

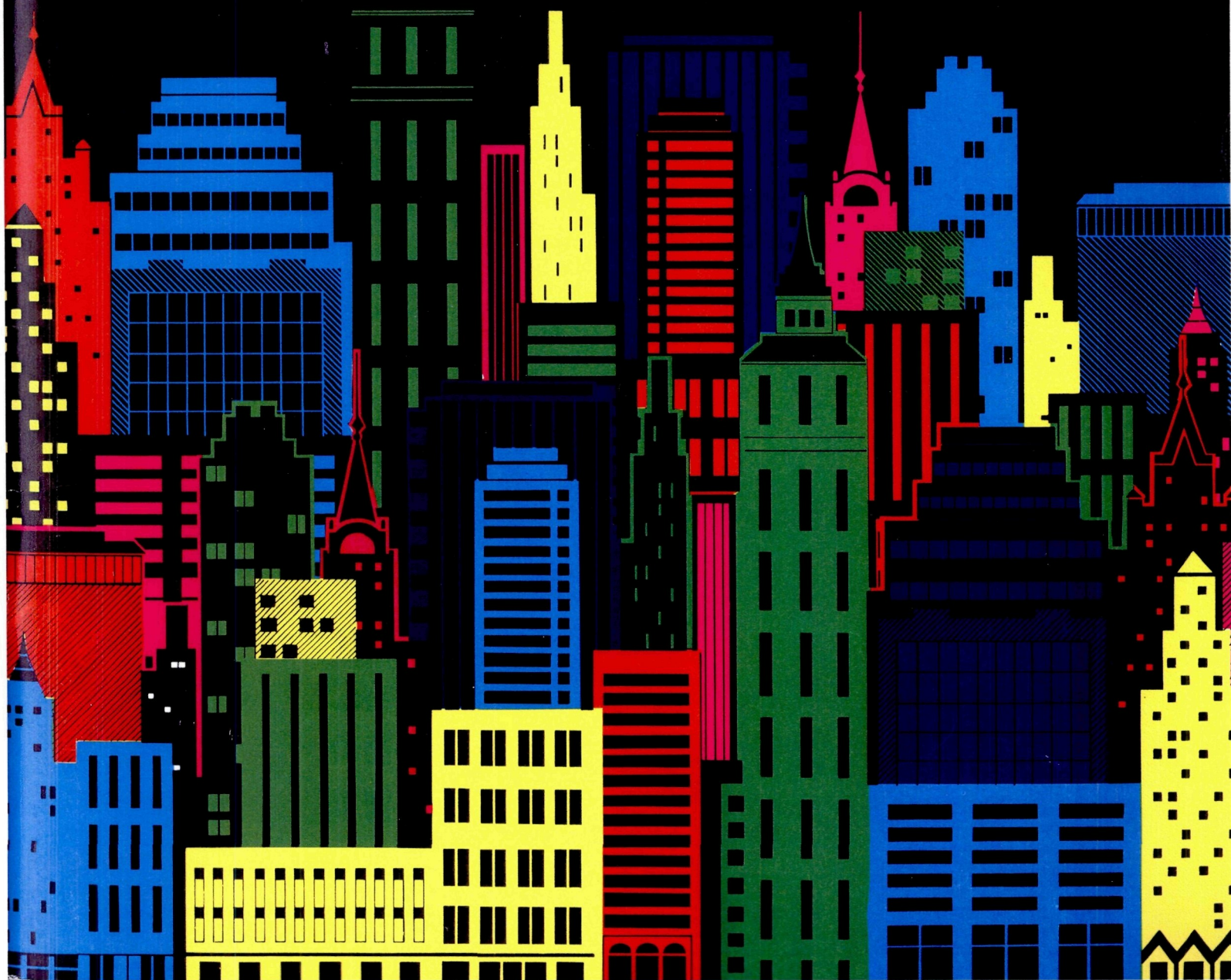
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Volume 6 Number 4

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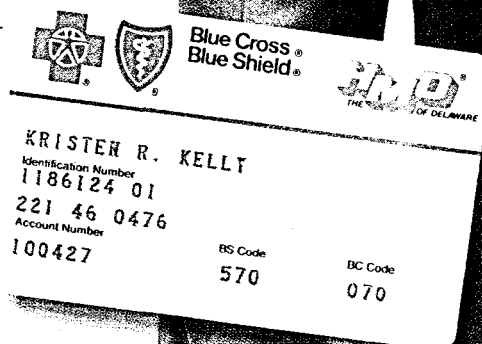
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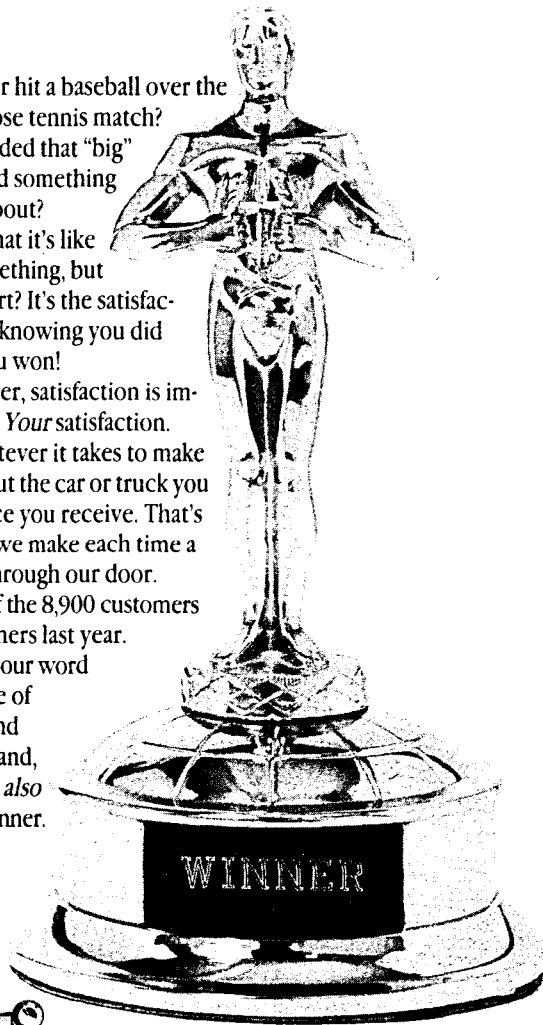
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LETTERS TO THE EDITORS

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Wilmington, DE 19801

Dear Person:

Enclosed is a copy of a letter dated January 27, 1988 I sent requesting issues of the *DELAWARE LAWYER* which we never received. Please let me know why we are not currently receiving copies.

If we need to pay for a subscription for the magazine, please let me know that also. I eagerly await your response.

Sincerely,
Nancy B. Matthews
Information Services Assistant

We respond:

Dear Ms. Matthews:

This is in response to your letter of March 29, misdirected to our old address, and commencing with the faintly thugish salutation "Dear Person". I have turned over your letter and the enclosure to Mrs. Lois Rasy of DELAWARE LAWYER who will look into your inquiry and advise you how to go about subscribing to the magazine.

Yours very truly,
William E. Person
Chairman, Board of Editors

N.B. (Those knowledgeable about such things tell me that "person" is proper etiquette in a gender blind society. Welcome to the surly new world of unisex!)

Victor Battaglia, Esq.
Chairman
Delaware Bar Foundation
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

Dear Vic:

I was delighted to see you at the luncheon in Wilmington and to be able to confirm my admiration for the *DELAWARE LAWYER* and the great job that Bill Wiggin does in putting together such a publication. It is clearly one of the best bar publications that I have seen anywhere in the country.

I enclose a copy of my remarks at the luncheon yesterday for the event there is something in the remarks that would be useful for you to use locally.

Again my thanks for letting me be for a few hours once again a member of the Delaware legal community.

Sincerely,
*Robert MacCrate

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Susan C. DelPesco
706 Market Street Mall
Wilmington, DE 19801

Dear Ms. DelPesco,

Please find enclosed House Resolution 185 honoring Board of Directors of the Delaware Bar Foundation and the Board of Editors of the *DELAWARE LAWYER* as a recognition for the wonderful product of their efforts.

Sincerely,
Donna A. Snell
House Bill Clerk

We reply:

The Honorable G. Robert Quillen
P.O. Box 38
Harrington, DE 19952

Dear Representative Quillen:

Harvey Bernard Rubenstein, Esquire has brought to my attention House Resolution 185, of which you were the sponsor. I am touched by the praise of the Bicentennial issue of DELAWARE LAWYER and, on behalf of the authors, and other Editors extremely proud. I write to thank you for your gracious gesture and the very kind words so reflective of what we undertook to accomplish in the Bicentennial issue.

I remain,

Very respectfully yours,
William E. Wiggin
Chairman,
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**Mr. MacCrate is the President of the American Bar Association.*

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*House of Representatives
134th General Assembly
House Resolution No. 185*

CONGRATULATING THE DELAWARE BAR FOUNDATION UPON ITS BICENTENNIAL TRIBUTE TO DELAWARE'S ADOPTION OF THE UNITED STATES CONSTITUTION.

WHEREAS, The Delaware Bar Foundation publishes the *DELAWARE LAWYER* as a forum for the expression and interchange of ideas, opinions and positions on legal subjects of general interest to Delaware judges, lawyers and the community at large; and

WHEREAS, in honor of Delaware's 200th anniversary of its adoption of the United States Constitution, the Delaware Bar Foundation prepared and published a truly marvelous edition of *DELAWARE LAWYER*, with fascinating articles by leading Delaware historians, judges, attorneys and legislators presenting facts of great interest not usually found in standard historical works; and

WHEREAS, the profiles on Delaware's delegates to the ratification convention, the articles on the practice of law in the 18th century and those on the evolution of the law since that time provide fascinating reading material to scholar and casual reader alike; and

WHEREAS, this publication truly stands out in our bicentennial year of celebration as worthy of recognition for its value, both today, and in years to come.

NOW, THEREFORE:

BE IT RESOLVED by the House of Representatives of the 134th General Assembly of the State of Delaware that we congratulate and commend the Delaware Bar Foundation upon its Bicentennial Tribute issue of *DELAWARE LAWYER*.

BE IT FURTHER RESOLVED that suitably prepared copies of this resolution be presented to the Board of Directors of the Delaware Bar Foundation and the Board of Editors of the *DELAWARE LAWYER* as a recognition for the wonderful product of their efforts.

SPONSOR: Rep. Quillen

EDITOR'S PAGE



Paula Lebrer

This issue of DELAWARE LAWYER is my second as guest editor and, once again, it has been my pleasure to work with the contributors and with Bill Wiggan, Executive Director of the Delaware State Bar Association. The topic of Land Use and Quality of Life is something with which I have been involved since I assumed a position in May 1987 with the Delaware Department of Transportation as Assistant to Secretary Kermit H. Justice. Secretary Justice has been a major architect of the Quality of Life legislation in Delaware. I assure you that my role as guest editor of this issue, however, was entirely voluntary and entirely separate from my professional position. It was my purpose to be sure that all sides of the issue were fairly and objectively aired, and I hope you will agree that we have succeeded.

This issue is divided into several sections, which I should like to describe briefly. First, how did we get where we are? Governor Castle, whose guidance and inspiration were so important to the decision to pursue Quality of Life legislation gives us his ideas. Then we take a brief look at some of the legal issues posed by Quality of Life.

We discuss impact fees, recent Supreme Court decisions, and State vs. local control. The next section deals with legislation recently passed by the General Assembly and which was part of the Quality of Life package. The two authors employed by the legislature, worked closely in the passage of the legislation. The last section discusses competing philosophies that had to be addressed in order for any Quality of Life legislation to pass. Those of us familiar with the problems know that we have a lot more work to do on such legislation if we are to manage the growth that Delaware faces in the next few years. Accordingly, I have asked representatives of private sector interests, environmentalists, economic development specialists, citizen groups, and members of government to tell us something about their philosophies regarding Quality of Life so that we can assess from where these competing interests come and how they can be worked into legislation yet to be written.

I hope you enjoy reading this issue as much as I enjoyed producing it. ■

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Quality of Life

How Did We Get Where We are?

Michael N. Castle

In the Fall of 1986, I had the opportunity to speak with many Delawareans as I campaigned for various legislators across the State. A common theme in many of these conversations was concern over changes taking place in local neighborhoods and nearby towns. For some, these changes meant longer travel times to work or for shopping. Others noted the loss of open space or woodlands to residential and commercial development. Many couldn't quite put their fingers on what had changed, but they had a definite sense that unique characteristics of the local community were being lost.

Delaware was enjoying an economic boom, and that boom had produced tangible benefits. At the same time, however, there was a growing feeling that some of the very features that make Delaware attractive, those elements contributing to our "quality of life", were being adversely affected by our prosperity.

A decade before, "quality of life" concerns in Delaware were jobs and the need to revitalize our economy and stimulate new business.

The duPont Administration, together with the State's General Assembly, took bold and innovative steps to set us on the path to economic recovery, including the Delaware Financial Center Development Act. In addition, retooling the State's organizational structure to emphasize economic growth under a Delaware Development Office, getting a firm handle on state spending and debt servicing, carrying out economic growth strategies—all contributed to

(Continued on next page)



It is our purpose to furnish brief biographies of the authors of articles, the better to acquaint readers with those whose work we publish. In the case of a sitting Governor this would appear to be an otiose practice, the breathless disclosure of unconcealed distinction to the already well informed. Of course, there are always small, surprising pockets of ignorance. And in the case of Governor Castle we have a far more interesting figure than the mere fact of incumbency would suggest. There is a kind of evolutionary consistency in his career. Five and one-half years ago when he was Lieutenant Governor he wrote a first article for this magazine. (See "Lawyers and Legislators," DELAWARE LAWYER, Fall, 1982.)*

At that time we observed of him, "The Honorable Michael N. Castle has been Lieutenant Governor of Delaware since 1981. During his term he has brought a refreshing activism to an office once regarded as largely ceremonial. He heads the Governor's Small Business Council; he has led a Delaware trade mission to Europe; has made a searching study of a vast number of State boards and commissions, and has proposed changes for their more effective functioning."

Note the reference to a trade mission. These beginnings have led to his leadership role in the Governor's International Trade Council, the Delaware Free Trade Zone, and a wide range of devices to strengthen the state in a market that becomes more and more international. (See "The Delaware Role in International Trade" by Senator Andrew Knox in the Winter 1988 issue of this magazine.) The current issue and the Governor's current initiative are, of course, devoted to quality of life, in effect a resolve that we not be spoiled by economic success and that we not imperil that hard won success through an unreflective condemnation of its every aspect. This, like much in life, is a balancing act, and we think an admirable one.

*We are reminded of the New Yorker cartoon in which a dizzy young woman upon introduction to a gentleman exclaims to her startled new acquaintance, "Not the Mr. Charles Dickens!"

Quality of Life (continued)

laying the foundation for the economic prosperity we enjoy today. These largely state level efforts were complemented by county and municipal efforts to foster a favorable climate for economic growth.

While many today take for granted the benefits these actions generated, it is important to remember that at the time much of our strategy was largely untested. Some critics felt that, if in fact we brought any new businesses in at all, it was probable that they would leave our state if a "better deal" came along. Others simply felt that our move toward fiscal restraint constituted a lack of caring and that the old ways of deficit spending and taxing were in the best interests of Delawareans.

Today, I think we can safely say that the critics were proven wrong. The steps we took to strengthen and expand Delaware's economy benefit us today and will do so in the years to come. Visible signs of this success can be seen in the expanding Wilmington skyline and in

new business and industrial parks throughout the state. One of the nation's lowest unemployment rates and an unprecedented string of income tax cuts illustrate the very real benefits attained.

There are other benefits to our rebound economic strength that are equally impressive, but not as well understood. The health of the Delaware economy is directly related to the ability of our government to provide human services, environmental protection, and public safety. Without a strong economy, state government would not have had the wherewithal to make major increases in funding to such departments as Health and Social Services and Children, Youth and Their Families over the past few years. Our ability today to spend money on urgent social, environmental, and safety issues greatly exceeds that of previous administrations, when the state's revenue base could not match the level of expenditures required to maintain desirable levels of public service.

In analyzing what has been accomplished, we now know that the businesses we have attracted are here to stay and that we have achieved a favorable

climate for Delaware's growth as a financial services center for years to come. A key factor underlying our ongoing success has been the range of amenities Delaware offers new corporate residents. Our rich cultural heritage, our natural resources, and our close proximity to major metropolitan areas make Delaware an attractive place to operate a business and to raise a family.

But absent continued attention and nurturing, these strengths can be jeopardized. In other states too rapid growth and development have overrun the very features that attracted new residents. Quite properly, these concerns have surfaced here in Delaware.

As the state has prospered, voices have been raised demanding that we take steps to maintain our quality of life. I share these concerns, and over the last few years I have looked to key members of my Administration and leaders in the community to give us a blueprint for managing our growth while maintaining our economic prosperity. As a first step in this process, I asked, "What are the key issues that confront us?" The answers I received were:

1) The main "roadmaps" to guide growth in an orderly fashion are local land use plans. Through most of the 1980s, land use plans at the county level were either incomplete or out of date.

2) The influx of new commercial and residential development that accompanied our economic growth has put increasing strains on our infrastructure and environment.

3) The rules for fostering economic strength are changing. The strategy of the future depends greatly on our ability to nurture and "home grow" new industries based on our competitive advantages.

Over the last year, we have moved aggressively to address these issues. The Delaware Development Office and my Task Force on High Technology have identified promising new industries, like composites, upon which new job opportunities can be created. We have also identified existing industries—such as the poultry and pharmaceuticals—with the potential to keep us competitive in the years ahead. Capitalizing on this strategy will ensure continued job opportunities and financial resources for government to meet the needs of our citizens.

(Continued on page 10)

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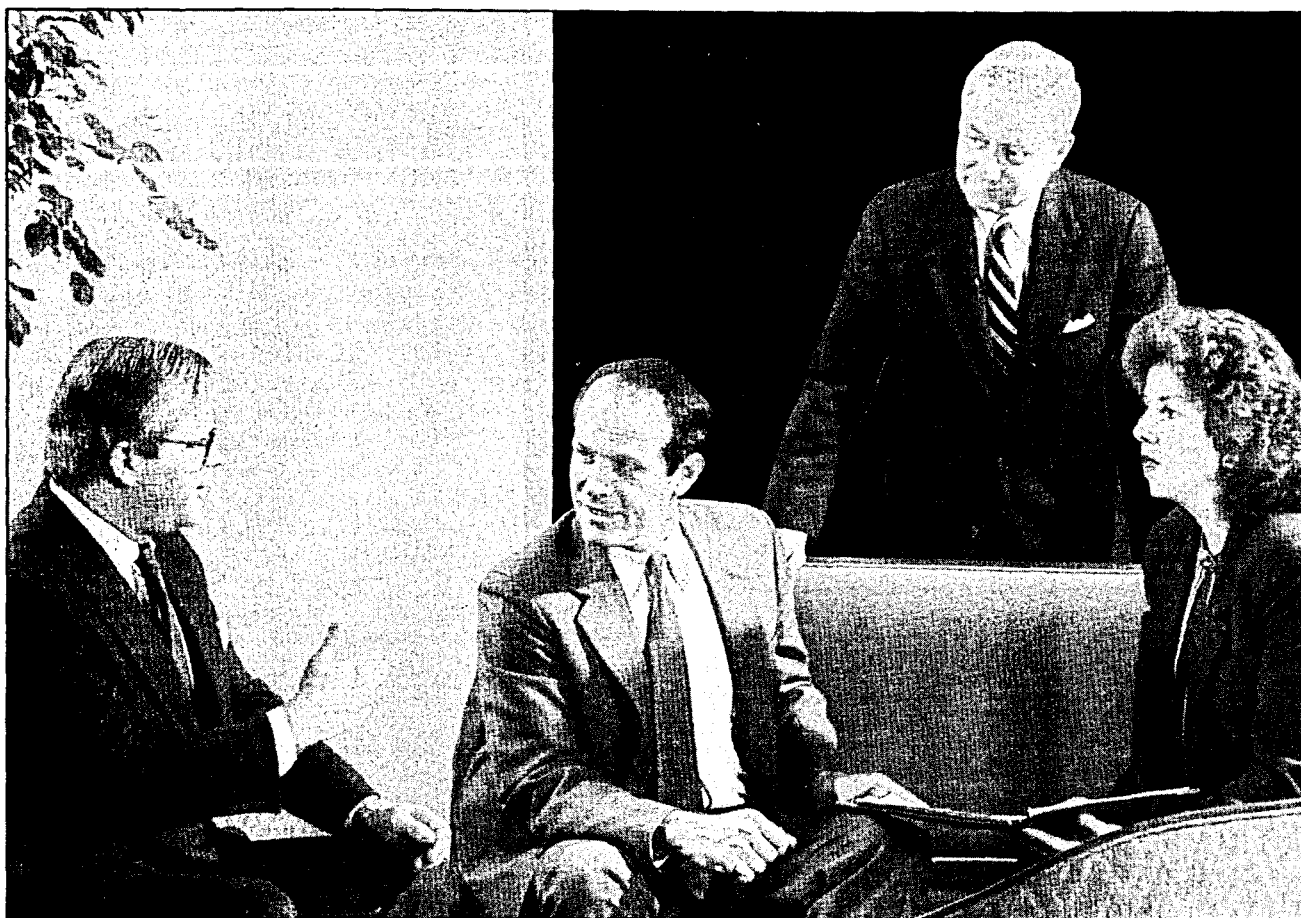
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Quality of Life (continued)

We have also put together a long range plan that will protect our natural resources for the benefit of future generations: the Delaware Environmental Legacy Program. That program has brought together leaders from all segments of the Delaware community and encouraged them to develop strategies for dealing with the most critical environmental issues facing our state.

I received the final Environmental Legacy Report last January. Its numerous recommendations provide a means of ensuring the high quality of Delaware natural resources for the long term. Many of the recommendations require a lengthy commitment; others are too far in the future to assess. Still others require immediate attention, and we are already taking steps—in beach protection, for instance—this year.

The combined long range plans for environmental protection and economic development should protect our quality of life. That they have been done in tandem is not by accident. The new

residents and buildings that come from economic development can have significant environmental repercussions. Unless we manage our economic growth consistent with environmental protection, we shall risk impairment of natural resources, such as wetlands and open space. We shall also threaten the all important water supplies vital to our communities.

Conversely, we must remain committed to keeping Delaware economically competitive and develop new job opportunities for future Delawareans. We must have environmental policies that can accommodate that desirable growth rather than divert it. Economic growth and environmental protection are interdependent, and without a strong economy that comes from successful economic development, we diminish our ability to manage environmental programs at optimum levels.

As we have seen in the past, however, attention to economic development and environmental protection alone are not sufficient to ensure that our growth does not exceed the capacity of our environment to support it. The other key ingredient in the mix is structuring land use planning at all levels of government with an eye to the future and full awareness of the development pressures of today.

Of all the messages I heard over the last year, the need to address the land use planning process was clearly one of the most urgent. The legislative package introduced last June, which has since become known as the "Quality of Life" initiative, responds to that need. It also includes bills designed to expand the capacity of our transportation network to keep pace with demand.

The Quality of Life initiative was perhaps one of the most extensive packages of legislation ever considered by the General Assembly. To its members' credit, the measures generated a great deal of discussion and debate. Passage of the many interrelated and complex bills is one of the most important events in the last ten years.

In looking at the specifics of what has been accomplished, I think it fair to say that the full effect will not be fully realized for some years. From a monetary standpoint the establishment of a \$1.1 billion, ten year Transportation Trust Fund is clearly a major commitment by the State to ensure proper funding for good roads and public transportation in the years ahead. Together with legislation that links growth along our highways with the ability of our transportation network to support increased demand, we have taken a major step toward ensuring safe and efficient transportation for Delaware's future.

In assessing all that we have done, I am most gratified that we have avoided the misguided calls for quick fix answers that curtail activities ultimately in our long term best interest. With a forward looking economic development strategy and environmental protection plan in place, we have taken steps that will benefit our lives and our children's. We have taken major strides in addressing the key management issues that, if left unattended, would surely make Delaware a less desirable place than what we now know.

Looking ahead, we see many challenges that remain. Many of the actions prescribed to protect our environment and foster economic development require public debate and discussion.

I am confident, however, that, as in the past, we will rise to that challenge. In doing so, we must be mindful of what is best for Delaware in the long run and recognize that quality of life is a fragile commodity, which requires a thoughtful approach and careful attention to the changing conditions around us. We can do nothing less for our children and for all future Delawareans. ■

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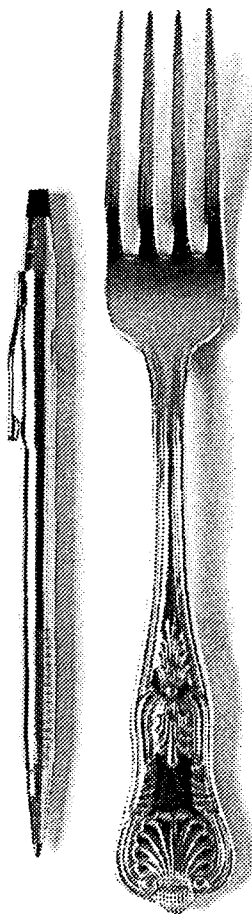
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Impact Fees: Paying the Developmental Piper

Mark A. McNulty

Impact fees have received a great deal of attention recently in Delaware and, indeed, throughout the country, as one method of making development help pay its own way. With the recent decision in *Nollan v. California Coastal Commission* 483 U.S., 107 S. Ct. 3141 97 L. Ed. 2d 677 (1987), the United States Supreme Court has drawn attention to growth management and developmental exactions, which are directly related to requiring financial contributions by development. An impact tax or fee is a recent device to ensure that growth does not infringe upon the public interest.

Land use management techniques were not tried with any great success in this country until the early 1900s. Since then a variety of devices have evolved. They include impact fees (which we shall examine in some detail), required dedication of land both on and off site, in-kind fees in lieu of dedication, and other controls over the development of land. Different methods of varying stringency and effectiveness have arisen in response to an emerging recognition that continued uncontained growth will eventually overburden the resources or the "quality of life" that attracted development in the first place.

The first significant method was zoning, which limits the type of development permissible in a given area. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) sustained the principle of zoning in face of Constitutional challenge. During this period, subdivision regulations were being adopted at the local level on the theory of nuisance control. They were generally designed to preserve public coffers and to shift to the real estate developer the responsibility for meeting at least some of the needs created by his activity. For example, subdivision and zoning regulations permitted local governments to require developers to dedicate the land necessary and to

make the required improvements for such things as streets, on-site sewer lines, and drainage facilities necessitated by development. These exactions have generally been upheld as valid exercises of the police power. *Trent Meridith Inc. v. City of Oxnard*, 114 Cal. Rptr. 3d 317 (1981). See also Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964).

It should be noted that there are two types of exaction commonly assessed for new development: on-site facilities and off-site requirements arising in consequence of new construction. As a rule of thumb, the more remote the exaction from the need, the more likely it is to fall before legal attack.

The next significant attempt to deal with this issue was a requirement that growth follow an approved schedule geared to the construction of new facilities needed to accommodate the growth. This process is commonly called "phasing," since it requires the developer to develop the property in stages while public improvements are put in place to serve the development.

In *Golden v. Planning Board of Ramapo*, N.Y. App. 285 N.E. 2d 291 (1982), the town had adopted a comprehensive zoning ordinance and capital improvement master plan in 1966. It covered a 6 year period and included a plan for additional capital improvements over the next 12 years. In effect it detailed permissible growth for 18 years. Developers challenged the restrictions as unreasonable.

Under the plan, a developer could choose between phasing his project in accordance with the town's timetable or paying for the public services needed to accelerate it. The Court of Appeals found that Ramapo had the authority to adopt a plan to phase in capital improvements over a long term and that the plan was a

reasonable exercise of the town's police power. In reaching its decision, the Court said;

"The fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to confiscation." 285 N.E. 2d, at p. 304.

In more recent times, impact fees have been aimed more accurately at those who will directly benefit from development, by exacting direct payments to the local government. The underlying premise of this approach is that those who cause growth should relieve the consequent strain by paying cash for improvements that would otherwise be unnecessary.

Impact fees should be distinguished from impact taxes, the latter imposed upon the business of land development itself. They appear to provide a greater flexibility in the use of the moneys they raise—they can be added to the general revenues of the jurisdiction. Impact fees, on the other hand, are subject to detailed restrictions on how they are to be spent.

In attempting to deal with this issue, various methodologies for the assessment of impact fees have been attempted. (See Jacobsen and Redding, *Making Development Pay Its Way*, 55 N.C.L. Rev. 407 [1977]).

Other approaches have included the use of special permits and special assessments, when, for example, a development may have zoning approval but the developer seeks additional uses beyond those permitted in the category for which it is zoned. Conditioning special permits on the developer's agreement to upgrade facilities external to the project but resulting from a need created

by that project can be valid in a proper case. *Associated Home Builders v. Walnut Creek*, Cal. Supr., 484 p. 2d 606 (1972). Special assessments, although generally viewed as an exercise of the public authority's taxing power, may not be bound by traditional restrictions on that authority but may be held to be a logical extension of the police power. *J.W. Jones v. City of San Diego*, Cal. App. 203 Cal. Rptr. 580 (1984).

As a result of the phenomenal amount of growth in Florida, local jurisdictions in that state have been very active in devising methods for collecting impact fees. The courts disallowed early attempts, but later efforts have withstood legal challenge. *Broward County v. Janis Development*, Fla. App. 311 So. 2d 371 (1975); *Contractors & Builders Association v. Duneden*, Fla. Supr. 329 So. 2d 314 (1976) cert. den. 444 U.S. 867; *Hollywood, Inc. v. Broward County*, Fla. Supr. 432 So. 2d 606 (1983).

The imposition of impact fees is a very complicated process, since it requires detailed financial analysis to ensure that the developer's and the com-

munity's contributions are equitably balanced. Several factors must be carefully considered, but the general test remains the distinguishing between an unlawful taking and a mere imposition upon the developer. Very simply, is the fee is reasonable? While the "Rational Nexus" test has become the most widely accepted by jurisdictions imposing impact fees, others have evolved.

The Illinois rule, which has since been modified, was first proposed in *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, Ill Supr. 176 N.E. 2d 799 (1961) and embodies the most conservative view of the "inequitable" fee. The Illinois court invalidated the requirement that land be dedicated for educational purposes as part of a subdivision proposal. The theory espoused by the court was that in order to be valid, the exaction had to be "specifically and uniquely attributable to the new development" and, since schools were a need of the entire community, the exaction was not supportable.

(Continued on next page)



Mark A. McNulty holds a Bachelor's Degree in History and Political Science from St. Peters College and a Law Degree from the University of Seton Hall. A member of the Delaware Bar, he served as the Deputy Attorney General to the Department of Transportation from 1975 until 1985 and as Executive Assistant to the Secretary of Transportation from 1985 through 1987. He currently serves as the Director of the Delaware Transportation Authority and has been very active in drafting Governor Castle's Quality of Life Legislation.

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Impact Fees (continued)

The New Jersey Supreme Court recently construed the Municipal Land Use Law, N.J.S.A. 40-55D-42 as reflecting the intent of the State legislature to adopt this theory. *N.J. Builders Assn. v. Bernards Township et. al.*, N.J. Supr. 528 A. 2d 555 (1987) holds that municipal exactions for off-site improvements from development are limited to those costs directly attributable to the new development.

Another test is for a "reasonable relationship" between the exaction and the need for which it is assessed. Many of the cases I cite have adopted this approach. *Ayers v. City Council of Los Angeles*, Cal. Supr. 207 P 2d 1 (1949).

The theory that has received the most attention is the so-called "rational nexus" approach. The underlying rationale is a reasonable connection between the assessment of the fee and how the funds generated are spent. *Jordan v. Village of Menomonee Falls*, Wis. Supr. 137 N.W. 2d 442 (1965); *Home Builders and Contractors Assn. et. al., v. Board of County Commissioners of Palm Beach County*, Fla. App. 446 So. 2d 140 (1983).

The Home Builders case reviewed an earlier Florida decision, *Contractors and Builders Association v. City of Dunedin*, Fla. Supr. 329 So. 2d 314 (1976) cert. den. 444 U.S. 867 (1979). In what has since become known as the "Dunedin Test" three precepts for a fair and equitable fee were laid down:

1. New development must be such that the present system of public facilities would be inadequate if not expanded.

2. The fees must not exceed the expense local government would incur in accommodating the new users of the system.

3. Fee proceeds must be earmarked for the purposes for which they were approved.

The "Rational nexus" approach is not without its problems. Two of the more significant questions it raises are:

The apparent inequity if the developer pays the cost of the capital facility improvement and is still required to pay taxes.

The apparent inequity between contributions for existing capital facilities and the contribution required of the developer for expanding them.

The Utah Supreme Court attempted to deal with these issues in *Banberry Development Corporation v. South Jordan City*, Ut. Supr. 631 P. 2d 899 (1981). The Court listed no less than seven factors in determining whether the developer was being asked to contribute an amount greater than his fair share. In a recent article in the American Planning Association Journal, the author suggests that the future direction of the courts in interpreting the imposition of impact fees is to require strict cost accounting to guarantee that the equities are built into the system. [Nancy Stroud, *Legal Considerations of Development Impact Fees*, APA Journal (Winter, 1988)].

Fees must not only be reasonable; a strict account must be kept of how the funds are collected and distributed.

While there undoubtedly will be further evolution of the "rational nexus" analysis, in all likelihood it will be in the nature of fine tuning rather than development of an entirely new test. The majority of courts who have dealt with this issue appear to have settled on the rational nexus analysis as the acceptable rule, and there now appears to be a sufficient body of law to validate carefully designed impact fees. Zoning and subdivision regulations, on-site and off-site exactions, phasing and the development of impact fees/taxes provide several tools for land use regulators in keeping growth under control and in recovering at least part of the cost to which that growth subjects the community as a whole.

Other approaches worth consideration are mitigation techniques and incentive/disincentive programs that guide development towards areas where it is needed and away from those where it may overburden an existing infrastructure. Mitigation and incentives to encourage development in suitable places may prove to be among the most effective methods yet devised. Used in conjunction with existing programs, including impact fees, they should enable planners to confront the next generation of land use problems. ■

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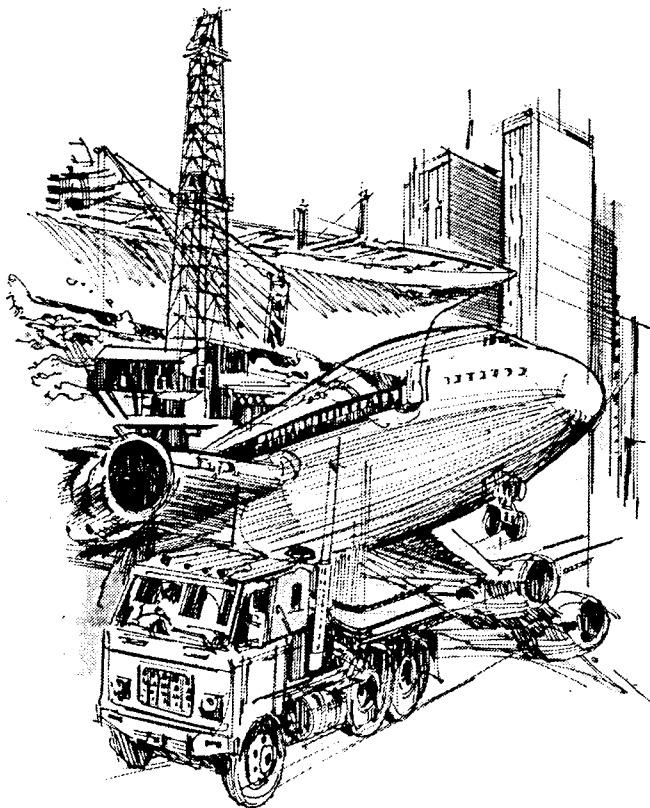
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Modern Land Use Regulation: Pay As You Go Or Do As You Please?

Scott A. Green

Zoning lawyers and planners often say that the only way you can be absolutely sure that open space will remain that way is to buy it. That saying used to be a joke, a cute way of fending off civic groups. For local governments it's no longer a joke.

The Fifth Amendment to the United States Constitution provides, in part, that "private property [shall not] be taken for public use, without just compensation." At the same time, the Constitution grants to States and, by delegation, to their political subdivisions, full police powers. Land use regulations often bring these two provisions head to head. Since the early part of this century, the Supreme Court has struggled to balance these two rules.

The Supreme Court has issued many decisions that addressed the takings issue, but in each case it stopped short of declaring a compensable taking. *Agins v. Tiburon*, 447 U.S. 225 (1980) (conditions imposed upon land may be takings); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (permit denials may be takings); *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978) (use restrictions may be takings). The Court used a "balancing test," in each case weighing the detrimental effect on the individual landowner against the societal interests served. Did it "feel" like a taking? Was it "fair" to take the land without compensation? Clearly, a more practical standard was needed.

The state of the law of "takings" before 1987 was defined by *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). In that case the city and the railroad company were at odds over city regulations limiting the development of an historic landmark. Rather

than an objective test, the Court offered a three-part "balancing test." To distinguish between a reasonable regulation or an unconstitutional taking the Court considered:

1. the economic impact of the regulation;
2. the effect on reasonable investment-backed expectation;
3. the nature of the regulation.

In short, a regulation before 1987 was safe from attack if it was reasonably related to promoting the general welfare and if it permitted a reasonable, beneficial use of the property.

The Supreme Court decided seven takings-related cases in 1987:

First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378 (1987);

Federal Communications Commission v. Florida Power Corporation, 107 S.Ct. 1107 (1987);

Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232 (1987);

U.S. v. Cherokee Nation of Oklahoma, 107 S.Ct. 1487 (1987);

Hodel v. Irving, 107 S.Ct. 2076 (1987);

Bowen v. Gilliard, 107 S.Ct. 3008 (1987);

Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987).

While the first (*First Church*) and last (*Nollan*) decisions have received the most attention, it is the cumulative effect of all seven cases that is changing the law of land use regulation.

The *First Church* decision signified a change in the law of takings. Los Angeles County had begun to enforce an interim flood control ordinance in 1979, adopted in response to a flood that had destroyed creekside properties and killed several people. The flood resulted from forest fires, which denuded lands along the



Scott Green, Director of the Wilmington firm of Cooch and Taylor, brings extensive hands-on experience to the subject of this issue. After serving as law clerk to then Superior Court Judges Christie and Walsh, he practiced law as an Associate with a Wilmington firm. Beginning in January 1985 he served for nearly two years as the County Attorney for New Castle County and thereafter until July of last year as Policy Coordinator for the County.

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creek. Under the new ordinance, the church could not use lands that had served as a campground for handicapped children until measures could be taken to restore the destroyed forests and control the flooding.

The Church had a lot going against it. The ordinance was temporary. It expired after a period of years. It also seemed like a reasonable regulation. It certainly seemed proper for the county to protect handicapped children from flash floods.

The Court didn't declare a taking with finality, but it did take a significant step forward. It concluded that a taking was a taking, no matter how long its duration. Previous cases had permitted local governments to invalidate the illegal ordinance, but the Court ruled this constitutionally insufficient. If a taking occurred, it required the payment of compensation. The case fell short of

earth-shattering, but it signaled a new attitude.

Then came the cases from *Florida Power to Bowen*. They offered little guidance. It was significant that the Court reviewed so many takings cases, but no single case advanced the state of the law. Without laboring over the facts of the cases, it is safe to say that the Court found a way out of each—until *Nollan*.

The respondent California Coastal Commission was an agency created to preserve public access to the beaches for recreational purposes. The Nollans sought a permit from the Commission to renovate and add to an existing beachfront home. The Commission required a deed restriction limiting the size of the building and creating a public easement over the Nollans' property.

The Nollans objected, arguing that the Commission's regulation constituted a taking. The Commission contended that the easement prevented congestion on the beaches and protected the public's ability to see the beaches. Concluding that the restriction was not a valid regulation but rather "an out-and-out plan of extortion," the Court agreed with the Nollans.

For the first time, the Court in *Nollan* used a "nexus test" to decide a takings case. The takings analysis is now more focused. The nexus test requires that "the prohibition . . . further the ends advanced as the justification for the prohibition." Rather than a case-by-case balancing of takings and police power concerns, courts must now examine whether the land use regulation deals specifically with the burdens imposed by development.

The decisions of 1987 announced a new era of takings case analysis. *Nollan* set the boundaries of an impermissible taking and streamlined the review process. *First English* delineated the remedy. Whether as a result of our country's "growing pains" or some judicial coincidence, decades of benevolent neglect were replaced by a new emphasis on the takings issue.

A Delaware court reached this issue several years before the United States Supreme Court. Indeed, the decision of then Vice Chancellor Brown in *Lake v. Mayor and Council of Odessa*, C.A. No. 81C-DE-1, (October 7, 1981), foreshadowed *First English*:

"... if there has been a taking there will always be an issue of monetary com-

pensation in any event, be it the full value of the property if deprivation of economically viable use is permanent, or be it compensation for the proven economic loss suffered by the landowner *between the time of the enactment of the zoning regulation and the time of its revision or amendment.*" *Lake* at p. 7 (italics supplied). This kind of reasoning is plainly in line with current U.S. Supreme court decisions.

How will current land use regulation in Delaware be affected by this shift in the law? This article was written in January, 1988 before final legislative consideration of the full "quality of life" package introduced by Governor Castle. Some of those "quality of life" initiatives raise difficult questions.

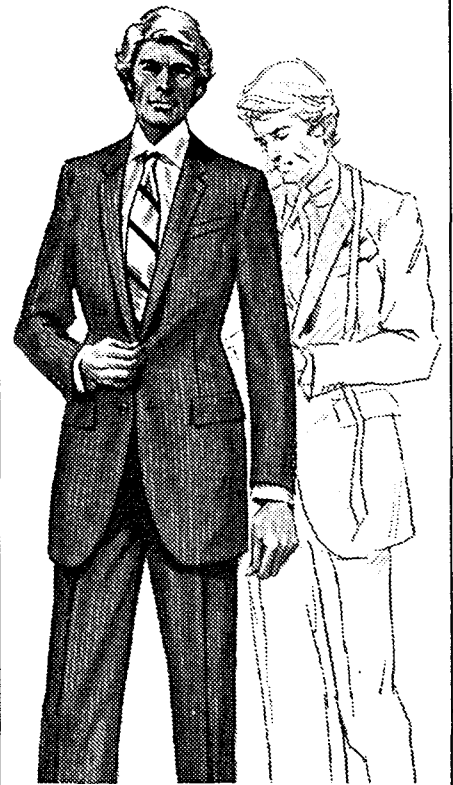
There appears to be little problem with legislation that requires notice to school districts or improves sediment and erosion controls. These restrictions are linked directly to the burdens they impose.

Other initiatives raise more complex problems. The validity of impact fees, for example, has been heavily litigated in other states. Impact fees are assessments used by local governments to help finance the infrastructure (roads, sewers, schools, etc.) needed to accommodate new development. They generally take the form of fees assessed when building permits are issued.

Courts first determine whether these assessments are fees or taxes. If they are taxes, they must be authorized by state law and they must be non-discriminatory, but the government generally has unfettered discretion over the use. If they are fees, there must be a very close nexus between the fee and the burden imposed by that particular development. *Builders and Contractors of Pinellas County v. City of Dunedin*, 329 So.2d 314 (1976), cert. denied, 444 U.S. 867 (1979). The funds must also be spent on improvements made necessary by the specific development from which the fees are drawn.

As originally introduced the development fees in the Governor's program were truly fees, not taxes. They were to be calculated by DELDOT to approximate the cost of road improvements. Because they are fees, there must be a nexus established between the fees enacted and the burdens imposed on the community by each development.

(Continued on next page)



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Modern Land Use (continued)

Yet, there is no standard in the legislation for setting fees, there is no tying of fees to improvements at or near the development site, and there is no mechanism for returning unused funds. Without these minimal standards, the State will not be able to establish the nexus necessary to fend off a legal challenge based on the takings and due

process clauses. However, amendments may have cured these ills by the time this article is published.

Similarly, sunset zoning provisions could result in takings. Under sunset provisions, properties revert to a residential or other holding zoning category if development does not occur within a specified period of time. If the reversion leaves the property owner, even temporarily, without an economic use of his property, the State or local government may be required to compensate him.

Before the *First Church* decision, this might have been viewed as a temporary or "correctable" taking, which did not justify compensation. *First Church* makes it clear that temporary takings are compensable.

Developers should see the takings cases as putting them on a more equal footing with the governments that regulate them. Local governments, especially in small states, are rarely held legally accountable for questionable conduct. Lawsuits are rarely filed against local governments because local legislators and administrators don't like to be sued. A developer who will often have more than one matter pending before a given government body will not want to risk creating an unfriendly environment.

Developers have also been reluctant to file suit because the remedy available in the past—corrective action—was unsatisfactory. Litigation is also expensive and time consuming. Many times it is easier to wait and start over. The takings cases may alter this logic. They offer a developer the possibility of recovering monetary compensation for the lost opportunity cost of a transaction or development delayed or halted by improper land use regulation.

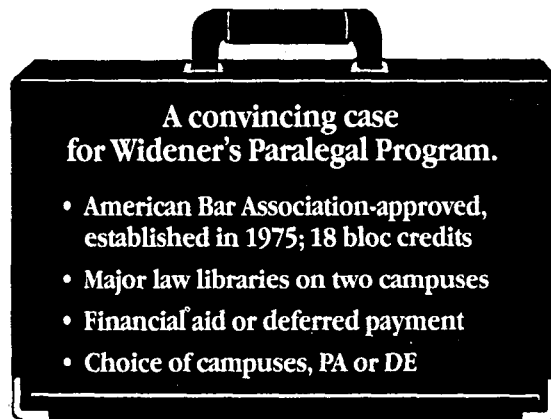
If the spate of decisions in 1987 have any lasting impact, it may be to stimulate corrective legal actions, which would previously have been viewed as fruitless. If the prospect of monetary compensation outweighs the fear of reprisal, developers may be more willing to fight.

The takings cases should also encourage proper procedures in handling land use matters. Careful government entities that guard the propriety of the process will forestall such lawsuits.

In his dissent to the *First Church* decision, Justice Stevens predicted that the decision would spark a "litigation explosion." Whether that happens or not, the takings cases of 1987 will leave a lasting impression on the law. After fifty years of a judicial "four corners" stall, the players are being allowed to play the game the way it was meant to be played—on the merits of each case. ■

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Quality Of Life: The Legislation

Francis J. Murphy

In December, 1987 and January, 1988, after more than six months of public debate, the Delaware General Assembly passed eleven bills collectively referred to as "The Quality of Life" legislation. All have since been signed into law by Governor Michael N. Castle. My purpose here is to outline briefly each bill for those unfamiliar with the legislation.

THE QUALITY OF LIFE ACT OF 1988

The cornerstone of the legislation is The Quality of Life Act of 1988 ("the Act"), House Substitute No. 1 for House Bill 391 (66 Del. Laws ch. 207).¹ Its stated purpose is "the establishment and implementation of comprehensive planning programs to guide and control future development" in each county.

The opening paragraph lays out clearly the intent of the drafters:

[T]o encourage the most appropriate use of land, water, and resources, consistent with the public interest and [to enable Delaware's three counties] to deal effectively with future problems that may result from the use and development of land within their jurisdictions.

To that end the Act seeks "to encourage and assure coordination of planning and development activities of units of County government, municipalities, regional planning agencies and state government." And to avoid the problems that stemmed from a lack of planning in the past, the Act provides that, "no development ... shall be permitted except in conformity with the land use map or map series and with County land development regulations enacted to implement ... the adopted comprehensive plan." (emphasis added).

Mandatory Comprehensive Planning

Each county must prepare a "comprehensive plan" or amend its existing plan

to meet the standards of the Act. These plans will govern the use of development of all unincorporated lands within each county, excluding incorporated municipalities, such as the City of Wilmington.²

Each county government must designate a local planning agency to draft the comprehensive plan in conjunction with public hearings. After the plan is drafted, at least one additional public hearing must be held before the county governing body votes on adoption of the plan.

Mandatory Elements Of The Comprehensive Plan

Each county's comprehensive plan must include the following "elements": (1) a future land use plan element, which shall include a land use map or map series showing the proposed distribution, location, and extent of the various categories of land use, (2) a circulation element, depicting the locations of existing and proposed major thoroughfares, (3) a water and sewer element, (4) an element for the conservation, use, and protection of natural resources, (5) a recreation or open space element, (6) a housing element, including housing for moderate and low-income families, group homes, and foster care facilities, and finally, (7) an intergovernmental coordination element, demonstrating the effects of the plan on municipalities and adjacent counties.

Capital Improvements Plan

Similarly, each county is required to adopt a Capital Improvements Plan ("CIP"). The CIP must include provisions for the construction and extension of public facilities, the estimated cost, and projected revenues sources. Each county is required to review its CIP annually and modify it as necessary.



Francis J. Murphy, a member of the Delaware Bar, is associated with the firm of Ashby, McKelvie & Geddes in Wilmington. In his capacity as an attorney for the Delaware State Senate, Frank assisted the legislators responsible for studying and drafting the Quality of Life legislation. His direct knowledge of the legislative process as it functioned in the evolution of this important body of statutory law lends force to his account and weight to his comments.

Evaluation And Appraisal

The Act provides that the planning program "shall be a continuous and ongoing process." To reach that goal, each county planning agency is required to report every two years to the Cabinet Committee on State Planning Issues. The report must "present an assessment and evaluation of the success or failure of the comprehensive plan or element or portion thereof" and include "reformulated objectives, policies, and standards" so that the plan may be refined.

LEGISLATION RELATED DIRECTLY TO THE ACT

Five of the bills are, in essence, extensions of the Act, because they build upon its provisions. They will appear as related sections when published in the Delaware Code.³

Adoption And Amendment Of The Comprehensive Plan

House Substitute No. 1 for House Bill 393 (66 Del. Laws ch. 216) sets deadlines for the adoption of conforming comprehensive plans. For New Castle County the deadline is December 31, 1988; for Kent and Sussex December 31, 1990. Each county must update its plan by December 31, 1995, and every ten years thereafter.

(Continued on next page)

DELAWARE STATE SENATE
134TH GENERAL ASSEMBLY
SENATE BILL NO. 303

AN ACT TO AMEND CHAPTERS 26, 49 AND 69 OF TITLE 9 OF THE DELAWARE CODE RELATING TO ZONING AND SUBDIVISION IN SUSSEX, KENT, AND NEW CASTLE COUNTIES, AND PROVIDING A LIMITATION ON THE LIABILITY OF CERTAIN PARTIES SEEKING JUDICIAL REVIEW OF ZONING, SUBDIVISION, AND LAND USE DECISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

WHEREAS, there is concern among members of the General Assembly that citizens and associations of citizens, in the exercise of their legitimate rights to seek judicial review of zoning, subdivision, and land use decisions, might be subjected to unjustifiable threats of retaliatory litigation, that would inhibit the exercise of those rights and thereby have serious detrimental effects upon citizens, and their enjoyment of life and the environment; and

WHEREAS, the General Assembly therefore deems it desirable to enact a law to be known as the "Citizens' Bill of Rights Act" to protect citizens from such threats and to assure that citizens will not be inhibited in the exercise of their rights to judicial review of land use decisions, so that there will be a full and fair opportunity for citizens to be heard;

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapters 26, 49, and 69 of Title 9 of the Delaware Code by adding thereto new sections 2699, 4999, and 6999, respectively, which sections shall read as follows:

"Court Review of Land Use Actions: Limitations on Liability of Individuals and Associations.

Any individual or association of individuals that challenges or opposes a zoning, subdivision, or other land use application, and seeks judicial review of a decision concerning the application in a



"The problem of managing growth has been at the State's doorstep for over 20 years now, and this legislation finally does something about it. It tackles some of the more pressing issues, such as the need for coordinated, county and state-wide planning. However, this is a never ending process, and much remains to be done."

Senator Roger A. Martin

manner prescribed by statute, shall not be liable to any other party to the judicial review for seeking such a review, except for such costs as are expressly provided for by the rules of court."

SYNOPSIS

The purpose of this bill is to protect citizens and civic associations against threats of litigation resulting from the filing of an appeal of a land use decision. This bill provides that individuals and associations of individuals, which seek judicial review of a land use decision, shall not be liable to any other party for bringing such an appeal, provided the appeal is filed in accordance with law. The only exception to this limitation are costs that may be awarded under the rules of the court where the appeal is filed.

Author - Senator Minner
and Senator Martin

Quality of Life
(continued)

Much of the debate in the General Assembly concerned the vote required for a county governing body to amend a comprehensive plan. Ultimately, the view that the counties should be permitted to adopt changes by a simple majority vote prevailed. The rationale was that to require a super-majority vote might concentrate too much power in the hands of a minority, with the result that county governments might become paralyzed in land use decision-making, or be forced to accept undesirable changes in their plans in order to reach legislative compromises.

Highway Capacity

Senate Bill 327 (66 Del. Laws ch. 217) addresses the impact of development on State roadways. It requires each county to enter into an agreement with the Delaware Department of Transportation, no later than June 30, 1988, establishing a procedure to analyze the effects that each rezoning application will have on traffic. The agreement must establish a "level of service suitable to the county and DelDOT," and "provide for the review of traffic impacts according to nationally recognized traffic criteria and ... 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." New Castle County already has such an agreement with DelDOT, and Kent and Sussex are expected to meet the June 30, 1988 deadline.

Rezoning And Subdivision Applications

Senate Bill 301 (66 Del. Laws ch. 198) requires each county planning agency to request input from State and local agencies and affected school districts, whenever it receives a rezoning or subdivision application. Interested agencies and school districts may insist on being given notice of any such application so that they can provide comment. And, if the county's planning agency makes a recommendation that conflicts with information provided by an agency or school district, it must explain its reasons in writing. The intent of the Bill is to require the counties to consider all available information when reviewing a rezoning or subdivision application,

(Continued on next page)

Quality of Life (continued)

and to substantiate any decision that appears to contradict the facts of record.

Notice To School Districts

Because school districts are often most affected by residential development, H.B. 389 (66 Del. Laws ch. 195) requires the counties to give them at least seven days notice of the initial hearing on any residential zoning change, or the initial approval of a residential subdivision plan.

The Citizens' Bill Of Rights Act

Senate Bill 303 (66 Del. Laws ch. 200) gives a measure of protection to those who seek judicial review of a land use application, by limiting their exposure to suits for abuse of process. It provides that they "shall not be liable to any other party to the judicial review for seeking such a review, except for such costs as are expressly provided for by the rules of court."

This provision responds to concerns voiced by Senator Ruth Ann Minner about reported threats against private citizens to inhibit their exercise of the right to appeal land use decisions from the county level to the Superior Court.

(Continued on next page)

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HOUSE OF REPRESENTATIVES 134TH GENERAL ASSEMBLY HOUSE SUBSTITUTE NO. 1 FOR

HOUSE BILL NO. 391

AS AMENDED BY

HOUSE AMENDMENT

NOS. 1 AND 2

AND

SENATE AMENDMENT

NOS. 1, 2, 3 AND 4

AN ACT TO AMEND TITLE 9, CHAPTERS 26, 49, AND 69, DELAWARE CODE RELATING TO COUNTIES AND COMPREHENSIVE PLANNING AND LAND DEVELOPMENT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 26, 49 and 69 of Title 9 of the Delaware Code by a new sub-heading at the beginning of said Chapters to read "Subchapter I" and by adding a new Subchapter II being new Sections 2651 through 2657, Sections 4951 through 4957, and Sections 6951 through 6957 to Chapter 26, 49 and 69 respectively of Title 9 of the Delaware Code which shall read as follows:

"SUBCHAPTER II. THE QUALITY OF LIFE ACT

§01. Short Title: Intent and Purpose

This Chapter shall be known and may be cited as the Quality of Life Act of 1988. It is the purpose of this Act to utilize and strengthen the existing role, processes, and powers of County governments in the establishment and implementation of comprehensive planning programs to guide and control future development. It is the intent of this Act to encourage the most appropriate use of land, water, and resources, consistent with the public interest and to deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of County government can preserve, promote, and improve the public health,

safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.

It is also the intent of this Act to encourage and assure cooperation between and among municipalities, counties and the State and to encourage and assure coordination of planning and development activities of units of County government, municipalities, regional agencies and state government in accord with applicable provisions of law. A growth management plan or policy plan that meets the standards and requirements of this Act shall be an acceptable comprehensive plan. The land use map or map series forming part of the comprehensive plan as required by this Act shall have the force of law, and no development, as defined in this Act, 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.

§52. Scope of Act

(1) Counties shall have power and responsibility:

(a) To plan for their future development and growth.

(b) To adopt and amend comprehensive plans, or elements or portions thereof, to guide their future developments and growth.



"Although the 'Quality of Life' legislative initiatives implemented earlier this year will not immediately resolve the past deficiencies of growth management, it will be the framework of how we will better prepare and plan for the turn of the 21st century."

Representative Steve Taylor

(c) To implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof.

(d) To establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this Act.

(2) Each County government shall prepare a comprehensive plan of the type and in the manner set out in this Act or amend its existing comprehensive plan to conform to the requirements of this Act.

§54. Local planning agency

(1) The governing body of each County government shall designate and by ordinance establish a 'local planning agency'. The governing body may designate itself as the local planning agency pursuant to this subsection. The local planning agency shall prepare the comprehensive plan after meetings to be held after due public notice and shall make recommendations regarding the adoption of such plan or element or portion thereof. The agency may be a local planning commission, the planning department of the County government, or other instrumentality, including a countywide planning entity established by special act or council of local government officials, provided the composition of the council is fairly representative of all the governing bodies in the county.

(2) The governing body or bodies shall appropriate funds for salaries, fees, and expenses necessary in the conduct of the work

of the local planning agency and shall also establish a schedule of fees to be charged by the agency. To accomplish the purpose and activities authorized by this Act, the local planning agency, with the approval of the governing body or bodies and in accord with the fiscal practices thereof, may expend all sums so appropriated and other sums made available for use from fees, gifts, state or federal grants, state or federal loans, and other sources; however, acceptance of loans must be approved by the governing bodies involved.

(3) The local planning agency shall have the general responsibility for the conduct of the comprehensive planning program. Specifically, the local planning agency shall:

(a) Be the agency responsible for the preparation of the comprehensive plan and shall make recommendations regarding the adoption of such plan or element or portion thereof consistent with existing county laws or regulations. During the preparation of the plan, and prior to any recommendation for adoption, the local planning agency shall hold at least one public hearing or public meeting, on the proposed plan or element or portion thereof. The local planning agency may designate any agency, committee, department, or person to prepare, revise, monitor and oversee the effectiveness and status of the comprehensive plan or any element thereof. Prior to adoption of the proposed comprehensive plan,

(Continued on next page)

Quality of Life (continued)

LEGISLATION SPECIFIC TO NEW CASTLE COUNTY

New Castle County Zoning Regulations

Senate Bill 302 (66 Del. Laws ch. 199), written by Senator Thomas B. Sharp corrected what was viewed as an undesirable deficiency in the Delaware Code relating to zoning regulations in New Castle County. Unlike the comparable provisions for Kent and Sussex (compare 9 Del. C. chs. 49 and 69, respectively), enabling legislation for New Castle County did not require that zoning regulations be in accordance with the county comprehensive plan. The practical effect was that, while comprehensive plans in Kent and Sussex had the force of law, in New Castle County the comprehensive plan was considered only a guideline, which could be disregarded in making land use decisions. The Bill corrects that discrepancy by requiring that New Castle County zoning regulations accord with the comprehensive plan.

Use Variances in New Castle County

Public hearings brought to light abuses under 9 Del. C. §1352, which permitted the New Castle County Board of Adjustment to grant use variances, whereby landowners engage in uses prohibited under zoning categories applicable to their property.

House Bill 392 (66 Del. Laws ch. 197) requires that henceforth all use variances in New Castle County be approved by the elected members of the County Council, and only after a favorable vote by the Board of Adjustment. The law further provides for advance public notice of Council meetings when a variance is to be voted upon, and notice to give affected State agencies an effective voice in the decision-making process.

With the enactment of the Quality of Life legislation, Delaware has taken a major step in addressing the problems created by economic development and population growth. By planning for the future, the State is in a position to make optimum use of its resources in providing the best possible life for its citizens. County comprehensive plans, applied in conjunction with planning at municipal, State, and regional levels should achieve the aims of the Quality of Life enactments.

(Continued on next page)

Quality of Life (continued)

It should be remembered, however, that any plan, even a plan that has the force of law, is only a tool in the hands of those who will shape the Delaware of tomorrow. While the preparation of the comprehensive plan for each county is well underway, the tasks of completing the plans and applying them still remain. Much work is required on the part of responsible elected officials and employees of government, at both the State and local levels. Input is needed from business people and developers; the men and women who provide the goods and services and the buildings and homes that help make up our quality of life. Most importantly, the process requires the input of an informed citizenry, that is active in the expression of its priorities, needs, and desires. Working together, these groups who made the Quality of Life legislation possible, can make the Delaware of tomorrow a reality. ■

¹The Act appears to have been drawn along the same lines as the Florida Local Government Comprehensive Planning and Land Development Regulation Act, 8 Fla. Stat. Ann. §163.3161 et seq.

²Municipalities are nevertheless required by Delaware law to engage in comprehensive planning. See 22 Del. C. §303 (municipal zoning regulations must be in accordance with a comprehensive plan).

³Not discussed are House Bill 390 (66 Del. Laws ch. 196) and Senate Bill 305 (66 Del. Laws ch. 202), which address the statewide problem of erosion and sediment control, and Senate Bill 304 (66 Del. Laws ch. 201), which extends the time in which the New Castle and Kent Planning agencies are required to give certain reports on zoning matters.

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H.B. No. 391 (continued)

the governing body shall hold at least one public hearing, with due public notice, on the proposed plan or element thereof. Final recommendation of the adoption of such plan to the governing body shall be in accordance with existing County procedures, or absent such procedures, shall be the responsibility of the local planning agency.

(b) Review proposed land development regulations, land development codes, or amendments thereto, and make recommendations to the governing body as to the consistency of the proposal with the adopted comprehensive plan.

(c) Perform any other functions, duties, and responsibilities assigned to it by the governing body or special law.

§55. Required and optional elements of comprehensive plan; studies and surveys.

(1) The comprehensive plan shall consist of materials in such descriptive form, either written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.

(2) Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process.

(3) A capital improvements plan covering at least a five year period shall be developed in accordance with the adoption of, and be consistent with, the comprehensive plan. The capital improvements plan shall be designed to consider the need for and the location of public facilities in order to encourage the efficient utilization of such facilities and set forth:

(a) Principles for construction, extension, or increase in capacity of public facilities, as well as principles for correcting existing public facility deficiencies, which are necessary to implement the comprehensive plan.



"I am disappointed in the Quality of Life Legislation, because, in my view, it did not go nearly far enough in addressing our highway problems and the uncontrolled growth throughout the State in general."

Senator Thomas B. Sharp

(b) Estimated public facility costs, including a delineation of when facilities will be needed, the general location of the facilities, and projected revenue sources to fund the facilities.

(c) Standards to ensure the availability of public facilities and the adequacy of those facilities.

(d) The capital improvements plan shall be reviewed on an annual basis and modified as necessary. Corrections, updates, and modifications concerning costs; revenue sources; acceptance of facilities pursuant to dedications which are consistent with the plan; or the date of construction of any facility enumerated in the capital improvements plan may be accomplished by ordinance and shall not be deemed to be amendments to the local comprehensive plan. All proposed improvements to public facilities shall be consistent with the capital improvements plan.

(Continued on page 30)

Sunset Or False Dawn?

(The Paving Stones of Good Intentions)

Devona E.G. Williams

Sunset zoning has appeared in the Delaware General Assembly as part of the "Quality of Life" legislative proposal. Originally introduced as a house bill the draft legislation provides that each county adopt an ordinance whereby zonings would have a life of only 10 years.¹ After that maximum period land would revert to its original zoning status. Moreover, unless developers gave assurance that projects would be completed within this time, approvals for subdivision building and occupancy permits would not be granted.

The house bill gives county governments 60 days to approve an ordinance (sunset zoning) once the bill becomes law. The bill also places a moratorium on rezonings until the county ordinances are adopted.

The plain intent of this legislation is to place some control on the admitted problems of unplanned growth and the perceived ones of speculative rezonings, and to address manifestly inadequate local zoning practices. (Rezonings inconsistent with existing county comprehensive plans in all three counties are seen as contributing factors.) Sunset zoning received a great deal of supportive testimony last fall when the House of Representatives held public hearings and workshops on the "Quality of Life" legislative proposals.

Not surprisingly, "Sunset" enjoys tremendous support from the general public but much less from the development community. The bill, as originally written, was riddled with technical flaws, which could possibly have produced some unintended and undesirable results. Developers strongly suggested that the original draft would have an adverse impact on the zoning process at the county level. The bill might have effectuated a zoning moratorium if a county chose not to enact the mandated ordinance. The legislation could also have inadvertently halted large scale projects, thereby encouraging piecemeal develop-

ment or the relocation of large scale projects to adjacent areas in other states.

On several occasions members of the business community have suggested that this type of proposal might constitute an "unlawful taking", violating the 5th Amendment of the U.S. Constitution. U.S. Supreme Court decisions on this topic do not, however, support the charge. They proscribe only those takings that deny an owner any economic use of his land. The Supreme Court has ruled that the mere destruction of profit potential is not enough to prove the loss of "economically viable use". In other words "the land remains viable for some purpose—even though that purpose may not be what the land owner had intended and even though that purpose may not justify the current owners' actual investment in the property—a taking may not be found".²

The sunset zoning measure is also problematic because it does not address lengthy development projects that extend upwards from 10 to 20 years, nor does it address changes in economic conditions that guide development. Moreover, this bill could cause developers to rush construction to meet deadlines with resulting low quality structures, and if not completed, inappropriate new rezonings. Local planners agreed to the proposals in principle but suggested phased development as an alternative. The development community also appears to support this approach. Others urge sunset zoning at the "front end" of the development process, whereby development would commence not later than 2 years after plan approval.³

In light of these issues raised during public testimony and by research, the House Land Use and Economic Development Committee recommended a revised bill designed to meet most of the objections. The new provisions would include:



Devona Williams is a legislative assistant to the Delaware House of Representatives. She also functions as an analyst and consultant to that body. She has been previously a Senior Planner with the Division of Planning, Research and Evaluation, Department of Health and Social Services and a U.S. Presidential Management Intern with, among other bodies, the National Aeronautics and Space Administration. Here in Delaware Mrs. Williams has accumulated an impressive record of community service, including membership on the Delaware Commission on Women, the Chairmanship of the Retired Senior Volunteer Program of Greater Wilmington Advisory Council, Inc., and various expert roles with the Junior League, the University of Delaware, and the Delaware Association of Public Administration. She is presently pursuing a doctoral degree in Urban Affairs at the University of Delaware.

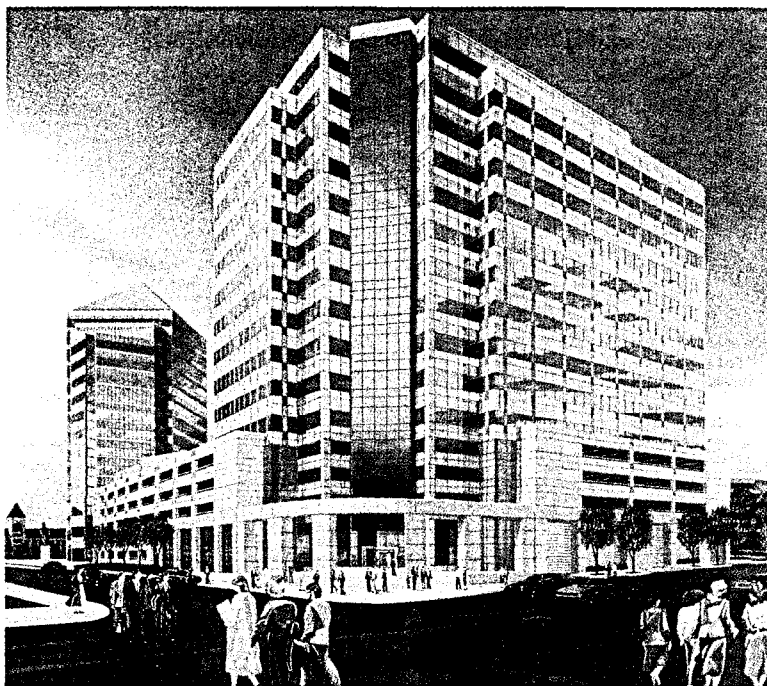
- *Replacement of the automatic reversion provision after 10 years, including a timetable requirement.* The developer would be required to propose a timetable and to adhere to it. It would specify target dates for construction and project completion.
- *A mechanism for review of the project progress and recall or stop-work provision to be allowed by the county planning department technical staff if the project failed to meet technical requirements.*

This type of legislation is an effort to improve the quality of life by managing growth and controlling unplanned development and sprawl. Many argue that by enacting this sort of legislation the state encroaches upon the role of local government in land use policy decision making. State proponents argue, however, that this type of legislation reasserts

(Continued on next page)

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Sunset Zoning (continued)

control needed to "get things back in order."

Yet others suggest this type of legislation is not properly rooted, and that it is only a temporary and even more troublesome solution to overdevelopment. Put another way, are we barking up the wrong tree? For example, perhaps the inadequate highway system contributes more to development woes—or possibly out-of-date comprehensive development plans should be updated and reformed. In Delaware some of these measures are already being addressed in other legislative proposals, and it is certainly not clear what the impact of such proposals in combination might be.

Locally, there is some experience in sunset zoning. The City of Newark enacted a regulation of this sort and found it unworkable because it forced the rezoning of properties back to what had become inappropriate designations. The reversion element also was difficult to monitor. The City rescinded its original ordinance and amended its regulation to sunset subdivision and building permits instead of the rezonings. This was achieved by instituting a 5 year subdivision time limit and a building permit expiration date of 3 months, if work on the project was not done.

Although redrafted several times, the sunset bill remained tabled in the House Land Use Committee at the end of the last session (June 30, 1987). It was not introduced at a special session held December 8, 1987 and called by Governor Castle specifically to deal with the Quality of Life legislative proposals; nor was it dealt with in January, 1988.

For many of the reasons mentioned, the original proposal and its many redrafts were too complicated and problematic to lend themselves to compromise during the joint meeting held by the House and Senate Committees before the special session.

This measure, though stricken, is not a dead issue. It is quite possible that we will see some version of the bill brought before the Delaware General Assembly in the near future. Public sentiment and local planning authorities support the underlying principles and may eventually exert the pressure needed to draft a less troublesome and more realistic version. ■

¹H.B. 284, 134th General Assembly, An Act to Amend Title 9 of the Delaware Code Relating to Sunset Zoning. Sponsor: Representative Taylor

²Clifford Weaver, "The Taking Issue: A Practical Framework for Analysis", October, 1987.

³Citizens Report on the Quality of Life Initiatives of 1987", Citizens Committee, September 1987.

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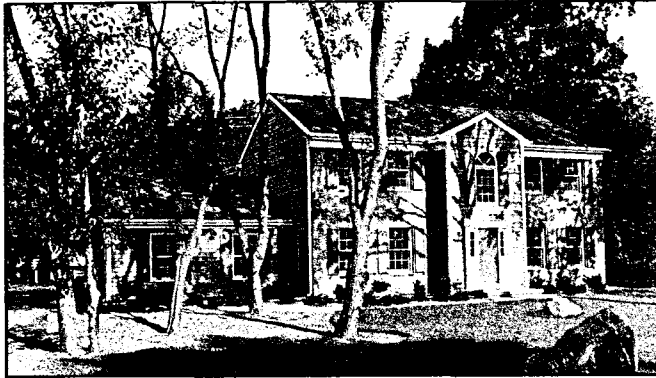
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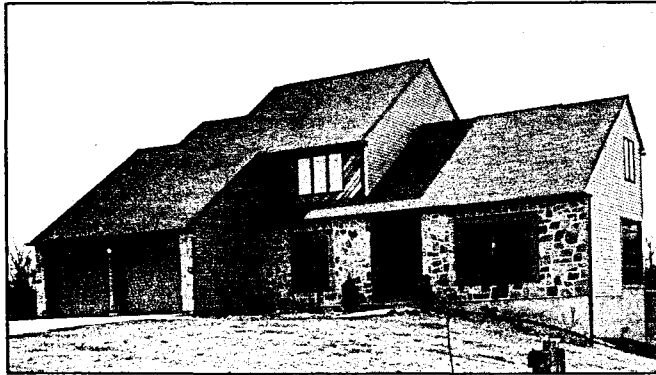
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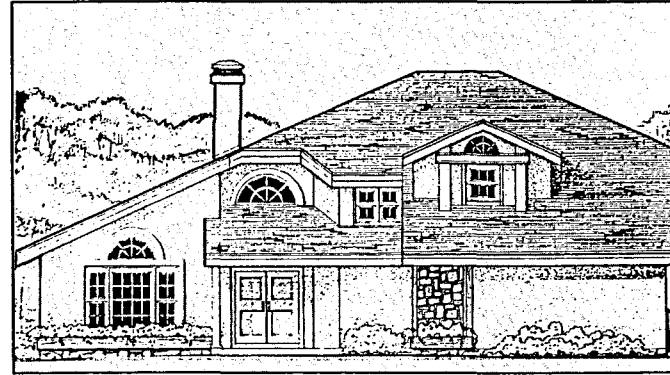
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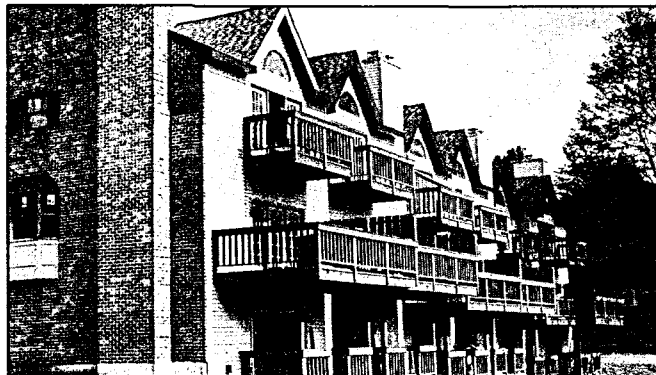
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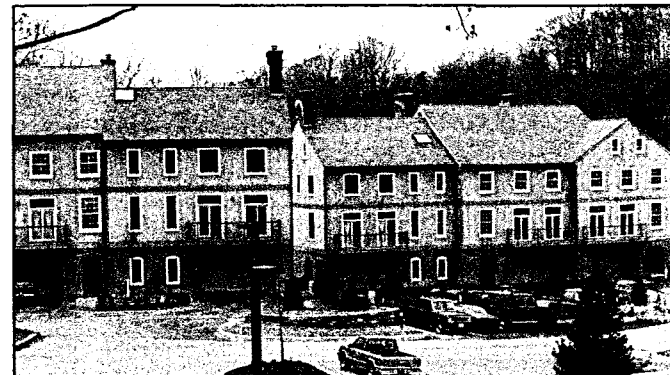
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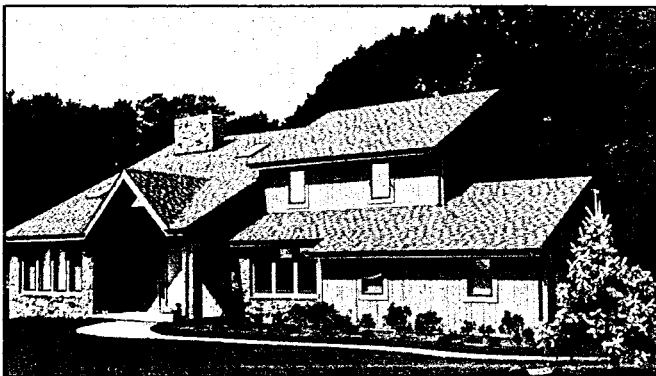
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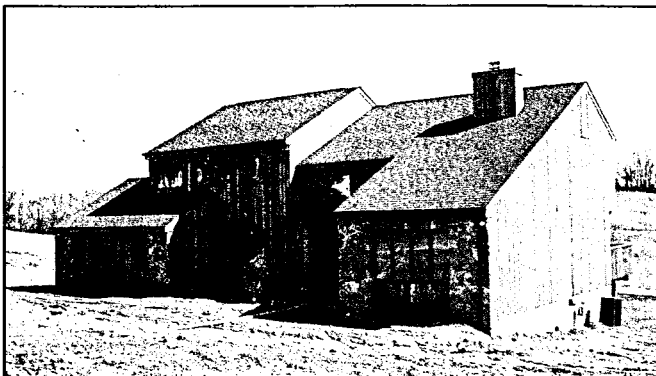
Evergreen: Semi-detached homes with 2-car garages off Rt. 896 between Carpenter State Park and Newark Country Club. Built by Baldo Development. From \$141,900.



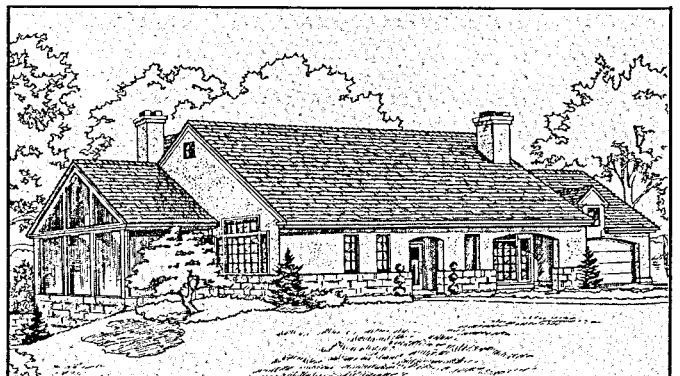
Ramsey Ridge: Single-family homes by seven quality builders on acre-plus sites in rolling countryside off Old Wilmington Road in Hockessin. From \$350,000.



Ridgewood Glen: Three styles of single-family homes with numerous features in secluded area off Old Paper Mill Road opposite Curtis Paper Mill in Newark. From \$179,900.



Thornberry: Only 19 custom homes off Old Wilmington Road in rolling countryside of Hockessin. Built by Williams Custom Homes. From \$290,000.



Wayridge: Luxury single-family homes in cluster community on beautiful 150-acre site off Way Road near Centreville. Built by Bancroft Builders. From \$500,000.

H.B. No. 391
(continued)

(4) Coordination of the comprehensive plan with the comprehensive plans of municipalities within the county, adjacent counties, and applicable state regulations and policy shall be an objective of the comprehensive planning process. To that end, in the preparation of a comprehensive plan or element thereof, and in the comprehensive plan or element as adopted, the planning agency shall include a specific policy statement or coordinated mapping element indicating the relationship of the proposed development of the area to the comprehensive plans of municipalities within the county, adjacent counties, and applicable state regulations and policy as the case may require.

(5) The comprehensive plan and its elements shall contain policy recommendations for the imple-

mentation of the plan and its elements.

(6) The comprehensive plan shall include:

(a) A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for such activities as residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. The plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map of map series which shall be supplemented by goals, policies, and measurable objectives. Each land use category shall

be defined in terms of the types of uses included and standards for the density or intensity of use. The future land use plan shall be based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services. The future land use plan may designate areas for future planned development use involving combinations of types of uses for which special regulations may be necessary to ensure development in accord with the principles and standards of the comprehensive plan and this Act. The land use maps or map series shall generally identify and depict historic district boundaries and shall designate historically significant properties meriting protection.

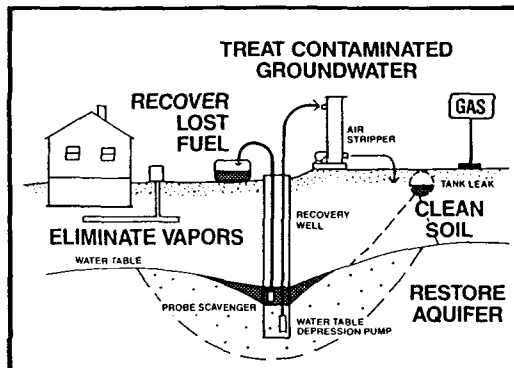
(b) A circulation element which examines transportation routes and has been received and reviewed by the Department of Transportation. The element shall contain a map series depicting the locations of existing and proposed major thoroughfares and transportation routes as proposed by the Delaware Department of Transportation's long-range plan.

(c) A water and sewer element correlated to principles and guidelines for future land use, indicating ways to provide for future potable water, and wastewater disposal for the area. County government, in conjunction with the state, shall assess their current, as well as projected, water needs and sources. The element shall describe the problems and needs and the general facilities that will be required for solution of the problems and needs. The element should be consistent with approved areawide wastewater treatment plans.

(d) A conservation element for the conservation, use, and protection of natural resources in the area and which results in the identification of these re-

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"I view the Quality of Life legislation as only the first step on a long road. I am deeply concerned about its failure to address adequately the problem of infrastructure deterioration, which is perhaps the greatest economic problem facing this State and this Nation. Particularly troubling is the absence of funding initiatives at the State level for capital projects other than highways."

Senator Ruth Ann Minner

sources. At a minimum, the element shall consist of such natural area classifications as wetlands, wood uplands, habitat areas, geological areas, hydrological areas, floodplains, aquifer recharge areas, ocean beaches, soils, and slopes. The land use map or map series contained in the future land use element shall generally identify and depict natural areas classifications, such as those enumerated in this section. The land uses identified on said maps shall be consistent with applicable State laws and regulations. Identification and depiction of the above shall be based on the best topographic maps and other information available from state and federal agencies or other sources that the County deems appropriate.

(e) A recreation and open space element indicating a comprehensive system of public and private sites for recreation including, but not limited to, nature preserves, parks and playgrounds, parkways, water bodies including beaches and public access to beaches, open spaces, and other recreational facilities. A County recreation and open space plan is acceptable in lieu of a recreation and open space element. Said County recreation and open space plan should be consistent, however, with the comprehensive land use plan.

(f) A housing element that is consistent with County housing plans, standards, and principles.

Such housing plans shall be in accordance with State and Federal rules and regulations and the housing plan or housing element of the Comprehensive Plan shall include the following:

(1) The provision of housing for existing residents and the anticipated growth of the area.

(2) The elimination of substandard dwelling conditions.

(3) The structural and aesthetic improvement of existing housing.

(4) The provision of adequate sites for future housing, including housing for low-income and moderate-income families, group home facilities and foster care facilities with supporting infrastructure and public facilities.

(5) Provision for relocation housing and identification of historically significant and

other housing for purposes of conservation, rehabilitation, or replacement.

(6) The formulation of housing implementation programs.

(g) An intergovernmental coordination element of the comprehensive plan shall demonstrate consideration of the particular effects of the plan, when adopted, upon the development of municipalities within the county, adjacent counties, or on the applicable state regulations.

(8) The comprehensive plan may include the following additional elements, or portions or phases thereof:

(a) A public buildings and related facilities element showing locations and arrangements of civic and community centers, public schools, hospitals, libraries, police and fire stations, and other public buildings.

(b) A recommended community design element which may consist of design recommendations for land subdivision, neighborhood development and redevelopment, design of open space locations, and similar matters to the end that such recommendations may be available as aids and guides to developers in the future planning and development of land in the area.

(c) A general area redevelopment element consisting of plans and programs for com-

(Continued on next page)

"Achieving a balance of economic and environmental concerns is the greatest challenge we face. Sustaining a solid economy with prudent growth, and at the same time, preserving our natural resources will require cooperative planning among all levels of government."

Senator Bill Slatcher



H.B. No. 391
(continued)

munity redevelopment, including housing sites, business and industrial sites, public buildings sites, recreational facilities, and other purposes authorized by law.

(d) A safety element for the protection of residents and property of the area from fire, hurricane, or man-made or natural catastrophe.

(e) A historical and scenic preservation element.

(f) An economic element setting forth principles and guide-

lines for the commercial and industrial development, if any, and the employment and manpower utilization within the area.

§56. Evaluation And Appraisal Of Comprehensive Plans

(1) The planning programs shall be a continuous and ongoing process. The local planning agency shall prepare periodic reports on the comprehensive plan, which shall be sent to the Cabinet Committee on State Planning Issues once every two (2) years after the adoption of the comprehensive plan. The Cabinet Committee and its Advisory Panel shall meet no later than six months after receipt of such reports to consider land use trends and changing conditions as they impact upon existing pertinent County and State policies. It is the intent of this Act that periodic updates on amendments to and the implementation of adopted comprehensive plans be communicated through the evaluation and appraisal reports to ascertain trends, monitor implementation and foster on-going coordination.

§57. Legal Status Of Comprehensive Plan

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

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Environmental Give and Take: From Strife to Progress

Richard P. Beck

Ten years ago, the State of Delaware had major problems. Unemployment and income tax levels were unacceptably high. State revenues were down and there were deficits. Delaware's credit rating fell. In its zeal to protect the coast, Delaware had earned a national anti-business reputation, parodied on Candid Camera by the mock closing of the Delaware border.

Then a program for strong economic development was put in place. With bipartisan support of four General Assemblies and two Administrations, Delaware achieved a remarkable turn-around. Today unemployment is extraordinarily low. Income taxes have been cut five times. The State's credit rating has improved. Budget surpluses are making more funds available for social programs and capital improvements.

Trouble In Paradise

The very growth and economic development that has produced our present enviable quality of life is said to be threatening it with unbearable traffic congestion and lack of open space. The State blames the Counties for poor growth management due to outdated comprehensive plans. The Counties blame the State for inadequate highway funding and revenue sharing. Everyone accuses developers of causing too much rapid growth without regard for neighboring residents and infrastructure strains.

...we must also recognize that funds that should have gone into road construction during the past ten years have instead been returned to us in the form of five successive income tax cuts.

This is the context in which the Castle Administration announced its Quality of Life Initiatives last June. The uneasiness that greeted them in the real estate

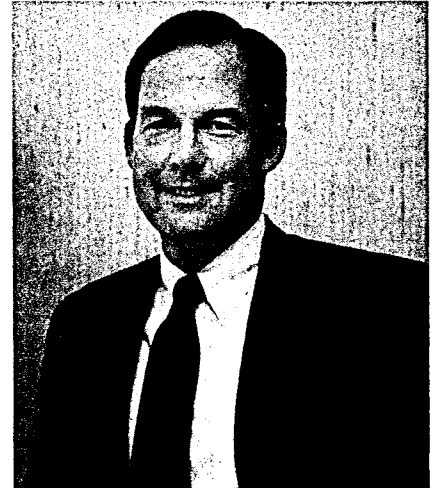
industry rose rapidly to full-scale alarm throughout the business community, as various civic groups seemed intent on transforming the Governor's goal of "better growth management" into a program for stopping development.

Fortunately, sound judgment and a spirit of constructive cooperation have prevailed up to this point among members of the General Assembly, the Administration, and responsible representatives of both business groups and civic associations. As a result, the "first tier" of Quality of Life legislation has been enacted in a form that will improve growth management without derailing the economy.

At a minimum, business groups, civic associations, and government must accept their responsibilities for the crisis, while retracting the blame they have unfairly placed on others.

The most controversial bills, however, dealing with impact fees, sunset zoning, and highway capacity, have yet to be brought before the General Assembly. Outside professional consultants who have dealt with these matters in other States and localities are being brought in by the Administration to recommend practical methods of dealing with Delaware's infrastructure needs. But whether their recommendations will be heeded, particularly in an election year, remains to be seen.

Forging a consensus will not be easy under the best of circumstances. It will be impossible in the atmosphere of suspicion, mistrust, and hostility with which different segments of our community presently view each other. Clearing the air requires, at a minimum, that business groups, civic associations, and government accept their several responsibilities for the crisis, while retracting



Richard P. Beck is a member of the firm of Morris, James, Hitchens & Williams, where he has practiced commercial real estate law and related litigation since 1969. He obtained his LL.B. from the University of Virginia School of Law, after graduating cum laude from Trinity College in Hartford, Connecticut. He has recently concluded a two year term as President of The Committee of 100, a local organization of businesses and professionals interested in the State's economic development and fiscal condition.

the blame they have unfairly placed on others.

No one group or person can hope to understand and accurately sort out all of the complex emotions at play. But open and honest communication of how even one participant sees the responsibilities of his own and other groups, may at least serve to initiate the dialogue that must occur between the various segments of our community before we achieve a consensus. I make the following observations with that goal in mind.

Business Group Responsibilities

The real estate industry must recognize that its best interests will be served

by formulating better land use regulations and encouraging responsible civic associations to participate in land use decisions.

- Regions where the "quality of life" is good will be in demand. Citizens who wish to protect that quality of life in their communities are helping to sustain and increase real property values not only for their own immediate benefit, but also for the ultimate benefit of land-owners, developers, builders, and future end-users of real estate improvements. The constructive input of knowledgeable civic associations should be welcomed and respected, with appropriate safe-guards against abuse.

- The aesthetics of development are immensely important. Citizen dismay over the loss of open land would not be so passionate if the resulting development were visually pleasing and perceived as an asset to the community. By failing to police itself against ugly shopping centers,* office buildings, and residential communities, the land use industry has provoked much of the resentment with which it is now confronted. This does not justify citizen efforts to gain control of aesthetics by means of political pressure, but it does explain their increasing concern with aesthetic considerations, which need to be handled by developers and builders with greater sensitivity.

- The State's infrastructure strains are real. While citizens' concern over traffic congestion frequently seems irrational, they genuinely fear that not enough is being done to prevent the present situation from becoming intolerable. Continued economic development and growth are just as dependent on an adequate infrastructure as the residents' "quality of life." If the real estate community wants sensible solutions to these problems, it must take the lead in dealing with the State's infrastructure requirements and demonstrate its willingness to pay a fair share of the resulting costs. Being forced to act under the gun of ill-advised legislation not only deprives the land use industry of respect, but jeopardizes its opportunity to get the job done right.

**Beauty consists, after all, of something more than a couple of fake Palladian windows in a discount shoe store.*
Editor

Delawareans whose shelter needs have already been met must stop trying to deny new homes, work places, shopping, and entertainment facilities to others who need them, under the smoke screen of attacking developers.

Civic Association Responsibilities

For their part, civic associations must acknowledge and guard against certain "turf" possessive tendencies, which undermine their credibility and legitimize efforts to limit their involvement in land development decisions. For example:

- Citizens must wean themselves from the illusion that developers are "the enemy." Shelter, like food, is a basic human need. Just as agriculture responds to the need for food, development responds to the need for shelter. Most civic associations are organized by residents who owe their communities and their homes to the real estate industry they now so vehemently oppose. Delawareans whose shelter needs have

already been met must stop trying to deny new homes, work places, shopping, and entertainment facilities to others who need them under the smoke screen of attacking developers.

- The spate of letters to the *News Journal* that every major rezoning or subdivision currently seems to provoke, exhorting County Council to save "our" green space by denying the proposed development, should be condemned as purely selfish demands that the land owned by some other Delawarean be appropriated, without payment, for the viewing pleasure of area residents. Instead of supporting this constant pressure upon our system of democracy to degenerate into a "tyranny of the majority," responsible civic associations should guard against it.

- Our roads and highways are ten years behind schedule. New development must certainly contribute its fair share towards the cost of constructing new roads. But we must also recognize that funds that should have gone into road construction during the past ten

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Give and Take (continued)

years have instead been returned to us in the form of five successive income tax cuts. Those of us now living in Delaware have felt free to absorb the existing road capacity made available by prior generations, without replacing it for the use of others. This selfishness should not be further compounded by demands that no new traffic be allowed. The roads are public facilities owned equally by everyone, and should be as readily available to accommodate the future development of new communities as they were to accommodate the past development. Instead of refusing to share any roads that detain rush hour traffic through more than one stoplight change, the citizens must be willing to tolerate the temporary inconvenience of traffic congestion created by their own prior lack of highway funding, while new road construction proceeds. This attitude of "Last one in, close the door" needs to be replaced by a spirit of goodwill and charity towards others on the highways.

Government Responsibilities

Finally, our lawmakers and government administrators must be willing to take the political risk of providing more open leadership in forging a true public consensus. This means that:

- The bias of both the real estate industry and citizens groups must be identified and confronted in an open, honest, and constructive way. The business community will not respect a process that has the appearance of pandering to narrow anti-growth sentiments. The civic associations will not trust a process that seems vulnerable to special interest pressures.
- Instead of dealing separately with each segment of our community, the government should relinquish its role as central power broker between conflicting interest groups, and create instead a context in which responsible business and civic representatives can work through their differences and reach a true consensus with the government's help.
- The final form of all proposed legislation should be available for public

scrutiny and comment well in advance of its placement on the legislative agenda. Even the appearance of a late June "legislative blitz" must be avoided to ensure continued public confidence.

The National Council on Public Works Improvement, established by Congress late in 1984, has recognized that the entire nation's infrastructure system just barely meets current demands, and that the need for additional infrastructure spending comes at a time when federal funding has declined and public resistance has increased. Our quandary in Delaware is not unique.

Stopping growth will not solve the problem. Aging infrastructure components will ultimately have to be replaced in any event. And in New Castle County, forcing new home construction to move across the State line into nearby Salem, Cecil, and Chester counties while confining office construction to the City of Wilmington, will simply lengthen the time and distance that commuters must travel on the county's highways during peak traffic hours, without decreasing the number of cars on our roads.

Good schools and libraries, efficient roads, adequate water supplies, and effective waste disposal systems are fundamental not only to our present quality of life, but also to our nation's future productivity and ability to compete in the global marketplace. The February 22, 1988, issue of *Newsweek* featuring "The Pacific Century" predicts that the Japanese alone by 1995 will hold American dollars equal to ten percent of our country's total assets. Coincidentally, the February 29, 1988 issue of the *Wall Street Journal* discusses "Reagan's Legacy: America for Sale." Without being unduly alarmist, we must recognize that continued decline in our country's productivity does not bode well for the future. Each community must do its part in providing the means to reverse this trend.

Delaware's ability to formulate legislation that serves as a model nationwide has been demonstrated repeatedly in such diverse fields as corporate law, banking and insurance, family law, and welfare reform. With a proper grasp of what is at stake, government, business groups, and citizens can make another significant contribution by finding innovative solutions to our infrastructure needs. ■



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The Philosophies of Competing Ideas

An Environmentalist View

Carroll F. Poole

It frequently happens that fundamental facts become truisms and clichés because they are so self-evident. But that very obviousness can be an obstacle to considering the consequences that flow from them. Such is the case with the proposition that, as of 1988 at least, this Earth is the only part of the Universe habitable by humans.

From this sole starting point one can trace all environmentalist thought in its rich elaboration and its flexible application to specific problems. Examples of both abound in the environmentalist approach to real estate planning and zoning.

There is a competing claim—sometimes even clothed with theological respectability—that mankind has been given dominion over the Earth and all the other creatures therein. This has often led to the assumption that the exercise of human control is both a right and, by definition, an improvement of the natural world. Thus the damming of the Colorado is referred to as the “taming of the river” and the filling of a marsh is often called a “reclamation project”.

The tensions between these differing points of view can best be examined by reference to specifics, many but not all of which involve techniques of public control or private enforcement other than traditional zoning.

For years the scientific community has been telling us that the United States is so heavily industrialized that it produces more carbon dioxide than our trees and other flora can process into organic matter and oxygen. In a word we are a debtor nation importing the very stuff of life produced, for example, in Canada and in tropical rain forests. Thus the World Bank is being asked to be discriminating in its development

loans so that the rain forest will not be destroyed for the sake of two or three years of meager crops. And yet those who live in the rain forests and nearby areas know they need more food. They also covet the gold that may be deposited in the Amazon Valley.

Recently a United States District Court sustained a decision of the Environmental Protection Agency, refusing to permit a developer to locate a shopping mall in a red maple swamp in Attleboro, Massachusetts. The Federal Clean Water Act authorizes the EPA to prevent wetland filling that would have environmentally unacceptable effects. The desirability of a certain number of shopping centers was not challenged; only the locations.

The more familiar zoning approach to environmental problems can be followed in detail and seen in action at the sessions of the New Castle County Council or before specialized administrative bodies. This is where confrontations between civic associations and developers, industry representatives, natural area advocates, and many other groups, are most visible and raucous.

On the local level the emotions flared over an application to rezone a small tract of land on the Lancaster Pike West of Wilmington adjacent to the retirement community known as Cokesbury Village. The developer sought rezoning for greater density housing. The outpouring of area residents was large, and the objections vociferous, principally because of fears of increased traffic on

Lancaster Pike. Counsel for the applicant suggested that existing zoning already permitted activities the residents would find more distasteful than those proposed in the application. The newspaper report permitted the inference that all parties left the hearing annoyed with their opponents.

An entirely different type of planning environmentalists approve is the outright removal of land from the general real estate market. There are a number of ways in which this can be accomplished: gifts to a public body (Brandywine Park within the City of Wilmington), purchases by a public body (Brandywine Creek State Park by the State of Delaware with private interests assisting), and purchases by a private conservation organization (the Great Cypress Swamp at the Delaware-Maryland Line by Delaware Wild Lands, Inc.). Certainly in the last two instances there were substantial competing pressures to open these parcels to one sort of commercial development or another.

There are common themes in the positions taken by environmentalists. One is the long view. Some, especially economists, trivialize this approach, saying “In the long run we will all be dead.” Certainly! And the long run most of us will have descendants to whom environmentalists would be ashamed to bequeath fouled nests. The Earth is still the only home we have; there is a moral obligation to leave an inhabitable home for those who follow us.

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Carroll Poole, a member of the Delaware Bar and one of the Editors of this magazine, belongs to a refreshing minority among those engaged in the environmental debate: he is both unsentimental and informed. Mr. Poole is one of the original organizers of the Delaware Nature Education Society and of the Delmarva Ornithological Society. He is now working actively with the latter Society in the preparation of a projected volume on the migration and nesting records of birds in Delaware.

(Continued from previous page)

A second theme is that the health of natural wild populations, whether tigers or tiger lilies, is a clear indicator of the health of the world in which humans will either survive or perish. When food fish and crabs disappear because there is no marsh in which they can breed, human food stocks are diminished. The position of the environmentalist is one of rigorous attention to the main chance, not maudlin sentimentality.

A third and final theme is flexibility. Constructive alternatives to cutting down rain forests are available and the World Bank can help to finance them. Shopping malls need not be banned, merely relocated. Housing of lesser density can still be produced. Cooperation with highway authorities can result in housing patterns compatible with the transportation network. Lands set aside can serve many useful purposes, as does the Walter S. Carpenter, Jr. State Park, where recreational facilities and largely unaltered areas exist side by side.

The reasonable environmentalist looks at the world as a complex place in which there are many conflicting essential interests, all of which require respectful and constructive attention. Planning and zoning are only two of the many techniques available in resolving the conflicts. ■

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Cars, Cars, and More Cars

Kermit H. Justice

When I was asked to write on Transportation and the Quality of Life for this issue, I debated for a long time about what perspective I should use. Fortunately, I was still undecided when I received in the mail a copy of an article prepared for a discussion paper in the 2020 Consensus Transportation Program. That program is being sponsored by the American Association of State Highway and Transportation Officials (AASHTO), in which I serve as a member of the Executive Board. I felt that the authors of the discussion paper had covered the topic well and that I could not possibly improve very much on their work. Therefore, I asked the Executive Director of AASHTO for permission to present the following precis of this working paper, and received it. My thanks to AASHTO and to the authors of this paper for their insights on the relationship between transportation, land use, and Quality of Life.

Growing Urban/Suburban Congestion

A modern American urban area is a complex web of social and economic relationships in which each strand simultaneously competes with the others. What goes on in one part of a community can often cause ripple effects throughout the urban area.

Nowhere is this relationship more evident than in traffic congestion. Urban and suburban streets, jammed with cars and trucks are like a balloon filled with water. Just when you think you've solved a problem in one area you find that, like the water balloon when you press your hand against its side, all you've done is push the problem into some other part of the community.

Traffic congestion is everywhere. According to the Federal Highway Administration, 40 percent of urban interstate freeways were "congested" during rush hour in 1975. The rate increased to 61 percent in 1985.¹ Two-lane, narrow roads carry traffic volumes more suited for four or five lanes.

Trips that took five to ten minutes a few years ago routinely take 25-30 minutes today. Stop and go traffic has become the norm. But still the problem grows. Why? The simple truth is that most of us are unwilling to make the changes in lifestyle that would ease congestion. We have come to the point where we accept congestion as necessary.²

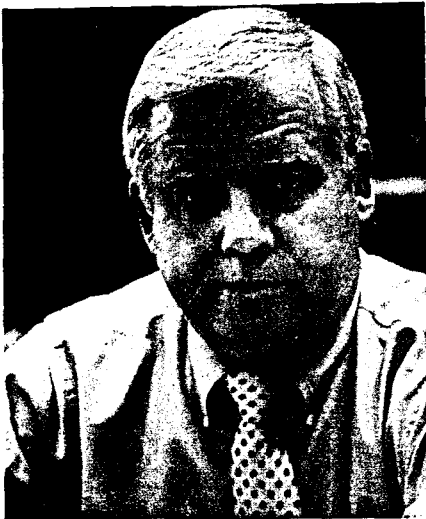
Are we destined to spend hours of our lives floundering in a sea of metal and gas fumes? Traffic congestion is the most significant transportation problem facing us in the next 15 years. Few experts believe there is any quick solution. We are up against changing economic conditions, a cultural "love affair" with the automobile, and a strong history of local autonomy. Traditional methods of dealing with traffic congestion will not meet the challenge.

Let us consider changes in our national life that have increased travel demand over the last 30 years.

Expansion and Growth of Suburban Areas

Over the last 30 years the rates of growth among suburbs, central city, and countryside have altered dramatically. In

(Continued on next page)



Kermit Justice was appointed Secretary of Transportation in January 1979 by then Governor Pierre S. duPont, IV. Reappointed in 1985 by Governor Castle, he has now held this post for more than nine years, during which his diverse accomplishments, buttressed by his extensive business experience, have made him a recognized leader in transportation. His most recent achievement has been to establish a transportation trust fund for the State of Delaware.

More Cars (continued)

1950, suburbs contained 23 percent of the total population, central cities 33 percent, and rural areas 44 percent. By 1980 these figures were reversed causing one urban expert to remark: "The city has turned inside out."³

Exurban areas are independent, urban villages located on the outskirts of major cities. They contain their own "downtowns," shopping and entertainment centers, office parks, and restaurants. Often the centers of these villages contain high-rise office buildings, daytime work force populations that exceed the number of residents, and extreme traffic congestion.⁴

There are several reasons for the growth of these urban villages. People in the United States prefer to live near cities but not in them. They like the range of services and cultural amenities cities offer but they prefer to live in the suburbs, where there is space to move about and room to breathe.⁵ Historically people have lived in cities for economic reasons. That is where the jobs

and stores were. But when it was no longer necessary to live near these activities, because the auto provided greater mobility, people left.

The explosive growth of suburbia is also an economic phenomenon. It is simply cheaper to do business in the suburbs. Construction costs in central cities and suburbs tend to be comparable, but other costs favor a suburban location. So long as these differentials remain, business will be attracted to the suburbs.

In the meantime new jobs have multiplied in suburbia as our economy has shifted from manufacturing to service and information processing. As technology has made it easier and cheaper to communicate and to process information, office buildings have become less dependent on proximity to clients and supporting services. Consequently many service-oriented businesses like accounting, banking, insurance, law firms, etc., have been drawn to suburban cheaper costs and abundant land for parking.

Will this trend continue or are there other factors at work, which will minimize such growth? How long this trend can continue is a matter of debate among planners, developers, politicians, environmentalists, and urban specialists. Leinberger and Lockwood write: "...the trend is already so advanced that it is irreversible."⁶ Others believe that the availability of desirable locations and office space has peaked and growth will be minimal, at least in the short term.

Those who hold to the low growth scenario base their prediction on two factors. First, desirable services such as good shopping and entertainment centers, restaurants, and hotels require a certain "critical mass," a concentration of services. There are only so many locations in a metropolitan area that have the necessary highway accessibility to allow this concentration to take place.

Another deterrent to further expansion is the 1987 tax reform law, which eliminated office buildings as tax shelters for developers. Previously developers would often construct office buildings with little concern over whether they had enough tenants to make a profit. This led to an increase in available office space.

On the other hand there are those who believe that suburban growth will continue because of a general lack of

(Continued on page 42)

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More Cars (continued)

willpower on the part of local officials to say "No" to more jobs and an increased tax base. Jobs and taxes are the soul of local politics. Many governments are facing severe budget problems due to reduced federal aid, anti-tax sentiments, and a growing demand for better services. The only way officials can deal with this is to raise tax revenues (but not tax rates) through new development.

Furthermore, communities are extremely competitive for new jobs, and developers know it. A developer can play off one jurisdiction against another to get the most favorable deal.

The political pressure for growth, coupled with the almost religious devotion we have in this country to the right to use and develop our private property as we see fit, make it highly unlikely that suburban growth will be controllable in the future unless local governments are willing to take stronger regulatory actions.

New Jobs — New Traffic Jams

Since 1980, the growth in the number of people in the labor force has exceeded the growth in the number of persons of working age, and the growth in jobs has been most dramatic in the suburbs. Suburban jobs increased 140 percent between 1960 and 1980. This growth affects congestion because, as Pisarski notes, it is the number of jobs that determines many characteristics of the traffic problems facing us today.⁷

Who have principally filled these new jobs? Baby-boomers, and women. And there are indications that the number of women seeking employment outside the home will increase. First, there is the growth in part-time jobs. (Women are employed in part-time jobs to a greater extent than men.) And part-time work is significant to traffic congestion. First, it spreads out the times at which people commute to work. Second, because transit systems are usually geared to the traditional work day they're not much help for people who work part-time. Without transit or alternative means of transportation, part-time workers must add their own vehicles to the volume of traffic.

Women are likely to continue working because of economic necessity. Increasingly in middle class families women work to maintain their standard of living.

Another factor that will influence the role of women in the work force is the increasing educational requirements of new jobs. According to the National Alliance of Business, 50 percent of all new jobs require education beyond high school and 30 percent require a college degree.⁸ In 1985 women earned 50 percent of all undergraduate degrees and they are steadily increasing their share of advanced degrees.⁹ We can expect women will fill many of the new jobs that require higher levels of education.

The key question we need to ask ourselves as transportation officials is: recognizing the direct link between jobs and traffic demand, are we prepared to live with the increases in traffic that will follow if these new job seekers find employment?

The dispersal of jobs through metropolitan areas has dramatically changed travel patterns both in and through urban areas. "Star-shape commuting paths, long a hallmark of America's cities, are being replaced by a patchwork quilt of crosstown, lateral travel."¹⁰

One of the most unfortunate aspects of the dispersal of economic growth throughout the suburbs is what has been described as "a growing employment mismatch."¹¹ While the suburbs grow and jobs go unfilled, the jobless populations of the central cities remain at double-digit levels. Without an automobile or convenient transit, it is virtually impossible for a prospective worker to take advantage of exurban job opportunities. Furthermore, affordable housing in the suburbs near the jobs is difficult to find, particularly since many of the new jobs pay less than \$15,000 a year. Result: the jobs are being filled by women looking for a second income for the family or by young people living in other less expensive suburbs further away.¹²

This mismatch between job sites and worker residence is one of the major social issues facing urban areas.

Cervero believes that the cause of this mismatch, "can be placed squarely on the nation's deference to market forces in guiding suburban growth in lieu of any kind of strategic siting of jobs and housing."¹³ He contends that high density, village-like communities near major employment locations would help alleviate traffic problems in the suburbs.

Although theoretically this may be a reasonable suggestion, it is fraught with practical problems. The issues of afford-

able housing for the less well paid in high class, exclusive suburbs is political dynamite. Many of these urban villages have spent years trying to keep such developments—and their occupants—out of town. Furthermore, there is no guarantee that if you build such complexes the people living there will also work there, or, for that matter, anywhere.

Commuting is no longer confined to AM and PM peaks. It now can occur throughout the day, six-days per week. Flexible work hours are an easy and effective way for employers to help ease peak hour congestion, but they also put more traffic on the streets during off-peak periods.

Another trend helping to ease the congestion burden is that nine million people work at home for more than 8 hours per week.¹⁴ Although this is a relatively small number, it does reduce the number of trips people need to make. (This could be important with foreseen advances in telecommunications.)

A major change in travel patterns has arisen as jobs and residences have shifted from the city and the origins and destinations of trips have become more suburban.¹⁵ Metropolitan traffic patterns, once predictable, have become random, literally running all over the map.¹⁶

A second major impact on travel patterns has occurred as planners have sought to separate various forms of traffic. In many urban communities, strip development is no longer confined to major roads but is found along the outer edges of shopping center parking lots and service drives abutting major highways. The cumulative effects of a number of such developments can cause just as severe traffic problems as large megacomplexes.¹⁷

Finally, as a result of the growth of suburban employment centers, freeways originally built for thru-traffic around metropolitan areas now carry as many local travelers as long distance drivers.

Americans have not taken to using various forms of transit (buses, rail, vanpools, or carpools) despite the hundreds of millions of dollars spent every year by government and private companies. Between 1960 and 1980, overall use of transit alternatives decreased by over five million commuters.¹⁸

Cars have been around for slightly more than 100 years. In that time the automobile has "evolved into a cog of civilization as vital as the electric light,

the telephone, and indoor plumbing."¹⁹ As dramatic as the growth in jobs has been during the last 12 years—25 million new jobs—the growth in private vehicles during the same period exceeded 46 million.

On the other hand, the demise of the auto's popularity has long been forecast. But the forecasters have been rational, whereas drivers are not: The pundits fail to consider the "psychology of driving" as a factor in the automobile's popular appeal.

Cars are not simply a means of transportation: They are a powerful means of self-expression, an extension of one's self perception and, more important, the self one wants to present to others. Most transportation experts tend to forget this; those who make and sell cars do not.

Sic Transit Transit

Our love affair with the private vehicle has had a dramatic impact on the use of all forms of transit. In 1960, transit accounted for 12.6 percent of all work trips, by 1980 6.2 percent.

Why has transit become so ineffective in meeting our travel needs?

There is the general attitude of the public towards transit as an alternative to their cars. Aside from the psychological aspects of driving, it is still "a truism that people own vehicles in order to use them."²⁰ This would seem obvious, but then the obvious sometimes fails to make much of an impression.

If someone is going to go through the effort and expense of getting a driver's license, shopping for a car, financing it, obtaining insurance, and making monthly payments, he's not going to keep it in the garage and take the bus to work, no matter how much transportation experts want him to. Investment in a private vehicle is simply too great.

Another reason the public shuns transit is that it limits mobility, which today society equates with freedom.²¹ If I take the bus to work, my mobility is restricted. It is difficult to run errands at noon, take a client to lunch, or simply take the afternoon off and go golfing. The fear of being stranded at work is one of the greatest deterrents to using transit.²²

A final factor in the public's general attitude towards transit is embedded in the psychological perception and fulfillment of the auto, mentioned previously. If people see their autos as an extension of their identities they also tend to see public transit as lower-class transportation.

Most transit systems have been rendered ineffective by the dispersal of housing and economic activity throughout the urban area. This has led to much lower densities in the suburbs than in the central city.²³ In order for transit to work it must have relatively dense concentrations of residents at one end of the trip and workers at the other. This is simply not the case with the new urban villages.

The new urban complexes have been designed to be "auto friendly." Most of them feature abundant, often free parking, providing more spaces for cars than there are workers employed in complexes, which are often built on sprawling campuses that discourage walking to bus or subway stations.²⁴

(Continued on next page)

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More Cars (continued)

Many transit systems today offer service that doesn't reach the people who need it most. Transit systems are typically designed for commuting within the central city from the suburb to the central city, but more than 58 percent of the growth in commuting between 1960 and 1980 occurred in the suburb to suburb market.²⁵

Transit is oriented toward the inbound flows during the AM peaks and outbound flows during the PM peaks. This does little to ease the mismatch between job sites and home sites of those in need of jobs. Most communities recognize these problems and offer an array of measures to encourage mass transit, particularly for commuting. Some are using "gentle persuasion" while others are legislating changes. The growth in traffic, the reluctance to use transit, the ineffectiveness of voluntary trip reduction measures can all be directly attributed to Americans' love affair with the automobile. And until we are willing to accept this fact and to

confront our national infatuation with the private automobile we will not unclog either our urban or suburban streets. Instead we will build more highways or in desperation restrict the use of private cars through legislation and local ordinances. ■

¹Gurwitt. "Communities Rethink Growth Policies As Gridlock Snarls The Suburbs." *Governing, Congressional Quarterly, Inc.* December 1987. p. 48.

²"Keeping Cool When Traffic Heats Up." *U.S. News & World Report.* September 7, 1987. p. 27.

³Peter Muller quoted in "It's Not Sub To The Urb Anymore." *USA Today.* November 19, 1987. p. 1A

⁴Leinberger and Lockwood. "How Business Is Reshaping America." *The Atlantic Monthly.* October 1986. p. 43.

⁵"It's Not Sub To The Urb Anymore." *USA Today.* November 19, 1987. p. 2A

⁶Leinberger and Lockwood. "How Business is Reshaping America" *The Atlantic Monthly.* October 1986. p. 52.

⁷Pisarski. *Commuting in America.* Eno Foundation for Transportation, Inc. 1987. p. 19.

⁸"A Critical Message For Every American Who Plans To Work Or Do Business In The 21st Century." National Alliance of Business. Advertising supplement to the *New York Times.* September 1987.

⁹"Women In The Work Force." *The Atlantic Monthly.* September 1986. p. 22.

¹⁰"Unlocking Suburban Gridlock." *APA Journal.* American Planners Association. Autumn 1986. p. 389.

¹¹"Jam Sessions." *U.S. News & World Report.* September 7, 1987. p. 23.

¹²*Ibid.*

¹³Cervero. "Unlocking Suburban Gridlock" *APA Journal.* Autumn 1986, p. 393.

¹⁴Pisarski. p. 56.

¹⁵Pisarski. p. 4.

¹⁶"Jam Sessions." *U.S. News & World Report.* September 7, 1987. p. 23.

¹⁷Cervero. p. 401.

¹⁸Pisarski. *Commuting in America.* Eno Foundation for Transportation, Inc. 1987 p. 47.

¹⁹"The Automobile Turns 100." *U.S. News & World Report.* September 30, 1985. p. 60.

²⁰Pisarski. p. 48.

²¹*U.S. News & World Report.* September 7, 1987. p. 20.

²²Cervero. "Unlocking Suburban Gridlock." *APA Journal.* Autumn 1986. p. 401.

²³Cervero. p. 390.

²⁴Leinberger & Lockwood. "How Business Is Reshaping America." *The Atlantic Monthly.* October 1986. p. 51.

²⁵Pisarski. p. 54.

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The Philosophies Of Competing Ideas: A Citizen's View

Philip D. Cloutier and James T. R. Funk

About four years ago communities throughout Delaware were plunged into a seething caldron of developmental proposals. Lulled by an extended period of moderate growth, the bodies politic and civic were unprepared to deal with the multitude of developmental requests. Both State and local governments had allowed the machinery of land use decision-making to fall into disrepair. For example, in New Castle County the award of "temporary" permits and the uncritical grant of variances for camouflaged rezoning had become worrisome to thoughtful students of land use. The State had abandoned the planning function and the counties had not updated their comprehensive plans for many years.

Recently Governor Castle has taken two steps in reasserting the State role in land planning. In April 1986 he announced the creation of the Delaware Environmental Legacy Program looking to "...a long range plan, one that will assure that Delaware's environmental legacy will be undiminished as we begin the 21st Century". In June 1987 he announced the "Quality of Life Initiatives of 1987" to "provide the means for state and local government(s) to make the right decisions about growth."

Citizens and organized civic groups have also faced up to the challenge of rapid development. They have joined the debate over land use issues and zoning proposals and now participate in the administrative and legislative process at all levels.

In theory, land use decisions should not be made piecemeal. A local government's comprehensive land use and development plan is supposed to provide a balanced prescription for the future. In practice local governments

In practice local governments have either ignored their comprehensive plans or have allowed amendments without thought or careful consideration whenever a rezoning request has conflicted with an existing, if outdated, plan.

have either ignored their comprehensive plans or have allowed amendments without thought or careful consideration whenever a rezoning request has conflicted with an existing, if outdated, plan.

Conflict is not new in land use. Throughout American history citizens and governments have sought to exercise land use control. Even in Colonial times competing philosophies joined issue in the courts. The law has evolved in the direction of harmonizing the interests of the community with the rights of the landowner, restricting the latter in the use and enjoyment of his land for the benefit of the public. These limitations have evolved into what we now know as zoning and comprehensive planning.

Ever more restrictive regulation has invaded that most valuable aspect of land — its highest and best use. The landowner, claiming an absolute right of ownership and unfettered prerogatives in the use of his land, confronts society's no less adamant claim of right to limit public injury resulting from such use.

Last summer a committee of citizens met to discuss the intent and spirit of current land use controls, and in September they issued "A Committee of Citi-

(Continued on next page)



Philip Cloutier, a member of the Delaware bar, is also a professional engineer. He is the Vice President of the Council of Civic Organizations of Brandywine Hundred and the zoning subcommittee chairman responsible for the Brandywine Center (Brandywine Raceway) project. He serves on the Transportation Committee for the Updating of the New Castle County Comprehensive Land Use and Development Plan. Mr. Cloutier holds Baccalaureate and Masters degrees in mechanical engineering from the University of Massachusetts at Amherst, and is a graduate of the Delaware Law School of Widener University. In addition to his membership in the Delaware bar, he is admitted to practice in the Commonwealth of Pennsylvania.



James Funk's credentials for writing this article are solid: Vice Presidency of the Civic League for New Castle County, membership in the Zoning and Executive Committees of the Council of Civic Organizations of Brandywine Hundred, and in the Community Character Committee for the Updating of the New Castle County Comprehensive Land Use Development Plan. Mr. Funk chaired the group that developed the Citizens Report on the Quality of Life Initiatives described in the article. Mr. Funk holds a Baccalaureate degree in business administration and an M.B.A. in transportation economics, both from the American University, Washington, D.C.

Competing Ideas (continued)

zens Report on the Quality of Life Initiatives of 1987 and Legislation". While a great deal of the text was devoted to an analysis of proposed legislation, a more fundamental approach to land use control was articulated in a list of "principles":

- **Citizen participation in Government at all levels is encouraged and expected by those elected.** Delaware, unlike many other parts of our country, gives citizens and organized civic groups an unusually strong voice in the affairs of government through elected representatives: In Delaware a State Representative has an average constituency of about 15,000, whereas in Pennsylvania or New York there are as many as 100,000 residents for each member of the House. Moreover, members of the General Assembly have little staff and must depend on citizens, civic groups, and lobbyists in analyzing legislative proposals.

Citizen participation in government in Delaware is in vigorous good health.

The Environmental Legacy Report urges the State:

To develop a citizenry that is aware of, and concerned about the total environment and its associated problems, and which has the knowledge, attitude, motivations, commitment, and skills to work individually and collectively toward solutions of current problems and the prevention of new ones. (Delaware's Environmental Legacy, Public Review Draft, December 15, 1987, page 146.)

- **Home rule represented by local governments is the best means to allow for citizen participation in land use planning and decision making.** The special interest of citizens in the use of nearby land requires decisions at the level of local government. Land use decisions should be a part of a public (political) process affording those most affected—usually nearby landowners—expression of their views to elected decision makers.

- **Environmental considerations must receive a high priority for the**

general health and overall well being of all citizens. Just about everybody wants a wholesome environment in which the unusual mix of urban, suburban, and rural settings in close and harmonious proximity peculiar to Delaware will be preserved. Unfortunately, there isn't such confidence that environmental considerations have been consistently respected. To emphasize this point, the Environmental Legacy Report identifies the "Urbanization of New Castle County" as one among Delaware's five challenges for the future:

The impact of economic development is no more clearly seen than in New Castle County. Open space is vanishing, traffic congestion is at an all time high and the water and waste infrastructures are becoming overburdened. The county is becoming an example of urban sprawl. Here again coordination appears lacking, decision making occurs incrementally and development planning has not kept pace with development pressures. (at page 158.)

But even in an atmosphere of inadequate preparation for the future, citizens and civic groups persevere in demanding *responsible* growth. Prosperity is essential to paying the bills for environmental quality.

In an era of rapid change and growth the average citizen feels threatened. His home may be his principal asset, imperilled by his neighbor's anti-social enterprise.

- **Proper land use in the vicinity of each citizen's home is a right of all citizens.** In an era of rapid change and growth the average citizen feels threatened. His home may be his principal asset, imperilled by his neighbor's anti-social enterprise. While neither governments nor private citizens have the right to condemn another's property without compensating him, restrictions limiting the value of his property are legitimate so long as there remains some reasonable productive use of his land.

It is difficult for individual citizens or civic groups to avoid the charge of self interest in seeking to restrict development of open space and to limit intense uses that impair the community as a whole. In Delaware, however, civic

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groups are often better balanced and more willing to compromise than are landowners or developers.

- **Economic development should be encouraged to continue to fuel growth and opportunity for Delaware citizens both present and future.** Over the last several years Delaware has enjoyed enviable growth in employment and economic vitality. To the extent consistent with environmental safeguards, further economic growth should be encouraged. The Committee believes that a strong economy can flourish in an environment of managed growth.

- **Infrastructure requirements to support economic development must be provided at a pace sufficient to preserve public safety and well-being.** Prosperity and economic expansion breed enthusiasm (sometimes unreflective frenzy) to share in these good things and to disregard the interests of those not directly benefiting from that prosperity. But surely congested highways, lowered water pressure, inadequate

schools, inadequate fire and police services, tainted water supplies, and polluted air are avoidable consequences of growth. Delaware economic history is too much a legacy of neglect and inattention to the social costs of improperly managed growth, discussed at length most recently in the Environmental Legacy Report.

- **Comprehensive planning and intergovernmental coordination and cooperation are necessary to assure both continued economic development and appropriate land use decision making.** The cozy illusion of effective local land use planning unrelated to other forms of local government planning requires a dose of reality. The key word is *comprehensive*.

Citizens dedicated to harmonious growth will recognize the rights and insist upon the obligations of government, industry, and affected communities in promoting an atmosphere congenial to continued prosperity in a civilized environment. ■

"Vogue Word" Now Buzzword

It sometimes seems that environmental integrity will be purchased at the price of language pollution. "Infrastructure" is a case in point. Its sonorous unintelligibility gives off a comforting whiff of superior technical competence. It is what Fowler calls a "vogue word" and it will surely prosper to the point where we won't be able to see the forest for the infrastructures. This spiffy term should enable a housewife to slip out of her apron and sound as oracular as the Cumæan Sibyl when she talks about recycling aluminum beer cans. We share with the unpretentious and intelligent general reader (this magazine's best friend) our hunch that "infrastructure" stripped of its fuzzy aura of pseudo-science means a sufficiency of fire hydrants and paved turnarounds for DART buses.

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3 Be careful who you hire. You are responsible for the acts of your partners, associates, and employees. Period!

4 Don't keep a client you can't handle. If your

client has outgrown your capabilities, be smart enough to recommend another firm. And, if you can no longer trust a client—withdraw!

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Quality Of Life In Wilmington? Doing Very Nicely, Thank You!

Larry L. Liggett and William E. Ward

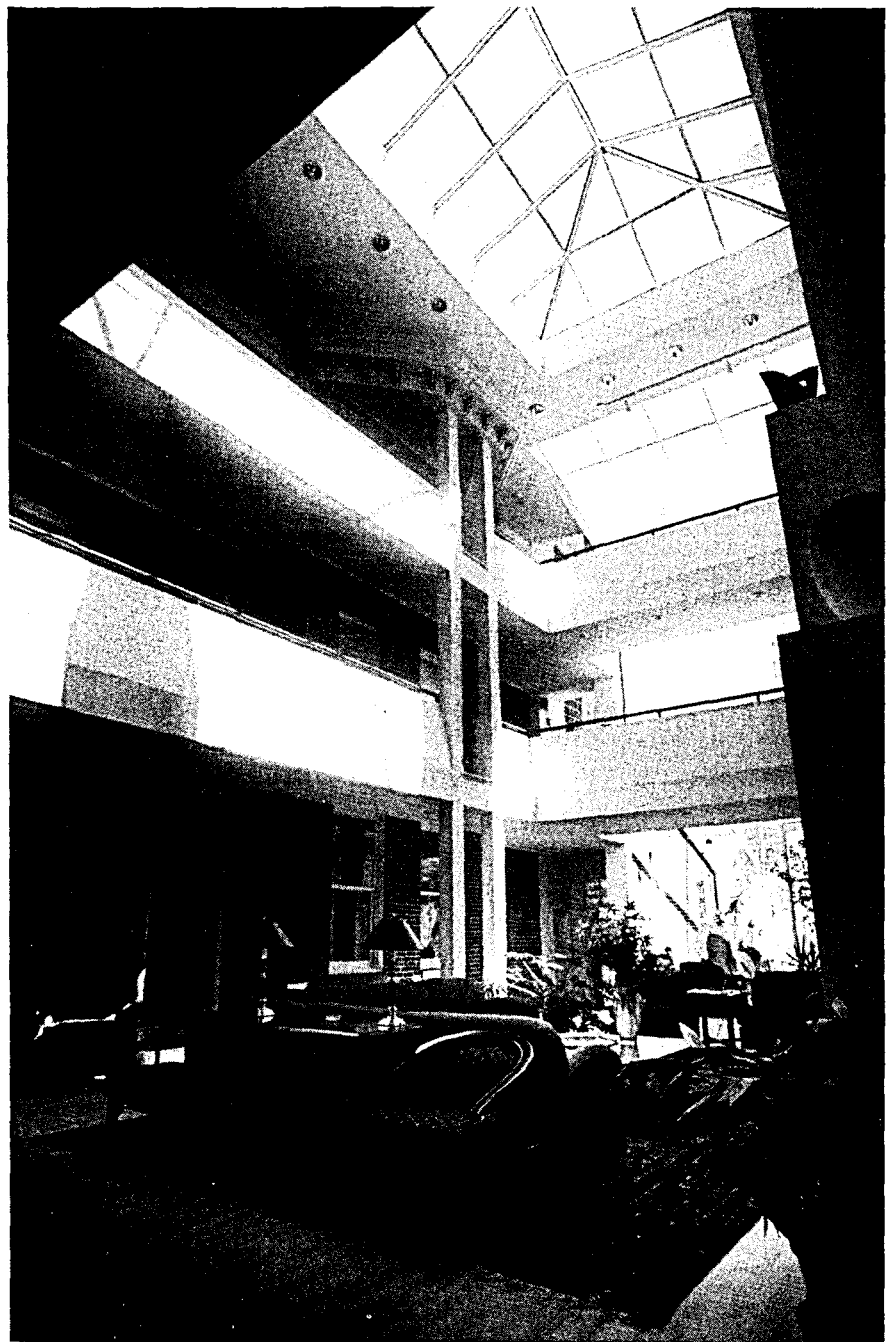
The General Assembly has recently considered a package of legislation known as the "Quality of Life" initiative, which moves the State into local land use and zoning. While most of the legislation currently applies only to counties, some of it may affect municipalities. It raises serious questions about State intrusion into local land use matters. Some civic activists and members of the General Assembly are dismayed that the more controversial pieces of the legislation do *not* apply to municipalities. We, as city officials, are no less dismayed by the proposed inclusion of cities in legislation that may hamper our efforts to revitalize Wilmington. That job is already difficult enough—we do not need this increased legislative burden.

The Rationale For Meddling

Zoning advocates have generally made three arguments for expanding the role of state and federal governments in land use planning and policy. First, they contend that certain problems, such as air and water pollution, are not amenable to local solutions. Second, they maintain that many other problems, such as the control of large-scale development, are not likely to be solved by local government: while the costs of any action would be concentrated locally, the benefits would be widespread, and this disparity would supposedly create disincentives to local response. Finally, they argue that even where local action is suitable, the balance of political forces at the municipal level would preclude the enactment of effective policies.

Reality Versus Theory

The performance of the City of Wilmington in land use matters shows that



Christina House, Inner City elegance

Photo by Jim Graham

these arguments are not valid. That performance has been marked by an altogether reasonable approach to quality of life, emphasizing (1) adequate public sector infrastructure; (2) quality public sector amenities; (3) strong land use controls to ensure quality development and to protect natural and cultural resources; and (4) sufficient private sector amenities.

Adequate Public Sector Infrastructure. The City has recently completed an intensive investigation of the vehicular transportation system into the central business district. It shows that we do not have a current problem with traffic capacity and in fact, we shall not have a problem in the year 2010, given planned and programmed improvements in the highway system. To maintain the system, the City invests approximately \$14,800,000 in capital funds every decade, while providing for street cleaning and snow removal in our annual operating budget.

Water and sewer service: the City invested in superior water and sewer systems that also serve part of neighboring New Castle County. A substantial planned maintenance investment program, which exceeds \$10,500,000 every ten years for water and \$19,800,000 for sewers, will ensure that these systems are sufficient for future development needs.

City officials have carefully studied the effect of future population growth on area schools. Current projections show that Wilmington's growth in the foreseeable future will be in households, not in overall population. While our population will grow modestly, average family size will drop. In addition, Wilmington has seen a three per cent growth in the number of available housing units since 1980. Given the drop in family size, as opposed to the incidence of household formation, the effect, if any, of population growth on schools will be minimal.

The Office of Planning projects city population and housing units as follows:

	1980	1990	2000	2010
City Population	70,195	72,095	74,027	73,268
Number Occupied Housing Units	26,900	29,217	31,487	32,480

Wilmington simply does not face the major demographic disruptions confronting, for example, suburban and

(Continued on next page)



Since March 1985 Larry Liggett has been the Director of the Wilmington Office of Planning, to which he has brought extensive experience from work in planning and economic development with urban, county, state, federal, and private sectors. Larry holds degrees from Case Western Reserve University and Ohio State University.



Bill Ward, Wilmington Assistant City Solicitor since February 1986, works primarily with the City departments of commerce and real estate and housing on commercial and residential development projects. Bill, a graduate of Emory University and the Duke University School of Law is a member of the Delaware Bar.

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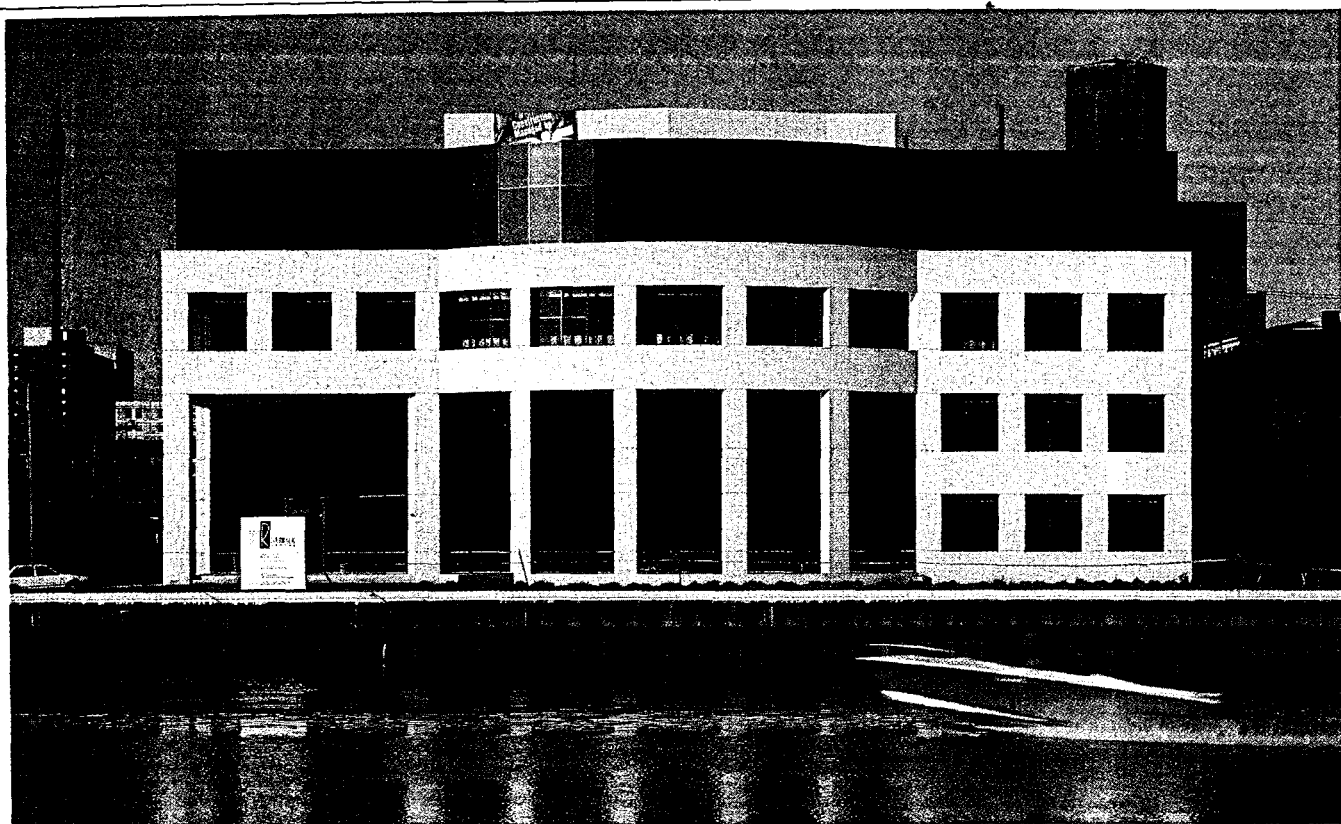


Photo by John Lewis

Riparian Renaissance: One Riverwalk Centre, home of Aloysius, Butler & Clark, an example of quality office space in Christina Gateway, and a key part of Wilmington's revived waterfront.

Doing Nicely (continued)

rural New Castle County and Sussex County, which may well justify state-centered planning for those regions.

Quality Public Sector Amenities. To be accurate if less than modest, we must assert that the City of Wilmington continues to lead the State in working to provide a superior physical and cultural climate for its citizens, and in fulfilling its role as the center of the region.

Recently, three institutions interested in enhancing the City's quality of life succeeded, with essential civic support, in major fund raising projects. The Delaware Art Museum made extensive renovations to its existing building, and Opera Delaware and the Delaware Theatre Company built new headquarters on the Christina River.

The City has created a new waterfront park at East 7th Street and has substantially improved Christina Park. It has plans for taking control of the poorly maintained Fort Christina Park to create a three-park historic loop. And a new six path trail network currently in the planning stage will create a pedestrian system linking existing and proposed cultural, natural, and historic sites.

Strong Land Use Controls. The argument that political forces at the local level frustrate effective environmental and land use policies doesn't stand up in Wilmington. The City has been a leader in sound planning policy that requires commercial development to respect the environment and the quality of life of those who live in proximity to change.

The first step in establishing effective land use controls is a comprehensive plan. The City has maintained just such a plan for years and reviews it constantly so that development will take place in an orderly fashion. The City also maintains a comprehensive zoning map, which dictates the type of permissible development.

Wilmington regularly updates both its comprehensive and its zoning plans. For example, in 1981, it established a new waterfront control scheme, expanding the typical purview of zoning laws to include view enhancement, preservation of historic structures and sites, review of site design, active use of the river, and creation of public easements. Proposed developments of the waterfront are reviewed by many different city departments to protect the infrastructure.

Aside from waterfront planning, the City conducts other design reviews of development in the Downtown Mall, special C-6 commercial areas, and historic districts. The object is to prohibit development that ignores the design integrity of surrounding buildings and the importance of historical roots in the distinct character of neighborhoods. To enhance the downtown central business district as a place to live and do business, the City shares with developers initial thoughts on "performance zoning".

Sufficient Private Sector Amenities. Historically the City has encouraged the private sector to develop and create facilities that will protect and enhance quality of life.

The prime example is the Christina Gateway Festival Marketplace, which will be constructed on the Christina River as part of the Christina Gateway project. Office development will serve as a nucleus for the waterfront Festival Market. In negotiating the agreement with the developer, the Christina Gateway Corporation, consisting of city and state officials, made the Festival Market a key component. The developer was chosen in large part because it realized

(Continued on page 54)

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Doing Nicely (continued)

the importance of the Market to the overall project and to the City.

The Radisson, Christina House*, and Hotel DuPont have helped provide necessary hotel and convention space in the City for lodging out-of-town business people and for the recreation and entertainment of Wilmingtonians. The Radisson and the more recent Christina House are good examples of City initiative. The Radisson was made possible in part by an Urban Development Action Grant (UDAG). (As of latest statistics made available to us Wilmington has received more UDAG money per capita than any other city.) Like the new Pickett facility, Christina House, which ties into the former Braunstein building on Market Street Mall, had support from the City Commerce Department during the planning phase. Result: a superior addition to Wilmington quality of life and an anchor piece of historic preservation on the Market Street side of the project. And the Pickett project is typical of our efforts to provide better multi-purpose hotel capacity.

One of the most important private sector amenities in the City is the Market Street Mall, a setting for retail business and restaurants. Several million dollars were invested in building the Mall and several more will be spent in maintaining it. Without such investment, the retail and entertainment mix that attracts office development and provides pedestrian space could not exist.

If It Ain't Broke, Don't Fix It (And if it's already fixed, don't break it)

Most of the proposed Quality of Life bills do not currently cover municipalities. One, however, does. It is particularly controversial and requires special discussion.

The proposed Impact Fee legislation would make developers pay for development impact on the road systems. As proposed, the fee would be levied in accordance with a formula to be established by the Delaware Department of Transportation.

It must be remembered in analyzing this bill that the City currently maintains

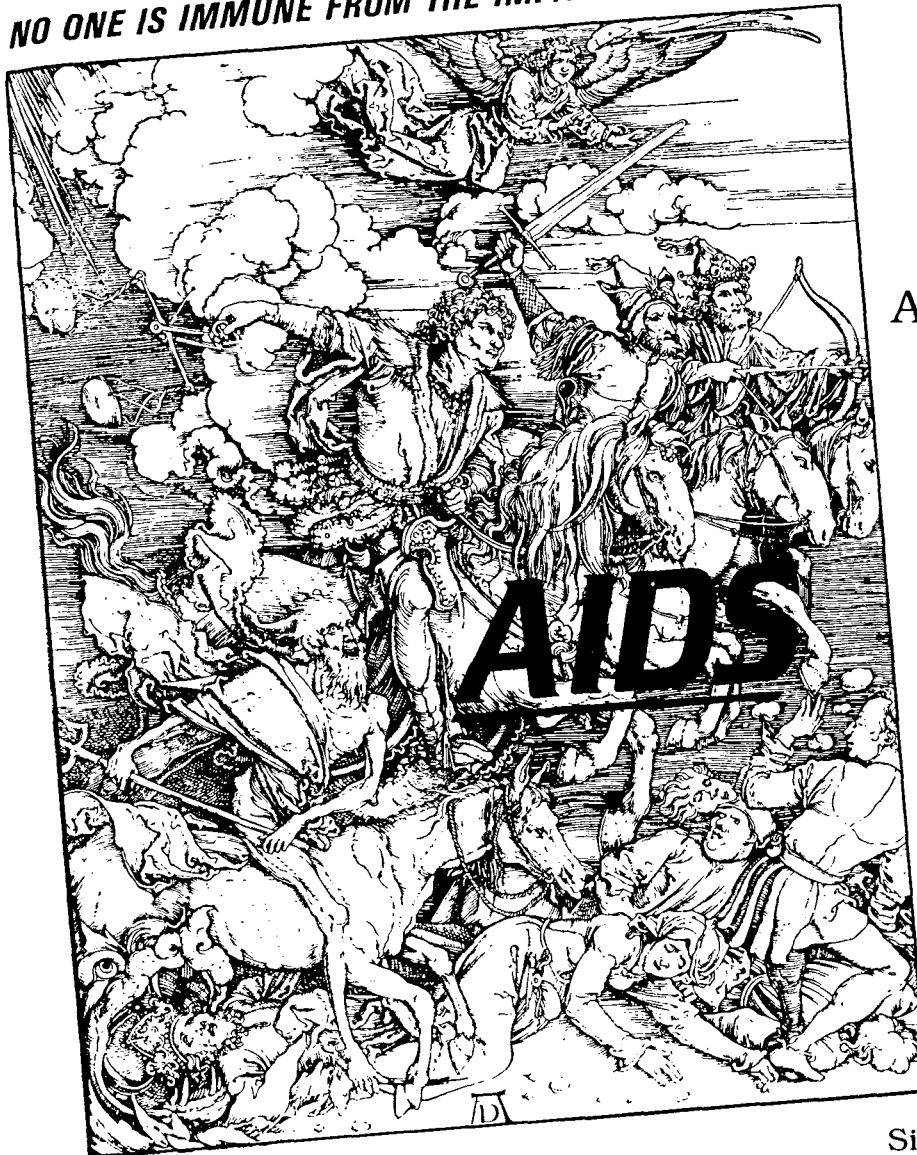
**Right on! The charming and imaginatively designed Christina House provides the office space occupied by this fortunate magazine.*

120 miles of roadway, while the State maintains 36 miles of streets within the city. The City not only keeps a substantial street system under repair; it also cleans and removes snow on its own streets and *state-maintained* streets. The City is far more affected than the State by development within the City. Businesses and residents already pay for the use of city roads through real estate taxes, which in turn pay off bonds issued to finance road construction. A double taxation in the form of a state imposed impact fee would be simply unjust and would ignore the effects of City development on roads. In our judgment, fees should be related to real impacts and be used to mitigate them. The kinds of transportation people use to get to the City and the 13 major alternative routes to the City accentuates the difficulty of assessing how new development affects the roadway system and the impact of development on infrastructure services. Finally, while some impact fees may be in order, the proposed bill is simply too broad in permitting the Department of Transportation unfettered discretion in imposing them.**

City officials have consistently attempted to balance the sometimes conflicting goals of economic development and quality of life, and have succeeded in doing so. They have planned, developed, and maintained a superior infrastructure system to allow growth in an organized fashion without compromising the quality of life. While we appreciate the problems that the Quality of Life legislative package is designed to correct, we are certain that the City is effectively addressing these problems without state intervention. Indeed, state control may hamper our efforts to deal with special housing and redevelopment problems peculiar to the City. Wilmington has consistently proven that it can meet its responsibilities to maintain quality of life. Accordingly its leaders view this legislation as unnecessary to continued progress in Wilmington and perhaps even harmful. They vigorously oppose its application to the City. ■

***As of this writing the Department of Transportation has decided not to push the Impact Fee legislation without further study and discussion. The City applauds this approach and looks forward to participating in this process.*

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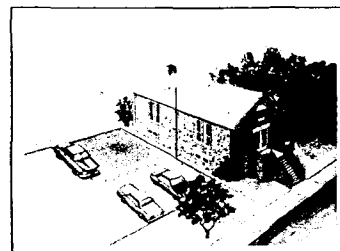
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