

Minutes of April 3, 1995

The regular meeting of the Sussex County Board of Adjustment was held Monday evening, April 3, 1995 in the Court of Common Pleas Court Room, Courthouse, Georgetown, Delaware.

The meeting was called to order at 7:00 P. M. with Chairman McCabe presiding. The Board members present were: Mr. McCabe, Mr. Mills, Mrs. Hudson, Mr. Wheatley, Mr. Callaway, Mr. Karsnitz-Attorney and Mr. Betts-Zoning Inspector III.

Motion was made by Mr. Mills, seconded by Mrs. Hudson and carried unanimously that the minutes of March 20, 1995 be approved as circulated.

Case No. 5622--Michele & Lester Wright - West side of Route 312A,
1,200 feet north of Route 312.

A variance from the minimum lot width requirement.

The case was presented by Mr. Betts. Michele & Lester Wright, Sr. were sworn in and testified, requesting a 43.69' variance from the 150' road frontage for a new parcel to be 106.31'. They propose to subdivide the property given to Mrs. Wright by her father, to provide parcels for two sons. They testified that there are fields on three sides of the property and a dwelling across the road.

There were no parties present in opposition.

Motion was made by Mr. Callaway, seconded by Mrs. Hudson and carried unanimously that the variance be granted.

Case No. 5623--Guy E. & Nancy S. Phillips - West side of Route 30,
at the intersection of Route 295.

A variance from the setback requirements for a poultry house.

The case was presented by Mr. Betts. Guy Phillips was sworn in and testified, requesting a 25' variance from the 50' setback requirements to construct two poultry houses. The two poultry houses are to be constructed at the same time. Mr. Phillips stated it is the only location on the property to put the poultry houses. He stated that his in-laws own the adjacent property.

Harold B. Short was sworn in and testified in behalf of the variance request, stating he is Mr. Phillips father-in-law and owns adjacent property. He testified that the poultry houses are a family thing.

There were no parties present in opposition.

Motion was made by Mr. Mills, seconded by Mr. Wheatley and carried unanimously that the variance be granted.

Case No. 5324--Douglas & Marie Pedersen - South side of Route 565,
at the corner of Route 592.

A special use exception to place a second
manufactured home on farm.

The case was presented by Mr. Betts. Douglas & Marie Pedersen were sworn in and testified, requesting to place a second manufactured home on farm for farm help. The applicants live in a double-wide manufactured home on the property. They will place a 14'x 52' single-wide unit on the property for a friend to live in and help on the farm. They testified the unit will basically not be rented. The applicants explained they will plant some vegetables, flowers and have a greenhouse. The applicants stated that the unit is on the property and a permit was obtained. They later found the permit was issued to them in error, and Board approval is needed.

Mr. Betts stated that a letter from the applicants had also been received.

Terry R. Lowe was sworn in and testified and questioned the type of farming to be done and exactly what they are going to do. He stated he does not oppose if things are straight. He questioned if the unit could be rented. Mr. Lowe also questioned if the uses were to be commercial. He also stated that the applicant's septic drawing shows the property as Lot 2.

Mr. Betts stated that anything raised on the property could be re-sold. He also stated that the unit can not be rented and if the property is subdivided smaller, and is approved as on farm, the use would be voided.

Brenda K. Jones was sworn in and testified in opposition, stating she has lived on her property since 1977. She is concerned about the property being a farm operation and the need for full time help. She stated there is no history of the property being a farm. Ms. Jones stated she understands the income from the manufactured home is to off-set the applicants expenses. She testified that she had information from farm agencies that for 10 acres it is not justified to have full time help. She asked who will check to see if it will be used as farm help. She stated that farming is a full time occupation.

Charlotte McCarron was sworn in and testified in opposition, stating she has the same concerns as Ms. Jones. Ms. McCarron stated it is unusual to have full time help on nine acres. She questioned what can be done if used as a rental.

Mr. Pedersen stated that the manufactured home has been on the property since January. He stated that both he and his wife work full time. The person living in the manufactured home will work more in the summer on the farm and for rent free.

Motion was made by Mr. Wheatley, seconded by Mr. Mills and carried unanimously that the case be taken under advisement.

At the conclusion of the public hearings, the Chairman referred back to this case. After some discussion, motion was made by Mr. Callaway, seconded by Mr. Wheatley that the special use exception

be granted, with Mr. McCabe voting nay. Motion carried with four voting in favor and one against.

Case No. 5625--David & Eileen Volk - South side of Route 275-A
Lot 2, within Rehoboth Shores.

A variance from the front yard setback requirement.

The case was presented by Mr. Betts. David & Eileen Volk were sworn in and testified and were represented by Tom Gay, Attorney. The applicants requested a .85' variance from the front yard setback of 30' for a dwelling, with porch on Lot 2, Rehoboth Shores. Mr. Gay stated that the applicants purchased the property with the existing house on it. The house has been on the property 3 to 4 years and not occupied. The applicants have thought about moving the structure, but it is on a concrete slab. The encroachment was not created by the applicants and they feel it will not alter the character of the area. They stated there is no Association in the development.

Mr. Betts stated that no correspondence had been received pertaining to this case.

Martin Priest who lives across from the applicants property was sworn in and testified in behalf of the variance request. He stated he does not feel the house should be moved and there is plenty of room.

There were no parties present in opposition.

Motion was made by Mr. Mills, seconded by Mrs. Hudson and carried unanimously that the variance be granted.

Case No. 5626--Alvin & Josephine Kruger, Linwood & Arvella Sirman,
IA Construction Corporation, Atlantic Concrete Co,
Inc., Thoro-Good's Concrete Co., Inc., David G. Horsey
& Sons, and Del-Mar-Va Paving Co., Inc.

An appeal of the Director's decision that property owned by Sussex County Government at the Sussex County Airport and Industrial Park is exempt from the jurisdiction of the Zoning Ordinance.

The case was presented by Mr. Betts, Zoning Inspector.

A. Dean Betts, Attorney, represented the applicants who are appealing the Director's decision that property owned by Sussex County Government at the Sussex County Airport and Industrial Park is exempt from the jurisdiction of the Zoning Ordinance. Mr. Betts presented a prepared notebook to the Board members.

Mr. Karsnitz, Attorney, stated he felt Mr. Lanks letter should be addressed first.

James Fuqua, Attorney, represented Mr. Lank, Director of Planning and Zoning, who wrote the letter. Mr. Fuqua stated what the letter said and also referenced the Zoning Code. An asphalt plant is being

permitted on County Land at the County airport.

Mr. Betts referenced the letter and the lease entered into with the County. Mr. Betts made reference to the lease being exempt. Mr. Betts stated that the basic question is the operation of an asphalt facility at the airport location, and if it comes under the exemption of the Zoning Code. Mr. Betts made reference to a New York case similar to what is being proposed. He stated that the use is clearly not a government function, that it is in error and without legal basis. He stated that an asphalt plant is a hazardous operation and that the property is zoned LI-2 and not heavy industry. Mr. Betts stated that LI-2 zoning does not permit an asphalt operation, but it could be allowed if applied for and approved by the Board of Adjustment, but only for a period of five years. For this to happen an application would have to be made to the Board for a five year period. The lease term with the County is for 20 years. The County Ordinance would have to be amended to be in HI-1, Heavy Industrial and hearings would have to be held. Mr. Betts stated the County by-passed this procedure. HI-1 Zoning and Board approval for the hazardous use would be needed and to grant it for 20 years. He stated that County Council pushed aside their Ordinance and by policy allowed the lease for an asphalt operation, and by their Ordinance this is not a governmental function. Mr. Betts stated that by statement of policy the Council cannot do away with zoning. He stated that hazardous uses must obtain special use approval. He feels a private enterprise is for private profit and not a governmental function. He feels the County Council, through its Director of Planning and Zoning has arbitrarily and capriciously attempted to rezone the industrial airpark and airport from LI-2 to HI-1, in total disregard of the hearing process called for in the Zoning Ordinance. Mr. Betts stated that people and businesses have the right to a hearing to see if what is proposed is compatible with the area. He also stated that no criticism is directed to Mr. Lank, the Director. He stated the key issue is whether or not an asphalt plant is a governmental function, thereby making it exempt.

James Fuqua, Attorney representing Mr. Lank, stated he feels it is important that the Board remember that the job before them is to render a decision on an appeal. That Mr. Lank made a determination that activities at the industrial airpark are exempt and feels his decision is correct. He stated that the permit was granted following 20 years of policy concerning the airport. He stated that the Director had not made an arbitrary determination. He stated that according to the Zoning Ordinance governmental functions of County Government are exempt. Mr. Fuqua asked Mr. Joe Conaway to give testimony to give background on the County Airpark.

Mr. Betts objected to testimony about what happened before, that the issue is here and now. He felt Mr. Conaway's testimony was not relevant to the case.

Mr. Karsnitz, Attorney representing the Board, stated he felt the testimony of Mr. Conaway was relevant to the case.

The Board agreed to hear Mr. Conaway's testimony.

Joe Conaway, Land Use Consultant, doing work for Corrado American, Inc. was sworn in and testified. He stated that he had been County Administrator for 14 years and one of his responsibilities

was the establishment of the Economic Development Office and development of the Sussex County Airpark. He made reference to the heavy industrial uses now at the airpark and that it was developed to solicit businesses and bring jobs to Sussex County.

Mr. Fuqua submitted copies of County Council minutes during the period of developing the airpark, and ownership of the park, for the record.

Lawrence Lank, Director of Planning and Zoning, was sworn in and testified stating he has worked in the Planning and Zoning Office since 1969, becoming Director in 1985. He stated it was his determination based on policy that industrial activities at the Sussex County Airport are exempt from the jurisdiction of the Zoning Ordinance. He stated Sussex County policy has been followed since the 1970's and 80's. He made reference to copies of building permits from 1976 to present pertaining to construction at the airport. He explained how the building permits were issued, that permits in the early 1970's to 1983 were issued according to site plan and reviewed as site plan in reference to buildings on the property. In 1983 to 94/95 the majority of the permits note exempt on them, some were handled through Board of Assessment with no Planning and Zoning approval or review. Mr. Lank referenced a three page list of industrial park businesses who have or had leased property at the Sussex County Airpark. All of the uses were/are permitted, although some activities could be questionable. Mr. Lank's letter is consistent with the determination of the County for 15 years or so.

Mr. Betts questioned how many permits were issued.

Mr. Lank stated that the permits had not been totaled, but the majority of the uses are permitted, but some activities are questionable.

The list of building permits and businesses at the airpark were presented.

Mr. Fuqua stated that Mr. Lank's decision was proper and that any other decision would have been inconsistent with what has been done at the airpark for 20 years.

Mr. Karsnitz questioned if any other use at the airpark had ever been challenged.

Mr. Lank replied that he was not aware of any other use at the airpark being challenged.

Bill Suddell, Attorney, representing County Seat Materials, LLC the company leasing land at the County Airpark for the asphalt plant, stated that the issue before the Board is Mr. Lank's decision and whether he had made a proper decision. He presented a copy of a letter to Mr. Karsnitz. Mr. Suddell spoke in opposition to the referenced appeal. He referenced evidence that had been heard. He stated that five of the seven appellants are companies in competition with County Seat Materials, LLC.

Motion was made by Mr. Mills, seconded by Mrs. Hudson and carried unanimously that the case be taken under advisement.

At the conclusion of the public hearings, the Chairman referred back to this case. After some discussion, motion was made by Mr. Mills, seconded by Mrs. Hudson that the case be tabled. Before voting on the motion Mr. Mills asked that the motion be held for further discussion.

After further discussion, motion was made by Mr. Callaway, seconded by Mr. Mills and carried unanimously that the case be tabled until next meeting.

OLD BUSINESS

Case No. 5614 (cont'd.)--Willie Adamson & Barry Harris - East side of Route 516, at the intersection of Route 525.

A special use exception to place a manufactured home in an AR-1 District on less than five acres for a permanent residence.

After discussion, motion was made by Mr. Mills, seconded by Mrs. Hudson and carried unanimously that the special use exception be granted.

Motion was made by Mr. Callaway, seconded by Mr. Wheatley and carried unanimously that the meeting be adjourned.

Meeting adjourned at 8:59 P. M.

APPEAL NO. 5626

From 2/3/95 Decision of
Director of Planning & Zoning

The facts of this case are essentially undisputed. County Seat Materials, LLC, leased from Sussex County and Sussex County Council a 19.38 acre parcel of land located at the Sussex County Airport in an industrial complex. On February 3, 1995, County Seat and Sussex County entered into the lease which authorized County Seat to utilize the property for the construction and operation of a stone depot, bituminous asphalt mixing plant and a future concrete batch plant. On the same date the County Director of Planning & Zoning Commission, Lawrence Lank, issued a letter in which he stated the following:

"... the property is owned by Sussex County government and leases are provided to other parties for industrial activities, the activities have been considered exempt from jurisdiction of the Zoning Ordinance."

In particular, Article 3, Section 115-18 of the Sussex County Code provides that:

"Governmental functions of the Sussex County government are considered exempt from the provisions of this Chapter except where these functions are located within the flood prone districts."

There is no contention here that the function considered is within the flood prone district.

Testimony also showed, and we found as a matter of fact, that over the past approximately twenty years all activities conducted pursuant to the lease from the County

to others for use of property at the Sussex County Airport and industrial park were considered by County officials to be exempt from the Zoning Code. Some of those activities would have violated the existing zoning in that area, while others may not.

The appellants have properly filed a Notice of Appeal from the determination by the Director of Planning & Zoning Commission challenging his decision that the activities suggested and allowed County Seat pursuant to the lease with Sussex County are exempt from the Zoning Code.

It is also undisputed that the activities of County Seat as suggested would not be permitted in the LI-2 Light Industrial District, which is the current zoning for the Sussex County Airport and Industrial Park Complex. It is also undisputed that County Seat did not request any special use exceptions as set forth in Section 115-105 of the County Code.

As a result, the only issue in the appeal is a legal one, and that is whether the lease by the County for the activities suggested and allowed to County Seat Materials is a "governmental function of Sussex County government" so as to fall within the exemption provided by Article 3, Section 115-18 of the Sussex County Code.

CONCLUSIONS OF LAW

The activity of economic development is a proper and legitimate governmental function, and the County's lease of land at the Airport and Industrial park is a governmental

function. The leasing itself is a governmental function. As a result, the activity here is exempt from the ordinary zoning pursuant to Section 115-18. This determination is buttressed by the long history of the County and its official interpreting the Code in this manner.

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