



Hearing

September 15, 2021

In the Matter of:

Delaware State Court Reporting Cases

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BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD
FOR THE STATE OF DELAWARE

JEANETTE SWAIN,)
COLLINS PARK CIVIC)
ASSOC.)
))
Appellants)
))
v.) CZICB Appeal No.
) 2021-01

THE STATE OF)
DELAWARE, DEPARTMENT)
OF NATURAL RESOURCES)
AND ENVIRONMENTAL)
CONTROL)
))
Appellee)

- - -

Virtual Public Hearing
Dial-In Number: 1-408-418-9388
Event Number: 2333 557 4740

Wednesday, September 15, 2021
9:00 a.m.

- - -

BEFORE: The Coastal Zone Industrial Control Board
Richard Legatski, Chairman
Robert Baker
Jeff Draper
Pamela Meitner
Karen Peterson
Jamie Whitehouse

VERITEXT NATIONAL COURT REPORTING COMPANY
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1 MR. LEGATSKI: Good morning. The purpose
2 of today's hearing is the consideration of appeal number
3 2021-01 filed by Jeanette Swain and the Collins Park
4 Civic Association.

5 Appellants are appealing Secretary's order
6 number 2021-CZ-0019 issued July 23, 2021, which granted
7 the application of FujiFilm Imaging Colorants,
8 Incorporated, for a costal zone permit and a line
9 construction and operation of their 110-ton per year
10 plant that would produce high performance pigment
11 dispersions in New Castle County, Delaware.

12 On August 13, 2021, appellants submitted
13 their statement of appeal.

14 I will skip over the part that says I'll
15 now introduce board members.

16 Appellants' counsel is Mr. Kristl; DNREC's
17 counsel is Mr. Jameson; and the permittee's counsel is
18 Mr. Whetzel.

19 Please turn off all cell phones and set
20 them to silence. If you need to answer your phone,
21 please leave the WebEx platform before you begin your
22 conversation.

23 We'll conclude the hearing no later than
24 4:30 p.m. We may take a mid-morning break, will take a

1 lunch break, and possibly other breaks should the hearing
2 run into the afternoon.

3 The board will deliberate in public as
4 required by statute. Notice of today's hearing was
5 posted on the State of Delaware Secretary of State's
6 public meeting calendar and the Richardson & Robbins
7 building, 89 Kings Highway in Dover.

8 In addition, public notice of this hearing
9 was published in the News Journal and Delaware State
10 News.

11 The board is a quasi-judicial body created
12 by the General Assembly to hear appeals of decisions of
13 the Secretary. The manner in which the board fulfills
14 its duties and responsibilities, including conducting
15 hearings, is established and governed by the Delaware
16 Code, the board's regulations, and caselaw.

17 That's it for the opening.

18 MS. PETERSON: Mr. Chairman, this is Karen
19 Peterson speaking.

20 Could we maybe have Ms. Mohammed identify
21 the board members who are present just to establish that
22 we have a quorum?

23 MR. LEGATSKI: That would be useful, yes.

24 MS. MOHAMMED: Hello. This is Sascha.

1 We have Jamie Whitehouse, Karen Peterson,
2 Rob Baker, Jeff Draper, we have the chairman, Richard
3 Legatski, Pam Meitner -- I'm sorry if I said that
4 wrong -- and we have the board's DAG, Kevin Maloney.

5 MS. PETERSON: Thank you.

6 MS. MOHAMMED: Welcome.

7 MR. MALONEY: This is Kevin.

8 Professor Kristl has identified an
9 unanticipated procedural issue, so I'd like to turn the
10 floor over to him at this time to briefly explain the
11 situation.

12 MR. KRISTL: Thank you. Good morning,
13 members of the board.

14 My client, the appellant, the individual
15 appellant, Jeanette Swain -- I was informed literally
16 minutes before this hearing was set to begin that she was
17 hospitalized overnight. I have not been able to contact
18 her since then. My information about her hospitalization
19 has come from people who she had reached out to before
20 she went to the hospital, so I do not know her current
21 status.

22 But she is the witness who was to testify
23 in the first phase of the hearing about standing, and so
24 because of her hospitalization and her inability to be

1 here, I have informed the board and would be requesting a
2 continuance of the hearing to see if we can resolve the
3 issues related to her ability to testify today or in the
4 very near future.

5 MR. MALONEY: Thank you, Professor Kristl.

6 MS. MEITNER: Mr. Maloney, I would be
7 happy as a member of the board -- this is Pam Meitner --
8 to make a motion.

9 MR. MALONEY: Okay.

10 MS. MEITNER: Because of the sudden and
11 unexpected hospitalization of Jeanette Swain, a key
12 witness for the appellants, I recommend that the hearing
13 be continued until 1:00 p.m. today when we potentially
14 will have additional information and be in a better
15 position to plan our path forward.

16 MS. PETERSON: This is Karen Peterson.

17 I'll second that motion.

18 Take a vote?

19 MR. LEGATSKI: Let's do a roll call vote.

20 Kevin, are you with me?

21 MR. MALONEY: I'm with you. I would call
22 for a vote -- I mean, in these circumstances, I would
23 just do all in favor and any object.

24 MS. MEITNER: I'm just concerned that it

1 may be difficult for the court reporter to identify in
2 that fashion.

3 MR. MALONEY: Okay. We'll do it roll call
4 then.

5 MS. MEITNER: Would you do the honors of
6 calling the members of the board, please?

7 MR. MALONEY: Yes.

8 MS. MEITNER: It's just difficult for
9 Richard, I think, because he's on the phone.

10 MR. MALONEY: Right, right. I understand.
11 Mr. Whitehouse?

12 MR. WHITEHOUSE: I would say "aye."

13 MR. MALONEY: Ms. Peterson?

14 MS. PETERSON: Aye.

15 MR. MALONEY: Mr. Baker?

16 MR. BAKER: Aye.

17 MR. MALONEY: Mr. Draper?

18 MR. DRAPER: Aye.

19 MR. MALONEY: Mr. Legatski?

20 MR. LEGATSKI: Aye.

21 MR. MALONEY: Ms. Meitner?

22 MS. MEITNER: Aye.

23 MR. MALONEY: Okay. So by a vote of six
24 to zero, the board has decided to continue the hearing

1 until 1:00 p.m. this afternoon.

2 So, Sascha, I assume we will all be
3 tapping into the meeting the same way that we did this
4 morning?

5 MS. MOHAMMED: Yes, that's correct.

6 MR. MALONEY: Okay. I will see you all at
7 1:00.

8 Oh, and can I make a request to the extent
9 it is possible, if folks could check their calendars for
10 the next week or so and see if there's any commonality of
11 ground for a potential continuance, I would appreciate
12 it. Thank you.

13 MR. LEGATSKI: All right. Are we ready to
14 adjourn for the moment?

15 MS. MEITNER: Yes, I believe we are.

16 MR. LEGATSKI: All right. We stand
17 adjourned until 1:00 p.m.

18 - - -

19 (The hearing was adjourned at 9:50 a.m.)

20 - - -

21 (The hearing reconvened at 1:08 p.m.)

22 MR. LEGATSKI: The hearing is reconvened.

23 Professor Kristl, could you tell us what
24 you've learned about your client's circumstances and

1 anything else pertinent?

2 MR. KRISTL: Yes. Thank you very much.

3 During our break, I did have an
4 opportunity to speak with my client. She is in the
5 hospital. She is currently undergoing tests and so is
6 unavailable to testify today.

7 I have also spoken with her about the
8 possibility of someone else from the Civic Association
9 being able to testify, and the reality of the situation
10 is that the Civic Association's standing involves, or
11 rests on, in part, the standing of Ms. Swain.

12 So there really isn't somebody else who
13 could step in, so I don't have the ability to present a
14 witness at this time.

15 I have spoken with counsel for both
16 permittee and DNREC. We had a conference call about
17 12:40. And at that conference call, I indicated that my
18 client is confident that she would be available to
19 testify on Monday or Tuesday. I think she's overly
20 confident in saying that she could testify tomorrow, but
21 I think Monday and Tuesday are realistic.

22 So what I think the appellants would
23 request is a short continuation of the hearing until
24 Monday or Tuesday, and that is sort of where things stand

1 from appellants' perspective.

2 MR. LEGATSKI: All right. Does anyone
3 else have comments on the ability to do things on Monday
4 or Tuesday as an alternative?

5 MR. MALONEY: This is Kevin. I would not
6 be available on Tuesday. I could be available on Monday,
7 the 20th. In fact, that is one of the only days --
8 the 20th and the 27th are the only days where I would be
9 available.

10 MR. WHITEHOUSE: This is Jamie Whitehouse.
11 Like Kevin, I am unavailable on Tuesday,
12 so for next week, it's Monday, the 20th, only for me,
13 unless we were looking at the following week.

14 MR. LEGATSKI: Anybody else?

15 MR. DRAPER: This is Jeff Draper, and --
16 yeah.

17 I am also unavailable on Tuesday, but
18 available by phone on Monday.

19 MS. PETERSON: This is Karin Peterson.
20 I'm available on Monday, the 20th.

21 MS. MEITNER: This is Pam Meitner.

22 I think I could be available. I have an
23 8:30 doctor's appointment, but I should be out of that so
24 I could at least hook in by phone and should be joining

1 shortly after that by video.

2 MR. LEGATSKI: And that's specifically on
3 Monday, the 20th, right?

4 MS. MEITNER: Yes.

5 MR. LEGATSKI: Anybody else have --

6 MR. BAKER: I am available either day.

7 MR. LEGATSKI: Okay.

8 MR. MALONEY: This is Kevin.

9 Let's try it this way just to cross-check.
10 Is there anyone who is unavailable on the
11 20th?

12 Okay. That's good. That sounds like a
13 winner. So maybe we should push it back until 9:30 given
14 Pam's situation.

15 MS. MEITNER: If that's not too
16 inconvenient for people, it would make things easier for
17 me.

18 MR. LEGATSKI: That's fine with me.

19 MS. PETERSON: It's fine with me.

20 MR. KRISTL: I think that the parties, and
21 certainly counsel for FujiFilm and for DNREC can correct
22 me, but I think each of us only has one, or maybe Bob, I
23 think, has two witnesses, but there's not a lot of
24 testimony that's going to happen, so I don't think we

1 need, like, the full 9:00 to 4:00. So I think starting a
2 little bit later I don't think will prejudice anything.

3 But counsel may have something different
4 to say on that.

5 MR. TWEEDIE: For DNREC's part, I can be
6 available on Monday, and I believe my client can as well.

7 We do have some concern, however, that,
8 you know, the public notice provisions in the CZA statute
9 are fairly explicit and their purpose is to allow public
10 to participate. That shows up in both the notice section
11 and in the prior sections of part C where it requires
12 that the public have the opportunity to attend and to be
13 heard.

14 Having had this hearing noticed for today,
15 members of the public might well not also have a future
16 day -- Monday available, and so we may well not be
17 complying with the language or intent of those sections
18 of the Coastal Zone Act Statute.

19 That's obviously not for me to decide.
20 I'm just passing along that view from our client in terms
21 of concern with public participation.

22 As far as Monday, the 20th, goes, I can be
23 available if that's what the board's decision is.

24 MR. WHETZEL: From Fuji's perspective, we

1 can be prepared to proceed on the 20th. We did discuss
2 with counsel for appellants and counsel for DNREC two
3 sort of procedural stipulations that we'd like to put on
4 the record and get everybody's agreement to if we do
5 proceed with an adjourned date, and I can recite those
6 for the board at whatever time the board would like to
7 hear them.

8 MR. TWEEDIE: Bob, I just wanted to let
9 you know that having spoken with my client, they're not
10 comfortable with a stipulation around the public notice
11 requirements.

12 MR. WHETZEL: Okay.

13 MR. TWEEDIE: They are comfortable with
14 the other one.

15 MR. WHETZEL: Okay.

16 Mr. Chairman, should I just raise those
17 issues now to see where we land on them?

18 MR. LEGATSKI: Yes.

19 MR. WHETZEL: So I think it's fair to say,
20 and counsel will certainly chime in, that the parties
21 have agreed that if we adjourn the hearing, that we will
22 proceed with the same witnesses and on the same issues
23 and on the same exhibits as have been raised in the
24 submissions that have already been made to the board.

1 And my understanding is that DNREC and
2 appellants' counsel are in agreement with that part of
3 the proposal.

4 MR. KRISTL: Appellants are.

5 MR. TWEEDIE: And also for DNREC.

6 MR. WHETZEL: Yeah.

7 We had also suggested that if we agreed to
8 a short adjournment, that the parties agree that none of
9 us will raise any objection to the notice or lack of
10 notice under the statute of regulations in this
11 proceeding or in any subsequent proceeding.

12 And I guess what I now understand is that
13 Mr. Kristl and I agreed to that, but DNREC is not in a
14 position to agree to that.

15 That doesn't -- that doesn't change Fuji's
16 position or willing to -- or willingness to make that
17 agreement.

18 MR. MALONEY: This is Kevin. Just a
19 question for Sascha.

20 Sascha, is it -- can you get to the
21 public -- the online meeting calendar and make a notation
22 that the meeting has been continued until the 20th?

23 MS. MOHAMMED: Yes, I can.

24 MR. MALONEY: Right. Okay.

1 I would say, I mean, it's not -- it's
2 obviously not ideal, but I would say, under the
3 circumstances, we're probably going to have to live with
4 that.

5 So the sooner you can get that notice
6 posted on the public meeting site, the better. And thank
7 you for that. Please. Thank you.

8 MS. MEITNER: May I ask a clarification?

9 Is that the Coastal Zone Industrial
10 Control Board site?

11 MR. MALONEY: Well, what I was referring
12 to is the public meeting calendar that's on the State of
13 Delaware website.

14 MS. MEITNER: In addition, is it possible
15 to put a notice on the Coastal Zone Industrial Control
16 Board site?

17 There's a blip for this appeal hearing,
18 and on that site, there's also a button, basically, to
19 get into the hearing. And if we could update that so
20 anyone going to that site could join the hearing on
21 Monday, and the notice would be up that the hearing was
22 continued, I think that would be a good step in keeping
23 the public informed.

24 I think that's a DNREC site, but I have no

1 idea who monitors or controls it.

2 MS. MOHAMMED: That can be done.

3 MS. MEITNER: Okay.

4 Sascha, if you can -- if you could make
5 that happen, too, that would be very wonderful.

6 MS. MOHAMMED: Yep. Will do.

7 MS. MEITNER: Thank you.

8 MS. MOHAMMED: I just want to clarify.

9 Are we starting at 10:00 a.m. on Monday?

10 MS. MEITNER: I thought 9:30 was the time
11 discussed.

12 MS. MOHAMMED: Okay.

13 MR. MALONEY: This is Kevin.

14 So I guess, with that, if there's nothing
15 further from anyone, we would need a motion from a board
16 member to continue the hearing until Monday at 9:30.

17 MS. MEITNER: Mr. Chair, I move to
18 continue this hearing on Monday, September --

19 MR. LEGATSKI: 20th.

20 MS. MEITNER: -- 20th. Thank you.

21 MR. LEGATSKI: Uh-huh.

22 MS. PETERSON: I'll second that.

23 MR. LEGATSKI: Shall we go around the room
24 with a voice vote?

1 MS. MEITNER: It's probably easier for the
2 record.

3 MR. MALONEY: Okay.

4 Ms. Meitner?

5 MS. MEITNER: Aye.

6 MR. MALONEY: Ms. Peterson?

7 MS. PETERSON: Aye.

8 MR. MALONEY: Mr. Baker?

9 MR. BAKER: Aye.

10 MR. MALONEY: I think I heard an "aye"
11 there. Was that Mr. Baker?

12 MR. BAKER: Yes, yes.

13 MR. MALONEY: Okay. Thank you. I'm
14 sorry.

15 Mr. Whitehouse?

16 MR. WHITEHOUSE: Aye.

17 MR. MALONEY: Mr. Draper?

18 MR. DRAPER: Aye.

19 MR. MALONEY: Thank you.

20 And Mr. Legatski?

21 MR. LEGATSKI: Aye.

22 Are there any other...

23 MR. MALONEY: Go ahead. I'm sorry. Go
24 ahead, Richard.

1 MR. LEGATSKI: I was just going to say, is
2 there anyone else who has not yet voted? I don't think
3 so.

4 I would say the "ayes" have it. We will
5 proceed next Monday at 9:30.

6 MR. KRISTL: And I just want to, for the
7 record, thank the board for accommodating this obviously
8 unexpected circumstance.

9 MR. LEGATSKI: Well, thank you for
10 arranging the change to deal with the circumstance.

11 MS. MEITNER: And we wish your client a
12 speedy recovery.

13 MR. KRISTL: Thank you.

14 MR. LEGATSKI: Yes, yes.

15 Are we -- is there anything else for
16 today?

17 MR. MALONEY: This is Kevin.

18 I don't think so.

19 MR. LEGATSKI: Then I suggest we adjourn.
20 I'm sorry?

21 MR. MALONEY: It's Kevin.

22 I don't think -- there's nothing further.

23 MR. LEGATSKI: All right. Then I would
24 suggest that we make a motion to adjourn for today and

1 resume on Monday.

2 MS. MEITNER: I think we just did that.

3 MR. LEGATSKI: Okay, then. I'm sorry. I
4 got myself tangled up in the back and forth. Anyway,
5 okay.

6 Then we stand adjourned for today.

7 (The hearing adjourned at 1:23 p.m.)

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I do hereby certify that the foregoing hearing was taken before me, pursuant to notice, at the time and place indicated; that the statements of participants were correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the transcript is a true record of the statements made by the participants; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand this 17th day of September, 2021.



Notary Public

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