

September 15, 2021

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Re: CleanBay Renewables, LLC, lapse of CU 2113

Dear Mr. Vincent and Mr. Wheatley,

On behalf of Food & Water Watch (“FWW”) and Sussex Health and Environmental Network (“SHEN”), we write to oppose the Sussex County Planning & Zoning Commission’s (the “Commission”) recent determination that Conditional Use 2113 (“CU 2113”) has not lapsed because construction or use of the site is substantially underway. As the Commission’s staff initially found, and as video and photographic evidence unequivocally shows, no construction was underway at the site more than three years after CU 2113 was adopted. Therefore, CleanBay Renewables is no longer legally permitted to begin construction, much less operation, of their proposed anaerobic digester plant, as their project is presumptively prohibited in an AR-1 district, *see* Sussex County Code § 115-20, and they no longer have a valid conditional use approval, *see* Sussex County Code § 115-174. The Commission’s determination otherwise was in clear error, and must be reversed.

On July 31, 2018, the Sussex County Council (the “Council”) voted to adopt Ordinance No. 2589, granting CleanBay Renewables, LLC (“CleanBay”) a conditional use of land in an AR-1 district to build and operate an electrical generation and nutrient recovery facility, more accurately described as an industrial natural gas and electricity production plant, denominated CU 2113.<sup>1</sup> CleanBay subsequently sought revisions to their plans and a height variance from the Sussex County Board of Adjustment.

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<sup>1</sup> <https://sussexcountype.gov/sites/default/files/minutes/073118.pdf>

On July 8, 2021, the Commission addressed CleanBay’s “Preliminary Site Plan” for a two megawatt power generation facility. CleanBay also submitted baseline water reports that had been requested by the Council in July 2018. Despite CleanBay’s submission of only a “*Preliminary Master Site Plan*,”<sup>2</sup> the Commission treated this plan as both a preliminary *and* a final site plan – which the Commission unanimously approved.

### **A Conditional Use Is Only Valid for Three Years without Substantial Construction or Use**

Sussex County Code states: “Approval of a conditional use under this article shall be valid for a period of three years after the date of approval and thereafter shall become null and void unless construction or use is substantially underway during said three-year period.” § 115-174. “Construction shall be deemed to be ‘substantially underway’ if the right-of-way has been cleared, the roadways, internal streets and/or parking areas have been rough-graded, the drainage system and/or stormwater management facilities have been rough-graded and erosion and sediment control measures are in place and being actively maintained.” *Id.*

While an applicant may seek an extension of up to six months in accordance with § 99-40C, CleanBay never sought nor received any such extension prior to the three-year grace period expiring.

### **CleanBay Failed to Commence Substantial Construction or Use within Three Years**

Three years from July 31, 2018 was August 1, 2021. Therefore, CleanBay was legally obligated to commence substantial construction or use on or before August 1, 2021 to retain CU 2113. Photographic evidence collected on August 5, 2021 by Commission staff clearly shows that construction or use was not substantially underway on that date as required by § 115-174, prompting a letter to CleanBay on August 9, 2021 informing it that the CU had lapsed.<sup>3</sup>

Video evidence collected by FWW on August 13, 2021 corroborates staff findings that no construction was underway as of the August 1, 2021 deadline. Furthermore, aerial video and photography taken on September 4, 2021 shows that CleanBay had not commenced any construction or use on the site as of that date other than the clearing of an abandoned house on the parcel. This limited activity, occurring over a month past the August 1, 2021 deadline and only *after* Commission staff had informed CleanBay of the CU’s expiration, constitutes neither

<sup>2</sup>

<https://sussexcountyde.gov/sites/default/files/packets/07.08.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 17).

<sup>3</sup> <https://sussexcountyde.gov/sites/default/files/packets/9.9.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 40-44).

timely nor substantial construction as required by County Code. FWW submits this video evidence<sup>4</sup> along with this letter, and the photographic evidence is included here as Exhibit 1.

CleanBay has failed to present any evidence to the contrary. By letter dated August 10, 2021, CleanBay sent photos to Commission staff purporting to “demonstrate the clearing of a right of way and roadway/parking areas.”<sup>5</sup> However, as Commissioner Hoey Stevenson rightly observed in the Commission’s September 9, 2021 meeting, the submission consisted of “basically the same pictures that staff took” showing no new construction.<sup>6</sup> CleanBay additionally claimed that “the drainage system, stormwater management and erosion and sediment control has been maintained over the prior three years as agricultural ditches and by agricultural tillage of the land.”<sup>7</sup> But to comply with §115-174, it was incumbent upon CleanBay to rough-grade the internal streets, parking areas, drainage system and stormwater management facilities necessary to implement the approved industrial use, not simply maintain the one-car parking spot and agricultural ditches that already existed on the land.

Because CleanBay failed to commence substantial construction or use by August 1, 2021, CU 2113 is legally null and void, and CleanBay is prohibited from beginning any construction or operation of their proposed natural gas and electricity production plant without obtaining valid zoning approval for such a use in an AR-1 district.

### **The Determination that Construction was Substantially Underway is Therefore Invalid**

Even though the Commission effectively acknowledged that no construction or use was substantially underway, it nevertheless agreed to reconsider its position, in direct contravention of County Code.

Per § 115-174, construction “shall” be deemed to be “substantially underway” only when it meets all of the criteria detailed above, and a CU “shall” expire if no substantial construction has occurred. “The word ‘shall’ is always mandatory,” *see* § 115-4, therefore the Commission has no discretion to redefine the term or accept any construction or use that fails to meet the minimum requirements as set forth in the County Code. *See also* § 115-227 (“In interpreting and applying the provisions of this chapter, they shall be held to be the minimum requirements for the promotion of the public safety, health, convenience, comfort, prosperity or general welfare,” and “shall govern” over any less stringent standards, rules, or regulations).

<sup>4</sup> <https://www.dropbox.com/sh/0xcen3a2vpg1jkz/AAAim2qCOQmLYPPU579fqJrPa?dl=0>

<sup>5</sup> <https://sussexcountyde.gov/sites/default/files/packets/9.9.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 45).

<sup>6</sup> [https://sussexcountyde.gov/sites/default/files/audio/Other%20Business\\_42.mp3](https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3) (at 16:18).

<sup>7</sup> <https://sussexcountyde.gov/sites/default/files/packets/9.9.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 45).

Statements made by Commissioners at the September 9, 2021 meeting show that the Commission understood it was making an exception for CleanBay, rather than applying County Code as written. Not only did Commissioners acknowledge that CleanBay's photos were insufficient evidence, since they were "basically the same pictures that staff took," Chairman Wheatley commented that "the nature of this type of project . . . take[s] longer anyway," and "at least this puts them on notice that they better start doing something."<sup>8</sup> County Code provides neither the Chairman nor the Commission with discretion to make such exceptions. For this reason, the Commission's determination that construction or use was substantially underway is invalid.

### **The Commission Lacked Authority to Cure CleanBay's Failure to Request an Extension**

CleanBay had every opportunity to apply for and receive a six-month extension if it so needed, *see* § 115-174, and the Commission cannot now at this late stage cure CleanBay's failure to do so with a faulty "substantially underway" determination. The proper—and only—procedure for granting an extension would have been for CleanBay to submit a written extension request *before* the CU lapsed. *See* § 99-40C. And while the Commission may recommend granting the extension, it is ultimately up to the Council to render the final decision. *Id.* at § 99-40C(3). This has not occurred, and now cannot occur, given the fact that the CU approval has already expired.

FWW respectfully requests that the Commission reconsider its "substantially underway" determination, which was made in clear violation of county and state law, and therefore subject to reversal on appeal. *See* 9 Del. C. § 6917; County Code § 115-209. FWW asks that Sussex County officials inform CleanBay that CU 2113 is null and void as of August 1, 2021, and that therefore no construction or use of the site under that non-existent conditional use approval is permitted. If CleanBay wishes to proceed with its proposed project, County Code requires it to apply for a new conditional use approval or some other method of zoning approval that authorizes the site to be put to this heavy industrial use.

Sincerely,



Emily Miller  
Staff Attorney, Food & Water Watch

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<sup>8</sup> [https://sussexcountyde.gov/sites/default/files/audio/Other%20Business\\_42.mp3](https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3) (at 16:18, 17:25, 17:35).



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# EXHIBIT 1

Aerial Photograph, CleanBay Site (Sep. 4, 2021)

