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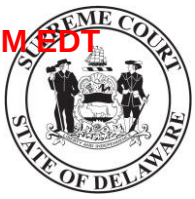

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE ALLEN HARIM FOODS, LLC'S ANSWERING BRIEF

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Dated: October 15, 2015

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NATURE OF PROCEEDINGS

Before this Court is an appeal of the Superior Court's July 2, 2015 Memorandum Opinion ("**Opinion**"),[1] affirming a November 5, 2013 decision ("**Decision**") of the Sussex County Board of Adjustment ("**Board**"). The Board's Decision approved an application for a Special Use Exception for a Potentially Hazardous Use ("**Application**") of property, filed by Appellee Allen Harim Foods, LLC ("**AHF**"). The property in question ("**Property**") is a 107-acre parcel located in a heavily-industrialized area near Millsboro, Delaware. For approximately four decades, the Property had been a pickle-processing plant.

In March 2013, AHF entered a conditional Agreement of Purchase and Sale ("**APS**") for the Property. AHF planned to renovate the Property's closed facilities and reopen them for use as part of AHF's Delaware poultry-processing operations. The Delaware Department of Agriculture estimated that AHF's plan would create approximately 700 jobs.

The seller was Pinnacle Foods Group, LLC ("**PFG**"), a Delaware limited liability company that had owned the Property since 2008 (and in the name of other Pinnacle entities, since 2001). Like prior owners, PFG had used the Property to process cucumbers into pickles. PFG was named in the Application as the Property's owner, and PFG was the legal owner of the parcel at all times relevant

[1] *Protect Our Indian River v. Sussex Cnty. Bd. of Adjustment*, 2015 WL 4498971 (Del. Super. Ct. July 2, 2015) [hereinafter "Opinion"].

to this case. However, PFG is a separate legal entity from the named Appellee, Pinnacle Foods Corporation.

The APS conditioned the sale on AHF's completion of certain due diligence requirements. Those requirements included, *inter alia*, AHF's obligation to confirm that the Property had the appropriate zoning for AHF's intended use. The Property is already zoned HI-1 (Heavy Industrial) under the "Zoning" chapter of the Sussex County Code ("**Code**"), but AHF's specific intended use of the Property as a poultry processing facility is subject to Board approval and to separate requirements that apply only to "potentially hazardous uses" in the HI-1 zone.

In April 2013, AHF filed the Application as the contract purchaser and equitable owner of the Property. The Board scheduled, noticed and on June 3, 2013, held a public hearing on the Application. The Board heard evidence from AHF and concerns from opponents. At the conclusion of the June 3 hearing, the Board announced it would table the Application until the Board's June 17 meeting, so that the Board could consult with health and safety agencies. Following the June 17 meeting, the Board solicited opinions from 10 federal, state, and local agencies. The Board gave the agencies 30 days to comment in writing, and the Board allowed 7 days for written responses to the agencies' comments.

At the Board's September 23, 2013 meeting, all participating Board members voted to grant the Application. The Board issued its written Decision on November 5, 2013.

Appellants[2] filed a Verified Petition in *Certiorari* ("**Petition**") on December 4, 2013 in the Superior Court. The parties completed briefing on April 26, 2014, and oral argument occurred on October 13, 2014. Thereafter, the parties briefed additional issues at the Superior Court's request.

Following oral argument below, AHF advised the Superior Court of the transfer of title of the Property from PFG to Harim Millsboro, LLC, assignee of AHF under the APS, and of AHF's entry into a Common Defense Agreement with PFG so as to allow Harim Millsboro the right to continue the defense of the *Certiorari*, with the cooperation of PFG, as necessary and appropriate. *See* B119-127. On July 2, 2015, the Superior Court affirmed the Board's Decision by its Opinion.

Appellants filed a Notice of Appeal with this Court on July 31, 2015. Appellants filed their Opening Brief on September 16, 2015. This is Appellee AHF's Answering Brief on Appeal. As noted in the preceding paragraph, AHF's Answering Brief is filed on behalf of Harim Millsboro, LLC, assignee of AHF under the APS, and PFG, with its cooperation, under the Common Defense Agreement. The appeal to this Supreme Court is hereafter referred to as the "**Appeal**," and the *Certiorari* proceeding below is hereafter referred to as the "***Certiorari***."

[2] This brief uses the term "Appellants" to maintain consistency with the Opinion and Appellants' Opening Brief. *See* Supr. Ct. R. 14(b)(v).

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that AHF had standing to bring the Application since applications may be filed by "any property owner" under Code § 115-208, and AHF was the equitable owner at the time AHF filed the Application. Furthermore, the Superior Court correctly held that the Code authorizes direct applications and that the General Assembly intended Sussex County to have broad authority in setting the Board's jurisdiction.

2. Denied. The Superior Court properly found that the Board met its agency consultation requirement where the Board solicited comments from ten agencies, incorporated all comments received, and specifically addressed health, safety, and environmental concerns.

3. Denied. Substantial evidence supports the Board's Decision. The Decision rests on thorough documentation, hearing testimony and agency comments. All of the probative evidence favored approval of the Application.

4. Denied. The Superior Court correctly held that all interested parties received notice. The Board published, posted and mailed notice in conformity with the Code and the Board's rules. Moreover, Appellants had constructive notice, and they participated in the Board's proceedings.

5. Denied. The Superior Court properly concluded that the Board followed the Board's rules and satisfied due process standards. The public participation and abundant public comments confirm that the notice given provided actual notice to the public, generally, and the interested parties, specifically.

STATEMENT OF FACTS

A. The Property and its Owner.

The Property is the site of a defunct industrial food-processing plant near Millsboro, Delaware. Before industrial operations ceased, the Property was used by different businesses to process pickles for approximately forty years. A23; A521; A527(8). Most recently, PFG operated the facilities after PFG's predecessor in interest purchased the property from Vlasic Foods International, Inc. B33; B93-94. The Property sits in a heavily industrialized area, and the Property is zoned as HI-1 (Heavy Industrial) under the Code. A51; A84.

Nearby properties are also zoned for and used for heavy industrial purposes. A528(12)-529(15).[3] These industrial uses include a concrete block manufacturer, a commercial propane business and a large banking facility. *Id.* While there are nearby residential properties, those properties were developed for residential use after the industrial uses had long been established. *Id.* For example, the concrete manufacturer has operated since approximately 1960, and other industries have operated since the early 1970s. *Id.*

Though unnamed in this Appeal, PFG was the legal owner of the Property at all times relevant below, *see* B93-94; B100-116, and was specifically named as owner of the Property in the Application. A84. Appellants named "Pinnacle Foods Corporation" in the *Certiorari*, and again on this Appeal. Pinnacle Foods

[3] Citations to transcripts in the appendices are to the page of the appendix followed by the page of the transcript, *e.g.*, A##(##).

Corporation took title to the Property by Deed from Vlasic Foods International, Inc. in May of 2001, after which it merged with and into an entity that became PFG. *See* B93-94; Opinion at *1, n.1. Pinnacle Foods Corporation ceased to exist in October 2007. B100-116. Though Pinnacle Foods Corporation was listed in the Deed, the records of the Delaware Secretary of State confirm that PFG had succeeded to Pinnacle Foods Corporation's ownership of the Property years before the Application was filed. *See id.* Despite this information of public record, Appellants erroneously served Pinnacle Foods Corporation with the Writ of *Certiorari* below and the Notice of Appeal here.

In spite of Appellants' error below, PFG obtained a copy of the Writ of *Certiorari* through its common registered agent with Pinnacle Foods Corporation. To protect its interests, PFG entered ***its*** appearance and participated in the Superior Court proceedings as the owner of the Property. B128-132. PFG advised the Superior Court of these circumstances, and further advised the Superior Court that PFG preferred a decision on the merits rather than a dismissal of Appellants' *Certiorari* for failure to name a necessary party. *See* Opinion at **2-3. After considering the issue, the Superior Court held that it had subject matter jurisdiction since PFG had constructively intervened in the *Certiorari* proceedings. *Id.* at *3.

B. AHF Conditionally Agrees to Purchase the Property from PFG.

On March 14, 2013, AHF entered the APS to purchase the Property from PFG. The APS contained a due diligence contingency that required AHF to confirm that the Property was appropriately zoned for AHF's intended use of the

Property— *i.e.*, as a poultry-processing facility. Opinion at *2. Throughout the due diligence period, PFG cooperated with AHF in completing due diligence requirements, including filing the Application and defending the *Certiorari* proceedings. Opinion at *11. The APS remained executory until after oral argument, and AHF advised the Superior Court of the subsequent transfer of title to the Property. B119-127.

C. AHF files the Application with the Board and supports the Application with extensive documentation.

On April 12, 2013, AHF filed the Application to the Board for a special use exception for a potentially hazardous use under Code §115-111. The Application identified AHF as the Applicant and PFG as the property owner. A84.

AHF supported its Application with thorough, relevant documentation. AHF included a site plan showing proposed renovations to the existing facilities. A85; B48. AHF also included an executive summary that explained how AHF planned to address Code §115-111's criteria, including water and air pollution; dust, odor and noise control; traffic concerns and safety issues. B25-27. AHF included a site history that identified several existing environmental issues. B33. AHF even identified the federal, state, and local agencies with authority and jurisdiction over the respective renovations, explained how these agencies would evaluate AHF, and provided contact information for the Delaware agencies. B50-63; A165-166. In addition to information about the site, AHF provided background information on AHF as a company. B81-86.

D. The Board mails, posts and publishes notice of the Application and hearing.

After receiving AHF's Application, the Board posted, published and mailed the required notices in accordance with its procedures.[4] Notice was posted on the Sussex County Planning and Zoning Commission bulletin board on May 6, 2013 and on the Property on May 9, 2013. A102; A106. The Board published notice of the Application and the hearing in both *The News Journal* and in the *Sussex County Post*. A133-144. Finally, the Board's staff prepared a list of property owners within 200 feet of the boundaries of the Property. A90-99. The Board sent these property owners written notice but some notices were returned. A107-132.

Of the Appellants, only William L. Gardner resided within 200 feet of the Property, and he was mailed notice. A93. Though Appellant Dianne Daly alleges that she lives within 200 feet of the Property, she does not.[5] Daly's home is not within 200 feet of any boundary line of the Property. *See* B117-118. In any event, Daly appeared and testified at the June 3 hearing. A537(45)-538(50).

E. The Board holds the public hearing on June 3, 2013 and receives evidence in support of the Application.

The Board addressed the Application at the Board's June 3, June 17 and September 23, 2015 meetings. On June 3, the Board held the public hearing, and it

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[4] *See* "Rules of Procedure of the Board of Adjustment of Sussex County, Delaware," Rule 3 (included at B11-20) [hereinafter, "Board R."].

[5] The Opinion assumed for purposes of argument that Daly lived within 200 feet of the property. Opinion at *16.

heard AHF's presentation and witnesses, testimony in support of the Application, and comments from concerned citizens.

AHF presented two witnesses to support the Application. James Quinton, AHF's director of operations, testified about AHF's plans for the Property. A526(4)-527(7). He clarified that the operation would not include rendering (the processing of chicken offal, blood, or feathers), and he explained that AHF planned to improve the Property to minimize dust, odor and traffic. *Id.* John Shahan, AHF's project engineer, testified about the specific details of the proposed renovations, including AHF's efforts to minimize or eliminate any adverse effects. A527(8). He also explained that the special use exception was only an initial step and that various permitting processes would follow. *Id.*

Edward Kee, Delaware's Secretary of Agriculture, also testified in support of the Application. A531(24)-534(33). Secretary Kee confirmed the Property's 40-year history as a food-processing facility, and he lauded AHF's plans to boost the local economy with the renovation of the facilities and the creation of 700 full time jobs. *Id.* Secretary Kee explained that he had personal knowledge of AHF's operations because he had toured AHF's South Korean plants. A532(25-26). He characterized AHF's proposed use of the Property as "a role model of a modern facility that really is run in an environmentally sound way, in a way that respects the community." A532(25; 28).

The Board also accepted letters from, and heard the testimony of the Application's opponents. A534(34)-541(62). Overall, the opponents voiced

concerns about the potential effect of AHF's proposed facility on the neighborhood and environment. *See id.* The opponents' concerns were speculative and admittedly "anecdotal." Appellants' Op. Br. ("**Op. Br.**") at 10. Following opposition comments, the Board allowed AHF to respond. A541(62)-544(75).

At the conclusion of the public hearing, the Board again addressed its obligation to consult with agencies as part of the Board's deliberative process. A528(12); A544(73). To allow time to comply with this obligation, the Board tabled further action on AHF's Application until June 17, 2013. A544(73-74). The Board then closed the public hearing. A544(75-76).

Following the public hearing, the Board posted notice of the June 17 meeting – including the continued consideration of the AHF's Application. A28-29. The minutes of the June 3 hearing also stated that the Board had tabled consideration of AHF's Application until the June 17 hearing. A171; A173.

F. The Board holds its June 17, 2013 meeting, consults with agencies and accepts public comments.

At the June 17, 2013 meeting, the Board further discussed the Board's duty to consult with agencies. A-547(2)-548(6). The Board voted to re-open the record for the limited purpose of soliciting written agency comments and public responses. *Id.* The Board allowed 30 days for soliciting and receiving agency comments, and it allowed 7 days thereafter public responses to the comments. *Id.* Agency comments were due July 31, and public responses were due August 7. *Id.*

On June 18, the Board directed 10 written inquiries to relevant agencies: Sussex County Building Code, the Office of the State Fire Marshal, six divisions of

DNREC, Sussex Conservation District, and DelDOT. A177-196. The inquiries requested the agencies to review AHF's Application and provide comments to the Board by July 31, 2015. *Id.*

None of the solicited agencies objected to the Board's approval of the Application. A197-201. The Board received written replies from the Office of the State Fire Marshall, DNREC's Division of Air Quality, Sussex County Building Code Enforcement and David Small, Deputy Secretary of DNREC. *Id.* Separately, each of these agencies explained that the Board's approval would be the start, not the end, of the agencies' respective involvements with AHF and the proposed renovations. *Id.*

Deputy Secretary Small's response to the Board's inquiry was particularly comprehensive. A200-01. He noted that even if the Board granted the Application, AHF would still face numerous regulatory and permitting requirements to ensure AHF's compliance with Delaware's environmental regulations and with federal environmental programs administered by DNREC. *Id.* After explaining these requirements, Deputy Secretary Small affirmed that DNREC's on-going involvement would guarantee that AHF's use of the Property would not substantially adversely affect neighboring properties. A201. In conclusion, Deputy Secretary Small confirmed that DNREC did not object to the Application. *Id.*

In response to the agency consultations, the Board received comments from members of the public. The comments consist primarily of printed form letters

with signatures or hand-written names added. *See* A241-269; A276-510. The remaining comments consist mostly of generic objections to poultry-processing plants or of untoward attacks on AHF and the Board. *See, e.g.*, A216 ("The Koreans have polluted their own country and now they are going to be permitted to come over here and pollute ours while a few of you welcome them with open arms or excuse me is it open pockets?"). Many of the commenters appeared to assume, mistakenly, that the Board's approval of the Application would immediately allow AHF to renovate and operate the facilities.

G. The Board approves the Application and issues its Decision.

The Board voted to approve the Application at the Board's September 23, 2013 meeting, A40-44, and the Board issued its written decision on November 5, 2013. A47-53. The Board found that AHF's proposed use of the Property was consistent with the Property's historical use and the area's industrial nature. A50-51. The Board also found that the nearby residential homes were constructed after the area was already industrial. *Id.*

The Board made further findings that incorporated AHF's evidence and the agencies' input. The Board found that there was little risk of fire or explosion based on evidence from AHF and the Delaware State Fire Marshal. A51. The Board's decision listed eight specific ways that AHF planned to control noise and found there would be no harm from vibration or light pollution. *Id.* The Board also found that concerns about dust and odor were addressed by AHF's proposed renovations and by agency coordination. A51-52. Additionally, the Board found

that AHF's proposals would handle wastewater and storm water, subject to outside regulation. A52. The Board found that AHF had a defined plan to address traffic concerns (subject to DelDOT's approval) and that DelDOT would enforce AHF's traffic compliance. *Id.*

Finally, the Board made specific findings based on its consultation with DNREC. The Board found that AHF would need DNREC permits throughout the renovations. A52-53. The Board further found that "DNREC's extensive involvement in the permitting process" would protect public health, safety, morals and welfare as well as surrounding property, persons, and water areas. A53.

In contrast to the voluminous evidence from the Application's supporters, the Board found that Application's opponents presented no probative evidence of their assertions. The Board found that the opponents acknowledged that the Property is in a "heavily industrialized area." A51. The Board also found that the opponents failed to provide any evidence that AHF's proposed use would adversely affect real estate values or neighborhood traffic. A52.

After considering all of the evidence presented, the Board specifically concluded that:

> Based on the record, the Applicant has demonstrated that the proposed use set forth in the Application will not substantially affect adversely the uses of neighboring and adjacent properties. Furthermore, the Applicant has demonstrated that the public health, safety, morals, and general welfare will be protected and that necessary safeguards will be provided for the protection of water areas or surrounding property and persons[.]

A53 ¶ 86(u).

ARGUMENT

I. AHF HAD STANDING TO FILE THE APPLICATION, AND THE BOARD HAD JURISDICTION TO HEAR AND DECIDE AHF'S APPLICATION.

A. Question Presented

Whether AHF, as contract purchaser and equitable owner, had standing to bring the Application when such applications "may be made by any property owner" under the Code § 115-208A, and whether the Board had jurisdiction to hear the directly-filed Application given that only the Board may approve applications for special use exceptions for potentially hazardous uses.

B. Standard and Scope of Review

This Court conducts the same limited review of the Board's Decision that the Superior Court conducts. *New Cingular Wireless PCS v. Sussex Cnty. Bd. Of Adjustment*, 65 A.3d 607, 610 (Del. 2013). This Court reviews the Board Decision for errors of law and to determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law. *Id.* This Court does not weigh the evidence, determine questions of credibility or make its own factual findings. *Id.* The Superior Court's legal determinations are reviewed *de novo*. *Id.*

C. Merits of Argument

1. AHF, as equitable owner of the property, had legal standing to bring the Application before the Board.

The Superior Court correctly determined that AHF, as equitable owner, was an appropriate applicant under § 115-208A of the Code. Delaware courts endeavor to apply clear statutory language without interpretation or variation. *See Bd. of*

Adjustment of Sussex Cnty. v. Verleysen, 36 A.3d 326, 331 (Del. 2012). "Neither the [zoning board] nor a reviewing court has the authority to rewrite the ordinance . . . to impose a heavier burden of proof upon the applicant than the ordinance requires." *New Cingular Wireless PCS*, 65 A.3d at 613. Section 115-208A's intent to allow a broad range of applicants is clear from the section's permissive language: "Applications for special exceptions, interpretations and variances *may* be made by *any* property owner . . . ." (emphasis added). There is no textual basis for Appellants' assertion that the Code allows only record title owners to file an application. Such a narrow interpretation finds no basis in permissive words such as "may" and "any." Rather, the Code explicitly allows any property owner, including the equitable owner, to apply for a special use exception.

The doctrine of "equitable conversion" has been long recognized in Delaware in connection with contracts for the sale of real property. *Briz-Ler Corp. v. Weiner*, 171 A.2d 65, 67-68 (Del. 1961). Under that doctrine, a buyer acquires equitable title upon entering the contract, and the seller holds legal title only as security for the buyer's performance (*i.e.*, payment). *Id.* at 67. *See* Opinion at *21 (citing sources). Here, AHF filed the Application after having entered into the APS with PFG. At all times relevant to the Application to the Board and the *Certiorari* proceedings, AHF was undisputedly the Applicant, and as contract purchaser, the equitable owner of the Property. Thus, this Court should affirm the Superior Court's conclusion that AHF had standing to file the Application.

2. The Code authorizes a direct application to the Board when an applicant seeks a potentially hazardous special use exception.

The Board had jurisdiction to consider the Application because the Board has initial jurisdiction over special use applications and because the Board has exclusive jurisdiction to authorize potentially hazardous uses. First, the Code expressly provides that the Board has jurisdiction to hear and decide direct applications for special exceptions. Code §115-209B gives the Board jurisdiction "to hear and decide on *applications* for Special Exceptions *upon which the Board is specifically authorized under this Chapter*" (emphasis added).[6] Second, the specific authorization in the case before the Court is provided at Code § 115-111:

> [Potentially hazardous uses] may, if not in conflict with any state or county law or ordinance, be located in the HI-1 District only after the location and nature of such use shall have been approved by the Board of Adjustment after public hearing as provided in Article XXVII. 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. . . .

The Code's repeated use of "shall" evinces the intent to vest the Board with mandatory, exclusive jurisdiction to consider applications for potentially hazardous uses. As such, not only does the Board have jurisdiction over special use applications generally, but also the Board has exclusive jurisdiction over special use applications involving potentially hazardous uses.

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[6] Though the Code punctuates with a section mark, the "Chapter" in question is Chapter 115, entitled "Zoning."

The structure and language of Code § 115-208 gives further support to this conclusion. Code § 115-208 delineates the Board's procedural and record-keeping duties. Subsection § 115-208A provides for direct applications for "special exceptions, interpretations and variances" since it requires those applications to be "transmitted promptly" to the Board for consideration. This is differentiated from the process for appeals to the Board under § 115-208B. Thus, the Code's language authorizes rather than prohibits direct applications to the Board.

3. Sussex County has broad authority to specify the jurisdiction of the Board, and 9 *Del. C.* §§ 6916, 6917 do not limit the Board's jurisdiction to appeals.

Our General Assembly has granted the Sussex County government broad authority to "provide and specify in its zoning or other regulations, general rules to govern the organization, procedure *and jurisdiction of the Board of Adjustment*, which rules shall not be inconsistent with this subchapter." 9 *Del. C.* § 6915 (emphasis added). Further, "the Board of Adjustment may adopt supplemental rules of procedure not inconsistent with this subchapter or such general rules." *Id.* Using that authority, Sussex County has specified jurisdiction and procedures, described *supra*, for the Board's consideration of direct applications and appeals. Nothing in the grant of authority from the General Assembly to Sussex County implies that the Board's authority may only be appellate.

Appellants misread 9 *Del. C.* §§ 6916 and 6917 to limit the Board's jurisdiction. While those sections discuss appeals to the Board, those sections do not proscribe direct applications to the Board. To the extent that there is any

ambiguity in the statutory text, the text must be read within its context and framework, including by reference to related statutes. *See Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011). Also, as the Superior Court noted, the word "appeal" in an administrative context may refer both to an attempt to overturn an existing decision and also to an attempt to resolve an issue in the first instance. *See* Opinion at **8-9 (citing sources). Here, Appellants would separate the word "appeal" from its context, and Appellants ignore the broad grant of authority granted by 9 *Del. C.* § 6915. Properly read, sections 6916 and 6917 require Sussex County to allow appeals to the Board for aggrieved persons and agencies. The sections do not limit the Board's jurisdiction to appellate processes.

This conclusion becomes clearer in the light of Delaware's constitutional and statutory provisions addressing Sussex County's authority over zoning matters. Article II, Section 25 of the Delaware Constitution of 1897 reads as follows:

> The General Assembly may enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle 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, as well as the use to be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State.

In the exercise of this constitutional power to delegate zoning authority to Sussex County, the General Assembly enacted 9 *Del. C.* § 7001. Section 7001 is a "Home Rule" statute that grants Sussex County broad powers to control land use:

> (a) General powers. The government of Sussex County, as established by this chapter, shall assume and have all powers which,

> 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 . . .
>
> (b) Construction. The *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 the general powers* stated in subsection (a) of this section. (emphasis added).

Furthermore, in 9 *Del. C.* § 6902(a), the General Assembly explicitly granted Sussex County the power and jurisdiction to set its own zoning functions:

> The county government may, in accordance with the conditions and procedure specified in this subchapter, regulate the location, height, bulk and size of buildings, parking areas, and other structures, . . . the location and uses of buildings, parking areas, and structures for trade, industry, . . . or other purposes and the uses of land for trade, industry, . . . or other similar purposes, in that portion of Sussex County which is not included within the corporate limits of any city or town.

Read as a whole, these related statutory provisions demonstrate the General Assembly's intent that Sussex County should control its own zoning processes, including setting the Board's authority to hear direct applications.[7] This also accords with the historical background to Delaware's zoning codes. *See* Opinion at **5-8. Construing the General Assembly's broad grant of authority liberally in Sussex County's favor, *see* 9 *Del. C.* § 7001(b), it is clear Sussex County has the authority to allow the Board to hear direct applications.

[7] In addition, Appellants' argument also finds no support in the precedents of the Delaware courts. As AHF argued below, Delaware courts (including this Court) have consistently accepted, without question, that the Board has subject matter over direct applications. *See, e.g., New Cingular Wireless PCS*, 65 A.3d 607; *Sea Pines Village Condo. Ass'n of Owners v. Bd. of Adjustment*, 2010 WL 8250842 (Del. Super. Ct. Oct. 28, 2010); *Cingular Pennsylvania, LLC v. Sussex Cnty. Bd. of Adjustment*, 2007 WL 152548 (Del. Super. Ct. Jan. 19, 2007); *Kollock v. Sussex Cnty. Bd. of Adjustment,* 526 A.2d 569 (Del. Super. Ct. 1987).

II. THE BOARD CONSULTED WITH THE REQUIRED AGENCIES, AND THE RECORD CONTAINED SUFFICIENT EVIDENCE TO SUPPORT THE BOARD'S DECISION.

A. Question Presented

Whether the Board met Code § 115-111's requirement to "consult with other agencies created for the promotion of public health and safety" when the Board solicited and incorporated comments from numerous health and safety agencies and whether more than a scintilla of evidence supports the Board's Decision.

B. Standard and Scope of Review

As stated in Argument sections above, this Court is deferential to the Board's findings of fact. This Court reviews the Board's Decision for legal errors and the Superior Court's legal conclusions *de novo*.

C. Merits of Argument

1. The Board consulted with health and safety agencies as required by the Code given that the Board solicited the agencies and incorporated the agencies' input.

Under § 115-111 of the Code, the Board must "consult with other agencies created for the promotion of public health and safety" and "pay particular attention to protection of the County and its waterways from the harmful effects of . . . pollution." The Code recognizes that there are other agencies created with the specific jurisdiction over the promotion of health and safety, and only requires that the Board, in exercising its approval of a proposed use, *consult* with such agencies. Contrary to Appellant's assertions, the Code does not require Board consultation with every possible agency. Rather, as the Superior Court explained, the Code

imposes a "common sense direction" so that the Board may consult with those agencies that the Board considers particularly germane to the particular application before the Board. Opinion at *13. Moreover, mere speculation about pollution is sufficient neither to require endless consultation nor to deny the permit. *See id.* at13 & n.98-100. Thus, the Board's action below and the Superior Court's Opinion confirm adherence with Delaware's long-standing practice of respecting the specialized competence of administrative bodies to determine what facts are relevant to a given determination. *See Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (citing 29 *Del. C.* § 10142(d).).

Here, the Board met its §115-111 obligations by soliciting ten agencies and by incorporating the input of all agencies that responded. The Board's record contains a wealth of evidence that the Board was aware not only of the existence of the relevant agencies, but also the respective authorities of the agencies over differing aspects of AHF's proposed project. In several cases, such agency involvement (including DNREC, DelDOT and Sussex County Building Code) was already ongoing with this particular project. As the Superior Court noted, "it is significant that not a single objection to [AHF's] Application was raised by an authority [the Board] consulted." Opinion at *13. The Board's Decision reflects careful consideration of the input from the State Fire Marshal, the Sussex County Building Code, and different divisions of DNREC. The input from the agencies directly addressed risks to public health and safety and to the water areas, including risks of fire and pollution. As such, this Court should affirm the

Superior Court's holding that the Board satisfied the requirements of § 115-111 of the Code.

Appellants list several agencies they assert the Board should have contacted, including the Environmental Protection Agency ("**EPA**"), the Delaware Center for Inland Bays ("**DCIB**"), and Sussex Conservation District ("**SCD**"). While the EPA administers the federal regulatory scheme over air and water pollution, the EPA has delegated its permitting authority to DNREC. Likewise, to the extent that the DCIB (a non-profit organization with no enforcement authority) is even an agency as intended by the Code, the Board's consultation with DNREC was sufficient to meet its inquiry obligation. Appellants misrepresent the record in claiming that the Board failed to consult with SCD. The Board solicited comments from SCD, which provided no response. The Board has neither the obligation nor authority to compel an agency to respond to its inquiry.

The Superior Court confirmed the appropriate distinction between the role of the Board in considering an application for a special use exception and the role of the health and safety agencies in considering the permits necessary to develop the property. Summarizing this Court's ruling in *Zoning Board of Adjustment of New Castle County. v. Dragon Run Terrace, Inc.*, 222 A.2d 315 (Del. 1966), the Superior Court wrote, "[F]ears 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." Opinion at *14. Applying that standard, the Superior Court held that the Board satisfied its

obligation "by considering ample evidence submitted by [AHF], testimony, and comments from agencies offering support or noting non-objections to [AHF's] Application." Opinion at *15. This Court should affirm that holding.

2. Substantial evidence supported the Board's decision to approve the Application, and the Application's opponents provided no probative counter-evidence.

The "substantial evidence" standard is well established in the context of judicial review of administrative decisions. "'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It need not be a preponderance of the evidence but only more than a scintilla. *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). So long as an administrative body supports its decision with substantial evidence, a reviewing court will sustain the administrative decision regardless of whether the court would have reached the same decision in the first instance. *Mellow v. Bd. of Adjustment of New Castle Cnty.*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989). In a challenge to an administrative decision, the burden of persuasion falls on the challenging party. *Id.* at 956. Both the Superior Court and this Court will uphold an administrative board's factual findings unless the challenger shows that no satisfactory proof supports those findings. *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

First, substantial evidence supported the Board's determination that approval of the Application would not substantially affect adversely the use of neighboring

properties. As this Court held in *New Cingular Wireless PCS*, "[s]pecial use exceptions are to be granted unless the [Board] finds the exception will '*substantially* affect adversely the uses of adjacent and neighboring property.'" 65 A.3d at 611 (quoting Code § 115-210) (emphasis supplied). In that case, this Court reversed and vacated the Board's denial of a special use permit after the Board required the applicant to prove that there would be no adverse effect. "[T]he word 'substantially' is an important one that cannot be ignored in applying" Sussex County's zoning ordinances. *Id.* at 613 (Strine, C., concurring) (discussing Code § 115-210). "'Some' adverse affect is insufficient. . ." to deny an application, and applicants need not prove an absence of adverse effect. *Id.*

Here, the Board correctly concluded that granting the AHF's request for a special use exception would not substantially affect adversely uses of nearby properties. The uncontroverted evidence established that the Property had historically been used for food processing on an industrial scale – the same use proposed by AHF. The Property, and nearby properties, have been used for heavy industry for decades, and these industrial uses preceded the nearby residential communities. The Board considered numerous, specific potential adverse effects (from risks of explosion to increases in traffic) on neighboring and adjacent properties. The Board found, and the evidence supported, that any potential adverse effects would be minimized by AHF's proposed renovations and on-going regulatory oversight. Overall, substantial evidence supports the Board's

conclusion that granting the Application would cause no substantial adverse effects.

Second, substantial evidence also supported the Board's conclusion that AHF demonstrated that the public health, safety, morals, and general welfare would be protected. The Board considered the Application, AHF's supporting documentation, the testimony at the public hearing, the input of multiple health and safety agencies, and the views of the Application's opponents. Except for the opponents' general, unsupported concerns, all of the evidence favored the approval of the Application. AHF supported the Application with specific facts, thorough documentation and relevant testimony. The Board received input from agencies, none of which objected to the Application and all of which pledged to enforce regulatory schemes at future stages of the Property's development. Thus, substantial evidence supported this conclusion within the Board's Decision.

Third, substantial evidence also supported the Board's conclusion that water areas would be safeguarded. "[T]he mere possibility of contamination of a stream is clearly insufficient to justify the denial of an otherwise permitted use." *Zoning Bd. of Adjustment of New Castle Cnty.*, 222 A.2d at 318. Contrary to the Appellants' position, the applicable standard does not require a zoning authority to address every issue that may arise in the future. Rather, the zoning authority must only consider the effects of its decision and "recommend[] mechanisms to minimize any potential negative effects" of that decision. *McLaughlin v. Bd. of Adjustment of New Castle Cnty.*, 984 A.2d 1190, 1193 (Del. 2009). In this case,

the Board reviewed specific documentation of AHF's plans for wastewater and storm water management. DNREC provided its input on AHF's plans, and more importantly, DNREC provided its guarantee of on-going oversight. As the Superior Court recognized, "not a single objection to [AHF's] Application was raised by an authority [the Board] consulted." Opinion at *13. The documented plans, combined with agency comments, constituted substantial evidence for the Board to conclude that water areas would be safeguarded if the Board granted the Application.

The opponents' nonspecific concerns did not undermine the significant evidence in favor of the Application, and the Appellants have failed to meet their burden of persuasion to overturn the Board's decision. In *Gibson v. Sussex Cnty. Council*, 877 A.2d 54, 78-79 (Del. Ch. 2005), the Court of Chancery considered whether vague community objections could prevent an owner from using a property in accordance with historical uses and neighboring uses. There, the Court of Chancery found that a zoning authority should not defer to "generalized concerns [without] specific evidence about the threat posed by [an application]," especially "[w]here the objection of the community does not rationally advance the public health safety or welfare, but rather simply seeks to deny one property owner the right to do what others in the area are already doing . . . ." *Id.* at 78-79.

Here, the Appellants again raise general concerns in an attempt to overcome credible, verifiable evidence. Insofar as the Appellants ask this Court to reweigh all of the evidence before the Board, the Appellants stray from the applicable

standard of review. Moreover, Appellants' arguments are insufficient even in their content. Appellants do not dispute the findings of the Board and the Superior Court that the Application's opponents acknowledged the industrial character of the area and that opponents failed to substantiate their concerns about property values or traffic. In the *Certiorari* and again on Appeal, Appellants parrot concerns that are common to many industrial uses, including the historical use of the Property and neighboring properties. As did opponents in *Gibson*, opponents here presented unsupported or general concerns rather than evidence. Those vague concerns were insufficient for the Board to rule against the Application, and they remain insufficient under the deferential "substantial evidence" standard of review.

Finally, the processes established by the Code, utilized by the Board and approved by the Superior Court represent sound zoning policies. The Code requires that the Board consider whether there are adequate health, safety and environmental protections in place. While the Board should inquire if there will be on-going administrative oversight, the Board cannot require (and applicants need not present) the full spectrum of evidence that may be collectively required for all future permits. Such a requirement would push the Board beyond its jurisdiction and its role. More significantly, the requirement would hinder industrial development by requiring duplicate proceedings during zoning and permitting stages. Neither AHF nor any knowledgeable purchaser would buy real property without confirming that the property's zoning is correct for the purchaser's

intended use. As such, this Court should continue treating a special use exception as a necessary, but limited, first step in the land development process.

In sum, the Board received and considered significant evidence supporting the Application, including AHF's evidence and the input of relevant agencies through consultation. After fulfilling its statutory obligations under the Code, the Board granted the Application. This Court should affirm the Superior Court's Opinion that the Board Decision was supported by substantial evidence.

III. THE BOARD MET ALL LEGALLY REQUIRED ADVERTISING, NOTICE AND PUBLIC HEARING REQUIREMENTS.

A. Question Presented

Whether the Board complied with all notice requirements by publishing, posting and mailing notice of the June 3 public hearing, and whether the Board provided adequate process by announcing and posting notices of the June 17 meeting and by accepting hundreds of pages of written public comments.

B. Standard and Scope of Review

As explained *supra*, this Court is deferential to the Board's findings of fact. This Court reviews the Board's decision for legal errors and the Superior Court's legal conclusions *de novo*.

C. Merits of Argument

1. Appellants are estopped from challenging the notice procedures because Appellants participated in the Board's review of the Application.

Initially, this Court should hold that Appellants are estopped from challenging the notice procedures used by the Board since Appellants participated in the Board's decision-making process. In keeping with accepted principles of zoning law, the Superior Court's precedent recognizes that "the presence of the objecting litigant at the hearing has been held to cure a variety of deficiencies in the notice." Opinion at *18 (quoting *Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment*, 1998 WL 733788, at *5 (Del. Super. Ct. Sept. 18, 1998)). This concept is an equitable corollary to Appellants' own claims that PFG's "constructive intervention" in the Superior Court cured a potentially-fatal subject

matter jurisdiction defect in the Writ of *Certiorari*. *See* Opinion at **2-3. In short, participation amounts to waiver and moots the issue of allegedly-defective notice. *Bethany Beach Volunteer Fire Co. v. Bd. of Adjustment*, 1998 WL 733788, at *5 (Del. Super. Ct. Sept. 18, 1998).

Here, at minimum, three of the four Appellants (Larry Hawkins, Diane Daly, and Protect Our Indian River) attended hearings or provided written input to the Board. The fourth, William Gardner, received mailed notice but chose not to participate. Daly spoke at the June 3 hearing, a fact that Appellants neglect to mention. *See* Op. Br. at 10, 29. Even without a bright-line rule covering all situations, this Court should find that the Appellants' extensive participation should estop them from asserting any deficiencies in notice.

2. The Board provided adequate notice because the Board published, posted and mailed notice in conformity with the Code and the Board's rules.

Looking to the merits, the Superior Court correctly concluded that the Board used proper notice procedures since the Board published, posted and mailed notice of the public hearing in accordance with the Code and the Board's procedural rules. Code § 115-208C provides that "[t]he Board shall fix a reasonable time for the hearing of an application or appeal, [and] give public notice thereof as well as due notice to the parties in interest." To meet the notice requirements, the Code requires the Board to provide "written notice of such hearing to the parties in interest," to publish notice in a newspaper "at least 15 days prior to the hearing,"

and the Code allows the Board to post notice on the property. Code § 115-208A, C.

Using the Code's requirements as a framework, the Board has promulgated its own Rules of Procedure. *See* B11-20. In addition to the Code's requirements, Board Rule 3 requires the Board to post notice in the Sussex County Office of Planning and Zoning, mail written notice to the applicant (or the applicant's attorney), and mail written notice to "owners whose property lies within a 200 foot radius of the boundaries of the property subject to the appeal or application." However, failure to mail notice to owners within 200 feet "shall not be considered a defect in the requirements for public notice of a public hearing." Board R. 3.3.

Here, the Board complied with the notice requirements imposed both by the Code and the Board rules. The Board published notice of the June 3 hearing in *The News Journal* and the *Sussex Post* on May 3 and May 8, 2013, more than fifteen days in advance of the hearing. A133-144. The Board also posted notice in the Office of Planning and Zoning, A102, and at the Property, A106. Lastly, the Board identified property owners within 200 feet of the Property, and the Board mailed notice to those owners. A90-99; A107-132.

Appellants' assertions of notice deficiencies lack merit. First, Appellants advocate for a new notice standard based upon truncated dictionary definitions. Appellants' proposed standard is vague and ignores the existing Code and the Board's rules. Moreover, Appellants provide no explanation why the proposed standard would better achieve the objectives of the Code's notice provisions. *See*

Opinion at *16. Appellants offer no rationale that an interested party would more likely receive mailed notice under the suggested standard but not receive mailed notice under the 200-foot standard. Even indulging in Appellants' assumptions that the BOA should have used the suggested standard, there is no evidence that more, or different individuals would have received mailed notice.

Second, Appellants offered no probative evidence that any interested party failed to receive notice. Daly may assert that she did not receive mailed notice pursuant to Board Rule 3.3, but Daly was not entitled to mailed notice since she did not live within 200 feet of the Property. Lack of mailed notice is not a defect under the Board's rules in any event, and Daly's appearance at the hearing confirms she had constructive notice. Accordingly, this Court should affirm the Superior Court's holding that the Board followed the proper notice procedures for the June 3 hearing.

3. Following the June 3 hearing, the Board also followed the appropriate processes, and Appellants have provided no support for a contrary conclusion.

None of the Appellants' remaining arguments show the Board acted outside of its rules or that the Board's interpretation of its rules was clearly wrong. Though this Court reviews questions of law *de novo*, this Court "give[s] judicial deference to an administrative agency's construction of its own rules in recognition of its expertise in a given field . . . [unless] such construction . . . is clearly wrong." *Christman v. Del. Dep't of Health & Social Servs.*, 2014 WL 3724215, at *2 (Del. July 25, 2014) (internal punctuation omitted). In contrast to Appellants'

unsupported assertions, neither the Board's rules nor standard municipal practice required the Board to undertake the full manner of notice for the June 17 meeting with regard to the tabled Application. *See* Board R. 2.4; Opinion at *17, n.22 (citing 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 12:24 (4th ed.).

Here, Appellants' arguments about "notice" appear to be nonspecific concerns about processes related to the June 17 meeting and the Board's agency consultations. Again, those arguments lack merit. At the end of the June 3 hearing, the Board announced the time and date of June 17 meeting and stated that the Board would address agency comments at that meeting. *See* A544(73-76). Publicly-available records, such as agendas and minutes, also announced the time, date and focus of the June 17 meeting. A28-29; A171; A173. This procedure was in keeping with the Board's rules, and the heavy attendance at the June 17 meeting, confirm the sufficiency of notice and process.

Appellants misplace their reliance on *Fields v. Kent County*, 2006 WL 345014 (Del. Ch. Feb. 2, 2006). First, the procedural and factual postures in *Fields* differ widely from the case at bar. *Fields* involved procedural issues in an attempt to invalidate a change to a county's comprehensive plan whereas here the issue is a direct appeal from a zoning board. Second, the cases address separate legal issues in different contexts. Appellants offer the case for the general proposition that "[l]and 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.'" Op. Br. at 31 (quoting *Fields,* 2006 WL 345014, at *3). That

snippet of text was neither the primary issue nor the holding in *Fields*. Regardless, as explained throughout this brief, Sussex County has broad authority, and it has complied with the Code and its own rules.

Lastly, Appellants assert that the Board should have granted a longer period, or another hearing, for the public to address the Board's consultations with outside agencies. Appellants' argument fails for two reasons. First, it is reasonable and within the Board's authority to conduct agency consultations and responses by written submissions, especially when the consultations deal with schematic diagrams, technical requirements, and multiple agencies' inputs. *See Christman*, 2014 WL 3724215, at *2. Second, the record shows the one-week public response period was appropriate. Notably, Appellants do not specify what period would have sufficed or what the Board might have gained from an extension or an additional hearing. During the response period, the Board received hundreds of pages of public comments. If the Board committed any error in notice procedures, the volume of public comments shows the error was harmless. In short, the timeframe was reasonable, and the response proves due process was satisfied.

Contrary to Appellants' suggestions, the Board considered the Application in an open manner that provided for ample notice to, and comments from, the public. Given the extensive participation by Appellants and the public, this Court should affirm the Superior Court's conclusion that the Board provided proper notice and sufficient process.

CONCLUSION

For all of the foregoing reasons, Allen Harim Foods, LLC respectfully requests that this Court AFFIRM the Opinion of the Superior Court.

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