

**BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY**

**IN RE: ERIC C. HOWARD**

**(Case No. 11925)**

A hearing was held after due notice on March 6, 2017. The Board Members present were Mr. Dale Calloway, Mr. John Mills, Mr. Jeff Hudson, Mr. Norman Rickard and Mr. Brent Workman.

Nature of Proceedings

This is an application where the applicant seeks the determination that the subject property includes an active Borrow Pit that predates the establishment of the Sussex County Zoning Code in approximately 1970, which would result in the determination that the Borrow Pit is a legal non-conforming use of property (Section 115-202 of the Sussex County Zoning Code).

Findings of Fact

The Board found that the applicant is seeking the determination that the subject property includes an active Borrow Pit that predates the establishment of the Sussex County Zoning Code in approximately 1970, which would result in the determination that the Borrow Pit is a legal non-conforming use of property (Section 115-202 of the Sussex County Zoning Code). The application pertains to certain real property located on the south side of Pine Haven Road, approximately 1,745 feet east of Cedar Creek Road/Route 30 (911 address: 22006 Pine Haven Road, Lincoln), said property being identified as Sussex County Tax Map and Parcel Number 2-30 7.00 42.03.

1. The Board was given copies of the Application, a portion of the tax map of the area and an overhead photo of the area.
2. The Board was given copies of an Exhibit Booklet submitted by the Applicant containing a copy of the tax map; aerial photographs (current); aerial photographs (1992 and 1968); and other users of the borrow pit.
3. The Board found that Francis Webb and Timothy Webb appeared before the Board after being sworn in with their representative, Richard E. Berl, Esquire.
4. The Board found that Francis Webb was authorized to speak on behalf of Eric C. Howard pursuant to a Power of Attorney executed by him.
5. The Board found that Francis Webb and Timothy Webb testified that the property is owned by Eric C. Howard, and that he has operated a Borrow Pit at this site since the early 1960s.
6. The Board found that Eugene Trotter was a dump truck broker in the early 1960s, and at that time started operating the Borrow Pit as side business known as "Trotter's Pit".

7. The Board found that Eugene Trotter worked with the State of Delaware from 1965 until 2002 and continued to operate the Borrow Pit as a side business.
8. The Board found that while the Borrow Pit was not used every day or even every week, it was used regularly in the same manner of use typical for borrow pit operations.
9. The Board found that there are aerial photographs dating back to 1968 showing the use of the borrow pit from that time until the present time.
10. The Board found that Dale Cohee, John Macklin, Chester Chaney, Donald Warrington, Robbi Smith, Jim Wooten and one other person signed a statement confirming that they "have hauled dirt out of Eugene Trotter's dirt pit since the mid 1970s".
11. The Board found that Chester Lee Chaney submitted a letter dated January 20, 2017 stating that "Swain Excavation, Inc. has on many occasions utilizing [sic] this resource for hauling dirt materials for the purpose of construction business over the course of 23 years. Swain Excavation, Inc. looks forward to continued availability of this resource in the future."
12. The Board found that John E. Macklin, Sr. submitted a letter dated January 20, 2017 stating that "As a sole proprietor in the late seventies, early eighties, John Macklin Hauling hauled dirt from Trotters Pit Haven Road Road Lincoln, Delaware. As John Macklin and Son Inc. we would like to continue the resources."
13. The Board found that Dale Cohee submitted a letter dated January 26, 2017 stating as follows: "I have been aware of the use of a portion of the property as a Borrow Pit for at least 50 years"; "Between 1964 and 1967, my family operated a wild animal park in the vicinity, and took dirt out periodically for use at that location. After that, we have owned the campground and mobile home park, and I have similarly removed dirt from the pit roughly 8-10 times each year to be used at the park. I have my own backhoe, and always made the necessary arrangements with the owners of the property."; and "I am also aware that I am not the only person who has used that pit to remove dirt. I have often seen other vehicles on the property removing dirt, although I do not know the identity of all of the individuals involved."
14. The Board found that Section 115-202 of the Code of Sussex County establishes that the determination of whether a nonconforming use exists shall be a question of fact and shall be decided by the Board.
15. The Board found that the use of the Borrow Pit, based on the testimony and the record presented during the public hearing was consistent with the nature, timing and extent of use that is reasonable and typical for a legal Borrow Pit. This ongoing use was neither casual nor intermittent.
16. The Board found that although there was testimony from James Bell and Ezekial Vetrum during the public hearing in opposition to the Borrow Pit, this testimony either confirmed the historic use of the Borrow Pit over time, or was not compelling

or relevant as to the determination of whether the Borrow Pit should be considered a legal, nonconforming use.


17. The Board found that based upon the record before it, there was sufficient evidence to determine that a Borrow Pit operation existed on the subject property prior to 1970, and that the use of Borrow Pit has continued without interruption since that time until the present date.

18. The Board found that based upon the record before it, the Borrow Pit that is the subject of this application is a legal, nonconforming use.

#### Decision of the Board

Upon motion duly made and seconded, the Board has determined that the Borrow Pit is a legal non-conforming use of property (Section 115-202 of the Sussex County Zoning Code). The Board Members in favor of the motion were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman. No Board Member voted against the Motion.

BOARD OF ADJUSTMENT  
OF SUSSEX COUNTY

  
Dale Callaway  
Chairman

If the use is not established within one (1) year from the date below the application becomes void.

Date April 4, 2017.