

COUNTY COMMENTS

Newsletter of the
CIVIC LEAGUE FOR NEW CASTLE COUNTY

Informed citizens for sound County growth

CLNCC Monthly Meeting
TUESDAY, APRIL 18TH
7:00 P.M.

CHRISTIANA PRESBYTERIAN CHURCH
SOCIAL HALL

15 N. Old Baltimore Pike, Christiana

Speakers:

County Executive Matt Meyer &
Richard Hall, General Manager of the
Department of Land Use

COMING SOON
ANNUAL MEETING & ELECTION OF
OFFICERS MAY 16TH

Proposed By-Laws changes will be mailed to paid members. Nominations for new Board Members and Officers should be sent to Frances West at edfran11@verizon.net

The Civic League is also looking for a new Editor for *County Comments*. We will be venturing into social media soon to improve communication with younger homeowners and those with a civic interest.

SURVEY OF REGIONAL CIVIC GROUPS

7 AND 40 ALLIANCE NEWS

Our Barry Shotwell has stepped up to help the 7&40 Alliance by serving as President temporarily as they search for new officers. They will be skipping an April meeting, but having one on May 1st to focus on local land use and DelDOT projects. They meet at the Bear Library at 7:00 P.M.

Ed. Note:

This group in the past has played a key role in helping DelDOT and the County plan for future growth in the region. If you live in their area, they deserve your support. They will be a vital connection should you encounter problems with either agency or you want to become acquainted with your County Council members and State legislators. The Civic League was formed to be a "watchdog" on County government, but the regional or umbrella civic groups have more of a working relationship with their representatives. When a big problem with overdevelopment or a rezoning that is not in the public interest appears, we all pull together to fight it. That is why the Stoltz strategy of threatening a second and third region if one would not cooperate with his plans for Barley Mill was so devastating to the civic community. The Civic League is still trying to rebuild the unity that his divide-and-conquer effort almost destroyed.

COMING SOON: SPECIAL EDITION ON WHARFAGE FEES (TO RAISE THE STATE'S INCOME PAINLESSLY)

COUNCIL OF CIVIC ORGANIZATIONS OF BRANDYWINE HUNDRED

Visit the CCOBH website at www.ccobh.org to obtain information on their plans for participating in the annual [Christina River Watershed Cleanup](#). Naamans Creek is a part of the watershed apparently. Sounds like fun.

A planned seminar called "Homeowner and Civic Associations: the Basics" is being rescheduled. This will be taught by a law professor and former State Representative, so it should be very informative.

CCOBH has a model website for a regional civic group. Outsiders can subscribe to their blog.

GREATER HOCKESSIN AREA DEVELOPMENT ASSOCIATION

You can find GHADA's website at www.ghadaonline.com. They even have a map of the region they cover. This is helpful as the existence of borders in the past has seldom been defined for regional groups that are not historic hundreds.

They meet on the third Monday of each month except July, August, and December at 7:00 P.M. at the Hockessin Fire Company Memorial Hall.

PIKE CREEK VALLEY CIVIC LEAGUE

<http://www.facebook.com/page/Pike-Creek-Valley-Civic-League> is kept up to date with useful information. Residents of the region can find out about land use plans in the application process and things like applications for liquor licences. Editor's Note: This area was protected by strong advocacy for decades, but there has been turnover. What they need now is a warning to homeowners that attorneys for developers will try to discourage opposition to new plans any way they can. If this civic group does not stand and fight, the bad court decision that was handed down two years ago will decide their fate. The Master Plan for Pike Creek Valley called for the open space to be turned over to the County or a civic association with the choice of which left to the owner at the time of "build out." The County has a mandatory on-going record they have had to keep of the number of units that are.



****Survey of regional groups con't on page 4

DNREC GOT IT WRONG AGAIN !! . .

Opinions by Nick Wasileski and Vic Singer

The latest of DNREC's efforts to dismantle Delaware's Coastal Zone Act (CZA) climaxed on 2/27/2017 with a Coastal Zone Industrial Control Board (CZICB) hearing on an appeal from DNREC's Secretary David Small's decision to grant a permit to the Delaware City Refinery Corporation (DCRC) to receive and export much larger quantities of ethanol than is used in its in-house manufacturing activities. The "Ethanol Marketing Project" (DCRC's term) is a bulk product transfer activity clearly prohibited by CZA provisions which have been upheld and strongly supported by our Superior and Supreme Courts. The Secretary carefully avoided mentioning the relevant prior adjudications in his decision.

The appellants were the Delaware Audubon Society and Delaware League of Women Voters, dedicated and vigilant supporters of the CZA over the years. Civic League members Nick Wasileski, Vic Singer and Charles Weymouth were present and spoke briefly on the record, but only after the CZICB had already dismissed the appeal on "standing" arguments by DCRC rather than on the law. Their impressions follow.

NICK'S

The CZICB ultimately rejected the appeal based on lack of standing. DE Audubon and DE LWV argued that they had standing because these groups and some of their members would be aggrieved by the project. Three members of the groups were questioned and cross-examined by the attorney for DCRC. Impacts they cited from the project included harms from the barges and trains. DCRC argued that the proposal to import/export ethanol would not increase the number of trains or barges entering the refinery. Even though ethanol volumes would increase from 2,000 to 10,000 barrels per day, the Board agreed with DCRC five to one due to the change in a member's vote. The official hearing ended after the Board voted. However, a Board member stated that a public comment period would follow. About a dozen people spoke during that period -- about half favoring the project, and about half against. Each speaker was allotted five minutes for comments.

Although the issue of standing has a legal definition and is designed to prohibit frivolous lawsuits, is it possible that the interpretation of standing can be subject to personalities, motivations, and even outside interests? When legitimate arguments are not addressed, it begs the question whether standing is being used to prevent arguments on the merits from being presented on the record? Impartiality is hard ground to plow, but it is demanded if due process is to be accorded both applicants and opponents before a decision is made by a government board or official. .

This appeal in question is the second appeal on a Coastal Zone Act permit issued by the refinery in recent years. In 2013, DNREC Secretary Collin O'Mara issued a permit for the "bulk product transfer" of 45,000 barrels per day of crude oil. O'Mara's order for the permit set limits on the destination of this crude oil to the Paulsboro Refinery also owned by this refinery's parent company, PBF Energy. This permit was appealed by the Delaware

Chapters of the Sierra Club and Audubon Society. DNREC argued that neither the Environmental Appeals Board (EAB), nor the CZICB had jurisdiction to hear the appeal because the issue was an air permit, and the CZICB has no jurisdiction over air permits. DNREC also argued before the Environmental Appeals Board (EAB) that it was a CZA issue, and the EAB has no jurisdiction over CZA issues. This decision, that there is no venue for the public to challenge a CZA decision when made within an air permit, was upheld by the Delaware Superior Court and the Delaware Supreme Court.

I bring this 2013 lack of jurisdiction issue over an oil matter to your attention as an example of how difficult it is to argue an environmental case on its merits. This example is one of impediment, and this impediment is not unlike how hard it is to argue a case when a lack of standing accomplishes the same thing. The Secretary cannot be overturned for an irrational decision.

(Following an investigation by *The News Journal*, DNREC issued a penalty assessment on March 9, 2017 against the Refinery for \$150,000 for a total of 17 separate barge shipments containing approximately 35.7 million gallons of crude oil in total over 15 days in 2014. The maximum penalty provided by law is \$10,000 per day for violations; so in issuing this fine, DNREC has levied the maximum penalty authorized.)

In summary, bulk product transfer is specifically prohibited by the CZA, yet DNREC has issued two permits within the past four years allowing DCRC to conduct bulk product transfer in the Coastal Zone. The ethanol project, the appeal of which was rejected by the CZICB on the basis of standing, will also need an air pollution permit from DNREC. That permit application has been noticed. No hearing has yet been scheduled.

VIC'S ESSAY

<> DNREC Secretary's Order **2016-CZ-0050** granted a Coastal Zone Act permit enabling broader export of ethanol, as an expansion of non-complying activity at the Delaware City Refinery. The Order favors speculative interpretations of the purposes of the Coastal Zone Act rather than the purposes delineated by the General Assembly in §7001 of the CZA, appropriately titled "Purpose." In the General Assembly's words:

..."offshore bulk product transfer facilities represent a significant danger of pollution... to the coastal zone and generate pressure for the construction of industrial plants...in the coastal zone, which construction is declared to be against public policy. For ... these reasons, **prohibition against bulk product transfer facilities in the coastal zone ... is deemed imperative.**" Those words allow arguing that the General Assembly was more afraid of docks and buildings associated with bulk product transfer activity than of the activity itself. That could be regarded as an AMBIGUITY in the words of the law. Adding to that ambiguity argument, the CZA at §7003 says: ". . . offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971 are prohibited in the coastal zone. . . ." BTW: the CZA at §7002 also exempts bulk product transfer facilities that serve a single on-shore industrial or manufacturing facility; or that are within the footprint of

the Port of Wilmington. Neither of these exemptions apply to the refinery's proposal.

The ambiguity argument was resolved by a 1985 opinion by the Del. Supreme Court in a case nearly identical to the current application. The *Coastal Barge* case involved lightering in the deep and sheltered waters of Big Stone Anchorage in Delaware Bay. Lightering of petroleum -- bulk material transfer between deep draft ocean vessels and shallow draft vessels bound upriver or to other Eastern Seaboard ports -- was ongoing before the CZA was passed in 1971. By its *Coastal Barge* decision, the Court denied a proposal to expand or extend that bulk transfer activity to a new and distinctly different mineral, coal. As with the current application, no new plant facilities would have been required. Clearly, the Court did not regard that detail as compellingly mitigating.

The Secretary's Order on the refinery's proposal pretended that the CZA prohibits new facilities for bulk product transfer activities, but does NOT prohibit the activities themselves. The Secretary dealt with the *Coastal Barge* decision in the simplest possible way. Rather than noting a contrary precedent, he didn't mention it. Even though the Supreme Court regarded the CZA's bulk product transfer prohibition as amply triggered by the change from mineral petroleum, which was grandfathered, to mineral coal, NOT grandfathered, the Secretary regarded the change from mineral petroleum to vegetable ethanol as NOT prohibited.

<> THE JOINT APPEAL by the DE League of Women Voters and the DE Audubon Society to the CZICB from the Secretary's Order, cited a collection of relevant issues. The appeal application didn't mention CZA §7001 "PURPOSE." Also not mentioned in the Statement of Issues are two additional facts: 1) the Secretary's Order addressed environmental impacts of the proposed activity under normal operating conditions while completely ignoring conditions "during mechanical malfunction and human error" as required by the CZA at §7004; and 2) the CZICB hearing occurred in Kent County rather than "in the county in which the proposed activity is to be located" as required by the CZ Regulation at Section 15.1. [Ed note: To me the requirement that the Board consider two possibilities negates the usual standing rule against permitting suits by parties who may suffer speculative damages.] <> The Standing Issue reflects two prior State Supreme Court decisions, both key to the LWV / Audubon appeal: *Oceanport Industries v, Wilmington Stevedores* was decided in 1994, <http://law.justia.com/cases/delaware/supreme-court/1994/636-a-2d-892-5.html> and *Nichols v. State Coastal Zone Industrial Control Board*, 74 A.3d 636, 644 (Del. 2013). The *Oceanport* case involved appeals to the EAB based largely on sections of Title 7 of the Del. Code other than Ch 70 (CZA) but it also touched some Coastal Zone issues. Under Ch. 70 (the CZA) the appeal was dismissed because the EAB has no CZA jurisdiction. And the appeal under Chapters 60 and 72 was dismissed because of the relevant language therein. Two quotations, following, from the ruling are particularly instructive:

... "While the general principles of standing are helpful ... the real determinant is ... the statutory language itself, for no party has a right to appeal unless the statute ... governing the matter has conferred a right to do so."

... "After the hearing process is complete and the Secretary has made a decision ... on the permits, the standing requirement changes. It then becomes the more ... stringent "substantially affected" test of the standing provisions at issue here. Based ... on the foregoing, it seems clear that the General Assembly intended a stricter ... standing requirement for appeals to the EAB or under the CZA than for that of the ... hearing process, which is open to the informed general public."

The second quotation asserts that the General Assembly intended for a stricter standing requirement after the DNREC Secretary's decision than before. That applies to Chapters 60 and 72, but somehow I can't read that interpretation into the CZA text at 7 Del. C. 7007(b) for appeals from the Secretary's Order and 7 Del. C. 7008 for appeals from the CZICB's finding. They seem to this old rocket scientist's weary eyes to be identical. Both say "Any person aggrieved by a final . . . decision by the Secretary or order by the CZICB . . . may appeal . . .".

The *Nichols* case involved an appeal to the CZICB from a CZA decision by the DNREC Secretary, that eventually reached the State Supreme Court when Nichols claimed that the Superior Court had misapplied the *Oceanport* opinion to his initial complaint. The Supreme Court answered as follows:

... "It seems clear that the intent of the Legislature was to limit standing to appeal to those ... who were actually affected by the Secretary's decisions. It seems equally clear that the... General Assembly did not open the flood gates to anyone who merely claimed an interest ...in the matter. That would have created a totally unworkable administrative structure.... In... *Oceanport*, we construed the term 'substantially affected' as it appears in 7 Del. C 6008...and 7210, finding that to have standing...a party must show there is 'injury in fact'.... ...Although our decision in *Oceanport* did not specifically address the phrase 'any person ... aggrieved' that appears in the statute at issue here ... it seems clear that the General ...Assembly intended a stricter standing requirement for appeals to the EAB or under the CZA."

The Courts are amply justified in requiring a clear showing of a potential for injury to mind, body or wallet when the statute is silent. But the Courts are not empowered to over-rule the Legislature when the statutory language is clear and unambiguous. **The extrapolation to the CZA is contrary to the General Assembly's actual words.** Does the Court have authority to legislate from the bench? No. Perhaps just this time, the State Supreme Court lost sight of Section 10 of the Delaware Constitution, which says:

"No power of suspending laws shall be exercised but by authority of the General Assembly."

What is to become of the violations of law and regulation cited in the LWV / Audubon Society Statement of Issues and the two others discovered

later? Did the CZICB's denial of standing make them lawful? No. Perhaps attention should be given here to Article 9 of the State Constitution, which says: "All courts shall be open; and every person . . . shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land . . ."

THE END

Editor's Note:

The Board of the Civic League supports the conclusions of Nick Wasileski and Vic Singer.

The right of the cause and the law both argue for a less strict interpretation of the standing requirement in order to address substantial error on the part of the Secretary. The errors open the door to a meltdown of the Coastal Zone Act. The Act has enabled Delaware to have an industrial northern section of the Coastal Zone and a recreational and environmentally-protected middle and residents and tourists have enjoyed and benefited from that balance for more than 40 years. Every land owner and permanent resident in this State has an interest in the interpretation of the Coastal Zone Act in keeping with the purposes and intent of the original law. The Legislature may amend it, but no Secretary of DNREC should get away with ignoring its language and precedents, and no Court should support him in doing so. The farmlands, wetlands, and beaches that are at risk every day because of shipping oil and chemicals on the Delaware River must not be increasingly threatened by what is allowed to happen on our shores and on the River. If the Civic League Board could find volunteer counsel, we would join the plaintiffs side with a Friend of the Court brief.

This is my last issue of *County Comments*. I hope I have contributed to your knowledge or stimulated your thinking in this past year and in previous years when I worked on this newsletter. The Civic League will continue communicating with you perhaps in a more modern format.

No homeowner or permanent resident of this County should ever let down their guard where land use is concerned. Stay informed. As a person who suffered a large financial setback when a seemingly non-threatening project was built behind my house, my warnings are based on the reality of life in this County. No one is going to notify you when your home or neighborhood is threatened. Watch the Saturday papers and check the County website often. If you do not know how to respond to a problem, contact the Civic League or one of the regional groups listed in this issue. They will last as long as volunteers care enough about this County to get involved.

Christine Whitehead, the Editor

SOUTHERN NEW CASTLE COUNTY ALLIANCE

SNCCA's website appears to have been hijacked by a jeweler. Sewers on the East side are the big issue now.

SAVE OUR COUNTY - SOC is temporarily inactive. New plans expected to be filed soon for Barley Mill Plaza may bring it back to life.

Con't from page 1. Pike Creek

already built and approved because there is a limit. Has it been reached? Open space is dedicated for the benefit of homeowners in a development and that serves a public purpose. If this principle is allowed to be ignored because a case was not properly argued, most homeowners in this County will find their quality of life at risk. When plans are filed to build more homes on the golf course, the Civic League and all the regional organizations should participate in fighting this legal battle. Pike Creek Valley is a wonderful place to live because it was planned that way. The County is obligated to protect it. A new County Executive who cares about residents of this County will do that. Failure is not acceptable.

THE KENNETT PIKE ASSOCIATION - The KPA has a very informative website. From explaining how to handle Ash borers harming your trees to describing the "Complete Communities" Bill leading to "Placemaking" and "Healthy Communities" terminology in the UDC this site will educate readers. The Brandywine Valley Scenic Byways Committee is seeking an "overlay district" designation for greater protection for the region. Visit www.kennettpike.com for more information.

THE MILLTOWN-LIMESTONE CIVIC ALLIANCE - The MLCA meets on the third Thursday of each month at the Mill Creek Fire Hall in the small room. They worked on a DNREC permit problem for the neighbors around Hercules. Now they are gearing up to work on the wharfage fees that Vic Singer suggested be levied on crude oil transfers from ships to barges at Big Stone Anchorage. It could help reduce the amount of tax increases that will be necessary in 2017.

The Civic League and This Publication

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The Civic League is a nonpartisan, non-profit, incorporated volunteer organization founded in 1962.

Re: The Newsletter

Opinions, whether identified as such or not, expressed herein are those of the authors of the individual articles and not positions of the Civic League unless so stated. Authors are responsible for the accuracy of their statements. The Editor will accept corrections and comments, as well as articles from any member including residents of member civic associations. Articles may be edited to conserve space and should be about County government or State matters that will affect County government or our residents. Deadline is 1st of each month.

Re: Meetings of the Board

The Civic League Board meets the third Tuesday of each month except July, August and December. Unless special events are being held, the meetings are usually at the Christiana Presbyterian Church Social Hall on old Route 7 in Christiana. The public is welcome to attend all meetings. They generally start at 7:00 PM. Annual Membership Meeting -May.

The agenda of the CLNCC is focused on New Castle County government and those State issues that impact County government or our quality of life in this County. Members may be delegates from regional or local civic associations or other nonprofits, individuals, or businesses. We believe the public interest is discovered by debating all points of view.