BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: CHRISTIAN BRAUER, CONSTANCE BRAUER, ANDREW MALANEY, CHRISTINE MALANEY

(Case No. 12373)

A hearing was held after due notice on October 21, 2019. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman.

Nature of the Proceedings

This is an appeal of a determination by the Planning Director.

Findings of Fact

The Board found that the Appellants are appealing a determination of the Planning Director. This appeal pertains to certain real property located on the southeast corner of North Old State Road and Fleatown Road (911 Address: 11671 Fleatown Road, Lincoln) said property being identified as Sussex County Tax Map Parcel Number 2-30-19.00-111.00 (Portion). After a public hearing, the Board made the following findings of fact:

1. The Board was given copies of the Appeal, exhibits from the Appellants, an aerial photograph of the Property, a transcript of the Planning & Zoning Commission hearing, a portion of the tax map of the area.
2. The Board found that Ms. Cornwell, Christian Brauer, and Constance Brauer were sworn in to give testimony about the Application. Robert Witsil, Esq., presented the appeal on behalf of his clients, Christian Brauer, Constance Brauer, Andrew Malaney and Christine Malaney. James Fuqua, Esquire, appeared on behalf of Chaney Enterprises and Vincent Robertson, Esquire, appeared on behalf of Ms. Cornwell. Mr. Fuqua submitted exhibits as part of his presentation.
3. The Board found that Mr. Witsil stated that the subject property consists of approximately 6 acres and was rezoned to HI-1 (Heavy Industrial) in 1986. The Property is located near the Appellants' homes. His clients purchased their lots in 2005 and the HI-1 zoning was in place at that time.
4. The Board found that Mr. Witsil stated that the Appellants have raised this appeal pursuant to Sussex County Code §115-208(B) and §115-209(A) and 9 Del. C. §6916(a) and §6917(1) for the decision of the Director of the Sussex County Planning and Zoning Department ("Director") to not require the owner of Sussex County Tax Parcel No. 230-19.00-111.00, Trinity Commercial Holdings, LLC or the proposed concrete manufacturer, Chaney Enterprises, LLC, ("Chaney") to submit an application to the Board of Adjustment for a public hearing for a Potentially Hazardous Use in an HI-I Heavy Industrial District. The Appellants argue that Chaney's proposed use requires a potentially hazardous hearing or a special use exception hearing before the Board of Adjustment. The hearing before the Board on this appeal was to determine whether the Director erred when she did not direct the site plan to the Board of Adjustment either before or after the site plan review.
5. The Board found that Mr. Witsil stated that the Sussex County Zoning Code outlines the purpose of the Heavy Industrial district and that potentially hazardous uses are listed in §115-111 of the Code.
6. The Board found that Mr. Witsil stated that §115-111 requires that the use or manufacture, compounding, processing or treatment of cement, lime, sand or gravel may be located in an HI-I Heavy Industrial District only after the location and nature of the use shall have been approved by the Board of Adjustment and that, as part of that process, the Board is required to review the proposed plans and

statements and shall not permit such buildings, structures, or uses until it has been shown that the public health, safety, and welfare will be properly protected and that necessary safeguards will be provided for the protection of water areas or surrounding property and persons. He also stated that the Board is charged with consulting other agencies for the promotion of public health and safety and shall pay particular attention to the protection of the County and its waterways from the harmful effects of air or water pollution of any type.

7. The Board found that Mr. Witsil stated that the Potentially Hazardous Use hearing is required if the proposed use is located in a Heavy Industrial District if any doubt exists as to the use.
8. The Board found that Mr. Witsil stated that Chaney Enterprises applied to the Planning & Zoning Commission for a central mixing and proportioning plant but the proposed use is not a central mixing and proportioning plant. Rather, he argued that the proposed plant is a concrete batching plant. He argued that there was no public hearing and that the Planning & Zoning Commission made no determination as to whether the use was "similar." Furthermore, the Director did not refer the application to the Board.
9. The Board found that Mr. Witsil stated that concrete batch plants are identified under §115-210 as a special use exception and that a concrete batch plant is not specifically allowed in the HI-1 district but a concrete batch plant is permitted as a special use exception in lesser districts.
10. The Board found that Mr. Witsil stated that the HI-1 district allows for any use permitted in the Light Industrial (LI-1) district.
11. The Board found that Mr. Witsil stated that, on July 18th, Samantha Bulkilivish of the Planning & Zoning Office sent a letter requesting information and that Chaney thereafter submitted additional information.
12. The Board found that Mr. Witsil stated that the description of the facility as given by the Applicant's attorney James Fuqua identifies the facility as a concrete batch plant and not a concrete mixing and proportioning facility.
13. The Board found that Mr. Witsil stated that cement, as a fundamental component of concrete, will be used or compounded as part of the process and that cement, sand, and gravel are essential elements to the concrete production and that the use of those ingredients thus requires a concrete plant to have to go through the potentially hazardous use process because those ingredients are specifically identified in §115-111 and that a potentially hazardous use hearing is required for all items listed in §115-111. He argued that the nature of the materials used in the process of Chaney's proposed use requires a hearing under §115-111.
14. The Board found that Mr. Witsil stated that §115-111 is an additional safeguard to the uses listed in §115-110.
15. The Board found that Mr. Witsil stated that, if allowed, Chaney will be able to operate the facility without any restrictions or conditions such as hours of operation or lighting. The Board has general powers to impose conditions on uses like this under §115-212. He believes that the Board should have the right to impose conditions on Chaney's use.
16. The Board found that Mr. Witsil stated that a similar facility operated by Chaney in Lorton, Virginia, is a concrete batching plant and that the Board previously heard an application for Southstar, L.P., where the Board granted a special use exception for a concrete batching plant.
17. The Board found that Mr. Witsil stated that the proposed use is a concrete batching plant and can only be allowed after a special use exception hearing or a potentially hazardous use hearing.
18. The Board found that Mr. Witsil stated that correspondence was sent to the Director explaining the issues with the request.

19. The Board found that Mr. Witsil stated that the Code does not provide definitions for a concrete batching plant or a central mixing and proportioning plant but both uses are specifically identified in the Code. He did not know why the two types of plants were separately identified.
20. The Board found that Mr. Witsil stated that the two plants use the same materials but the difference is that a concrete batch plant mixes the dry materials and water is later added whereas water is added to the mixed materials at the concrete mixing and proportioning plant. He admitted that there is not much difference between the two types of plants but he argued that concrete batch plants cause more harm than concrete mixing and proportioning plants due to when the water is added.
21. The Board found that Mr. Witsil stated that he was initially confused about the difference when he wrote an earlier letter to the director.
22. The Board found that Mr. Witsil stated that Chaney has the burden of proving that this facility does not create any more objectionable influences than a concrete mixing and proportioning facility and that the Director erred in not requiring this additional information.
23. The Board found that Mr. Witsil stated that doubt exists about the proposed use.
24. The Board found that Mr. Witsil stated that nothing was mentioned by the Director at the Planning & Zoning Commission meeting about the concerns raised by Mr. Witsil and no conditions were imposed on the use.
25. The Board found that Mr. Witsil stated that the Director has not issued a written decision but the appeal was filed within 30 days as required under §115-208 and §115-209.
26. The Board found that Mr. Witsil stated that the Appellants are aggrieved parties and that the proposed facility will detrimentally affect their health, safety, and welfare and the use will affect their property values.
27. The Board found that Mr. Witsil stated that the Director should have directed the application to the Board for a potentially hazardous use hearing and that his clients believe an error was made by the Director.
28. The Board found that Mr. Witsil stated that there is little Delaware caselaw on point. He cited Lowes v. Sussex County where the Superior Court determined that no public hearing is required for a site plan approval; though the issue in the Lowes case did not apply to a special use exception or a potentially hazardous use. He also noted that, in 1994, the Superior Court ruled in East Lake Partners v. Dover City Planning Commission, that the Commission has no right to deny a site plan approval for a permitted use simply because opponents oppose the proposal but the Court ruled that the Commission has further right to scrutinize the project to protect neighboring properties and the general public. Mr. Witsil argued that neither of those decisions resulted in a referral to the Board of Adjustment.
29. The Board found that Mr. Witsil stated that a highly industrial concrete facility has been approved without consideration of how objectionable influences will affect neighbors.
30. The Board found that Mr. Witsil stated that the property is located in a rural, residential area.
31. The Board found that Mr. Witsil stated that the Appellants request that the Board determine as follows:
    a. The Director's action and/or determination not to require Chaney Enterprises, LLC to proceed to a Potentially Hazardous Use public hearing and decision by the Board of Adjustment was an error and that a public hearing and decision by the Board must be conducted in accordance with Sections 115-111 and 115-110(C)
    b. The Director's actions and/or determination not to refer Chaney Enterprises, LLC, to the Board of Adjustment for a public hearing on a Special Use Exception for a concrete batching plant was an error and

that a public hearing and determination must be conducted by the Board of Adjustment

c. The Director's action and/or determination not to require Chaney Enterprises, LLC to revise its site plan to identify the correct proposed use of a concrete batching plant was an error and that the Director must declare the preliminary site plan null and void and require the Applicant to revise the preliminary site plan and re-apply for preliminary site plan approval.

32. The Board found that Mr. Brauer affirmed the statements made by Mr. Witsil as true and correct.
33. The Board found that Mr. Fuqua stated that Chaney Enterprises is the owner / operator of the concrete plant and he argued that the Director's determination should be affirmed by the Board.
34. The Board found that Mr. Fuqua stated that the proposed use is a permitted use in the HI-1 district, which is a heavy industrial zone. The property has been zoned HI-1 since 1986. §115-109 states the purpose of the HI-1 zoning district and that §115-110 lists the permitted uses in the HI-1 district.
35. The Board found that Mr. Fuqua stated that §115-110 has 3 sections and all sections list permitted uses including §115-110(c) which lists "concrete products and central mixing and proportioning plants." He argued that §115-110(c) also allows for similar industrial uses involving the manufacture, compounding, processing, packaging or treatment of concrete.
36. The Board found that Mr. Fuqua stated that a concrete batching plant is similar to a concrete mixing and proportioning facility and has no greater impact.
37. The Board found that Mr. Fuqua stated that the 2 types of plants are permitted uses in the HI-1 zoning district.
38. The Board found that Mr. Fuqua stated that the fundamental rule of statutory construction is that the plain meaning of the statute controls.
39. The Board found that Mr. Fuqua stated that the plain meaning of §115-110 is that a central mixing and proportioning plant is a permitted use in the HI-1 zone and that a concrete batch plant is a permitted use as a similar use with no greater impact.
40. The Board found that Mr. Fuqua stated that no error occurred in the Director's decision.
41. The Board found that Mr. Fuqua stated that concrete batch plants are identified as a special use exception in the LI-1 district but the Property is zoned HI-1 – not LI-1 - and concrete batch plants are not identified as needing special use exceptions in the HI-1 zone.
42. The Board found that Mr. Fuqua stated that the Appellants suggest that the Board require a special use exception and, thus, ignore the plain language of §115-114 which identifies the uses which require a special use exception in the HI-1 zone.
43. The Board found that Mr. Fuqua stated that the Board has no authority to amend the existing zoning code.
44. The Board found that Mr. Fuqua stated that §115-210 addresses the Board's authority to grant special use exceptions and that §115-210 notes that the special use exceptions are specified in each district.
45. The Board found that Mr. Fuqua stated that concrete batching plants are identified as special use exceptions in 8 different zoning districts but §115-114 does not authorize concrete batch plants as a special use exception in the HI-1 zone.
46. The Board found that Mr. Fuqua stated that the special use exceptions authorized in the LI-1 zone have no bearing on the special use exceptions authorized in the HI-1 zone.
47. The Board found that Mr. Fuqua stated that the ordinance is plain and clear and that a concrete batch plant is not authorized as a special use exception in the HI-

1 zone. Rather, the HI-1 zone is the logical place where a concrete batch plant would be located and a special use exception for a concrete batch plant in an HI-1 zone is not required because the use is a permitted use.

48. The Board found that Mr. Fuqua stated that there a difference between concrete and cement as explained in his letter as they are different products. He noted that cement is made from a closely controlled chemical mixture of limestone, calcium, silicone, iron, aluminum, and other ingredients through heating in kilns of approximately 2,700 degrees Fahrenheit to create clinkers and that product is then grounded into cement. He stated that the manufacturing of cement is a potentially hazardous use which would require Board approval under §115-111 but Chaney's process, however, does not include the creation of cement. Rather, as explained by Mr. Fuqua, Chaney makes concrete.
49. The Board found that Mr. Fuqua stated that concrete includes rock, stones, sand, pebbles, and cement and cement makes up about 10-15% of the mass of the ingredients of concrete and water is added to the mixture.
50. The Board found that Mr. Fuqua stated that there is no heating involved in the creation of concrete and that cement is not being made on the site.
51. The Board found that Mr. Fuqua stated that a concrete plant consists of equipment to store, weigh, and load concrete ingredients into a concrete transport truck.
52. The Board found that Mr. Fuqua stated that there are 2 main types of concrete plants: 1) a central mixing and proportioning plant which is wet and 2) a concrete batch plant which is dry.
53. The Board found that Mr. Fuqua stated that a central plant premixes the concrete ingredients with water before loading onto the truck whereas a batch plant loads the dry ingredients into the truck where water is added and the ingredients are mixed in the truck. A central plant is a large facility that makes big mixes of concrete whereas a batch plant involves the creation of a singular batch.
54. The Board found that Mr. Fuqua stated that the only difference between the two plants is when the water is added and that, otherwise, the two plants are identical. Mr. Fuqua argued that the Appellants' counsel acknowledged that the two types of plants are "interchangeable."
55. The Board found that Mr. Fuqua stated that §115-110(c) authorizes as permitted uses by right central plants and similar uses having no greater impact.
56. The Board found that Mr. Fuqua stated that there are no conditions required for permitted uses. Mr. Robertson agreed.
57. The Board found that Mr. Fuqua stated that zoning laws are interpreted in favor of landowner and, if there are 2 reasonable interpretations of zoning laws and there is doubt, the doubt must be resolved in favor of the landowner.
58. The Board found that Mr. Fuqua stated that, if a statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the Court's role is limited to an application of the literal meaning of those words and the plain meaning of statute controls. Mr. Fuqua argued that the plain meaning of the statute is that both concrete batch plants and central plants are permitted uses.
59. The Board found that Mr. Fuqua stated that a statute is ambiguous only if it is reasonably susceptible to different interpretations and that, even if a statute was deemed ambiguous, the statute must be construed as a whole such as to give effect to all provisions of the statute and avoids absurd results. He argued that the arguments raised by the Appellants creates an absurd result.
60. The Board found that Mr. Fuqua stated that concrete batch plants are not recognized as potentially hazardous uses in any other district and that the Appellants' argument that the concrete batch plant is a hazardous use would create an absurd result.

61. The Board found that Mr. Fuqua stated that Board approval for this use is not needed and that a special use exception for this use cannot be applied for because it is not authorized as a special use exception.
62. The Board found that Mr. Fuqua stated that the Appellants' argument ignores the plain meaning of §115-110(c) and that there is no doubt that what is proposed is a concrete plant.
63. The Board found that Mr. Fuqua stated that the Director makes the determination as to whether doubt exists and that the Director did not commit error.
64. The Board found that Mr. Fuqua stated that it was appropriate to submit the site plan to the Planning & Zoning Commission.
65. The Board found that Mr. Fuqua stated that the Board should find that:
    a. The Director did not commit error because the proposed use is a permitted use authorized by §115-110(c) of the Sussex County Code and the Director's decision should be affirmed.
    b. The Director did not commit error because the proposed use is not authorized by §115-114 of the Sussex County Code as a special use exception in the HI-1 district and is a permitted use in that district per §115-110(c) of the County Code and the Director's decision should be affirmed.
    c. The Director did not commit error since the proposed use is a permitted use and it was appropriate to present the site plan to the Planning and Zoning Commission for preliminary site plan review.
66. The Board found that Kyle Murray was sworn in to give testimony about the Appeal. Mr. Murray affirmed statements made by Mr. Fuqua as true and correct.
67. The Board found that Ms. Cornwell testified that, in July 1986, the Property was rezoned to HI-1 and, in June 2019, a site plan application was filed.
68. The Board found that Ms. Cornwell testified that, pursuant to §115-110(c), the Planning & Zoning Office processed the site plan application.
69. The Board found that Ms. Cornwell testified that §115-110(c) lists the permitted uses and one of the permitted uses is concrete products or central mixing and proportioning plants.
70. The Board found that Ms. Cornwell testified that §115-111 does not apply in this situation because the proposed use is not a potentially hazardous use and that Chaney sought relief under §115-110.
71. The Board found that Ms. Cornwell testified that a central plant and a batch plant use identical materials and that the Appellants' attorney noted that the two plants are "interchangeable."
72. The Board found that Ms. Cornwell testified that the Commission granted preliminary approval for the site plan at its meeting on August 8th.
73. The Board found that Ms. Cornwell testified that §115-210 refers to special use exceptions as are identified in each specific zoning district but §115-114 does not identify a concrete batch plant as a special use exception in the HI-1 district. Rather, she argued, the use is a permitted use and a special use exception is not required.
74. The Board found that Mr. Robertson stated that he agrees with Mr. Fuqua and Ms. Cornwell.
75. The Board found that Mr. Robertson stated that words and the Code have meaning and that the Appellants' have cherry-picked portions of the Code to fit their argument.
76. The Board found that Mr. Robertson stated that the property owners and the County need predictability on how Code sections are interpreted and that property owners are entitled to rely on the plain meaning of the Code.
77. The Board found that Mr. Robertson stated that the Board does not have jurisdiction to hear an appeal of a decision of the Planning & Zoning Commission.

78. The Board found that Mr. Robertson stated that site plans appear as "Other Business" items at Commission meetings because they are permitted uses and no public hearing is necessary.
79. The Board found that Mr. Robertson stated that there was no hearing before the Commission. Rather, the Commission reviewed the site plan as an "Other Business" item and the agenda item lasted 2-3 minutes.
80. The Board found that Mr. Robertson stated that, once preliminary site plan approval is received, an applicant must obtain other state agency approvals prior to final site plan approval.
81. The Board found that Mr. Robertson stated that §115-110 lists permitted uses and §115-110(c) identifies concrete products and central mixing and proportioning plants and any similar industrial uses as permitted uses.
82. The Board found that Mr. Robertson stated that batching and mixing facilities are interchangeable and there is no doubt as to the use.
83. The Board found that Mr. Robertson stated that the HI-1 district incorporates the permitted uses in the LI-1 district which include agricultural uses.
84. The Board found that Mr. Robertson stated that there is an agricultural use notice which is similar to the language in §115-110(c) and that, by analogy, using the Appellants' logic, would require any farmer in the HI-1 district to have to come to the Board for a potentially hazardous use which would be an absurd result.
85. The Board found that Mr. Robertson stated that the "doubt" clause comes into play when something was not specifically listed such as a new product or use that is similar to the permitted uses where the Director had doubt about the nature of the use or process.
86. The Board found that Mr. Robertson stated that §115-111 identifies potentially hazardous uses and specifically states that it does not apply to the uses "listed above" which include the concrete uses discussed in §115-110.
87. The Board found that Mr. Robertson stated that §115-210 does not apply to this situation either.
88. The Board found that Mr. Robertson stated that, using Appellants' logic for example, §115-210 requires that a special use exception be given for commercial use greenhouses but commercial greenhouses are permitted uses on agricultural lands of greater than 5 acres in the AR-1 district. Mr. Robertson argued that the Appellants' argument is that §115-210 overrides the clear language in the AR-1 district about permitted uses and, if that argument were accepted, applicants would be required to obtain a special use exception for a commercial greenhouse on AR-1 lands of greater than 5 acres even though the use is listed as a permitted use in the AR-1 zone and that the result would be absurd.
89. The Board found that Mr. Robertson stated that the Appellants' arguments, if accepted, would create a dangerous precedent and that the decision of the Director should be upheld.
90. The Board found that Ms. Cornwell testified that she reviewed the letters submitted by Mr. Witsil and Mr. Fuqua prior to the Planning & Zoning Commission hearing and took those letters into consideration before allowing the proposed site plan to move forward to the Commission for review.
91. The Board found that Ms. Cornwell testified that she is unaware of similar determinations made by the Director in a case similar to this but that staff has not taken the position that items listed in §115-111 which are used in permitted uses (such as flour used in a bakery) require a potentially hazardous use hearing.
92. The Board found that Mr. Witsil stated that there is a reasonable doubt as to the application of §115-110(c).
93. The Board found that Mr. Witsil stated that concrete batch plants are not listed in §115-110 because they are different from central mixing plants. He acknowledged that he made an error in his previous correspondence with the Director and he

stated that he clarified his error in his August 8th letter after consulting with an expert.

94. The Board found that Mr. Witsil stated that a concrete batch plant creates more objectionable influences than a central mixing plant.
95. The Board found that Mr. Witsil stated that batch plants mix the ingredients in the truck whereas central plants mix all the ingredients in the facility prior to placing the mixture onto trucks.
96. The Board found that Mr. Witsil stated that the special use exception argument he raised is likely "far-fetched".
97. The Board found that Mr. Witsil stated that no evidence has been provided that a concrete batch plant creates no more objectionable influence than a central mixing plant.
98. The Board found that Mr. Witsil stated that he questions why a concrete batch plant is not listed in the Code in this section when it is listed elsewhere in the Code.
99. The Board found that Mr. Witsil stated that Chaney failed to truly identify its plant in the application and that Chaney is not proposing a central mixing plant but, rather, Chaney is proposing a concrete batching plant.
100. The Board found that Mr. Witsil stated that cement is listed as a potentially hazardous use in §115-111 and cement is an ingredient for concrete.
101. The Board found that Mr. Witsil stated that, even if it was a central mixing plant, a potentially hazardous use hearing would be necessary.
102. The Board found that Mr. Robertson stated that in both concrete batch plants and central mixing plants you have storage of the same materials, hoppers to mix facilities, and trucks to deliver the concrete and that the uses are the same with the only difference being whether the hose is applied to the hopper in the truck or the hopper which is fixed on the site. He fails to see the difference between the two uses.
103. The Board found that Mr. Robertson stated that HI-1 is the most intensive zoning district in the Code and the HI-1 zone discourages residential and commercial uses.
104. The Board found that Mr. Robertson stated that the reason the concrete batch plant is a special use exception in the other 8 districts is because those are districts where residential and commercial uses are typically found.
105. The Board found that Mr. Robertson stated that, since the use is a permitted use, it does not trigger a special use exception hearing.
106. The Board found that Mr. Fuqua stated that concrete batch plants are authorized as special use exceptions in 8 other districts but is not authorized as a special use exception in the HI-1 district because it is a permitted use.
107. The Board found that Mr. Fuqua stated that it was originally submitted as a central mixing plant.
108. The Board found that Mr. Brauer testified that he understands the points made by Mr. Fuqua and Mr. Robertson but he does not understand why the property was zoned HI-1. He understands that HI-1 is the most intensive use. He acknowledged, however, he and his neighbors purchased their homes after the property was re-zoned but he was not aware of the HI-1 zone at that time.
109. The Board found that Mr. Brauer testified that he questions where the water is coming from and the amount of water being used.
110. The Board found that Norma Shelton, Robert Sullivan, and Paul Reiger were sworn in to give testimony about the Appeal.
111. The Board found that Ms. Shelton testified that she lives near the site and she is concerned about dust and noise. Her husband works for Chaney Enterprises and he knows what it will be like. She believes that her home will be ruined.
112. The Board found that Ms. Shelton testified that people live near the site and that she was not aware the property was zoned HI-1.

113. The Board found that Mr. Reiger testified that the Code is not consistent with definitions and that there are conflicts in the Code. He believes that the Director should be consistent with her interpretations.
114. The Board found that Mr. Reiger testified that, if the use is listed in §115-210, it should come to the Board as a special use exception.
115. The Board found that Mr. Sullivan, who lives near the site, testified that the plant should be allowed. He noted that the previous owner had a sign up for 10 years identifying the property as HI-1.
116. The Board found that three parties appeared in support of and one party appeared in opposition to the Appeal.
117. The Board tabled the Appeal until November 4, 2019, at which time the Board discussed and voted on the Appeal.
118. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, which the Board has weighed and considered, the Board affirms the Director's decision and denies the appeal. The findings below support the Board's decision.
    a. This appeal pertains to property zoned HI-1 (Heavy Industrial) located near Ellendale, Delaware. Chaney Enterprises proposes to operate a concrete production facility on this site.
    b. On appeal, neighbors raise 3 issues to the Board alleging that the Director erred in:
        i. Not requiring the Applicant to apply to the Board for a potentially hazardous use.
        ii. Not requiring the Applicant to submit a special use exception application.
        iii. Permitting the site plan approval process to proceed
    c. With regard to the first issue, the Board finds that the Director was correct in not requiring Chaney Enterprises to apply to the Board for a potentially hazardous use. §115-110(c) identifies "concrete products and mixing and proportioning plants" as permitted uses. A mixing and proportioning plant, which is also referred to as a central mixing plant, involves the mixture of ingredients to create concrete. Water is added during that process. This type of plant is sometimes referred to as a "wet" plant. Chaney, proposes to operate a concrete batching plant which is sometimes referred to as a "dry" plant. With a concrete batching plant, the mixture is created and water is added to concrete trucks in batches. While the two types of plants have different names, the distinction is one without a major difference. The Appellants' attorney acknowledged that "a concrete central mixing and proportioning plant has identical ingredients and methods of processing the raw materials into concrete as a concrete batching plant" and that "the terms of the two facilities are interchangeable." While the Appellants' attorney later retracted the "interchangeable" statement, the materials subsequently provided by the Appellants note that "regardless of the type of facility, the emission sources are generally consistent." The only notable distinction between the two facilities is when water is added to the mix. Though a concrete batching plant is not identified as a specifically permitted use, Chaney's proposed use is clearly a "similar industrial use" with no greater objectionable influences than a central mixing plant. There was no doubt as to the proposed use, product, or process. As such, the proposed use is permitted and the Director was correct in not referring this application to the Board as a potentially hazardous use.
    d. The Board also finds that the application does not need to be submitted as a potentially hazardous use under §115-111. Appellants argued that §115-111 applies because the production of concrete involves the use of

materials such as cement, sand, and gravel. The Appellants suggest that the presence of these materials in the concrete-making process requires that the use be considered potentially hazardous. The Board disagrees. Chaney is not making cement, sand, or gravel. Rather, these are ingredients in the production of concrete. Using this logic, no concrete facility would be allowed without a potentially hazardous use hearing and that argument flies in the fact of the plain reading of §115-110(c) which identifies concrete products, mixing and proportioning plants, and similar industrial uses as permitted uses. Likewise, such a broad reading also runs contrary to the plain reading of other portions of the Code. For example, flour is identified as a potentially hazardous use but a bakery is listed as a permitted use. The Board refuses to adopt the Appellants' argument here.

e. With regard to the second issue, the Board finds that the Director was correct in not requiring Chaney Enterprises to submit a special use exception. The Appellants argued that a special use exception is required under §115-210 but that argument is flawed. §115-210 is a general list of uses which require special use exception and those uses "are specified in each district." A concrete batching plant, however, is not specified as needing a special use exception in the HI-1 district. While in other zoning districts, the Code requires applicants to obtain special use exceptions prior to operating concrete batching plants no such requirement in the HI-1 zoning district. When looking at the Code in its full context, the lack of this prior authorization requirement makes sense. The HI-1 zone is the most intensive zoning classification and the purpose of the district is to preserve land for industrial uses and exclude new residential or commercial development. In other words, the additional layer of approvals required in other districts for this use is not required in the HI-1 district because the district was designed for these types of uses. Acceptance of the Appellants' arguments would create an absurd result whereby an owner of a property zoned heavy industrial would be required to obtain a special use exception and a potentially hazardous use approval prior to operating a concrete batch plant. This position runs contrary to the plain meaning of the statutory language in the Code and the literal interpretation thereof. Further, this would require an additional layer of approval for the proposed use which would not otherwise be required in a more restricted zoning district.

f. With regard to the third issue, since the proposed use is a permitted use under §115-110(c), the Director did not err in permitting the site plan approval process to proceed.

The Board affirmed the decision of the Planning & Zoning Director and denied the appeal.

Decision of the Board

Upon motion duly made and seconded, the decision of the Planning & Zoning Director was affirmed and the appeal was denied. The Board Members in favor of the Motion to deny the appeal and to affirm the decision of the Planning & Zoning Director were Dr. Kevin Carson, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. Mr. Jeffrey Chorman voted against the Motion to deny the appeal and to affirm the decision of the Planning & Zoning Director.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY

Ellen M. Magee

Ellen M. Magee
Chair

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

Date January 7, 2020.