

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

IN THE MATTER OF)	
)	
APPEAL OF FISCHER)	APPEAL NO. 192
ENTERPRISES, INC. FROM)	
COASTAL ZONE STATUS DECISION)	ORDER

NATURE OF THE PROCEEDINGS

On June 25, 1986 Fischer Enterprises, Inc. (Fischer) applied for a Coastal Zone status decision to permit the bulk transfer of liquid fertilizer from vessel to vessel at Big Stone Anchorage. By letter dated August 25, 1986, John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control found that such operation would be prohibited. On September 5, 1986, an appeal of that decision was taken to the State Coastal Zone Industrial Control Board (Board). On October 10, 1986, the Board's counsel held a telephone conference with counsel for the Department of Natural Resources and Environmental Control (Department) and Mr. Robert A. Fisher, Jr. On October 16, 1986 at 7:00 p.m. at the Auditorium of the Department in Dover, Delaware a hearing was held before the Board on the appeal.

Members of the Board present were Dr. Donald F. Crossan, Chairman, Mrs. Lynn Williams, Mr. Harry M. Fischer, III, Mr. Louis H. Papineao, Dr. V. Eugene McCoy and Mr. Jack Roe. Malcolm S. Cobin, Assistant State Solicitor acted as counsel to the Board. The Department was represented by Robert Thompson, Deputy Attorney General. Fischer was represented by Donald Reid,

Esquire. The Board held the hearing pursuant to 7 Del. C. c. 70.

SUMMARY OF THE EVIDENCE

The Board made part of the record the Chronology which included the application, decision of the Secretary, all appeal documents and notices required by law. Counsel for Fischer stated its position that it believed that the 1981 decision of the Board in Dunn Development Company, Inc. was controlling. Fischer argued that the proposed vessel to vessel transfer was nothing more than use of the existing dock storage facilities and did not change the operation in kind or quantity.

Mr. Robert Fischer, Jr., Vice President of Fischer testified that Fischer wished to use the vessel to vessel transfer to bring in liquid fertilizer. Fischer Exhibit 1 which was admitted was a letter from Mr. Karl T. Johnson of the Fertilizer Institute which was offered as evidence that the proposed use would not be a danger. Mr. Fischer testified that the facility had been in use for such purposes for thirty to forty years. He testified that Fischer had an 1,100 foot dock and had off-loaded one vessel each year in 1981, 1983 and 1986 from barges to smaller vessels. However, this was later clarified to say that this was not done within the Coastal Zone. Mr. Fischer testified that there would be no change in product and no additional land, facilities or quantity. He further testified that this use could have been done prior to 1971. Fischer offered Exhibits 2, 3, 4 and 5 which were ullage reports

which showed vessel to vessel transfers but none at Big Stone Anchorage. Also introduced as Exhibit 6 was a copy of the Dunn Development decision of 1981, Exhibit 7, a letter from John Sherman of the Department to Mr. Robert A. Fischer, Jr. and Exhibit 8, a letter of December 8, 1982 from John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control to Mr. John A. Fischer, Jr., both letters relating to the movement of the storage tanks.

Mr. Fischer testified that in 1986 he was contacted by Mr. Valls about an overseas shipment which would need a vessel to vessel transfer to be unloaded at Fischer's dock. Someone at U. S. Customs had told Mr. Valls that there might be a problem with the Coastal Zone Act. Mr. Fischer testified that he contacted the Department and was initially told it would not be prohibited. He then stated that he was later told the Department had contacted Deputy Attorney General Regina Mullen who had stated that a status decision request was needed. Subsequent to that, he was told that Deputy Attorney General Mullen had advised that such a bulk transfer would be prohibited. Mr. Fischer stated the reason a vessel to vessel transfer was needed was because of the draft of the vessel. If not off-loaded then the vessel would have to go to another terminal and be off-loaded to smaller barges.

In accordance with the Board's regulations, it allowed cross-examination from members of the audience. Under such cross-examinations, Mr. Fischer acknowledged that this would be a vessel to vessel transfer at Big Stone Anchorage and that no such

transfer had been conducted at Big Stone Anchorage prior to 1971 when the Act became effective. Mr. Fischer stated that there had been vessel to vessel transfers prior to 1971 but not in Delaware Bay. He stated that none had been done in Delaware Bay until 1981. Finally, he stated that because of the problems, the ship that was the subject of this particular application in June of 1986 was unloaded at Brown Shoal, outside the Coastal Zone.

Mr. Robert McPherson of the Department then testified on behalf of the Department. He stated that on June 13 he became aware of the proposed transfer and after several attempts, contacted Mr. Valls and told him of the possible problem with the Coastal Zone Act. He advised Mr. Valls to apply for a status decision. He then contacted the Coast Guard and was told that the Coast Guard had no knowledge of any transfers within the Coastal Zone waters prior to June 28, 1971. He then contacted Deputy Attorney General Regina Mullen who advised him that Fischer should file a status decision application. On June 25, 1986 he met with Mr. Robert Fischer, Jr. and assisted him in filling out an application. At that time, he admonished Mr. Fischer that he believed such a bulk transfer might be prohibited. On June 26, 1986 he told Mr. Fischer that Deputy Attorney General Mullen had advised that such a transfer would be prohibited. He stated that he never implied to Mr. Fischer that such a transfer would be alright, although under cross-examination, he did state that he told Mr. Fischer perhaps there might be a loophole.

Counsel for the Department stated its position that the

proposed vessel to vessel transfer at Big Stone Anchorage was a different type of activity and not conducted prior to 1971. It was further the Department's position that Fischer presently operates under a nonconforming use in the Coastal Zone and that by law, nonconforming uses are to be restricted with an eye towards eventually eliminating them by attrition, not expanding them. The Department also argued this was a different facility.

FINDINGS OF FACT

The question presented to the Board by this appeal is whether a vessel to vessel bulk transfer of liquid fertilizer at Big Stone Anchorage is part of the nonconforming uses of Fischer property and therefore, can be carried out without the necessity of a permit. In essence, Fischer is asserting that such transfer is a nonconforming use under 7 Del. C. sec. 7004(a). The Board believes that the facts are clear and do not support such a nonconforming use. By Mr. Robert Fischer, Jr.'s own testimony, which was in agreement with that of Mr. McPherson of the Department, no vessel to vessel bulk transfer of this type occurred at Big Stone Anchorage prior to June 28, 1971, although such transfers occurred in waters outside the Coastal Zone both prior to and subsequent to that date.

The Board further finds that factually this use is not part of the use of the Fischer property which was granted a nonconforming use status. Not only is the Anchorage several miles off the dock of Fischer, it is not Fischer property or controlled by Fischer. Contrary to the assertion of Fischer, the

Board finds that the vessel to vessel transfer would be a separate and distinct type of bulk product transfer and not the same operation as being conducted at Fischer's dock. The port facilities for the transfer of bulk products from vessel to vessel would be a "bulk product transfer facility." Coastal Barge Corporation v. Coastal Zone Industrial Control Board, et al., Del. Supr., 492 A.2d 1242, 1247 (1985).

THE LAW

Pursuant to 7 Del. C. sec. 7007, the Board has the power to affirm or reverse the decision of the Secretary of the Department "with respect to applicability of any provisions of this Chapter to a proposed use." Seven Del. C. sec. 7004(a) provides in part:

Except for heavy industry uses, as defined in section 7002 of this Title, manufacturing uses not in existence and in active use on June 28, 1971, are allowed in the coastal zone by permit only, as provided for under this section. Any nonconforming use in existence and in active use on June 28, 1971, shall not be prohibited by this Chapter. All expansion or extension of nonconforming manufacturing uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this Chapter, are likewise allowed only by permit.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board concludes that the use proposed was not in existence and in active use on June 28, 1971. Specifically, the Board concludes that there was

no such use at Big Stone Anchorage prior to 1971 by Fischer, or anyone else, based on the evidence. Unlike Dunn Development Company, Inc. in 1981 where a new product was going to be substituted for part of the capacity of the facility without changing the size or character of the facility, here a new activity, namely vessel to vessel bulk transfers at Big Stone Anchorage is planned, which operation was not in existence and in active use in 1971 would be commenced. Accordingly, the Board's decision in Dunn is inapposite.

Further, it is clear that the intent of 7 Del. C. sec. 7004(a) is not to allow any extension or expansion of a nonconforming use without a permit. This embodies the traditional law about nonconforming uses that they are allowed to exist with the idea that they will not grow and will become smaller and eventually become extinct by attrition. New Castle County v. Harvey, Del. Ch. 315 A.2d 616 (1974). The Board therefore concludes that the proposed use was not in existence and in active use on June 28, 1971, and would constitute an expansion or extension of a nonconforming use, if not an outright new use, for which a permit would be necessary in either case.

DECISION AND ORDER

For the foregoing reasons, the Board hereby affirms the decision of the Secretary this 28th day of October, 1986.

Lynn Williams
Lynn Williams

Harry M. Fischer, III
Harry M. Fischer, III

Louis H. Papineau
Louis H. Papineau

V. Eugene McCoy
V. Eugene McCoy

Jack T. Roe
Jack T. Roe