

MINUTES OF MARCH 5, 2018

The regular meeting of the Sussex County Board of Adjustment was held on Monday, March 5, 2018, at 7:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 7:00 p.m. with Chairman Dale Callaway presiding. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Mrs. Jennifer Walls – Planning Manager and Ms. Christin Headley – Recording Secretary.

The Pledge of Allegiance was led by Mr. Callaway.

Motion by Mr. Mears, seconded by Ms. Magee, and carried unanimously to approve the revised agenda as circulated. Motion carried 5 – 0.

Motion by Mr. Mills, seconded by Mr. Mears, and carried unanimously to approve the Minutes and Finding of Facts for January 8, 2018. Motion carried 5 – 0.

Motion by Mr. Mills, seconded by Mr. Mears, and carried unanimously to approve the Minutes and Finding of Facts for January 22, 2018. Motion carried 5 – 0.

Mr. Sharp read a statement explaining how the Board of Adjustment meeting is conducted and the procedures for hearing the case.

OLD BUSINESS

Case No. 12092 – Marvin Weaver - seeks variances from the side yard and rear yard setback requirements (Section 115-25 of the Sussex County Zoning Code). The property is located on the north side of Marina Drive, approximately 450 feet west of the intersection of Woodland Circle and Marina Drive West. 911 Address: 23406 Marina Drive West, Lewes. Zoning District: AR-1. Tax Map No.: 2-34-17.08-127.00.

Mrs. Walls presented the case which has been left open since February 5, 2018.

Mrs. Walls stated the office of Planning and Zoning received a letter from the Applicant requesting a stay until April 16, 2018; and that the reason for the request is because the Applicant is revising the buildings plans and is awaiting approval from the homeowners association which meets on April 12, 2018.

Mr. Sharp stated that the Applicant is now being represented by counsel; that the record was left open at the prior hearing; and that, if the Board wishes to move forward with the Application, the Board may do so.

Mr. Mears stated that he has no problems with leaving the case open.

Mr. Workman stated that he has no problem with leaving the case open.

Mr. Mills stated that he has no problem leaving the case open.

Mr. Sharp stated that Ms. Magee recused herself from any discussion regarding this case.

Motion by Mr. Mears, seconded by Mr. Workman, and carried that the **case be left open until April 16, 2018**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Mr. Mills – yea, and, Mr. Callaway – yea.

Case No. 11903 – Anne Harding & Michael Harding - seek a special use exception to place a manufactured home type structure for a medical hardship (Sections 115-23A and 115-210A of the Sussex County Zoning Code). The property is located on the east side of Hollyville Road approximately 1,179 feet south of Mount Joy Road. 911 Address: 26265 Hollyville Road, Millsboro. Zoning District: AR-1. Tax Map No.: 2-34-21.00-169.01.

Mrs. Walls presented the case which has been left open since January 9, 2017.

Mrs. Walls stated that the Applicants were unable to proceed with the request due to financial constraints.

Mr. Sharp stated that the case was previously left open for the Applicants to provide information on the unit being placed; that, at the time of the hearing, it was not clear to what type of unit the Applicants were going to place on the Property; that two members of the Board were not a part of the Board at the time of the public hearing; that, if the new members wished to vote on the merits of the Application, they would need to state that they have reviewed to the record; and that, alternatively, the Board may grant the Applicants' motion to withdraw the Application if the Board finds that good cause exists.

Motion by Mr. Mills, seconded by Mr. Workman, and carried unanimously to **grant the Applicants' request to withdraw the Application for good cause**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

PUBLIC HEARINGS

Case No. 12109 – D. Lee McCreary & Susan McCreary - seek variances from the front yard and side yard setback requirements (Sections 115-34 and 115-183 of the Sussex County Zoning Code). The property is located on the north side of Ann Avenue, approximately 435.06 feet southwest of the

intersection of Ann Avenue and Coastal Highway (Route 1). 911 Address: 20964 Ann Avenue, Rehoboth Beach. Zoning District: MR. Tax Map No.: 3-34-20.13-21.00

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application. The Applicants request a variance of 10.2 feet from the thirty (30) feet front yard setback requirement for a proposed addition and a variance of 3.5 feet from the five (5) feet side yard setback requirement on the southwest side for an existing landing. The existing covered porch is considered a non-conforming structure and the Board previously granted a variance for the Property.

Ms. Magee recused herself and left the chambers.

Wayne Hanby was sworn in to testify about the Application. David Hutt, Esquire, presented the case on behalf of the Applicants and submitted exhibit booklets for the Board to review.

Mr. Hutt stated that the Applicants acquired the Property in 2013; that Mr. Hanby is a contractor who performed work on the dwelling in 2014 and will build the proposed addition if the variances are approved; that the Property measures 50 feet by 107 feet; that the Property is located in the "Forgotten Mile" between Rehoboth Beach and Dewey Beach; that the Property is identified as Lot 35 in the Poynter's Addition to Rehoboth subdivision; that the subdivision was created in 1952; that a map in the exhibit booklet shows variances and special use exceptions in the area from 2011 to current; that the dwelling was built prior to the adoption of the Sussex County Zoning Code; that the dwelling is a beach-style cottage that was built in 1953; that the property record card shows the dwelling being 832 square feet; that the Board previously granted a variance for the addition of a covered porch to the rear of the dwelling in 2014; that the dwelling encroached into the side yard setback area and the porch was constructed to line up with the dwelling; that the Applicants own the adjacent Lot 36; that the Applicants received a certificate of occupancy for the porch; that the dwelling was also renovated at that time; that Tab 6 of the exhibit booklet shows an example of the architectural renderings of the proposed addition; that the proposed addition will be used as a bedroom for the Applicants' parents; that the addition will provide first-floor accessibility; that Tab 5 of the exhibit booklet includes a survey showing the location of the proposed addition; that the proposed addition will be 9.8 feet from the front property line and will not encroach any farther than the dwelling on the adjacent Lot 34; that the landing as shown on the survey is at grade level and is not raised; that the Property is unique in size and shape; that lots in the MR zoning district are required to have a minimum lot size of 10,000 square feet and a minimum lot width of 75 feet; that the Property is smaller and narrower than is required by the Code; that the variances are necessary to enable the reasonable use of the Property because the lot was created before the adoption of the Sussex County Zoning Code; that the lot's size and shape have created a compact building envelope; that the proposed addition is for a first floor accessible bedroom; that the Applicants did not create the lot size and shape as the lot was created prior to their ownership thereof; that the variances will not alter the essential character of the neighborhood; that the immediate adjacent property encroaches the same distance into the front yard setback area; that the edge of paving of Ann Avenue is 10 feet from the front property line and the area between the front property line and Ann Avenue is landscaped; that

the dwelling will be approximately 30 feet from the edge of paving of Ann Avenue; that the variances requested are the minimum variances necessary to afford relief; and that the dwelling is a small and modest sized home and the proposed bedroom is as small as it can be while providing necessary accessibility.

Mr. Hanby testified that he is familiar with the Property; that he worked on the home in 2014; and that the landing consists of wood planks at grade level.

Mr. Hanby affirmed the statements made by Mr. Hutt as true and correct.

The Board found that no parties appeared in support of or in opposition to the Application.

Mr. Mears moved to approve Variance Application No. 12109 for the requested variances based on the record made at the public hearing and for the following reasons:

1. The Property is unique due to the size and the placement of the home prior to the enactment of the Sussex County Zoning Code;
2. The Property cannot otherwise be developed in strict conformity with the Sussex County Zoning Code;
3. The exceptional practical difficulty has not been created by the Applicants;
4. The variances will not alter the essential character of the neighborhood because the dwelling will be no closer than the house on Lot 34; and
5. The requested variances are the minimum variances necessary to afford relief.

Motion by Mr. Mears, seconded by Mr. Mills, and carried unanimously that the **variances be granted for the reasons stated**. Motion carried 4 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Ms. Magee returned to Chambers.

Case No. 12110 – Ronald Wroblewski & Lori Wroblewski - seek variances from the side yard setback requirements (Sections 115-42 and 115-183 of the Sussex County Zoning Code). The property is located on the west side of Pintail Drive, approximately 1,070 feet north of the intersection of Pintail Drive and Swann Drive. 911 Address: 37013 Pintail Drive, Selbyville. Zoning District: GR. Tax Map No.: 5-33-12.16-20.00.

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application. The Applicants request a variance of 3.0 feet from the ten (10) feet side yard setback requirement on the north side for a proposed deck, a variance of 7.5 feet from the ten (10) feet side yard setback requirement on the north side for a proposed HVAC system, a variance of 4.5 feet from the ten (10) feet side yard setback requirement

on the north side for a proposed dwelling, and a variance of 5.7 feet from the ten (10) feet side yard setback requirement on the south side for a proposed handicap ramp.

Ron Wroblewski, Lori Wroblewski, and Adam Rones were sworn in to testify about the Application.

Mr. Wroblewski testified that the Property is unique; that the community was originally developed as a mobile home park; that the ten (10) feet setback requirements create a narrow building envelope; that the Applicants have attempted to design the home to minimize the setback encroachments; that the dwelling is designed to allow for handicap accessibility; that the halls and doorways are wider to accommodate a wheelchair; that the need for the variances were not created by the Applicants; that the size of the lot was created prior to the Applicants' acquisition of the Property; that the proposed dwelling will be consistent with the surrounding new construction and the neighborhood; that the variances requested are the minimum variances necessary to afford relief; that the Applicants acquired the Property in February 2017; that there is approximately 5 feet from the front property line to the edge of paving of Pintail Drive; that there will be adequate parking on the Property; that the dwelling will be a two-story home; and that there will be no parking underneath the home.

Mr. Mills stated that modern HVAC systems typically extend 4 feet from the dwelling.

Mr. Wroblewski agreed that the HVAC system will extend 4 feet from the dwelling.

Mr. Sharp confirmed that a variance of 8.5 feet from the ten (10) feet side yard setback requirement on the north side is needed for the HVAC system.

Mr. Wroblewski testified that the proposed deck was centered with the home for aesthetic reasons facing the canal.

The Board found that no parties appeared in support of or in opposition to the Application.

Ms. Magee moved to approve Variance Application No. 12110 for the requested variances, as amended, based on the record made at the public hearing and for the following reasons:

1. The Property is a small lot;
2. The Application meets all the standards for granting a variance.

Motion by Ms. Magee, seconded by Mr. Mears, and carried unanimously that the **variances, as amended, be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12111 – Louis C. Nepa & Sharyn Luzier - seek a variance from the side yard setback requirement (Sections 115-25 and 115-183 of the Sussex County Zoning Code). The property is located on the southwest side of Creek Drive, approximately 750 feet south of the intersection of Creek Drive and Pond Road. 911 Address: 3 Creek Drive, Millsboro. Zoning District: AR-1. Tax Map No.: 2-34-24.00-57.00.

Mrs. Walls presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application. The Applicants request a variance of 1.5 feet from the fifteen (15) feet side yard setback requirement on the northwest side for an existing two-story deck.

Sharyn Luzier, Louis Nepa, and Theodore C. Parker, Jr., were sworn in to testify about the Application. Susan Weidman Gardner, Esquire, presented the case on behalf of the Applicants and submitted exhibits for the Board to review. The exhibits consisted of pictures of the existing deck and a letter of support.

Ms. Gardner stated that the first-floor deck does not encroach into the setback area; that the second-floor deck encroaches into the setback area; and that the second-floor deck is directly above the first-floor deck.

Ms. Luzier testified that the Property is located in Winding Creek Village; that the Applicants purchased the Property in December 2017; that the Applicants learned of the encroachment as part of the settlement process; that prior owners constructed the deck; that the building permit for the dwelling includes the second-floor deck; that the building permit was issued in 2006; that a certificate of occupancy was issued for the deck; that the Applicants did not build the deck or create the encroachment; that there is no way to remove the deck without great expense; that the Property is adjacent to the water and the deck provides her with a view of the water; that the deck was built at an angle; that the variance requested is the minimum variance necessary to afford relief; and that the neighbors closest to the deck support the variance request.

Mr. Parker testified that he has no objections; that the Applicants are the third owners in the home since construction was completed in 2006; and that the neighborhood has no objections.

The Board found that one (1) party appeared in support of the Application.

The Board found that no parties appeared in opposition to the Application.

Ms. Magee moved to approve Variance Application No. 12111 for the requested variance based on the record made at the public hearing and for the following reasons:

1. The exceptional practical difficulty has not been created by the Applicant because the house was built at an angle; and
2. The Application meets all standards for granting a variance.

Motion by Ms. Magee, seconded by Mr. Mills, and carried unanimously that the **variance be granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Case No. 12112 – Hudson Family, LLC - seeks a determination of an existing non-conforming use (Section 115-202 of the Sussex County Zoning Code). The property is located on the northwest side of Eagle Crest Road, approximately 495 feet southwest of the intersection of Coastal Highway (Route 1) and Eagle Crest Road. 911 Address: 30045 Eagle Crest Road, Milton. Zoning District: AR-1. Tax Map No.: 2-35-22.00-50.02, 2-35-22.00-50.03, 2-35-22.00-52.00, 2-35-22.00-441.00, and 2-35-22.00-442.00.

Ms. Cornwell presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application. The Applicant requests a determination of the existence of a non-conforming use.

Mr. Sharp advised the Board that this hearing is different than cases typically heard before the Board; and that the issue before the Board is whether certain uses on the Property existed prior to the enactment of the Sussex County Zoning Code and has continued to exist since that time.

John Paradee, Esquire, appeared on behalf of the Applicant. Mr. Paradee submitted exhibits to the Board to review.

Mr. Paradee stated that the Application is unusual; that a property owner who wishes to establish that a non-conforming use exists must come before the Board for such determination; that the Property consists of five (5) parcels and are commonly referred to as “Hudson Fields”; that Hamm v. City of Wilmington Zoning Board of Adjustment is an instructive case on the issue; that the burden of proving abandonment of a non-conforming use is on the zoning authority; that zoning ordinances are in derogation of common law; that zoning laws have to be construed in favor of the property owner where this doubt; that the zoning authority must affirmatively demonstrate that the use has been abandoned; that cessation of the use does not constitute abandonment of the use; that intent on part of the property owner to abandon the use and an act or failure to act which demonstrates the abandonment of the use are necessary to show abandonment; that Sussex County Zoning Code § 115-195 provides that “except as otherwise provided herein, the lawful use of land or buildings existing at the effective date of this chapter may be continued although such use does not conform to the provisions herein”; that non-conforming uses are grandfathered under the Code; that Sussex County Zoning Code § 115-198 provides that “no building, land or portion thereof used in whole or in part for a nonconforming use in any district which remains idle or unused for a continuous period of two years, whether or not the equipment or fixtures are removed, shall again be used except in conformity with the regulations of the district in which such building or land is located”; that, if the Property remains idle or unused for a

continuous period of two years, there is a presumption of abandonment; that there was never a period of time where the Property remained idle or unused for a continuous period of two years for the types of uses subject to this application; that the Sussex County Zoning Code was adopted in December 1970; that, in 1982, the Code was amended by Ordinance No. 97; that the provisions of the Code cited have remained essentially the same; that, in order to find that these uses were abandoned, the Board must determine that 1) the owners intended to abandon the use and took affirmative action to abandon the use or failed to act in such a way as to evidence the intent to abandon the use or 2) that the owners did not engage in such uses for a continuous period of two years; that the owners have engaged in numerous non-conforming uses such that the Property remained idle or unused for a continuous period of two years; that the burden of proof is on the government to demonstrate abandonment; that the Property has been used for a slew of commercial uses since the 1950s and even the early 1900s; that the Property has been used for commercial aviation, horse racing, athletic events, weddings, camping, outdoor events, and concerts; that opinions as to whether the uses are appropriate are irrelevant to the Application; and that the inquiry from the Board is a fact-based one.

Christian Hudson was sworn in to testify about the Application. Mr. Hudson submitted pictures, newspaper articles, and a book on the history of Punkin' Chunkin' to the Board to review.

Mr. Christian Hudson testified that he is one of the owners of Hudson Fields; that his grandfather started the airport in 1953; that the Property was used for parachuting, air shows, balloon rides, Tuskegee airmen, and similar activities after the airport opened; that the Property was later used for events such as Punkin' Chunkin'; that he was born in 1980 and many of the uses arose prior to his birth; that he recalls horse shows and pony rides when he was young; that he recalls concerts by Chicago, Hall & Oates, and the Beach Boys; that the Property is now used for Foodie Fest, athletic events, and Highway One concerts; that his grandfather was inducted into the Aviation Hall of Fame; that there are pictures of the racetrack and the airport; that the horse track use dates back to the 1940s and 1950s; that there are newspaper articles about events on the Property; that signage on the Property states that Hudson Fields was established in 1952; that Punkin' Chunkin' started at the Property in 1989; that a fence was installed as the event grew; that Punkin' Chunkin' ended at the Property in 1998 because the technology used in the event outgrew the size of the Property; that Punkin' Chunkin' drew 17,000 to 20,000 attendees; that the Punkin' Chunkin' event had pony rides, balloon rides, camping, food and beverage sales, amusement activities, and concerts; that Punkin' Chunkin' was similar to the fair; that the first concert in the Delaware River & Bay Authority series was the Beach Boys concert in 1996 and it drew 15,000 to 20,000 spectators; and that there were two concerts in that series.

Mr. Sharp questioned about concerts which took place prior to 1970 and stated that the law treats non-conforming uses narrowly with the premise that they will eventually be phased out over time.

Mr. Paradee stated that the Applicant has 68 affidavits from neighbors and that at least 25 of those affidavits attest to concerts and festivals happening on the Property before 1970.

Mr. Christian Hudson testified that the Beach Boys concert was not the first concert on the Property; and that there were concerts long before the Beach Boys concert.

Mr. Paradee submitted affidavits and a summary of the affidavits for the Board to review.

Mr. Paradee stated that 46 of the affidavits reference concerts and festivals on the Property prior to 1990; and that the special events ordinance was enacted in 1990.

Mr. Christian Hudson testified that a fence was installed on the Property in 1997 related to one of the Delaware River and Bay Authority concerts; that sheds were installed for different events; that signs and entrances were placed on the Property; that the Applicant obtained permits for the signs; that the Applicant has retained Sussex County E.M.S. and police for events; that no one from Sussex County has told him or his grandfather that the Applicant could not engage in the commercial or special event activities described as having taken place on the Property since the early 1950s; that the Applicant has not been required to apply for a conditional use for the commercial or special event activities described as having taken place on the Property; that his father and grandfather have not been required to apply for a conditional use either; that neither he, his father, or grandfather have expressed an intent to discontinue any of the uses; that neither he, his father, or grandfather have taken any measures to express a manifest intent to cease any of the uses on the Property; that neither her, his father, or grandfather have had any intent to discontinue those uses on the Property; and that, he, his brother, father, and grandfather have always tried to promote activities on the Property.

Mr. Paradee submitted to the Board a letter from Joe Hudson to Roland Derrickson, Planning & Zoning Director, dated February 1, 1983, a letter from Joe Hudson and Christian Hudson to Lawrence Lank, Planning & Zoning Director, dated August 25, 2016, and an affidavit of Joe Hudson.

Mr. Christian Hudson testified that the 1983 letter from Joe Hudson and the 2016 letter to Lawrence Lank explain the uses on the Property from the 1950s; that Joe Hudson's affidavit states that Punkin' Chunkin' was held on the Property from 1992-1998 but Punkin' Chunkin' actually started on the Property years earlier; that the uses described as having taken place on the Property since the 1950s have continuously taken place on the Property since at least December 1970; that he has spoken with his father, grandfather, and neighbors; that there has not been a time since December 29, 1970 when the Property has sat idle or unused for the commercial uses or the special events described for a period of more than two years; and that the Property has been used for commercial uses and special events since December 29, 1970.

Mr. Jamin Hudson was sworn in to testify about the Application and submitted pictures to the Board to review.

Mr. Jamin Hudson affirmed the statements made by Christian Hudson. Mr. Jamin Hudson testified that he was born in 1982; that he recalls his grandfather's commercial spraying business on the Property until the late 1980s; that he recalls the Property being leased for airplane storage; that the Property has been used for fuel sales, pilot lessons, and Tuskegee air shows; that Punkin' Chunkin' started on the site in the late 1980s until 1997; that concerts and performances took place at the Punkin' Chunkin' events; that he recalls alcohol and beverage sales, vendors, amusement park rides, helicopter rides, bonfires, and ticket sales on the Property; that he recalls concerts with fireworks shows and laser shows on the Property; that approximately 20,000 people attended the concerts; that fencing and lighting were installed for the concerts; that athletic events started in 2000 on the Property; that attendance at sporting events ranges from a few hundred to a few thousand depending on the event; that his father and grandfather tried to promote activity on the Property; that his grandfather recalled weekly horse races on the Property in the late 1800s to early 1900s; that he took photos from old family videos; that a photo shows Joseph R. Hudson Aerial Spraying truck; that planes were outfitted for crop dusting; that the phone number on the truck displays a 4 digit phone number; that phone numbers in the area did not switch to 7 digit numbers until the early 1950s; that an aerial spraying operation was in place in the early 1950s; that his father was born in 1952; and that the spray plane operation was in effect in 1962 as evidenced by a photo.

Mr. Sharp stated that he thought that a conditional use was in effect for the Property regarding the airport and related uses; and that a conditional use was granted in 1990 with stipulations.

Mr. Paradee stated that he was unaware of the conditional use.

Mr. Jamin Hudson testified that the photographs show that fuel tanks were on the Property and that he lives in the area.

Mr. Christian Hudson testified that his family owned many of the lands near the Property; and that Joe Hudson purchased the Property where the airstrip is located in 1948; and that the airport existed prior to the 1970s. Mr. Hudson also pointed out the parcels in question on the tax map.

Mr. Paradee stated that concerts and events have taken place on all five parcels which comprise the Property; and that recent concerts have taken place near Route 1.

Mr. Christian Hudson testified that the latest concert took up approximately 4 acres of the Property and additional area was used for parking; that there are airplane tie-downs on the site.

Mr. Paradee stated that the Property was a commercial property with festival grounds when the Sussex County Zoning Code was adopted in 1970; that non-conforming uses in effect as of December 29, 1970, may remain in effect so long as the Property is not idle or unused for a period of two continuous years; that evidence and testimony demonstrate that the Property was used for

a wide variety of commercial uses and special events with no intent to discontinue or abandon those uses; that the Property has not remained idle or unused for a period of two continuous years; that there is no evidence or testimony to the contrary; that the Applicant is legally permitted to continue such uses, including the special event use, as a non-conforming use; that the Applicant is exempt from the special events policy; that a finding to the contrary would constitute an unconstitutional taking; that no one in Sussex County government contested the Applicants' use of the Property; that Sussex County government has never cited the Applicant for violation of the Sussex County Zoning Code; that Sussex County has participated in such events on the Property; that fundamental fairness and equity require that the Applicant may continue such use; that Sussex County approved a commercial entrance with signage; that the Property is used for airplane storage, fuel sales, truck storage, lighting, fencing, commercial parking lot (which has been expanded), and year-around porta potties; that no other property in Sussex County has been used for these uses prior to the enactment of the Sussex County Zoning Code and continued for such use; and that the Applicant is exempt from all zoning regulations that would preclude them from engaging in the commercial and special event activities which have been ongoing for many years.

Mr. Sharp stated that the letter from Mr. Paradee references 38 different uses on the Property.

Mr. Paradee stated that as long as the Property was used for any special event, such as a festival, wedding, concert, or any of the other enumerated uses listed in his letter, at least once every two years, the Applicant retains the right to continue using the Property for all of the enumerated uses; that the types of special events and uses which can occur on the Property are not limited to the uses identified in his letter but there are limitations; that rodeos, for example, have occurred on the Property can could take place thereon; that anything like a rodeo, festival, carnival, or concert would be permitted on the Property; that uses which are similar to the historical uses of the Property should be permitted; that the types of uses which are so dissimilar to the historical uses of the Property would not be permitted but he would not want to speculate as to those uses; and that the Applicant should be able to use the Property in this fashion 365 days a year with no zoning limitations.

Mr. Sharp provided copies of the Conditional Use Approval for the airport.

Mr. Sharp stated that the conditional use was approved for Parcel 52 in 1990 for some of the uses listed in Mr. Paradee's letter.

Mr. Paradee stated that the approval of the conditional use does not mean that the other uses on the Property are somehow unlawful; and that everyone knew that the Property was being used for special events for years prior to the conditional use application.

Mr. Sharp stated that a special use exception application submitted to the Board in 1997 for special events on the Property was approved in early 1998; that a letter was submitted by the Applicant's attorney John Sergovic after the approval rejecting the approval; and that in Mr.

Sergovic's letter he states that the Applicant reject the approval so that "the land shall revert to any other use available to it under its zoning classification as a matter of right without the offered special use exception".

Mr. Paradee stated that, from time-to-time, the Applicant has attempted to be a good citizen and tried to meet the County half-way even though it believes these uses are grandfathered; that the Applicant has applied for special event permits with no permit being issued; that the Applicant has not abandoned or waived their rights; and that the Applicant still has these events.

Mr. Sharp stated that he would like to ask the Applicant questions as to each of the uses but realizes that the affidavits may answer some of those questions.

Mr. Paradee stated that the Applicant is willing to recess on this issue and return to answer questions from the Board at a later date.

Mr. Mills asked if the Board is reviewing the decision of a Sussex County official.

Mr. Sharp advised the Board that the application is a request to determine whether a non-conforming use exists and that there is no appeal of a Sussex County official – which is why a Sussex County official is not testifying in this matter.

Mr. Paradee stated that Sussex County is reviewing a new special events ordinance and the Applicant seeks a determination that it is grandfathered so that the new ordinance would not apply to the Property; and that there has been no position taken by the County regarding the uses.

Mr. Sharp advised the Board that there is a section of the Code regarding special events and that there is a proposed update to that section of Code.

Mr. Mills stated that he would like more time to review the materials.

Ms. Cornwell stated that all concerts on the Property went through the County's special events process and permits were issued; that the County has received requests for concerts this year as well; and that she would have to research whether permits were issued for previous events.

Mr. Christian Hudson testified that the 2016 letter from he and Joe Hudson explains the historical uses of the Property; that in 2016, the Applicant hosted 33 athletic events, 4 public festivals, and 2 private events including a wedding; that the Applicant never heard a response back from the County; that last year the Applicant hosted 4 Foodie Fest events; and that the Applicant never heard anything back from the County regarding the Foodie Fest.

Ms. Cornwell stated that she has never received an application for the Foodie Fest.

Mr. Christian Hudson testified that the Applicant requires the tenant to obtain the necessary permits; that, when they applied for Foodie Fest, a person at the Sussex County E.M.S. said that no permit was needed; that special events permits are submitted through the Sussex County website; that he never heard a response from the 1983 and 2016 letters; and that the Applicant seeks clarity on its right to use the Property.

Mr. Paradee stated that the tenant for the concert series (Highway One) received permits for the concerts.

Mr. Christian Hudson testified that he does think Punkin' Chunkin' received permits.

Mr. Paradee stated that the burden is on the government to prove abandonment.

Mr. Sharp stated that the Hamm case states that the burden of proving abandonment is on the asserting party; that the Applicant claims it never abandoned the use; that the Sussex County Zoning Code Section 115-198 provides that, if you have not used the Property for the non-conforming use for two years, you lose the right to continue the non-conforming use; that abandonment and discontinuance are treated the same; that there is a legal question as to whether the Applicant is required to conduct each use at least every two years or whether the Applicant is required to conduct at least one use every two years in order to be permitted to continue the right to the non-conforming uses; that he has a question as to each of the 38 enumerated uses as to when did each use begin, did the uses ever cease and, if so, when and for how long, and on which parcels did the uses occur; and that the analysis is a fact-based analysis and the Board has a duty to investigate the request.

Ms. Cornwell stated that special event applications do not come directly to the Planning & Zoning Office.

Mr. Christian Hudson testified that the concert is on the parcel closest to Route 1 but other parcels were used for parking; that the airport, hangars, and tie-downs are on multiple parcels; that the parcels are all tied together; and that special event permit applications were submitted to Shane Abbott and Lawrence Lank in 2016.

Mr. Robert McNamara was sworn in to testify against the Application.

Mr. McNamara testified that he lives approximately 400 yards from the back of the stage; that he moved to the area in 2014; that he is a fan of the Applicant and lot of the events on the site; that the Highway One events on the Property have been a problem; that the area is more residential than it was decades ago; that he supports live music; and that Highway One concerts involve hours of sound checks.

Mr. Sharp advised Mr. McNamara that the issue is whether the use is a non-conforming use and has continued since 1970.

Mr. McNamara testified that he has supported a number of events on the Property; that Foodie Fest is a good thing for the community; that he finds the Highway One concerts intrusive; and that he is scared that the approval of the non-conforming use would allow the Applicant to operate the Property in this fashion for 365 days a year.

The Board found that no parties appeared in support of the Application.

The Board found that one (1) party appeared in opposition to the Application.

Mr. Mills stated that it has been requested to leave the record open to give the Board time to review the materials and ask the Applicant questions.

Mr. Sharp recommended that the record be left open for the limited purpose of allowing the Board to ask the Applicant questions about the record.

Mr. Mills moved that the record be left open for the limited purpose of allowing the Board to ask the Applicant questions about the record and the hearing be scheduled at a later date.

Motion by Mr. Mills, seconded by Ms. Magee, and carried unanimously that the **record be left open for the limited purpose of allowing the Board to ask the Applicant questions about the record and to schedule the hearing at a later date.** Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Mears – yea, Ms. Magee – yea, Mr. Mills – yea, and Mr. Callaway – yea.

Ms. Cornwell stated that the staff will look at the upcoming agendas and see if we can schedule the hearing for April 9th.

Meeting was adjourned at 9:32 p.m.