

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: KRUGER FARMS

(Case No. 12189)

A hearing was held after due notice on September 10, 2018. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a determination of a non-conforming use regarding a borrow pit.

Findings of Fact

The Board found that the Applicant is requesting determination of non-conforming use regarding a borrow pit. This application pertains to certain real property south side of Fleetwood Pond Road, approximately 0.52 miles southwest of Old Furnace Road and on the southside of Fleetwood Pond Road at the intersection of Old Furnace Road and Rum Bridge Road (911 Address: N/A); said property being identified as Sussex County Tax Map Parcel Number 2-31-14.00-19.00 & 2-31-14.00-20.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a portion of the tax map of the area, aerial photographs of the Property, a letter from Timothy Willard, Esquire, a timeline of history of the Property, and pictures of the Property.
2. The Board found that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application.
3. The Board found that Paul Kruger was sworn in to testify about the Application. Tim Willard, Esquire, was present on behalf of the Applicant, presented the Application and submitted a petition from thirty-one (31) people in support of the Application.
4. The Board found that Mr. Willard stated that Mr. Kruger's father founded Kruger, Inc., in the 1940s and that the Kruger family farms lands near Georgetown. The Property is located off Fleetwood Pond Road and contains approximately 290 acres. Mr. Kruger purchased the parcels in 1972 and 1975. Most of the Property is farmland.
5. The Board found that Mr. Willard stated that there is evidence that dirt was hauled out of the Property prior to the enactment of the Sussex County Zoning Code.
6. The Board found that Mr. Willard stated that Mr. Kruger recalls purchasing dirt in the 1960s from the prior owner. A timeline submitted as part of the record further illustrates the history of the Property.
7. The Board found that Mr. Willard stated that the exhibits include an irrigation diagram and the borrow pit will be limited due to the irrigation. The pit will also be buffered by crops.
8. The Board found that Mr. Willard stated that the pit has grown over the years; particularly in recent years.
9. The Board found that Mr. Willard stated that the pond is approximately 2 acres and the dig area for the borrow pit is approximately 4-6 acres. The pond will not expand into the farmland which is being irrigated.
10. The Board found that Mr. Kruger affirmed the statements made by Mr. Willard as true and correct.
11. The Board found that Gordy Pusey was sworn in to testify about the Application.

12. The Board found that Mr. Pusey testified that he lives adjacent to the site and has lived there for 52 years. His children used to play in the area. When he moved to the area, the borrow pit was very small but has grown over the years.
13. The Board found that Mr. Pusey testified that the pit was a hole in the ground for many years and was not used very often. He noticed trucks taking dirt from the pit from time-to-time and that the excavations were more frequently than every 2 years. In the past 7-8 years, however, excavations have occurred more frequently and the size of the pit has grown.
14. The Board found that Mr. Pusey testified that he agrees that the borrow pit has been in operation over fifty years and prior to the existence of the Code.
15. The Board found that seven (7) people appeared in favor of the Application.
16. The Board found that no parties appeared in opposition to the Application.
17. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board weighed and considered, the Board makes the following determinations.
 - a. §115-202 of the Sussex County Code establishes that a determination of whether a nonconforming use exists shall be a question of fact for the Board. The Board found that the use of the borrow pit, based on the testimony and record presented at 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 or intermittent.
 - b. Based on the record, there was sufficient evidence to determine that the borrow pit existed on the Property prior to 1970, and that the borrow pit has continued without interruption since that time. More specifically, the borrow pit has existed on the Property since the 1960s.
 - c. The Applicant has demonstrated that dirt was purchased and removed from the pit since the early 1960s for housing, irrigation fields, and other construction projects. The Applicant submitted an extensive timeline outlining the history of the borrow pit. While the Applicant's family only purchased the Property in 1972 and 1975 (after the enactment of the Sussex County Zoning Code), the Applicant was familiar with the site and actually excavated dirt from the pit prior to such ownership. The Board is convinced that the Applicant's recollection of the history of the borrow pit is accurate. As such, the record is clear that the pit was used in a continuous manner since the 1960s; though its use has intensified in recent years.
 - d. The testimony of Mr. Pusey was particularly helpful to the Board because he has lived adjacent to the Property since 1966 and he confirmed the long-time usage, without interruption, of the borrow pit. His testimony was also credible and persuasive.
 - e. The Board notes that the Sussex County Code limits expansion of non-conforming uses. The Board also notes that borrow pits, by their nature, require extraction from the ground and, thus, naturally require expansion. In this case, the expansion of the borrow is limited due to the irrigation line of farmlands on the site. As presented by the Applicant, the area of the borrow pit will be naturally confined to a corner of the Property and is buffered by crops.
 - f. The Property was used for the borrow pit use prior to the enactment of the Sussex County Zoning Code and said use continued since that time without a lapse of at least two (2) years. As such, the Board determined that the borrow pit was a pre-existing, non-conforming use allowable under the Sussex County Zoning Code.
 - g. This borrow pit use may continue as a non-conforming use as provided in §115-195 of the Code and in 9 Del. C. § 6920.

The Board determined that the current use of the Property as a borrow pit is a pre-existing, non-conforming use and may continue as provided in §115-195 of the Code and in 9 Del. C. § 6920.

Decision of the Board

Upon motion duly made and seconded, the Applicant was approved. The Board Members in favor were Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. No Board Members voted against the Motion to approve the Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY


John Mills
Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date November 7, 2018.