BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN RE: ARTHUR J. SCHULTE, PARTICIA C. SCHULTE, MICHAEL V. TAYLOR, GEORGE B. COLE, GERALDINE COLE, ELIZABETH BERGSTROM, JOHN BULLEN, LENA C. BULLEN, JEAN G. BRITTINGHAM, CATHERINE, P. MCKEE, LINDA MITCHELL, JOSEPH MITCHELL, GERALD ALTER, CHARLOTTE ALTER, EDWARD HALLER, CHARLES POTE, ROBERT BERGSTROM, MARY BERGSTROM, AND DARLENE POTE MORGAN (#92-02), MURRAYS ESTATES PROPERTY OWNERS ASSOCIATION, INC. (#92-03), WHITES HAVEN WATER COMPANY/CAT HILL WATER COMPANY (#92-04), SUSSEX SHORES WATER COMPANY (#92-05), TOWN OF BETHANY) BEACH AND SALT POND ASSOCIATES (#92-07))	)	Consolidated Appeal Nos. 92-02 through 92-05 and 92-07

FINAL ORDER

On April 28, 1992, the Board held a hearing on the above captioned consolidated appeals. The Board members present were Thomas J. Kealy, Chairman, Clifton H. Hubbard, Jr., Joan Donoho, Mary Jane Willis, Edward Cronin and Richard Sames. At the conclusion of that day's testimony, the Board continued the hearing until May 5, 1992, to allow the remaining evidence to be presented. Mary Jane Willis was unable to attend the May 5, 1992, hearing and, accordingly, she has not voted on this decision. Steven C. Blackmore, Deputy Attorney General, advised the Board. Whites Haven Water Company ("Whites Haven")/Cat Hill Water Company ("Cat Hill") were represented by John Sergovic, Jr., Esquire and Althea E. McDowell, Esquire; Newton Acres and Murray's Estates property owners were represented by Robert V. Witsil, Jr.; Sussex Shores Water Company

("Sussex Shores") was represented by James D. Griffin, Esquire; the Secretary of the Department of Natural Resources and Environmental Control ("DNREC" or the "Secretary") was represented by Kevin P. Maloney and David L. Ormond, Deputy Attorneys General; and The Town of Bethany Beach ("Bethany Beach") and Salt Pond Associates ("Salt Pond") were represented by Jeremy W. Homer, Esquire. Bethany Beach and Salt Pond had been allowed to intervene into these proceedings by prior Order of the Board, which also consolidated these appeals.

These appeals involved Secretary's Order No. 91-0011 and 89-CPCN-02 and two separate applications by water utilities for a certificate of public convenience and necessity ("CPCN"). A utility must obtain a CPCN prior to establishing water service to a specific area. A CPCN is issued under statutory authority from 7 Del. C. sec. 6075 et seq. In brief, Sussex Shores filed an application for a CPCN which encompassed a large territory adjoining its existing territory, while Whites Haven was organized for the purpose of providing water to a one-hundred-fifty lot subdivision (Cedar Landing) within the Sussex Shores application area. White's Haven's CPCN application was denied by DNREC while Sussex Shores' application was granted in part and denied in part. The subdivision being developed by Salt Pond and the area known as Quillen's Point were excluded from the CPCN (89-CPCN-02) granted by the Secretary to Sussex Shores. The Murray's Estates and Newton Acres property owners had unsuccessfully requested exclusion from this CPCN. Sussex Shores received these areas as well as Cedar Landing.

The following summary of the evidence is not intended to be a complete description of all the testimony and evidence offered.

SUMMARY OF EVIDENCE

Robert Witsil opened the hearing on behalf of Newton Acres and Murray's Estates property owners. These areas are located near the northern end of the Cedar Landing peninsula in Sussex County. Murray's Estates presented its testimony through William Bass, President of the Homeowners' Association. Newton Acres property owners presented evidence through testimony of Arthur J. Schulte. These property owners had been present at the original August 28, 1989 DNREC hearing. They had unsuccessfully requested that their developments be excluded from the area covered by Sussex Shores' CPCN application. Mr. Witsil argued that the new law regulating the issuance of CPCNs, Senate Bill No. 144, was designed to prevent the broad expansion into undeveloped areas which Sussex Shores was attempting. Thus, he argued that the inclusion of his clients' property in the CPCN area was contrary to law.

Mr. Bass testified that Murray's Estates contains primarily owners of single family dwellings with individual family wells for water. Murray's Estates contains approximately 55 residences and 20 lots. He did not believe that they had any water problems and there was no present need for a water utility transmission line. Their wells were functioning properly. While the majority of their wells were drilled into the closest aquifer, he believed that they could drill into

lower aquifers in the event of problems. A letter dated March 11, 1992 from Senator Richard Cordrey to Secretary Clark was offered as an exhibit. This letter, drafted after passage of S.B. No. 144, indicates Senator Cordrey's belief that Murray's Estates and Newton Acres should not be included in a CPCN absent health or environmental justification.

Arthur J. Schulte, a resident of Newton Acres, testified that their water is excellent, although surrounding areas do have water problems. Newton Acres has 16 lot owners. Mr. Schulte's greatest concern was that his costs would dramatically increase if he were served by Sussex Shores. He also objected to the unfair exclusion of the Quillen's Point area which is due east of Newton Acres.

J. Harry Adams testified under subpoena that he is the President of the Quillen's Point Homeowners Association, which operates its own water distribution company to provide water to the 52 improved lots in the area. Their system is operated by Arthur Goodwin, a permanent resident, who is a retired chemical engineer and technically qualified to operate the system. The system is monitored by the Division of Public Health. Mr. Adams stated that they have a very reliable system.

Goodwin Taylor, a principal in Hocker Farm Limited Partnership ("Hocker Farm"), the developer of Cedar Landing, testified that Hocker Farm formed Whites Haven to provide water service to that subdivision. Hocker Farm initially asked Sussex Shores to supply water but Sussex Shores rejected this opportunity due to the short timetable which Hocker Farm

desired and the failure to agree to financial terms. Goodwin Taylor also testified that Sussex Shores tries to extract cash from developers to capitalize expansion of its water system. He testified about the tax and financial implications which contributed to the failure of a Sussex Shores-Hocker Farm agreement. Hocker Farm refused to pay the large fees which Sussex Shores had requested for water service.

Mr. Sergovic argued that the Secretary ignored the new requirements of Senate Bill No. 144 when it issued this CPCN. Instead, it followed its old policy of promoting regionalization of water services. Mr. Taylor admitted that it was logical philosophically to serve Delaware's water needs through a few large water companies. This would prevent salt water intrusion into the aquifer which numerous individual wells near the beach might allow. Whites Haven introduced a letter from Stephen N. Williams of DNREC dated December 7, 1988, which contained a recommendation that Whites Haven receive the CPCN after it submitted a performance bond. However, Sussex Shores filed its CPCN application before the Whites Haven application was deemed to be complete. (The bond requirement had been imposed by DNREC). Mr. Taylor dissolved Whites Haven after its CPCN application was denied, and transferred its remaining assets to Cat Hill, a small water company operating nearby. The transfer of assets to Cat Hill was apparently designed to take advantage of tax losses.

Dean Phillips, the Town Manager of Bethany Beach, next testified under subpoena that Bethany Beach had been approached

by Salt Pond about possible water service and, after consideration, Bethany Beach decided to pursue these negotiations. Bethany Beach did ask Secretary Clark to delay issuance of the CPCN to Sussex Shores, to allow Bethany Beach to determine whether it wanted to provide water to Salt Pond. On May 18, 1990, Bethany Beach executed a water service agreement with Salt Pond. Bethany Beach is a tax-exempt organization; it does not have to pay the approximately 65% tax which Sussex Shores would have to pay. Bethany Beach submitted its CPCN application to the Secretary on May 21, 1990.

Rodney Short, President of Sussex Shores and its Chief Operations Officer, then testified about Sussex Shores' five year development plan and its expansion of its storage and treatment facilities. He indicated that the tax which is at the heart of his dispute with Goodwin Taylor is 65.9%, but that Sussex Shores imposes an additional 15% administrative fee for other services which it provides, including planning and drafting, completion of permit applications, notification, etc. Sussex Shores does request that subdivision developers pay the up-front capital costs for a transmission/distribution line, plant expansion, etc., but it refunds the lesser of 3% of revenue or 15% of its profit from each subdivision for the next 33 years or until the developer's capital contribution is returned in full. Mr. Short also indicated that he had been verbally informed by Steve Williams that DNREC planned to award the CPCN to Sussex Shores for the entire application area. Mr. Short believed that post-hearing political or lobbying pressure

resulted in the exclusion of Salt Pond and Quillen's Point from the CPCN. Sussex Shores has been in business for approximately 33 years. It is an established water utility presently serving approximately 750 units. Bethany Beach is also an established water utility.

Sussex Shores would like to serve Salt Pond with its approximately 640 lots and Cedar Landing with its approximately 140 lots so that Sussex Shores could increase its economies of scale and decrease its rates per customer. Also, fewer individual wells would provide fewer entry points for salt water contamination. Sussex Shores might service Cedar Landing initially through its existing closed system or single wells until it would be cost efficient to fund a transmission line. Similarly, Sussex Shores might serve Salt Pond individually with a closed system until it is cost efficient to tie into its main. A closed system might not offer fire protection equal to that offered by connection into a large transmission system. Mr. Short believed that joining the Sussex Shores transmission system would supply better quality water than the water available presently at Murray's Estates, Newton Acres and Quillen's Point. Sussex Shores plans to slowly expand its system inland (westward) and drill new water wells further away from the coast. Mr. Short believed that it was unfair for a municipality like Bethany Beach, which is tax-exempt, to compete with Sussex Shores, a privately owned entity. He also testified that he would not require present homeowners, such as those on

Newton Acres, to tie into Sussex Shores water until such time as they request inclusion.

Steve Williams was the next witness. Mr. Williams had been employed by the Groundwater Management Section of DNREC for approximately four years and he served as the coordinator for the CPCN Committee. He was asked about various internal DNREC memoranda. He understood that the application of Sussex Shores was going to be approved, but then Bethany Beach's application and intervention halted its approval. He also indicated that Whites Havens' application for a CPCN had been recommended for approval. He did not recall telling Rodney Short that the CPCN Committee had recommended that Sussex Shores' application be granted in full.

Ken A. Simpler, Managing Partner of Salt Pond, testified that the county has approved its plan for 380 individual residences and 160 townhouse sites. He testified that Salt Pond would like its residences to have the best possible water at the best price. Salt Pond does not want to pay the approximately 65% taxes requested by Sussex Shores. Further, it did not want service from Sussex Shores because of animosity between Salt Pond and Sussex Shores. The animosity was caused, in part, by Sussex Shores' initial reluctance to provide water, and its high rates.

The April 28, 1992, Board hearing was then adjourned until May 5, 1992. When it continued, Rodney Short indicated that a large development such as Salt Pond would be beneficial to his company's construction of a transmission line beyond Cedar

Landing. He conceded that he did provide limited ex parte communication to the Secretary without copying other parties, despite the fact that his appeal to this Board made an issue of such ex parte communication from the other parties. He had no personal knowledge that the Secretary improperly delayed the decision below. Also, Mr. Short did lobby for modifications to Senate Bill No. 144.

Bethany Beach/Salt Pond presented the testimony of Gerald Friedel, Licensed Professional Engineer, who has worked with Salt Pond. Mr. Friedel provided background on the water distribution system for Salt Pond. He was prepared to testify about the quality of the Bethany Beach system and its rates. However, the Board determined that testimony as to Bethany Beach's qualifications would be irrelevant to this proceeding, because Bethany Beach's application for a CPCN is presently pending. Mr. Friedel testified that the 1986 Tax Reform Act operates as a capital gains tax on contributions given from a developer to a utility. For a utility to avoid the impact of this tax, it must pass the tax on to the developer. Sussex Shores was attempting to pass this tax on to the developers here.

The final witness was Alan J. Farling, who was the Administrator of Groundwater Management of DNREC when these CPCN applications were filed. He had been the Chairman of the CPCN Advisory Review Committee. He does not remember telling any water utility that it would receive a CPCN prior to the Secretary's decision. While his memory was uncertain on many

specific questions regarding ex parte communications, he testified that it would not be characteristic for him to communicate approval prior to the date of written approval. In general, all of the testimony involving ex parte communications, while not entirely flattering in its revelation of the operations of DNREC, did not produce a finding of wrong-doing or a finding that the Secretary had granted a CPCN application before the date of the written decision below.

Mr. Farling indicated that the residents of Newton Acres and Murray's Estates would not be required to connect to a water utility's system until the distribution line was extended to the homeowner's development and the homeowner's individual well failed. Failure would include the need to drill a new well at the same depth or the need to drill a deeper well. While Mr. Farling was concerned about the general ground water conditions and, especially, future ground water conditions, both inside and outside of the area at issue here, he did not believe that the homeowners in Murray's Estates or Newton Acres were in imminent danger. The Board then gave the parties the opportunity to submit written closing arguments.

FINDINGS OF FACT

1. On or about August 5, 1988, Whites Haven filed its application for a CPCN to serve the Cedar Landing subdivision.

2. On or about January 30, 1989, Sussex Shores filed its application for a CPCN to serve a larger area which included the Cedar Landing subdivision, the proposed Salt Pond

subdivision and the existing developments at Quillen's Point, Newton Acres and Murray's Estates.

3. On August 28, 1989, the Secretary conducted a joint public hearing on both applications.

4. The homeowners from the developments known as Quillen's Point, Newton Acres and Murray's Estates objected to being included within the territory requested by Sussex Shores. They voiced these objections to DNREC in a timely manner. Sussex Shores did not have an agreement to serve any of these areas.

5. After the hearing, the Secretary attempted to assist the parties in their negotiations involving water service, but no agreements were reached.

6. The Secretary re-opened the record on April 9, 1991, to receive additional testimony, without notifying many of the affected individual residents.

7. The Delaware General Assembly enacted S.B. No. 144, which altered the approval process for issuance of CPCN's. This bill was signed into law on July 9, 1991. See 7 Del. C. sec. 6075 et seq.

8. The Secretary issued his Order No. 91-0011 on December 13, 1991 (the "Order"). The CPCN itself, 89-CPCN-02, was issued on January 1, 1992.

9. The Order did not contain any specific findings describing the existing water quality within the Sussex Shores application area, or any findings that the area's water supply would be insufficient.

10. Whites Haven has an executed water services agreement with Hocker Farm Limited Partnership, the developer of the Cedar Landing subdivision. Cedar Landing had been approved by Sussex County in 1987.

11. On May 18, 1990, Bethany Beach entered into a signed water services agreement with Salt Pond, the developer of the Salt Pond subdivision, which has also been approved by Sussex County.

12. There are indications that water quality in some nearby areas outside of the Sussex Shores CPCN area is poorer than water quality in some areas within the CPCN area.

13. The development proposed by Ward Development Company, which would be partially within Sussex Shores' existing service area and mostly within the proposed expansion area, has apparently been delayed.

14. Federal and state laws now impose a tax of approximately 65% on contributions from subdivision developers to utilities for the cost of, for example, distribution lines and plant expansion. Sussex Shores requests that developers pay the cost of these taxes, in addition to the capital contributions themselves. However, the capital contributions should be returned to the developer over a period of years, assuming profitability. Sussex Shores also requests that developers pay an additional administrative fee of approximately 15%. Hocker Farm and Salt Pond objected to these fees.

15. The Board found evidence of numerous ex parte contacts with the Secretary after the August 28, 1989 public

hearing. It appears that all parties were involved in these ex parte contacts and/or the legislative/lobbying process involving S.B. No. 144. However, it does not appear that DNREC was improperly influenced or that any party gained an unfair advantage as a result of these contacts. No misconduct by the Secretary was shown.

16. Similarly, the Board received evidence of a number of draft decisions or recommendations from subordinates of the Secretary involving these CPCN applications. The Board did not give these much weight. These were merely proposed decisions; they were not binding decisions from the Secretary.

17. After receipt of the Order, White Hill dissolved and transferred the majority of its assets to Cat Hill, another small water utility operated by Goodwin Taylor. It is unclear whether Whites Haven would be reconstituted as an independent water company, or continue to be controlled by Cat Hill.

18. Sussex Shores needs to service the Salt Pond and Whites Haven subdivisions and their large number of residences to serve the other areas applied for through one large efficient and economical transmission system. Absent developers' contributions and proposed revenue from these subdivisions, Sussex Shores and its existing customers cannot presently afford to interconnect the entire application area.

19. Granting a CPCN to Sussex Shores for the Murray's Estates, Newton Acres and Quillen's Point areas would not provide any immediate benefits to these areas. Sussex Shores

would probably operate Qullen's Point through its existing closed end system.

20. The testimony about the rates of various utilities was not a primary factor in the Board's decision.

CONCLUSION

Senate Bill No. 144 is the law which governs CPCN applications. It applies to CPCN applications pending on July 9, 1991, including the applications at issue here. S.B. No. 144 sec. 6080. Section 6077(a) states:

> (a) The Secretary shall grant a certificate of public convenience and necessity only where it has been ascertained that the water in the proposed service area does not meet the regulations governing drinking water standards of the State Board of Health for human consumption, or where the supply is insufficient to meet the projected demand, or:
>
> (1) The applicant is in possession of one of the following:
>
> (i) A signed service agreement with the developer of a proposed subdivision or development, which subdivision or development has been duly approved by the respective county government;
>
> (ii) A petition requesting such service signed by a majority of the landowners of the proposed territory to be served;
>
> (iii) A duly certified copy of a resolution from the governing body of a county or municipality requesting the applicant to provide service to the proposed territory to be served; or
>
> (2) The Secretary determines, by findings and conclusions based upon a public hearing record, that sound and efficient water resource planning,

> allocation, management and regulation would be implemented by the certification of a water utility service territory compromising an area larger than a service territory authorized by paragraph (a)(1) of this section. (Emphasis added).

Despite the odd numbering and categorizations, this section allows issuance of a CPCN under the following six categories:

1) Where the Secretary ascertains that the water in the proposed service area does not meet human consumption standards (sec. 6077(a));

2) Where the Secretary ascertains that the supply is insufficient to meet projected demand (sec. 6077(a));

3) Where the applicant is in possession of a signed water services agreement with the developer of a county-approved subdivision (sec. 6077(a)(1)(i));

4) Where the applicant is in possession of a petition requesting service from a majority of landowners in the area (sec. 6077(a)(1)(ii));

5) Where the applicant is in possession of a resolution from a government body requesting service (sec. 6077(a)(1)(iii)); or

6) Where the Secretary determines that sound and efficient water resource planning and management necessitate certification of an area larger than the area allowed by sub-part (a)(1). (sec. 6077(a)(2)).

In the Order, the Secretary rejected Whites Haven's application and stated that DNREC policy and regulations favor

large, established water utilities over small, developer owned utilities. The Secretary should have made S.B. No. 144 the primary focus of his analysis. Section 6077(a)(1)(i) requires issuance of a CPCN to utilities which have signed water services agreements with developers of approved subdivisions. The Secretary recognized this section when he excluded the Salt Pond area from the CPCN due to Salt Pond's contract with Bethany Beach. The exclusion of Salt Pond from the CPCN is in accordance with S.B. No. 144 and is hereby affirmed. However, the Secretary failed to recognize the water services contract between Hocker Farm and Whites Haven, in violation of sec. 6077(a)(1)(i). While comparisons between applications are implicitly authorized, the requirements of S.B. No. 144 must be followed.

The Secretary contends that the portion of the decision unfavorable to Whites Haven is supported by the "sound and efficient water resource planning...." language from sec. 6077(a)(2). This provision permits the Secretary to certify a territory "comprising an area larger than a service territory authorized by paragraph (a)(1) of this section." This provision must be interpreted to allow the Secretary to certify a CPCN territory under sec. 6077(a)(2) only if the utility also qualifies for a portion of that territory under sec. 6077(a)(1). Interpreting the statute in this manner prevents the Secretary from using sec. 6077(a)(2) to override the intent and clear language of the other portions of S.B. No. 144. Statutes should be interpreted in a harmonious manner so that

all the language is given meaning; words chosen by the Legislature should not be rendered meaningless by interpretation. Coastal Barge Corp. v. Coastal Zone Industrial Control Board, Del. Supr., 492 A.2d 1242, 1245 (1985); C & T Associates v. Government of New Castle, Del. Ch., 408 A.2d 27, 29 (1979). The primary goal of statutory construction is to determine legislative intent. Coastal Barge, 492 A.2d at 1246.

Allowing the Secretary to justify its decision against Whites Haven under sec. 6077(a)(2) would ignore the mandatory nature of "shall" in sec. 6077(a) and would render the "area larger" language in sec. 6077(a)(2) meaningless. A reading of S.B. No. 144 as a whole indicates that the Secretary was not given the power to override agreements which qualify under section 6077(a)(1). The Secretary can only grant larger territories to utilities with such agreements. S.B. No. 144 places a premium on the signed water services agreement, whether the utility which signed the contract is large or small. Although Whites Haven's operating history is checkered, S.B. No. 144 gives Whites Haven the opportunity to become a water utility, either independently or through Cat Hill. Cat Hill is apparently operating as a viable water utility and Mr. Taylor could use his experience with Cat Hill to operate Whites Haven. Therefore, the issuance of the CPCN to Sussex Shores for service to the Cedar Landing subdivision is reversed. The Secretary should have issued the CPCN to Whites Haven. If Whites Haven fails to provide water service, its CPCN should then be revoked.

Sussex Shores did not qualify for a CPCN under sec. 6077(a) or (a)(1). Sussex Shores should reapply if it obtains an agreement for water service or if water quality or supply problems arise. Sussex Shores' attempt to expand its territory and wells inland is unsupported by law at this time. The purpose of S.B. No. 144 was to allow expansion of water utilities while preserving traditional patterns of water utilization, where possible. 7 Del. C. sec. 6075. The preamble to this statute reveals the intent to limit the powers of water utilities and to hinder their expansion into large, underdeveloped rural areas. This avoids "an unnecessary bureaucratic hardship" for existing water users. See preamble to S.B. No. 144 at 1-2. The preamble is a proper source for legislative intent. Gibson v. Keith, Del. Supr., 492 A.2d 241, 247 (1985). Senator Cordrey's letter supports this interpretation, but the preferred source of legislative history is that created prior to passage of the bill at issue. Siegman v. Columbia Pictures Entertainment, Inc., Del. Ch. 576 A.2d 625, 634 (1989).

The homeowners' groups which requested to be excluded from Sussex Shores' CPCN territory should have been excluded. Sussex Shores' application for these areas did not qualify under S.B. No. 144 and excluding these homeowners is consistent with the goal of preserving traditional water use. A water utility should not be permitted to serve these areas absent a finding of poor water quality or insufficient supply or other statutory authority. These homeowners do not need the services of a large water utility at this time and they have not

requested such service. For example, Sussex Shores would initially serve Quillen's Point by operating the existing closed system. Therefore, the portion of the Order which excluded the Quillen's Point subdivision from the CPCN is affirmed, but the portion which included the Newton Acres and Murray's Estates developments is reversed. Under S.B. No. 144, Sussex Shores is not entitled to service these areas at this time.

The Board agrees with the Secretary that established, central water service is the preferred approach, primarily where salt water intrusion is a possibility. The Board is especially concerned about areas with a number of residences located on small, adjacent lots with individual septic systems. However, S.B. No. 144 limits the Secretary's ability to achieve a centralized service goal. Of course, the various utilities can still interconnect their systems. While the tax laws may have placed Sussex Shores and the other private utilities at a competitive disadvantage in comparison with tax-exempt, municipal water companies (like Bethany Beach), this inequity is not resolved by S.B. No. 144 and it cannot be cured now by this Board.

Even accepting Sussex Shores' argument that the Secretary should not have re-opened the record to accept the Salt Pond-Bethany Beach services agreement, such an error does not mandate reversal here since Sussex Shores would not have been entitled to service this area under the new requirements of S.B. No. 144. While Sussex Shores objects to the legislative

interference, its CPCN application was not grandfathered and the Board is obligated to apply the new law to this CPCN.

In conclusion, the Order is affirmed in part and reversed in part. Sussex Shores' CPCN application should have been denied. Whites Haven's CPCN application should have been granted.

The decision was unanimous.

Thomas J. Kealy, Chairman

Edward Cronin

Joan Donoho

Clifton H. Hubbard, Jr.

Richard C. Sames

DATED: July 21, 1992