IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY McKENZIE, Acting Secretary, Department of Natural Resources and Environmental Control and DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL OF THE STATE OF DELAWARE,	§	No. 112, 2000
Defendant Below-Appellant,	§	Court Below—Superior Court of the State of Delaware, in and for Sussex County C.A. No. 98C-12-023
v.	§	
CITY OF REHOBOTH,	§	
Plaintiff Below-Appellee.	§	

Submitted: April 18, 2000
Decided: May 23, 2000

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices

O R D E R

This 23rd day of May 2000, it appears to the Court that:

(1) On March 24, 2000, the Clerk issued a notice directing the appellants to show cause why this appeal should not be dismissed pursuant to Supreme Court Rule 29(b) for the appellants' failure to comply with Supreme Court Rule 42 when taking an appeal from an apparent

interlocutory order. On April 7, 2000, the appellants filed a response to the notice to show cause. On April 18, 2000, at the request of the Clerk, the appellees filed an answer to the response to the notice to show cause.

(2) In its February 29, 2000 order, the Superior Court determined that the Environmental Appeals Board ("EAB") had jurisdiction to hear appellee's appeal from a regulation issued by appellant. The appellants state in their response that the Superior Court's February 29, 2000 order is final and that this matter is properly appealable to this Court. The appellee states in its answer that the Superior Court's order is interlocutory because it decided only appellee's request for a declaratory judgment in Count I of its complaint and did not address its contention in Count II of the complaint that the regulation is unreasonable. However, the appellee requests that this Court decide the issue of the EAB's jurisdiction now in the interest of efficiency.

(3) The test for whether an order is final and therefore ripe for appeal is whether the trial court has clearly declared its intention that the order be the court's "final act" in a case.[1] If the order of the court below has not "determine[d] the substantial merits of the controversy and the

[1] *J. L. Kislak Mortgage Corporation of Delaware v. William Matthews, Builder, Inc.*, Del. Supr., 303 A.2d 648, 650 (1973).

material issues litigated or necessarily involved in the litigation" or "[i]f there is no finality of the decision of the essential questions involved," then the matter is interlocutory and not ripe for appeal.[2] At the time this appeal was filed, the Superior Court had entered an order granting only "partial summary judgment" in favor of appellee. The contentions in Count II of appellee's complaint remained pending before the Superior Court. Appellants' right of appeal remains intact until the Superior Court has disposed of all matters before it. Moreover, "[p]arties may not convert an otherwise interlocutory order into a final order by consensual conduct or by representations of intention to take remedial action so as to render an otherwise less-than-final order final for purposes of appeal."[3]

(4) Since the requirements of Supreme Court Rule 42 have not been met by the appellants, the appeal must be dismissed.

[2]*Showell Poultry, Inc. v. Delmarva Poultry Corporation*, Del. Supr., 146 A.2d 794, 796 (1958).

[3]*Stroud v. Milliken Enterprises, Inc.*, Del. Supr., 552 A.2d 476, 482 (1989).

NOW, THEREFORE, IT IS ORDERED that the within appeal be, and the same hereby is, DISMISSED pursuant to Supreme Court Rules 29(b) and 42.

BY THE COURT:

Randy J. Holland
Justice