

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

IN THE MATTER OF:)
)
COASTAL ZONE STATUS DECISION) DECISION AND ORDER
REGARDING APPLICATION OF)
DUNN DEVELOPMENT COMPANY, INC.)

INTRODUCTION

1. On Wednesday, November 18, 1981, at 1:00 p.m., the Coastal Zone Industrial Control Board (hereinafter "Board") held a hearing, at the University of Delaware, Lewes, Delaware, to consider cross-appeals filed by Dunn Development Company, Inc. (hereinafter "Dunn") and Pilot Point Association of Owners (hereinafter "Pilot Point") challenging the decision of the Acting Director of the Office of Management, Budget and Planning (hereinafter "Acting Director") which held that Dunn could operate a bulk transfer facility in Lewes because such a bulk transfer facility was in operation at the same location before the effective date of the Coastal Zone Act.

2. The hearing was conducted by Dr. Donald F. Crossan, Chairman of the State Coastal Zone Industrial Control Board. Other members of the Board present at the hearing were: Mrs. Lynn Williams, Mr. Charles W. Cole, Dr. V. Eugene McCoy, Mr. Jack Roe, and Mr. John Allen. The Honorable Nathan W. Hayward was in attendance for only part of the hearing and took no part in the decision. Roger A. Brown, and W. Harding Drane, Jr., Deputy Attorneys General, acted as counsel to the Board.

3. Richard J. Abrams, Esquire, Stephen E. Herrmann, Esquire, and James L. Myers, Esquire, represented Dunn Development Company, Inc. Dunn's witnesses were Mr. T. Phillip Dunn and Mr. Richard S. Neville. David Swayze, Esquire, and Dennis Spivack, Esquire, represented Pilot Point. Pilot Point's witnesses were the Honorable Harry Derrickson, Richard Stimson, George Gibson, Dr. Jonathan H. Sharp, Wadsworth Owen, and Alfred Stango. Catherine S. Mulholland, Esquire represented the Acting Director. She called no witnesses. In accordance with the rules and regulations of the Board, members of the audience posed questions to the witnesses and were provided the opportunity to submit oral and written statements to the Board.

4. Prior to the hearing, counsel for the Board, Dunn, Pilot Point and the Acting Director conducted a pre-trial conference. As a result of said pre-trial conference, the parties submitted legal memoranda to the Board on the issues raised in this appeal.

PROCEDURAL REQUIREMENTS

Pursuant to the provisions of 7 Del.C. §7007 any person aggrieved by a final decision of the Director of Office of Management, Budget and Planning* under 7 Del.C. §7005(a)

* Effective November 1, 1981 the Secretary of the Department of Natural Resources and Environmental Control will perform the functions previously performed by the Director of the Office of Management, Budget and Planning.

may appeal that decision to the Board within fourteen (14) days following announcement by the Director of his decision. Appeals of the decision of the Director shall be conducted in accordance with 29 Del.C. §10125 under regulations promulgated pursuant to 29 Del.C. §10112. Pursuant to 7 Del.C. §7007, the Board may affirm or reverse the decision of the Director with respect to the applicability of any provision of 7 Del.C. Ch. 70 to a proposed use; it may modify any permit granted by the Director, grant a permit denied by him, deny a permit, or confirm his grant of a permit; however, the Board may grant no permit for uses prohibited by 7 Del.C. §7003. The Board must render a final order within 60 days following receipt of the appeal notification.

SUMMARY OF THE EVIDENCE

1. The Acting Director introduced into the record various documents relating to (a) the status decision application and decision, (b) the appeal applications, and (c) other affidavits and background materials. This evidence was not controverted and showed that on May 22, 1981 Dunn Development Company requested a coastal zone status decision from the Acting Director, which would allow it to operate a bulk transfer facility on a 63.5 acre parcel of land in Lewes which is presently owned by Fisher Enterprises, Inc., and on which a bulk transfer facility was operated on June 28, 1971. A decision was issued by the Acting Director on September 10, 1981. The decision

was published in the newspaper on September 16, 1981. Pilot Point appealed on September 23, 1981 and Dunn appealed on September 30, 1981.* The decision of the Acting Director was that because there was a bulk transfer facility in operation on the effective date of the Coastal Zone Act, the facility is not subject to the prohibitions against new bulk product transfer facilities set forth in §7003 of the Coastal Zone Act. The Acting Director further held that a non-conforming bulk product transfer facility cannot be expanded or extended, but that Dunn could operate the bulk transfer facility provided it does not substantially change the character of the facility as it existed at the time the Act was adopted. In connection therewith, the Acting Director also held that Dunn could restore the existing pier as it existed in 1971 and that it could make modifications to the pier to reflect current codes and requirements as well as improvements in technology but that the basic design and configuration of the pier could not be changed.

2. Phillip Dunn, President of Dunn, testified as to the use of the facility in question in 1971. He further testified that his company intends, among other proposed uses,

* The question of whether Dunn made a timely appeal was not raised. The Board will assume that publication in the newspaper was the date of announcement and thus Dunn's appeal was filed within 14 days.

to commence bulk transferring of coal at the facility. Richard S. Neville, Vice-President of Dunn, testified about the productive capacity of the facility as it existed in 1971, stating that the facility could handle fifteen million tons of liquid product per year and fifteen million tons of solid product per year. He also testified as to how the coal would have to be stored should coal operations be commenced and that there would be adequate protection to the environment if the facility was used as a coalport.

3. Representative Harry Derrickson testified that he was a member of the Delaware General Assembly in 1971 when the Coastal Zone Act was passed and that the intent of the General Assembly at that time was to exclude any new bulk transfer facilities in the coastal zone and to avoid the adverse environmental impact that an operation of the port Dunn is proposing would create. Richard Stimson, Project Manager for Dunn, was next called by Pilot Point to testify. His testimony concerned the coal trains that would serve the proposed coalport. He testified that the coalport was capable of handling two hundred railcars per day and that a train 200 cars would be 4850 feet long. George Gibson, who was employed by the owner of the facility in 1971, testified as to the uses of the buildings as he remembered them to be in 1971. His testimony indicated that he did not know the capacity of the buildings in the facility. Dr. Jonathan Sharp, an Associate Professor of Chemical Oceanography at the Univer-

sity of Delaware, in Lewes, testified as an expert on the environmental impact of coal on the bay. He testified that both because of dust and rain water run-off that coal was a material that posed a severe threat to the environment. Wadsworth Owen, Director of Marine Operations at the University of Delaware, also testified as to the negative environmental impact of coal dust. Finally, Mayor Alfred Stango of Lewes testified to the deleterious effects of the presence of long coal trains in Lewes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board agrees with the decision of the Acting Director (which was not in issue) that the facility in question was a bulk transfer facility in operation on the effective date of the Coastal Zone Act and thus is a permissible non-conforming use.

2. Dunn contends however that it was improper for the Acting Director to hold that the character of the facility could not change and that the design and configuration of the pier at the facility could also not change from what existed in 1971. The Board disagrees. Seven Del.C. §7003 provides that offshore gas, liquid, or solid bulk product transfer facilities which were not in operation on June 28, 1971 are prohibited in the coastal zone and 7 Del.C. §7004(a) further provides that any non-conforming use in existence and in active use on June 28, 1971, shall not be prohibited. The Board

does not read this language to require a bulk transfer facility to remain static with the product being transferred always remaining the same; however, the Board does conclude that the word "use" refers to the nature of the facility in existence on June 28, 1971 and thereby limits future use of the facility to those operations which, both in kind and quantity, could, in fact, have been performed in 1971. The Board reads the Acting Director's reference to "change of character" in his decision to mean that modification of the facility which would permit uses or operations that could not be accomplished on June 28, 1971 are prohibited. Accordingly, the Board concludes that the Acting Director's decision on this point was correct. The Board believes this analysis to be consistent both with the intent of the act, which is to prohibit new bulk transfer facilities, see 7 Del.C. §7001, and gradually eliminate existing bulk transfer facilities (and other non-conforming uses) through attrition, and with existing Delaware case law on non-conforming usage, which provides that a new use differing in quality or character is prohibited unless otherwise provided by statute. New Castle County v. Harvey, Del. Ch., 315 A.2d 616 (1974). As a result of its analysis, the Board necessarily concludes that the Acting Director was correct in requiring that the pier maintain the same design and configuration as it had on June 28, 1971 and may not be modified in order to adapt it to operations that could not have been performed on June 28, 1971.

The Board further reads the Acting Director's decision to provide that detailed plans for future use of the facility must be submitted to the Secretary of the Department of Natural Resources and Environmental Control for a separate status decision. The Board specifically endorses and affirms this portion of the Acting Director's decision. The application of Dunn referred to many possible uses of the facility, including a bulk coal transfer facility. Inasmuch as the use of the facility as a bulk coal transfer facility was not specifically addressed by the Acting Director, the Board believes that until specific plans are submitted to the Secretary for use of the facility there can be no determination by this Board that a bulk coal transfer facility either would or would not result in a use not in existence on June 28, 1971. Whether a coal transfer facility would be a different use is ultimately a factual decision that cannot be made until all the relevant circumstances have been presented to and considered by the Secretary.

3. In its appeal, Pilot Point requested the Board to modify the Acting Director's decision in three ways: (a) to expressly prohibit the bulk transfer of coal; (b) to limit the proposed bulk transfer use to those facilities actually used for bulk transfer on June 28, 1971; and (c) to only permit bulk transfer of liquid products. The Board believes that its analysis of the issues raised by Dunn likewise address

these requests as well. However, to the extent the Board's responses do not answer the requests for modifications, the Board can express no comment or opinion on such requests. Under 7 Del.C. §7007(a) the Board can only modify a permit granted; however, here there was no permit granted, only a status decision, and the Board may only affirm or reverse such decision.

4. Accordingly, by a vote of six to zero the Board concludes that the decision of the Acting Director is correct as a matter of fact and law and should be affirmed.

DECISION AND ORDER

IT IS HEREBY ORDERED that the status decision of the Acting Director of the Office of Management, Budget and Planning be affirmed.

Donald F. Cronan

Lynn W. Williams

V.E. McCoy

Charles W. Cole

Jack Dor

John L. Allen

Dated:

