



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

	:	
	:	
PROTECT OUR INDIAN RIVER,	:	
JOSEPH MEYER, CHERYL	:	
MEYER, RAY WHARTON,	:	
GERALDINE WHARTON,	:	
JOANNE HAYNES, KENNETH	:	
HAYNES, DONNA SKIBBE, and	:	
LEWIS PODOLSKE,	:	
	:	C.A. No.
Petitioner(s),	:	
	:	
v.	:	
	:	
SUSSEX COUNTY BOARD OF	:	
ADJUSTMENT and ALLEN	:	
HARIM FOODS, LLC,	:	
	:	
Respondent(s).	:	

VERIFIED PETITION IN CERTIORARI

The Petitioners bring this statutory *Certiorari* Appeal pursuant to 9 *Del. C.* § 6918, based upon the following:

THE PARTIES

1. Petitioner Protect Our Indian River (the “Association”) is a Delaware unincorporated, non-profit association in accordance with Title 6, Chapter 19 of the Delaware Code, composed of numerous residents of the area in the vicinity of the property which is at issue in this action located on the northwest corner of Pinnacle

Way and Iron Branch Road (Route 331), 911 Address: 29984 Pinnacle Way, Millsboro, and further identified as Sussex County Tax Parcel Numbers 2-33-5.00-14.00, 2-33-5.00--15.00, and 2-33-5.00--16.00 (the “Property”).

2. Petitioner Joseph Meyer is a resident of Sussex County, Delaware living at 27857 Possum Point Road in Millsboro, which is in a residential community located directly across the street from the Property. He is also a member of the Association.

3. Petitioner Cheryl Meyer is a resident of Sussex County, Delaware living at 28016 Possum Point Road in Millsboro, which is in a residential community located directly across the street from the Property. She is also a member of the Association.

4. Petitioner Ray Wharton is a resident of Sussex County, Delaware living at 29575 Nor’easter Drive in Millsboro, which is in a residential community located directly across the street from the Property. He is also a member of the Association.

5. Petitioner Geraldine Wharton is a resident of Sussex County, Delaware living at 29575 Nor’easter Drive in Millsboro, which is in a residential community located directly across the street from the Property. She is also a member of the Association.

6. Petitioner Joanne Haynes is a resident of Philadelphia, Pennsylvania who owns property at 27976 Old Swimming Hole Rd., Millsboro, Delaware and

28040 Possum Point Road, Millsboro, Delaware, both of which properties are in a residential community located directly across the street from the Property. She is also a member of the Association.

7. Petitioner Kenneth Haynes is a resident of Philadelphia, Pennsylvania who owns property at 27976 Old Swimming Hole Rd., Millsboro, Delaware and 28040 Possum Point Road, Millsboro, Delaware, both of which properties are in a residential community located directly across the street from the Property. He is also a member of the Association.

8. Petitioner Donna Skibbe is a resident of Washington, D.C. who owns property at 27857 Possum Point Rd., Millsboro, Delaware which property is in a residential community located directly across the street from the Property. She is also a member of the Association.

9. Petitioner Lewis Podolske is a resident of Washington, D.C. who owns property at 27857 Possum Point Rd., Millsboro, Delaware which property is in a residential community located directly across the street from the Property. He is also a member of the Association.

10. Respondent 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”).

11. Respondent Allen Harim Foods, LLC (“AHF”) is a Delaware limited liability company.

JURISDICTION

12. This Court has jurisdiction over this action by persons who are aggrieved and constitute taxpayers that are alleging the illegality of a Board decision pursuant to the provisions of County Code § 115-215, 9 *Del. C.* § 6918, 10 *Del. C.* § 541, and Article IV, § Section 7 of the Delaware Constitution.

BACKGROUND & GROUNDS OF BOARD DECISION ILLEGALITY

13. On March 19, 2018, the Board conducted a public hearing on AHF’s request for a special exception, at the conclusion of which the Board tabled the public hearing, leaving the record open until the close of business on April 19, 2018, for the limited purpose of receiving additional comments, if any, from agencies and for one individual to submit written comments regarding the *Dragon Run Terrace* decision. A copy of the Board’s Agenda and Minutes regarding the request are attached as Exhibits A and B.

14. On May 7, 2018, the Board engaged in further discussion of the request, and then voted on the special exception. A copy of the Board’s Agenda and Minutes are attached as Exhibits C and D.

15. On July 10, 2018, the Board issued a decision granting a special use exception to AHF for purposes of operating a poultry deboning operation at the

Property (the “Decision”). A copy of the decision is attached as Exhibit E and is herein incorporated by reference. The approval stated two conditions at paragraph 63, p., the second of which reads: The spray irrigation system to be used as part of the proposed use must be upgraded, approved, permitted, and operational before the facility is operational.¹

16. The Decision is illegal and should be overturned by the Court in this statutory *Certiorari* appeal for five (5) reasons: 1) the Findings of Fact and the Minutes fail to accurately represent the actual testimony presented before the Board thereby demonstrating both a lack of substantial evidence to satisfy the legal standards for granting the special exception and rendering the decision arbitrary and unreasonable; 2) despite diligent efforts taken by opponents to secure all information prior to the public hearing on March 19, 2018, lengthy and detailed information and studies were presented by the applicant at the hearing, without any prior opportunity for the Petitioners or other members of the public to review or study them, precluding any reasonable opportunity to comment or rebut misleading, inadequate and/or inaccurate information contained therein, and thereby depriving the Petitioners of a reasonable notice and opportunity to be heard; 3) lack of jurisdiction based upon an incomplete application by AHF; 4) The Board demonstrated a clear bias in favor of

¹ Petitioners note that, although no request for rehearing under BOA Rule 18 was filed, on July 10, 2018, the same day that the Findings of Fact and Decision of the BOA was issued, AHF filed a Special Use Exception/Administrative Variance with the BOA seeking to vitiate the referenced condition. That application has now been scheduled to be heard by the BOA on August 20, 2018.

the applicant and against the opponents, as evidenced in the language with which they characterized the testimony of witnesses, arbitrarily accepting some as factual and others as mere speculation and otherwise in the conduct of the hearing; and 5) the Board demonstrated a clear failure to meet its obligation to protect the public health, safety, morals and general welfare.

17. Section 115-111 of the County Code, which is part of Article XV, Chapter 115, requires a showing “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.” In addition, § 115-111 mandates that “in reviewing the plans and statements, [the Board] shall consult with other agencies created for the promotion of public health and safety and shall pay particular to protection of the County and its waterways from the harmful effects of air or water pollution of any type.” The use for which approval was sought by AHF in this matter is subject to the provisions of § 115-111.

18. County Code § 115-210A (3)(h) requires a special exception for any Heavy Industrial 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. The applicable § 115-210 legal standard is that the special exception “will not substantially affect adversely the uses of adjacent and neighboring property.” *See*

also New Cingular Wireless PCS v. Sussex County Bd. of Adjustment, 65 A.3d 607, 611 (Del. 2013) (en Banc).

19. The Board did not consult with appropriate and available agencies on the questions of public health and impact on waterways and persons. In fact, despite its charge under § 115-111 to ensure “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 code’s direction that the Board “shall consult with other agencies created for the promotion of public health and safety”, no consultation was made with the Delaware Department of Health and Social Services, Division of Public Health.

20. Fully cognizant of the history of the site at issue as a Brownfield contaminated site, of DNREC’s failure to prevent or remedy years of ongoing violations at a related facility operated by AHF in Sussex County, currently the subject of a disputed fine in the hundreds of thousands of dollars, and of the department’s failure to prevent or remedy serious wastewater violations at another facility in Millsboro, located just a few miles from the proposed use, the Board failed to meet its obligations to the members of the county to protect public health and safety.

21. The Board also had no legitimate evidence regarding impact on waterways and surrounding properties and persons, instead relying on a combination

of conclusory and unsupported statements of representatives of AHF, including, but not limited to statements that the process, particularly for wastewater disposal, would be “state of the art” without providing any engineering designs or specifications and with no specificity as to what AHF meant by “state of the art”, and despite opponents’ presentation of an Environmental Justice study prepared by an expert and which gave detailed information on the negative impacts of the proposed activity on the surrounding property.

22. The Board failed to compile sufficient information and failed to provide members of the public a reasonable opportunity to be heard, thereby failing in its duty to conduct a full and fair public hearing. As a result, the Decision is illegal and should be overturned.

WHEREFORE, the Petitioners respectfully request that this Court invalidate the special exception approval granted by the Board in the Decision based upon the illegality thereof pursuant to the legal infirmities described herein.

LAW OFFICE OF ANDREA G. GREEN, LLC

/s/ Andrea G. Green
Andrea G. Green, Esquire (I.D. #2487)
28412 Dupont Blvd., Suite 104
Millsboro, DE 19966
(302) 934-1234

Attorneys for Petitioners

Dated: August 8, 2018