INSIDE: POLICY, PUBLIC PARTICIPATION & DECISION-MAKING

# DELAWARE LAWYER

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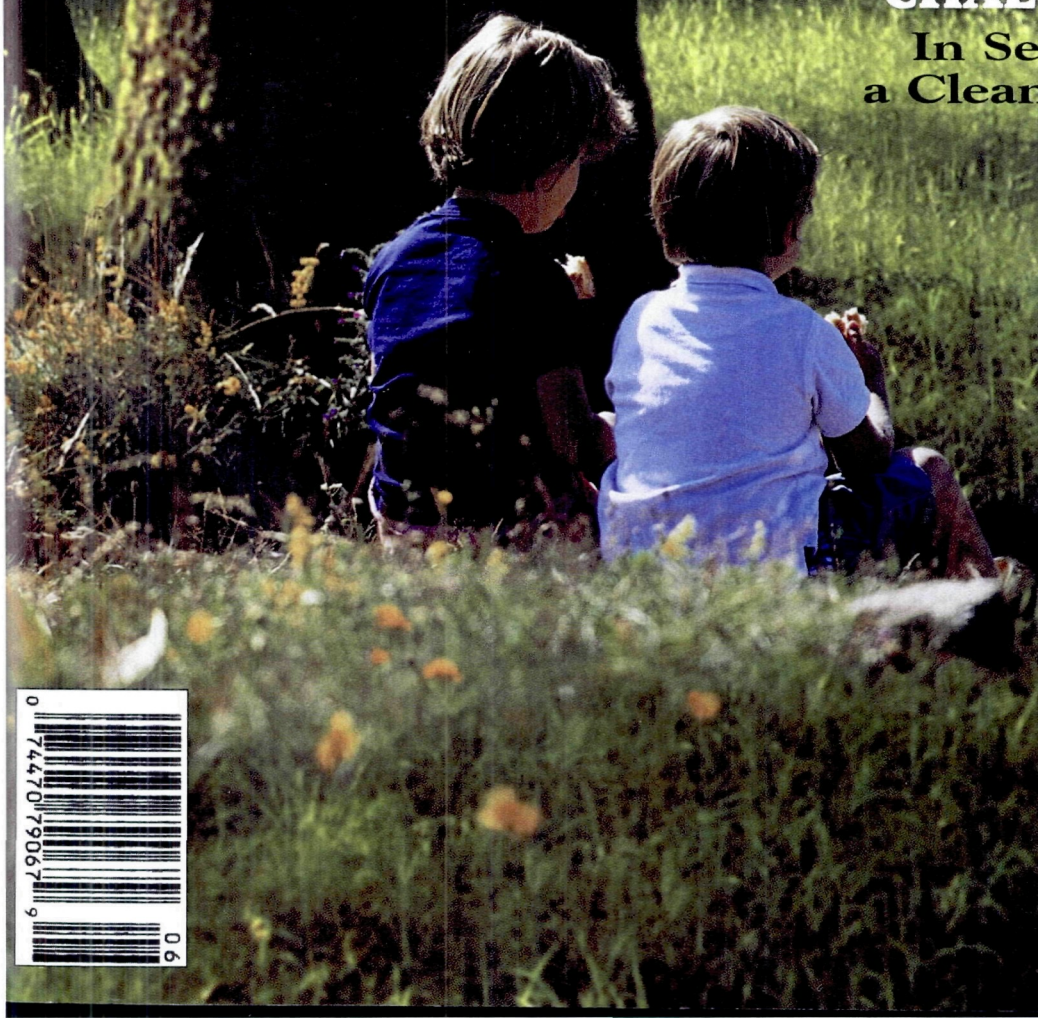
## ENVIRONMENTAL CHALLENGES

### In Search of a Cleaner World



# Chester County's Best-Kept Secret

*Auburn Hills*

*Bayard Estates at Longwood*

*Blackburn Knoll*

*Brittany Hills of New Garden*

*Brittingham*

*Carlton*

*Elk Ridge Farms*

*Havenstone*

*Highlands of White Clay*

*Longwood Reserve*

*The Preserve at Hyde Falls*

*Watsons Mill*

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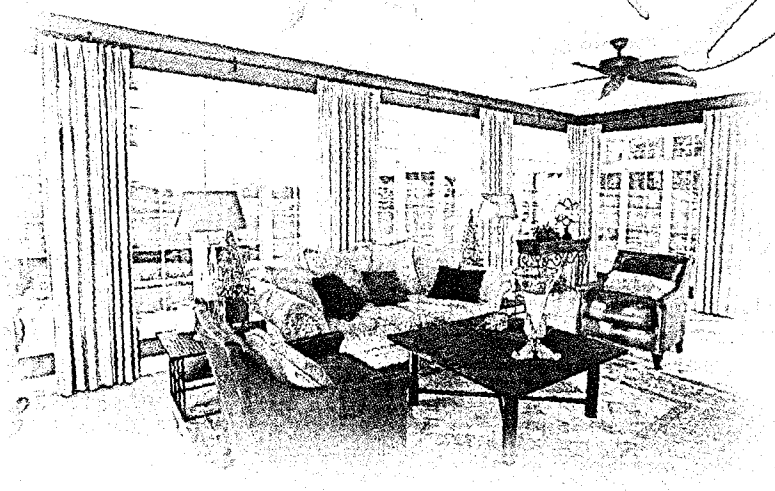

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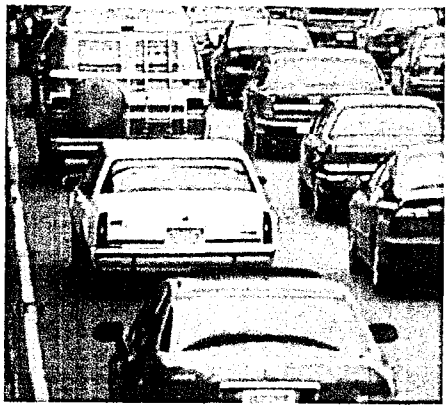

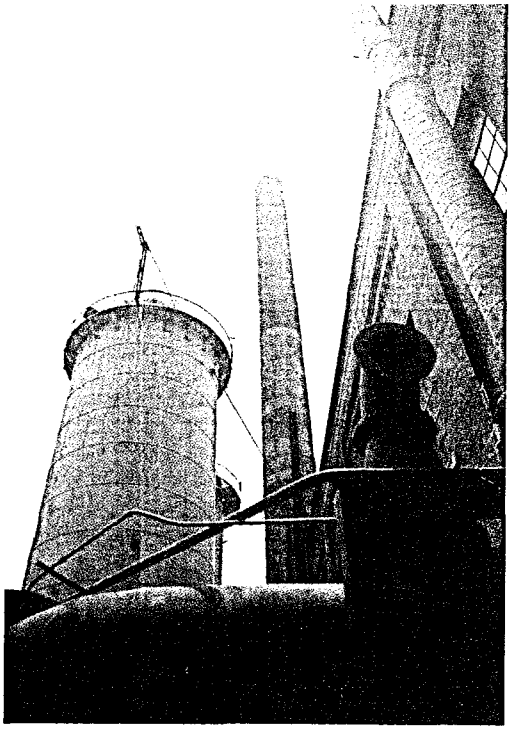

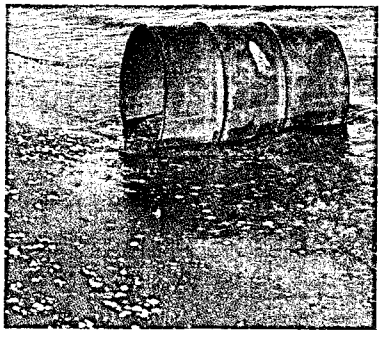

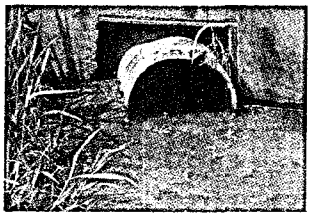

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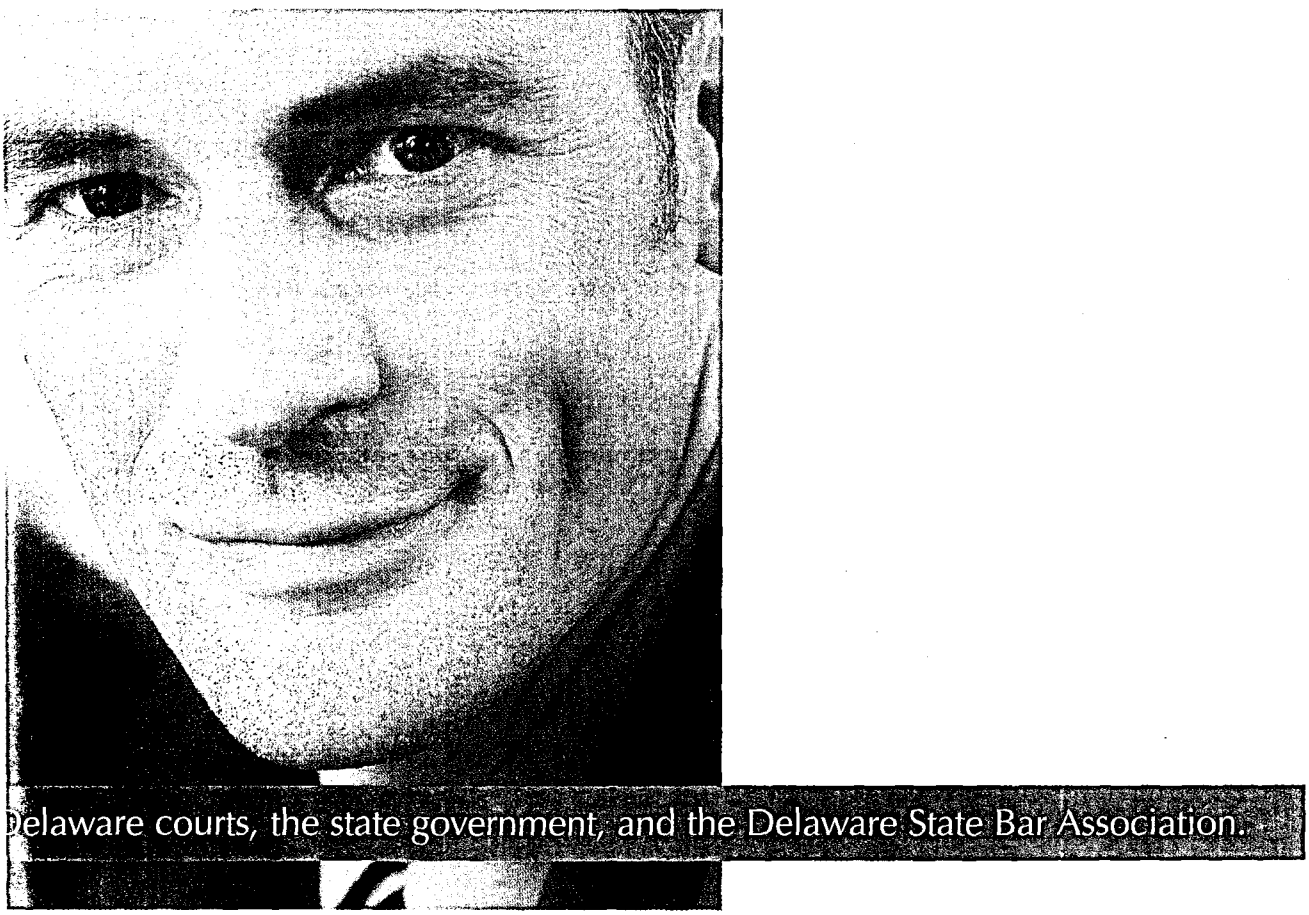


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Environmental issues tend to provoke strong responses. The public and community reaction on environmental matters is often intense, and can be highly divisive and heavily politicized. This issue examines the process and the "players" involved in the environmental policy and decision-making debate.

Environmental policy making is a critical function of both state and federal government. At the Delaware state level, the Minner administration has been frequently called upon to address environmental issues — ranging from "Livable Delaware" initiatives to increasing civil and criminal penalties for those who violate environmental laws. In our first article, Mark Brainard, chief of staff in the Minner administration, offers an overview of the state's recent environmental policy initiatives and a preview of some future plans. These initiatives notwithstanding, some would point to Delaware's rankings on various health care and mortality statistics as indicative of the need for even more action.

In recent years, the public has spoken with increasing volume on environmental issues in Delaware. As community organizations have become more active in the environmental debate (with the help of professional activists), controversy has arisen as to the scope of public participation in environmental decision-making. The appropriate role of the public is addressed in a trilogy of articles — the first by Neenah Estrella-Luna, a public health professional; the second by Lyman Welch, general counsel to the Mid-Atlantic Environmental Law Clinic, and the third by Mike Parkowski and Michael Teichman, private practitioners who represent permit applicants.

Our final article considers the contrasting roles of two Delaware governmental entities in setting environmental land use policy. Stephanie Hansen, now in private practice and formerly president of New Castle County Council, reviews the contrasting approaches to environmental land use policy and implementation between the State of Delaware Brownfields initiatives, and New Castle County's Environment First Ordinance.

It has been nearly 35 years since the enactment of the first major federal environmental laws. In that time, there has been much progress in achieving cleaner air and cleaner water. It is often said that the "low hanging fruit" of environmental improvement has been picked, and further improvements will be more difficult to achieve. Some of the future policy alternatives to be considered will impinge more directly on individuals — whether through mandatory recycling, increased cost or decreased availability of consumer products, higher gasoline or electricity costs, or reduced speed limits. As the trade-offs between environmental improvement and individual choice are balanced, the policy decisions may become more difficult. In all of this, one thing remains constant — these issues will continue to be the subject of intense debate, and the process in which environmental decisions are made will be the subject of very close scrutiny.

Robert W. Whetzel

## MARK BRAINARD

Mr. Brainard has served as Chief of Staff to Governor Ruth Ann Minner since December 2002. Prior to this position he served as executive vice president and senior vice president of the State Chamber between 1999 and 2002. He served as assistant vice president for personnel and legal affairs at Delaware Technical and Community College from 1995 to 1999 and as director of external affairs at DelDOT from 1993 to 1995. He was chief of staff for the Democratic caucus in the Delaware House of Representatives from 1987 to 1993 and administrative assistant to the Democratic caucus of the Delaware Senate from 1984 to 1987. He held a series of part-time legislative positions from 1979 to 1984. Mr. Brainard has a Bachelor of Arts in Behavioral Science from Wilmington College and a law degree from Widener University School of Law.

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Neenah Estrella-Luna is a public health professional and social justice activist in Wilmington, DE. She is currently working with Community Bridges, a community building organization working to make visible improvements in Wilmington's struggling neighborhoods through collaboration on visible neighborhood change efforts and youth leadership development. Ms. Estrella-Luna has a Master of Public Health from Boston University and will begin the Law, Policy and Society doctoral program at Northeastern University in the fall. She has worked in numerous positions in health care, public health research, and community health in Los Angeles and in Boston.

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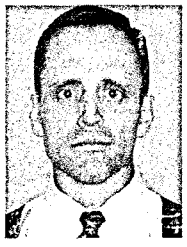

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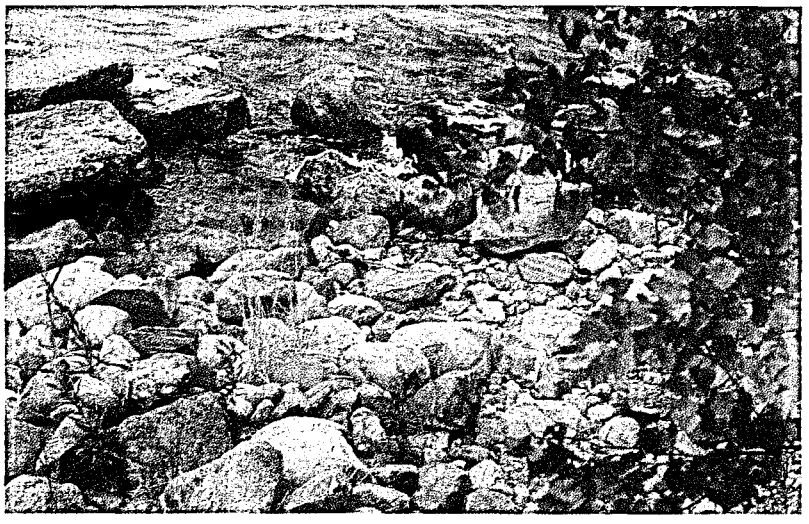
Mark Brainard

# THE CHANGING LANDSCAPE OF DELAWARE'S ENVIRONMENTAL POLICY AND LAW



Delaware's environment is a top concern for the Minner administration, which has worked to bring about legislation that safeguards and improves the quality of life in the First State. Among her many initiatives, the governor has worked to increase the availability of environmental information to the public to foster greater public participation, has increased the enforcement tools available to address chronic violators of our environmental laws, and will in the future look to voluntary or mandated reductions in the level of pollutants emitted into our environment. Through collaborative efforts where possible, or coercive enforcement where necessary, the Minner administration will continue its efforts to enhance the quality of life for all Delawareans and to make Delaware more livable.

Early in her administration, Governor Minner recognized the growing need to include the public in the state's efforts to make changes in environmental policy and address problems that could threaten the health and safety of state residents. The Community Right to Know Act (Senate Bill 33), passed in 2001, requires the Department of Natural Resources and Environmental Control (DNREC) to develop a public database that includes information on all permitted facilities in the state. The act makes information available through increased public notification of pollution releases at those facilities. S.B. 33 also created the Community Involvement Advisory Committee to advise DNREC on ways to increase public involvement in environmental decision-making.

More recently, in 2003, the governor's legislative agenda included strengthening environmental enforcement laws to address facilities with chronic problems and to deter willing pollution of Delaware's environment. Senate Bill 60 and House Bill 109, referred to as the Corporate Responsibility Laws, tripled the fines charged to chronic violators of state environmental laws, increased public disclosure of information on industrial facilities, included new annual reporting requirements, and authorized DNREC to require third party audits of chronic violator facilities.

These laws also established new criminal liability provisions and felony punishments for corporations and their agents, and should serve as an effective deterrent and incentive for improvement at problem facilities.

**Responding to and Learning from Events**

Governor Minner recognizes the importance of learning from past events, one of which was the sudden shutdown and abandonment of the Metachem facility in Delaware City, leaving the state and federal government with a cleanup bill of more than $70 million. In response to that event, Governor Minner created the Task Force on Responsible Management of Facilities Handling Hazardous Products, better known as the "Metachem Task Force," to recommend corrective actions to prevent this situation from happening again. The Task Force made recommendations for legislation requiring certifications and cleanup plans any time ownership changes for a facility handling hazardous materials. Governor Minner

is pursing legislation to ensure that whenever a potentially hazardous site changes hands, the state is given notice of potential environmental hazards, together with plans for addressing such hazards.

Also based on a Task Force recommendation, the governor is pursuing legislation to place liens on property held by companies owning potentially hazardous establishments to ensure that the people responsible for those hazardous conditions will be held accountable, and the value of property they own can be used to defray cleanup and response costs. The principles of the disclosure recommendation have been applied to the recent sale of Motiva Enterprises to Premcor.

The governor was forced to respond to a tragic situation in 2002 when an acid spill at Motiva resulted in a worker's death and prompted the governor to call for legislation regulating previously unregulated large storage tanks. Regulations for the above-ground storage tank program are in the final stages of adoption.

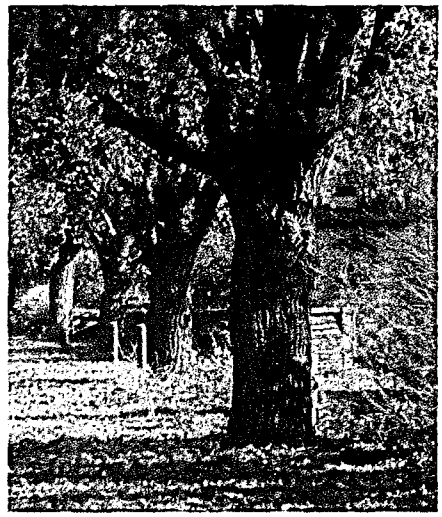
Also in response to the acid spill, Governor Minner required Motiva to hire an outside firm to conduct a mechanical integrity audit of the entire facility. The audit has resulted in a consent order requiring the facility to implement specific recommendations and stipulating penalties for any delays or inaction.

**The Energy Link to the Environment**

Another focus of the Minner administration has been energy policy. Energy generation and consumption is the single largest contributor to air pollution in Delaware. Eighty percent of all nitrogen oxide emissions and 50 percent of all carbon dioxide emissions are a direct result of our energy generation and consumption.

In 2002, the governor created the Delaware Energy Task Force to provide recommendations regarding ways to address Delaware's short- and long-term energy challenges. More than 100 participants representing a wide range of public and private sector interests worked together for more than a year to develop the strategies and recommendations included in the Task Force's report "Bright Ideas for Delaware's Energy Future." This report has provided the framework for many administrative changes and incentive programs designed to increase energy efficiency and reduce the impact of energy use on the environment. Encouraging clean and renewable energy generation and advanced energy technology development in Delaware, as well as promoting clean distributed generation and alternative transportation fuels are strategies being pursued as a result of the Energy Task Force effort.

Recognizing the public health impacts of energy generation and the lack of action by the federal government to sufficiently address mercury emissions, Governor Minner announced a new effort to reduce emissions from coal-fired commercial electricity generating facilities, namely Indian River and



Edgemoor. Both facilities have been given an opportunity to develop plans for reducing emissions of sulfur dioxide and nitrogen oxide. If those plans are insufficient, the state will generate plans. These efforts are important, because power plants account for 44 percent of Delaware's sulfur dioxide emissions, a third of the nitrogen oxide emissions, a third of greenhouse gas emissions and are also a significant source of air toxins such as mercury and dioxin.

To address greenhouse gas emissions, the governor has joined with other Northeastern states to develop a model rule for a regional cap and trade program for carbon dioxide for the power sector. Delaware has signed on to the effort as a full participant and is committed to developing a Delaware-specific rule, following development of a regional rule.

**Encouraging Responsible Industry**

The Minner administration has also recognized facilities that have worked to be environmentally responsible. In 2003, the governor announced the PRIDE program. PRIDE, Principles for Responsible Industry in Delaware, is based on substantive public disclosure by facilities and specific commitments to implementing five principles:

- Managing through Systems Approaches
- Community Involvement
- Valuing and Protecting Workers
- Protecting the Environment and Community
- Conserving Energy

Facilities involved in the program can receive benefits such as reduced inspections and reporting based on their compliance records and annual progress toward achieving their commitments. This approach reduces the administrative burden on the facility and the resources required by DNREC for oversight. Response from the private sector has been positive, with corporate leaders like CIBA leading the way in participation.

Increasing participation of local residents in the decision-making process is an ongoing effort. DNREC is currently reviewing its public hearing process, with the goal of offering state residents more opportunities to provide meaningful comments and constructive input. Many of the DNREC hearings use a process that is fairly unstructured, creating a situation where a small group of people can dominate the public comment period, driving away local residents who may be intimidated by the process. Finding a balance between allowing sufficient time for comments and providing an open environment that encourages participation by more people is difficult, but the Department is working to address the issue through a modified process.

**The Livable Delaware Agenda**

The governor tackled the issue of land use and sprawl with her Livable Delaware agenda, which recognizes that state taxpayer investments in roads, schools and other infrastructure and services are driven by local land-use decisions. Livable Delaware is an effort to align state, county and local decisions with five principles when determining how Delaware should grow. The principles include:

- Guiding growth to areas that are most prepared to accept it in terms of infrastructure and thoughtful planning
- Preserving farmland and open space
- Promoting infill and redevelopment
- Facilitating attractive affordable housing

- Spending taxpayer money effectively while curtailing sprawl

Since the Livable Delaware agenda was launched, almost every municipality in the state has taken steps to develop or update its comprehensive plan. Since House Bill 255 was signed into law in 2001, towns must plan for growth before they can seek annexation. They must provide a plan of services detailing how sewer, police, utilities and other services will be provided to annexed parcels. Within 18 months of adopting their comprehensive plans, they must rezone in accordance with that plan — providing more predictability and transparency to residents, developers and the state.

When Senate Bill 65 passed in 2003, the state's Land Use Planning Act (LUPA) was overhauled so the state could provide more meaningful review and comment on development projects at the beginning of the process, rather than just before local governments conduct public hearings. Under LUPA, major development projects, including residential subdivisions of more than 50 acres, are presented to state agencies at the onset of the application process. The result is improved communication among the state, developers and local governments, as well as better projects that mitigate environmental, traffic, agricultural and other impacts. The new law took effect in February 2004.

Adopted in 1999, the State Strategies for Policy and Spending provide the foundation for Livable Delaware. They provide a blueprint detailing where the state will make its investments, steering growth to municipalities and surrounding areas and away from rural Delaware. Public meetings were scheduled throughout the state this spring to share the updated State Strategies with Delawareans. The Cabinet Committee on State Planning Issues is expected to adopt that update this summer.

Even during tight budget times, Delaware has put its money behind Livable Delaware's investment strategies. In 2002, the state stepped in to purchase the development rights of the 200-acre Blendt Farm in Smyrna. In a designated rural area west of Del. 1, the historic family farm was slated for 460 houses but is now part of Delaware State University's agricultural research facilities. A continuing commitment to identifying and preserving critical Green Infrastructure throughout Delaware resulted in a request to set aside $40 million next fiscal year for open space and farmland preservation.

**Brownfields a Priority**

More incentives are available to encourage the redevelopment of Brownfields. Since 2001, the Delaware Economic Development Office has quadrupled the amount of matching funds available for assessment and cleanup, up to $100,000. DNREC now makes up to $50,000 in Hazardous Substance Cleanup Act funds available for the same purpose and has created a statewide Brownfields coordinator.

Senate Bill 157, passed in 2003, mirrors federal liability law for prospective Brownfields purchasers. As part of her 2004 legislative agenda, Governor Minner will support legislation to reorganize the state's Brownfields provisions into a single unified program in DNREC. This legislation will also permit Brownfields certifications for properties to be broken up into divisible units.

While Governor Minner steadfastly believes that zoning is a local government issue, her administration has encouraged innovative tools such as Transfer of Development Rights and efficient plan design that consumes less land and allows services to be delivered more cost-effectively.

Some progressive developers have proposed traditional neighborhood design plans that create an old-fashioned sense of neighborliness with flexible lot sizes, mixed uses, back alleys, front porches, streetscaping, pocket parks and high quality architectural features. The Office of State Planning Coordination collaborated with The Nature Conservancy to produce and publish a guidebook on community design that offers examples and tools for fostering livable, attractive communities that preserve open space. The state will be conducting workshops on the community design principles with municipal leaders.

Whether it is environmental protection, energy use or land use, providing incentives for sound environmental practices and strong deterrents and enforcement for violating environmental laws have been the governor's preferred approach. The Minner administration's approach to creating a Livable Delaware focuses on accountability, aligning resources to where they are needed most, and making the public a part of the process to improve our environment and quality of life. ◆

Neenah Estrella-Luna

# PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

*"The highest measure of democracy is neither the 'extent of freedom' nor the 'extent of equality', but rather the highest measure of participation."* — *A. D. Benoist*

On a cold October night in a community not too far away, community residents came together to hear about a local environmental issue. Huddled together in a cramped community center, they waited anxiously to hear what else had befallen their neighborhood. A smartly dressed young woman began a Powerpoint presentation and over the next half hour presented 46 slides of graphs, charts, numbers, and acronyms. When the show ended and the lights came up, she gazed out at a room full of confused and angry faces. In a moment of unusual candor, the local community leader spoke up, "I didn't understand a word you just said." After two hours, the residents began their trek home feeling that the young woman and her agency were trying to pull one over on them.

Too often, this is the extent of public engagement that agencies and industry invest in. The conventional way that institutions and private businesses interact with the public is by way of legal notices, written comments, and public hearings.[1] If a person is interested in the rules, regulations, and permits issued relating to environmental issues handled by her state agency, there is probably a list she can get on to receive that information. If she is connected to the Internet, it may be quite easy to receive these notices. Otherwise, she will need to search the legal section of her local newspaper. If she finds something of interest and wants to influence a decision being made, she can submit comments to the appropriate person or she can (sometimes) request a public hearing. The public hearing will probably be noticed in the same back pages of the newspaper where the original notice was found, and almost certainly not in the local, non-English-language newspapers. The major participants in these public hearings will likely include the people who are regularly part of these activities, either because they have nothing else to torture themselves with or because it is their job.

In certain instances, the state might take the initiative to make some proposal or decision more public. In that case, there may be a notice placed in mailboxes, or an article published in the newspaper. However, such action is usually reserved for controversial issues or extremely bad news. Regardless, to have any influence on a decision requires much the same steps outlined above.

Environmental policies, regulations, and permitting decisions do not have to be made this way. Indeed, they should not be. The notice/comment/hearing practice is a pale shadow of what true public participation should be.

**Why Public Participation?**

Public participation should be a process that engages the public to make decisions and solve problems; to seek out and rely upon the public's input in making decisions. The fundamental values of true public participation are civic engagement, empowerment, transparency, and accountability. These are important elements of a well functioning democracy. Without them, we do not have a government "by the people

and for the people."

By engaging in good public participation processes, we reinforce our democratic principles by involving people in decisions that affect their lives. Community residents share responsibility for their own neighborhoods. However, in order to fulfill that duty, they must have the opportunity to influence decisions that may result in changes in their physical, social, economic, or cultural environment. Interestingly, agencies and industry often find this the least compelling reason to engage the public. By contrast, communities find this the most important justification, particularly marginalized communities. For these communities, justice and fairness (or lack thereof) is always an underlying factor in the justification for greater public participation. Such concerns should not be taken lightly.

Public participation fosters social justice by supporting community empowerment. This is especially important in low-income, marginalized communities where we find most of our localized environmental problems. The sense of responsibility and connection to their neighborhood can only be developed when communities have a sense of control over their environment and their lives. True public participation allows for this sense of control, and more importantly provides a real opportunity to influence decision-making. Indeed, residents have the right to influence what happens in their community because of their interests in community integrity and self-determination.

The willingness to engage is dependent upon a sense of trust. Over the last few decades, there has been a steady decline in trust in our government institutions, as well as in private business. This has resulted from a steady stream of revelations of misconduct, malfeasance, and corruption at all levels of government and in business. For environmental agencies in particular, distrust has developed from the sense of indignation, outrage, and victimization as environmental decisions and policies have reinforced social injustices and allowed the persistence of activities or conditions that are harmful of human health and the physical environment.

At the same time, we must also recognize that the public cannot be involved in every single decision that an agency or a business makes. We need to be able to trust that our environmental agencies, and our corporate neighbors, will do the right thing.

Transparent decision-making processes foster trust. For environmental decision-making, transparency involves knowing how decisions are made and who influences those decisions. It is critical for the public to know the criteria by which decisions are made. Environmental analyses, which form the basis for most permitting and regulatory decisions, are intensely technical. At the same time, many of the analytical methods used in environmental decision-making have many unacknowledged assumptions that may be questionable in a given context. For example, the process of "discounting" in risk assessment and cost-benefit analysis weighs children's health differently than the health of senior citizens. The Environmental Protection Agency's own risk assessment model treats small risks to a lot of people more importantly than large risks to fewer people. Through public participation processes, these assumptions can be discussed and the analyses can be adjusted to fit the needs of a specific decision being made in a specific place.

It is also important for the public to know who has influence on environmental decisions. Much of the mistrust of environmental agencies stems from the perception (and in some cases reality) that industry's prerogatives are prioritized over community concerns. Knowing who and how decisions are made allows the public to hold government more accountable.

It is often said that people get the government they deserve. This has some element of truth to it. But, when processes are designed that effectively disengage the public, we lose our ability to hold our government accountable for its decisions. This is both undemocratic and dangerous. It calls into question the legitimacy of any decision made and has the potential to reinforce social and environmental injustices.

Empowerment, transparency, and accountability are normative benefits of public participation and provide the ethical bases for it. However, there are also instrumental benefits to pursuing it. Good public participation should produce a more informed public, reduce mistrust in our institutions and in industry, establish cooperative relationships, and generate legitimacy for the decisions made. These can create better, more just, decisions.

An informed public is an important part of any democracy. The notice/comment/hearing requirements that drive much of our current practices of engaging the public are based on the notion that people have a right to information on activities in their community that could potentially affect their health or quality of life. However, conventional notice and comment practices do little to actually educate the public about environmental issues. Research has found that the public is quite misinformed about many environmental issues. Most people, for example, believe that the greatest source of air pollution comes from factories and other stationary sources. This particular idea is strongly held in communities that live with and within industry. However, the most significant sources of air pollution are cars and trucks[2]. This is not to say that communities do not have the right to demand that the industrial plant next to them install sulfur scrubbers, but it can put the issue of air pollution into a different light. Good public participation processes actually educate the public about environmental problems. Communities that understand the issues are more effective at addressing them.

Good public participation fosters an environment in which communities, industry, and government work together to solve problems. Alexis de Tocqueville is quoted as saying that democracy does not create ties between people; but it does make living together easier. Public participation only works, however, when it fosters and reinforces ties between communities, agencies, and industry. It should result in not just being able to live together, but in all of us living better.

Working together creates cooperative relationships that can reduce conflict, create consensus, improve communication, and mobilize resources. The divisive conflict that characterizes most environmental decision-making reinforces mistrust on all sides. Good public participation encourages collaboration; communities, agencies, and industry become partners in developing alternatives, identifying acceptable solutions, and making decisions. This reinforces the principle that people should be allowed to influence decisions that directly affect them. More importantly, it allows for future decisions to be made much more easily, because the people involved know each other and understand each other's needs and values.

Working to achieve consensus is based on the belief that everyone has something to offer a decision and no single person or entity has all the answers. Consensus does not mean that

everyone will like a decision. It does mean that everyone's contribution was considered carefully and that everyone understands the reason for the decision.

Communication is key to this. Our current public engagement process places people in mutually exclusive categories and in adversarial roles. In the typical public hearing, agency staff are huddled together on one side of the room, the business interests (and their lawyers) are gathered on another side of the room, and organized interests (i.e. environmental advocacy groups) are clustered in yet another area. The public is generally crowded in the back. The setup itself is not conducive to effective communication, but more importantly, people are not communicating as people. They engage each other as representatives of a class of interests: government interests, business interests, environmental interests, and community interests; each with their own positions. These positions create barriers to interacting as human beings.

A more effective form of communication involves people talking with each other as people. In a collaborative relationship, participants are no longer working against each other's positions, but working toward achieving consensus on a decision. The people involved stop seeing the 'other' as simply uninformed, unrealistic, greedy, racist, or any other number of pejoratives. They start to respect one another as people who have legitimate needs and contributions.

If public participation is done well, all the stakeholders will be involved. Stakeholders may include the agency with the decision-making authority, other agencies, industry, communities, and organized interests. When these groups of people work together, it increases access to the resources needed to solve problems effectively and to make well informed decisions.

Working collaboratively also generates greater public acceptability of the decisions made. This makes the decisions more legitimate. If we create consensus between communities, agencies, and industry, we also deflate the arguments of critics or opponents of the decision. Community concerns are less likely to get hijacked by narrow interests, either in the community, by industry, or within agencies. Most importantly, when agencies and industry collaborate with communities to make a decision or solve a problem, this contributes to empowerment, transparency, and accountability. We also increase the chance that decisions made and problems solved will promote social justice.

### What Does Public Participation Look Like?

While we all can certainly agree that public participation is something we want to work toward, the challenge is making it happen. What does good public participation look like? How do we know when we have done it?

By definition, public participation should engage the public. The most important element of this is establishing relationships. This cannot be done in the conventional public hearing process. It must be done in the community of interest by talking with community residents and community leaders, as well as local businesses. There is generally a lot of coffee, and ideally food, involved. Agencies and industry wishing to engage a community should invest time and effort in becoming a part of the community. It does not mean that they have to relocate their offices, but it does mean that some time must be spent physically in the community, listening to people, and going to community meetings. It involves documenting the concerns of community members and

understanding their vision.

Public discourse should be pursued in a communal fashion. Although some communities have strong leaders with overwhelming support, the most marginalized, least empowered neighborhoods generally lack good leadership. Engaging the residents directly in group settings, rather than mediating through conventional or self-selected representatives, is important to gaining community trust and moderating the influence of narrow, but vocal, interests. Engaging communities directly and collectively will go a long way to getting consensus and promoting a form of civic engagement which respects the variety of opinions and needs within a community. This is, by the way, ideally done using an experienced, trained facilitator.

Public participation is inherently process focused. A cardinal rule of good public participation is that the process of decision-making be mutually understood, and ideally agreed upon, by all participants. This means that everyone's role must be clear to them, and agencies must be clear about how the decision will be made. By engaging the public, the agency is making the promise that those involved will have some influence on the decision made. Agencies must be unambiguous about who exactly will make the decision and how. Will the community, working with other stakeholders, make the final decision? Will they make recommendations that will be considered by the relevant decision-maker? Will the community and other stakeholders have the opportunity to explore a variety of solutions?

The International Association for Public Participation has described public participation as a spectrum of goals and promises.[3] The form of public participation that is most commonly used, and is least participatory, is simply providing information to help the public understand problems, alternatives, and the solutions. The promise to the public is a simple one: we will keep you informed. The next level entails consulting the community to get feedback on an environmental analysis, the alternatives considered, and the solutions chosen. The promise to the public is, we will keep you informed, listen to your concerns, and let you know how your input influenced the decision. The next level involves the community by incorporating their concerns in the analysis, alternatives considered, and solutions chosen. The promise to the public is, your concerns will be directly reflected in the analysis, alternatives considered, and the decision made.

The next more participatory form of public participation is collaboration with communities and other stakeholders in every aspect of the decision-making process. The promise to the public is, you will be involved in formulating alternatives and your advice and recommendations will be incorporated into the final decision. The most participatory form of public participation places final decision-making authority in the hands of the public. The promise to the public is, we will implement what you decide.

Obviously, different decisions and different contexts will require different forms of public participation. Additionally, different stakeholders may want to be engaged differently than others. Some may only want to be kept informed. Others may want to be involved. Others may want to collaborate.

An important element of public participation which is lacking in the mechanisms used today is feedback. Veterans of the notice/comment/hearing practice often complain that they never really know how their input was used in the final decision. Communities that invest their time and efforts in public participation need to know if their participation mattered. Good public participation involves explaining how concerns and suggestions were used in the final decision. This contributes to transparency and allows for greater accountability.

A marker of good public participation is whether the relationships between agencies, industry, and communities, as well as other stakeholders, are maintained after a decision is made and implemented. Public participation is dependent on building relationships. It serves no purpose to put time and effort into building relationships that will end once a decision has been made. For communities where environmental problems are concentrated, these relationships are key to managing the many environmental risks they face and being proactive in addressing persistent problems.

There are several reasons for agencies and industry to incorporate public participation as a regular part of business. We should acknowledge, however, that public participation is no substitute for the legal protections afforded through notice and comment requirements. The public comment and hearing processes are still necessary to address decisions made through bad processes. They also provide a mechanism to voice opposition to decisions made. There is always the possibility that even good processes will result in bad decisions. However, given that the current mechanisms effectively marginalize certain, very specific, communities, and also have historically resulted in very bad decisions, public participation is an alternative that offers some hope.

**Conclusion**

Public participation reinforces our commitment to democratic principles. The opportunity for civic engagement is part of the foundation of a democracy. Civic engagement includes the opportunity for residents to participate in the decisions that affect their lives and their communities. Public participation allows for a greater number and quality of voices, concerns, and suggestions to be heard. If citizens are to do their job of holding decision-makers accountable for the decisions they make, the process must be open and transparent. Most importantly, however, we must recognize that our past decisions have inequitably concentrated environmental burdens in low income and minority communities. Conventional notice/comment/hearing practices have contributed to these inequities, as well as contributing to a culture of mistrust between agencies, industry, and communities. Improving environmental decision-making not only means reestablishing trust; it also means recognizing the significance of socially just processes, as well as outcomes. Good public participation holds the potential to bring us closer to this ideal. ◆

## FOOTNOTES

1. Much of this conventional notice/comment/hearing practice is driven by state and federal legislation and regulation. See, e.g., 42 U.S.C. §1342; 42 U.S.C. § 7607; 42 U.S.C. § 7661(a); 40 C.F.R. § 124; 7 *Del. C.* § 6004; 7 *Del. C.* § 9104; 7 *Del. C.* § 9107; 22 *Del. C.* § 304-305; 29 *Del. C.* §§ 10115-10118.

2. Nadakavukaren, A. (1995). Our global environment: A health perspective (4th ed.). Prospect Heights, IL: Waveland Press.; Schwartz, J. (2000) as cited by Brown, P., et al. (2003). The health politics of asthma: environmental justice and collective illness experience in the United States. Social Science and Medicine, 57: 453-464.

3. *See* the International Association for Public Participation website for more detail on the spectrum, as well as tools for public participation and opportunities for training in public participation techniques, *available at* http://www.iap2.org

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On the federal level, the Environmental Protection Agency (EPA) has recognized the value of public participation. In an August 1993 memo to all EPA employees, Administrator Carol M. Browner announced: "In all its programs, EPA must provide for the most extensive public participation pos-

changes and has the ability to appeal permit decisions in an administrative or judicial forum. Under many environmental statutes, the public has the right to petition EPA for action. If EPA is not acting diligently or according to law, environmental statutes permit citizens to file their own lawsuits to enforce the law.

Like the federal government, Delaware has long recognized the right of the public to influence the government's decisions through participation in the political process. Article I, Section 16 of Delaware's Constitution protects the right of citizens ". . . in an orderly manner to meet together, and to apply to persons entrusted with the powers of govern-

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Public participation includes an open process that the public can have access to questions from the public, to information, and opportunities for comment before decisions are made. In environmental programs, EPA regulations require that before permits are issued or revised. The agency must provide an explanation of the impact of the proposed permit and a history of how the permit conditions were developed. The public has access to documents supporting the agency's decision. If the public disagrees with the agency's decision, it can provide comments seeking changes and has the ability to appeal permit decisions in an administrative or judicial forum. Under many environmental statutes, the public has the right to petition EPA for action. If EPA is not acting diligently or according to law, environmental statutes permit citizens to file their own lawsuits to enforce the law.

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FEATURE

Lyman C. Welch

# NEW APPROACHES TO PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS

Every week in Delaware, new environmental permit applications are filed and permits are issued. When the public objects to a proposed permit, the public may ask the agency to hold a public hearing to consider its objections. Last year, Delaware announced new draft agency guidelines for public participation in environmental permit hearings. Many environmental groups and other organizations object to this proposal and argue that the proposed limits on public participation will result in poor decisions. This article discusses how environmental decisions benefit from public participation and suggests improvements Delaware should make as it develops formal public participation procedures.

**Environmental Decisions Benefit from Public Participation**

Environmental laws allow industries to pollute as long as they have the proper government-issued permits to monitor and limit the amount and manner of the pollution. The public has learned that more stringent permit requirements and aggressive enforcement of environmental regulations will result in environmental improvement over time. Citizens have a strong desire to enjoy clean air and water free from toxic chemicals. Now more than ever, people concerned with environmental quality are seeking to influence governmental decisions by participating in the permitting process.

On the federal level, the Environmental Protection Agency (EPA) has recognized the value of public participation. In an August 1993 memo to all EPA employees, Administrator Carol M. Browner announced: "In all its programs, EPA must provide for the most extensive public participation possible in decision-making. This requires that we remain open to all points of view and take affirmative steps to solicit input from those who will be affected by decisions. Our willingness to remain open to new ideas from our constituents, and to incorporate them where appropriate, is absolutely essential to the execution of our mission." EPA has implemented this policy by including public participation requirements throughout its permitting and regulatory programs.

EPA's policy promotes an open process that the public can understand, responsiveness to questions from the public, timely and open access to information, and opportunities for interaction with the agency before decisions are made. In most federal environmental programs, EPA regulations require public notice before permits are issued or revised. The public is provided an explanation of the impact of the proposed permit, a summary of how the permit conditions were imposed, and provided with access to documents supporting a proposed permitting decision. If the public disagrees with the permit proposal, it can provide comments seeking changes and has the ability to appeal permit decisions in an administrative or judicial forum. Under many environmental statutes, the public has the right to petition EPA for action. If EPA is not acting diligently or according to law, environmental statutes permit citizens to file their own lawsuits to enforce the law.

Like the federal government, Delaware has long recognized the right of the public to influence the government's decisions through participation in the political process. Article I, Section 16 of Delaware's Constitution protects the right of citizens ". . . in an orderly manner to meet together, and to apply to persons entrusted with the powers of govern-

ment, for redress of grievances or other proper purposes, by petition, remonstrance or address."

In contrast to the expanded public participation in the federal system, however, Delaware law is unclear on the role of the public when environmental permitting decisions are made. The Department of Natural Resources and Environmental Control (DNREC) has no written procedures for permit hearings beyond what is required by the specific statute and regulations for the permit in question. Delaware's Administrative Procedure Act does not generally apply to DNREC permit decisions. Just last year, attorneys for DNREC argued before the Coastal Zone Industrial Control Board that Delaware's permitting process merely requires that "the public be given the opportunity to observe the agency conduct its business in an open forum with the applicant."[1] Aggrieved citizens have appeal rights under most statutes, however Delaware generally does not allow citizen lawsuits to enforce violations of environmental laws.

Delaware's narrow view of public participation has caused friction between environmental activists and DNREC employees. Environmental groups often use a public hearing to raise public awareness of concerns that a permit applicant or the government has kept out of the spotlight. The public may ask hard questions or demand pollution reductions beyond what regulations might require. Often agency employees prefer to accommodate the corporate entities they regulate instead of aggressively enforcing the law.

For example, during late 2002, officials at DNREC tried to gain approval for significant changes to planned air pollution reductions at one of Delaware's worst environmental violators. Concerned members of the public and environmental organizations worked through the holiday months to uncover documents showing increased pollution risks to the Delaware River from the proposed plan. Public opposition grew, causing legislators to demand a delay in the public hearing on the proposal to allow the public more time to review the record. At the public hearing, individuals, organizations and legislators voiced intense opposition to the proposal and concerns over environmental risks. Within three weeks, DNREC cited the public opposition in announcing its opposition to the proposal and stated that new studies had confirmed the pollution risks.

Was DNREC's change in direction after the public hearing a victory for the public? Most definitely. Now, however, DNREC points to that public hearing as a prime example of why new policies should limit future public involvement in the permitting process.

### Improvements are Needed to DNREC's Public Participation Guidelines

In response to concerns from Department staff, DNREC Secretary Hughes met with several Delaware environmental organizations last year to propose new limits on public participation. Secretary Hughes explained that new restrictions were necessary because some members of the public have introduced "extraneous agenda-driven material" during public hearings. In October 2003, DNREC issued draft public participation guidelines that severely limit both the public's ability to participate and the relevant areas of consideration at a public hearing. The DNREC draft document explains that "the General Assembly placed the emphasis upon the Department and the Applicant as the major players in permitting matters" and the public's role is sharply limited.

DNREC's proposal does little to improve public outreach and access to information. Rather than empowering the public, DNREC would allow its own hearing officers broad discretion to decide whether public comments are relevant and should be included in the administrative record. Public comments would be subject to strict time limits. DNREC and the applicant could refuse to answer any questions from the public during the hearing. Basic ground rules for public participation would be left to the DNREC hearing officer's discretion.

Many environmental and community organizations have objected to DNREC's proposed guidelines and called for revisions. Environmental groups and activists often use public hearings to raise their concerns with proposed decisions and to seek meaningful environmental improvement. Many environmental organizations are frustrated with a perceived lack of information and responsiveness by DNREC. The public has a perspective and values that go beyond technical and regulatory issues and concerns. DNREC and its hearing officers, on the other hand, often limit their consideration to what is technically allowed by the regulations rather than looking at the bigger picture.

The EPA has developed extensive guidance on enhancing public participation that DNREC should follow when developing its new guidelines. EPA's guidance is summarized in an August 2000 reference guide titled "Public Involvement in Environmental Permits."[2] DNREC should follow EPA's lead and ensure that its final public participation guidance incorporates: 1) improved access to information; 2) public education and outreach; 3) greater public involvement at workshops and hearings; 4) allowing formal interested party status; and 5) better feedback to the public after a decision is made. Suggested improvements in each area are described below.

- Improved information access: A significant defect in DNREC's proposed new procedures is that they provide little incentive for the government to be proactive in providing useful information to the public in advance of decision-making. Meaningful public participation in environmental matters requires that the public be fully informed. Providing the public with access to information enhances the agency's credibility and may be enough to satisfy the public's concerns. DNREC should do more to make information available to the public online and through reading rooms. Documents describing DNREC's internal review of the permit application and the company's compliance history should be readily available to the public for every proposed permit.

- Public education and outreach: DNREC must inform and educate the public before important decisions are made instead of working behind closed doors. DNREC should distribute outreach materials to make the public aware of planned activities and outline the issues as early as such information is available. The more complex the issue and greater the potential for controversy or misunderstanding, the earlier DNREC should distribute the materials. Information and educational programs should encourage all levels of government and the public to become familiar with the issues, technical data and relevant science. Such programs should include integrated, on-line, user-friendly access to health and environmental data and information. The information provided must be written in plain language the public will easily understand, summarize complex technical materials and clearly identify the

role of the public in the specific decisions to be made.

• Greater public involvement at workshops and hearings: Public workshops and hearings should be part of an overall process that gives the public more opportunities for becoming informed and involved. DNREC should carefully consider the needs of the affected community and individual participants when planning these events. Procedures should not be so proscriptive as to discourage participation. When the subject of a public hearing, workshop or other information exchange process relates to conditions or facilities in a specific geographic area, DNREC should hold the public hearing or workshop in that general geographic area. All public comments should be included as part of the record rather than allowing DNREC broad discretion to exclude public comments as irrelevant.

• Allowing formal interested party status: Allowing members of the public to seek party status is important for individuals and organizations who may appeal an adverse decision. Several other states have long explicitly recognized the public's right to party status and allow organizations and citizens to seek such status during environmental permit hearings. For example, Connecticut and Texas allow citizens to obtain party status by requesting a contested evidentiary hearing. Delaware should do the same. Before and during a public hearing, DNREC should provide an opportunity for any member of the public to request interested party status. All designated interested parties should receive an opportunity for cross-examination of witnesses, copies of any allowed post-hearing submissions, and have appeal rights. The DNREC hearing officer should resolve any objections arising from such participation because the public will often not be represented by counsel.

• Improved feedback to the public when a decision is made: Currently, DNREC's proposal allows it to ignore public comments that it considers insignificant or irrelevant. No provision is made to ensure that members of the public who participate will receive a response that tells them how DNREC used their input. DNREC must ensure that it carefully considers all public comments and provide each commenter with a summary of the public comments and DNREC's responses to each comment. DNREC should also use other public feedback methods such as publishing the response on its website or publishing a notice of its availability in newspapers. DNREC can use press briefings and news releases where the number of commenters is so large that individual contact is not practical.

Incorporation of these concepts into DNREC's new public participation procedures will give the public greater confidence that the environment is protected, enhance the final decisions, and reduce objections and appeals to agency action. Should DNREC believe that existing Delaware law does not provide it with sufficient authority to allow extensive public participation, DNREC should recommend necessary changes to the General Assembly so that the public can participate on equal footing with industry and corporate interests. ◆

FOOTNOTES

1. (DNREC Motion to Dismiss, Coastal Zone Industrial Control Board, Docket No. 2003-01).

2. (Online at http://www.epa.gov/permits/publicguide.pdf).

FEATURE

F. Michael Parkowski
and
Michael W. Teichman

# PUBLIC PARTICIPATION IN THE COASTAL ZONE ACT PERMITTING PROCESS: Too Much of a Good Thing?

In the past year or so, Delaware's Coastal Zone Act[1] ("CZA") has received attention from the environmental activist community at a significantly increased level. Under the claim of asserting the rights of the public generally, environmental activists have sought to intervene as "parties" in the CZA permitting and appellate processes, with full rights to examine witnesses, introduce evidence, and make legal arguments. Certain of these activists have also sought such status not on their own behalf, but on behalf of the organizations they represent. In virtually all recent CZA permitting and appeal activity, environmental activists have employed the tactic of engaging in argumentative confrontations with counsel, hearing officers, and appellate board members. Notwithstanding a significant degree of latitude afforded them, these environmental activists complain loudly that they are not being afforded sufficient procedural due process under the CZA and even under the U.S. Constitution.

In this article, the authors briefly discuss the history of the CZA and the procedures for the issuance of permits, and the rights of the public as set forth in the governing statutes and regulations. Against that background, the authors suggest procedural guidelines for public hearings that would ensure that interested members of the public may be heard in a way that does not undermine the permitting and appellate processes.

**History of the Coastal Zone Act**

In response to concerns expressed by public officials and Delaware citizens over the possibility of a supertanker terminal or additional petroleum refineries being located along the Delaware River and Bay, and over the likelihood of unchecked industrial growth generally along Delaware's coastal areas, the Peterson administration introduced legislation into the General Assembly (H.B. 300) that would, as signed into law on June 28, 1971, become the CZA.[2]

The CZA is generally recognized as one of the first pieces of legislation adopted in Delaware designed specifically to preserve critical aspects of Delaware's environment — indeed, the CZA predates Delaware's Environmental Protection Act[3] by two years. Adoption of comprehensive regulations to implement the CZA was slow in coming, and for years the only regulations implementing the CZA were a simple set of largely non-substantive regulations adopted in December 1971. On May 11, 1999, a comprehensive set of regulations was adopted by the Coastal Zone Industrial Control Board (the "Board").[4] Entitled *Regulations Governing Delaware's Coastal Zone* (the "1999 Regulations"), these regulations remain in force today.[5] Initially, the CZA was administered by the State Planning Office, which, under the DuPont administration, became the Office of State Management, Planning and Budget in 1977. In 1981, administration of the CZA was

again transferred, this time to the Secretary of DNREC (the "Secretary").

Patterned after land use statutes, the CZA prohibits new heavy industry uses and new bulk product transfer facilities in the Coastal Zone, but grandfathers such uses that were in existence prior to June 28, 1971. The CZA allows new manufacturing uses as well as the expansion or extension of existing non-conforming uses, but only by permit. Within this simple structure, however, there are a myriad of exceptions, inconsistencies and ambiguities that have proven fertile ground for debate since the CZA became law.[6]

**Procedure Under the Coastal Zone Act**

Procedure under the CZA is unusual in several respects. First, the CZA allows, but does not necessarily require, an applicant who wishes to know whether a proposed use is permissible in the Coastal Zone to file a "status decision" request with the Secretary.[7] If a status decision is sought (or required by the Secretary), notice is given and public comment is sought, but a hearing is not held.[8] The status decision may result in a finding that the proposed activity is unregulated, allowable only by permit, or impermissible altogether.

The procedure changes when the applicant files a request for a permit. Under the CZA, the Secretary must consider the environmental, economic and aesthetic impact of the proposed use, the number of supporting facilities, the effect on neighboring land uses and county/municipal development and conservation planning. In addition, the 1999 Regulations layer on the additional requirement that the applicant propose an offset project that "must more than offset the negative environmental impact associated with the proposed activity."[9] The Secretary is required to hold a public hearing on all Coastal Zone permit applications.

DNREC is not subject to the Administrative Procedures Act ("APA") in permitting proceedings, so the Secretary's decision is not a "case decision" within the meaning of the APA. However, the 1999 Regulations require all CZA hearings before the Secretary to be "conducted in accordance with the Delaware Administrative Procedures Act (29 Del. C. Chapter 101)," though it is less than clear whether this is a reference to Subchapter III of the APA (case decisions) or Subchapter IV (licenses). Irrespective of whether the APA governs the Secretary's hearing, what is clear is that neither the CZA, nor the 1999 Regulations, nor the APA provide any standard with respect to the rights of the public, *qua public*, at a "public hearing" before the Secretary.

As a practical matter, CZA hearings before the Secretary are conducted much the same as other DNREC permit hearings. The Secretary assigns a hearing officer who will, at the time and place set for the hearing, take evidence from the applicant and DNREC and will accept comments from the public. In recent years, the hearing officer has permitted members of the public to ask questions directly of the applicant's witnesses, and even of the Secretary's witnesses. This practice, which in the absence of a statute requiring it is really an indulgence, has lead to the assumption by certain environmental activists that they are entitled to be treated as "parties" at the hearing with the same rights as the applicant or the Secretary to introduce evidence, examine witnesses and make legal argument. Unfortunately, hearings before the hearing officer are now frequently marred by confrontational and aggressive behavior of environmental activists any time the hearing officer attempts to limit the scope of their comments or examination of witnesses to matters relevant to the proceeding. The atmosphere of these public hearings often devolves into acrimonious and irrelevant debate, and the presence of armed environmental protection officers is not uncommon.

**Procedure Before the Coastal Zone Industrial Control Board**

Unlike the actions of most Delaware administrative agencies, final decisions of the Secretary are generally not reviewed initially by the Superior Court. Rather, appeals are first heard by administrative appellate boards made up of lay members of the community. Most of these appeals are heard by the Environmental Appeals Board. However, in the case of appeals under the CZA, such appeals are heard by the Coastal Zone Industrial Control Board. Under § 7007(b) of the CZA, "[a]ny person aggrieved by a final decision of the Secretary . . . under subsection (a) of 7005 of this title may appeal same under this section." The statute is silent on what makes a person "aggrieved" sufficient to allow an appeal. Environmental activists take the position that this language should be broadly construed to mean that any person who finds fault with a decision of the Secretary should be permitted to take an appeal. In fact, as discussed below, "person aggrieved" more properly equates to standing which, under a well developed line of case law, is limited to persons who can show that their personal interests are directly harmed above and beyond the interests of the public at large.

Unlike the decision of the Secretary, the action of the Board is governed under the APA. In practice, procedure before the Board is somewhat more formal, with the parties being given an opportunity to present opening statements, introduce evidence, and make closing statements. Counsel for the parties, as well as their witnesses, are subject to examination by the Board. At the conclusion of the presentations made by the parties, the Board typically opens the matter to public comment.

Appeals taken by environmental activists have constituted the majority of the Board's activity over the past year. As to these appeals, the Board has been very relaxed in its determination of who might be a "person aggrieved" under the CZA. As with the hearings before the Secretary, environmental activists frequently become argumentative and confrontational with the Board, its attorney, and counsel for the permittee or appellant when displeased with particular rulings or findings.

**Where Does the Public Fit In?**

There are generally two types of public attendees at CZA hearings. The first type of attendee is a member of the potentially affected public, i.e., a person in attendance because he or she lives, works or recreates in close proximity to the site of the activity at issue and is concerned that the activity might have an effect on his or her personal health or economic interests. Most often, such members of the public are satisfied to observe the proceedings and to offer comments to the tribunal. The second type of public attendee at these hearings is what we have termed herein the *environmental activist,* a person typically allied with a group or organization dedicated to environmental or conservation issues. These persons are in attendance because they, or their organizations, hold certain beliefs and attitudes respecting the environment and the activities of government and commercial interests within that environment.

As noted, a handful of environmental activist groups have sought to assert themselves forcefully into the CZA

process. Great latitude has been granted by both the hearing officer and by the Board with respect to their participation, and yet, they remain unsatisfied. The vitriolic debate and lengthy discourse on matters of minimal relevance that now characterizes these hearings leads to the unfortunate result that the voices of other members of the public, those who might be directly and personally affected, are rarely raised. Moreover, to the extent that the environmental activists have points that might truly be of interest to the Secretary or the Board, these points are likely to be missed, awash as they so often are in a sea of irrelevance.

Unquestionably, the public has a right to attend hearings conducted both by the Secretary and by the Board. To deny the public this basic right would not only violate the terms of the CZA and the 1999 Regulations, but also would likely violate the due process rights of those members of the public who might be impacted directly by the matter addressed at the hearing. But what rights does the public have beyond merely attending these hearings? Are certain members of the public entitled to be admitted to these proceedings as "parties"? Should representatives of public interest groups be allowed to "cross-examine" the applicant — as they so often demand? Should non-attorneys be able to represent the interests of organizations before the Secretary and the Board and, if so, how and in what capacity? Lastly, if the interest groups are afforded a right to cross-examine under oath, should not the representatives of these groups who offer factual information also be sworn and subject to cross-examination?

**Participation vs. "Party Status" in Hearings Before the Secretary**

One of the principal issues raised by environmental activists is whether they can be "parties" to the process before the Secretary, such that they will have rights to call witnesses, introduce evidence, and cross examine the witnesses of the permit applicant. Neither the CZA, nor the 1999 Regulation, nor the APA (to the extent it applies) specifically allow members of the public to be admitted as parties, and for good reason. To allow all members of the public to have rights as parties would cause the process to grind to a halt. Oft woven into the environmental activists' claims that they should be afforded party status are allegations that failure to do so deprives them of "due process." In fact, to the extent that they are permitted to question witnesses in hearings before the Secretary, environmental activists are accorded far more process than they are due.

The reference to "due process" is, of course, a reference to the Fourteenth Amendment of the United States Constitution, which prohibits a state from depriving any person of "life, liberty or property without due process of law."[10] The flaw in the environmental activists' due process claim is that, irrespective of the quantity and quality of the process afforded them by the hearing officer, the State of Delaware has at no time proposed to deprive environmental activists, as members of the public generally, of any liberty or property interest. The Fourteenth Amendment does not create property or liberty interests; rather, it extends various procedural safeguards to certain interests that stem from an independent source such as state law.[11] To be enforceable therefore, a claim of entitlement to "due process of law" under state law must be derived from statute or legal rule or through a mutually explicit understanding.[12] A mere "expectancy" is not sufficient.[13] As noted, however, neither the CZA nor the 1999 Regulations grant any special "party status" rights to any groups or any particular member of the public, and one is hard pressed to find anything remotely resembling a "mutually explicit understanding" between the state and any particular environmental activist or organization that grants special procedural rights.

What about those members of the public with direct tangible interests that may be affected by a particular activity? Should these persons be granted full party status? Such persons would seem to have due process rights resulting from the process of granting environmental permits. Thus, for example, were the Secretary to permit the construction and operation of a hazardous waste dump in the middle of a residential neighborhood, the dump's neighbors would surely be entitled to "due process of law" because the state's action, in granting the permit, has the effect of depriving these neighbors of the value and enjoyment of their real estate. The question remains, however, as to the extent of the due process to which such persons are entitled. So long as they are given the right to observe the hearing, the public hearing requirements of the CZA and the 1999 Regulations would appear to be satisfied; and, to the extent that such persons are given the opportunity to make comments to the hearing officer, such persons will be afforded more than the statute requires. More importantly, any "person aggrieved" may appeal to the Board. Because the Board is subject to the APA, it is fully empowered to issue subpoenas,[14] and a person who is "aggrieved" and properly takes an appeal will, in this manner, have the opportunity to call and examine witnesses under oath. Of course, the appellant will also have access to the full record of the proceedings before the Secretary in preparing for the appeal.

For purposes of Fourteenth Amendment procedural due process, Delaware has adopted the balancing test utilized by the U.S. Supreme Court to evaluate the sufficiency of administrative standards under the Fifth Amendment.[15] This balancing test requires an evaluation of:

1) The importance of the individual interest involved
2) The value of the specific procedural safeguards to that interest
3) The governmental interest in fiscal and administrative efficiency

Considering the availability of an appeal to the Board to any "aggrieved" person and the full panoply of procedural rights available in that proceeding, the relative value of full party status rights in the hearing before the Secretary is quite low. Yet, the administrative burden of allowing all persons with a real and tangible interest to have full party status rights is considerable indeed. Thus, application of this balancing test simply does not compel the conclusion that members of the public should be afforded full party status rights at the Secretary's hearing.

**Standing in Appeals to the Board**

The issue of "party status" is one of far less importance in the context of appeals to the Board because the CZA and the 1999 Regulations do not limit appeals to the Board solely to persons who were parties to the proceedings before the Secretary. Instead, one need demonstrate only that he or she is a "person aggrieved" in order to take an appeal.

Environmental activists have urged that the term "person aggrieved" should be liberally construed to allow virtually anyone who is dissatisfied with the Secretary's decision to take an appeal to the Board. In recent appeals, the Board has not looked closely at the

"person aggrieved" standard, but as the same environmental activists return to the Board again and again, the Board may well decide that a closer analysis is warranted. When this occurs, the Board should conclude that "person aggrieved" requires that a person have standing in order to take an appeal.

Although Delaware courts have not directly addressed the meaning of the term "aggrieved" in the context of the CZA, the courts have addressed the phrase "person or persons, jointly or severally aggrieved" as it appears in the Delaware statute dealing with appeals from Boards of Adjustment.[16] In that context, the Superior Court recently held that this phrase limits potential appellants to those who are "potentially affected" by Board of Adjustment actions and who are landowners.[17] The Court reasoned that failure to limit the universe of potential appellants in this fashion would allow an appeal by any "individual or group who had a philosophical or perceived objection to the Board's action."[18]

The seminal Delaware case dealing with the issue of standing in environmental cases is *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994). *Oceanport* involved appeals of various permits[19] granted by DNREC with respect to a pier constructed by Oceanport Industries at its facility in Claymont, Delaware. Following the award of the permits, Wilmington Stevedores, Inc., a corporation engaged in the stevedoring business in the Port of Wilmington, appealed to the Environmental Appeals Board. After litigation before the Environmental Appeals Board and the Superior Court, the issue of Wilmington Stevedores, Inc.'s standing was ultimately presented to the Delaware Supreme Court as an issue of first impression.

Initially, the *Oceanport* Court noted that, under general principles of standing, a plaintiff must have an interest distinguishable from that of the general public, and that "state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the request of parties who are 'mere intermeddlers.'"[20] Thereafter, relying heavily on principles developed in federal environmental litigation, the *Oceanport* Court set forth comprehensive standards with respect to standing in Delaware environmental litigation and appeals from permitting decisions of DNREC. The *Oceanport* Court applied two notable Supreme Court cases; *Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and articulated the test for standing as follows:

> First, a party must have suffered an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute. *Id.* at —, 112 S.Ct. at 2136. The invasion must be 1) concrete and particularized, and 2) "actual or imminent not 'conjectural' or 'hypothetical'" *Id.* at —, 112 S.Ct. at 2136 (citations omitted). Second, "there must be actual connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at —, 112 S.Ct. at 2136 (citations omitted). Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative. *Id.* at —, 112 S.Ct. at 2136.[21]

Concrete and particularized injury means that an individual must have a *personal stake* in the outcome, not just a mere interest.[22] Injury to the environment is not sufficient. Rather, to have standing, a person must somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense.[23] It is simply not enough to be a "roving environmental ombudsman seeking to right environmental wrongs wherever they may be found."[24]

While the ownership of land ought not be a prerequisite to standing in CZA appeals, a direct and adverse effect on the putative appellant should be. To construe this standard more broadly, for instance meaning merely "dissatisfied" or "displeased," would permit persons to appeal a decision of the Secretary, notwithstanding that the decision has no impact on them. As environmental activists repeatedly take appeals to the Board, it is likely to become more apparent that such activists are in precisely this position — they cannot demonstrate a personal interest at stake, but instead have purely philosophical or moral objections to the activities in question

and the decisions of the Secretary. Absent an injury to their personal interests, such roving environmental ombudsmen are not "persons aggrieved" sufficient to have standing before the Board.

**Unauthorized Practice of Law**

When environmental activists attempt to take appeals on behalf of their organizations, not only is the standing of the organization at issue, but the very ability of environmental activists to represent the organization *pro se* is also called into question. Last summer, the Board dismissed the appeals of three organizations that sought to appeal through non-attorney representatives. In its initial order, the Board did not include a full discussion of its reasoning.[25] When the dismissed appellants took an appeal (this time through Delaware counsel acting *pro bono*) to the Superior Court, the permit applicant petitioned the court, over the objections of the appellants, to remand the matter to the Board so that it could re-issue an order that fully explained the rationale underlying its decision. The court did so,[26] and on November 5, 2003, the Board issued an Amended Order and Decision which, citing multiple Delaware cases, noted that the appellants, none of whom were licensed to practice law in Delaware, sought to pursue a legal remedy as advocates for their respective organizations. In the eyes of the Board, this came squarely within the definition of the practice of law.[27] The Board cited rules established for the Board on the Unauthorized Practice of Law to support its conclusion that non-lawyer representation of organizations before governmental agencies was the unauthorized practice of law. It further noted that even attorneys licensed in other jurisdictions were, pursuant to Supreme Court Rule 72, required to be admitted *pro hac vice,* and that it would be "difficult to imagine" that non-attorneys should be held to a lesser standard.[28]

The issue attracted media attention at the time, and there was a negative visceral reaction expressed by many in response to the Board's ruling. However, the difficulties encountered by the Secretary and the Board in dealing with both the irrelevancies advanced by *pro se* environmental activists and the circus-like atmosphere many actively foster, highlight the importance of having accountability through trained lawyers, subject to accepted rules of practice, representing all parties in these proceedings.

**DNREC and the Board Need Guidelines to Control their Processes**

In response to the increasingly rancorous and confrontational behavior of environmental activists at public hearings, the Secretary proposed to limit the scope of questioning that could be directed to DNREC witnesses at a CZA hearing last March. Due to outcry amongst the environmental activists, these ground rules were not used in future hearings. However, the Secretary has not abandoned the goal of returning a measure of control to public hearings In late 2003, the Secretary issued proposed guidelines that would govern all hearings before the hearing officer, and a number of comments were received. On a parallel track are guidelines proposed to be adopted by the Board, which guidelines would also set limits on the participation by the public at Board hearings. Both sets of guidelines are still under development.

Adoption of guidelines to govern the hearing process is a good first step. Controlling the monopolistic and disruptive actions of environmental activists, while still allowing them to be heard, will create an atmosphere that allows average citizens, who might be affected by a proposed permit, to feel welcome in providing comments. A controlled atmosphere will also allow the hearing officer to focus on the issues of greatest importance, and will foster an atmosphere in which the hearing officer is more likely to hear the important points that environmental activists do have, without those points being drowned by rhetoric.

The authors suggest that any guidelines adopted by the Secretary should include the following:

- Clarify that the only entities at the public hearing that will have rights as "parties" are the applicant and DNREC.
- Require that questions from the public that would otherwise be directed to witnesses should instead be directed to the hearing officer. Thus, for example, a question from the public might be addressed to the hearing officer as follows: *"Mr. Hearing Officer, I would like to know if the witness can explain why the applicant proposes to install a Claus Unit rather than a newer technology."* This will allow the hearing officer to screen public questioning and focus on those that will prove relevant and useful in formulating recommendations.
- Provide for the presence of environmental protection officers, and identify conduct that will subject persons in attendance at the hearing to removal therefrom.[29]

Similarly, any guidelines adopted by the Board should include the following:

- Clarify that a "person aggrieved" to take an appeal is a person with standing under *Oceanport.* This would require a putative appellant, as a threshold issue, to *credibly* demonstrate that the activity at issue will cause an injury in fact to the appellant. Mere displeasure or disagreement with a decision of the Secretary should not be sufficient. An appellant should be required to satisfy this basic test before the appeal would be permitted to proceed on the merits.
- Clarify that the only parties to the appeal shall be such appellants as are able to demonstrate standing, the Secretary, and the applicant/permittee. Only such parties will be permitted to call witnesses and cross examine the witnesses of other parties.
- Permit members of the public who are not parties to nonetheless comment on the appeal following the conclusion of presentations by the parties. In this way, an environmental activist who cannot establish standing will still have the opportunity to express his or her views to the Board.
- As with the Secretary's hearing guidelines, the Board's guidelines should provide for the presence of Environmental Protection Officers, and provisions identifying conduct that will subject persons in attendance at the hearing to removal therefrom by a majority vote of the Board members present.

From the authors' point of view, it appears that environmental activists use these hearings primarily to stage a battle in which the activist "David" sets out to defeat the state and industry "Goliaths," and to build a soapbox from which to spread their message and garner publicity (and perhaps membership contributions). Of course, public hearings are not intended for these purposes. Rather, hearings before the Secretary and the Board are legal proceedings designed to determine whether established standards have been satisfied such that the

Secretary, or the Board, can make informed decisions, and also to create a record for the courts to review, should it become necessary. The limits the authors propose are not intended to silence the environmental activists, but rather allow to all members of the public an appropriate opportunity to be heard in a fair and balanced forum. ◆

FOOTNOTES

1. 7 *Del. C.* Ch. 70.

2 *See* Coastal Zone Act Administration, June 28, 1971 – June 30, 1977, State Coastal Zone Industrial Control Board and Office of Management, Budget and Planning (September 1977).

3. 7 *Del. C.* Ch. 60.

4. The Board is charged with approving implementing regulations as well as hearing appeals from permit applications or status decision requests. 7 *Del. C.* § 7005.

5. A 1993 set of regulations was invalidated because the procedures used by the Board in adopting them violated the Freedom of Information Act. *Chemical Industry Council of Delaware, Inc., et al. v. State Coastal Zone Industrial Control Board,* 1994 WL 274295 (Del. Ch. 1994).

6. In September, 1972, the Coastal Zone Industrial Control Board heard its first appeal, and by July of the following year, the Superior Court had issued its first decision on an appeal from the Board. *See Kreshtool v. Delmarva Power and Light Co.,* 310 A.2d 649 (Del. Super. 1973).

7. 7 *Del. C.* § 7005; 1999 Regulations at § G.

8. 1999 Regulations at § G.3.

9. 1999 Regulations at § I.1.a.

10. U.S. Const. Amend. XIV.

11. *Leis v. Flynt,* 439 U.S. 438, 441, 58 L.Ed.2d 717, 99 S.Ct. 2185 (1979).

12. *Id.* (*citing Perry v. Sindermann,* 408 U.S. 602, 603, 92 S.Ct. 2694, 33 L.Ed.2d. 570 (1972)).

13. *Perry v. Sindermann,* 408 U.S. 602, 92 S.Ct. 2694, 33 L.Ed.2d. 570 (1972).

14. 29 *Del. C.* § 10125(b)(1).

15. *See In the Matter of Arons, et al.,* 756 A.2d 867, 873 (Del. 2000) (*citing Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 99 L.Ed.2d 645 (1988)).

16. 22 *Del. C.* § 328(a).

17. *Healy v. Board of Adjustment,* 2003 WL 21500330 at *2 (Del. Super 2003).

18. *Id.*

19. The permits granted were: air quality, water quality, private subaqueous lands permit and public subaqueous lands lease. The Secretary had previously issued a status decision, ruling that a CZA permit was not required. Nonetheless, the CZA figured prominently in the *Oceanport* decision.

20. *Oceanport Industries, supra,* 636 A.2d at 900 (*citing Stuart Kingston v. Robinson,* 596 A.2d 1378 (Del. 1991)).

21. *Oceanport Industries, supra,* 636 A.2d at 904.

22. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, New York, et al.,* 250 F.Supp.2d 48, 56 (2003) (*citing Warth v. Seldin,* 422 U.S. 490, 489-99, 95 S.Ct. 2197, 45 L.Ed. 343 (1975)).

23. *See Friends of the Earth v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 156 (4th Cir. 2000).

24. *Id.* at 157.

25. *See In the Matter of Appeal No. CZ 2003-01,* (Decision dated August 1, 2003).

26. *Common Cause of Delaware, et al. v. Coastal Zone Indust. Control Bd.,* C.A. No. 03A-08-001-HLA, Jurden, J. (September 10, 2003).

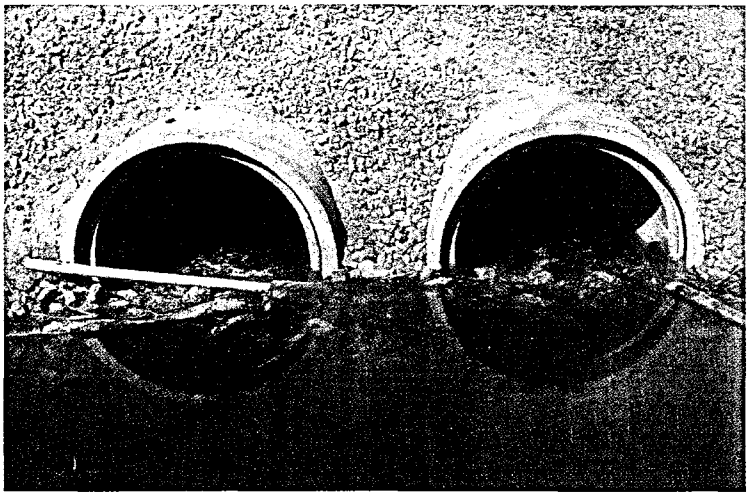
27. *In the Matter of Coastal Zone Permit 403P Issued to Sunoco, Inc.,* Appeal No. CZ 2003-01 at 4 (November 5, 2003).

28. *Id.* at 5 (no appeal was taken from this Amended Order and Decision).

29. DNREC law-enforcement officers have "police powers similar to those of . . . police officers when enforcing the laws, regulations, rules, permits, licenses, orders, and program requirements of the Department of Natural Resources and Environmental Control."

Stephanie L. Hansen

# ENVIRONMENTAL LAND USE LAWS: Who's Driving the Train?



There is no shortage of residential, commercial or industrial developers in New Castle County. Everyday, developers make decisions on whether to proceed through the governmental process to develop a particular piece of land. Today, there are two new environmental land use laws in play in New Castle County — the Environment First Ordinance passed by New Castle County and the State of Delaware's 2003 Brownfields redevelopment law. Both laws affect the land development process, and each has a distinct environmental origin. Development under the Environment First Ordinance is the province of New Castle County, and development under the state's Brownfields law is the province of DNREC.

A striking difference between the two laws is the rate of implementation. While developers are actively submitting development plans that implement the principles and initiatives in the Environment First Ordinance ("EFO"), there has been some reluctance to proceed under the state's Brownfields law. The result is that Brownfields redevelopment is still rare and development of "greenfields" (i.e. farms, meadows, and other open lands) under the county's EFO is steadily progressing. Local land use laws continue to have the most direct effect in implementing environmental land use policy, even though the vast majority of environmental policy is, at least in theory, implemented at the state and federal level. Unfortunately, for a number of reasons the state's implementation of Brownfields initiatives has fallen short of its goal, and the Brownfields law is not fully accomplishing its mission of directing development to the areas which need it the most.

### The Environment First Ordinance ("EFO") and Delaware's Brownfields Law

New Castle County's EFO, also known as the Conservation Design Ordinance, has changed the way development occurs in unincorporated New Castle County by requiring that stormwater management no longer be controlled by engineered basins and pipes, but by following and enhancing the natural drainage features of the property — a concept coined Conservation Design. The EFO simultaneously addresses stormwater management, erosion and sediment control, habitat fragmentation, and open space conservation in residential subdivisions of 50 acres or more.

Lest one think conservation design is some small consideration when it comes to the development of property, next to traffic impact, stormwater management has emerged as *the* most significant development consideration in unincorporated New Castle County. And, just to bring the point home in a very practical manner, the ordinance requires that 50% of the property (not 10%, not 25%) be set aside as open space to accomplish these goals.

Within older, generally incorporated, areas stormwater management shares importance with, and probably runs a close second to, Brownfields redevelopment when it comes to environmental land use issues. In order to encourage Brownfields redevelopment, the Delaware General Assembly passed legislation last year that was intended to provide a consistent scheme of liability concerning Brownfields between the state and EPA, and to reduce the uncertainty and high potential costs associated with Brownfields redevelopment in the state. Unfortunately, Brownfields redevelopment has been adrift in a

sea of uncertainty for quite some time. Although the new law recites that redevelopment is important for the economic vitality of the state, and professes that redevelopment of Brownfields is preferred over the relentless development of greenfields, DNREC's reluctance to provide meaningful liability protection to developers has chilled the desire of some developers to move forward.

In the following discussion, we will contrast the path followed by New Castle County's EFO and that followed by the state's Brownfields redevelopment legislation. Although both are currently law, the level of implementation varies significantly. Developers of residential subdivisions have begun submitting, and gaining approval of, land development plans implementing the concepts and principles of the EFO, but because a core principle of Brownfields redevelopment remains elusive, actual implementation of the state's Brownfields law is rare and risky. In other words, the EFO is influencing development because it is in actual use. The state's Brownfields redevelopment law is influencing development by its non-use — and that's a shame because redevelopment of Brownfields should be the first choice for land development in New Castle County and elsewhere, not the development of greenfields.

**Statutory Protection Versus Prospective Purchaser Agreements**

The federal Superfund statute ("CERCLA"), and its Delaware state law counterpart ("HSCA") impose joint and several liability for site remediation on past and present owners of a site. Although there is a statutory "innocent landowner" defense, in practice that defense is difficult to establish and of little comfort to developers. Thus, the "current owner" liability provisions of these laws have made efforts to purchase, finance, and redevelop potentially contaminated property fraught with risk and uncertainty.

In 2002, the federal government recognized the importance of Brownfields redevelopment to the national economy and set out to mitigate liability under CERCLA for prospective purchasers of environmentally-compromised property. With this issue in mind, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (the "Federal Brownfields Law") as an amendment to CERCLA in January 2002. The Federal Brownfields Law provided important liability limitations for property owners that qualify as either: 1) bona fide prospective purchasers, 2) contiguous property owners, or 3) innocent landowners.

In order to qualify for the liability protections under the Federal Brownfields Law, a property owner must meet certain statutory criteria, including 1) conducting "all appropriate inquiry" of the property prior to purchase and 2) taking "reasonable steps" after the purchase with respect to any hazardous substances located at the property. EPA was charged with developing regulations to establish standards and practices for conducting all appropriate inquiry, and did so in May 2003. EPA has also developed guidance documents regarding what constitutes "reasonable steps" in addressing hazardous substances at a site. Conspicuously absent from the Federal Brownfields Law is any requirement to enter into an agreement with EPA in order to benefit from this liability protection.

What's so important about this turn of events at the federal level is that it represents a significant change in attitude and practice. No longer is a prospective purchaser required to negotiate a very cumbersome, detailed and expensive prospective purchaser agreement in order to have liability protection from the federal government. If the statutory requirements are met, liability is avoided. In fact, the attitude at EPA has become one of discouraging prospective purchaser agreements and instead, promoting reliance upon the statutory standards for establishing liability protection.

Delaware started down this path last year when the General Assembly began tinkering with HSCA. Much of the language from the Federal Brownfields Law was imported regarding prospective purchasers, contiguous property owners and innocent landowners, but absent was the ability to simply meet statutory requirements in order to qualify for liability protection. In fact, the bill created an express requirement for a Prospective Purchaser Agreement — an agreement that must be negotiated with DNREC on a site-specific basis.

What has resulted is a two-step process that any prospective purchaser in Delaware must go through in order to be protected from liability. First, one must meet the definition of a Prospective Purchaser. Second, as a Prospective Purchaser, one must enter into a Prospective Purchaser Agreement ("PPA") in order to be protected from liability. Thus, what the federal government allows by statute, Delaware allows only by site-specific negotiated agreement. Although the federal approach leaves some uncertainty as to the interpretation of the statutory elements, at least it avoids the immediate necessity of protracted and expensive negotiations in drafting a PPA. Complex sites may warrant a PPA at the federal level to clarify any uncertainty but that is an option for the developer to use where necessary, not a statutory requirement. Delaware, by contrast, requires a PPA for all sites — large or small, simple or complex.

In recent months, DNREC has been working with a Brownfields Task Force to review and streamline the Brownfields program. Although some early progress was made toward fashioning liability protection for Brownfields developers (i.e., that well-defined endpoints to liability seemed obtainable), the vestiges of enforcement-minded joint and several liability live on. This is troubling not only because of the chilling effect on Brownfields redevelopment, but also because the continuation of the old paradigm of open-ended liability runs counter to the intent of the Delaware Brownfields law. More to the point, by insisting that prospective purchasers assume such liability, in a PPA, DNREC is whittling away the protection that the General Assembly granted.

In actuality, DNREC is simply faced with conflicting goals — on the one hand it is charged with encouraging Brownfields redevelopment, and on the other hand it is to ensure that "responsible parties", not the state, pay for cleanup of contaminated sites. And therein lies the rub. Although prospective purchasers generally are not adverse to performing a defined amount of work or assuming a quantified amount of liability (as known, upfront conditions), they do not want to sign up for the open-ended liability faced by a "responsible party." So long as DNREC continues to look to prospective purchasers as the deep pocket source of funds to cleanup problems they did not create, Brownfields redevelopment in Delaware will languish. If the Brownfields Task Force cannot balance the broad principles in the Delaware Brownfields law with DNREC's reluctance to limit risk, the resolution of this conundrum may require further action by the General Assembly.

In an attempt to do something, *anything,* New Castle County passed an ordinance focusing on Brownfields which cleared away certain county obstacles in the path of redevelopment. The county's ordinance (Ord. 03-069) passed in October 2003, and streamlined the redevelopment process by not

requiring certain studies (i.e. traffic impact studies and a site resource capacity analysis), waiving impact fees, and by loosening the regulations on setbacks and other land use restrictions on development in the Unified Development Code. But it's probably safe to say that few, if any, Brownfields redevelopment projects have ever been thwarted by the development requirements of New Castle County. The major roadblock to Brownfields redevelopment — unquantified environmental liability face by a prospective purchaser — is simply not a problem that New Castle County has much control over. Resolution of that issue lies squarely in the hands of DNREC — and, at present, must be determined on a site-by-site basis.

The result is that, today, developers are justifiably concerned by the expense of redeveloping older, environmentally-compromised properties and the substantial risk of inheriting liability for the acts of prior owners should they venture into the realm of Brownfields redevelopment. So, off into greenfields they go — and straight into the provisions of the EFO.

But not all of DNREC is delayed at the starting gate when it comes to land use and encouraging environmentally responsible development — in fact, if it weren't for the forward thinking and action of DNREC's Sediment and Stormwater Program, the EFO may never have come to pass.

**Stormwater Management and Conservation Design**

The original concept of conservation design now embodied in the EFO was first introduced into Delaware in the early 1990's by nationally renowned land use guru Randall Arendt and DNREC's Earl Shaver. Mr. Shaver, an engineer in DNREC's Sediment and Stormwater Program at the time, correctly foresaw the problems associated with engineered stormwater management. Although the concepts that Arendt and Shaver were promoting met with swift and decisive defeat in Sussex County, Shaver and DNREC were undeterred. In 1997, they generated the "Delaware Conservation Design for Stormwater Management Guidance Manual," and pairing with the Brandywine Conservancy, developed a slide show presentation on conservation design that they took on the road throughout Delaware.

At the time, New Castle County was still wrestling with the decision of whether to get involved in stormwater management. While certain members of county council (including the author) were pressing for the county to offer some level of oversight or management regarding stormwater retention basins, the administration was staunchly entrenched in the position that any management or oversight of "water issues" by the county would not be forthcoming. The thinking at the time was that surface and groundwater were state issues, that drinking water was a private industry issue, and that stormwater was some odd combination of a state, Water Resource Agency, and Soil Conservation Service issue.

Time marched on. The DNREC Sediment and Stormwater Program continued to advocate for conservation design in land use decision-making, began stormwater committee meetings and, ultimately, held a large conference on stormwater management at Dover Downs lasting three days in October 2002.

During this time, New Castle County awakened to the problems associated with the management of engineered stormwater basins and agreed to begin developing an inventory of the basins and ranking them in order of their need for attention and potential for structural failure. An annual inspection program was initiated and, shortly thereafter, the county began discussing proactive stormwater management — ultimately, this led to conservation design.

Enter, from stage right, DNREC's Sediment and Stormwater Program. Actually, a more accurate metaphor is that DNREC built the theater, wrote the play, and waited for someone (in this case, it was New Castle County) to step on stage. DNREC had been advocating conservation design for years and during the drafting of the EFO by the county, DNREC was an active participant in the workshops and provided the resources necessary for the county to acquire EPA grant money. Consultants schooled in conservation design were hired to review development plans in concert with the county and to suggest development redesign in accordance with conservation design principles. Ultimately, the Environment First Ordinance passed in mid-2003.

**Next Generation Stormwater Management**

Since the passage of the EFO, over 20 plans for development incorporating provisions under the EFO in New Castle County have been processed. This represents the set aside of approximately 900 acres of open space (conservation design is accomplished within the open space). Truth be told, New Castle County was requiring developers to incorporate many of the provisions of the EFO into development plans months before the passage of the EFO. The result is that there has been a lot of new open space area set aside in New Castle County.

The question who bears responsibility for the open space remains as a significant issue. According to the EFO, open space is to be transferred to a maintenance organization (i.e., a homeowner's maintenance corporation, condominium association or third party conservancy) or a "governmental body." A governmental body is defined as "any federal, state or local government including the departments, agencies, commissions, and instrumentalities thereof." It is the responsibility of the maintenance organization or governmental body to maintain and keep in good order and repair the open space and the common facilities in accordance with an approved natural resource area open space management plan and the Delaware Sediment and Stormwater Regulations.

In practice, many homeowners and condominium associations do not have the expertise or continuity of leadership to manage stormwater management system (now a part of the natural resource area open space) on a long-term basis, and inter-neighborhood coordination of stormwater management is minimal. Unfortunately, New Castle County's desire that a third party conservancy with the expertise and core mission of environmental management/stewardship step forward to manage the open space has not materialized. In reality, what generally happens is one of two things: 1) the maintenance corporation registers with the county and in return the county annually inspects the stormwater management area and fixes major repair items or 2) the stormwater management area is ignored by the maintenance corporation at the neighborhood's peril.

Still, a hodgepodge of maintenance corporations managing stormwater management areas is not something uncontemplated by New Castle County. And, for the time being, there are scant examples of this type of management causing a major problem. Recent tropical storms have brought to bear the tremendous potential destruction that can be associated with poor stormwater management. Knowledge that this type of management is precarious, though, is something that New Castle County is aware of, but

that knowledge did not stop the implementation of the EFO, and hasn't stymied the initiative to manage stormwater more naturally — the original intent behind the EFO.

### Conclusion

As is the case with any new law that makes a significant change in current practice, there are risks of unintended consequences, difficult enforcement, or creation of new problems. On the other hand, one hopes that a new law implements a beneficial solution to the problem at hand and that, at the very least, it is a good step forward. The important thing is to put the law into play after having researched the problem and given thoughtful consideration to the consequences of implementation. Should problems arise from the implementation, next generation modifications to the law can be put in place. This is the approach that New Castle County has taken.

A sure way to hinder the implementation of any new law is by the addition of new requirements in the execution that defeat the original intent of law. Not only does the implementation of the law get sidetracked, but also the consistency of implementation is jeopardized. This is precisely what has happened with the state's Brownfields law. As the boundaries of liability set in the original bill are expanded by DNREC on a site-by-site basis (well beyond the intent and purpose of the original bill), there is no consistency of expectation in the development community regarding liability risk. With the potential costs of liability continuing to rise, the risk to redevelop is viewed as simply too great. The result has been that Brownfields redevelopment is rare while greenfields development (albeit under the county's EFO) is steadily progressing. No doubt, this was not the intent of the General Assembly when it passed the Brownfields legislation last year. ◆

## STUDENT ESSAYS

### CAILAH E. GARFINKEL

*(Continued from page 28)*

don't act as if they are above the law or politics. For that reason, they listen to their "boss" The Constitution, not voters or lobbyist.

If the foundation of our country is the United States Constitution, then the cornerstone is the First Amendment right to Freedom of the Press. If there is one amendment, that is literally first among equals, then it is truly the First Amendment.

The First Amendment guarantees our right to express themselves in a wide array of avenues such as: newspapers, speeches, demonstrations, books, billboards, movies, and computers. This leads to a sharing of the conflicting sides of a story. What is most important about this amendment is its ability to break through the sugar coated version and show the real face of reality.

We the people of the United States know that the beliefs that were bestowed upon us remain alive in the American spirit that pulses through our great nation. We delve and look forward to being a part of the twenty-first century. Our historical experience offers valuable lessons to the rapidly globalizing society.

John F. Kennedy once said, "We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people." ◆

### NITIKA GUPTA

*(Continued from page 28)*

interpretations of the law.

A free press is also important as it protects the rights of the people. The people have the right to be informed and the responsibility to inform others. If the press was controlled by the government, then the government could easily influence the information that reaches the public. Consequently, the information may be unjustly filtered to either give citizens a false impression of the government or to purposely mislead. For instance, politicians seeking to further their political agendas could spread lies through the press to gain support. Another role of the press is to allow for people's opinions to be heard. Today, the people have the right to speak out against the government; this allows for the improvement of governmental policies that citizens feel are unjust. Therefore, without a free press, the government would have significant control over the decisions of the people, thereby undermining the rights of the populace.

An independent judiciary and free press are vital to honest government practices and the preservation of democracy. While an independent judiciary protects a facet of the government from popular control, a free press protects the rights of the people from governmental control. These two aspects are necessary to ensure a just democratic system. Without the two, the fundamental American principle of democracy would be replaced by corruption and the violation of rights. ◆

### DOROTHY OSTERHOUT

*(Continued from page 28)*

impartial decisions, while they are also being protected from political and societal pressures.

Freedom of the press is equally important in our society. The First Amendment gives society this right. The press, which includes newspapers, magazines, and other types of media, has the right to publish whatever it deems worthy. Whether it is announcing a small community happening or covering a huge, public trial, the press has the right to report and present its views on a subject. Importantly, freedom of the press goes hand in hand with freedom of speech. Individuals have the right to publish what they desire. For example, an individual may choose to have their opinion on a given issue published in a local newspaper. Whether on a local or a national level, freedom of the press is a right the media holds as stated in the First Amendment. Without freedom of the press, individuals would have no way of getting information that involves them and their environment. Clearly, freedom of the press is vital to our society.

In conclusion, both judicial independence and a free press are extremely key. Having an independent judiciary means judges make impartial decisions regardless of outside pressures. Also, it is important to have an independent judiciary rather than to have judicial elections be based on the amount of money spent on a campaign. Additionally, having a free press is very important, as many different opinions and subjects can be viewed by society. The right to free press, mentioned in the First Amendment, gives us the right to publish significant events that relate to us. Without a doubt, having an independent judiciary and free press is critical. ◆

# BAR BENCH MEDIA CONFERENCE ESSAY CONTEST WINNERS

The Bar Bench Media Conference of Delaware, formed in 1975, was designed to develop and foster the mutual understanding essential for conducting fair and impartial court proceedings without encroaching upon the freedom of the press. The Conference consists of representatives of the Delaware electronic and print media, judiciary and legal community. Each year, the Conference sponsors an essay contest for 11th and 12th grade Delaware public high school students on the importance of an independent judiciary and free press. Delaware Lawyer is pleased to present this year's winning essays by Nitika Gupta of The Charter School of Wilmington in New Castle County, Cailah E. Garfinkel of Campus Community High School in Kent County, and Dorothy Osterhout of Sussex Tech High School in Sussex County.

## THE IMPORTANCE OF AN INDEPENDENT JUDICIARY AND A FREE PRESS

### CAILAH E. GARFINKEL

Our founding fathers dared to imagine a country whose fundamental beliefs ensured basic human and civil rights to all its citizens and their future generations. This vision eventually transformed into the document, which laid the foundation for our country: the United States Constitution. The founding fathers put together a document that remains unmatched even today. It ensured that our government's power would not be vested in any one person or branch of government, but be equally divided into three separate branches – Executive, Legislative, and Judiciary. The three branches of government were given their own particular set of duties and responsibilities. This created a system of checks and balances. This ensures that no one branch can control all functions of government. The founders wanted to guarantee that each branch was sufficiently detached from one another; such that they may act independently, immune from that conduct of the other branches. Therefore, the founding fathers also wanted our Constitution to give all Americans rights and a voice. It is clear, therefore, that Independent Judiciary and Freedom of the Press are important to the United States of America.

An Independent Judiciary is the final judge of what is and what is not constitutional. It is the guardian of our constitutional freedoms. The importance of such a concept is that it does not give an advantage. An Independent Judiciary is a considerably large part of checks and balances; it is a necessary integral. An Independent Judiciary and checks and balances both portray the equality between all persons. In addition, an Independent Judiciary is just as is says in its name, it's Independent. The judges

*(Continued on page 27)*

### NITIKA GUPTA

An independent judicial system and a press free from the influence of government encompass the basic foundations that our nation was built upon. These aspects protect the judiciary and the rights of the people from unjust control of the government and popular politics. Without these two fundamental principals, the American government would undoubtedly be tainted by corruption and tyranny.

A judiciary independent of political and social pressures is integral to the American government. The role of the judicial branch is to be an impartial arbiter of the law, which often results in its significant influence over public policy. If the judiciary was dependent on the popularly elected legislative branches or executive branches, it would also be dependent upon the populace. As a result, there would be more opportunities for corruption within public policy. For example, if the judiciary was directly accountable to the president, then the president could influence judges to "interpret" laws to aid his political cause. Similarly, if judges were elected by the people, they would likely deliver court decisions that appealed to the majority in hopes of re-election. An independent judiciary prevents such occurrences. Also, the checks and balances system of our government promotes an independent judiciary. A significant "check" of the judicial branch over both the executive and legislative branches is its power of judicial review. With this power to declare acts of either branch unconstitutional, the judiciary is able to exert influence over the other branches of government, keeping the balance of power in check. As a result, a strong independent judiciary is vital to the honest workings of the government and the impartial

*(Continued on page 27)*

### DOROTHY OSTERHOUT

In the state of Delaware, the Governor appoints judges. However, throughout most of the country the citizens of their area elect judges. While this may seem like a fine practice on the surface, in reality, it all comes down to judges selling themselves just to win the public's vote. This is why our state operates under an independent judiciary. In addition, freedom of the press is extremely important throughout our state as well as our nation.

Judicial independence was an important issue when the U.S. Constitution was written. Founders wanted judges and their rulings to be protected. They didn't want judges to feel political, legislative, special interest, financial, public, media, or personal pressure.

An independent judiciary is one that is free from the influence of political or social pressures. It cannot be stressed enough how important judicial independence is. In many states (Delaware excluded), judges are elected by citizens. Therefore, candidates would spend huge campaigns and large sums of money. This, in turn, bases the appointment of judges on how much money they have put into a campaign, regardless of how competent the candidate is. Not utilizing judicial independence causes corrupt elections. For example, special interests spend millions of dollars to elect judges and influence their decisions, just to serve their interests instead of the public's interests. Elections are 'bought' this way, and it seems money buys a candidate judicial favor.

In addition, in competitive elections, opposing candidates may make misleading, biased attacks on many candidates. This brings politics into the court. All in all, having an independent judiciary helps judges uphold the law and make

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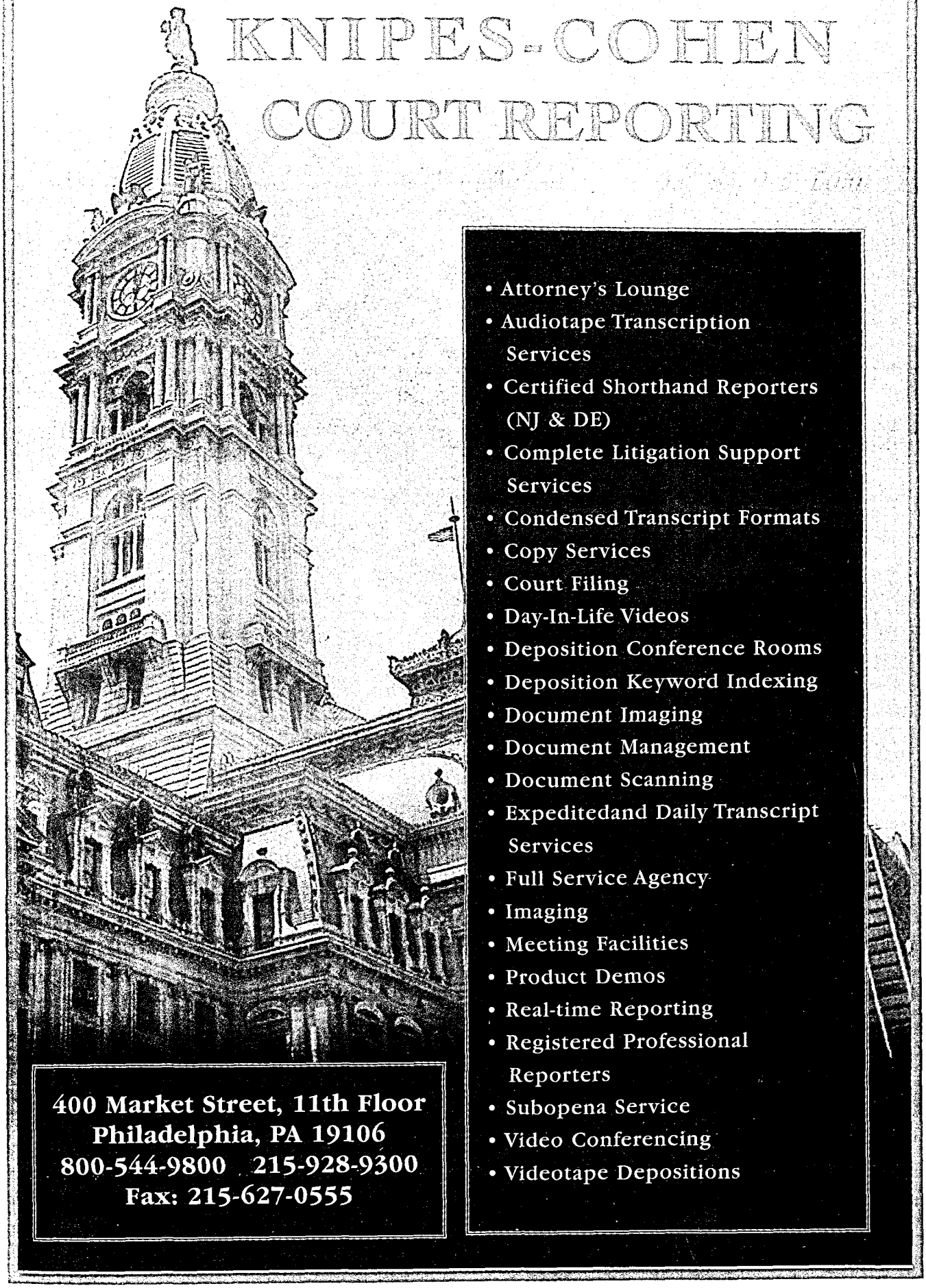
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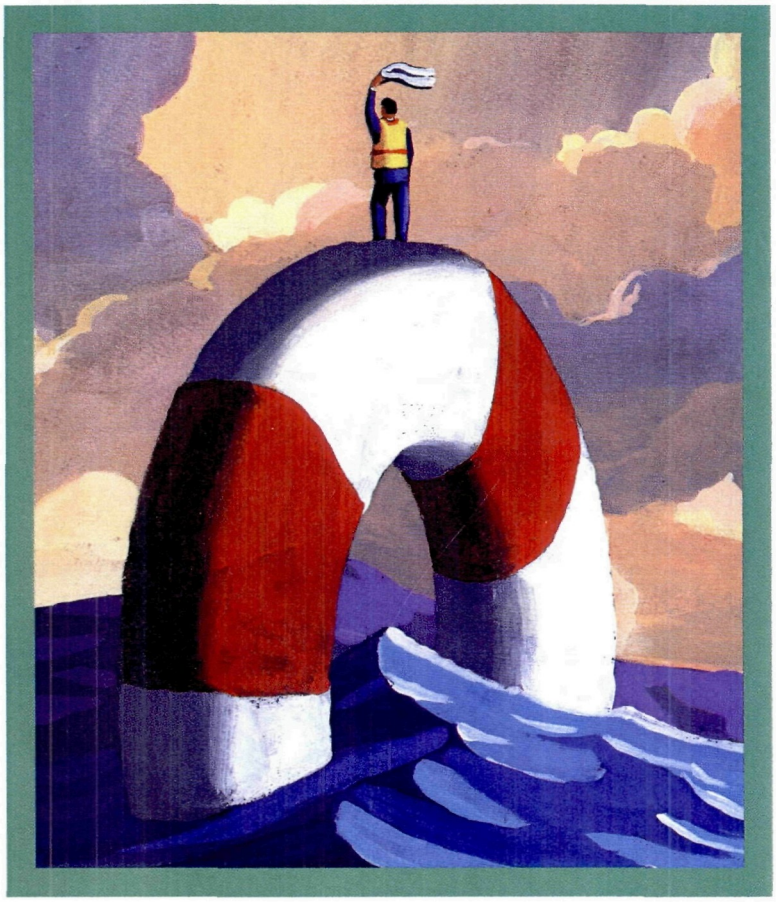

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