

Sussex County Notice of Appeal Form Sussex County, Delaware

Sussex County Planning & Zoning Department
2 The Circle (P.O. Box 417) Georgetown, DE 19947
302-855-7878 ph. 302-854-5079 fax

Name of Subdivision:

N/A (see attached - this appeal relates to Conditional Use No. 2113).

Date of Approval:

July 31, 2018

Location of Subdivision:

Southwest corner of Dupont Blvd (Rt. 113) and Treasure Rd, Georgetown, DE 19947

Tax Map #: 133-6.00-123.00

Total Acreage: 16.71

Appellant Information

Appellant Name: Jacob Breasure and Food & Water Watch

Appellant Address: 2208 Breasure Road

City: Georgetown State: DE ZipCode: 19447

Phone #: (302) 245-6583 E-mail: jbreasure@yahoo.com

Developer Information

Developer Name: CleanBay Renewables, LLC

Attorney Information (If Applicable)

Attorney Name: Kenneth T. Kristl, Esq.

Attorney Address: 4601 Concord Pike

City: Wilmington State: DE ZipCode: 19803

Phone #: (302) 477-2053 E-mail: ktkristl@widener.edu



Sussex County, DE - Appeal Form

Basis for Appeal: (Please provide a written statement regarding reason for appeal - Note that in accordance with Section 99-39B of the Code of Sussex County, the appeal must be on the record of the hearing before the Planning & Zoning Commission.)

See Attached.

Check List for Sussex County Appeal Applications

The following shall be submitted with the Notice of Appeal

Completed Application

Provide Fee \$500.00

Within thirty (30) days following the filing of this Notice of Appeal, the Appellant shall pay the costs to have a certified court reporter prepare a verbatim written transcript of the hearing before the Commission and to file the transcript with the Clerk of County Council. Failure to file the transcript within this thirty (30) day period shall cause the appeal to be dismissed. Code of Sussex County, Section 99-39B.(2).

The undersigned hereby certifies that the forms, exhibits, and statements contained in any papers or plans submitted as a part of this appeal are true and correct.

Signature of Appellant/Attorney



For office use only:

Date Submitted: _____

Fee: \$500.00 Check #: _____

Staff accepting Notice of Appeal: _____

Application & Case #: _____

Location of property: _____

Date of Commission Hearing: _____

Decision: _____

Date Transcript is due: _____

**ATTACHMENT TO NOTICE OF APPEAL
FILED BY JACOB BREASURE AND FOOD & WATER WATCH
SUSSEX COUNTY BOARD OF ADJUSTMENT**

NATURE OF THIS APPEAL

1. Appellants Jacob Breasure and Food & Water Watch (“FWW”) are appealing a Sussex County Planning & Zoning Commission (the “Commission”) decision that in effect overturned an August 9, 2021 decision by the Planning and Zoning Director’s staff that Conditional Use 2113 (“CU 2113”) granted to CleanBay Renewables, LLC (“CleanBay”) had lapsed. Planning and Zoning staff had found that CU 2113—granted by County Council on July 31, 2018—had lapsed because staff investigation found, and video and photographic evidence unequivocally shows, no construction was underway at the site more than three years after CU 2113 was adopted, and thus, by operation of § 115-174 of the Sussex Code, CU 2113 was null and void. On September 9, 2021, in response to a request by CleanBay, the Commission held that CU 2113 has not lapsed because construction or use of the site is substantially underway.

2. Appellants respectfully request that the Board of Adjustment (the “Board”) reverse the Commission’s “substantially underway” determination for two reasons. First, the Commission lacked jurisdiction to hear and decide CleanBay’s request for reconsideration of staff findings, as that authority lies exclusively with the Board. Second, the Commission committed clear errors of law and fact, because its “substantially underway” determination directly conflicts with County Code requirements and was not based on substantial evidence.

STATEMENT OF JURISDICTION

3. The Board has original jurisdiction to hear and decide appeals where appellant alleges that “there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of the zoning regulations.” 9 Del. C. § 6917.

4. The Board's jurisdiction is separately codified in § 115-209(A) of Sussex County Code, which grants the Board the power to "hear and decide appeals where it is alleged that there is an error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter".

5. The Commission is an "agency" made up of "administrative officials," who made a determination in the enforcement of Sussex County zoning law §115-174. Thus, the Board is competent to hear an appeal of the Commission's overruling of Planning and Zoning Director's staff.

6. This appeal is timely filed. *See* §115-208(B).

PARTIES

7. Appellant Jacob Breasure resides at 2208 Breasure Road, Georgetown, DE 19447, which is located approximately a half mile from the CleanBay project site. The property has been in Mr. Breasure's family for over 70 years, and Mr. Breasure has resided there for over 36 years. In 2010, Mr. Breasure's mother deeded him the one-acre parcel at which he currently resides.

8. Mr. Breasure has adamantly opposed the construction and operation of the CleanBay facility since the project's inception. He provided testimony in opposition to granting conditional use approval at the public hearing that took place on January 25, 2018. He testified to the ways in which he would be harmed by the proposed project, raising economic, aesthetic, and environmental impacts, which he remains concerned about to this day.¹

9. Mr. Breasure will be directly and adversely affected by the CleanBay biogas facility if the Commission's substantially underway determination remains in effect, and the project is allowed to move forward in that:

¹ <https://sussexcountyde.gov/sites/default/files/packets/SCC.Public.Packet.073118.pdf> (pg. 3).

- a. Mr. Breasure is concerned that the construction and operation of this heavy industrial facility will decrease his property value, and adversely affect the character and aesthetics of the neighborhood due to the noise and odors the facility is expected to emit;
- b. Mr. Breasure will be adversely impacted by the increase in truck traffic in the neighborhood. CleanBay has stated the facility will daily receive up to twelve tractor trailer trucks, delivering a total of 276 tons of poultry litter each day. *See* Ordinance No. 2589, Finding of Fact C (Jul. 31, 2018). However, the Delaware Department of Transportation (“DelDOT”) estimates there will be 84 trips per day to and from the site based on employee and truck usage. *Id.* at E.
- c. Operation of the facility will negatively affect the environment and may expose him and his family to water and air pollution. Mr. Breasure’s drinking water is supplied by a residential well on his property, which he reasonably believes could be contaminated by the storage and handling of hundreds of thousands of tons of poultry waste next door. In addition, biomethane processing facilities emit dangerous air pollutants, including nitrous oxide, ammonia, and hydrogen sulfide. Mr. Breasure is worried about the immediate quality of life impacts associated with these pollutants and their odors, as well as the health effects associated with long-term exposure to this pollution.

10. The interests that Mr. Breasure seeks to protect fall within the zone of interests protected by Sussex County zoning laws. Per 9 Del. C. § 6904, the purpose of Sussex County zoning laws and regulations are to “promot[e] the health, safety, morale, convenience, order, prosperity or welfare of the present and future inhabitants of Sussex County, including, amongst other things,

the lessening of congestion in the streets or roads” and facilitating “water and air pollution abatement.”

11. FWW is a 501(c)(3) nonprofit membership organization, that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people’s health, communities, and democracy from the growing destructive power of the most powerful economic interests. Industrial livestock pollution—and particularly the harmful impacts of factory farm gas production by sources like the proposed CleanBay facility—is one of FWW’s priority issues. FWW is currently engaged in a Delaware-based campaign to stop the regional build out of these dangerous and polluting facilities. FWW joins this appeal on behalf of its member, Jacob Breasure.

12. The Sussex County Planning & Zoning Commission is a five-member panel appointed by the Sussex County Council, as stipulated by 9 Del. C. Chapter 68, to consider requests for change of zone, conditional use and subdivision applications. The Commission acts as an advisory board to the County Council on conditional use requests.

FACTUAL AND LEGAL BACKGROUND

13. On July 31, 2018, the Sussex County Council voted to adopt Ordinance No. 2589, granting 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 2113.² CleanBay subsequently sought revisions to its plans and a height variance from the Sussex County Board of Adjustment.

A Conditional Use is Only Valid for Three Years without Substantial Construction or Use

² <https://sussexcountyde.gov/sites/default/files/minutes/073118.pdf>

14. 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.*

15. 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

16. 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 Planning and Zoning Director’s 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.³

17. 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 construction still was not “substantially underway”, as it is defined by County Code. Appellants submit this video evidence⁴ along with this notice of appeal, and the photographic evidence is attached hereto as Exhibit 1.

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

⁴ <https://www.dropbox.com/sh/0xcen3a2vpg1jkz/AAAim2qCOQmlYPPU579fqJrPa?dl=0>

CleanBay Requested, and the Commission Agreed to, Reconsideration of Staff's Finding

18. By letter dated August 10, 2021, CleanBay contested staff findings, and sent photos purporting to “demonstrate the clearing of a right of way and roadway/parking areas.”⁵ 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.”⁶

19. By letter dated August 24, 2021, CleanBay formally requested the Commission reconsider the staff’s finding, and determine CU 2113 in compliance and construction substantially underway.⁷ CleanBay reiterated the arguments it had made to staff, and attached the same photos already submitted as proof that construction or use was substantially underway.

20. On September 9, 2021, the Commission met to discuss CleanBay’s request for reconsideration. At this meeting, the Commission effectively acknowledged that no construction or use was substantially underway. Commissioner Hoey Stevenson correctly observed that CleanBay’s submission consisted of “basically the same pictures that staff took,” showing no new construction.⁸ Notwithstanding this deficiency, Chairman Wheatley commented that he was nevertheless “inclined to give [CleanBay] the benefit of the doubt” because “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.”⁹ After discussing the matter for approximately three minutes, and without providing any opportunity for public comment,¹⁰ the three commissioners present

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

⁶ <https://sussexcountyde.gov/sites/default/files/packets/9.9.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 45).

⁷ <https://sussexcountyde.gov/sites/default/files/packets/9.9.2021%20Other%20Business%20Paperless%20Packet.pdf> (pg. 47-48).

⁸ https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3 (at 16:18).

⁹ https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3 (at 17:25, 17:35).

¹⁰ https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3 (at 12:16-12:28).

unanimously voted that the project was substantially underway, and therefore CU 2113 had not lapsed.¹¹

21. Appellant FWW submitted a letter to the Commission on September 15, 2021, urging it to reconsider in light of the legal and factual deficiencies with its decision, which are detailed more fully below.¹² The Commission has not responded.

LEGAL GROUNDS FOR THIS APPEAL

I. The Commission Did Not Have Jurisdiction to Hear and Decide CleanBay’s Request for Reconsideration, As That Authority Lies Exclusively with the Board of Adjustment

22. Appellants Mr. Treasure and Food & Water Watch hereby reallege and incorporate by reference paragraphs 1 – 21 above.

23. The Commission has no legal authority or power to reconsider or reverse a determination by Planning & Zoning Director’s staff that enforces the provisions of the Zoning Ordinance such as a determination that a conditional use has lapsed.

24. State and County law are clear: only the Board has the power “to hear and decide” whether “there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of the zoning regulations.”

9 Del. C. § 6917. *See also* Sussex County Code § 115-209(A). The staff that investigated the site, determined construction or use was not substantially underway, and notified CleanBay that CU 2113 had consequently lapsed, were “administrative officials” that made a determination that was both based on and made in the enforcement of Sussex County zoning regulations, namely § 115-174. For this reason, the proper—and only—body to reconsider this determination was the Board.

¹¹ https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3 (at 18:04-18:28).

¹² https://www.foodandwaterwatch.org/wp-content/uploads/2021/09/2021.09.15_CleanBay-Georgetown-letter.pdf

25. In addition, the Commission lacked the authority to cure CleanBay’s failure to request an extension of time to fulfill its substantial construction or use requirements. CleanBay had every opportunity to apply for and receive a six-month extension if it so needed before the CU lapsed, *see* § 115-174. It failed to do so. The Commission cannot—after a conditional use has expired—cure CleanBay’s failure 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.

26. Because the Commission exceeded its authority when it granted CleanBay’s request for reconsideration, and ultimately reversed, the staff’s substantially underway determination, the Board must vacate the Commission’s action.

II. The Commission Committed Clear Error of Law and Fact Because Its “Substantially Underway” Determination Conflicts with County Code and Was Not Based on Substantial Evidence

27. Even if the Commission had the authority to hear and decide CleanBay’s appeal—which it did not—the Board should also vacate its determination because it was made in clear error. The Commission effectively acknowledged that no construction or use was substantially underway, yet nevertheless agreed to reconsider staff’s prior August 9, 2021 determination, in direct contravention of County Code.

28. Per § 115-174, construction “shall” be deemed to be “substantially underway” only when it meets all of the criteria detailed,¹³ and a CU “shall” expire if no substantial construction has

¹³ County code dictates that substantial construction requires all of the following criteria be met: that “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

occurred. “The word ‘shall’ is always mandatory,” *see* § 115-4; thus, 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).

29. As staff found, CleanBay simply did not satisfy this substantially underway requirement, nor did its supply sufficient evidence to the Commission proving otherwise. To comply with § 115-174, it was incumbent upon CleanBay to rough-grade the internal streets, parking areas, drainage system and stormwater management facilities, and put in place and actively maintain erosion and sediment control systems necessary to implement the approved industrial use. At best, CleanBay’s “evidence” merely demonstrates that it mowed the grass at one point in time, and “maintained” the one-car parking spot and agricultural ditches that already existed on the land. This is not enough.

30. There is no substantial evidence to support the claim that construction was substantially underway by August 1, 2021, when CU 2113 by law expired. In addition to the photographic evidence provided by Planning and Zoning Director’s staff, Appellants also have photographic and video evidence showing that none—much less all—of the necessary components for showing construction is substantially underway were met on August 1, 2021.

31. Statements made by Commissioners at the September 9, 2021 meeting show that the Commission understood that the record did not show evidence of construction being substantially underway. Not only did Commissioners acknowledge that CleanBay’s photos were

measures are in place and being actively maintained.” § 115-174 (emphasis added). *See also* Norman J. Singer, *Statutes and Statutory Construction*, Vol. 1A § 21.14 (7th ed. 2013) (“use of the conjunctive ‘and’ in a list means that all of the listed requirements must be satisfied”).

insufficient evidence, since they were “basically the same pictures that staff took,” Chairman Wheatley commented that “he was inclined to give [CleanBay] the benefit of the doubt” because “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.”¹⁴ The record shows that the Commission was making an exception for CleanBay, rather than applying County Code as written. 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.

CONCLUSION

32. For the foregoing reasons, appellants respectfully request that the Board reverse the Commission’s “substantially underway” determination and declare CU 2113 null and void as of August 1, 2021.

Respectfully submitted this 7^h day of October, 2021.

s/ Kenneth T. Kristl
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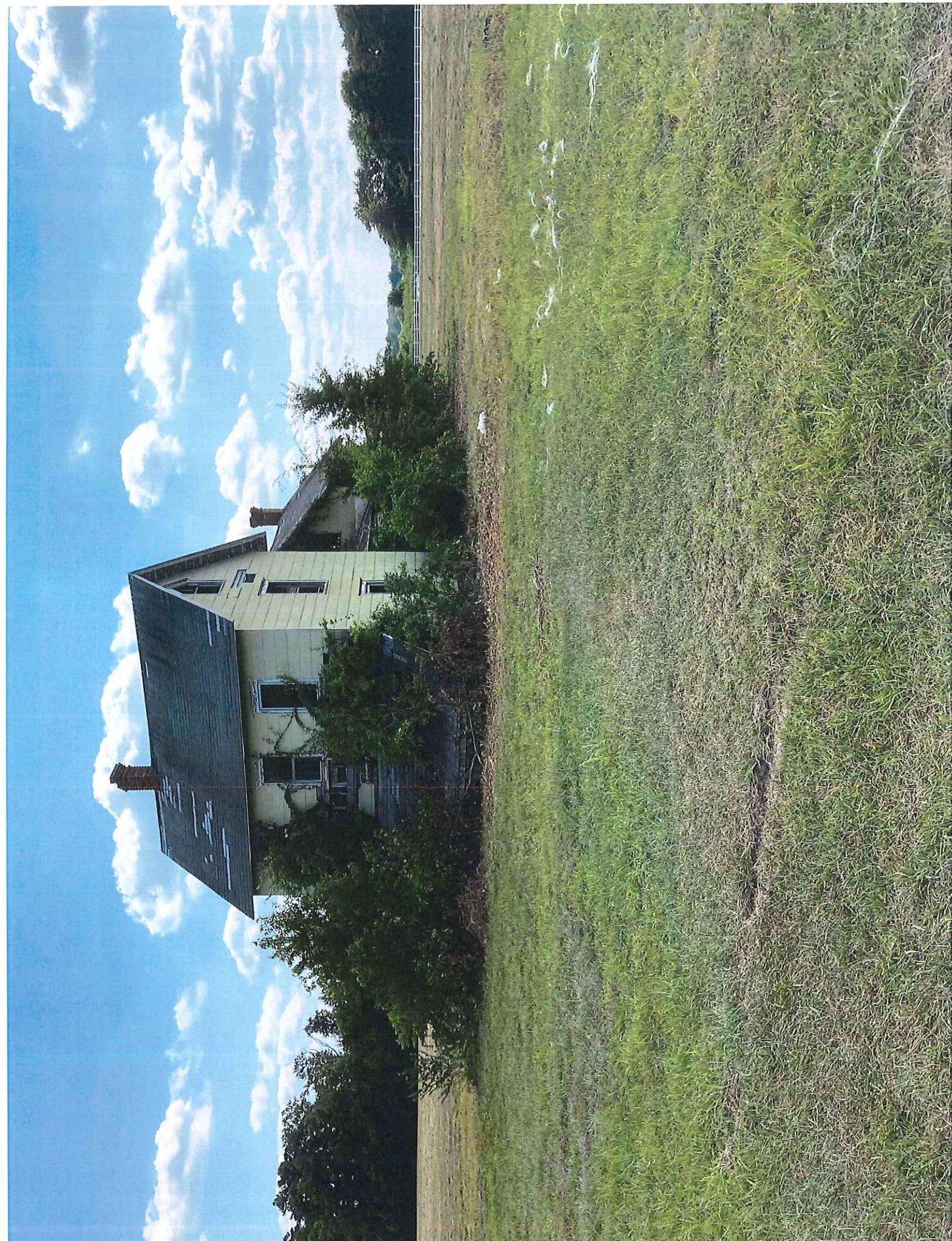
Counsel for Appellants

¹⁴ https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3 (at 16:18, 17:25, 17:35).

EXHIBIT 1

Staff's Photos taken on August 5th, 2021







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

