BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD

OF THE STATE OF DELAWARE

DEGUSSA DELAWARE, INC.,)
)
Appellants)

OPINION AND ORDER ON APPEAL
FROM THE STATE PLANNER: REVERSED

(November 12, 1973)

David N. Williams, Esquire; Cooch & Taylor, Wilmington, Delaware for Appellants.

David R. Kiefer, State Planner, for the State Planning Office.

This matter comes before the Coastal Zone Industrial Control Board under §7007(a) of the Coastal Zone Act (hereinafter "Act"), which permits an appeal from any final decision of the State Planner with respect to the applicability of any provisions of the Coastal Zone Act. DeGussa Delaware, Inc. (DeGussa) has appealed the decision of the State Planner which found that a proposal by DeGussa to construct an aerosil plant within the Coastal Zone was prohibited because that plant would be a heavy industry use as defined by §7002(e) of the Act. The State Planner is required by 7 Del. C. §7005 to initially determine whether or not a proposed use is a heavy industry use, a use allowable only by permit, or a use requiring no action. DeGussa applied for a Coastal Zone status decision

on July 24, 1973. After considerable research by members of the Planning Office staff and several conferences with DeGussa, the State Planner determined on August 31, 1973 that the proposed facility was a prohibited heavy industry use.

The use which was prohibited by the State Planner's status decision is a chemical plant for the production of fumed silica. The proposed site is located north of Delaware City in a heavily industrial area currently zoned M-3 by New Caslte County. This site was selected because of the availability of raw materials from neighboring industries such as Getty Oil Company - Eastern Operations, Inc., Air Products & Chemicals, Inc., and Diamond Shamrock Chemical Company, Inc. The twenty-five acre site is currently utilized as farmland.

This appeal is based on the ground that the proposed facility is not within the heavy industry prohibition of the Act. DeGussa contends that the State Planner erred for four reasons:

(1) The conjunctive "and" in the definition of "heavy industry use" automatically precludes any facility covering less than twenty acres from the definition of "heavy industry use";

(2) The proposed facility will not have a sufficient amount of the type of equipment listed in the Act as characteristic of a heavy industry use;

(3) The proposed "light" chemical plant is not the type of chemical plant designated as a "heavy industry use";

(4) The facility will not have a potential to pollute when equipment malfunctions or human error occurs because the proposed facility is identical to facilities which the appellant has operated in a pollution free manner for many years.

Appellants primary argument for reversal is that no "use" is a heavy industry use unless that use involves more than twenty acres. "Heavy industry use" is defined at 7 Del. C. §7002(e) as:

> "a use characteristically involving more than twenty acres, and characteristically employing some not necessarily all of such equipment such as, but not limited to, smoke stacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickeling equipment, and waste treatment lagoons; which industry although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulose pulp paper mills, and chemical plants such as petro-chemical complexes. Generic examples of uses not included in the definition of 'heavy industry' are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments."

Appellant argues that the first part of the conjunctive in the definition is not met and therefore the plant does not

fall within the prohibited classification. We reject this contention. Appellant places undo emphases upon the phrase "more than twenty acres", while ignoring the phrase "characteristically involving". It is our opinion that an industry which can be constructed upon less than twenty acres, but has historically characteristically involved more than twenty acres could be prohibited under the Act. The Legislature did not intend that the Act would permit the proliferation of fifteen acre oil refineries, basic steel manufacturing plants, basic cellulose pulp paper mill, or chemical plants.

We do not agree with DeGussa that "the application made it clear that only six acres were to be used". A close reading of the application indicated two references to twenty-five acres. The first page of the application indicates "location of project site 25 acres located to the west of the intersection Road No. 406...". The property in question is referred to a second time on page two as "the 25 acre parcel of land described in the attached plan". There is no clear statement within the application which would have required the State Planner to conclude that a maximum of six acres would be used by the proposed facility. The application does indicate at page four that "[T]he area required for the plant including parking facilities and shipment by either truck or rail, is five to six acres".

Mr. Williams' letter of October 2, 1973 which clearly states that DeGussa plans to use only six acres was in response to the Status Decision of the State Planner, not a portion of the original application.

We note that DeGussa has stated for the record that its plant will involve a maximum of six acres. For purposes of this opinion, we will accept as a basis for this opinion DeGussa's statement that "a fence could be erected around six acres and, within that fence, all the facilities for production, packaging, and transportation of aerosil would be enclosed".

If the proposed facility is not exempt from the "heavy industry use" provision as a result of the six acre site, DeGussa argues that the facility is exempt because it does not employ the type of equipment listed as characteristic of a "heavy industry use". Upon the unrebutted statement of DeGussa, it would appear that the aerosil plant will employ no smoke stacks, but rather vent pipes which are similar in appearance to smoke stacks; employ four or five silos or tanks of 25,000 gallon capacity; employ three 50 feet in height distillation or reaction columns; employ continuous reaction closed system chemical processing equipment; employ no scrubbing towers, because

scrubbing will be incorporated into the reaction columns mentioned above; employ no pickeling equipment; and employ no waste treatment lagoons. The equipment listed in the Planner's decision would appear to be incorrect based upon new information supplied by DeGussa during the hearing. Of the equipment listed in the Act as characteristic of "heavy industry use", the proposed facility will employ five tanks, three combination scrubbing-reaction columns and chemical processing equipment. It is our opinion that the character and quantity of equipment to be utilized in the proposed facility is not determinative as to the "use" classification of the facility.

DeGussa seeks to buttress its position by contending that the "chemical plant" which the Act lists as an example of heavy industry, is different in character from the proposed aerosil plant in that the aerosil plant will be a "light chemical manufacturing plant". We reject this contention. It is clear that by referring to "chemical plants" without the qualification "basic", after having listed "basic steel manufacturing plants" and "basic cellulosic pulp paper mills", the Legislature intended that the many varities of chemical plants must be evaluated on individual merit.

The final argument advanced by DeGussa is that the proposed facility will not have the potential to pollute. We reject this argument on the basis of the information supplied by DeGussa and the evaluation supplied by Mr. N. C. Vasuki, the Director of the Division of Environmental Control of the Department of Natural Resources and Environmental Control. It is our common sense evaluation, given the current state of control technology and the human factor, that any facility handling large quantities of chemicals such as chlorine will a potential to pollute if equipment malfunctions or human error occurs. However, it is clear from the record that DeGussa operates identical plants in other parts of the world without significant pollution.

After a careful review of the record and extensive discussion among ourselves, we find that the facility proposed by DeGussa is not a "heavy industry use". This decision was reached after examining all of the factors which define "heavy industry use". We are persuaded by the following factors: the facility will use only six acres of land, far less area than the twenty acre standard of the Act; the facility will employ only a limited quantity of the equipment listed by the act as characteristic of a "heavy industry

use"; the facility is identical to facilities which the appellant operates without detrimental effect upon the environment; the selected site is in an industrial area; and the site is zoned and planned by New Castle County to be industrial.

We wish to make it clear that our reversal of the State Planner's decision is not intended to reflect detrimentally upon the Planner or his staff. It is clear from the record that the appellant made substantial additional information available to the Board. We note for the benefit of the appellant and future applicants that the applicant bears the burden of establishing the use classification of the proposed facility. Chancellor, then Judge, Quillen in Kreshtool v. Delmarva Power & Light Company, Civil Action No. 5423, 1972 in discussing the operation of the Act states "In order to receive a permit, the applicant must establish to the satisfaction of the State Planner that the proposed use is not a heavy industry use."

For the reasons stated above, the decision of the State Planner is reversed. An appropriate Order is entered this day.

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)
. Appellants)

ORDER

AND NOW, to wit, this 12th day of November, 1973, a public hearing having been held on October 18, 1973, and it appearing that the appellant did establish that the proposed aerosil plant is not a "heavy industry use" as defined by the Coastal Zone Act,

THEREFORE and for the reasons stated in this Board's opinion of November 12, 1973, with the unanimous action of the six of the ten Board members present and considering this appeal, be and is hereby reversed.

COASTAL ZONE INDUSTRIAL CONTROL BOARD

George W. Dorrilow, Chairman

Thomas D. Whittington, Jr.
Deputy Attorney General
Attorney for Coastal Zone
Industrial Control Board