

Nature of the Proceedings

This is an application for a special use exception for a potentially hazardous use (facility for further processing, deboning, packaging, and shipping of poultry products).

Findings of Fact

The Board found that the Applicant was requesting a special use exception for a potentially hazardous use (facility for further processing, deboning, packaging, and shipping of poultry products). The Applicant has requested that the aforementioned requested special use exception be granted as it pertains to certain real property located on the northwest corner of Pinnacle Way and Iron Branch Road (Route 331) (911 Address: 29984 Pinnacle Way, Millsboro. Zoning District) ; said property being identified as Sussex County Tax Map Parcel Number 2-33-5.00-14.00, 2-33-5.00-15.00, & 2-33-5.00-16.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a site plan, an application summary, a list of agency contacts, memorandums from the Office of Planning & Zoning to agency contacts, comments from the certain agencies, an aerial photograph of the Property, and a portion of the tax map of the area.
2. The Board also was provided with an extensive exhibit booklet from the Applicant which included a copy of the Application, notice to property owners, notice to the Applicant, Certification of Posting, Sussex County Zoning Code §115-111, a slide presentation, a site plan, agency consultation records, a memorandum to the Center on Inland Bays, letters supporting the Application, and documentation preceding the application.
3. The Board found that the Office of Planning & Zoning received four (4) letters in support of the Application and twenty-two (22) letters in opposition to the Application. The Office of Planning & Zoning, on behalf of the Board, reached out to multiple state agencies to solicit comments prior to the hearing. The State Fire Marshal had no objection to the Application. The Delaware Department of Transportation (“DelDOT”) noted that a traffic impact study is underway. The Delaware Division of Natural Resources and Environmental Control (“DNREC”) Groundwater Discharge Division noted that the Applicant is working with the agency on its spray irrigation permit. The DNREC Division of Waste & Hazardous Substance Department noted that the release of any hazardous substance must comply with the Hazardous Substance Cleanup Act. The DNREC Site Investigation and Restoration Section provided comments as well.
4. The Board notes that a prior application (Case No. 11216) for a poultry processing facility for this location was heard and approved by the Board in 2012. The Board’s

Case No. 11216. The Applicant argued that the Board is allowed to rely on permitting agencies to perform their duties to safeguard the public and that fears of potential health hazards, which can be more appropriately addressed by permitting agencies, are not proper fodder to support the denial of a special use exception in the zoning context.

7. The Board found that the Property consists of 3 parcels and was previously the subject of an application for a poultry processing plant as noted above. Previously, the Applicant proposed a slaughtering facility in 2013 which was approved by the Board. The Applicant now proposes only to debone, pack, and ship poultry on the site. Slaughtering and defeathering will be conducted at a different location and will not be performed on the Property. The deboning process will not include any offal.

8. Based on the Applicant's presentation, the Board found that the proposal will increase jobs as the deboning facility will result in approximately 165 employees on site. According to Mr. Van Brunt's testimony, the plant is planned to be a one-shift operation

9. The Board found that the truck traffic related to the use will be approximately 16 trucks per day as compared to 50-85 trucks per day when the Viasic Pickle plant was in operation on the site.

10. Based on the Applicant's presentation, the Board found that the wastewater discharge from the prior approved use would result in 1.2 million gallons per day and would include stream discharge. The wastewater discharge from the proposed use under this application, however, will result in only 40,000 gallons per day and would not include stream discharge. The treated wastewater will be discharged via spray irrigation subject to an existing permit application to DNREC. According to the Applicant, DNREC has already approved the wastewater discharge permit but there are other related permits still on-going.

11. The Board found that the prior application applied to the entire building and included an additional 72,860 square feet of space. The proposed application will only use 11% of the existing building for the deboning operation. No new structures are planned to be constructed on site.

12. The Board found that the facility has been used for warehousing.

13. The Board found that the proposed use is a permitted use in the LI-1 (Light Industrial) zoning district. This property, however, is zoned HI-1 (Heavy Industrial) and a special use exception is needed for the proposed use.

14. The Board found that the Applicant is working with DeIDOT regarding traffic improvements for the nearby roads. According to the Applicant's presentation, all traffic will be able to use the existing main entrance on Iron Branch Road but the entrance will most likely be re-aligned to improve the traffic along Iron Branch

spray irrigation. Per the testimony of Mr. Van Brunt, the spray irrigation area includes some trees but most of the area is grassland. There has been no irrigation on the site since 2011.

20. The Board found that the Applicant plans to use the most advanced processes and methods to address environmental concerns. The spray irrigation system, for example, will be state-of-the-art and the Applicant will attempt to minimize the effluent levels.

21. The Board found that the Applicant proposed that all treated wastewater will be trucked off site until the spray irrigation system is upgraded.

22. The Board found that, per the Applicant's presentation, there will be no appreciable impact of the facility by way of fire, explosion, noise, vibration, dust, odor, emission of smoke, toxic gases, or other pollutants. The facility will have a fire suppression system.

23. The Board found that the Applicant admitted that the facility will result in some limited noise and dust and that any vibration from the truck traffic will be de minimis.

24. The Board found that the Applicant argued that there is not much odor from the deboning process and there should be no appreciable odor from the site.

25. The Board found that the Applicant will use only a small portion of the facility for the deboning facility. According to the testimony of Mr. Van Brunt, the site will also be used for corporate offices and a refrigerated shipping dock. Building 3 will be used for warehousing and Building 2 will be largely unoccupied except that a corner of the building is used by Sussex County Toys for Tots. The facility will be limited to approximately 50,000 square feet but Mr. Van Brunt could not attest to any growth plans that exceed that square footage. He believes, however, that there is room for growth on site.

26. The Board found that the comments from some agencies have been submitted into the record including comments from the Groundwater Discharge Section of DNREC confirming that the Applicant is in the preliminary stages of the permitting process.

27. The Board found that, per the Applicant's presentation, a Phase 1 environmental report was issued prior to the Applicant's purchase of the Property which, as the Applicant claimed, concluded that there were no environmental issues on the site. The Applicant ordered another Phase 1 environmental report as part of its due diligence which resulted in significant testing and sampling.

28. The Board found that the Applicant applied for inclusion in the Brownfield program at the suggestion of DNREC. The Brownfield program is a program offered for sites which have environmental problems or are thought to have such problems due to their historic use as a means to make vacant properties productive sites again. According to the Applicant the Brownfield program is a proactive program

31. Based on the testimony of Mr. Hershberger, the health of the Property was improving. The LTS sampling was to determine whether contaminants exist and are leaving the site and the monitoring has shown a stabilization and decrease of constituents on site. DNREC will require continued monitoring of the wells on site to ensure compliance with the LTS plan. If the monitoring shows that the spray irrigation proposed by the Applicant leads to an increase in constituents, DNREC will review the plan and may require remediation.
32. Based on the testimony of Mr. Hershberger, the Board found that the LTS plan is in place to monitor ground water to confirm that the constituents are not migrating off site and they monitor constituents of concern set forth in the LTS plan. There are 18 wells and 4 production wells which are monitored. Nitrates and nitrites are being monitored as part of the LTS plan and they have been decreasing. The monitoring wells would also show additional nitrates if they exist.
33. The Board found that DNREC will monitor the spray irrigation system and has its own testing requirements. According to Mr. Van Brunt, the spray irrigation permit is separate from the LTS plan and DNREC will require additional testing related to the spray irrigation system above and beyond the testing required under the LTS plan.
34. The Board found that the Applicant will not be able to move forward with the spray irrigation without DNREC's approval. The water from the spray irrigation will be tested prior to discharge and the Applicant will have to implement a nutrient management program to demonstrate that crops and plantings on site - such as corn, loblolly pines, and grasses – will be able to absorb nitrates. According to Mr. Van Brunt, the goal is to have a net zero sum of nitrates into the ground from the spray irrigation due to the nutrient management program. The by-products from the spray irrigation system will be used to fertilize the crops. The Applicant is in the preliminary stages of the nutrient management program. The crops will be tested to confirm that the nitrogen is being pulled out of the spray irrigation by the crops.
35. The Board found that the Delaware Farm Bureau and the Delmarva Poultry Association support the Application.
36. The Board found that the chickens, which are to be deboned at the facility, will be slaughtered and processed at the Applicant's Harbeson plant. The finished products will be brought to the Property and the bones from those products will be removed and the poultry will then be packed and shipped out. All feathers, guts, and offal will be handled at the Harbeson plant.
37. The Board found that, based on the testimony of Mr. Van Brunt, poultry at the Property will be similar to the poultry available in the store only the Applicant will be removing bones from the poultry. The bones will then be placed back into

agricultural crop growing in the summer months will evaporate that amount of water in approximately 3 hours and the spray irrigation system is not enough to grow a crop or even keep the crop cool for 3 hours.

41. The Board found that John Austin, Anthony Scarpa, Ken Haynes, Michael Proso, Keith Steck, Charlotte Reid, Maria Payan, and Tom Bretten were sworn in and testified in opposition to the Application. The opposition submitted exhibits to the Board to review. The comments and exhibits submitted by the opposition have been weighed and considered by the Board and a brief summation of some of those comments are found below.

42. The Board found that concerns raised by members of the opposition included concerns about water quality, wastewater treatment and discharge, environmental, Brownfield, traffic, fire, safety, noise, health, air pollution, property values, and spray irrigation. For example, regarding air pollution concerns, Ms. Reid, of Rehoboth Beach, alleged that 541 million gallons of wastewater aerated over 29 acres will cause odor problems. Ms. Payan also expressed concerns that the County cannot guarantee safety from fires and that fires and explosions can occur by mixing of cleaning agents. She also testified that truck traffic and emissions are a problem in the area – particularly in the summer months.

43. The Board found that the opposition also expressed concerns about DNREC's enforcement of its regulations and the Applicant's adherence to those regulations. Ms. Payan specifically expressed that she has no trust in DNREC and she alleged that DNREC has failed to issue fines or to file criminal charges against Mountaire or the Applicant for violations. Mr. Haynes also expressed frustration with DNREC's enforcement. The concerns about DNREC's enforcement of its regulations, however, are better addressed by DNREC than by the Board.

44. The Board found that many of the opposition's concerns focused on the Applicant's plant in Harbeson – and not the site which is the subject of the Application. Mr. Scarpa, for example, testified that wastewater from the Property will be trucked to the Harbeson facility where it will be sprayed on fields and that the additional spray irrigation will send nitrates closer to the Town of Milton. Mr. Steck expressed that he has concerns about the hauling of wastewater because the spray irrigation system cannot be used when the ground is frozen or saturated or if the wind is too great. According to Mr. Steck, the wastewater at the Harbeson plant will be transported to an Artesian facility where it will be spread over 1,800 acres. Likewise, Mr. Proso testified about his concerns with noise and traffic related to the Applicant's Harbeson facility. He believes that the deboning facility will result in more truck traffic to the Harbeson facility. The Board finds these concerns not germane to the issue before the Board with this application because this application does not pertain to the Harbeson facility or the Artesian facility.

was polluted by the Vlastic Pickle Plant; a concern echoed by Mr. Haynes who lives in nearby Possum Point. The Applicant admitted that there are some trace elements of arsenic on the site but noted that the elements are not at a level of concern for the governing agencies. To the extent there is pollution on the site or could result from the proposed use, the issue of pollution is proper fodder for those governing agencies.

46. The Board found that the Certificate of Completion of Remedy outlines the condition of the site and that DNREC submitted a proposal for remediation which was vetted and appealed. According to the Applicant, there were no recommendations for remediation at that time.

47. The Board heard testimony from Ms. Payan, a representative of the Socially Responsible Agricultural Project. She expressed concern that this application will lead to a full processing plant on the site. The Board, however, notes that a full poultry processing plant is not being proposed by this application. Ms. Payan argued that property values are lower nearer poultry processing plants and that there were 3 homes in Possum Point which were under contract but were withdrawn after the buyers learned of the earlier poultry processing plant. She alleges that banks will not give loans for nearby properties because the properties are not valued enough. Ms. Payan also expressed concerns about the character of the neighborhood. Ms. Payan testified that the character of the neighborhood has changed in the past few years and is much different than when the Vlastic plant was in operation as there are thousands of people in the area.

48. The Board found that a concrete plant, an animal vaccine plant, 2 EPA Super Fund sites, a poultry processing plant, and a coal-fired power plant are located within 2 miles of the Property as testified by Ms. Payan. Mr. Scarpa also noted the close proximity of the coal-fired power plant.

49. The Board found that the neighborhood is zoned heavy industrial and was used as a heavy industrial area prior to the enactment of the Sussex County Zoning Code. There are numerous heavy industrial and commercial properties in the area and the residential properties have grown around those heavy industrial properties.

50. The Board notes the opposition's concerns and will address the same later in this decision.

51. The Board found that the Property is owned by Harim Millsboro, LLC. Allen Harim Foods is a related entity and the ownership of the Property is separated from the operation of the business which is a common practice.

52. The Board found that, based on the Applicant's presentation, DNREC required the LTS plan where wells would be monitored and these reports are regularly vetted by DNREC.

53. The Board found that the previous DNREC decisions were appealed to the Court

discernible odor from the plant's spray irrigation system.

57. The Board found that the Applicant will pump and haul the wastewater to a facility on a different property whenever the Applicant is unable to spray irrigate for long periods of time. He anticipates 5-6 trucks per day to transport wastewater off-site.
58. The Board found that the facility will likely process approximately 2 million pounds of poultry per week as noted in Mr. Van Brunt's testimony.
59. The Board found that four (4) parties appeared in support of the Application
60. The Board found that twenty-six (26) parties appeared in opposition to the Application.
61. The Board voted to leave the record open until the close of business on April 9, 2018, for the limited purpose of receiving additional comments, if any, from agencies and for Ms. Reid to submit written comments, per her request, on the Dragon Run Terrace case referenced by the Applicant.
62. At its meeting on May 7, 2018, the Board discussed and voted on the Application.
63. Based on the testimony and evidence presented at the public hearing and the public record, which the Board has weighed and considered, the Board determined that the Application met the standards for granting a special use exception for the following reasons:
 - a. Legal Requirements:
 - i. Pursuant to §115-111 of the Sussex County Zoning Code, 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 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.
 - ii. With §115-111 of the Sussex County Zoning Code in mind, the Board also finds the decision of the Delaware Supreme Court in Zoning Bd. of Adjustment of New Castle Cnty. v. Dragon Run Terrace, Inc., 222 A.2d 315 (Del. 1966) and decision of the Delaware Superior Court in Protect Our Indian River v. Sussex County Bd. of Adjustment, 2015 WL 4498971 (Del. Super. 2015) helpful in analyzing the Application. The Dragon Run Terrace case was cited and heavily discussed in the Protect Our Indian River decision. These cases are particularly

instructive since the Protect Our Indian River case dealt with an

sanitation concerns] and the Board could rely on the public health authorities to safeguard the public by denying a permit should there be a bona fide sanitation issue.” Id. at *15-16 (citing Dragon Run Terrace). The Court further held that “fears of potential health hazards, which can be more appropriately addressed by permitting agencies, are not proper fodder to support the denial of a special use exception in the context of zoning”. Id. at *16 (citing Dragon Run Terrace). Likewise, the Court held that Board “may properly rely on the appropriate authorities to safeguard public health, safety, and pollution and to utilize discretion when issuing a permit.” Id.

b. General:

- i. The proposed use is for a poultry processing facility in a heavy industrial area.
- ii. The poultry processing facility will be used for deboning, packing, and shipping poultry. There will be no slaughtering of poultry or rendering on site.
- iii. The facility will only use approximately 50,000 square feet or roughly 11% of the existing building on site.
- iv. The Applicant has demonstrated that it will implement and / or follow necessary safeguards to protect the public health, safety, morals, and general welfare.

c. Fire:

- i. The existing building will be protected throughout by a state-of-the-art fire detection and suppression sprinkler system which will be maintained to meet current standards
- ii. Opposition expressed concerns about the potential for fire in the facility and provided articles regarding fires at other facilities. These concerns appeared speculative in nature. One report cited by the opposition was from 1991 and focused on a lack of enforcement of existing codes. With regard to the facility, the Delaware State Fire Marshal has jurisdiction over the Fire Prevention Regulations and shall ensure compliance. The other cases cited by the opposition appeared to be isolated incidents and the Board was not convinced that the proposed facility will lead to a substantial increase in the risk of fire which would rise to the level of creating a substantial adverse impact on neighboring and adjacent properties.

d. Explosion:

- i. The Applicant presented evidence that the proposed deboning operations do not present any normal explosion hazards or risks

pickle plant.

- iv. The Property is a large site and has a buffer of trees and ponds which also buffer noise, vibration, and dust from the facility.
- v. The Board was not convinced that the noise, dust, and vibration would rise to the level of a substantial adverse effect on neighboring and adjacent properties.

f. Odor:

- i. The deboning process produces minimal waste and any waste generated will be removed daily.
- ii. The natural odors associated with the wetlands and marshlands which surround the property will likely be more distinguishable than any possible odor from the facility.
- iii. There was no evidence that the facility or the spray irrigation system would produce appreciable odors to the area. Concerns raised by the opposition were speculative. It should be noted that concerns raised by the opposition about the Harbeson Plant were not relevant since the Harbeson Plant has a much more intensive use than what is proposed here.

iv. The Board also notes that Ms. Reid expressed speculative concerns about the odor from the spray irrigation system but her comments focused on a significantly greater amount of water being sprayed on the site than is actually being proposed by the Applicant. To the extent there were concerns about odors from the spray irrigation system, the Applicant consulted with experts on that issue and was informed that the odor from the spray irrigation system will not be discernible.

v. The Board was not convinced that the odor from the proposed facility would rise to the level of a substantial adverse effect on neighboring and adjacent properties.

g. Emissions:

- i. A deboning facility typically produces no airborne pollutants but the Applicant will be required to maintain air quality permits with DNREC.
- ii. To the extent air quality is a concern, the Applicant will employ hygienic design guidelines and sustainability guidelines. Applicant will also deploy a technologically advanced automated processing solution to allow advancements in automation and efficiency to be realized. All DNREC regulations must be followed and complied with.

iii. The Board was not convinced that the emissions from the proposed

reduction in wastewater discharge as only 40,000 gallons of treated wastewater per day will be discharged through spray irrigation. Under the current proposal, there will be no discharge into the stream.

iv. All wastewater will be treated according to a new DNREC permit.

v. The spray irrigation system will be upgraded with new technology.

vi. The Applicant will provide a nutrient management plan to provide for the absorption of nitrates from the spray irrigation system.

vii. The opposition presented concerns about the wastewater discharge but these concerns were speculative; especially given the heavy industrial uses in the area and the history of the neighborhood. The Board was not convinced that the proposed facility – which will be required to operate under DNREC guidelines – would somehow substantially affect adversely those properties. The site is already heavily tested and monitored and that testing will continue. If the spray irrigation or handling of the wastewater violates DNREC regulations, DNREC has the authority to enforce those regulations – not the Board.

viii. The Board was not convinced that the handling of wastewater from the proposed facility would rise to the level of a substantial adverse effect on neighboring and adjacent properties.

i. Traffic:

i. The Applicant testified that the facility will lead to improvements along Iron Branch Road.

ii. The facility will produce traffic from 165 employees and approximately 16 trucks per day but such traffic is significantly less than the Applicant's original proposal and the pickle plant's traffic.

iii. Opposition to the Application did not present evidence from a traffic engineer as to any negative impact the application would have on traffic in the neighborhood.

iv. DeIDOT will ultimately have jurisdiction over the traffic impact of the plant.

v. The Board was not convinced that the traffic from the proposed facility would have a substantial adverse effect on neighboring and adjacent properties.

j. The Neighborhood:

i. The site was previously used for as a cucumber pickling plant

ii. There are other industrial facilities in the neighborhood including a

concrete plant, an animal wrapping facility, a power plant, a

focus on the area at hand and referenced impacts of much larger animal operations such as pig farms and poultry rendering plants. The Board was not convinced that this report was applicable to the Applicant's property and the proposed deboning use. The report's qualifier also greatly limits its value to the Board.

vi. Opposition noted that some neighbors lost sales of their homes due to the previously approved poultry plant. These comments were extremely vague and provided little insight as to the alleged circumstances of those properties and transactions; especially since the opposition often focused comments on an entirely different and more intensive poultry plant in Harbeson. The Board finds these comments to, thus, have limited probative value. Even if neighbors have experienced a decline in property values, the Applicant's proposed deboning facility is a significant reduction in the use of the Property as compared to the prior application approved by the Board and there was no evidence provided into the record as to the effect of the proposed deboning facility on the values of neighboring and adjacent properties.

vii. The Board was not convinced that the use of the Property for the proposed poultry processing facility was out of character for the neighborhood or the historical use of the site or that the proposed facility will have a substantial adverse effect on property values in the neighborhood.

k. The Board solicited comments on the Application from the Delaware Department of Natural Resources and Environmental Control, the Delaware Department of Transportation, the Delaware Office of the Fire Marshal, the Chief Building Code Inspector for Sussex County, and the Sussex Conservation District. These agencies were created for the promotion of public health, safety, and welfare.

l. The Board received the following comments:

i. The State Fire Marshal has no objection to the request and noted that "all renovations shall obtain proper permits prior to construction."

ii. DeIDOT indicated that a traffic impact study is under review and may result in the realignment of Iron Branch Road. DeIDOT also referenced other requirements the Applicant must meet in order to receive DeIDOT approval. DeIDOT's comments contained no objection to the Application.

iii. DNREC Groundwater Discharge Section confirmed that the

Applicant is working with DNREC for snow irrigation permitting and

the air and water pollution emanating from the site and over the systems and permits the Applicant intends to use, and no objection from DNREC has been noted in the record.

m. Applicant has noted to the Board that, in order to operate its facility, Applicant will need to obtain the following permits and approvals from DeIDOT, DNREC, Sussex County Building Inspector, and the State Fire Marshal. Those agencies were created for the promotion of public health, safety, and welfare. DNREC, through its rules and regulations, will have jurisdiction to protect the county and its waterways from the harmful effects of air and water pollution of any type. DNREC's extensive involvement in the permitting process indicates that it will make sure 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.

n. The opposition expressed frustrations with DNREC but DNREC is the appropriate agency to enforce environmental regulations. It is possible that public hearings will be necessary as part of the DNREC permitting process which should give the opposition a chance to express concerns.

o. 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 properly protected and that necessary safeguards will be provided for the protection of water areas or surrounding property and persons. The Board is convinced that the extensive permitting process by which the Applicant must undergo will give the appropriate authorities the opportunity to safeguard the public by denying a permit should a bona fide issue arise which threatens the public health, safety, morals, general welfare, water areas, or surrounding property and persons.

p. This approval is based on the following conditions:

- i. This approval is limited to a poultry deboning, packing, and shipping facility of a size and scope proposed by the Applicant.
- ii. 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.

The Board approved the special use exception application with conditions finding that it met the standards for granting a special use exception for a potentially hazardous use

Dale Callaway
Chairman

A handwritten signature in black ink, appearing to be the name 'Dale Callaway', written in a cursive style.