The Court's advice is based on their wish not to have the taxpayers and developers tie up the Court's time and their money fighting over something that it would be easy to fix--awkward language in the original act. Wishing to be responsive to the Court whose excellent decision renewed my faith in the system, I have drafted a proposed bill and sent it to several legislators for comments. I will continue to pass it around until I find a sponsor, but it is late in the session and many of them have as many bills to sponsor as they can handled in the time remaining.

We will discuss the proposed bill at the next meeting of the Civic League.
Many opinions will help make the language too perfect to misinterpret again. Many calls to legislators to pass the proposed bill this session would help. Lord knows we need to avoid another expensive and controversial case like the one over Barley Mill Plaza again. For developers not to know for certain what is expected of them is bad for their business. They must be able to predict what their investment will require. Let's make sure they know they must provide a traffic study when they want a major rezoning.

Personal Opinion of Christine Whitehead

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

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BARLEY MILL PLAZA REZONING:
SUBTLE TEACHINGS IN THE SUPREME COURT DECISION

by Vic Singer 5/4/2014

The Delaware Supreme Court invalidated County Council's rezoning of the Barley Mill Plaza (BMP) on 3/25/2014. That decision is fascinating both for what the Court said and for what it left unsaid. And it leaves to all of us who care about the rule of law to decide where we go from here. Finding a proper path requires careful study of the Court's ruling, and the underlying law.

The case before the Supreme Court was an appeal from the prior Chancery Court decision, and several related cross-appeals. Sitting en banc, the Court unanimously affirmed the Chancery Court finding that Council acted arbitrarily and capriciously, in part because ". . . Council had received erroneous legal advice that . . . Traffic Information was both unavailable and irrelevant at the time Council cast its discretionary vote. . ." The Chancery Court had held that ". . . the mistake of law caused the Council to vote without first obtaining the Traffic Information that was material to its vote. . ." Chancery Court decided that one of the seven favorable votes was arbitrary and capricious, which reduced the 7/6 majority result to a 6/6 tie, so the rezoning failed for lack of a majority.

The Council members who favored the rezoning may well interpret the Court's ruling as much less than what the Court actually said - - and as much less than what State law, and County law as well, actually say. Sometimes, where you stand depends on where you sit. The Supreme Court saw no need to "reach the claims raised by Save Our County and New Castle County [the Executive branch rather than the legislative branch] that the Court of Chancery erred in holding that neither [9 Del. C. Section] 2662 nor the UDC require Council to consider a traffic analysis before voting on a rezoning ordinance."

Despite seeing no need to delve beyond upholding the arbitrary and capricious finding, the Supreme Court did indeed guide us via footnotes in its decision, on what 9 Del. C. 2662 means. In footnote 5 on page 7 the Court says:

> ". . . we express no opinion about whether [9 Del. C.] Section 2662 requires the Council to receive and consider the Traffic Information before casting its discretionary vote on the rezoning ordinance. For a discussion of this important issue, see infra note 39 and accompanying text. . ."

And in footnote 39 on pages 23 and 24, the Court notes that:

> ". . . other judicial decisions have read the language of Section 2662 as requiring that whatever traffic analysis is required in connection with a rezoning proposal be provided to the Council before its discretionary vote on the rezoning ordinance. See *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *9 (Del. Ch. Dec. 7, 2001) holding that *9 Del. C. Section 6962*, the statutory equivalent of 9 Del. C. 2662 for Sussex County mandates that the County Council consider DelDOT's traffic analysis before deciding whether or not to rezone."

While regarding NC County Council's decision to be so flawed that reaching the 9 Del. C. 2662 message wasn't needed, the Supreme Court reached it anyway. We are left to wonder why. A good guess is that the Court anticipated exactly the response to its decision that was expressed by Councilman Dave Tackett (one of the "YES" votes on the BMP rezoning) in his e-mail to me on 3/27/2014, barely two days after the Court's decision:

> “. . . Recall that the lower court opined that State law and the UDC did not require, but did permit, Council to consider traffic information before its vote. Again I am not an attorney

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> but the way I read the ruling and the way several of us understand it, if there had been 8 votes for the rezoning this would not have been overturned. So thus we are here today and will deal with the next step and I for one stand ready to address the needed changes to make sure the code is clear, I know one may argue it is clear, but that's what attorneys are for. . ."

Obviously, if there had been 8 votes instead of just 7 for the rezoning, finding one to have been arbitrary and capricious wouldn't have invalidated the rezoning. But it would have elevated the Court's footnotes to the forefront. Anticipating Councilman Tackett's point may have been a reason for the Supreme Court to include the footnotes in its opinion. But there's also a second reason.

By footnote 39 on page 24 of its finding, the Supreme Court reminds not only County Council but also the author of the lower court opinion on the BMP rezoning that 9 Del. C. 2662 ". . . mandates that the County Council consider DelDOT's traffic analysis before deciding whether or not to rezone." Effectively, the Supreme Court - - as gently as it could - - slapped the wrist of the Chancery Court Vice Chancellor for disregarding the 2001 Chancery Court finding in the cited Sussex County case.

Indeed, another provision of State law -- 9 Del. C. 2603(a) -- also points to the mandate that the Supreme Court now cites, which is also acknowledged in NC County's Unified Development Code (UDC). It says that among the purposes of the County's zoning regulations is promoting the safety and convenience of the state's inhabitants by limiting congestion in the streets and roads. And 9 Del. C. 2662 prohibits any zoning change that doesn't follow an agreement between the County and DelDOT ensuring that while the 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." Section 2603(a) says WHY to do it, and Section 2662 says HOW to do it.

The 2662 provision means that the County and DelDOT share responsibility for transportation system congestion. HOW to share - - rather than WHETHER to share - - is left to the County and DelDOT to work out. The County cannot discharge its SHARING responsibility by adding, as it did shortly before the BMP rezoning vote, UDC subsections 40.08.130.B.6.a thru h establishing for "all major redevelopment plans . . and any plan that is also requesting a rezoning" (Section 40.08.130.B.6.d) that "a traffic impact study shall only be required if requested by DelDOT" (Section 40.08.130.B.6.e.7).

The first section of the "Transportation Impact" Article of the UDC (Division 40.11.000) states: "No major land development or any rezoning shall be permitted if the proposed development exceeds the level of service set forth in this Article unless the traffic mitigation or the waiver provisions of this Article can be satisfied. " The Article requires that "the transportation capacity for a proposed development shall be based upon the available capacity as determined by a traffic impact study" (Section 40.11.110). No redevelopment exemption is among waiver provisions (Section 40.11.121), but staging to coincide with transportation system improvements and developer contributions to improvement costs are addressed.

State law (9 Del. C. 1152) demands that when a new County Ordinance repeals or amends prior County law, the new Ordinance must set out in full both the prior language and the new language. But the Ordinance creating the redevelopment exemption was itself invalid because it didn't amend the UDC Article 11 requirements. The redevelopment exemption has since been repealed.

In his 3/27/2014 e-mail, Councilman Tackett pointed out that he and the majority of Council are not attorneys, and that therefore "council . . must relay (sic - - obviously, 'rely') on the professionals to provide assistance and guidance in issues like this one."

The professionals that County Council relied upon, for advice on proper interpretations of standing law, were the attorneys FOR THE APPLICANT and the General Manager of the Land Use Department, while

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Counsel to Council remained silent. That so intensely astonished the Supreme Court that it commented at page 12 of its decision:

> ". . . Barley Mill's attorney stated: '[t]he Planning Board's vote was 5-2 against the recommendation [by the LU Department]. The members that spoke against it[,] some of them had traffic concerns[,] which as Council knows is not part of the equation for this type of analysis.' The inaccurate contention that the Traffic Information was not relevant to the Council's analysis and could not be considered before the discretionary vote on the rezoning ordinance permeates the record. ***That inaccurate assertion was never contradicted*** . . ." (bold font added)

That leads to an interesting question - - WHY WASN'T THE INACCURATE ASSERTION CONTRADICTED BY COUNSEL TO COUNCIL? - - which Councilman Tackett hasn't yet answered.

If a sufficient function of Counsel to Council is to offer legal advice only WHEN COUNCIL ASKS FOR IT, Counsel to Council is off the hook but Council must explain why it was so anxious to accept legal advice from the Applicant's attorneys that the Supreme Court has branded as "inaccurate" - - polite for WRONG - - without asking Counsel to Council. Perhaps Council was so intent on terminating its debate on this application that it NO LONGER CARED about whether the advice from Applicant's counsel was right or wrong. Despite what the Oath of Office says. That suggests that for this application, Council acted as a bull in a china shop, befouling what it doesn't break.

The public has borne the burden of providing proper legal advice via Counsel to Council. Why didn't Council demand legal advice from its own Counsel? The notion that Counsel to Council speaks only when asked to speak is the exact opposite of proper professional behavior. The PROPER function of Counsel to Council ought to be assuring that what Council does is free from legal error. That responsibility is analogous to the proper function of a physician confronted by a patient complaining of an ingrown big toenail. If the physician sees that the patient has an advanced case of gangrene in the pinkie toe on the same foot, the physician is obligated to advise the patient of that fact.

Councilman Tackett pointed out that "This was not an easy project from the beginning and everyone had a different reading of the law and how this should proceed or actually not proceed." For this point alone, Council should have asked its own Counsel what the rule of law demands. And Counsel to Council should have reminded Council that 9 Del. C. 2662 " mandates that the County Council consider DelDOT's traffic analysis before deciding whether or not to rezone" (as the Supreme Court has just reminded us all), and that the issue was adjudicated in 2001 by the Chancery Court (again as the Supreme Court has just reminded us). Nowhere in the Supreme Court's decision is there even a hint that the Supreme Court finds fault with the 2001 Chancery Court finding that it cited as a mandate.

Indeed, the Barley Mill Plaza project was evidently so difficult from the beginning that neither Council, nor the Land Use Department, nor the Applicant's attorney were aware of what version of the County's own UDC was applicable to the pending application. Council had recently altered UDC Article 8 (as discussed above). But that alteration was irrelevant to the pending application because the application was dated before Council enacted that improper provision. The law as it read on the date of the application was the relevant law for the application. Again, the record shows consistently that the bull in the china shop notion fits Council to a tee.

There is a bottom line to all of this. Let's imagine how much money would NOT have been spent, by the Barley Mill Plaza neighbors who paid dearly for the lawsuits, by the Applicant who threw good money after bad, and by the New Castle County Government for its TWO legal teams, if County Council had bothered to read AND UNDERSTAND the standing law, and also to recognize TIMELY that SOMETIMES it should think more thoroughly. And let's also imagine that if County Council were to resurrect the Barley Mill Plaza and somehow convince seven members to vote favorably on it, who would fight the heroic battle, and who would pay the fare, for upholding the law as it is written? In other words, is there any VIABLE alternative to demanding that County Council be taught what the laws say and what the laws mean?

LEGISLATIVE SESSION REPORT
INDEPENDENT REDISTRICTING LOSING IN THE LEGISLATURE

Tuesday, April 29th, several good government organizations held a rally at Legislative Hall in support of the Blevins bill to create an independent redistricting commission. Frank Sims represented the Civic League at the rally. Senate Bill 48 came up for a vote in the House Administration Committee the next day and lost.

Without significant personal contact from voters interested in this issue, the bill will die for the session. It is a step in the right direction and the Senate passed it. Persuasion is needed with the House members. You will find the legislators listed in your Civic League Membership Directory. Please contract your own representative and Rep. Schwartzkopf, the Majority Leader to see if we can help revive it. Redrawing districts has been used as a tool to control legislators as well as to insure the victory of the majority party, so it is hard to get the leadership to do the right thing. The purpose of redistricting should be to insure better representation through fair elections – not to retain control unfairly. Who knows what talent we miss or lose when candidates are discouraged from running or legislators are punished for opposing a leader or being in the wrong party. I know one example. Former Senator Dori Connor was the best at constituent service I have known about in 48 years in politics. The Democrats always moved her lines around in crazy ways. Last time, the former Senate President pro tem moved her district lines below the Canal to protect his own territory, and then he was defeated too. The loss of her experience and caring concern for her constituents was extremely disheartening. This kind of thing should not happen again. Only an independent commission drawing the lines can stop it.

Personal Opinion of Christine Whitehead

Thank you for your support of the Civic League for New Castle County.
Our membership year ends on June 30th. Renewal letters will be mailed by the first week of July.
You can renew or join at anytime on our website - www.CivicLeagueforNCC.Org