

**UPPER TOWNSHIP ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
DECEMBER 14, 2006**

The regular meeting of the Upper Township Zoning Board was held at the Township Hall, 2100 Tuckahoe Road, Petersburg, New Jersey at 7:30 p.m.

CALL TO ORDER

SUNSHINE ANNOUNCEMENT

SALUTE TO THE FLAG

ROLL CALL

Present: Elizabeth Bergus, Mary Jean Burgin, Jeffrey Pierson, Andrew Shawl, Matthew Unsworth, Christopher Phifer, Lynn Petrozza, Paul Casaccio.

Absent: Ted Klepac

Also in attendance were Dean Marcolongo, Board Solicitor; Paul Dietrich, Board Engineer; Shelley Lea, Board Secretary and Zoning Officer.

APPROVAL OF THE NOVEMBER 21, 2006 MEETING MINUTES

A motion to approve the minutes was made by Mrs. Bergus, seconded by Mr. Pierson, and approved. Abstain: Burgin.

TABLED APPLICATIONS

1. ATKINSON DEVELOPMENT GROUP – BLOCK 559, LOTS 36.01, 37, 39 – BA29-06

John Cranmer, Esquire, was present to represent the applicant. He requested to table the application until January 11, 2007. He agreed to the tolling of the time. No further notice of this application is required.

2. WHIPPOORWILL CAMPGROUND – BLOCK 616, LOTS 3,4,5 AND BLOCK 615, LOTS 1 & 2 – BLOCK 613, LOT 5 AND BLOCK 617, LOTS 3 THROUGH 10 – BA33-06

Julius Korschak, Esquire, was present to represent the applicant. He requested to table the application until January 11, 2006. He agreed to the tolling of the time. No further notice of this application is required.

1. THOMAS TOWER / ACTION SUPPLY INC. – BLOK 549, LOT 110 – BA09-06

Application is for an interpretation to determine if the applicant can utilize this lot as part of his adjoining mining operation located off of Stagecoach Road in Seaville or if a use variance will be needed.

Chairman Casaccio stepped down during this application and Mr. Unsworth acted as Chair.

Solicitor Marcolongo stated that this is an interpretation only as to whether Action Supply's mining operation can take place on adjoining lot 110. The applicant has testified that the lot was purchased in 1986 for the purpose of mining. Mining was a permitted use on the lot when at that time. The agreement of sale included deed restrictions requiring the applicant to maintain a 100 ft. buffer on the southwest portion of the premises, install a 6 ft. high stockade fence in the middle of the buffer and prohibit any mining on one half of the property closes to the Canterbury subdivision for a period of one year. He believes it is clear that the applicant purchased the property knowing that Upper Township was preparing to amend its zoning ordinance to require licensing and more strict regulations for mining operations. Resolution 21-86 requiring the licensing of mining pits was adopted on September 29, 1986 approximately 2 months after the applicant purchased lot 110. Resolution 22-87 adopted on June 8, 1987 removed lot 110 from the mining zone and placing it in the AR zone. The lot was previously split zoned, mining and agricultural. On October 7, 1986 the township issued a cease and desist order to the applicant on October 7, 1986 regarding his mining operation on lots 110 and 111 since these lots were not licensed. The applicant applied to the planning board for site plan approval in 1987. The planning concluded that mining on lot 110 was not a pre-existing non-conforming use and that they need to comply with the 500 ft. buffer requirement. However, site plan approval was granted site plan approval and was licensed by the township. Site plan approval was granted again in 1989 and 1991 and licensed up to January 31, 1992. In 1993 and 2001 during the master plan reexaminations Mr. Korschak requested the planning board return lot 110 to the mining zone. This request was not granted. The meeting will begin with the continuation of the public comment portion. There have been 31 exhibits submitted so far.

Mr. Phifer testified that he has read the transcript of the previous meeting and has certified that he has done so.

Continuation of public comment

Charles Gack, 58 Evergreen Drive, Seaville, was sworn in. He testified that Mr. Tower has been a good neighbor and upstanding member of the township. His property is adjacent to one of the applicants other mining operations.

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Joseph Schwaab, 17 Cambridge Drive, Seaville, was sworn in. He submitted a copy of a map that was given to him when he purchased his property in 2002. The map shows the zone line. The map was marked as Exhibit P-1.

Jeffrey Light, Esquire, was present to represent Leo and Michelle Previti of 16 Cambridge Drive, Seaville. The Previti's oppose the application and request for an interpretation. He read the definition of a non-conforming use from the Municipal Land Use Law. Their position is that the applicant had nothing to abandon since he never had a lawful pre-existing mining operation prior to June of 1987. He submitted a document prepared by Thomas Darcy titled Requirements for a "lawful" pre-existing non-conforming mining operation on Lot 110. The document was marked as Exhibit P-2.

Thomas Darcy, 118 Jimmy Leads Road, Galloway, was sworn in. He is a Licensed Professional Planner, Licensed Professional Surveyor and Attorney. He has reviewed the information submitted by Mr. Kenschak, the extraction ordinance and statutes in regards to mining operations. He also listened to a tape of the previous meeting.

Mr. Darcy testified that in his opinion there is no documented evidence that supports a conclusion that there was a lawful pre-existing mining use on lot 110. The township passed Ordinance No. 37 in 1953 requiring mining operations to obtain a permit from the township to conduct mining. The ordinance further requires that a plan prepared by a professional engineer be submitted showing where the operation will take place and the buffers. Based on this it is his opinion that anyone in the township wanting to conduct a lawful mining operation was required to obtain a permit first before they commenced the operation. Zoning Ordinance 10-1978 was adopted in 1978 placing lot 110 in the mining district and requiring a 100 ft. buffer around each mined parcel. Between 1975 and 1980 the State Legislature passed the soil erosion and sediment control act. It was made it mandatory that mining operations disturbing over 5,000 sq. ft. receive approval from the Cape Atlantic Soil Conservation District. Later it was made necessary that mining operations receive a license from the Township Committee. The applicant had the right to conduct a mining operation on the site if he had a license from the Township Committee. There is no evidence that a license was ever issued on lot 110 from August 1986 up to September 1986. Ordinance 21-86 adopted September 29, 1986 required site plan approval from the planning board prior to appearing before Township Committee for a mining license and a certification from Cape Atlantic Soil Conservation District. The ordinance required a 500 ft. buffer be provided adjacent to a residence. There is no evidence that any license was issued for lot 110 that would exempt them from the 500 ft. buffer requirement. He submitted a document dated 10/12/06 containing ordinance 37-1953, ordinance 10-1978, NJSA 4:24-41 Et Seq Cape Atlantic Soil, Cape Atlantic Soil denial letter and ordinance 21-1986. This document was marked as Exhibit P-3.

Mr. Darcy testified that certification from Cape Atlantic Soil Conservation District, Planning Board approval and a license from the Township is required to be a lawful mining operation. On June 8, 1987 the zoning ordinance was amended and mining was

no longer a permitted use on lot 110. There is no evidence that the applicant had a license to mine on lot 110 prior to 1987. There is no evidence of planning board approval or a certification from Cape Atlantic Soil Conservation District prior to 1987. It is his opinion that the applicant does not have a lawful mining use on lot 110.

The meeting was closed to the public.

Mr. Korschak stated that the applicant uses Lot 110 in conjunction with his mining operation. He utilizes the lot for storage and also uses it for access to Lot 111. There is evidence that some mining occurred on the site sometime prior to the applicant purchasing the property. Mr. Darcy responded that storage of equipment and material does not require a license from the township and it is also not considered a mining operation. He believes that a license from the township is needed to have a lawful operation.

Mr. Dietrich stated that a mining license is required every year and that site plan approval from the Planning Board is currently required every 5 years.

Solicitor Marcolongo stated that the last mining license presented would have terminated on January 31, 1992.

Mr. Tower, previously sworn, testified that excavation was done on this lot prior to receiving a cease and desist notice from the township. He purchased Lot 110 to use as access to his other lots. In 1986 he used material from lot 110 while doing work on the Longport Bridge.

Solicitor Marcolongo informed the board that the applicant is requesting that the board interpret that this is a pre-existing non-conforming use. If it is interpreted as a non-conforming use the applicant will be required to file an application with the Planning Board for amended site plan approval. If it is not interpreted as a non-conforming use the applicant will be required to obtain a use variance to allow mining on this lot. If the interpretation is in their favor the applicant is only asking to mine that portion of the lot that would have been in the mining zone. The buffer requirements from 1986 would apply.

Mr. Korschak stated that Mr. Tower obtained a permit for mining prior to the zoning change. The applicant received two licenses from the Township to allow mining on Lot 110. He referred to a letter from Killiam Associates, stating that the site work was in conformance with the planning board resolution. The lot was purchased in 1986 and the first permit was issued in 1990. The reason it took so long to get the license was because Mr. Tower was in litigation with the township for a very long time. The township refused to issue any further permits on this lot. Planning Board Resolution PB20-89, Exhibit A-18, acknowledges that a complete application was filed for site plan approval and recommends township committee issue a license. He submitted a site plan by

Swiderski & Thomas from April 1986. The site plan was marked as Exhibit A-35. The plan shows some excavating activity close to the property line on lot 110.

The meeting was open to the public for any comments on the new testimony given tonight.

Thomas Darcy, previously sworn, stated that in 1986 the applicant filed an application with the Cape Atlantic Soil Conservation District. The application was denied. In his opinion the application was not denied due to any court order or litigation with the township only that the applicant did not want to comply with the 100 ft. buffer requirement contained in the ordinance. He read the letter from CASCD dated September 22, 1986. The plans submitted with the application were in violation of the zoning ordinance. The applicant was trying to mine more area than the law permitted.

Mr. Light stated that the application should not be granted since he never had a permit to mine on lot 110.

Mr. Korschak stated that the plans were revised to show the 100 ft. buffer. Two licenses were issued for the years 1990, 1991 and 1992. It is his opinion that the applicant has not abandoned the use since the license was issued. The applicant has maintained the fence and buffer on the site. He never intended to abandon the use. He showed the board the location of the objectors on the map.

Solicitor Marcolongo disagreed with the comments by Mr. Korschak in regards to where the objectors live. The location of the objectors is not relevant. He read his summary of the application to the board. He also referred to case law involving expanding non-conforming uses and abandonment of non-conforming uses.

The board members were asked to give their findings of fact.

MR. SHAWL – Thomas Tower is before the board requesting an interpretation to determine if mining is a pre-existing non-conforming use on Block 549, Lot 110. The property is currently zoned “AR” Agricultural. The applicant purchased the lot in 1986 for the purpose of mining. A portion of the lot was located in the Mining zone when it was purchased by Mr. Tower. An ordinance was established in 1986 requiring a 100 ft. buffer. Mr. Korschak has suggested that once a non-conforming use is established it is entitled to continue unless it is abandoned. Mr. Korschak has stated that the applicant did not abandon the mining use. It is true that lot 110 did not continue to be licensed. Solicitor Marcolongo provided information that failure to act by an applicant is also part of abandonment. A copy of a cease and desist order was included in the exhibits. The order requested that any operation on this site stop until site plan approval was obtained. It was stated by Mr. Tower that he was changing engineers and lawyers at this time and it was overlooked. This particular lot was included in the license two times. The applicant uses lot 110 as access to his other lots and for storage of materials. The board solicitor has indicated there are no pending applications before the township committee at this

time. The lot is 17 acres and the ordinance requires 20 acres to mine on this lot. The lot will be used in conjunction with the other lots owned by the applicant. The applicant has testified that he takes approximately 6 loads out per year to maintain the non-conforming use. When the applicant purchased the property from the Donzanti's the buffer and fence were required by the seller. Vincent Orlando, PE, testified that in his opinion the applicant has established a non-conforming use since he has maintained the fence and buffer. He made reference to the McDowell case. Mr. Marcolongo provided information on case law. Mr. Darcy gave testimony that the applicant did not have a license as required in 1953 to operate a mine on lot 110. In 1980 it was mandatory that mining operations obtain certification from the Cape Atlantic Soil Conservation District. There was no license prior to 1986. In 1986 an ordinance went into effect requiring site plan approval and recommendation from the planning board prior to obtaining a license from the township committee. The zoning of the property was changed in 1987. A license was not required at the time of the zoning change. An adjacent property owner testified that Mr. Tower is a good neighbor. Many of the residents believed that the property was in an AR zone and that no mining would ever occur on Lot 110. The applicant obtained a license in 1989, 1990, 1991 and 1992 that included lot 110. Lot 110 was never included in the licensing after that time. The lot has been used for access to lot 111. Exhibit A-35 is a plan by Mr. Swiderski dated 11/5/87 showing excavation activity on site. Case law suggests that municipalities have authorization to enact ordinances to protect the public health, safety and welfare of its residents. Pre-existing non-conforming uses offer protection for the individual however a variance can also provide protection from zoning changes. Special rules exist for extraction industries such as sand mining. The board must decide if applicant is legally operating a mining operation to determine if existing non-conforming use.

MR. PIERSON – In testimony heard over the last several months there may have been several reasons why the applicant did not have a license or apply for a license. He looks at this as an accessory to a mining operation. He believes it is ancillary to a mining operation. The lot would be used to store equipment, supplies, etc. In his mind this lot is part of the mining operation. There are at least three years that the applicant did have a license. He believes the mining use was not abandoned.

The mining ordinance was created while the applicant was in litigation with the township. The applicant was legally licensed on three occasions after that time. He believes the applicant did not abandon the mining use and that the applicant intended to use the property for mining.

MRS. BERGUS – She does not believe this is a pre-existing non-conforming use. She doesn't believe that using the lot for access to another lot and stockpiling is a mining operation. A mining license has not been issued from 1993 until present.

MRS. BURGIN – Thomas Tower has testified that he removes six loads of soil a year from lot 110 without the needed permits to demonstrate his intent to mine the lot as a continuation of a non-conforming use. During the time from 1991 until 2006 no permits or license were applied for or granted for lot 110. His other lots were licensed. Special rules apply to extraction industry and they are permitted to expand beyond their existing footprint even when zoning changes make them non-conforming. A neighbor with 200

ft. of lot 110 who made closing on her home March 31, 2006 and neighbors outside of 200 ft. testified they had believed that mining would not take place on lot 110 because its located in the AR zone and the township ordinances. The township adopted ordinance 21-1986 in September of 1986. The property was rezoned in 1987. A portion of lot 110 was no longer in the M zone but an AR zone. Mr. Tower has traveled across lot 110 to access his other pit. Mr. Tower requested during the master plan review in 1993 and 2001 that the planning board restore the mining zone on lot 110. The planning board and Township of Upper have taken no action to restore the mining zone. The Upper Township committee has the power to change what is allowed or not allowed in any give zone.

MR. UNSWORTH – The applicant is here for an Intention. There are no variances requested at this time. The applicant has demonstrated an intention to use the lot for mining. The property was zoned for mining when the applicant purchased it. Lot 110 was included in the mining license in 1991 & 1992. There was no license issued prior to the zoning change. The township continued to deny the request to rezone the lot. If it is determined this is a non-conforming use the applicant will file an application with the planning board for site plan approval.

A motion was made by Ms. Petroza and seconded by Mrs. Burgin, to interpret that the use on lot 110 constitutes a pre-existing non-conforming use permitting the applicant to mine on the property that was previously located in the mining zone. In favor: Pierson, Shawl, Phifer, Petroza, Unsworth. Opposed: Bergus, Burgin.

2. JOHN & WENDY DOUGHERTY – BLOCK 845, LOT 12 – BA31-06

Applicants are requesting variances for rear yard setback and building height for renovations and additions to an existing single-family dwelling at Whittier Road in Strathmere.

Julius N. Kenschak, Esquire, represented the applicants. He stated that the applicants are requesting variances to reconstruct the existing dwelling. The proposed height of the structure is 34 ft. where 33 ft. is permitted. A letter has been issued by Edward Kenney, Construction Official, to the Cape May County Health Department, indicating this is reconstruction not a new structure. A copy of the letter was marked as marked as Exhibit A-1. A copy of the approval letter from Denise Versage of the Cape May County Health Department was marked as Exhibit A-2.

Robert Bachich, Principal of the firm Bachich Associates, was sworn in. He testified the applicants are requesting a variance for the rear yard setback to allow 10.5 ft. where 30 ft. is required. A variance is needed to allow the height of the building to be 34.78 ft. where 33 ft. is permitted. The structure will exceed the allowable height only where the elevator tower and stair tower are located. Approximately 12% of the building will exceed the height. The rest of the structure will comply with the height requirement. The height will provide access to a rooftop deck by an elevator. The elevator will go to the rooftop deck making it handicap accessible. The deck meets the height requirements.

He believes that the benefits of providing handicap accessibility outweigh any detriments. He sees no detriment to the zone plan or zoning ordinance. There is no detriment to the public good. There are other buildings in the area that are higher than the proposed structure shown on the plan by Stephen C. Martinelli dated 11-14-06.

Mr. Dietrich stated that two standard size automobiles should be able to park under the structure. The as built survey has to show that the cars can get into the parking area underneath the house. There will be sufficient off street parking. An additional variance will be needed for lot coverage since the exterior landing and stairs in the front of the structure.

Mr. Bachich stated that the steps and landing are over 18 inches and are not calculated in the lot coverage. They will request a variance for lot coverage. They are not proposing any accessory buildings on site. The stairs allow them to have entry above the base flood elevation. He believes this will be a benefit for flood purposes. There will not be an outside shower. The landing and steps will only be over by 1 percent.

John Dougherty, 200 Church Road, Marmora, was sworn in. He testified that they need the elevator for handicap accessibility to the roof deck. It is important for his family to watch the sunset and he wants his mother and older relatives to be able to get to the deck. He intends to move to Strathmere and this will be his residence.

The meeting was open to the public. Hearing no response the meeting returned to the board for findings of fact.

MR. SHAWL – John & Wendy Dougherty of 200 Church Road, are the owners of block 845, lot 12 on the Whittier Road in Strathmere. They are proposing to reconstruct an existing dwelling and adding on. They intend to improve the rear yard setback. They have amended the application to include a variance for lot coverage for the proposed stairs and landing. They are also requesting a height variance for 12 percent of the building. The height will conform to other structures in the area. The septic will be upgraded.

MRS. BURGIN – The height variance is requested to provide access to the roof deck that will be handicap accessible.

MS. PETROZA – There is concern about off street parking in Strathmere. It was noted that there should be no problem parking 2 standard size vehicles under the structure.

MR. PIERSON – In accordance with 40:55D7c(1) he believes they applicant has tried to comply more with the rear yard setback and (5) to demonstrate that they do not violate light, air and open space. There is exceptional shallowness to the property. A letter from Mr. Kenney, Construction Official and the Cape May County Health Dept. has been marked into evidence.

MR. UNSWORTH – There was no public comment. The septic location limits the location of the house in regards to setbacks. The handicap access does merit additional consideration in regards to the height of the building.

A motion was made by Ms. Petroza and seconded by Mr. Pierson, to grant the variances including the lot coverage variance with the standard conditions. In favor: Burgin, Pierson, Phifer, Petroza, Unsworth. Opposed: Bergus, Shawl.

RESOLUTIONS

1. CHRISTINE SHALLCROSS – BLOCK 455, LOT 39 – BA25-06

A motion to adopt the resolution was made by Mrs. Bergus, seconded by Mr. Pierson, and approved. Abstain: Burgin, Phifer.

2. CLYDE AND BONNIE ASH – BLOCK 485, LOTS 13,14,25 THROUGH 32 – BA27-06

A motion to adopt the resolution was made by Mrs. Bergus, seconded by Mr. Unsworth, and approved. Abstain: Burgin, Phifer.

3. ROBERT HICKMAN – BLOCK 722, LOTS 1,2,3 – BA28-06

A motion to adopt the resolution was made by Mrs. Bergus, seconded by Mr. Pierson, and approved. Abstain: Burgin, Phifer, Unsworth.

BILLS

A motion to pay the bills was made by Mr. Shawl, seconded by Mrs. Bergus, and approved. _

ADJOURNMENT

A motion to adjourn the meeting was made by Mr. Pierson, seconded by Mrs. Bergus, and approved. The meeting was adjourned at 11:00 p.m.

Submitted by,

Shelley Lea