BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
FOR THE STATE OF DELAWARE

JOHN A. NICHOLS	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. 2012-01
	)	
SECRETARY COLLIN P. O'MARA	)	
and the DELAWARE DEPARTMENT	)	
OF NATURAL RESOURCES AND	)	
ENVIRONMENTAL CONTROL,	)	
	)	
Appellees.	)	

OPINION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Coastal Zone Industrial Control Board ("Board") on June 13, 2012, at the Delaware Technical & Community College Terry Campus, Room 727, 100 Campus Road, Dover, Delaware.

Members of the Board present and constituting a quorum were: Richard Legatski (Chairperson), Albert Holmes, Pallatheri Subramanian, John Burton, Robert Wheatley, Stanley Tocker and Robert Bewick, Jr. Deputy Attorney General Peter Jamison, III represented the Board. Appellant John A. Nichols appeared *pro se*. Deputy Attorney General Robert F. Phillips represented the Delaware Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary Collin P. O'Mara ("Secretary"). Joseph C. Schoell, Esquire and Shawn P. Tucker, Esquire appeared on behalf of the permittee, Diamond State Generation Partners, LLC ("Diamond State").

STATEMENT OF THE CASE AND PROCEEDINGS

On November 15, 2011, Diamond State submitted an application to DNREC

requesting a permit for the construction of a fuel cell electrical power generation facility in Delaware's coastal zone in the area of New Castle, Delaware. According to the application, the facility (to be called the "Red Lion Energy Center") would generate up to 47 megawatts of electrical energy that would be distributed to the PJM electrical grid.

On March 6, 2012, Robert P. Haynes, acting as Hearing Officer for DNREC, held a public hearing to solicit and consider public comment on Diamond State's permit application. Following the hearing, the Hearing Officer prepared and submitted a report to the Secretary dated April 13, 2012. The report to the Secretary set forth the procedural history of the permit application, a summary of the record before the Hearing Officer, and his conclusions regarding the issuance of the requested permit.

On April 30, 2012, the Secretary issued an order (Order No. 2012-CZ-0013) directing that the permit requested by Diamond State be issued.

On May 15, 2012, the appellant filed with the Board a timely notice of appeal from the Secretary's order. The appeal, in essence, challenged the legality and reasonableness of the Secretary's order.

On or about May 22, 2012, Diamond State filed a motion with the Board to dismiss the appeal on the grounds that the appellant lacked standing.

On May 23, 2012, the appellant filed with the Board a response to Diamond State's motion to dismiss.

On or about June 4, 2012, the appellant filed a further response to Diamond State's motion to dismiss.

Neither DNREC nor the Secretary made any written submissions regarding the issue of the

appellant's standing, but they did, at the hearing on June 13, 2012, join in arguments made by Diamond State in support of its motion to dismiss.

MATTERS BEFORE THE BOARD

At the hearing on June 13, 2012, prior to the hearing of evidence and argument on the merits of the appeal, the Board heard oral argument from the parties (and offered the parties an opportunity to present evidence) on the motion to dismiss. At the conclusion of the oral argument on the motion to dismiss, the Board announced that it would defer decision on the motion to dismiss until after the parties' presentation of evidence on the merits of the appeal.

Summary of the Evidence

In his case-in-chief, the appellant presented the testimony of two witnesses: David T. Stevenson and Richard Timmons.

Mr. Stevenson testified that:

(1) He is the director of the Center of Energy Competitiveness at the Caesar Rodney Institute. Tr. at p. 60.[1]

(2) He holds a Bachelor of Science degree from Rutgers University in Agricultural Economics. Tr. at p. 59.

(3) He was employed 23 years by the DuPont Company in "various sales, marketing, and business management, technical management positions." Tr. at p. 59.

(4) While employed by DuPont, he conducted numerous analyses regarding the economic viability of proposed business ventures. Tr. at p. 60.

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[1]The abbreviation "Tr." shall be used throughout this opinion and order to refer to the transcript of the Board's hearing on June 13, 2012.

(5) He was an official intervenor in a Delaware Public Service Commission hearing involving Diamond State's Red Lion Energy Center. Tr. at pp. 61 - 62.

(6) In his opinion, the Red Lion Energy Center would not have a net benefit economically to the State of Delaware. Tr. at p. 70.

Mr. Timmons testified that:

(1) He holds a Bachelor's degree in Chemical Engineering and a Bachelor's degree in Chemistry, both from the University of Delaware. Tr. at p. 84.

(2) He worked for Diamond Shamrock Chemical Company (now doing business as "Oxidental Chemical Company"). Tr. at pp. 84 - 85.

(3) As an employee for Diamond Shamrock, he worked as a production superintendent, production manager, maintenance manager, and technical manager and "was involved in pretty much all phases of chemical engineering." Tr. at p. 85.

(4) As an employee of Diamond Shamrock, his job responsibilities often involved issues relating to the management and procurement of electrical power from the PJM grid. Tr. at pp. 86 - 87.

(5) The EPA has established that the use of natural gas in the generation of electricity (by any process) produces 117 pounds of carbon dioxide per one million BTUs. Tr. at p. 94.

(6) He back-calculated from the data that Diamond State included in its application to the Secretary to determine what assumption Diamond State was making regarding the carbon dioxide produced by its facility and came to the conclusion that Diamond State was assuming (erroneously in his opinion) that its facility would produce 102 pounds of carbon dioxide per one

million BTUs. Tr. at p. 94.

(7) Diamond State, in its application to the Secretary, exaggerated the cleanliness of its facility (in terms of its impact on the environment) by comparing it to coal-fired and oil-fired electrical generation facilities. According to Mr. Timmons, the appropriate comparison would be to the "next increment of energy", which, in his opinion, would be a combined-cycle natural gas facility. Tr. p. 95.

(8) The fuel cell facility at the Red Lion Energy Center would not compare favorably (in terms of environmental emissions) to a combined-cycle natural gas facility. Tr. at p. 95.

In its case-in-chief, Diamond State presented the testimony of two witnesses: William Brockenborough and Jeffrey M. Bross.

Mr. Brockenborough testified that:

(1) He is General Manager of Bloom Electronics, which manufactures the fuel cell servers to be installed at the Red Lion Energy Center. Tr. at p. 153.

(2) Fuel cells produce electricity "through a combination of oxygen and a fuel without combustion, without flame." Tr. at p. 154.

(3) "The raw materials in the process are utility natural gas and air, and at startup of the installation, the initial startup, a small amount of water." Tr. at p. 154.

(4) The by-products of the fuel cell electrical generation process "are principally carbon dioxide and water vapor and very small amounts of nitrous oxides, sulfur oxides, and volatile organics...." Tr. at p.154.

(5) The Bloom process does not generate any hazardous waste. Tr. at p. 155.

(6) "[E]lemental sulfur is present as an odorant in utility natural gas in the form of mercaptan," and the mercaptan is removed from the gas through the use of a resin bed that "absorbs the mercaptan...." Tr. at p. 155.

(7) The mercaptan that is removed from the utility natural gas "is nontoxic." Tr. at p. 155.

(8) No hydrogen sulfide is used in the fuel cell electrical generation process. Tr. at pp. 155 - 56.

(9) "Underwriters Laboratory has examined the design and manufacture of [Bloom's fuel cell] and has found it to be in conformance with ANSI [American National Standards Institute] standard SC1 for the construction of fuel cells." Tr. at p. 158.

(10) "Bloom meets two standards of the National Fire Protection Agency, NFPA 853, which governs the construction and installation of fuel cells, and NFPA 70, which is the National Electric Code." Tr. at p. 159.

(11) The Bloom fuel cell meets the "very stringent" emission standards of the California Air Resources Board. Tr. at p. 160.

(12) There is a catalyst in the Bloom fuel cell box that creates an electrochemical reaction, and he could not disclose the nature of the catalyst, because it is proprietary information. Tr. at p. 171.

(13) "The catalyst...is not in any way consumed or used up or discharged or emitted during fuel cell operation. The fuel cells, the very thin ceramics that act as the electrolytes and sandwich over time...degrade physically and become less effective and less efficient. They're entirely within the enclosure. The fuel cell stack mass, when it leaves the a site, is identical to its mass, when it came in. None of the material is discharged in any way." Tr. at p. 186.

Mr. Bross testified that:

(1) He is Chairman of the Board of and consultant with Duffield Associates, which is an environmental sciences and geosciences consulting firm. Tr. at p. 198.

(2) He conducted a study of the average emissions from all electrical generation facilities currently providing energy to the PJM grid and that the emissions from the Red Lion Energy Center's fuel cell electrical generators compared favorably to those average emissions. Tr. at pp. 208 - 09.

(3) The Red Lion Energy Center, in terms of its impact on surrounding wetlands, complies with state and county wetland preservation requirements. Tr. at pp. 217 - 18.

(4) New Castle County has approved of the storm water management plan for the Red Lion Energy Center. Tr. at pp. 218 - 19.

(5) New Castle County has confirmed that the electrical generation activities to occur at the Red Lion Energy Center would be permissible uses of the land in question under the zoning laws of the county. Tr. at p. 220.

In its case-in-chief, DNREC presented the testimony of one witness–Kevin Coyle. Mr. Coyle testified that:

(1) He is employed as a principal planner by DNREC.

(2) He provides administrative support to DNREC in connection with the preparation of legal notices, the drafting of environmental assessment reports and other similar documents. Tr. at p. 234.

(3) The buffer between the Red Lion Energy Center and surrounding wetlands would protect the wetlands from nitrogen and phosphorous runoff from the center. Tr. at p. 239.

(4) If Diamond State were to violate the terms of the permit issued by DNREC for the construction and operation of the Red Lion Energy Center, DNREC could take action to revoke the permit. Tr. at p. 241.

Diamond State's, DNREC's and the Secretarys' Motion to Dismiss

In their motions to dismiss, Diamond State, DNREC and the Secretary request that the Board dismiss the appellant's appeal on the ground that the appellant does not have standing pursuant to the standing requirements set forth in 7 *Del.C.* § 7007(b)[2] and 7 Del. Admin. Code § 101-16.1.1[3]. According to the moving parties, a party does not have standing to appeal from a decision of the Secretary under the Coastal Zone Act unless the party can show that the decision injures him or her in a concrete and particularized way, and the appellant has neither alleged or shown any such injury. In his response to the motion to dismiss, the appellant takes issue with the requirement that a party appealing a decision of the Secretary should have to prove a concrete and particularized injury. The appellant argues that the standard is too onerous, not capable of being met under any circumstances, and should not be applied here. The appellant further argues that, because the Act was designed to protect the flora and fauna of the Coastal Zone, none of which can speak for themselves, he should be granted standing to speak for them.

In *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994),

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[2] 7 *Del.C.* § 7007(b) states, in pertinent part: "Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under § 7005(a) of this title [which authorizes the Secretary to administer the Coastal Zone Act] may appeal same under this section.

[3] 7 Del. Admin. Code § 101-16.1.1 states "Any person aggrieved by any permit or other decision of the Secretary under the Act may appeal same under Section 7007 of the Act and this section of the regulations.

the Delaware Supreme Court considered the standards applicable to standing in administrative appeals from orders of the Secretary under chapters 60 and 72 of title 7 of the Delaware Code and held 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. The invasion must be 1) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical. Second, there must be actual connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Finally, it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative.

Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d at 904, see also, *Ropp v. King*, 2007 WL 2198771 at *3 (Del. Ch. 2007)(held that, where a statute allows an "aggrieved" party to appeal an administrative decision of a state official, "[the] party seeking to establish standing must satisfy the test of whether: (1) there is a claim of injury-in-fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.")

In the instant case, the appellant, who has the burden of proof on the issue of standing, has 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. In his response to the motions to dismiss, the appellant alludes to potential injury to the flora and fauna in the coastal zone, but fails to make any connection between that potential injury and his own legally protected interests. Further, factual averments in the appellant's response to the motion to dismiss (as well as factual averments in his notice of appeal) do not constitute evidence. They are merely

allegations and assertions. When presented with the opportunity to present evidence on the issue of standing at the hearing before the Board on June 13, 2012, the appellant presented no evidence whatsoever that might be relevant to his standing to bring the present appeal. Having no evidence before it to support a finding that the appellant has standing to bring the appeal, the Board must, and hereby does, grant the motions of Diamond State, DNREC and the Secretary to dismiss for lack of standing.

IT IS SO ORDERED this 13th day of July, 2012.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

BY: */s/ Richard Legatski*
Member

/s/ Robert Wheatley
Member

/s/ Albert Holmes
Member

/s/ John S. Burton, Sr.
Member

/s/ Pallatheri Subramanian
Member

/s/ Stanley Tocker
Member

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

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[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.

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[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

EFiled: Aug 16 2013 10:33AM EDT
Filing ID 53765754
Case Number 190,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN A. NICHOLS,	§	
	§	No. 190, 2013
Appellant Below,	§	
Appellant,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	C.A. No. N12A-07-001
STATE COASTAL ZONE	§	
INDUSTRIAL CONTROL BOARD,	§	
DELAWARE DEPARTMENT OF	§	
NATURAL RESOURCES AND	§	
ENVIRONMENTAL CONTROL,	§	
and DIAMOND STATE	§	
GENERATION PARTNERS, LLC,	§	
	§	
Appellees-Below,	§	
Appellees.	§	

Submitted: July 24, 2013
Decided: August 16, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

Upon appeal from the Superior Court. **AFFIRMED**.

Richard L. Abbott, Esquire, Abbott Law Firm, Hockessin, Delaware, for appellant.

Robert F. Phillips, Esquire, Department of Justice, Wilmington, Delaware, for appellee, Delaware Department of Natural Resources and Environmental Control.

Joseph C. Schoell, Esquire and Shawn P. Tucker, Esquire, Drinker, Biddle & Reath, LLP, Wilmington, Delaware, for appellee, Diamond State Generation Partners, LLC.

HOLLAND, Justice:

The appellant, John Nichols ("Nichols"), appeals from a final judgment of the Superior Court affirming the order of the State Coastal Zone Industrial Board (the "Board"), granting motions to dismiss filed by appellees, Diamond State Generation Partners LLC ("DSGP") and the Delaware Department of Natural Resources and Environmental Control ("DNREC" and with DSGP, "appellees"), in response to Nichols' appeal of the grant of a Coastal Zone industrial permit application.

Nichols raises two claims on appeal. First, he argues that the Board's vote on whether Nichols had standing to pursue the appeal failed due to the lack of a five-vote majority. Second, Nichols contends that he possessed standing under the "any person aggrieved" standard of title 7, section 7007(b) of the Delaware Code, or, in the alternative, as a matter of common law.

We have determined that both of Nichols' arguments are without merit. Therefore, the judgment of the Superior Court must be affirmed.

Facts and Procedural History

In November, 2011, DSGP submitted a written application for a Coastal Zone Act ("CZA")[1] permit to develop and operate a facility, known as the Red Lion Energy Center, that would utilize "Bloom Boxes" to

[1] The Coastal Zone Act is codified in Chapter 70 of Title 7 of the Delaware Code.

generate electricity in the Coastal Zone of Delaware. The manufacturing process to be employed involved the use of fuel cells, which would "chemically convert natural gas to electrical power."[2] The Secretary of DNREC issued an Environmental Assessment Report (the "Report") describing the project and its purpose, and found the application to be administratively complete. The Report also stated multiple benefits of the project and that "no hazardous wastes" would be generated from the facility.

In March, 2012, the Secretary of DNREC, through a hearing officer, held a public hearing to receive public comment on the proposed permit. Nichols appeared and raised several objections to the permit. Specifically, Nichols questioned whether DSGP's application disclosed all materials that could be hazardous, and brought attention to the fact that the application failed to include an Environmental Assessment Report from DNREC's Natural Heritage Program, as required by CZA Regulations. The hearing officer issued a report recommending granting the CZA permit over the objections of Nichols, and the Secretary issued the permit.

[2] The total land affected by the project development was 9.3 acres and the sanitary wastewater sewage was to be disposed of by the use of an underground septic system.

Nichols appealed the order granting the permit, citing five reasons why the ruling should be overturned.[3] In response, DSGP, joined by DNREC, filed a motion to dismiss Nichols' appeal based on lack of standing. The appellees argued that Nichols failed to show that he was an "aggrieved" person under title 7, section 7007(b). Nichols raised two arguments in response to DSGP's motion to dismiss. First, he argued that he was acting on behalf of the "nesting birds and other flora and fauna, which were unable to file an appeal." Second, he argued that his interest was the "public interest in a thorough, fact-based administrative determination before a Coastal Zone permit is issued."

A hearing was held (the "Hearing") before the Coastal Zone Industrial Control Board to address Nichols' appeal. At the Hearing, Nichols declined to be sworn in and present testimony, but relied solely on the arguments advanced in his response to DSGP's motion to dismiss and the testimony of expert witnesses he called to testify. Nichols contended that the term "aggrieved" in section 7007(b) referred to "any person who simply thinks that DNREC got it wrong" and that "[g]rievance is based on . . . state of

[3] *Nichols v. State Coastal Zone Indus. Control Bd.*, 2013 WL 1092205 at *1 (Del. Super. Ct. Mar. 19, 2003) (citing the following issues that were raised on appeal: "(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.").

mind." The Board deferred ruling on the issue of Nichols' standing until after the evidentiary portion of the Hearing. At the conclusion of the Hearing, five of the seven board members present voted to dismiss Nichols' appeal for lack of standing, while the other two abstained.

The Board issued its Final Opinion and Order, in which it memorialized the members' votes and granted the motion to dismiss for lack of standing, reasoning 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 connect the potential injury to the flora and fauna and his own legally protected interests, and "presented no evidence whatsoever that might be relevant to his standing to bring the present appeal."

The Superior Court affirmed the decision of the Board, reasoning that Nichols failed to present any evidence that would prove his own legally protected interests were infringed upon by the order and that the record clearly and correctly reflected that "five members of the Board voted that Nichols lacked standing." The Superior Court also found that Nichols' challenge to the Board's method of voting on standing was not objected to at the Hearing and was raised for the first time in his opening brief to the

Superior Court. Therefore, the Superior Court held that argument was waived and could not be considered.

Board Majority Votes on Standing

Title 7, section 7006 states, in relevant part: "A majority of the total membership of the Board less those disqualifying themselves shall constitute a quorum. A majority of the total membership of the Board shall be necessary to make a final decision on a permit request." Nichols argues that the transcript of the hearing reveals that the Board failed to achieve the majority vote required by title 7, section 7006 to render a binding decision. According to Nichols, only four of the nine members of the Board actually voted.

The Superior Court did not consider whether or not a majority of the Board properly voted that Nichols lacked standing. The Superior Court determined that Nichols waived this argument by not objecting to the sufficiency or procedural propriety of the vote at the Hearing. Nichols argues that he had "no chance" to object to the alleged invalid board vote, as the Chairman immediately adjourned the Board Hearing after the vote. However, the transcript of the Hearing shows that counsel for DNREC requested and obtained a clarification from the Chairman that five members had voted in favor of dismissing Nichols' appeal for lack of standing, before

adjournment of the Hearing. Nichols offers no reason as to why he could not have objected or requested a re-vote at that time.[4]

Generally, issues not presented to the Board will not be considered for the first time on appeal—in the Superior Court or in this Court.[5] Nevertheless, this Court has stated that "[w]here the interests of justice require, this Court may choose to adjudicate a question not fairly presented at [the hearing]."[6] In this case, we will address the merits of Nichols' argument regarding the Board's vote that he lacked standing.

The crux of Nichols' argument on appeal is that the Board did not garner sufficient votes (5) at the Hearing to dismiss Nichols' appeal for lack of standing. Accordingly, a recitation of the pertinent portion of the Hearing transcript is instructive.

> Mr. Subramanian: I don't want to work on the standing yet. But I think they brought up a lot of points. For that I want to thank them. A lot of education. But with that aspect of it is the particular purpose of the meeting, that's what we had to think about. We are charged with acting on the Secretary's decision. So for that standing, I don't

[4] DSGP also notes that a transcript of the Hearing was made available to all parties three weeks before the Board issued the final order, yet Nichols never questioned the sufficiency of the vote until he filed his opening brief with the Superior Court.

[5] *See* Del. Supr. Ct. R. 8; *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 658 (Del. 2008); *Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1262 (Del. Super. 1993).

[6] *Day & Zimmerman Sec. v. Simmons*, 965 A.2d at 658.

think he has that standing for that. But for education, yes, very good. We thank him for that.

Chairman Legatski: Yes. I agree and I think we all do this. There has been a lot of good and mostly pertinent information put in front of us. And still that docsn't gct to the dispositive question, the question of standing, and at this point I'd like to poll the Board on whether you vote that Mr. Nichols does or does not have standing. I will start with Mr. Wheatley.

Mr. Wheatley: No standing.

Mr. Holmes: No standing.

Mr. Burton: At this point can I say a little something also as the reason I'm voting this way?

Chairman Legatski: Okay.

Mr. Burton: I expressed some concerns here today, as you people expressed a lot of concerns. Maybe at the first meeting, the first hearing it might have been a different story. We're really here as to whether we're going to uphold a Secretary's decision. Different safety things and I tried to sneak a few things in like the power and after personally observing the location in question, I find everything in order with the exception that, like I stated, there was a few, three houses. And to relieve some people's minds, this is not setting on the river. It's at least a

mile away from the river. Very close to wetlands, but there's a mile of wetlands, maybe a mile and a half. I want to make that point. So I have not heard any evidence that would justify the Secretary's order being overturned. I, John S. Burton, Sr., do hereby vote to uphold the Honorable Secretary's . . . Order. I vote to uphold it.

Chairman Legatski: Thank you. . . . We're still working on the vote of the question.

Mr. Burton: On the standing, I don't sustain the appeal.

Chairman Legatski: You're voting he does not have standing?

Mr. Burton: Right. He doesn't. Because that's not the issue.

Mr. Bewick: I'm not voting on standing because I don't think it has anything to do with the decision that I want to make.

Chairman Legatski: You will abstain?

Mr. Bewick: I'm abstaining on standing.

Mr. Tocker: I'm abstaining also.

Chairman Legatski: That's four – I am not inclined to support standing. I have heard a lot of interesting information, but as far as the particular identifiable harm, standing which I'm paraphrasing, I have not been persuaded that Mr. Nichols has standing. **That leaves us**

	with a vote of 5 to 1. (emphasis added). That is the end of the hearing. Thank you all for your participation and your patience.
Mr. Phillips:	I'm not sure that the vote was properly recorded. I have one, two, three - -
Chairman Legatski:	**Mr. Subramanian voted**. (emphasis added).
Mr. Phillips:	- - four votes, **five votes saying there was no standing**. (emphasis added).
Chairman Legatski:	**That's correct**. (emphasis added).
Mr. Phillips:	And two abstentions?
Chairman Legatski:	Yes.
Mr. Phillips:	Okay. I wasn't clear on that. Thank you.

The meeting was adjourned.

Nichols argues that, because Mr. Subramanian—one of the five members voting—stated, "I don't want to work on standing yet," that he failed to vote. But, immediately after making that statement, Mr. Subramanian stated "[s]o for that standing, I don't think [Nichols] has that standing." The emphasized portions of the hearing transcript make clear that Chairman Legatski was counting that statement by Subramanian as a vote to deny Nichols' standing.

At the Hearing, Chairman Legatski clearly stated that there were "five votes saying there was no standing." No one—in particular, Mr. Subramanian—challenged the recording of that vote. This is significant because the end of the Hearing was specifically reserved to address and vote on the issue of standing. The only reasonable reading of the Board's Hearing transcript is that five Board members—Subramanian, Wheatley, Holmes, Burton, and Legatski—voted to deny Nichols' appeal because he lacked standing.

The Board's Opinion and Final Order is additional evidence as to the vote taken at the Hearing. At the Hearing, the Board chairman announced that five members were voting that Nichols did not have standing on appeal to contest the CZA Permit. Nevertheless, pursuant to title 19, section 10128(b), the Board was subsequently required to reduce this to writing.[7] The Opinion and Final Order of the Board was signed by Legatski, Wheatley, Holmes, Burton, Subramanian, and Tocker. That subsequent writing by the Board further demonstrates a five member majority of the Board voted that Nichols lacked standing to appeal.

[7] *See* Del. Code Ann. tit. 19, § 10128(b) (stating that "[e]very case decision . . . shall be incorporated in an final order.").

Standing Requirement Under the Coastal Zone Act

In anticipation of our holding that a five member majority of the Board voted to dismiss, Nichols also challenges the substantive decision of the Board to deny him standing. Nichols' argues that the Board, and subsequently the Superior Court, misapplied the CZA standing requirement in two ways. First, Nichols asserts that the Superior Court erred in applying the test adopted by this Court in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*,[8] because that test was based on statutory language wholly inapplicable to the instant action. Second, Nichols argues that the Superior Court erred in applying common law standing requirements.

Any right Nichols has to appeal the decision of the Secretary of DNREC to grant the CZA Permit is derived from title 7, section 7007 of the Delaware Code. Section 7007(b) states that "[a]ny person aggrieved by a final decision of the Secretary of [DNREC] under § 7005(a) of this title may appeal same under this section." The important term in section 7007(b) is "aggrieved." All parties agree that the term is not defined in the Coastal Zone Act (title 7, section 7001 *et seq.*) and has never been construed by this Court.

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

The Superior Court relied upon this Court's decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, to define standing in this case. In *Oceanport Industries, Inc.*, this Court was presented with the question of whether certain organizations had standing to contest the issuance of permits for pier improvements in publicly owned subaqueous lands (pursuant to title 7, section 7205 of the Delaware Code), for fugitive air emissions (section 6003), and for point source discharge into the Delaware River (section 6003).[9] The organizations challenged the issuance of the permits to the Environmental Appeals Board ("EAB") pursuant to sections 6008[10] and 7210.[11] This Court noted that defining the words "interest" and "substantially affected" was necessary to give meaning to sections 6008 and 7210.

To properly define "substantially affected," this Court turned to the definition espoused by the United States Supreme Court in *Association of Data Processing Serv. v. Camp*.[12] Under *Data Processing*, standing is conferred where there is "1) a claim of injury in fact; and 2) the interest

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[9] *Id.* at 902.

[10] Del. Code Ann. tit. 7, § 6008 states in pertinent part that "[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the [EAB] within 20 days after receipt of the Secretary's decision or publication of the decision."

[11] Del. Code Ann. tit. 7, § 7210 states in pertinent part that "[a]ny person whose interest is substantially affected by any action of the Secretary or of the Department taken pursuant to this chapter, may appeal to the [EAB] as established by § 6007 of this title within 20 days after the announcement of the decision."

[12] *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

sought to be protected is arguably within the zone of interest to be protected or regulated by the statute . . . ."[13] In *Oceanport*, this Court stated the following reasons for adopting the *Date Processing* test:

> There is a logical strength to the application of *Data Processing* to the present case independent of *Agrico*. By enacting the standing provisions, the General Assembly adopted an appeals standard requiring a heightened interest. It seems clear that the intent of the legislature was to limit standing to appeal to those who were actually affected by the Secretary's decisions. It seems equally clear that the General Assembly did not open the flood gates to anyone who merely claimed an interest in the matter. That would have created a totally unworkable administrative structure.
>
> In supplying the necessary interpretation of the term "substantially affected," we adopt the *Data Processing* test because it gives meaning to the obvious intent of the General Assembly. A party who is required to show an injury in fact, and that such injury is within the zone of interest sought to be protected by the statute, clearly comes within the purview of these statutes. Determining standing by such criteria complies with the legislature's goal of administrative workability. Thus, in the absence of any legislative definition of the term "substantially affected", the *Data Processing* test provides a workable and just interpretation.[14]

After acknowledging that the statute invoked here—title 7, section 7007(b)—conferred standing on "any person aggrieved," the Superior Court applied the rationale from *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.* In doing so, the Superior Court noted that "[t]his appeals

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[13] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d at 903 (quoting *Gannett Co. v. State*, 565 A.2d 895, 897 (Del. 1989)).
[14] *Id.* at 904.

standard has been construed to require 'a heightened interest,' such that only those who were 'actually affected' by the Secretary's decision may appeal." Accordingly, the Superior Court held that Nichols was required to demonstrate an injury in fact and that such injury was within the zone of interest sought to be protected by the statute.

Nichols argues that the Superior Court erred in relying upon our decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.* Nichols offers the following definition of "aggrieved": "having a grievance; suffering from an infringement or denial of legal rights." Nichols interprets this definition to mean that a person is aggrieved if: "(1) he has a reasonable complaint or objection to the grant of the CZ permit application; or (2) has had rights under the Act detrimentally affected by the CZ Permit application approval." However, Nichols offers no precedent to support his position.

In *Oceanport,* we construed the term "substantially affected" as it appears in title 7, section 6008(a) and title 7, section 7210, finding that to have standing to appeal from an Environmental Board's order granting a permit, a party must show there is "injury in fact" and an interest "arguably within the zone of interest to be protected or regulated by the statute."[15] The invasion must be (1) "concrete and particularized," and (2) "actual or

[15] *Id.*

imminent, not conjectural or hypothetical."[16] Since this Court relied upon the United States Supreme Court's decision in *Data Processing* to determine standing under the term "substantially affected," we will look to that same decision for guidance in this appeal with regard to the word "aggrieved."

In *Data Processing*, the United States Supreme Court was not only interpreting the meaning of the words "adversely affected" but also addressing the meaning of the word "aggrieved" under the Administrative Procedure Act ("APA")—specifically, pursuant to 5 U.S.C. § 702.[17] Section 702 confers the right of appeal on "[a] person suffering legal wrong because of agency action, or *adversely affected or aggrieved* by agency action." (emphasis added). In *Data Processing*, the United States Supreme Court moved away from a traditional 'legal interest' and 'legal wrong' test and instead "held more broadly that persons had standing to obtain judicial review of federal agency action under section 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of

[16] *Id.* (internal citations omitted).
[17] *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970).

interests to be protected or regulated' by the statutes that the agencies were claimed to have violated."[18]

Although our decision in *Oceanport* did not specifically address the phrase "any person aggrieved" that appears in the statute at issue here, the rationale of *Oceanport* for adopting the *Data Processing* test is equally applicable in this appeal. In fact, our opinion in *Oceanport* makes reference to the CZA, stating, "it seems clear that the General Assembly intended a stricter standing requirement for appeals to the EAB or under the CZA."[19] Nichols has failed to demonstrate that an application of the *Oceanport/Data Processing* test for standing is not warranted based solely on a variance in the statutory language, or that the Superior Court's application of that standard was erroneous based on his own suggested definition of the term "aggrieved." Accordingly, we hold that the *Oceanport* standing requirements must be satisfied to establish that a person is aggrieved as that term is used in the CZA.

The record supports the Superior Court's finding that Nichols "failed to identify or present any evidence relating to any legally-protected interest

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[18] *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). *See also Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 127 (1995) (stating that the United States Supreme Court has "interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question.").

[19] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d at 901.

that has been or will be injured by issuance of a CZA permit to DSGP." Nichols lives approximately fourteen miles from the property affected by the permit. Despite several opportunities, Nichols declined to be sworn in at the Hearing. Thus, he provided no testimony as to how the facility would affect any of his legal rights. Nevertheless, he now broadly claims that he is directly affected by the "probable air and water pollution likely to be generated by the proposed"[20] facility and the negative aesthetic affect on the Coastal Zone.[21] The record reflects that the Superior Court properly applied our holding in *Oceanport* to conclude Nichols lacked standing to appeal because he did not establish that he was an aggrieved person under the CZA.

Conclusion

The judgment of the Superior Court is affirmed.

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[20] The Board decided that Diamond State's project has received all required New Castle County approvals. Thus, Nichols' concerns are unsupported by the record.

[21] In his appeal to the Superior Court, Nichols also asserted a claim that he is aggrieved by operation of the New Castle County Comprehensive Development Plan. This claim was not raised by Nichols to the Board, thus, it was not considered by the Superior Court and will not be considered by this Court. *See* Del. Supr. Ct. R. 8.