MINUTES OF AUGUST 20, 2018

The regular meeting of the Sussex County Board of Adjustment was held on Monday, August 20, 2018, at 7:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 7:00 p.m. with Chairman John Mills presiding. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Ms. Janelle Cornwell, Planning and Zoning Director, Mr. Jamie Whitehouse – Planning Manager, Ms. Christin Headley – Recording Secretary and Ms. Ann Lepore – Clerk II.

The Pledge of Allegiance was led by Mr. Mills.

Motion by Ms. Magee, seconded by Mr. Mears, and carried unanimously to approve the agenda as circulated. Motion carried 5 – 0.

Mr. Sharp read a statement explaining how the Board of Adjustment meeting is conducted and the procedures for hearing the case.

PUBLIC HEARINGS

Case No. 12183 – Christine Figurell seeks variances from the rear yard setback requirement for proposed structures (Sections 115-25 & 115-183 of the Sussex County Zoning Code). The property is located on the north side of Poplar Dr., approximately 172 feet northwest of Woodland Cir. 911 Address: 32813 Poplar Dr., Lewes. Zoning District: AR-1. Tax Parcel: 234-11.20-107.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of the Application or in opposition to the Application and two mail returns. The Applicant seeks a variance of 14.5 feet from the fifteen (15) feet rear yard setback requirement for a proposed deck and a variance of 14.2 feet from the fifteen (15) feet rear yard setback requirement for a proposed deck.

Darlene Gilbert was sworn in to give testimony about the Application.

Ms. Gilbert testified that the variances are for a deck to the rear of the dwelling; that the Property is unique because the house is set so far back on the lot; that, at the time the house was built, a septic field was located in front of the house; that the septic system had to be at least 150 feet from a well which was located in the common area to the rear; that the location of the septic field limited the size and location of the house; that the exceptional practical difficulty was not created by the Applicant; that the deck can only be developed as such because there is no other area to place a deck that would meet setback requirements; that the Applicant did not create the shape and size of the house and had no control over the placement of the septic field; that the variances will not affect the character of the neighborhood but will enhance it; that the variances requested are the minimum

variances; that the deck will be placed over the current cement patio; that the deck would not have been an issue had the dwelling not been located towards the rear property line due to the septic system; that steps for the deck will be located within the building envelope and no variance will be needed for the steps; and that the neighbors and homeowners association support the Application.

Ms. Cornwell advised the Board that the deck can be 5 feet from the rear property line due to recent ordinance changes; and that the Property is otherwise subject to a 15 feet rear yard setback requirement since the lot consists of less than 10,000 square feet.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Callaway moved to approve Variance Application No. 12183 for the requested variances based on the record made at the public hearing and for the following reasons:

1. The variances will not affect the essential character of the neighborhood because there are similar variances in the neighborhood;
2. The exceptional practical difficulty has not been created by the Applicant; and
3. There is no possible way the Property can be developed in strict conformity with the Sussex County Zoning Code.

Motion by Mr. Callaway, seconded by Mr. Workman, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12184 – DEStorage.com, LLC seeks a special use exception to place an off-premise sign (Sections 115-80, 115-81, 226-159.5, & 115-210 of the Sussex County Zoning Code). The property is located on the southwest corner of Dickerson Rd., and DuPont Blvd. (U.S. 13), also lying on the northeast side of Handy Rd., approximately 493 feet southeast of Dickerson Rd. 911 Address: 28862 DuPont Blvd., Millsboro. Zoning District: C-1. Tax Parcel: 233-5.00-101.00

Ms. Cornwell stated that the Applicant submitted a request to withdraw this Application but the request was received too late to be removed from the agenda by staff; that the Applicant was not prepared to present the request; and the Board needs to vote whether to accept the withdrawal.

Mr. Sharp stated that any request to withdraw submitted within two business days of the hearing must come to the Board to allow for the withdrawal.

Ms. Cornwell stated that the request was submitted on Thursday August 16th; and that the Applicant is aware that it will have to file a new application if it wishes to be heard on this request.

Mr. Mears moved to accept the Applicant's request to withdraw Application No. 12184 based on the request from the Applicant.

Motion by Mr. Mears, seconded by Ms. Magee, and carried unanimously that the **case be withdrawn.** Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12185 – Robert & Sherilyn McLaughlin seek variances from the front yard, side yard, and rear yard setback requirements for existing and proposed structures (Sections 115-74 and 115-185 of the Sussex County Zoning Code). The property is located on the north side of Washington St., approximately 237 feet east of Church St. 911 Address: 37499 & 37503 Washington St., Rehoboth Beach. Zoning District: C-1. Tax Parcel: 334-13.20-88.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no letters in support of the Application or one letter in opposition to the Application and three mail returns. The Applicants seek a variance of 2 feet from the five (5) feet rear yard setback requirement for an existing accessory building, a variance of 3.9 feet from the five (5) feet side yard setback requirement on the southeast side for an existing accessory building, a variance of 2.8 from the five (5) feet side yard setback requirement on the northwest side for a proposed dwelling, a variance of 2.2 feet from the five (5) feet side yard setback requirement on the northwest side for a proposed dwelling, and a variance of 14.7 feet from the thirty (30) feet front yard setback requirement for a proposed dwelling.

Robert and Sherilyn McLaughlin were sworn in to give testimony. Tim Willard, Esquire, was present on behalf of the Applicants, presented the Application, and submitted one exhibit for the Board to review.

Mr. Willard stated that the Applicants acquired the Property in 2015; that nearby lands are used for condominiums; that the Property is developed with a small house and porch and a cottage in the rear yard; that the dwelling was built in the 1940s and is in poor condition; that the Applicants intend to expand the existing dwelling; that the encroachment into the front yard setback area will be reduced by the renovation; that the Property is unique because there are non-conforming structures on the lot; that the Property is zoned C-1 but is in a largely residential area; that the shed will be removed and no variance is needed for the shed; that the cottage will also be renovated; that there will be no change to the footprint of the cottage; that there is no kitchen in the cottage; that the existing porch is 8 feet from the front yard property line and the renovated dwelling will be 15 feet from the front property line thereby reducing the encroachment; that the Property is unique because it is small and consists of approximately 6,000 square feet; that other lots have similar guest houses; that most

of the requested variances are for existing buildings; that the exceptional practical difficulty was not created by the Applicants as these buildings were in existence when they purchased the Property; that the variances will not alter the essential character of the neighborhood but rather enhance it; that the Applicants plan to build their home in the Craftsman style which is common in the neighborhood; that there is no change to the encroachment to the side yard setback from the cottage; that the neighbor opposed to the Application only opposed the side yard encroachment by the cottage; that the Applicants will continue to have off-street parking; that the Applicants want to keep the style of the existing dwelling; that these are the minimum variances necessary to afford relief due to the placement of the current buildings; that the variances will improve the neighborhood; and that the footprint of the home is reasonable.

Mr. McLaughlin affirmed the statements made by Mr. Willard as true and correct. Mr. McLaughlin testified that the dwelling will be a two-story home; and that the intention is to build a home in keeping with the neighborhood and therefore enhance it.

Mrs. McLaughlin testified that the dwelling and cottage are in poor condition; that she expects that, when the renovations are made to their property, it will improve neighboring property values; and that there is a gap of a couple of feet between the front property line and the edge of paving of Washington Street.

Mr. Willard stated that the Applicants are removing all kitchen appliances from the cottage; that the HVAC and steps for the dwelling will be within the proposed footprint; that the home must be offset on the Property in order to provide off-street parking; and that the dwelling cannot be built narrower.

Daniel Cochran was sworn in to give testimony in support of the Application.

Mr. Cochran testified that he is the president of the homeowners' association in the condominium to the left; that he and the homeowners' association support the Application; that the renovations will improve property values in the neighborhood; and that the neighborhood is in transition.

The Board found that two (2) parties appeared in support of the Application.

The Board found that no parties appeared in opposition to the Application.

Mr. Mears moved to approve Variance Application No. 12185 for the requested variances based on the record made at the public hearing and for the following reasons:

1. The Property is unique due to its width and depth;
2. The Property cannot be otherwise developed without these variances;
3. The exceptional practical difficulty has not been created by the Applicants but created by

the lot's conditions;

4. The variances will not alter the essential character of the neighborhood because the craftsman style exterior that the Applicants are planning will enhance the community; and
5. The requested variances are the minimum variances necessary to afford relief to build their new house.

Motion by Mr. Mears, seconded by Ms. Magee, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12186 – Lawrence G. Plank & Holly J. Fox seek a variance from the side yard setback requirement for an existing structure (Sections 115-25 & 115-185 of the Sussex County Zoning Code). The property is located on the west side of Harbor Rd., approximately 60 ft. south of S. Rodney Dr. in North Shores development. 911 Address: 21933 Padula Rd., Georgetown. Zoning District: AR-1. Tax Parcel: 234-8.00-59.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received one letter in support and no letters in opposition to the Application and zero mail returns. The Applicants seek a variance of 5.4 feet from the fifteen (15) feet side yard setback requirement on the southwest side for an existing shed.

Lawrence Plank was sworn in to give testimony. Bill Schab, Esquire, was present on behalf of the Applicants, presented the Application, and submitted one exhibit for the Board to review.

Mr. Schab said that the Applicants bought the Property, which consists of 18.619 acres, a house, a pool, and a barn; that the survey shows that the pool was on the lot line and that the barn was located within the setback area; that the neighbor sold part of his property so that the pool would be located entirely on the Applicants' lot; that the Applicants tried to rectify the situation prior to settlement but could not complete it prior to settlement; that the house was built in 2002 and the barn was built thereafter by a prior owner; that the Property is unique because current placement of the buildings; that the Property cannot otherwise be developed without removing the building at great cost to the owner; that only the back corner of the building is in the setback area; that the exceptional practical difficulty was not created by the Applicants as these buildings were built by the prior owner and Mr. Plank did not get the information regarding the violation until two days before settlement; that the variance will not alter the essential character of the neighborhood as this building has been there for fifteen years; that the only neighbor who it could affect has written a letter of support and the neighbor tried to help resolve the issues; and that the variance requested is the minimum variance to allow relief.

Mr. Plank affirmed the statements made by Mr. Schab as true and correct. Mr. Plank testified

that the only way to correct this without a variance would be to remove a large piece of the structural integrity of the building which would change the character of the building and create a financial hardship; that the building would be ruined if it had to be brought into compliance; that most of the encroachment is an overhang of the building; and that he has applied for permits to make the shed / garage and pool legal.

Ms. Cornwell stated that no permits were issued to the prior owner for the building; that the Applicants have applied for and been issued permits for the structures; and that the house complies with the setback requirements.

Mr. Plank testified that the house was built in 2002; that the pool and barn were not in compliance; that the lot is wooded with a pond in the rear yard; and that the difficulty was not created by the Applicants.

The Board found that one person appeared in support of and no one appeared in opposition to the Application.

Mr. Mears moved to approve Variance Application No. 12186 for the requested variance based on the record made at the public hearing and for the following reasons:

1. The variance is needed to enable the Applicants to reasonably use the shed that is in violation;
2. The violation was not created by the Applicants because the original owners of the property built the shed;
3. The variance will not alter the essential character of the neighborhood as it has been there for fifteen years without adversely affecting the neighborhood;
4. A neighbor has submitted a letter supporting the Application; and
5. The requested variance is the minimum variance necessary to afford relief.

Motion by Mr. Mears, seconded by Mr. Callaway, and carried unanimously that the **variance be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12187 –Theodore McBride seeks a variance from the side yard setback requirement for a proposed structure (Sections 115-25 & 115-185 of the Sussex County Zoning Code). The property is located on the north side of Arvey Rd., approximately 215 feet east of Hitch Pond Rd. 911 Address: 14265 Arvey Rd., Laurel. Zoning District: AR-1. Tax Parcel: 332-9.00-42.00

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received four letters in support and no letters in opposition to the Application and zero mail returns. The

Applicant seeks a variance of 9.6 feet from the 15 feet side yard setback requirement on the west side for a proposed garage. The Applicant also submitted an updated survey which showed that a variance of 1.6 feet from the five (5) feet side yard setback requirement on the east side for a shed is needed. Since the survey came in after the case was advertised, the side yard variance request for the shed cannot be heard at this time and the Applicant will have to submit a new variance application for the shed.

Theodore McBride was sworn in to give testimony about the Application. Mr. McBride submitted exhibits to the Board to review.

Mr. McBride testified that the property is unique due to the shape of the lot; that the structure cannot be placed elsewhere on the lot because of the septic field and well placement; that the situation was not caused by Applicant as he did not draw the lot lines; that the lot was created by a prior owner; that the variance will not affect the essential character of the neighborhood as there are similar garages on neighboring properties; that neighbors support the Application and letters of support from the neighbors have been submitted; that this request is the minimum variance needed to afford relief; that, if it were to be placed any other place on the Property, it would create a need for a greater variance; that the garage was placed in alignment with the house and driveway; that the pool shown on the survey is a kiddie pool; that there is 7 feet to the driveway as shown on the survey is the apron for the building; that there is a well in the rear yard and a septic system in the front yard; that the shed can be moved; that he will not be requesting a variance for the existing shed but will move the shed to be compliant with setback requirements; that he did not build the dwelling; and that the dwelling is parallel to the road but not the side property line.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Mears moved to approve Variance Application No. 12187 for the requested variance based on the record made at the public hearing and for the following reasons:

1. The uniqueness of the property is due to the angled west boundary which is pinching the proposed garage between the existing driveway and the property line;
2. The Property cannot be otherwise developed without this variance;
3. The well is located in the rear yard and limits the buildable area;
4. This situation was not created by the Applicant;
5. The variance will not affect the essential character of the neighborhood because there are similar buildings on each side of the Applicant; and
6. The requested variance is the minimum variance necessary to afford relief and to place the building properly in relationship to driveway and house.

Motion by Mr. Mears, seconded by Mr. Workman, and carried unanimously that the **variance be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Ms. Magee – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12188 – Allen Harim Foods LLC requests 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 (Sections 115-214 of the Sussex County Zoning Code). The property is located on the northwest corner of Pinnacle Way and Iron Branch Rd. (Rt. 331). 911 Address: 29984 Pinnacle Way, Millsboro. Zoning District: HI-1. Tax Map: 233-5.00-14.00, 233-5.00-15.00, & 233-5.00-16.00

Ms. Magee recused herself and left chambers. She stated that she has active legal matters with the firm Morris, James, Wilson, Halbrook & Bayard who are representing the Applicant.

Ms. Cornwell stated that the Application is to amend a condition of approval of a special use exception and that the Office of Planning and Zoning received no letters in support of or in opposition to the Application. The Office received seven (7) mail returns.

Mr. Sharp stated that the application regards a narrow issue; that, in March 2018, the Board previously heard an application for a deboning facility on this site and a decision was rendered in July 2018; that the decision included a condition that 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; that the hearing is specific to that condition only and is not a rehearing of the original application; that Applicant seeks to amend or eliminate that condition; and that all testimony should be specific to that condition.

Robert Gibbs, Esquire, presented the Application on behalf of the Applicant.

Mr. Gibbs stated that the Applicant does not oppose the first condition under the original decision which limits the facility to the size and scope proposed by the Applicant; that the Applicant seeks to amend the condition regarding the spray irrigation system; that the Applicant intends to truck wastewater to a fully permitted wastewater site; that trucking of wastewater to permitted facilities is a common practice in the poultry industry; that Eastern Shore Poultry trucks its wastewater from lands its leases from Sussex County pursuant to DNREC permits; that the Board previously found that the wastewater discharge from the proposed deboning facility will only result in 40,000 gallons of wastewater per day; that the deboning facility is a limited use and does not include slaughtering or processing; and that the Applicant did not proffer this condition at the original hearing.

Mr. Mills stated that the condition arose due to concerns raised at the initial hearing.

Mr. Gibbs stated that the Board previously found that the Applicant proposed that all treated wastewater will be trucked off site until the spray irrigation system is upgraded; that the

Board previously received comments from the DNREC Groundwater Discharge Section confirming that the Applicant is in the preliminary stages of the permitting process; that the Board previously found that DNREC will monitor the spray irrigation system and has its own testing requirements; that 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; that the Board previously found that the Applicant will not be able to move forward with the spray irrigation without DNREC's approval; that the Supreme Court has ruled as to the Board's role in the land use planning process as opposed to the role of administrative agencies; that Board found that Delaware has state agencies to make the technical decisions about the Applicant's proposed use and DNREC is there to protect the public health, safety, and welfare; that the Applicant must work with DNREC; 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; that trucking would be needed at certain points even if spray irrigation is used; that the Applicant must have DNREC permits to truck wastewater to a facility off-site; that trucking the wastewater will remove all wastewater from the site; and that the Applicant has a state-of-art treatment facility in Harbeson and the wastewater would be trucked there.

Mr. Sharp stated that the Board's original approval of a facility in 2013 did not include any conditions on that approval.

Mr. Gibbs stated that the section of Code is unusual; that, in a Light-Industrial Zone, this type of processing is a permitted use but, in a Heavy Industrial Zone, there is a different requirement for the Board to entertain; that the agencies are the ultimate decider of all things permitting; that there will be no wastewater discharge into a stream; that all wastewater will be treated according to a DNREC permit; that the spray irrigation system will be upgraded with new technology; that Board was not convinced that the handling of wastewater from the proposed facility would not rise to the level of a substantial adverse effect on neighboring and adjacent properties; that the Applicant previously proposed to truck all wastewater until the spray irrigation system is up and running; that the Board previously found that the Applicant is working with DNREC for spray irrigation permitting and wastewater transport permits and that public hearings are scheduled for those permits; that DNREC indicated that the Applicant will need to receive these permits before proceeding with the proposed deboning facility; that forcing the Applicant to wait to open the facility until the spray irrigation system is operational only penalizes the Applicant; that the Applicant loses $100,000 per week that the facility is not operational; that the cost is not insignificant; that wastewater transport and spray irrigation are means by which to dispose of wastewater; that a new technology called water reuse can reduce wastewater discharge by 80% and may result in a significant reduction of wastewater discharge under spray irrigation; that the implementation of this technology may take longer to incorporate into the spray irrigation system; that the use of this new technology would benefit everyone; that the Applicant seeks to remove the spray irrigation condition set forth in the Board's original decision; that DNREC will hold hearings on the spray irrigation system and discussion of these matters is outside the Board's purview; that, if the Board wanted to place some condition, the Board could require that the facility

not be operational until DNREC permits are in place; that the DNREC process could include public hearings and appeals; that the Applicant cannot accurately predict how long it will take to get the spray irrigation permit; that, 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; and that the Applicant has applied for permits to truck the wastewater to the Harbeson facility.

Everett Brown was sworn in to give testimony about the Application.

Mr. Brown affirmed the statements made by Mr. Gibbs as true and correct. Mr. Brown testified that he is the senior director of operations for Allen Harim; that he is directly involved in the permitting process; that a letter of intent is being submitted to DNREC; that the DNREC review process can take 3-6 months; that he has contacted a construction company out of Texas regarding water reuse technology; that the Applicant will have to work with DNREC and USDA; that the water reuse technology is something he recently learned about since the last hearing; that water reuse is a cleaner technology; that the Applicant will have to truck wastewater when the spray irrigation is not be used; that the holding tank onsite is not large; that the wastewater processed through the water reuse process would not be sprayed or trucked; that the water reuse will likely not completely eliminate the need for spray irrigation but could allow the Applicant to reuse up to 80% of the wastewater; that the Applicant has a permit to be able to haul wastewater to facility in New Castle County but it is expensive; that there is sufficient capacity at the Harbeson facility to accommodate the wastewater from this facility; that typically it typically takes 6 months for a permit to be processed with DNREC, another 7-8 months for construction, and then the Applicant can apply for an operational permit which requires additional public hearings; that it could easily take a couple of years to receive the necessary DNREC permits; that 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; and that he believes the hauling permits will be in place by late September but there are other permits at issue as well.

The Board took a ten (10) minute recess.

Mr. Mills stated that testimony is related to the condition at issue only and that persons speaking in support or opposition to the Application should focus their testimony on that condition.

Andrea Green, Esquire, appeared on behalf of 2 local public interest groups (Protect Our Indian River and Keep Our Wells Clean).

Mr. Gibbs stated that Ms. Green, on behalf of her clients, has filed an appeal of the Board's decision.

Ms. Green stated that she lives in Milton and has resided in Delaware for 18 years; that her clients believe the Application is inappropriate both procedural and substantively; that the Board held public hearings earlier this year; that the Applicant sought to repurpose the old Pinnacle facility as a deboning facility; that the Applicant proffered that it would install a spray irrigation system to dispose of wastewater over 29 acres; that the Applicant proposes to haul by truck wastewater to its facility in Harbeson for disposal until the spray irrigation system is approved; that the Applicant also testified that there would be times during the year when the spray irrigation system could not be used such as when the ground is frozen or saturated; that the Applicant would not be able to spray irrigate wastewater from November to March; that the Board approved the Application and imposed 2 conditions on the approval; that the spray irrigation system must be upgraded, approved, permitted, and operational before the facility is operational; that the Applicant implies that the Board made a mistake and did not intend to place this condition on the decision; that the appropriate remedy when a mistake is made is that the Applicant seek a motion for a rehearing under Board Rule 18; that the Applicant is out of time for filing a motion for a rehearing; that amendments are normally sought when there is a change in circumstances; that the Applicant has not advanced any change of circumstances; that the Applicant is bound by the Board's decision; and that the Applicant suggests that the Board did not know what it was doing when it imposed the condition.

Ms. Green submitted a copy of the transcript of the previous hearing for the Board to review and she recited portions of that hearing regarding the Board's deliberations on the wastewater hauling.

Ms. Green stated that the statements made by the Applicant are misleading; that, if the condition is removed, the Applicant would be allowed to haul wastewater every day of the week subject to DNREC permits; and that the DNREC permits are still pending. Ms. Green submitted a DNREC email into the record. Ms. Green stated that the Board has a responsibility to weigh the credibility of witnesses; that the Applicant's CEO made a statement to the press that the Applicant will haul wastewater to Harbeson until the spray irrigation system is operational; that the Applicant has indicated that it will not comply with the Board's previous decision; 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; that, if the condition is removed, the Applicant may never build the spray irrigation system and truck the wastewater; that the Application is not properly before the Board due to procedural defects; and that the Application should be denied.

Mr. Sharp stated that the Sussex County Code has a provision which allows an applicant to apply to the Board for a change in a condition; and that the Applicant chose not to seek an appeal or motion for rehearing but did choose to seek a change to the condition under the Code.

Ms. Green stated that there must be a change in circumstance in order for an applicant to seek a change in condition.

Mr. Sharp stated that there is no condition precedent in the Code which requires a change in circumstances in order to seek a change in condition; and that, to the extent a change in circumstances is required, we have heard testimony from the Applicant that the water reuse system is now being considered.

Ms. Green stated that the water reuse system was not discussed at the prior hearing and was not cited in the Application.

Mr. Sharp stated that the Board often does not always receive the full record prior to the public hearing and the public hearing is the place where the Board vets this information and presentation.

Ms. Green stated that a literal reading cited in the Application is another way of saying the Board made a mistake; that the water reuse system was not part of the original application; and that, if the condition is removed, the Applicant will not be required to put in a spray irrigation system.

Mr. Sharp stated that the original decision requires the Applicant to go through proper permitting through DNREC.

Mr. Mears asked if a time limit could be imposed whereby the Applicant would be required to file a spray irrigation permit application with DNREC.

Donald Ayotte, Keith Steck, Charlotte Reid, Maria Payan, Jay Myer, Ken Haynes, Tom Brett and Lou Padolske were sworn in to testify in opposition to the Application.

Donald Ayotte testified that the site is contaminated.

Mr. Steck asked for clarification if the Applicant is seeking only to amend the condition pursuant to § 115-214 and if the Director determined that the change was minor.

Ms. Cornwell stated that she determined the change in condition was not minor and needed to go through the public hearing process.

Mr. Steck testified that the public was not provided with access to all of the Applicant's documents prior to the March 19th meeting.

Mr. Sharp stated that the record is open at the office and is available to the public; that documents submitted at the public hearing become part of the public record; and that documents submitted after the public hearing are not considered as part of the public record.

Mr. Steck stated that Mr. Gibbs compared the new application against the application from 5 years ago; that the best comparison is the current application and the special use exception standard; that he believes the water reuse system should be considered as an entirely new application since it is different than what was previously proposed; that where the wastewater is hauled is important; and that the Harbeson facility has a permit customized based on its onsite treatment and not what it receives from elsewhere.

Mr. Mills stated that the issue of the permitting is a DNREC issue.

Mr. Steck 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.

Ms. Reid testified that she felt the condition was appropriate and well-supported by the record; that there has been no spray irrigation on the site since 2012; that some of the areas were too wet and unusable; that she has concerns about the handling of sanitary waste from the plant; that sanitary waste would also be hauled off-site; and that she believes the Applicant will not implement the spray irrigation system due to cost. She questioned whether there was a sewage treatment facility nearby.

Mr. Mills stated that it is DNREC's responsibility to monitor the sanitary conditions; that approval by the Board does not give the Applicant the right to begin operating the facility; and that the Applicant still must obtain other necessary agency approvals.

Ms. Reid testified that the Applicant intends to use the spray irrigation system for industrial and sanitary wastewater.

Ms. Cornwell stated that the term wastewater includes sanitary wastewater but all wastewater permits go through DNREC.

Ms. Reid testified that she believes the Board was right to put this condition in place; that the spray irrigation system needs to be dramatically upgraded; and that the hauling of wastewater would, thus, be limited.

Ms. Payan testified that the Board was absolutely correct; that the Applicant proposed temporary hauling with DNREC approval; that the Applicant has made misrepresentations; that the Applicant is subject to a federal decree; that the Applicant plans to handle 600,000 gallons of wastewater onsite; that the Applicant's application for wastewater indicates that they are going to handle 600,000 gallons of wastewater; that the Applicant is in violation of federal law; that she called the EPA about the violation; that there are 2 schools near the site; that there is a big difference between 40,000 gallons and 600,000 gallons being used; that the speed limits shown on the traffic impact study were incorrect; that children will be exposed to diesel fuel from the trucks;

that the site is contaminated; and that she believes the Applicant has made misrepresentations to the Board.

Ms. Payan submitted exhibits into the record.

Mr. Padolske testified that the Board has a serious obligation and fulfilled that obligation; that no one has an idea how quickly it will take the Applicant to receive its permits and approvals; that when the opposition says something it is considered speculative; that the comments from the Applicant have been treated as gold; that the Applicant has not provided plans for its systems and its comments are speculative; that traffic in the area is a problem; that truck traffic from the facility will add to that problem; that technology constantly changes; that it would best for the Applicant to have its systems in place prior to operating the facility; and that he believes the condition should remain in place.

Mr. Brett testified that the Board had a right to impose this condition; that relevant information brought to the Board should be considered; that there has been a lot of relevant information brought to the Board tonight; and that the Board should consider that information.

Mr. Myer testified that he lives in Possum Point; that he questions the Board's knowledge of environmental concerns; that barnacles no longer grown on pilings; that crabs and fish are no longer in the area; that boat navigation is difficult due to the coal plant; that the Board relies on DNREC to enforce its rules but he no longer has faith in DNREC; that DNREC is not doing its job; that the Board has a responsibility to the citizens of Sussex County; that DNREC has a history of lax enforcement; and that the EPA found that DNREC did not adequately enforce regulations – particularly as to significant violations.

Mr. Haynes testified that a tanker truck can handle 9,000 gallons; and that 600,000 gallons of wastewater would result in 134 trucks in and out of the site per day.

Mr. Gibbs stated that the applicable ordinance provision is unusual; that the Board is allowed to rely on permitting agencies; that a deboning facility uses minimal water – only 40,000 gallons per day; that the rest of the site is built out commercially and not industrially; that Eastern Shore Poultry trucks wastewater all the time; that the Applicant intends to place a spray irrigation system; that the water reuse system is a component of the spray irrigation system and will impact the size of the system needed; that determining the type of spray irrigation system is a time-consuming process; that the Applicant has not been disingenuous in its representations to the Board; that the Applicant is not mandated to seek a rehearing; that the Applicant looked at §115-214 regarding the procedure to changing a condition attached to an approval; that the Application is focused on a single condition; that the Applicant is not seeking a rehearing; that the Applicant is not seeking to have the Board overturn its decision granting the special use exception; that the Applicant cannot predict how long it will take to process an application and exhaust all appellate remedies; that the Applicant has permits for hauling of wastewater to an upstate facility but it is

more expensive; that the Applicant seeks permits for trucking to Harbeson; that he has no idea how long the permitting process will take but it could take a long time if there are appeals; that, based on Mr. Brown's testimony, he does not think the spray irrigation facility would be up and running within 6 months; that there will no stream discharge of wastewater; that the Applicant received favorable feedback for its proposal; that this is a DNREC issue; that the scope of the project is 50,000 square feet / 11% of the building; and that the scope of the wastewater discharge is approximately 40,000 gallons per day.

The Board found that no parties appeared in support of the Application.

The Board found that fifteen (15) parties appeared in opposition to the Application.

Mr. Mills stated that he is interested in reviewing the materials provided into the record.

Motion by Mr. Mears, seconded by Mr. Callaway, and carried unanimously that the **Application be tabled until September 10, 2018**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea Mr. Mills – yea, and Mr. Callaway – yea.

Meeting was adjourned at 10:35 p.m.