

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: ALLEN HARIM FOODS, LLC

(Case No. 12188)

A hearing was held after due notice on August 20, 2018. The Board members present were: Mr. Dale Callaway, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a request to change the condition of approval found in Paragraph 63(p)(ii) of the Findings of Fact regarding wastewater treatment for Board Case No. 12113.

Findings of Fact

The Board found that the Applicant requested to change the condition of approval found in Paragraph 63(p)(ii) of the Findings of Fact regarding wastewater treatment for Board Case No. 12113. The Applicant has requested that the Board amend this condition to a special use exception approval 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); said property being identified as Sussex County Tax Map Parcel Numbers 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. On July 10, 2018, the Board issued a decision regarding Case No. 12113 – Allen Harim Foods, LLC – which granted the Applicant a special use exception to operate a facility for further processing, deboning, packaging, and shipping of poultry products. As part of the application process for Case No. 12113, the Office of Planning & Zoning, on behalf of the Board, reached out to multiple state agencies to solicit comments. Those comments, including comments from the Delaware Department of Natural Resources & Environmental Control (“DNREC”), were noted in the Board’s decision in Case No. 12113.
2. The Board’s approval of Case No. 12113 was subject to two conditions as noted in Paragraph 63(p) of the Board’s decision. First, the special use exception approval was “limited to a poultry deboning, packing, and shipping facility of a size and scope proposed by the Applicant.” See ¶63(p)(i). Second, “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.” See ¶63(p)(ii).
3. Thereafter, the Applicant requested an amendment to the second condition pursuant to §115-214 of the Sussex County Zoning Code and that request is the subject of this application. Specifically, the Applicant requested that the second condition either be eliminated entirely or, alternatively, that the Applicant be required to obtain appropriate permits from DNREC for the proper treatment and disposal of wastewater for the limited processing approved by the Board. The hearing on this request was focused on this narrow issue.
4. The Applicant has not sought to amend the first condition of the Board’s approval of Case No. 12113.
5. The Board was given copies of the Application, a letter from the Applicant’s attorney Robert Gibbs, an aerial photograph of the Property, a portion of the tax map of the area, and copies of the minutes and Findings of Fact for Case No. 12113.
6. The Board found that the Office of Planning & Zoning received no correspondence in support of or in opposition to the Application.

7. The Board found that Everett Brown was sworn in to testify about the Application. Rob Gibbs, Esquire, presented the Application on behalf of the Applicant. Mr. Gibbs' presentation was affirmed by Mr. Brown.
8. The Board found that Mr. Gibbs stated that the Applicant seeks to amend the condition regarding the spray irrigation system. Based on that condition, the Applicant would not be able to operate a facility for further processing, deboning, packaging, and shipping of poultry products until the Applicant has obtained permits for an upgraded spray irrigation system related to the facility and said system is operational. The Applicant, however, intends to truck wastewater from the facility to a fully permitted wastewater site. Trucking of wastewater to permitted facilities is a common practice in the poultry industry. Eastern Shore Poultry, for example, trucks its wastewater from lands it leases from Sussex County pursuant to DNREC permits.
9. In the decision for Case No. 12113, the Board found that the Applicant previously proposed a facility in 2013 that would be much more intensive and would include 1.2 million gallons of wastewater discharge. What was proposed by the Applicant in Case No. 12113, however, was a significant reduction in the wastewater discharge from the 2013 application. Mr. Gibbs confirmed in his statements to the Board that the scope of the Applicant's project is 50,000 square feet / 11% of the building and that the scope of the wastewater discharge will be approximately 40,000 gallons per day. As previously noted, the size and scope of the facility was limited by the first condition of the Board's approval and this condition has not been challenged.
10. The Board found that the Applicant intends to upgrade its spray irrigation system and is in the process of investigating that system. In the meantime, the Applicant proposes to haul treated wastewater off site until the spray irrigation system is upgraded; though hauling of wastewater would still be needed at certain points even if spray irrigation is used. The hauling of wastewater and the spray irrigation system are governed by DNREC and are subject to DNREC approval and permits. The Applicant will not be able to move forward with the spray irrigation without DNREC's approval. As noted in the Board's prior decision, comments from the DNREC Groundwater Discharge Section confirmed that the Applicant is in the preliminary stages of the permitting process and that DNREC will monitor the spray irrigation system and has its own testing requirements. According to Mr. Gibbs, 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. Likewise, the spray irrigation permit is separate from wastewater transport permits.
11. The Board found that Mr. Gibbs stated that the Supreme Court has distinguished the Board's role in the land use planning process from the role of administrative agencies and that Delaware has state agencies to make the technical decisions about the Applicant's proposed use. One such agency is DNREC which exists to protect the public health, safety, and welfare. The Applicant clearly must work with DNREC with regard to DNREC's rules and regulations. It is clear to the Board that, in order to haul wastewater off-site or to operate a spray irrigation system, the Applicant will need to obtain DNREC permits.
12. The Board found that Mr. Gibbs stated that trucking the wastewater will remove all wastewater from the site. The Applicant has a state-of-art treatment facility in Harbeson where the wastewater from the facility will be trucked and the Applicant has applied for permits to truck treated wastewater to this facility. There will be no wastewater discharge into a stream and all wastewater will be treated according to a DNREC permit.
13. The Board found that Mr. Gibbs stated that the spray irrigation system will be upgraded with new technology. The Applicant is currently exploring new

technology called water reuse which can reduce wastewater discharge by 80% and may result in a significant reduction of wastewater discharge under spray irrigation. According to Mr. Gibbs, the implementation of this technology may take longer to incorporate into the spray irrigation system but the use of this new technology would benefit everyone.

14. The Board found that the Applicant's main concern with the second condition imposed by the Board is that the Applicant would be unable to operate a facility for further processing, deboning, packaging, and shipping of poultry products until the spray irrigation system is upgraded, approved, permitted, and operational. The Applicant has indicated uncertainty as to how long the DNREC permitting process will take for the spray irrigation system and this delay poses a significant financial cost to the Applicant. While the Applicant's cost is immaterial to the Application, the Applicant's point about the delay in operating the plant due to the spray irrigation permitting process is a fair one; particularly if the Applicant obtains DNREC permits to otherwise dispose of the wastewater through hauling.
15. The Board found that Mr. Gibbs stated that DNREC will hold hearings on the spray irrigation system and discussion of these matters is outside the Board's purview. The DNREC process could include public hearings and appeals. The Applicant cannot accurately predict how long it will take to get the spray irrigation permit; though, if all goes smoothly, the permitting could be in place within 6 months but could be longer – particularly if the Applicant plans to incorporate the newer technology in its system.
16. The Board found that Mr. Brown testified that he is the senior director of operations for Allen Harim and he is directly involved in the permitting process. He explained the DNREC review process and stated that the review process can take 3-6 months; though typically it takes 6 months for a permit to be processed by DNREC. He also noted that construction of the system would likely take another 7-8 months and then the Applicant could apply for an operational permit which requires additional public hearings. He believes that it could easily take a couple of years to obtain the necessary DNREC permits related to the spray irrigation system. The process for obtaining permits to haul treated wastewater, however, is much shorter and Mr. Brown believes that hauling permits will be in place by September 2017.
17. The Board found that Mr. Brown testified that he has contacted a construction company out of Texas regarding water reuse technology and the water reuse technology is something he recently learned about since the last hearing. Water reuse is a cleaner technology and wastewater processed through the water reuse process would not be sprayed or trucked. While the water reuse will likely not completely eliminate the need for spray irrigation, it could allow the Applicant to reuse up to 80% of the wastewater.
18. The Board found that Mr. Brown testified that the Applicant will have to truck wastewater when the spray irrigation is not being used because the holding tank onsite is not large. The Applicant has a permit to be able to haul wastewater to facility in New Castle County but it is expensive. Mr. Brown believes that there is sufficient capacity at the Harbeson facility to accommodate the wastewater from this facility. The Applicant wants the ability to truck wastewater in the interim until the spray irrigation system is operational and the ability to truck wastewater thereafter if there was an issue with the spray irrigation system or during months when the spray irrigation system could not be used.
19. The Board found that Andrea Green, Esquire, appeared on behalf of 2 local public interest groups (Protect Our Indian River and Keep Our Wells Clean) who oppose the Application. Donald Ayotte, Keith Steck, Charlotte Reid, Maria Payan, Jay Myer, Ken Haynes, Tom Brett and Lou Padoiske were sworn in to testify in opposition to the Application as well. Ms. Green and Ms. Payan introduced exhibits for the Board to review. The opposition argued that the Board's

implementation of the second condition was correct. The opposition also presented general concerns about the procedure, DNREC, alleged misrepresentations by the Applicant, the environment, the amount of wastewater generated by the site, and whether the Applicant will install a spray irrigation system.

20. The Board found that Ms. Green argued that the Applicant implied in its application that the Board made a mistake in imposing the second condition and that the appropriate remedy when a mistake is made is that the Applicant seek a motion for a rehearing under Board Rule 18 but the Applicant is out of time for filing a motion for a rehearing. She also argued that amendments are normally sought when there is a change in circumstances and that the Applicant has not advanced any change of circumstances. Ms. Green's arguments, however, fail. While Board Rule 18 provides a mechanism for relief if a party believes that the Board has made a mistake, this relief is not the sole relief afforded to an aggrieved party, such as the Applicant. Rather, §115-214 of the Sussex County Zoning Code provides an alternate remedy in cases where the Board has imposed a condition. In this case, the Applicant requests that the Board amend that condition. The Applicant has acknowledged that it has not filed a motion for a rehearing under Board Rule 18 so discussion of that point is moot. Ms. Green's argument also misapplies the clear language of §115-214. There is no requirement under §115-214 that a party who seeks to amend a condition imposed by the Board must first demonstrate a "change in circumstance." What Ms. Green suggests would require an applicant to prove an additional element beyond what is required in the Code in order to amend a condition. The Board is not inclined to impose a condition precedent on an applicant who seeks to amend a condition. Assuming, *arguendo*, that a "change in circumstance" is required as suggested by Ms. Green, the Applicant has demonstrated that a change in circumstance exists. When the Applicant originally sought the special use exception, there was no mention of the water reuse technology in the wastewater disposal system – a point recognized by Ms. Green. Since the hearing in Case No. 12113, however, Mr. Brown has learned of such technology and is exploring ways to incorporate this cleaner technology into the Applicant's spray irrigation system. Not surprisingly, the potential implementation of water reuse technology has resulted in the Applicant consulting with firms familiar with such technology and will likely result in discussions with DNREC. The Board finds that the Applicant's discovery of this water reuse technology is certainly a "change in circumstance" even though such change in circumstance is not necessary to seek an amendment of the Board's condition of approval.
21. The Board found that Ms. Green also argued that the Applicant did not cite the water reuse technology in its application. The Applicant, however, is not required to list all of its reasons or arguments on its application or pre-hearing submissions to the Board. While such information is usually helpful to the Board and the public, the Board often receives written submissions and testimony at the public hearing which provide insight into the application. The Board's rules do not preclude this practice. Importantly, the public hearing is the time and place where the Board can receive oral presentation, exhibits (beyond what is submitted into the record pre-hearing), and testimony and where the Board can ask questions of witnesses and otherwise vet the information it has been provided. Ms. Green's suggestion as to handling of Applicant's water reuse presentation is simply contrary to long-held Board practices.
22. The Board found that members of the opposition, including Ms. Green, expressed concern that, if the second condition is removed, the Applicant would be allowed to haul wastewater every day of the week subject to DNREC permits and would not be required to install the spray irrigation system. While it is true that the

removal of the second condition could result in this outcome, the Board fails to see how the hauling of wastewater from the site would substantially affect adversely the uses of neighboring and adjacent properties. As acknowledged by Ms. Green, the Applicant would only be allowed to haul the wastewater pursuant to a permit from DNREC and the wastewater would only be allowed to be delivered to a facility operating under a DNREC permit. DNREC is the agency with oversight over the handling of these permits and, while the Board has heard testimony from members of the opposition about their lack of confidence in DNREC, the proper agency to oversee the handling of wastewater is DNREC – not the Board. As held in Protect Our Indian River v. Sussex County Bd. of Adjustment, “the appropriate time to ferret out the legitimacy of concerns of this nature are at the permitting stage, not when considering a special use exception”. 2015 WL 4498971, *15 (Del. Super. 2015).

23. The opposition’s concerns about the hauling of wastewater rather than the use of an updated spray irrigation system is also curious because the opposition argued that the site is contaminated and that portions of the site are too wet and unusable. The overarching concern expressed by the opposition at the prior hearing – and as noted in the Findings of Fact for Case No. 12113 – was that spray irrigation would result in contaminants being spread to neighboring properties. Ms. Payan expressed similar concerns in her submissions about this request as well. The Board fails to see then how the relaxation of the second condition to allow the Applicant to haul wastewater subject to a DNREC permit prior to the installation of an upgraded and permitted spray irrigation system would substantially adversely affect the uses of neighboring and adjacent properties. The hauling of wastewater from the site would result in the complete removal of wastewater from the site and would appear to alleviate the opposition’s concerns. Meanwhile, as noted in the Board’s previous decision, if the Applicant seeks to install a spray irrigation system, that system will be subject to DNREC approval and permits.
24. The Board found that opposition seemed confused as to the amount of wastewater which would be generated by the facility on a daily basis. The Applicant previously advised the Board that the use would be limited to approximately 40,000 gallons per day. This figure was again confirmed by the Applicant at the hearing. The opposition alleged, however, that the Applicant misrepresented those figures to the Board and that the Applicant actually intends to generate 600,000 gallons of wastewater per day. In support of this claim, Ms. Payan submitted a letter dated February 26, 2015, from the John Reid, of Reid Engineering, to DNREC noting that the Applicant intends to “generate wastewater volume of approximately 500,000 gpd monthly average and 600,000 daily maximum.” The Board notes that the Applicant previously sought in 2013 a special use exception for a much more intensive use of the Property and, as noted by the Applicant’s attorney at this hearing, the approval of the 2013 request would have resulted in the discharge of 1.2 million gallons of wastewater per day. As was made clear at the hearings regarding the Applicant’s current intended use, however, the actual wastewater discharge would be limited to 40,000 gallons per day. This figure is consistent with correspondence submitted to DNREC by Ray Ebaugh on behalf the Applicant which clearly states that “the average daily flow of process water is expected to be 40,000 to 50,000 gallons per day.” Mr. Ebaugh’s letter, which was submitted to the Board by Ms. Payan, was dated November 28, 2017. Additional internal correspondence between DNREC officials, which was also submitted by the opposition, further confirms the intended 40,000 gallon per day figure. See email from John Rebar dated March 16, 2018. Likewise, a letter from DNREC official Bryan Ashby to the Applicant dated January 26, 2018 specifically states “it is anticipated that the volume of wastewater should not exceed 40,000 gallons per day.” While these documents further demonstrate that the facility will generate

40,000 gallons per day. To the extent there is a question as to the amount of wastewater to be generated by the facility, the first condition of the Board's Findings of Fact for Case No. 12113 specifically limits the facility to the size and scope presented by the Applicant and the Applicant has confirmed that the size and scope of the facility includes a maximum wastewater discharge of 40,000 per day. The amount of wastewater to be generated and hauled away by the facility is, thus, limited.

25. The opposition's clear misunderstanding of the amount of wastewater to be generated by the facility is puzzling given that the opposition itself submitted clear evidence demonstrating that the amount of daily wastewater generation. This error also calls into serious question the opposition's concerns about the traffic generated from the hauling of wastewater off-site. As noted by Mr. Haynes a tanker truck can handle 9,000 gallons of wastewater per day. Mr. Haynes then argued that the facility would generate 134 truck trips per day. Mr. Haynes' math would be true if the facility generated 1.2 million gallons of wastewater per day and had to haul the wastewater in 9,000 gallon tanker trucks. What the Applicant proposes – and what the Board has limited the facility to – would result (based on Mr. Haynes' argument that a tanker truck holds 9,000 gallons) in approximately 4-5 trucks per day. The Board is simply not convinced that the hauling of the wastewater would thus result in a substantial adverse effect on neighboring and adjacent properties. Moreover, the hauling of wastewater would otherwise be permitted if the condition remained unchanged and the Applicant installed the spray irrigation system because the hauling of wastewater would be necessary at certain points even if the spray irrigation system is installed.
26. The Board found that Mr. Steck testified that he believes the water reuse system should be considered as an entirely new application since it is different than what was previously proposed. The Board, however, fails to see why the Applicant would need to re-apply for approval for the entire facility simply due to a possible change in the technology to be used in the facility's spray irrigation system. The special use exception application was for the approval of a facility for further processing, deboning, packaging, and shipping of poultry products – not a spray irrigation system – and the proposed use of the Property (e.g. a facility for further processing, deboning, packaging, and shipping of poultry products) is not changing due to the proposed change in the spray irrigation technology. As noted in the Findings of Fact for Case No. 12113, DNREC has jurisdiction over treatment of wastewater from the facility and DNREC is the permitting authority for the spray irrigation system. Importantly, the Board is "allowed to rely on permitting agencies to perform their statutory duties to safeguard the public." Protect Our Indian River, 2015 WL 4498971, *15. The question of sanitary facilities is a matter for the health authorities because actual use of the premises cannot be commenced until DNREC issues a permit about the treatment and disposal of wastewater and that "if the applicant cannot satisfy the permitting requirements, then the facility will not be permitted to operate" and "the appropriate time to ferret out the legitimacy of concerns of this nature are at the permitting stage, not when considering a special use exception". *Id.* at *15. The Board also notes that changes in the technology during the construction and permitting process are not unusual; a point even recognized by the opposition.
27. The Board found that Mr. Steck testified that where the wastewater is hauled is important. He argued that the Harbeson facility has a permit customized based on its onsite treatment and not what it receives from elsewhere. He also questioned why it would take 2 years to make the spray irrigation system operational and whether it would take longer to implement the water reuse process into the spray irrigation system than it would to build the spray irrigation system. Again, Mr.

Steck's concerns about the handling of wastewater and the permitting process are questions which should be directed to DNREC and not the Board.

28. The Board found that Ms. Green expressed concerns about the credibility of representations made by the Applicant about what it plans to do and she argued that the Applicant will not comply with the Board's previous decision. She stated that, in 2015, the State provided grants to the Applicant for a water reuse system but the system was never built and the Applicant applied to DNREC to pump the wastewater to a 90 million gallon lagoon. Again, the construction of the spray irrigation system is an issue for DNREC and DNREC is the proper authority to regulate whether a spray irrigation system is necessary.
29. The Board found that Mr. Myer testified that the Board relies on DNREC to enforce its rules but he no longer has faith in DNREC because he believes that DNREC is not doing its job and has a history of lax enforcement. While the Board understands the concerns raised by members of the opposition about DNREC, the Board is not an expert on environmental issues. Mr. Myer even questioned the Board's knowledge of environmental concerns - the implication being that specific environmental issues are not the Board's specialty. Reliance on DNREC with regard to environmental issues, however, is proper. The Court has clearly ruled that Board "may properly rely on the appropriate authorities to safeguard public health, safety, and pollution and to utilize discretion when issuing a permit." Protect Our Indian River, 2015 WL 4498971, *16. DNREC is the appropriate agency to enforce environmental regulations and to address the opposition's concerns. 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. This finding is in keeping with the long-held decision 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.* (citing Dragon Run Terrace). As such, the Board will defer to DNREC on issues regarding permitting for the handling of wastewater on the site.
30. The Board found that no parties appeared in support of the Application and that fifteen (15) parties appeared in opposition to the Application.
31. The Board tabled its decision on the Application until September 17, 2018, at which time the Board discussed and voted on the Application.
32. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board weighed and considered, the Board amended the condition set forth in Paragraph 63(p)(ii) of the Findings of Fact for Case No. 12113 to read as follows:

"The Applicant must obtain appropriate permits from DNREC for the proper treatment and disposal of wastewater from the limited processing and packaging facility approved by the Board in the above-referenced special use exception."

- a. As noted in the Findings of Fact for Case No. 12113, the approved special use exception will not substantially affect adversely the uses of neighboring and adjacent properties. The amendment of this condition, as noted above, will not change that finding.
- b. Furthermore, as noted in the Findings of Fact for Case No. 12113 and discussed above, 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.

The Board approved the Applicant's request to amend the condition set forth in Paragraph 63(p)(ii) of the Findings of Fact for Case No. 12113 as set forth above.

Decision of the Board

Upon motion duly made and seconded, the Applicant's request to amend the condition set forth in Paragraph 63(p)(ii) of the Findings of Fact for Case No. 12113 was approved. The Board Members voting to amend the condition set forth in Paragraph 63(p)(ii) of the Findings of Fact for Case No. 12113 were Mr. Dale Callaway, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. No Member voted against the Motion to Approve the Applicant's request to amend the condition set forth in Paragraph 63(p)(ii) of the Findings of Fact for Case No. 12113. Ms. Ellen Magee did not participate in the hearing, discussion, or vote of this Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Mills
Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date November 20, 2018.