IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN A NICHOLS,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-07-001 MMJ
	)	
STATE COASTAL ZONE INDUSTRIAL CONTROL BOARD, DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL, and DIAMOND STATE GENERATION PARTNERS, LLC,	)	
Appellees.	)	

Submitted: January 2, 2013
Decided: March 14, 2013

On Appeal from Opinion and Final Order of the
State Coastal Zone Industrial Control Board

AFFIRMED

MEMORANDUM OPINION

Richard L. Abbott, Esquire, Abbott Law Firm, Hockessin, Delaware, Attorney for Appellant

Joseph C. Schoell, Esquire, Sean P. Tucker, Esquire, Drinker, Biddle & Reath, LLP, Wilmington, Delaware, Attorney for Appellee Diamond State Generation Partners, LLC

Robert F. Phillips, Esquire, Peter O. Jamison, III, Esquire, Department of Justice, Wilmington, Delaware, Attorneys for the State Coastal Zone Industrial Control Board and Department of Natural Resources and Environmental Control

JOHNSTON, J.

John Nichols has appealed the July 13, 2012 Opinion and Final Order of the Coastal Zone Industrial Control Board (the "Board"). The Board dismissed Nichols' appeal, finding that Nichols did not have standing to appeal the issuance of a Coastal Zone Act permit ("CZA Permit") by the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC").

FACTUAL AND PROCEDURAL BACKGROUND

On November 5, 2011, Diamond State Generation Partners, LLC ("DSGP") submitted a written application for a CZA Permit to construct and operate a facility utilizing "Bloom Boxes" to generate electrical power. The proposed project site, located at 1593 River Road in New Castle, Delaware, sits adjacent to the Delmarva Power Red Lion substation.

On February 10, 2012, the Secretary of DNREC issued an Environmental Assessment Report ("EA Report"), assessing the impact of the proposed project on Delaware's Coastal Zone. The EA Report found that DSGP's application was "administratively complete" and, therefore, sufficient to proceed to a public hearing.

March 6, 2012 Hearing

On March 6, 2012, the Secretary of DNREC, through a hearing officer, held a public hearing on DSGP's application. John Nichols,

Appellant, attended the hearing as an interested citizen. Nichols raised several objections to the proposed CZA Permit. Specifically, Nichols questioned whether DSGP's application disclosed all materials that might be hazardous substances. Nichols also took issue with the fact that DSGP's application failed to include an Environmental Assessment Report from DNREC's Natural Heritage Program, as required by CZA Regulations.

On April 13, 2012, the hearing officer issued a report, concluding that DSGP should be granted a CZA Permit. On April 30, 2012, the Secretary adopted an Order approving the CZA Permit, and issued DSGP Permit No. 394.

Nichols' Appeal of Secretary's Order

On May 15, 2012, Nichols appealed the Secretary's April 30, 2012 Order. In support of his appeal, Nichols raised the following arguments: (1) the Secretary's Order incorrectly referenced the public hearing date; (2) the hearing officer failed to consider Nichols' comments at the public hearing; (3) a report from DNREC's Natural Heritage Program was missing; (4) the hearing officer did not consider the environmental hazards of the facility; and (5) DSGP incorrectly calculated the efficiency and environmental impacts of the facility.

On May 22, 2012, DSGP filed a Motion to Dismiss Nichols' appeal, arguing that Nichols lacked standing. DSGP contended that Nichols had failed to demonstrate that he was an "aggrieved" person under 7 *Del. C.* § 7007(b). DNREC joined in DSGP's Motion to Dismiss. On May 23, 2012, Nichols filed a response to DSGP's Motion, arguing that he was acting on behalf of the "nesting birds and other 'flora and fauna,'" which were unable to file an appeal.

June 13, 2012 Hearing

On June 13, 2012, a hearing was held before the Board on Nichols' appeal. At the hearing, Nichols declined to be sworn and present testimony. Nichols instead relied on the arguments advanced in his response to DSGP's Motion. In addressing whether he was an "aggrieved" person under Section 7007(b), Nichols stated:

> The Coastal Zone Act provision says any person aggrieved can appeal. So we ask ourselves does this mean that we must first prove a particularized injury, which is what Mr. Schoell is arguing, or does it mean any person who simply thinks that DNREC got it wrong can appeal.
>
> As I stated earlier, various definitions can be pointed to. In common parlance aggrieved means having a grievance. If you look at Merriam Webster's, it says annoyed. Grievance is based on a subject[ive] perception or state of mind.

Nichols further contended that he was representing the "flora and fauna," and therefore, had "an interest in the environmental hazards associated with siting the fuel cells within the coastal zone."

The Board deferred ruling on Nichols' standing, and proceeded with the evidentiary portion of the hearing. At the conclusion of the hearing, the Board returned to the issue of standing. Five Board members voted to dismiss Nichols' appeal for lack of standing. Two members abstained.

Board's Opinion and Final Order

On July 13, 2012, the Board issued its Opinion and Final Order as to Nichols' appeal. The Board found that Nichols had "not identified or presented any evidence relating to any legally protected interest that he possesses that has been or will be invaded upon by the permit issued to Diamond State." The Board further found that Nichols failed to make any connection between the potential injury to the flora and fauna and his own legally protected interests. The Board granted the motions of DSGP, DNREC and the Secretary of DNREC, to dismiss Nichols' appeal (of the Secretary's April 30, 2012 Order) for lack of standing.

Nichols timely appealed the Board's July 13, 2012 Opinion and Final Order.

STANDARD OF REVIEW

The sole issue before the Court is whether Nichols had standing in this case to appeal the Secretary's April 30, 2012 Order, granting DSGP a CZA Permit. That issue presents a mixed questions of fact and law.[1] Whether the Coastal Zone Industrial Control Board correctly interpreted the applicable standing provision is a question of law, which the Court reviews *de novo.*[2] As to the Board's factual findings, the Court must determine whether such findings are supported by substantial evidence in the record.[3] "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."[4] It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5]

ANALYSIS

Background of the Coastal Zoning Act

The Coastal Zoning Act (the "CZA"), set forth at 7 *Del. C*. § 7007(b) *et seq*., was enacted by the General Assembly to protect the natural

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[1] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994).

[2] *Harvey v. Zoning Bd. of Adjustment of Odessa*, 2000 WL 33111028, at *5 (Del. Super.).

[3] *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[4] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

[5] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

environment of Delaware's bay and coastal areas, by controlling the location, extent and type of industrial development in such areas.[6] To accomplish this purpose, the CZA prohibits entirely "the construction of new heavy industry in [Delaware's] coastal areas."[7] With respect to industrial development, other than heavy industry, the CZA requires a permit for such development.[8]

In determining whether to grant a permit, the Secretary of DNREC may consider: (1) the environmental impact; (2) the economic effect; (3) the aesthetic effect; (4) the number and type of supporting facilities required and the impact of such facilities on all these factors; (5) the effect on neighboring land uses; and (6) county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.[9]

In this case, the Secretary considered the above factors, and determined that DSGP's proposed use for the area was consistent with the CZA's goals. Therefore, DSGP was issued CZA Permit No. 394. Nichols appealed the Secretary's determination, arguing, *inter alia*, that

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[6] 7 *Del. C*. § 7001.

[7] *Id.*

[8] *Id.*

[9] 7 *Del. C*. § 7004(b)(1).

environmental impact was detrimental to the "flora and fauna" in the coastal area.

As anticipated by the General Assembly, the general public, including Nichols, had been provided the opportunity to participate through the agency hearing process:

> After the hearing process is complete and the Secretary has made a decision on the permits, the standing requirement changes. It then becomes the more stringent "substantially affected" test of the standing provisions at issue here. Based on the foregoing, it seems clear that the General Assembly intended a stricter standing requirement for appeals to the EAB or under the CZA than for that of the hearing process which is open to the informed general public.[10]

Standing

At issue here is whether Nichols has standing to appeal the Secretary's determination. Standing refers to the right of a party to invoke the jurisdiction of a court, or in this case, an administrative board, to enforce a claim or to redress a grievance.[11] The appellant has the burden of proof to establish standing.[12]

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[10] *Oceanport,* 636 A.2d at 900-901 (recognizing the similarity of the "substantively affected" test in 7 *Del. C.* §§ 6008(a) and 7212, with "person aggrieved by a final decision" standard in 7 *Del. C.* § 7007(b)).

[11] *Harvey*, 2000 WL 33111028, at *5 (citations omitted).

[12] *Dover Historical Soc. v. City of Dover Planning Comm'n,* 838 A.2d 1103, 1109 (Del. 2003).

Under the Coastal Zoning Act, standing to appeal is conferred on "any person aggrieved by the final decision of the Secretary of the Department of Natural Resources and Environmental Control …."[13] This appeals standard has been construed to require "a heightened interest," such that only those who were "actually affected" by the Secretary's decisions may appeal.[14] Thus, for purposes of the CZA, a person wishing to appeal the Secretary's decision must show: (1) an injury in fact; and (2) that such injury is within the zone of interest sought to be protected by the statute.[15]

In *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*.,[16] the Delaware Supreme Court set forth the applicable standard to determine whether a party has suffered "an injury in fact." The Court found that the injury must be "concrete and particularized," and "actual or imminent," as opposed to conjectural or hypothetical.[17] Further, there must be an actual

[13] 7 *Del. C*. § 7007(b).

[14] *Oceanport Indus*. *Inc*., 636 A.2d at 904.

[15] *Id.*

[16] 636 A.2d 892 (Del. 1994).

[17] *Id.* at 904 (citations omitted).

connection between the injury and the conduct complained of – that is, the injury must be fairly traceable to the challenged action.[18]

Applying the *Oceanport* standard, the Board in this case found that Nichols failed to demonstrate that he sustained an "injury in fact." A majority of the Board concluded that Nichols lacked standing to appeal the Secretary's determination. The Court agrees.

As properly noted by the Board, Nichols failed to identify or present any evidence relating to any legally-protected interest that has been or will be injured by issuance of a CZA permit to DSGP. Nichols' only argument, with respect to "an injury in fact," relates to the potential injury to the flora and fauna in the coastal zone. Nichols, however, fails to draw any connection between that potential injury and his own legally-protected interests. For instance, Nichols does not show that he has a personal interest – be it financial or aesthetic – in the relevant coastal areas. Nor does Nichols demonstrate that he lives in close proximity to such areas.[19] Absent such evidence, the Board properly found that Nichols failed to demonstrate that he was an "aggrieved" person under Section 7007(b).

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[18] *Id.*

[19] *See Kostyshyn v. Comm'rs of Town of Bellefonte,* 2006 WL 1520199, at *2 (Del. Super.).

Nichols' contention that the Board lacked the requisite 5-person majority to carry the motion is without merit. When reviewed in its entirety, the record plainly establishes that five members of the Board voted that Nichols lacked standing to appeal the Secretary's April 10, 2012 Order.[20]

Further, Nichols' challenge to the Board's vote on standing was raised for the first time in his Opening Brief on appeal. Having failed to object to the sufficiency or procedural propriety of the vote at the time of the Board's hearing, Nichols has waived this argument on appeal to the Superior Court.[21]

CONCLUSION

The Court finds that Appellant Nichols lacked standing to appeal the issuance of Coastal Zone Act Permit No. 394. Appellant failed to demonstrate that he is an "aggrieved person" pursuant to 11 *Del. C.* § 7007(b). A majority of the State Coastal Zone Industrial Control Board correctly interpreted the legal standard, and properly voted that Appellant had no standing. The Board's findings are supported by substantial record evidence.

[20] Two Board members abstained.

[21] *Wilmington Trust Co. v. Conner,* 415 A.2d 773, 781 (Del. 1980); *Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1262 (Del. Super. 1993).

THEREFORE, the Opinion and Final Order of the Coastal Zone Industrial Control Board, dated July 13, 2012, is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston