



by operation of § 115-174 of the Sussex County Code, CU 2113 was null and void. On September 9, 2021, in response to a request submitted by CleanBay to reconsider the staff decision, the Commission determined that CU 2113 has not lapsed because construction or use at the site was substantially underway.

2. Petitioners respectfully request that the Court vacate the Commission's "substantially underway" determination and declare CU 2113 null and void for two reasons. First, the Commission exceeded its jurisdiction when it heard and decided CleanBay's request for reconsideration of the Director's staff determination, as that authority lies exclusively with the Sussex County Board of Adjustment ("Board of Adjustment"). Second, the Commission committed a clear error of law because its "substantially underway" determination ignored nondiscretionary, statutory elements necessary to make such a finding, as set forth in County Code § 115-174.

### **PARTIES**

3. Petitioner 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.

4. Mr. Breasure has adamantly opposed the construction and operation of the proposed 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. *See* Memorandum from Planning and Zoning Director to Sussex County Council dated July 27, 2018, at 3, attached hereto as Exhibit 1.

5. If the Commission's substantially underway determination remains in effect and the CleanBay biogas facility is allowed to move forward, Mr. Breasure will be directly and adversely affected by the facility as follows:

- 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 (*i.e.*, chicken manure, detritus, and soiled bedding material) each day. *See* Ordinance No. 2589, Finding of Fact C (July 31, 2018), attached hereto as Exhibit 2. 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, handling, and processing of hundreds of thousands of tons of poultry waste practically next door. In addition, biogas processing facilities such as CleanBay's proposal 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.

6. 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.”

7. 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 works extensively in Delaware, and Sussex County in particular, to protect the public and the environment from pollution. Working to ensure that industrial biogas production does not adversely affect public health or the environment is one of FWW’s priority issues. FWW joins this petition on behalf of its member, Jacob Breasure.

8. 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 Sussex County Council on conditional use requests.

### **FACTUAL AND LEGAL BACKGROUND**

9. 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, which is zoned for agriculture and low-density residential use, to build and operate an “electrical generation and nutrient recovery facility,” more accurately described as an industrial gas and electricity production plant, denominated CU 2113. *See* Sussex County Council Meeting Minutes dated July 31, 2018,

attached hereto as Exhibit 3. CleanBay subsequently sought revisions to its plans and a height variance from the Board of Adjustment.

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

10. 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 (1) the right-of-way has been cleared; (2) the roadways, internal streets, and/or parking areas have been rough-graded; (3) the drainage system and/or stormwater management facilities have been rough-graded; and (4) erosion and sediment control measures are in place and being actively maintained. *Id.*

11. 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 expiration of the three-year grace period.

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

12. The three years after the July 31, 2018 approval of CU 2113 ended on August 1, 2021. Under County Code § 115-174, CleanBay was legally obligated to have construction substantially underway on or before August 1, 2021 to avoid CU 2113 becoming null and void by operation of law. Photographic evidence collected on August 5, 2021 by the Planning and Zoning Director’s staff clearly shows that neither construction nor use was substantially underway on that date as required by § 115-174, prompting a letter from the Sussex Planning and Zoning Department to CleanBay on August 9, 2021 informing it that CU 2113 had lapsed because construction was not substantially underway. *See* Letter from Nick Torrance to CleanBay dated August 9, 2021, attached hereto as Exhibit 4.

### **C. CleanBay Requested, and the Commission Agreed to, Reconsideration of Staff's Finding**

13. By letter dated August 10, 2021, CleanBay contested Planning and Zoning staff's findings, and sent photos purporting to "demonstrate the clearing of a right of way and roadway/parking areas." *See* Letter from CleanBay to Nick Torrance dated August 10, 2021, attached hereto as Exhibit 5. CleanBay additionally claimed that "[t]he 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." *Id.*

14. Rather than appealing the staff decision to the Board of Adjustment, as State and County law provide, CleanBay instead sent a letter to the Commission on August 24, 2021 requesting the Commission reconsider the staff's finding, and determine that construction was substantially underway and therefore CU 2113 was still valid. *See* Letter from CleanBay to Commission dated August 24, 2021, attached hereto as Exhibit 6. CleanBay reiterated the arguments it had made to staff, and attached essentially the same photos already submitted as evidence that construction or use was substantially underway.

15. On September 9, 2021, the Commission met to discuss CleanBay's request. 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.<sup>1</sup> 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

---

<sup>1</sup> *See* Audio Recording of the September 9, 2021 meeting [hereinafter "Meeting Audio"], at 16:18, available at: [https://sussexcountyde.gov/sites/default/files/audio/Other%20Business\\_42.mp3](https://sussexcountyde.gov/sites/default/files/audio/Other%20Business_42.mp3).

something.”<sup>2</sup> After discussing the matter for approximately three minutes, and without providing any opportunity for public comment,<sup>3</sup> the three commissioners present unanimously voted that the project was substantially underway, and therefore CU 2113 had not lapsed.<sup>4</sup> The Commission provided formal written acknowledgement of its ruling when it included a reference to its decision in its minutes of the September 9, 2021 meeting, which were issued on October 14, 2021. *See* September 9, 2021 Commission Meeting Minutes, at 2–3, attached hereto as Exhibit 7; October 14, 2021 Commission Meeting Agenda, at 1, attached hereto as Exhibit 8.

16. CleanBay did not appeal the Planning and Zoning Department staff determination to the Board of Adjustment.

17. Petitioner FWW submitted a letter to the Commission on September 15, 2021 urging it to reconsider its decision in light of its clear legal deficiencies, which are detailed more fully below. *See* Letter from FWW to Commission dated September 15, 2021, attached hereto as Exhibit 9. As of the date of this filing, the Commission has not responded.

18. On October 7, 2021, Petitioners attempted to exhaust any and all administrative remedies by appealing the Commission’s decision to the Board of Adjustment, citing the adjudicatory body’s power to review certain zoning decisions as granted by state and county law. *See* 9 Del. C. § 6917 (granting authority 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”); Sussex County Code § 115-209(A) (authority to “hear and decide” whether “there is an error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of this chapter”). *See* Petitioners’ Notice of Appeal dated October 7, 2021, attached hereto as Exhibit 10.

---

<sup>2</sup>*Id.* at 17:25, 17:35.

<sup>3</sup> *Id.* at 12:16–12:28.

<sup>4</sup> *Id.* at 18:04–18:28.

19. The Director of Planning and Zoning (“Director”), who is responsible for processing such appeals, responded to Petitioners by letter dated November 2, 2021. *See* Letter to Petitioners from Jamie Whitehouse dated November 2, 2021, attached hereto as Exhibit 11.<sup>5</sup> The Director informed Petitioners that the cited statutory appeal provisions were inapplicable, that “the Board of Adjustment does not have jurisdiction to hear an appeal of a decision of the Sussex County Planning & Zoning Commission,” and consequently, his office would not process the appeal. *Id.*

### **CERTIORARI**

20. Petitioners Mr. Breasure and FWW hereby reallege and incorporate by reference paragraphs 1 – 19 above.

21. The Delaware Constitution grants the Superior Court jurisdiction to hear petitions for and issue Writs of Certiorari. Del. Const. art. IV, § 7; *see also Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1209–10 (2008). The court’s jurisdiction is also separately codified in 10 Del. C. § 562.

22. Petitioners need only satisfy two threshold conditions to properly petition the court for writ of certiorari: “the judgment [from which relief is sought] must be final and there can be no other available basis for review.” *Maddrey*, 956 A.2d at 1213. Those requirements are satisfied here. The Commission’s determination was final, and as the Director of Planning and Zoning confirmed, there is no administrative remedy available from the Board of Adjustment. In addition, no statutory appeal rights are available for review of Commission decisions.

23. This petition is timely filed within the 30-day deadline for certiorari proceedings. *See Dover Historical Dover Historical Soc’y v. City of Dover Planning Comm’n*, 2003 Del. Super.

---

<sup>5</sup> The Director’s letter references the date of Petitioners’ appeal as October 14, 2021. *See id.* at 1. While Petitioners filed their appeal on October 7, 2021, they subsequently submitted an amended version with a different cover sheet, to comply with a procedural request by the County.



LEXIS 478, \*12, C.A. No. 03A-06-002 (Del. Super. Ct. Aug. 25, 2003) (*rev'd on other grounds*). This deadline is not a jurisdictional requirement, but rather subject to the discretionary powers of the court, and runs from the date on which the decision at issue was published in writing. *Id.* at \*12–13. Here, the Commission’s September 9, 2021, decision was published on October 14, 2021 when it approved and made public its minutes of the September 9, 2021 hearing. *See* Ex. 7; Ex. 8.

24. In certiorari proceedings, the court can review the record for lack of jurisdiction, errors of law, and procedural irregularity. *See Maddrey*, 956 A.2d at 1207. Here, Petitioners allege that the Commission (1) lacked jurisdiction to reconsider staff findings, and (2) committed legal error in its application of the “substantially underway” standard, as clearly defined in County Code.

**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**

25. 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 a Zoning Ordinance, such as a determination that a conditional use has lapsed.

26. State and County law are clear: only the Board of Adjustment 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* Sussex County Code § 115-209(A). The Planning and Zoning staff who 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 course of enforcing Sussex County zoning regulations, namely § 115-174. For this reason, the proper—and only—body to reconsider this determination was the Board of Adjustment.

27. The Planning and Zoning office itself confirmed the Commission’s lack of jurisdiction when it rejected Petitioners’ appeal to the Board of Adjustment. According to the Director, “it is quite clear from the texts of 9 Del. C. § 6916 and § 115-209” that the Board of Adjustment’s power to hear appeals encompasses all “appeals of administrative decisions of the Director or a County Official.” Ex. 11 at 1–2 (emphasis in original). If the Board of Adjustment is empowered by State and County law to hear such appeals, it necessarily follows that the Commission cannot usurp that power.

28. 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 obligations. CleanBay had every opportunity to apply for and receive a six-month extension if it so needed before the conditional use lapsed. *See* § 115-174. It failed to do so. The Commission cannot—after a conditional use has expired—paper over CleanBay’s failure with a faulty “substantially underway” determination. The proper procedure for granting an extension would have been for CleanBay to submit a written extension request *before* the conditional use lapsed. *See* § 99-40C. And while the Commission may recommend granting the extension, it is ultimately up to the Sussex County Council to render the final decision. *Id.* at § 99-40C(3). This has not occurred, and now cannot occur, given the fact that the conditional use approval has already expired.

29. Because the Commission exceeded its jurisdiction when it heard CleanBay’s request for reconsideration, and ultimately reversed, the staff’s substantially underway determination, the court should vacate the Commission’s action.

**II. The Commission Committed Clear Error of Law Because Its “Substantially Underway” Determination Ignored the Minimum Legal Requirements Set Forth in County Code**

30. Even if the Commission had the authority to hear and decide CleanBay’s appeal—which it did not—the court should also vacate the Commission’s September 9, 2021 determination

because it was made in clear error of law. County Code expressly sets forth four minimum requirements that must be met in order for construction or use of a site to be substantially underway. Here, the Commission acknowledged that CleanBay failed to satisfy these minimum requirements, yet nevertheless determined that substantial construction was underway in direct contravention of County Code.

31. Per § 115-174, construction “shall” be deemed to be “substantially underway” only when it meets all the criteria detailed, and a Conditional Use “shall” expire if no substantial construction has occurred. “The word ‘shall’ is always mandatory,” *see* County Code § 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).

32. As the Director’s staff found, CleanBay simply did not satisfy all substantially underway requirements, nor did it provide any evidence to the Commission showing otherwise. To comply with § 115-174, it was incumbent upon CleanBay to (1) clear the right-of-way, (2) rough grade the roadways, internal streets, and/or parking areas, (3) rough grade the drainage system and stormwater management facilities, and (4) put in place and actively maintain erosion and sediment control systems necessary to implement the approved conditional use.<sup>6</sup> By CleanBay’s own admission, it only “maintained” the right-of-way onto the property, “maintained” the one-spot parking area in front of the property, and “maintained” the drainage system, stormwater management, and erosion and sediment control as “agricultural ditches and by agricultural tillage

---

<sup>6</sup> *See* Norman J. Singer, *Statutes and Statutory Construction*, Vol. 1A § 21.14 (7<sup>th</sup> ed. 2013) (“use of the conjunctive ‘and’ in a list means that all of the listed requirements must be satisfied”).

of the land.” Ex. 5 at 1; Ex. 6 at 2. In other words, it mowed the grass at some point in time, and maintained the agricultural and residential features that already existed on the land but were not built or designed to accommodate CleanBay’s industrial use.

33. However, two of the four “substantially underway” elements specifically require the developer to go beyond “maintaining” the existing land by “rough grading” the site, which involves the leveling or sloping of ground in order to set a solid foundation for a construction project. See Merriam Webster, “Grading,” available at: <https://www.merriam-webster.com/dictionary/grading> (“to level off to a smooth horizontal or sloping surface.”). Here, CleanBay did not allege, nor did the Commission find, that it had rough-graded the internal streets and/or parking areas necessary to accommodate thousands of tractor trailer truck trips per year or an influx of employees. Likewise, CleanBay did not allege, nor did the Commission find, that it had rough-graded the drainage system or stormwater management facilities necessary for an industrial biogas plant to operate. Indeed, the photographs staff took of the site on August 5, 2021 unequivocally prove that these activities did not take place. Because County Code required both of these construction activities to occur, construction or use of the site was *not* substantially underway as a matter of law. The Commission lacked discretion to ignore these statutory elements.

34. Statements made by Commissioners at the September 9, 2021 meeting show that the Commission understood the record did not provide evidence of construction being substantially underway. 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 “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.*<sup>7</sup> (emphasis added). 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 as a matter of law.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioners respectfully request this Court issue a writ of certiorari to the Sussex County Planning & Zoning Commission, after briefing by the parties, and decide the merits of the issues raised in this petition in the following ways:

1. Vacate the Commission's September 9, 2021 substantially underway determination;
2. Declare that by operation of law, CU 2113 is null and void as of August 1, 2021; and
3. Grant such other and further relief as the court deems necessary and proper.

Respectfully submitted this 12<sup>th</sup> day of November, 2021.

s/ Kenneth T. Kristl

Kenneth T. Kristl, Esq. (DE Bar No. 5200)  
Environmental & Natural Resources Law Clinic  
Widener University Delaware Law School  
4601 Concord Pike  
Wilmington, DE 19803  
Telephone: (302) 477-2053  
Email: [ktkristl@widener.edu](mailto:ktkristl@widener.edu)

*Counsel for Petitioners*

---

<sup>7</sup> Meeting Audio at 16:18, 17:25, 17:35.