

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PROTECT OUR INDIAN RIVER, an : No. 406,2015
unincorporated association, :
LARRY V. HAWKINS, WILLIAM L. :
GARDNER, and DIANE M. DALY, :
 :
Appellants/Petitioners-Below, :
 :
v. : Trial Court Below:
 : Superior Court of the State
 : of Delaware
SUSSEX COUNTY BOARD OF : In and For Sussex County
ADJUSTMENT, ALLEN HARIM FOODS, : C.A. No. S13A-12-002 RFS
LLC, a Delaware limited liability company, :
and PINNACLE FOODS CORPORATION :
a Delaware corporation, :
 :
Appellees/Respondents-Below. :

APPELLANTS' OPENING BRIEF

ABBOTT LAW FIRM

/s/ Richard L. Abbott

Richard L. Abbott, Esquire (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Appellants

Dated: September 16, 2015

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NATURE OF PROCEEDINGS

This is an appeal of the July 2, 2015 Memorandum Opinion issued by the Sussex County Superior Court (“Opinion”) which affirmed a decision rendered by the Sussex County Board of Adjustment (“Board”) approving a Special Use Exception for a Potentially Hazardous Use, namely a poultry processing plant. The Special Use Exception application was filed by applicant Allen Harim Foods, LLC (“Harim”) effective April 12, 2013. The Board granted the application after a public hearing, a re-opening of the Record for supplemental submissions, and a meeting which were conducted between June 3, 2013 and September 23, 2013.

On November 5, 2013, the Board issued its written decision granting Harim the Special Use Exception. In doing so, the Board relied upon evidence submitted at a public hearing and supplemental written submissions permitted after it partially and conditionally re-opened the Record.

An appeal was initiated in the Court below pursuant to the filing of a Verified Petition *In Certiorari* (“VPC”) on December 4, 2013, within the 30 day statutory appeal period. Appellants include adjacent and nearby residents and property owners, as well as an unincorporated association established by area residents who oppose the Special Use Exception, Protect Our Indian River (the “Association”). The Appellants asserted 3 errors in support of their request for invalidation of the Board’s decision: 1) Lack of Board Jurisdiction under the Delaware Code; No

Appeal or Property Owner before it; 2) Failure to Satisfy Legal Standards in the Sussex County Code for a Special Use Exception for a Potentially Hazardous Use; and 3) Lack of proper Notice, Advertising, and Public Hearing Procedures.

Briefing was completed in the Trial Court on April 16, 2014. Oral argument was entertained by the Court below on October 13, 2014, and the case was taken under advisement. The Trial Court thereafter requested that the parties make supplemental submissions on a number of occasions over the following 6 months, and the matter was deemed submitted for decision effective April 15, 2015. The Opinion was issued on July 2, 2015. On July 31, 2015, a Notice of Appeal was filed initiating this appeal.

On August 10, 2015, the Clerk issued a letter establishing a Brief Schedule. A one week extension to the Brief Schedule was granted by the Court on August 18, 2015. This is the Appellants' Opening Brief on Appeal.

SUMMARY OF ARGUMENT

- I. The Board Lacked Jurisdiction To Consider Harim's Application Since:
1) Harim Was Not The Property Owner As Required By 9 *Del. C.* § 6916 and Sussex County Code § 115-208; And 2) No Decision Was Being Appealed To The Board, As Required By 9 *Del. C.* §§ 6916 And 6917.

- II. The Board Failed To Consult With Other Agencies Regarding Protection Of Waterways As Required By Sussex County Code § 115-111 Where The Board Did Not Consult With The EPA, The Conservation District, The Delaware Center For The Inland Bays, Or The Delaware Division Of Public Health.

- III. The Board Did Not Receive Substantial Evidence From Harim To Satisfy Its Burden Of Proof Under The Special Use Exception Legal Standard; The Conclusory Statements And Legal Truisms From DNREC Are At Best A Mere Scintilla Of Evidence.

- IV. The Board's Decision Is Legally Invalid On The Grounds That Notice Was Not Provided To Residents Who Constitute Parties In Interest Under Sussex County Code § 115-208.

- V. The Board Violated The County Code In Failing To Provide Advertised And Written Notice And To Re-Open The Public Hearing, Instead Allowing Only Supplemental Written Submissions.

STATEMENT OF FACTS

A. The Parties And The Property

1. Appellants: A Citizen Group & Closely Proximate Residents/Taxpayers

Appellant Protect Our Indian River (the “Association”) is a Delaware unincorporated, non-profit association composed of numerous residents of the area in the vicinity of the property which is at issue in this action located west of Road 331 (Iron Branch Road), and further identified as Sussex County Tax Parcel Numbers 233-5.00-14.00, -15.00, and -16.00 (the “Property”). A-11 (VPC at para. 1).¹ The individual Appellants are Sussex County taxpayers. A-67 to A-73.

Appellant Larry V. Hawkins is a resident of Sussex County, Delaware living at 10022 Iron Pointe Drive in Millsboro, which is situated approximately 200 feet from the Property. A-12 (VPC at para. 4). He is a member of the Association. *Id.*

Appellant William L. Gardner is a resident of Sussex County, Delaware living at 29799 Iron Branch Road in Millsboro, which is located approximately 50 feet from the Property. A-12 (VPC at para. 5). He is also a member of the Association. *Id.*

¹ Citation to “VPC at para. __” refers to the paragraph number in the Verified Petition *In Certiorari* dated December 4, 2013.

Appellant Diane M. Daly (“Daly”) is a resident of Sussex County, Delaware living at 20016 Bluff Point Drive in Millsboro. A-12 (VPC at para. 6). Her home is located less than 200 feet from the Property. *Id.*

2. The Board, The Applicant, & The Property Owner

Appellee Sussex County Board of Adjustment (“Board”) is created, authorized, and empowered by Title 9 § 6913 *et seq.* of the Delaware Code and § 115-207 *et seq.* of the Sussex County Code (“County Code”). A-12 (VPC at para. 7). Appellee Allen Harim Foods, LLC (“Harim”) is a Delaware limited liability company. A-12 (VPC at para. 8).

Appellee Pinnacle Foods Corporation (“Pinnacle”) is a Delaware corporation that was the owner of the Property.² A-12 (VPC at para. 9). Pinnacle was listed as the owner of all 3 tax parcels constituting the Property in the Sussex County tax records. A-74 to A-76. And the last recorded Deed for the Property was a June 7, 2001 conveyance from Vlastic Foods to Pinnacle. A-77. Pinnacle was a valid Delaware corporation, with a current Registered Agent available for service of process. A-78.

² Pinnacle Foods Group, LLC is the successor by merger to Pinnacle Foods Corporation, but the Trial Court held that Pinnacle Foods Group, LLC constructively intervened in the action below. *Protect Our Indian River v. Sussex County Bd. Of Adjustment*, 2015 WL 4498971, *1 and n.1, Stokes, J. (Del. Super., July 2, 2015).

3. The Property: 107 Acres, Bounded By Indian River Tributaries

A 1989 Property site plan, last revised in 1993, was submitted by Harim as being reflective of existing conditions. A-85. The site plan showed the existing Vlastic pickle plant buildings and improvements. *Id.* And a tax map showed all 107.34 acres contained in the 3 tax parcel numbers constituting the Property. A-89.

The north side of the Property includes the Little Mill Creek and associated floodplain. A-85. And the tax map shows the northern side of the Property being the location of a confluence of the Whartons Branch and Iron Branch streams. A-89. The southeast corner of the Property is transected by a stream known as Barberry Branch. A-85.

Harim also filed a "Schematic Site Plan" for "2013 Plant Renovations" (the "Harim Plan"). A-101. The Harim Plan showed proposed renovations to the existing plant, an addition to the receiving area, and additional paved area in proximity to a stream identified as "Whartons Branch of the Indian River." *Id.* New stormwater management ponds were also proposed in an area of the Property near Whartons Branch. *Id.*

B. Harim Applies, The Property Owner Does Not, And Nothing Is
Appealed

Effective April 12, 2013, when a site plan for the property was received, the Sussex County Board of Adjustment accepted an application from Harim for a Special Use Exception request regarding a Potentially Hazardous Use, to-wit: a

poultry processing facility (the "Application"). A-84 and A-85. The Application identified the 3 Sussex County Tax Parcel numbers (2-33-5.00-14.00, -15.00, and -16.00) constituting the Property as the location of the facility. A-84. The Property was noted as being located on the west side of County Road 331, Iron Branch Road, in Dagsboro Hundred, near the Town of Millsboro. *Id.*

Mailed notice of the June 3rd Board hearing on the Application was purportedly sent to a list of property owners located within 200 feet of the boundary of the Property. A-90 to A-99. This included a long list of dozens of property owners. *Id.* A notice of the June 3, 2013 public hearing on the Application was also advertised in The News Journal and The Sussex Post. A-134 to A-144. And a sign was posted on the Property. A-106.

The attorney that filed the application on behalf of Harim did not represent the Property's owner. A-84. And the Board's hearing notices stated that Harim alone was "seeking a Special Use Exception for a potentially hazardous use (poultry processing facility)." A-105, A-107, A-133, A-136, and A-138. No mention was made of: 1) any appeal to the Board; or 2) the prior denial of any application from which an appeal was being taken. *Id.* Instead, notices stated that Harim had made application for a "variance." *Id.*

C. The State Begins Lobbying The Board Based Upon Economic Development And Jobs Considerations, But Neighbor Opposition Is Strong

Sussex County officials were apparently on red alert for the politically favored Harim project. Indeed, the Sussex County Manager quickly notified the Delaware Economic Development Office that the Application had been filed. A-524. And he advised that the County already knew the Board would be considering the application at its June 3rd hearing. *Id.*

Before the Board even held its June 3rd public hearing on the Application, the Secretary of the Delaware Department of Agriculture submitted a letter to the Board Chair. A-144B. In it, he touted the job creation and economic benefits of Harim's poultry processing facility (the "Harim Chicken Plant"). *Id.* But the letter did not provide any details on environmental impacts. *Id.* Indeed, all the Secretary could say at the Board hearing was environmental concerns would be dealt with later, during the permitting process. A-532 and A-533 (at pp.25 and 31). Harim's counsel took the same "mañana, mañana" approach in his effort to convince the Board to overlook environmental impacts of the Harim Chicken Plant. A-530 (at p.18)("This is not the time or the place to take up matters of air quality, water quality, wastewater, stormwater.").

In contrast, numerous area residents submitted public comments prior to the Board's June 3rd hearing containing their objections to the Application and the Harim

Chicken Plant. A-145 to A-164. Objections included: 1) odors/smell; 2) traffic; 3) noise; 4) lighting; and 5) pollution of nearby creeks and rivers. *Id.* A number of area residents were particularly concerned given the history of pollution in the Indian River waterway caused by the Indian River coal fired power plant. *Id.* The letters were submitted into the record at the Board hearing. A-533 and A-534 (at pp.32-33).

D. The June 3, 2013 Public Hearing; Waterway Pollution Concerns Are Voiced, But Harim Cannot Respond

At the Board's June 3, 2013 public hearing on Harim's Application, evidence was presented regarding the proposed "poultry slaughter, cut-up, and cooking operation," and renovations and improvements to the 107 acre Property. A-167 to A-168, and A-526 to A-527 (at pp.3-5). The only comments regarding impacts on adjacent waterways, however, was the self-evident statement that certain permits would have to be obtained from DNREC. A-168 and A-528 (at pp.10-12). Indeed, Harim's attorney effectively punted on the subject, noting that "the permitting agencies are the best places to address the environmental concerns." A-168 and A-530 (at p.18).

Residents living in close proximity to the Property testified at the June 3rd hearing regarding the environmental concerns and potential negative environmental impacts from the Harim Chicken Plant. Concerns expressed by 7 nearby residents included: 1) specific impacts on residents' well water; and 2) general impacts on

waterways. A-169 to A-170 and A-534 to A-540 (at pp.33-60). Some of the opponents questioned why more environmental permitting review and approval should not occur prior to the Board deciding the Application. A-169 and A-535 (at pp.39-40). And one resident provided anecdotal evidence of the plant's potential to contaminate Iron Branch Creek and the Indian River. A-536 (at pp.43-44). All that Harim's attorney said in response was that "the concerns the opposition has will be addressed throughout the permitting process." A-527 (at p.8).

Ultimately, the Board decided to table the Application in order to defer voting on it until June 17, 2013. A-172 to A-173, and A-544 (at pp.73-75). In doing so, the Board closed the public hearing record. A-544 (at p.76). The hearing was then adjourned. A-545 (at p.77).

E. The Board Meets Again On June 17th & Takes Its Lawyer's Hint To Seek Comments From Other Agencies On Public Health & Waterway Impacts

At the Board's June 17th meeting, its counsel effectively directed it to seek input from other agencies in order to meet the Sussex County Code requirement in that regard. A-174 and A-547 to A-548 (at pp.2-5). Counsel noted that the Board had failed to seek such input, and had not even suggested such an inquiry when it tabled Harim's application on June 3rd. *Id.* As a result, the Board approved a motion to re-open the Record in order to seek comments from State agencies. *Id.* Interestingly,

the agency list used by the Board was authored by Harim's counsel. A-528 and A-544 (at pp.12 and 73) and A-547 (at pp.2-3).

The Board's motion to re-open the public Record only permitted written comments from State agencies, with a 7 day period for the public to present written comments in response. A-175, and A-547 to A548 (at pp.3-5). The Board simply rubber stamped Harim's agency list; it did not independently decide what agencies should be consulted. *See* A-165 to A-166. Nor did the Board schedule a public hearing in order to permit public comment in reply to agency submissions. No explanation was given as to why the Board declined to consult federal, local, and non-profit agencies.

Notice was sent to Harim that the Board had re-opened the Record in order for "Planning and Zoning staff to contact agencies for comments." A-176. But notice was not sent to area neighbors advising them that the Board had effectively re-opened the public Record hearing, despite having closed it in front of the public on June 3rd. And the solicitation of comments from "agencies" was limited to: 1) the Sussex County Building Code Inspector; 2) the Office of the State Fire Marshal; 3) 6 DNREC officials; 4) the Sussex Conservation District; and 5) DelDOT. A-165 to A-166 and A-177 to A-196. Comments were not solicited from the United States Environmental Protection Agency ("EPA"), the nearby Towns of Dagsboro or Millsboro, or any non-profit organizations involved in advocating for Clean Water,

the Inland Bays, and other concerns relevant in the context of the Indian River waterway and its tributaries. *Id.*

F. The Board Failed To Consult With Relevant Public Health & Waterway Protection Agencies, And Got Nothing But Legal Truisms From Agencies It Did Contact

Notably, the Board did not seek comments from the Delaware Center for the Inland Bays (“DCIB”), which is a non-profit organization created by the General Assembly that has developed a Comprehensive Conservation Management Plan “to preserve, protect, and enhance Delaware’s inland bays and their watershed.” 7 *Del. C.* § 7602 *et seq.* and A-549 to A550. “Nutrient pollution” caused by agricultural waste like chicken manure is a focus of such protection efforts. *Id.* In fact, the DCIB has a Scientific & Technical Advisory Committee that would have been a logical choice to solicit comments from regarding pollution of the Indian River that could be caused by chicken manure runoff and wastewater discharges from the Harim Chicken Plant operations. A-551 to A-555.

An even greater oversight was the Board’s failure to solicit comments from the EPA. The EPA’s National Estuary Program was established by Congress in the Clean Water Act, directing the EPA to develop plans for attaining or maintaining water quality in our nation’s estuaries. A-556 to A-560. The 1995 Comprehensive Conservation And Management Plan for Delaware’s Inland Bays contains a detailed set of water quality objectives to meet the goals of the Federal Clean Water Act. *Id.*

Since the legal standard applicable to the Application included impacts on adjacent waterways, which include tributaries of the Indian River and Indian River Bay, the failure to seek input from the EPA is perplexing.

The Record also reflects that the Sussex Conservation District (“Conservation District”) never provided the Board with any comments. *See* A-522 to A-523. The Board decision admitted that the Conservation District constitutes an agency which is created for the promotion of public health and safety. *Id.* But the Board never obtained this essential input.

For over 20 years, the Conservation District has served as the delegated agency in Sussex County for the administration of the Delaware Sediment & Stormwater Regulations. A-561 to A-567. Among the Conservation District’s duties is to oversee and inspect permanent stormwater facilities and insure compliance with approved sediment and stormwater management plans. *Id.* The Conservation District also works in tandem with DNREC to provide technical assistance on nutrient management planning, including “water quality improvements with the implementation of conservation best management practices throughout the...Delaware Bay, and Inland Bays Watersheds.” *Id.* Stormwater will be discharged into the surrounding waterways from the Harim Chicken Plant retaining ponds. Therefore, advice from the Conservation District was critical.

Comments received by the Board from the agencies that were actually consulted with all stated nothing more than the mere self-evident fact that Harim would have to comply with all applicable Codes and laws. A-197 to A-201, and A-521 to A-523. The Board decision recounts DNREC's non-substantive comments regarding what Harim "may" need to obtain in terms of approvals. *Id.* Thus, even the "agencies" comments were received from shed no light on the question of whether pollution of abutting waterways would be caused by the Harim Chicken Plant.

G. Opponents Of Harim's Application Submitted Voluminous Comments Regarding Negative Environmental Impact & Lack Of Opportunity For Public Input

The 2 main themes of the written submissions provided to the Board by members of the public were: 1) lack of sufficient opportunity for public comment; and 2) concerns regarding pollution and other negative environmental impacts. Cindy Wilton objected to the limited chance for public response to agency comments and the lack of evidence showing that environmental and contamination concerns would be addressed if the Harim Chicken Plant was constructed. A-202. Lew Podolske commented that agency submissions were lacking since they failed to address the effects of the proposed \$100,000,000 in improvements Harim intended to make to the site, instead basing their comments solely on the pre-existing pickle plant operations. A-205 to A-206. *See also* A-531 (at p.24)("a hundred million

dollar construction project.”). Other objections more generally complained about the lack of public notice and response time and increased pollution and degradation of water quality. A-207 to A-227.

The Delaware Chapter of the Sierra Club also chimed in, contending that a Board vote was premature. A-214 to A-215. Additional Sierra Club objections included: 1) a lack of detailed information on the magnitude of the Harim Chicken Plant’s operations; 2) lack of information regarding impacts on water quality; and 3) EPA designation of the site as a Brownfield due to high levels of pollutants, including nitrates. *Id.* Other objectors to the Application stated their general concerns about environmental impacts on the Indian River and the lack of any evidence beyond the mere possible future permitting process to show that the Harim Chicken Plant would not bespoil the waterways. *Id.*

A submission made by Bruce Ballantine and Cindy Wilton on behalf of the Association outlined 5 procedural and substantive defects in the Board process: 1) failure to properly notify adjacent property owners; 2) failure to give proper notice of the public comment period; 3) failure to provide a “reasonable time” for public comment; 4) failure to conduct a public hearing addressing agency comments; and 5) failure to solicit comments from relevant public health and safety agencies. A-223 to A-227. Many of these points were echoed in written comments submitted in opposition to the Application. A-228 to A-240.

A written submission from The Johns Hopkins Center for a Livable Future, Bloomberg School of Public Health highlighted the negative environmental impacts of large poultry processing plants based on wastewater discharges. A-230 to A-234. In particular, the expert submission by 1 medical doctor and 3 Ph.D.'s highlighted the fact that "[p]oultry processing plant effluents are high in nitrogen, phosphorous, and total suspended solids, all of which could threaten quality if discharged into the Indian River Bay." A-231 (emphasis added).

One particularly telling submission from a member of the public is contained in an undated and unsigned letter which describes the degradation of the waterways caused during the 50+ residence of the citizen commenter from another nearby chicken plant and the Vlastic pickle plant – e.g. "all the dumping caused the fishes to disappear" and "[w]e would see pickles and red stuff floating down the river." A-239 (emphasis added). This is in stark contrast to the letter's 1957 recollections, which described the waterways as "clean and clear" and noted that "[w]e used to be able to see our feets knee-deep, see crabs and fish swimming." *Id.* (emphasis added).

Additional public comments pointed out the Board's lack of research and due diligence regarding public health impacts of the Harim Chicken Plant. A-241 to A-374. In addition, the letter writers objected to the lack of re-advertisement for solicitation of public comment in response to the agencies' submissions. *Id.* Letters were sent in by Cindy Wilton and Larry Hawkins, as well as dozens of additional

area residents. *Id.* And approximately 136 letters of opposition submitted by area residents, including Bruce Ballantine, focused on the lack of evidence establishing that the Indian River waterway would not be detrimentally affected by water pollution coming from the Harim Chicken Plant. A-375 to A-510.

Apparently, many area residents complained to the news media about the lack of sufficient time to respond to the supplemental agency comments submitted to the Board. A-511 to A-516. Despite that fact, the Sussex County Department of Planning And Zoning announced that it would stringently comply with the 7 day deadline for public responses, disregarding any other submissions that might be received after that date. *Id.*

ARGUMENT

I. THE BOARD LACKED JURISDICTION SINCE THERE WAS NO APPEAL BY THE PROPERTY OWNER

A. Question Presented

Whether the board lacked jurisdiction under 9 *Del. C.* § 6916-17 since neither the property owner nor an appeal was before it? The question was preserved in the Trial Court at pages 12 and 13-15 of Petitioners' Opening Brief dated February 26, 2014 and pages 2 through 5 of Petitioners' Reply Brief dated April 16, 2014.

B. Standard and Scope of Review

When reviewing a Board of Adjustment Decision, the Supreme Court applies the same standard as the Superior Court. *New Cingular Wireless PCS v. Sussex County Bd. of Adjustment*, 65 A.3d 607, 610 (Del. 2013)(en Banc). "The Board's decision is reviewed for errors of law, and to determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law." *Id.* All legal determinations rendered by the Superior Court, including issues of statutory interpretation, are reviewed *de novo*. *Id.* The Court may also determine whether the Board possessed subject matter jurisdiction, and if it did not, then its decision is void. *Dawson v. Sussex County Bd. of Adjustment*, 1993 WL 390229, *3, Lee, J. (Del. Super., Aug. 20, 1993).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla, but less than a preponderance. *Id.*.

C. Merits Of Argument

A. The Board Lacked Jurisdiction; It May Only Hear Appeals Of Administrative Decisions, Not Direct Applications

The government of Sussex County is required to establish a Board of Adjustment and provide for its rules, procedures, jurisdiction, and governance consistent with Title 29, Chapter 69, Subchapter I of the Delaware Code. 9 *Del. C.* § 6915. Under 9 *Del. C.* §§ 6916 and 6917, the Board’s jurisdiction is expressly limited to “appeals.” Both the headings of those two sections and the language contained in the body of those sections indicate that the Board is vested solely with authority to hear and decide “appeals.”

In pertinent part, § 6916(a) provides:

Appeals to the Board of Adjustment may be taken...from the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning regulations. **Appeals** to the Board of Adjustment may be taken...[from any] decision of an administrative officer or agency based on or made in the course of the administration or enforcement of the provisions of the zoning regulations. (emphasis added).

In turn, § 6917 provides that:

Upon **appeals**, the Board of Adjustment shall have the power to: (2) Hear and decide, in accordance with the provisions of any zoning regulation, requests for special exceptions... . (emphasis added).

Consequently, it is evident that the Board is only vested with subject matter jurisdiction over **appeals** from Sussex County government administrative decisions on zoning matters.

In the case at bar, a direct application was submitted to the Board by Harim seeking a Special Use Exception. No administrative decision under the zoning regulations was rendered in order to give rise to an appeal. A prerequisite to initiate an appeal to the Board is a property owner submission of a land use plan with the County, which in turn will technically “deny” the application until a Variance or Special Use Exception is obtained via an “appeal” to the Board. Since the Board only possesses subject matter jurisdiction to consider such appeals, the Board decision is void for lack of jurisdiction.

B. Only The Property Owner, Not Harim, Has Standing To Bring A Board Appeal; The Board Lacked Jurisdiction

Additionally, property owner Pinnacle did not file anything with the Board in order to vest it with jurisdiction to grant a Special Use Exception. According to the Sussex County Tax and Deed records, Pinnacle was the owner of the Property. And PFG, who constructively intervened in the Court below, did not file any application or participate in Board proceedings. 9 *Del. C.* § 6916(a) and Sussex County Code

§ 115-208A, however, require that the property owner must seek a Special Use Exception.³

Under § 115-208A., “[a]pplications for special exceptions...may be made by any property owner, tenant, government official, department, board or bureau.” (emphasis added). Harim is none of these. Nor is Harim a “person” who was refused a building permit or received an administrative decision under the zoning regulations per 9 *Del. C.* § 6916.

Harim was not the property owner and it did not appeal any zoning or building code decision rendered against it. Harim lacked the necessary legal Standing required to vest the Board with subject matter jurisdiction to consider a Special Use Exception appeal initiated by it. Accordingly, the Board’s decision regarding the request submitted by Harim is legally void.

³ Pertinent Sussex County Code provisions may be found at A-574 *et seq.*

ARGUMENT

II. THE BOARD LEGALLY ERRED BY FAILING TO CONSULT WITH COUNTY CODE MANDATED AGENCIES REGARDING WATER POLLUTION & HARIM FAILED TO PRESENT MORE THAN A SCINTILLA OF CONCLUSORY & LEGAL TRUISM EVIDENCE

A. Question Presented

Whether the Board failed to sufficiently consult with Indian River waterway agencies and lacked substantial evidence that additional water pollution would not be added to the already polluted Indian River watershed? The question was preserved in the Trial Court at pages 12 and 15-18 of Petitioners' Opening Brief dated February 26, 2014 and pages 8 through 12 of Petitioners' Reply Brief dated April 16, 2014.

B. Standard and Scope of Review

The standard and scope of review are set forth in Argument I.B. hereinbefore.

C. Merits Of Argument

A. Numerous Legal Standards Impose A Burden On The Board & Harim To Show Public Health & Waterways Will Not Be Adversely Affected

Section 115-109 of the Sussex County Zoning Code explains that the purpose of the Heavy Industrial zoning district is, "to restrict or prohibit those industries which have characteristics likely to produce serious adverse affects within or beyond the limits of the district." (emphasis added). Given the immediate adjacency of

residential neighborhoods and communities in which the Appellants and their neighbors reside, this purpose is sensible and advances the interests of public health and safety. The HI zoning purpose section also provides that “[c]ertain potentially hazardous industries are permitted only after public hearings and reviewed to assure protection of the public interest and surrounding property and persons.” (emphasis added). And the list of “permitted uses” in County Code § 115-110 does not include poultry processing facilities like the Harim Chicken Plant. Instead, Harim’s proposed use falls into the Potentially Hazardous Use category, which is expressly restricted and limited by the provisions of, *inter alia*, § 115-111.

County Code § 115-210A.(3)(h) requires a Special Exception for any Heavy Industrial zoning district use which the Board is required to pass upon under Article XV, Chapter 115 of the County Code. The Property is zoned Heavy Industrial. And the applicable § 115-210 legal standard is that the special exception “will not substantially affect adversely the uses of adjacent and neighboring property.” *See New Cingular Wireless PCS v. Sussex County Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013)(en Banc).

Section 115-111 of the County Code, which is part of Article XV, Chapter 115, requires a showing that “safeguards will be provided for the protection of water areas...” (emphasis added). In addition, § 115-111 mandates that the Board “shall consult with other agencies created for the promotion of public health and safety and

shall pay particular attention to protection of the County and its waterways from the harmful effects of air or water pollution of any type.” (emphasis added). Uses which are subject to § 115-111 include “Slaughtering of animals,” which is precisely what the Harim Chicken Plant will do.

Sussex County Code § 115-111 specifically provides:

The Board shall review the plans and statements and shall not permit such buildings, structures, or uses until it has been shown that the public health, safety, morals, and general welfare will be properly protected and that necessary safeguards will be provided for the protection of water areas or surrounding property and persons.

and

The Board, in reviewing the plans and statements, shall consult with other agencies created for the promotion of public health and safety and shall pay particular attention to protection of the County and its waterways from the harmful effects of air or water pollution of any type. (emphasis added).

Thus, § 115-111 bars the grant of any Special Use Exception for a Potentially Hazardous Use absent: 1) Board consultation with agencies that promote public health and safety, including those involved with protecting waterways from water pollution; and 2) Harim’s satisfaction of its burden of proof to establish that water areas/waterways will be safeguarded from water pollution of any type.

B. The Board Did Not Consult With Key Agencies,
Warranting Automatic Reversal

The Board did not consult with all relevant agencies on the questions of public health and impact on waterways, persons, and property. Indeed, the Board did not consult at all with the Delaware Division Of Public Health. Instead, it only obtained written comments from DNREC, which contained mere surmises and guesswork and provided no specific details on public health and safety impacts.⁴ The Property includes wetlands, and wastewater discharges and stormwater runoff will drain directly into tributaries of the Indian River. Harim Chicken Plant operations, which will necessarily include chicken manure storage and chicken slaughtering effluent, would certainly bespoil those waterways.

The uncontraverted record evidence also establishes that the Board failed to consult with the Conservation District, the EPA, and the DCIB.⁵ It cannot be legitimately questioned that all 3 of those agencies were created for the promotion of public health and safety. The Inland Bays conservation plan prepared and overseen by the DCIB and the EPA under the Congressionally mandated National Estuary program provides ample standards for the Board to have considered in

⁴ Comments from the Sussex County Building Code Inspector and the Delaware State Fire Marshal go to the subject of safety, not health.

⁵ The Board blindly adopted Harim's agency list *in toto*, without bothering to think of additional agencies which fall within the scope of County Code § 115-111.

deciding upon the Application. And the Conservation District would have been able to advise on the extensive stormwater pond component of Harim Chicken Plant. Given Harim's potential discharge of millions of gallons of wastewater per day, the water quality impact on surrounding tributaries of the Indian River would be significant. Consequently, it is evident that the Board failed to comply with the minimum legal prerequisites before rendering a decision, therefore warranting reversal.

C. The Board Received A Scintilla Of Evidence At Most; Substantial Evidence Was Lacking

The Board also had no legitimate evidence regarding impact on waterways and surrounding properties and persons, instead relying on the mere conclusory and unsupported statements of representatives of Harim that generally asserted everything would be fine and dandy. Statements which merely contain conclusory assertions regarding a promise to comply with all applicable Codes and laws are insufficient to meet the substantial evidence test. At most, the statements constitute a scintilla of evidence, which fails to exceed the threshold necessary to meet the legal standard (*i.e.* more than a scintilla and less than a preponderance).

Additionally, the paucity of record evidence supporting a conclusion that water areas and waterways would not suffer from harmful effects of water pollution resulting from the significant amount of industrial wastewater discharged into the

Indian River tributaries establishes that Harim failed to meet its burden of proof. DNREC's comments that if permits are required Harim would have to obtain them in accordance with applicable law is nothing more than a statement of the obvious. It is a mere legal truism, not a legitimate basis upon which to render a decision in accordance with the applicable standard. Given the highly sensitive nature of the Inland Bays and the existing nitrate pollution problems in the Indian River Bay and its watershed, obtaining detailed factual information sufficient to support a conclusion that the waterways will not be polluted by the Harim Chicken Plant was a necessity. Since the Board lacked anything more than a mere scintilla of conclusory evidence, however, its decision should be reversed as legally unfounded.

ARGUMENT

III. THE BOARD DECISION SHOULD BE REVERSED BASED ON VIOLATIONS OF PUBLIC ADVERTISING, NOTICE & HEARING REQUISITES OF COUNTY LAW

A. Question Presented

Whether the Board's Decision is legally invalid on the grounds that it failed to follow legal Ad, Notice, and Public Hearing requirements contained in the Sussex County Code? The question was preserved in the Trial Court at pages 12 and 19-21 of Petitioners' Opening Brief dated February 26, 2014 and pages 13-14 of Petitioners' Reply Brief dated April 16, 2014.

B. Standard and Scope of Review

The standard and scope of review are set forth in Argument I.B. hereinbefore.

C. Merits Of Argument

A. The County Code Contains Stringent Public Notice, Advertising & Hearing Provisions

Under §§ 115-109, 115-111, and 115-208 of the County Code, certain notice, advertising, and public hearing requirements for the Board are imposed. The Board must conduct its proceedings in a public hearing format – *i.e.* public attendance and comment are permitted. And advertisement of the public hearing must be published in a newspaper of general circulation at least 15 days prior.

Advance written notice of the Board's public hearing must also be given via U.S. Mail to "parties in interest" under County Code §§ 115-208A. and C. Parties

in interest include those persons and property owners that the applicable legal standards expressly address: 1) “surrounding property and persons”; and 2) “adjacent and neighboring property.” *See* Sussex County Code §§ 115-111 and 115-210. In turn, “surrounding” and “neighboring” properties include nearby lands, not just directly abutting parcels. “Surround” is defined as “something (as a border or edging) surrounding or nearly surrounding a central object or area.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 2302. And the term “neighboring” is defined as “immediately adjacent or relatively near.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1514. Accordingly, notice was required to be provided to any person who resides within relatively close proximity to the Property.⁶

B. Notice, Newspaper Ad, & Public Hearing Mandates
Were Not Followed

Daly lives in the neighboring community of Bluff Point, and did not receive a written notice of public hearings from the Board. A-15 (VPC at para. 26). She is within 200 feet of the Property and qualifies as a party in interest. *See Id.* In addition, dozens of additional parties in interest were not provided with written

⁶ Sussex County apparently applies a 200 foot perimeter rule to identify property owners who will be sent U.S. Mail notice.

notice of the Board's public hearings. *Id.* For this reason alone, the Board process was legally defective.

Additionally, the Board did not provide written notice or publish a newspaper ad once it re-opened the public hearing, albeit in a limited fashion, at its June 17, 2013 meeting. The legal requirements regarding advertisement/publication and direct mail notification to neighboring and surrounding residents was triggered by the Board's continuation of the public hearing process. How else was the public supposed to know comments were allowed after the record was formally closed at the June 3rd public hearing and the Board announced the hearing was adjourned (*i.e.* concluded)? The Board violated the County Code public notice and advertising requirements.

The Board also failed to re-open the public hearing process in its entirety, instead providing a limited basis for receiving written submissions from some agencies, with only a short one week written public rebuttal period thereafter. The Board was legally required to conduct a supplemental public hearing regarding comments from agencies and any public rebuttal comments. Sussex County Code § 115-208C. requires that the Board conduct a public hearing; it does not allow a "paper" record to substitute for live proceedings. And parties in interest must be provided with written notice of its public hearings. *Id.* But the Board eschewed the public hearing process required by law.

Due to lack of compliance with Sussex County Code § 115-208C., the Board's final decision was procedurally defective and therefore should be invalidated. In fact, many of the members of the public that did make written submissions in response to public agency written comments expressly advised the Board that the proper notice and advertisement requirements had not been followed. Yet the Board soldiered on, blindly ignoring the obvious failings of its procedure. As a result, the Court should reverse the Board due to its fatal violations of the public notice/advertisement, written notification and public hearing provisions.

Procedural requirements regarding Sussex County's delegated zoning authority must be strictly complied with. *See Carl M. Freeman Associates, Inc. v. Green*, 447 A.2d 1179, 1181-82 (Del. 1982). Land use regulation is a power delegated to counties by the General Assembly, and therefore "full compliance with conditions imposed on the exercise of that power is essential." *Fields v. Kent County*, 2006 WL 345014, *3, Noble, V.C. (Del. Ch., Feb. 2, 2006). *See also Farmers for Fairness v. Kent County*, 94 A.2d 947, 956 (Del. Ch. 2008). 9 Del. C. § 6915 requires Sussex County to adopt rules governing the Board's procedures. In turn, the County Code establishes the minimum advertisement, notice, and public hearing procedural requirements for Board proceedings. Since the Board unquestionably failed to provide the necessary notices and advertisements needed to advise the public and area residents of their opportunity to comment on the

supplemental agency comments submitted in the re-opened public hearing process,
the Court should invalidate the Board decision.

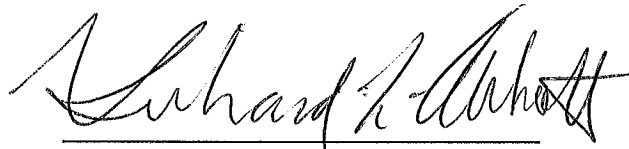
CONCLUSION

Based upon the foregoing, the Court should reverse the Trial Court's decision in the Opinion and the Board's approval of the Special Use Exception for the Harim Chicken Plant, a Potentially Hazardous Use. The Board did not have Jurisdiction since the Property Owner must request a Special Exception, not Harim. In addition, the Board is only vested with Jurisdiction to consider Appeals, not direct applications which have yet to be reviewed and decided upon by Sussex County officials.

Moreover, the Board erred as a matter of law by failing to consult with agencies that fell within the purview of the County Code legal standard: the Division of Public Health; the EPA; the Sussex Conservation District; and the Delaware Center for the Inland Bays. Further, no more than a mere scintilla of evidence, conclusory and self-evident in nature, was presented to establish that the Indian River watershed would not be adversely affected by millions of gallons of wastewater the Harim Chicken Plant will discharge into the Indian River tributaries abutting the Property.

Finally, the failure of the Board to properly notice, advertise, and conduct all public hearings as required by the Sussex County Zoning Code constitutes a fatal procedural flaw. The legally mandated process was subverted by the Board. Accordingly, the Court should reverse the Opinion and the Board decision.

ABBOTT LAW FIRM

A handwritten signature in cursive script, appearing to read "Richard L. Abbott". The signature is written in black ink and is positioned above a horizontal line.

Richard L. Abbott (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Appellants

Dated: September 16, 2015