IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

Protect Our Indian River, an Unincorporated association, Cindy Wilson, Bruce Ballantine, Larry V. Hawkins, William L. Gardner, and Diane M. Daly, Appellants,	:	C.A. No: S13A-12-002 (RFS)
v.	:	
Sussex County Board of Adjustment, Allen Harim Foods, LLC, a Delaware limited liability company, and Pinnacle Food Corporation, a Delaware corporation, Appellees.	:	

MEMORANDUM OPINION

Upon Appellants Appeal from the Sussex County Board of Adjustment. **Affirmed.**

Date Submitted: April 15, 2015
Date Decided: July 2, 2015

Richard L. Abbott, Esquire, Abbott Law Firm, 724 Yorklyn Road, Suite 240, Hockessin, DE 19707, Attorney for Appellants

Robert G. Gibbs, Esquire, Dennis L. Schrader, Esquire, 107 West Market Street P.O. Box 690 Georgetown, DE 19947, Attorney for Appellees

STOKES, J.

Presently before the Court is an appeal from the Sussex County Board of Adjustment, ("BOA"), brought by Protect Our Indian River, an Unincorporated Association, Cindy Wilton, Bruce Ballantine, Larry V. Hawkins, William L. Gardner, and Diane M. Daly, ("Appellants"). Appellants seek to reverse BOA's decision granting a special use exception to Allen Harim Foods, LLC, ("Harim"). The special use exception enables Harim to renovate and utilize the subject property as a chicken processing plant.

Appellants allege BOA erred by granting a special use exception for four reasons. Appellants assert BOA erred by: (1) acting outside of their jurisdiction by accepting a direct application; (2) granting the exception given an improper party requested the Application; (3) making a determination based on a record that reflects insufficient evidence was considered to ensure the public health, safety, and general welfare will be properly safeguarded; and (4) failing to adhere to standards required by due process by providing inadequate notice. Harim and BOA maintain jurisdiction was properly exercised, a proper party requested the Application, substantial evidence supports the decision, and due process notice requirements were satisfied. As such, Harim and BOA both seek to affirm BOA's decision.

Following oral argument and written submissions by the parties, the Court **AFFIRMS** the decision of BOA for the reasons set forth therein.

I. PROCEDURAL POSTURE

Pinnacle Foods Group LLC, ("PFG"), is a Delaware entity and the owner of a 107 acre parcel of land near the town of Millsboro. This parcel is the site of the former Vlasic Pickle Plant ("Property"). Pinnacle Foods Corporation, the party named in this appeal, no longer exists as an entity, although it was the Delaware entity that initially took title to the Property by deed from Vlasic Foods International on May of 2001. Through merger and conversion, PFG later converted to the interests of Pinnacle Foods Corporation, Inc. and PFG is the owner of the Property throughout this petition.[1]

Harim is a Delaware entity and contract purchaser of the Property under a confidential Agreement of Purchase and Sale dated March 14, 2013 ("APS"). Under the APS, PFG is the seller and the contract remains executory between Harim and PFG. The APS contains a "due diligence" contingency. This

[1] According to Harim: "Pinnacle Foods Corporation merged with and into Pinnacle Foods Group, Inc., a Delaware Corporation, by and through that Certificate of Ownership and Merger, filed with the Secretary of State of the State of Delaware, Division of Corporations ("Secretary of State)" on September 27, 2007 (SRV 071060028-2911079); corrected by that certain Corrective Certificate of Ownership and Merger, merging Pinnacle Foods Corporation with and into Pinnacle Foods Group, Inc., a Delaware corporation, filed November 25, 2008 with the Secretary of State, (SRV 081146820-2911079), effective on November 26, 2008. Pinnacle Food Groups, Inc. converted to Pinnacle Food Groups, LLC, a Delaware limited liability company by and through that certain Certificate of Conversion filed with the Secretary of State on October 1, 2007 (SRV 071070520-2199079), filed with the Secretary of State, October 1, 2007 (SRV 071070520-2199079)." Letter from Robert G. Gibbs, Esq., Attorney for Harim, to the Honorable Richard F. Stokes, Sussex County Superior Court at n.2 (December 12, 2014) (on file with the Court).

contingency includes a condition that requires Harim to exercise due diligence to obtain confirmation that the Property is appropriately zoned under state and local zoning codes for Harim's intended use of the Property. The Property is zoned HI-1 (Heavy Industrial) under the Sussex County Zoning Code. Harim's specific intended use of the Property, as a poultry processing plant, is subject to Sussex County Code Section 115-111which applies only to "potentially hazardous uses" in the HI-1 zone.

As part of its due diligence under the APS, on April 12, 2013, Harim filed an application to the Sussex County Board of Adjustment for a Special Use Exception ("Application"). PFG is listed as the owner of the Property, and the Application was filed with PFG's full knowledge, consent, and support.

BOA scheduled and provided notice of the pending proceeding that would discuss the special use exception request filed by Harim. On June 3, 2013 BOA held a public hearing on the Application. At the conclusion of the public hearing, BOA announced it would table the Application until the next scheduled meeting, June 17, 2013, to allow BOA an opportunity to comply with Code requirements. Specifically, BOA was required to consult with other agencies created for the promotion of public health and safety prior to rendering a decision on the Application.

During this time, BOA voted to leave the record open conditionally in order to solicit comments from other agencies. BOA also decided to leave the record open an additional seven days to allow the public an opportunity to provide input related to the comments offered by the consulted agencies.

Following the receipt of the responses from the consulted agencies, and further written comments from the public, BOA voted on the Application at its meeting held on September 23, 2013. BOA approved the Application and issued its opinion on November 5, 2013. Appellants initiated an appeal within thirty days pursuant to a Verified Petition *In Certiorari* ("VPC") on December 5, 2013. On February 26, 2014, Appellants filed their opening brief and on March 31, 2014 the answering brief was filed. Oral argument was held on October 13, 2014. Thereafter the Court sent a letter to the attorneys requesting their positions regarding whether the Court had subject matter jurisdiction in the appeal.[2] The parties subsequently responded by letter and memoranda of law. [3]

[2] This letter sought a confirmation as to whether the Appellants were "formally withdrawing the objection that [BOA] lacked jurisdiction to render a decision based on the absence of the record title owner." Letter from Hon. Richard F. Stokes, Sussex County Superior Court, to Richard L. Abbot, Esq., James P. Sharp, Esq., Jane R. Pachell, Esq., Dennis L. Shrader, Esq., Robert, G. Gibbs, Esq., Attorneys for Appellants and Appellees (Jan. 13, 2015) (on file with the Court).

[3] Appellants responded by letter on March 30, 2015 citing *Preston v. Bd. of Adjustment of New Castle County* for the proposition that a necessary party that voluntarily participates in stay proceeding in order to protect its interests is said to have constructively intervened. 772 A.2d 787, 791 (Del. 2001); Letter from Richard L. Abbott, Esq., Attorney for Appellants, to the Honorable Richard F. Stokes, Sussex County Superior Court (March 30, 2015) (on file with the Court). As such, Appellants acknowledged PFG constructively intervened in the action presently before the Court, and any dispute as to the Record Owner Rule was moot as a matter of law. *Id.* Harim acknowledged the Appellants letter on April 15, 2015. Letter from Robert G. Gibbs, Esq.,

As the record title owner is an indispensible party on appeal, the failure to join this party is a fatal defect. The VPC names Pinnacle Foods Corporation in paragraph nine as the owner of the property. This is incorrect because the owner is PFG.[4] Harim noted PFG was viewed as the owner in the Application before BOA, taking the position that the Court had discretion. On the whole record, PFG has constructively intervened in this appeal by participating through legal counsel and in its name throughout the pendency of this action. To the extent there was discretion to dismiss the appeal, however, the Court preferred to decide the case on its merits.

II. Statement of Facts

Harim sought to purchase property from PFG subject to an APS agreement which conditions the sale on certain requirements including the confirmation of approvals for anticipated renovations in order to utilize the property as a chicken processing plant.[5] PFG is listed as the record title owner of all three tax parcels constituting the subject property as of a June 7, 2001 conveyance from Vlasic Foods to PFG. Harim, in accordance with the due diligence requirement of the APS agreement with PFG, filed an Application with BOA for a Special Use Exception.

Attorney for Harim, to the Honorable Richard F. Stokes, Sussex County Superior Court (April 15, 2015) (on file with the Court).

[4] Letter from Robert G. Gibbs, Esq., Attorney for Harim, to the Honorable Richard F. Stokes, Sussex County Superior Court at n.2 (December 12, 2014) (on file with the Court).

[5] APS Agreement.

BOA accepted the Application and proceeded to prepare a list of property owners within 200 feet of the boundaries of the Property. Written notice of the Application and date of the public hearing was sent to those on the list. Some notices were returned to BOA either undelivered or undeliverable. Notice of the June 3, 2013 public hearing was also advertised in The News Journal and The Sussex Post. In addition, notice of the Application was posted on the Sussex County Planning & Zoning Commission's bulletin board on May 6, 2013 and on the Property on May 9, 2013.

Harim supported its Application with relevant documentation. A schematic site plan illustrating the proposed renovations to existing facilities accompanied the Application. Also, an Executive Summary was attached in order to provide BOA a concise statement outlining how specific concerns would be addressed. Water pollution, dust control, odor control, air pollution, noise, traffic, and safety were the main concerns addressed in the Executive Summary. Furthermore, Harim supplemented the Executive Summary with a separate list acknowledging the various permitting requirements for the proposed renovations and upgrades as required by the appropriate State and Federal agencies. These agencies include: Sussex County Building Inspector, Delaware State Fire Marshal, Delaware Department of Transportation, ("DelDOT"), Delaware Department of Natural

Resources and Environmental Control, ("DNREC"); and United States Department of Agriculture.

The property is also subject to a Brownfield Development Agreement entered into between Harim, and DNREC.[6] Harim included a Site History report that referenced several existing environmental issues identified in the Phase I Environmental Assessment including a Limited Subsurface Investigation, prepared by B.P. Environmental, Inc. In addition, Harim prepared and submitted a separate document entitled "Special Use Exception," summarizing the requirements of Sussex County Code Section 115-111, and detailing how the areas of concern—fire, explosion, noise, vibration, dust and odor, and emissions—would be addressed if the proposed modifications were approved.

Numerous area residents submitted public comments prior to BOA's meeting held on June 3, 2014. The public comments cited objections to the Application and the anticipated chicken processing plant as a whole. Most of the objections specifically highlighted the following concerns: odor, traffic, noise, lighting, and pollution of nearby creeks and rivers.

[6] A party seeking to develop property that may be contaminated may enter a Brownsfield Development Agreement. DNREC: Brownsfields, http://www.dnrec.delaware.gov/dwhs/SIRB/Pages/Brownfields.aspx. This site would be developed with an appropriate remedial plan. The agreement under the auspices of DNREC is available to parties who are not current site owners. *Id*. There is companion litigation pending in this Court on this very subject. *Protect Our Indian River, v. Del. Dep't of Natural Resources and Envtl. Control*, No. S14A-07-003 (Del. Super. filed July 10, 2014).

At the public hearing, Harim presented the sworn testimony of James M. Quinton, Harim's Director of Operations ("Quinton"), who provided a brief explanation of the poultry processing operation; planned renovations and proposed new improvements to the existing facility; certain procedures and improvements specifically designed to minimize dust and odors; and anticipated traffic that would be generated as a result of planned operations. Next, Harim presented the sworn testimony of John Shahan, Harim's project engineer, a mechanical engineer who discussed the logistics of the plan. Edward Kee, Delaware Secretary of Agriculture, also testified in support of the Application.

BOA then heard the testimony of residents living in close proximity to the Property regarding concerns about the potential negative environmental impacts from the chicken processing plant operation. Concerns voiced by nearby residents included the potential impact on residential well water, and the overall impact the plant might have on Delaware's waterways. Some of the opponents questioned the scope of the environmental permitting procedure required prior to approval of the Application.

Ultimately, BOA decided to table all discussions and defered any vote on the Application until June 17, 2013. In doing so, BOA announced the discussion was tabled and closed the record regarding the Application until at least the next scheduled meeting of the BOA, June 17, 2013.

At the June 17, 2013 meeting, BOA further discussed the Code requirements regarding consulting with additional State agencies on the Application. At this time, BOA voted to keep the record open for the limited purpose of soliciting written comments from State agencies within thirty days and to allow additional public written comments related to the comments offered by State agencies for an additional seven days thereafter. Notice was sent to Harim that BOA had re-opened the record in order to consult agencies for comment. Notice was not sent to area neighbors informing them that BOA had re-opened the Record.

The solicitation of comments from State agencies included the following agencies: Office of the State Fire Marshall, DNREC, Sussex County Building Code Inspector, Sussex Conservation District, and DelDOT. The Office of the State Fire Marshall responded, noting its non-objection to the re-zoning, but prompted BOA and Harim to reach out to its office should there be any changes in the site plans for their review. DNREC, Division of Air Quality, responded, noting existing permits for boilers and fuel oil tanks were in compliance with current air quality regulations, and these permits could be transferred upon DNREC's approval. Also, DNREC stated any new equipment must meet current regulations and permitting requirements. The Sussex County Building Code Inspector replied with no objection to the proposed poultry processing plant, but reminded the

parties that the project would be subject to review intermittently to secure compliance with the governing building code.

However, BOA did not seek comments from the Delaware Center for the Inland Bays, which is an organization that facilitates a Comprehensive Conservation Management Plan to preserve and protect Delaware's inland bays. BOA also did not solicit comments from the EPA. Although requested, the Sussex Conservation District did not provide BOA with any comments.

The written submissions provided to BOA by members of the public evidenced some concerns regarding the limited opportunity for public comment, potential pollution issues, and other negative environmental impacts. Following the receipt of responses from the consulted agencies and further written comments from the public, BOA voted on the Application at its meeting on September 23, 2013. BOA approved the Application and the written decision was issued November 5, 2013.

III. Standard of Review

The standard of review on appeals from the Board of Adjustment is limited to the correction of errors of law and a determination of whether substantial evidence exists in the record to support the Board's findings of fact and

conclusions of law.[7] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] If the Board's decision is supported by substantial evidence, a reviewing court must sustain the Board's decision even if such court would have decided the case differently if it had come before it in the first instance.[9] "The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable."[10] In its appellate review, the Superior Court after examining the record may "reverse or affirm in party or in whole, or may modify the Board's determination."[11]

IV. Analysis

A. BOA Properly Exercised Jurisdictional Authority

i. BOA's Statutory and Regulatory Power Includes the Jurisdictional Authority to Hear and Decide Direct Applications for Special Use Exception Requests

Appellants contend BOA erred by exercising jurisdiction over the special use exception proceeding, and the decision authorizing a special use exception is

[7] *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).
[8] *Miller v. Bd. of Adjustment of Dewey Beach*, 1994 WL 89022, *2 (Del. Super. Feb. 16, 1994).
[9] *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).
[10] *Mellow*, 565 A.2d at 956.
[11] 22 *Del. C.* § 328(c).

consequently a nullity.[12] In this case, no prior administrative decision was rendered by Sussex County government giving rise to an appeal.[13] Rather, Harim's special use exception request was submitted, accepted, and granted by BOA.[14]

Appellees assert BOA maintained jurisdiction to entertain the direct Application.[15] Furthermore, Appellees contend the direct Application was submitted, accepted, and granted in accordance with the proper procedures.[16] On the other hand, Appellants contend BOA erred in taking jurisdiction of the proceeding because BOA's jurisdiction is "expressly limited to 'appeals.'"[17] The first question for this Court is whether BOA may exercise jurisdiction over a direct request for a special use exception.

The jurisdictional background for zoning and special exception finds its origins in the standard State Zoning Enabling Act ("Model Zoning Act"), first published in 1924 by a special advisory committee on zoning within the United States Department of Commerce.[18] As a proposed model act, the legislative bodies of "cities and incorporated villages" are given the ability to regulate and restrict

[12] Pet'r Opening Br at 13–14.
[13] *Id.*
[14] *Id.*
[15] *See generally,* Appellee Answering Br.
[16] *Id.*
[17] Pet'r Opening Br at 13.
[18] *See generally,* Advisory Comm. On Zoning, U.S. Dep't of Commerce, A Standard State Zoning Enabling Act (rev. ed. 1926).

building and land use, a power intended to promote the general welfare of local communities.[19] In his commentary on zoning, then-Secretary of Commerce Herbert Hoover wrote that the need for the Act was made clear by the fact that 11 states, including Delaware, passed their own zoning enabling acts based wholly or partly after it by the following year.[20] Within two years of the creation of the advisory committee, the number of cities and towns where zoning was in effect rapidly rose from 48, with less than 11,000,000 inhabitants, to 218 with more than 22,000,000.[21]

As zoning is historically undertaken under the police power and falls within the powers granted to the legislature by state constitutions, there exists no rule that it requires any amendment to a state's constitution.[22] The Act provides for the creation of a Board of Adjustment by local legislative body, granting it the power to "hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance."[23] The Act itself makes clear that its language is meant to be interpreted as broad and unrestrictive, cautioning against adding new words and phrases and declining to include definitions which could give a word or phrase within the Act a restrictive meaning.[24]

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[19] *Id.*
[20] *Id.* at n.1.
[21] *Id.*
[22] *Id.* at 1.
[23] *Id.* at 11.
[24] *See generally,* Advisory Comm. On Zoning, U.S. Dep't of Commerce. Also, for a detailed

In *Searles v. Darling*, Justice Tunnell recognized "this model act was promptly adopted verbatim by approximately two-thirds of the states in the United States, and has been adopted by some others with modifications, [and] it is a relatively simple matter to find judicial precedents for [land use] problems."[25] Delaware, a long-standing proponent of zoning, enacted an amended draft of the model enabling act.[26] The enabling act, drafted after the Model Zoning Act, defines the powers of Sussex County and BOA.[27] The Delaware Constitution, although as noted above was not required to make an amendment regarding zoning, provides a general grant of authority to Sussex County to develop zoning regulations. It states:

> [T]he County of Sussex . . . may adopt zoning ordinances, laws, or rules limiting and restricting to specified districts and regulating therein buildings and structures according to their construction and the nature and extent of their use to be made of land in such districts for other than agricultural purposes; and exercise of such authority shall be deemed to be within the police power of the State.[28]

The Delaware Code articulates BOA's scope of authority providing Sussex County broad power to regulate property through zoning ordinances.[29] "The government of Sussex County . . . shall assume and have all powers, which

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history of the Standard State Zoning and Enabling Act, *see*, James Metzenbuam, The Law of Zoning 303-309 (New York, Baker, Voorhis and Co. 1930) (1930).
[25] *Searles v. Darling*, 83 A.2d 96, 98 (Del. 1951).
[26] Advisory Comm. On Zoning, U.S. Dep't of Commerce, at n.1.
[27] *Id.*
[28] Del. Const. Art. II, § 25.
[29] 9 *Del. C.* § 7001.

under the constitution of the State, it would be competent for the General Assembly to Grant by specific enumeration, and which are not denied by statute."[30] In other words, Sussex County has all powers not denied by statute that the Legislature could feasibly grant.[31]

The Code further instructs: "[t]he powers of Sussex County under this reorganization law shall be construed liberally in favor of the County, and specific mention of particular powers in the reorganization law shall not be construed as limiting in any way."[32] Thus, the powers of Sussex County are extensive and are to be interpreted liberally by this Court.[33]

Zoning authority is further organized by the Code. Section 6913 provides for the formation of BOA which consists of five members appointed by Sussex County.[34] Section 6915 describes the division of regulatory authority between Sussex County and BOA, stating: "[t]he county government shall provide and specify in its zoning or other regulations, general rules to govern the organization, procedure, and jurisdiction of the Board of Adjustment" while BOA "may adopt supplemental rules of procedure."[35]

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[30] *Id*.
[31] *Id.*
[32] 9 *Del. C.* § 7001(b).
[33] *Id.*
[34] 9 *Del. C.* § 6913.
[35] 9 *Del. C.* § 6915.

Sussex County BOA has in fact adopted their own Rules of Procedure ("BOA-ROP "). As such, BOA's jurisdiction is simultaneously governed by the law embodied in the Constitution, Delaware Code, and the rules enumerated in BOA-ROP.[36]

Further, Section 6916 describes the general procedures of BOA and authorizes who may take an appeal.[37] The Code expressly states:

> [An] Appeal to the Board of Adjustment may be taken by any person refused a building permit, or from the decision of any administrative officer or agency based upon or made in the course of administration or enforcement of the provisions of the zoning regulations. Appeals to the Board of Adjustment may be taken by any property owner, officer, department, board or bureau of the county affected by the grant or refusal of a building permit or by other decision of an administrative officer or agency based on or made in the course of administration or enforcement of the provision of the zoning regulation.[38]

Section 6917 confers upon BOA administrative and quasi-judicial power including the ability to hear and decide appeals, requests for special exceptions, and requests for variances.[39] Section 6917 expressly provides the following:

> Upon appeals, the Board of Adjustment shall have the power to:
> (1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal

[36] *See, e.g., Barry v. Town of Dewey Beach,* 2006 WL 1668352, at *5 (Del. Ch. June 8, 2006) (discussing how the various sources of law operate together with respect to zoning).
[37] 9 *Del. C.* § 6916.
[38] *Id.*
[39] 9 *Del. C.* § 6917.

> made by an administrative official or agency based on or made in the enforcement of the zoning regulations;
> (2) Hear and decide, in accordance with the provisions of any zoning regulation, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which the Board is authorized by any zoning regulation to pass;
> (3) Hear and decide requests for variances. The Board may grant a variance in the application of the provisions of the zoning ordinance or code only [upon certain conditions].”[40]

Lastly, BOA’s decisions are subject to judicial review by this Court according to Section 6918.[41]

Turning back to Appellant’s argument, the aforementioned sources of law indicate the authority conferred upon BOA includes the jurisdictional authority to entertain direct applications for two reasons. First, the law expressly confers the authority upon BOA. Section 6917 (2) provides: BOA shall “[h]ear and decide . . . “requests” for special exceptions.”[42] Certainly, a direct application for a special use exception qualifies as a request for special exception.[43] Obviously, no Sussex County administrator officer can grant or deny a special exception. In this case, BOA acted pursuant to their statutory authority by exercising jurisdiction over a request for a special use exception.[44] Therefore, BOA validly accepted the direct

[40] *Id.*
[41] 9 *Del. C.* § 6918.
[42] 9 *Del. C.* § 6917(2).
[43] *Id.*
[44] *Id.*

Application for a special use exception submitted by Harim pursuant to the express jurisdictional authority conferred to BOA by the Code.[45]

Second, the broad authority granted to Sussex County provides an adequate basis for BOA's jurisdictional authority to hear and decide direct applications for special use permits.[46] Counties have all powers that are not otherwise prohibited. The Legislature has not designated accepting a direct application beyond the scope of the jurisdictional authority of Sussex County or BOA.[47] Moreover, it is easily foreseeable for the Legislature to grant BOA the jurisdictional authority to accept special use requests. Therefore, even if the Code failed to expressly confer the jurisdictional authority for BOA to directly hear a special use exception request, given the broad scope of authority provided by home rule, BOA is permitted to exercise jurisdiction via their implied authority.[48]

Thus, BOA was not required to wait for a decision to be rendered by another administrative agency or any official in order to give rise to an appeal. BOA properly exercised their express and implied jurisdictional authority by directly accepting the Application for a special use exception from Harim.

[45] *Id.*
[46] *See e.g.*, *Searles*, 83 A.2d.
[47] *Id.*
[48] *Id.*

ii. BOA Has the Jurisdictional Authority to Directly Hear and Decide Cases Because the Word Appeal Indicates a Method of Invoking BOA's Jurisdiction

Appellants premise the allegation that BOA's jurisdiction is lacking on a technical interpretation of the word appeal.[49] Therefore, this Court must determine the intended meaning of word appeal in the statute. In other words, whether the word appeal requires BOA to abstain from exercising jurisdiction until a prior decision gives rise to an appeal, as suggested by Appellants; or, in the alternative, whether appeal refers to the method by which a party may properly come within the jurisdiction of BOA.

Courts in our sister states have recognized the occasional misleading nomenclature used in statutes outlining proper administrative proceedings. It is true that "the word "appeal," when used in its technical sense, suggests the removal of a case from an inferior to a superior court for review."[50] Conversely, Courts have also recognized the word appeal is not limited to this technical definition. In fact, whether the word appeal was used in a technical sense in statutes regulating administrative procedure has been the cause of considerable comment. The Connecticut Supreme Court shed light on this very issue, stating:

> '[A]ppeals' allowed by various statutes from the action of administrative and legislative boards are not appeals in the sense of a

[49] Pet'r Opening Br at 14–15.
[50] *In re McInerney*, 34 P.2d 35, 40 (Wyo. 1934).

> transfer of jurisdiction from one court to another, but that such statutes must be construed as providing a process, under the misleading name of appeal, for invoking the judicial power to determine a legal injury complained of, or the legality of an act.[51]

Hence, the word appeal is often misleading in a statute discussing administrative procedure.[52] The word appeal may indicate the technical meaning of a plea to overturn an existing decision.[53] It is also possible that the word appeal may simply indicate a plea to resolve or correct an injustice in the first instance.[54]

Appellants suggest "it is evident" jurisdiction is lacking based on the use of the word "appeal" in "headings" and "language" of provisions governing BOA's jurisdiction.[55] Based on this contention, Appellants conclude BOA "is only vested with subject matter jurisdiction over appeals from administrative zoning decisions rendered by the Sussex County government."[56] In reaching this conclusion, Appellants apparently rely solely on the technical definition of the word appeal and infer BOA is required to defer considering direct applications for a special use exception until after a prior administrative decision gave rise to an appeal.

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[51] *Malmo v. Commissioners of Fairfield Cnty.*, 43 A. 485, 487 (Conn. 1899).
[52] *Id.*
[53] *In re McInerney*, 34 P.2d at 35.
[54] *Malmo*, 43 A. at 487.
[55] Pet'r Opening Br at 14–15.
[56] Pet'r Opening Br at 13–15. (emphasizing the word appeal with bold typeface as it appears in the headings and the provisions of Sections 6916 and 6917 of the Code.); *see also*, 9 *Del. C.* §§ 6916–6917.

Premising BOA's alleged lack of jurisdiction on the technical connotation of the word appeal is problematic because "[t]he word appeal has different meanings in different jurisdictions, and varies widely in its application to various sets of circumstances."[57] The word appeal, as the Supreme Court of Wyoming noted, "does not always have that [technical] meaning when used in statutes regulating procedure. It is not infrequently employed in the sense of being simply a method of bringing before a court for judicial determination a controversy of a character such that it comes fairly within the court's original jurisdiction."[58] As such, when a statute is regulating administrative procedure the word appeal is likely intended to convey the method for how a party comes before a court or similar adjudicative agency as opposed to the technical meaning of the word appeal.[59]

Both sections referenced by Appellants to support the contention that BOA lacks jurisdictional authority are intended to regulate the procedures and powers of the zoning authorities.[60] For example, 6916(a) provides: an "Appeal to the Board of Adjustment may be taken by any person refused a building permit, or from the

[57] *In re McInerney*, 34 P.2d at 40.
[58] *In re McInerney*, 34 P.2d at 40.
[59] *Id.*
[60] 9 *Del. C.* §§ 6916–6917.

decision of any administrative officer." [61] Utilizing the technical definition in this example would require an aggrieved property owner to take additional unspoken steps.

As noted above, when the word appeal appears in a statute discussing administrative proceedings it typically does not require a prior decision to give rise to an appeal.[62] Rather, the word appeal connotes the means by which a party may invoke the original jurisdiction of an agency or a court.[63] As such, the word appeal in this instance would likely indicate a method by which a party may fairly come within BOA's original jurisdiction.[64] Therefore, it cannot be said that the jurisdictional authority of an administrative agency is evidently limited to appellate review based on the appearance of the word appeal in the Delaware Code, Sussex County Code, or BOA-ROP alone.

Even if this Court ignores the context of the statute and applies the technical meaning of the word appeal, Appellants' interpretation of the word appeal is "too technical and grudging in scope to promote the ends of the law."[65] Delaware Code expressly prohibits construing particular power conferred to BOA as limiting BOA's authority in other respects. Again, the Legislature expressed "specific

[61] 9 *Del. C.* § 6916(a). Also, Appellant omitted this particular sentence of the statute in the opening brief. Pet'r Opening Br at 13–15.
[62] *In re McInerney*, 34 P.2d at 40.
[63] *Id.*
[64] *Id.*
[65] *Id.*

mention of particular powers in the reorganization law shall not be construed as limiting in any way."[66] As established above, BOA has both express and implied jurisdictional authority to consider the direct Application.[67] Accordingly, it is improper to limit BOA's jurisdictional authority to hear a request for a special use exception based on the grant of an authority to hear an appeal in another section of the statute.[68]

In sum, BOA's subject matter jurisdiction is not limited to appellate review. A decision giving rise to an appeal need not be rendered before BOA may approve a special use exception request. Moreover, utilizing the technical definition of the word appeal to reach the conclusion that jurisdiction is lacking is inconsistent with the historical origins of zoning, the procedural purpose of the statute, and BOA's broad express and implied statutory and regulatory power. Therefore, BOA properly exercised jurisdiction over Harim's Application.

B. An Equitable Owner is a Proper Party with Standing to Request a Special Use Exception

Appellants present the argument that BOA's decision is void because only the record property owner has standing to request a special use exception.[69]

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[66] 9 *Del. C.* § 7001(b).
[67] 9 *Del. C.* § 6917(2).
[68] *In re McInerney*, 34 P.2d at 40.
[69] Pet'r Opening Br at 13–15.

Appellants contend the real property owner did not seek the special use exception because Pinnacle was the owner of the property when the Application was submitted, not Harim.[70] It is undisputed that Harim, not Pinnacle, was the advocate for the special use exception request.[71] In fact, Pinnacle was no longer the record title owner of the property at the time of the Application.[72]

Sussex County Code Section 115-208A defines who may file an application, stating: "applications for special exceptions . . . may be made by any property owner."[73] Thus, the question for this Court is whether Harim qualifies as a property owner with sufficient standing to file a direct application with BOA for a special use exception.

Turning to the language of the Sussex County Code, Section 115-208A utilizes permissive language—may—as opposed to mandatory language—must—when describing who is an appropriate applicant.[74] It states: "applications . . . may be made by any property owner."[75] The word 'may' is permissive language suggesting there are other parties who may initiate an application other than the record title owner of property. Moreover, the word 'any' indicates the legislative

[70] *Id.*
[71] Letter from Richard L. Abbott, Esq., Attorney for Appellants, to the Honorable Richard F. Stokes, Sussex County Superior Court (March 30, 2015) (on file with Court).
[72] Letter from Robert G. Gibbs, Esq., Attorney for Harim, to the Honorable Richard F. Stokes, Sussex County Superior Court at n. 2 (December 12, 2014) (on file with the Court).
[73] Sussex Cty. C. § 115-208A.
[74] *Id.*
[75] *Id.*

intent was to include every valid holder of a property interest. Therefore, the Code does not limit potential applicants to only the record title owner of property, as Appellants suggests. Rather, the language indicates there is a broad range of potential applicants who may initiate an application for a special exception permit based on the permissive language in the statute.[76]

Multiple persons can have various interests in the same parcel. These interests are often simultaneously held. One conjoined interest, recognized in Delaware property law, arises during the sale of property through the doctrine of equitable conversion.[77] Equitable conversion is a well-established Delaware doctrine that provides for the division of legal and equitable title upon between the buyer and the seller upon execution of a contract for the sale of property.[78] Under Delaware law, when a contract for real property is executed the seller transfers the equitable interest in the property to the prospective buyer and the seller retains a legal interest, the right to obtain money from the sale of the property, but not the

[76] *Id.*

[77] *Briz-Ler Corp. v. Weiner*, 171 A.2d 65, 67 (Del. 1961) (formally adopting the doctrine of equitable conversion, stating "the uniform opinion of the bar of this State for years has been that the doctrine of equitable conversion was the law of Delaware).

[78] *Id.; see also, Lawyers Title Ins. Corp. v. Wolhar & Gill, P.A.*, 575 A.2d 1148, 1153 (Del. 1990) (explaining the doctrine of equitable conversion as follows: when an "executory contract for sale of land, which requires seller to convey legal title upon full payment of purchase price, works equitable conversion of land; execution of contract for sale of real property effectively transfers seller's equitable interest in land to purchaser, and thereafter, seller merely retains legal interest in proceeds of sales transaction").

rights in the property itself.[79] In this case, Harim executed the APS on March 14, 2013 becoming a conditional vendee.[80] Once the APS was executed, Harim became an equitable owner of the property according to the doctrine of equitable conversion.

Provided that Harim, as a conditional vendee, maintained a valid property interest as an equitable owner at the relevant time, the question remaining is whether an equitable owner has sufficient standing to file a direct application for a special use exception with BOA as a matter of law. Appellants seek to narrowly interpret the definition of a property owner to "the common and ordinary dictionary definition of a property owner" to limit potential applicants to the legal title owner.[81] For the purposes of standing, however, any party that has a sufficient interest may seek to enforce, protect, or modify the interests presently owned in property.

For example, a future interest property owner may seek to prevent waste from being committed by the owner in possession.[82] The future interest holder may

[79] *Id.*
[80] Appellee Answer Br. at 18.
[81] Tr. of Oral Argument at 39.
[82] *Matter of Estate of Bates*, 1994 WL 586822, at *3 (Del. Ch. Sept. 23, 1994) (stating "[a] tenant for life of a possessory estate has a right to the undisturbed possession of the land and to the income and profits thereof. His use and enjoyment of the premises is limited by the law of waste, that is, he is under a duty to refrain from any act which will diminish the value of the reversion or the remainder if such act is also, under all of the circumstances, an unreasonable use of the

or may not be successful, but as a matter of standing they have the right to begin the process. Similarly, an equitable owner of property, such as Harim, as a matter of standing has a sufficient interest in the property to request a special use exception. Whether or not an application is granted, or upheld on appeal, is a separate matter.

It is also important to note in this case that PFG is present on the record. At oral argument on October 13, 2014, the Court discussed whether PFG constructively appeared effectively authorizing Harim's Application. The Court stated:

> The application has on the face of it the contract date, the purchase of sale, it identifies the parties. And then as one would look through all of these exhibits that were generated by the Board it seems every instance where notice is given, notice is given to Pinnacle, the owner, as well as to Harim all the way through.[83]

PFG signed the APS evidencing an intent that demonstrates PFG and Harim's interests were aligned through the administrative proceedings culminating in the BOA decision.[84] In fact, the due diligence provision contractually obligated Harim to seek the permits for the property in order to complete the sale.[85] Also, PFG is

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premises) (quoting Cornelius J. Monynihan, Law of Real Property 58–59 (West Pub. Co. 1962) (1962) (footnotes omitted).

[83]Tr. of Oral Argument at 39.
[84] APS Agreement.
[85] *Id.*

named as the owner of the Application.[86] Perhaps, it would have been a better business practice to attach an affidavit by the legal title holder, PFG. However, BOA's decision is not eviscerated because Harim took the lead. Further, PFG appeared constructively, as noted above, in this appeal which cannot be divorced from the original proceeding.[87]

Without doubt the Delaware Supreme Court held in *CCS Investors, LLC v. Brown* that on appeal a record property owner is an indispensible party and the status of a property interest may not be fully adjudicated absent the real property interest holder of record.[88] As a special exception affects property, the law is crystal clear that the legal title holder is indispensable should an appeal be made from a BOA decision.[89] Yet, that rule should not foreclose an equitable owner from taking the initial, pre-appeal, agency steps. Frequently, an investor seeks to make a major commitment in real property, but will only purchase it if the property can be zoned for a particular use. Often, contracts to purchase real property are contingent on obtaining a special use, or variance. At the BOA level, there is a long standing in practice in Delaware permitting investors who are not the legal title owners to apply for special use exceptions. The prospective buyer is clearly in

[86] Application.
[87] Letter from Richard L. Abbott, Esq., Attorney for Appellants, to the Honorable Richard F. Stokes, Sussex County Superior Court (March 30, 2015) (on file with the Court).
[88] 977 A.2d 301, 323 (Del. 2009), as corrected (Aug. 10, 2009) (stating "the landowner is an indispensable party to an appeal from a decision of the board of adjustment that affects the landowner's property").
[89] *Id.*

the best position to know why a special use exception is needed and what the future needs are for the property.

Here, PFG and Harim were named in the Application on its face and a signature was incorporated through the APS contract. During the process, PFG maintained the status quo of the property. Under these circumstances, Harim and PFG's interests were united when the Application was submitted to BOA. PFG authorized Harim to make the request. This is supported by the Application, by reference to the APS, and by notice and information provided by BOA to PFG at all critical stages. Significantly, no objection was made by any of the Appellants before BOA decided the request. While theoretically a conditional vendee may opt out, this is not the posture in this case. Overall, PFG was before BOA.

To reiterate, an equitable owner, including a conditional vendee, is a valid property owner under the broad category of any property owner for administrative proceedings.[90] Furthermore, for appeal purposes, a record legal title owner like

[90] *See*, 4 Rathkopf, Rathkopf's The Law of Zoning and Planning § 63:7 (4th ed.); *see also, e.g., Area Plan Comm'n, Evansville-Vanderburgh Cnty. v. Hatfield*, 820 N.E.2d 696, 699 (Ind. Ct. App. 2005) (finding a prospective owner under a binding purchasing agreement "is considered to have property rights sufficient to grant standing); *Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Comm'n of Town of Morris*, 755 A.2d 249, 254 (Conn. App. Ct. 2000) (reversing and remanding a lower court's decision finding that a conditional vendee lacked standing to appeal a special use permit); *Robinson v. City of Huntsville*, 622 So. 2d 1309, 1311 (Ala. Civ. App. 1993) (stating "an equitable owner of property under contract to purchase, even if conditioned on the grant of a variance, is entitled to apply for a variance").

PFG is an indispensible party. Here, PFG constructively appeared in the appeal for previously stated reasons. Likewise, PFG was constructively before BOA in support of the Application. Harim proceeded to request the special use exception with the support of PFG, essentially acting as if it was an agent for PFG in order to complete their intended transaction. Consequently, Harim was a proper party able to file a direct Application to BOA.

C. The Record Reflects Substantial Evidence was Submitted to BOA Demonstrating the Public Health, Safety, Morals, and General Welfare Will Be Properly Safeguarded

BOA's decision was supported by substantial evidence on the record. Harim submitted numerous exhibits and testimony to support the Application for a special use exception. Harim provided a schematic site plan outlining the proposed renovations and an Executive Summary detailing how specific concerns would be addressed. Harim compiled a list of the various requirements from state and federal permitting agencies, including: Sussex County Building Inspector, Delaware State Fire Marshal, DelDOT, DNREC; and United States Department of Agriculture. Harim provided the Site History Report and the Phase 1 Environmental Assessment, including a Limited Subsurface Investigation, created pursuant to the Brownsfield Agreement for BOA's consideration. Also, Harim

submitted a separate document entitled "Special Use Exception," summarizing the requirements of Sussex County Code Section 115-111, and detailing how potential concerns would be addressed.

During the hearing, Harim presented several witnesses who offered sworn testimony supporting the Application. Quinton, its Director of Operations, discussed the scope of the planned renovations, procedures to minimize dust and odors, and anticipated traffic that would be generated as a result of planned operations.[91] John Shahan, Harim's project engineer, discussed the logistics of the plan.[92] The Delaware Secretary of Agriculture also testified in support of the Application.[93]

In addition to the exhibits and testimony submitted by Harim, other administrative agencies submitted input on the record supporting the Application. In fact, BOA was required to consult with other agencies pursuant to Sussex County Code Section 115–111. In compliance with this provision, BOA solicited comments from a panoply of state authorities, including: Sussex County Building Code Inspector, Office of the State Fire Marshall, DNREC, Sussex Conservation District, and DelDOT. An officer from each authority mentioned above, except for the Sussex Conservation District, responded to BOA's request for public comment.

[91] Appellee Answer Br. at 5.
[92] Appellee Answer Br. at 6–7.
[93] Appellee Answer Br. at 7–8.

Input from the agencies and authorities who responded to BOA's request were considered and placed on public record.

Appellants argue BOA received "nothing but legal truisms from Agencies it did contact."[94] Notwithstanding Appellant's characterizations of the responses from the agencies of this State, numerous agencies were contacted and consulted regarding the Application. It is significant that not a single objection to Harim's Application was raised by an authority BOA consulted. Many of the comments reiterated the authority to review the project for permitting purposes and requested updates should there be any modifications to the Application. Their acquiescence combined with their duties to engage in continued monitoring of the proposed Harim Chicken Plant provided assurances that the public health, safety, moral and general welfare would be properly protected.

Next, Appellants contend BOA's failure to solicit comments from additional agencies merits reversal of BOA's opinion. The Code requires "in reviewing the plans and statements [BOA] shall consult with other agencies created for the promotion of public health and safety and shall pay particular attention to the protection of the county and its waterways from the harmful effects of air or water pollution of any time."[95] This standard is flexible; it provides discretion to BOA concerning what and how many agencies BOA must contact, and to what extent

[94] Pet'r Opening Br. at 8.
[95] Sussex Cty. C. § 15-111.

BOA is required to consult with those agencies. This is a common sense direction that recognizes applications may present varying circumstances and provides necessary leeway in the administrative process.

Of course, BOA must render its opinion based on sufficient evidence. In order to pass muster on appeal, BOA's decision also must reflect substantial evidence on the record. Neither the Code section nor the substantial evidence standard mandate BOA is under a duty to consult every conceivable agency monitoring or regulating the public health, public safety, and pollution. Thus, BOA's decision is not inherently flawed because BOA was not under a duty to consult with the universe of agencies.

The remaining question is whether the agencies BOA consulted were sufficient to establish substantial evidence when taken together with the evidence presented by Harim. Appellants argue BOA "failed to comply with the minimum legal prerequisites before rendering a decision."[96] Specifically, Appellants contend BOA's failure to solicit comments from the Sussex Conservation District, the EPA, and the Delaware Center for the Inland Bays are fatal flaws.[97]

According to Appellants, the potential for pollution resulting from industrial wastewater run-off makes consultation with these authorities necessary.[98] In this

[96] Pet'r Opening Br at 7.
[97] *Id.* at 17–19.
[98] *Id.*

vein, the Delaware Supreme Court held to the contrary by determining the potential for waterway contamination was insufficient to justify the denial of a conditional use permit. Speculative concerns over pollution should not be used to deny a conditional use permit particularly when "there is no evidence to indicate that the possibility cannot be avoided by adequate methods."[99] As such, the possibility that pollution might arise in abutting waterways was not an adequate reason to deny Harim's Application initially and would not warrant reversal now.[100]

Moreover, the absence of comments from the Sussex Conservation District, the EPA, and the Delaware Center for Inland Bays are not sufficient grounds for reversal because it was not necessary for each of these authorities to be consulted in order for BOA to render a decision. First, Appellants contend BOA failed to consult the Sussex Conservation District. BOA actually made an attempt to contact the Sussex Conservation District by letter on June 18, 2014. The Sussex Conservation District did not provide a response. BOA did not have the authority to force Sussex Conservation District to respond to the solicitation of comments regarding Harim's Application. The attempt to consult with this agency is

[99] *Zoning Bd. of Adjustment of New Castle Cnty. v. Dragon Run Terrace, Inc.*, 222 A.2d 315, 318 (Del. 1966).
[100] *Id.*

sufficient as it was outside of BOA's control whether a response would be provided for BOA's consideration.

Next, BOA's failure to contact the EPA does not warrant reversal. The EPA is a federal agency with the authority to administer the Clean Water Act and the Clean Air Act. The EPA also has the authority to delegate to States, including Delaware, permitting authority under these Acts. The agency in Delaware that has been delegated the permitting authority from the EPA is DNREC. BOA solicited comments from DNREC and received responses from DNREC representatives. Paul E. Foster, P.E. provided a letter regarding air quality. Also, Deputy Secretary David Small responded noting the additional permitting requirements regarding suitable air emissions, well water, water allocation, National Pollution Elimination Discharge, and Large On-site Wastewater Treatment Disposal Systems. Although the record does not include a response from the EPA, it does reflect responses from the appropriate state authority—DNREC—charged with implementing the permitting procedures established by the EPA. For the purposes of zoning, it is sufficient that BOA received a response from the local authority, DNREC, rather than the federal authority, the EPA.

Lastly, Appellants submit reversal is warranted because the Delaware Center for Inland Bays was not consulted by BOA. Appellants believe consultation was necessary based on this organization's relationship with the EPA and its role

facilitating the National Estuary Program. Delaware Center for Inland Bays is a prominent environmental organization in Delaware charged with water quality improvement and habitat restoration for indigenous wildlife. Much like the EPA itself, however, BOA was not required to solicit comments based on the Delaware Center for Inland Bays' relationship with the EPA in order to render a decision on Harim's Application when DNREC will be monitoring these very same concerns.

Furthermore, in *Dragon Run Terrace, Inc.*, the Delaware Supreme Court acknowledged BOA was allowed to rely on permitting agencies to perform their statutory duties to safeguard the public.[101] One of the contentions in *Dragon Terrace, Inc.*, was whether a conditional use permit should be granted in light of lingering sanitation concerns.[102] The Delaware Supreme Court noted the "question of sanitary facilities is a matter for the health authorities" because "[a]ctual use of the premises cannot be commenced until the certificate is granted."[103] In other words, if the applicant cannot satisfy the permitting requirements, then the facility will not be permitted to operate.[104] The appropriate time to ferret out the legitimacy of concerns of this nature are at the permitting stage, not when considering a special use exception.[105] The Delaware Supreme Court reasoned "the Board of Adjustment has no power to deny the permit solely on this ground,"

[101] 222 A.2d at 318.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

and BOA could rely on the public health authorities to safeguard the public by denying a permit should there be a bona fide sanitation issue.[106] Therefore, the Court held fears of potential health hazards, which can be more appropriately addressed by permitting agencies, are not proper fodder to support the denial of a special use exception in the context of zoning.

Similarly, the question of water pollution is a question for the permitting agencies referenced by Deputy Secretary David Small and acknowledged in Harim's Application. Harim will not be able to commence or continue to operate a chicken processing plant if the operations fail to meet permitting standards. As such, BOA may properly rely on the appropriate authorities to safeguard public health, safety, and pollution and to utilize discretion when issuing a permit. Thus, it would have been improper for BOA to deny Harim's Application based on water pollution concerns when the State has adequate safeguards in place to address these concerns. Appellants are not entitled to reversal based on fears of potential pollution, or the failure to consult with specialized organizations regarding these fears, as these concerns will be appropriately addressed by the requisite permitting authorities.

Certainly, BOA is not a permitting agency nor is the hearing conducted by BOA a substitute for the permitting authorities. The board members of BOA are

[106] *Dragon Run Terrace, Inc.*, 222 A.2d at 318.

members of the community, not experts. Also, it is important to recognize BOA's role is limited when conducting a hearing for a special use exception. In this case, BOA's focus at this preliminary stage was tailored to whether Harim was entitled to a special use exception to operate a chicken plant that requires Heavy Industrial zoning at a particular location. The scope of BOA's duties includes reviewing proposed plans, testimony, and input from state agencies according to Sussex County Code Section 15-111. Here, BOA has satisfied that duty by considering ample evidence submitted by Harim, testimony, and comments from agencies offering support or noting non-objections to Harim's Application. Based on the extensive record, BOA's determination was legally sound.

The record reflects substantial evidence supporting the Application because numerous agencies were consulted and thorough documentation, testimony, and input was provided to BOA for consideration. As noted above, BOA may rely on the permitting agencies and the proper authorities charged with oversight to perform their due diligence. It is the duty of these authorities to evaluate and ameliorate the impact of the plant and the potential environmental hazards—not BOA's. BOA was not under a duty to consult an exhaustive list of authorities or debate and resolve the inherent and technical risks involved in the operation of a chicken plant. By reviewing the extensive evidence available on the record and consulting a sufficient number of agencies, BOA collected substantial evidence to

make a determination within its proper role. It is apparent that in collecting all of this information, BOA gave particular attention to environmental concerns. Therefore, reversal is not warranted based on BOA's failure to receive a response from the Sussex Conservation District or the failure to solicit comments from the EPA and the Delaware Center for Inland Bays because BOA collected and considered appropriate information on the subject of concern.

In conclusion, reversal of BOA's decision is not warranted because there was substantial evidence on the record, sufficient agencies were consulted, and reliance on the appropriate authorities to adequately safeguard the community was proper.

D. Due Process Requirements Were Satisfied By Adequate Notice

Generally, Delaware Law ensures that members of the public have a right to be heard prior to granting a special use exception.[107] Due Process Clauses of Amendments V and XIV of the United States Constitution and Article 1, Section 7 of the Delaware Constitution of 1897 require notice must be provided to

[107] *Tarapchak v. Town of South Bethany Bd. of Adjustment*, 1998 WL 109829, at *3 (Del.Super. Feb. 24, 1998). *Accord Cnty. Council of Sussex Cnty. v. Green*, 516 A.2d 480, 481 (Del. 1986) (describing minimum due process requirements for a public hearing, stating: "[s]uch proceedings require adequate notice to all concerned; a full opportunity to be heard by any person potentially aggrieved by the outcome; a decision which reflects the reasons underlying the result and, most importantly, an adherence to the statutory or decisional standards then controlling").

surrounding residents in a meaningful and timely manner to protect the public's right to be heard.[108]

Sussex County Code embodies this concept requiring public notice for the hearing of an application at a fixed reasonable time.[109] Furthermore, BOA-ROP mandates notice procedures must comply with "all provisions of State and County ordinances."[110]

BOA published, posted, and advertised the hearing several ways. Advertisements announcing a meeting must be published at least fifteen days prior to the meeting in a general circulation in Sussex County.[111] BOA published advertisements on May 3 and May 8, 2013 in two separate newspapers, The News Journal and The Sussex Post. These advertisements were publicized well before the fifteen-day deadline as the meeting was scheduled for the following month—June 3, 2013.[112]

Notice was also posted by BOA on bulletin boards at the Sussex County Planning and Zoning Office in accordance with § 115–208C.[113] BOA provided

[108] *Green*, 516 A.2d at 481.
[109] Sussex Cty. C. § 115-208C.
[110] BOA-ROP R. 3.2.
[111] Sussex Cty. C. § 115-208.
[112] Appellee Answering Br. at 24.
[113] *Id.*

Harim a separate written notice vis-à-vis the attorney of record.[114] Later on, written notice was sent out to Harim for a second time along with six local government agencies and municipalities. Property owners residing within 200 feet of the subject property's perimeter were also notified by a direct mailing in accordance with BOA-ROP 3.3.[115]

Appellants argue notice was defective and BOA's decision is consequently invalid. First, appellants propose a broader standard for valid notice by blending the dictionary definitions of terms from various procedural statutes that govern notice requirements. The standard offered by Appellants is notice must be given to residents who are in relatively close proximity to the property.[116] This proposed standard is nebulous and contradicts the well-defined requirements for notice that have been established through the proper procedural channels.

Second, Appellants assert BOA failed to adhere to the existing standards for notice as established by the laws, ordinances, and rules of procedure. In contrast to the standard proposed by Appellants, the standard employed by BOA requires notice must be provided to people or entities that own property within 200 feet of the perimeter of the subject property.[117] Appellant contends that Diane Daly lives

[114] *Id.*
[115] *Id.* at 24–25.
[116] Pet'r Opening Br at 19.
[117] Sussex Cty. C. § 115-208C.

within that perimeter and did not receive notice; however, BOA contends that Diane Daly does not in fact live within 200 feet of the subject property.

Even if, assuming *arguendo*, Diane Daly owned property within 200 feet of the perimeter of the subject property and did not receive adequate notice, the "failure to comply with the provisions of Rule 3.3 shall not be considered a defect in the requirements for public notice of a public hearing."[118] Thus, whether Diane Daly and 'dozens' of unnamed parties received notice, assuming they reside within the boundary, does not in itself make notice defective according to BOA-ROP. This Court held that "the mailing requirement is not exclusive or outcome determinative on the effectiveness of notice."[119] Therefore, the Board's final decision is not procedurally defective for lack of notice to Daly or the other similarly situated unnamed parties based solely on the sufficiency of the mailing requirements.

Another relevant factor establishing compliance with due process and notice procedures is the magnitude of public participation in this matter.[120] Although public attendance at a hearing does not in itself establish notice was effective, it is nonetheless important to note BOA received fifteen letters and e-mails about the

[118] BOA-ROP R. 3.3.
[119] *Preston*, 2002 WL 254150, at *4 (internal quotations removed).
[120] *Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment of Town of Bethany Beach*, 1998 WL 733788, at *5 (Del. Super. Sept. 18, 1998).

subject property's special use exception Application. The public meeting was held, as accurately indicated in the notice, on June 3, 2013. Twenty-five people were present at the meeting. Also, to make the proceeding more accessible an inestimable number of attendees were able to listen to the hearing via the live broadcast over the internet. The amount of inquiries received in conjunction with the opposition presented before and during the meeting, weighs heavily in favor of finding adequate notice was provided.

Next, Appellants contend the deferral of the discussions regarding the special use permit exception created confusion which required another round of public notifications. On June 3, 2013 discussions were commenced regarding the special use exception that is the subject matter of this case, but further discussion of the Application was deferred. The meeting was deferred for a bona fide reason; BOA was not attempting to unreasonably delay the hearing or shield the hearing from public comment. BOA was required to consult with other agencies pursuant to Sussex County Code Section 115–111. Discussion of the special use Application was 'tabled' until BOA could consult with these agencies. Any discussion was postponed until the next regular meeting which was to be held on June 17, 2013.

Scheduling these discussions for the next regularly held meeting was a matter of public record and members of the public, including many of the

appellants, were in attendance. Those who attended, either physically or via the live broadcast, heard first-hand that the meeting was rescheduled. Also, the agenda was modified to reflect that discussions were postponed until the following meeting. Notwithstanding the actual notice provided during the meeting and via the posted agenda, Appellants essentially assert BOA was under a duty to re-publicize, re-post, and re-circulate the information.

It was not unknown to the community that Harim's special use exception Application was a forthcoming issue. The purpose of the public notice requirements were fulfilled—the public was in fact on notice that this was a pending matter and was apprised of the time and place for the scheduled discussion.[121] Hence, adequate notification was provided and those interested in participating in the process were welcome to participate.[122] Indeed, comments from the public and agencies that were consulted pursuant Section 115–111 were solicited and placed on public record. These comments were made available even after the meeting on June 17, 2013. Therefore, due process was satisfied because BOA was not required to issue another formal notice.[123]

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[121] *Tarapchak*, 1998 WL 109829, at *3.

[122] *See*, 1 Rathkopf's The Law of Zoning and Planning § 12:24 (4th ed.) (explaining the result of this very scenario, stating when "a body adjourns to a time certain, it may reconvene on the adjourned date without once again giving formal public notice").

[123] *See e.g.*, *Tramonti v. Zoning Bd. of Review of City of Cranston*, 93 R.I. 131, 172 A.2d 93 (1961) (finding the failure to issue formal notice following an adjourned meeting regarding the adoption of an ordinance did not invalidate the Board's decision because the public was

Again, participation in a public hearing does not invariably mean that notice was effective. In this particular case, however, it is telling that BOA collected approximately 220 letters and twelve e-mails during the public comment period, including many from the appellants in this matter.[124] Regardless of whether the Appellants who were present at the hearing personally received notice, they attended the meeting and had an opportunity to object to the alleged inadequate notice. Extensive public participation in the June 17, 2013 meeting and beyond indicates the changes made regarding scheduling were accessible and known to the public. Moreover, the large number of responses and comments in opposition received by BOA indicate the public's ability to comment during the pendency of this matter was also well-known.

Furthermore, this Court has held in similar cases "no harm, no foul." In other words, "[t]he presence of the objecting litigant at the hearing has been held to cure a variety of deficiencies in the notice."[125] In this matter, Appellants attended and substantially participated in the hearing. This participation essentially amounts to waiver because "the part[ies] asserting the defect attended the hearing and

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informed of the new date and time at the previous meeting which was advertised and attended by members of the public).

[124] The record reflects attendance and or input from Bruce Ballantine, Cindy Wilton, Larry Hawkin, and Protect Our Indian River.

[125] *Bethany Beach Volunteer Fire Co.*, 1998 WL 733788, at *5.

w[ere] not prejudiced by the deficiency."[126] Even if some deficiencies were present, Appellants are essentially estopped from claiming notice was defective because Appellants contributed ample public comments following the notice that was provided.[127] Appellants argument fails because "they were present at the hearing and therefore had constructive notice."[128]

In short, the record in this case indicates BOA provided sufficient notice that satisfied due process standards, and BOA was not under a duty to re-publish on account of the necessary deferral of discussions. For these reasons, BOA's decision was procedurally valid.

[126] *Id.*
[127] *Preston*, 2002 WL 254150, at *5 (holding presence at a meeting and the failure to object to inadequate notice amounts to waiver).
[128] *Id.*

V. CONCLUSION

Considering the foregoing, Appellants failed to satisfy their burden to show BOA's decision was arbitrary and unreasonable. The Court finds jurisdiction was properly exercised, a proper party requested the special use exception, BOA's decision was based on substantial evidence, due process notice requirements were satisfied, and the decision is free from legal error. Therefore, the BOA decision is **AFFIRMED**.

IT IS SO ORDERED

/s/ Richard F. Stokes

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Richard F. Stokes, Judge

cc: Prothonotary