

MINUTES OF OCTOBER 21, 2019

The regular meeting of the Sussex County Board of Adjustment was held on Monday, October 21, 2019, at 6:00 p.m. in the County Council Chambers, 2 The Circle, Georgetown, Delaware.

The meeting was called to order at 6:00 p.m. with Chair Ellen Magee presiding. The Board members present were: Dr. Kevin Carson, Mr. Jeff Chorman, Ms. Ellen Magee, Mr. John Williamson, and Mr. Brent Workman. Also, in attendance were Mr. James Sharp, Esquire – Assistant County Attorney, and staff members Ms. Janelle Cornwell – Planning and Zoning Director, Ms. Samantha Bulkilvish – Planner, and Ms. Ann Lepore – Recording Secretary.

The Pledge of Allegiance was led by Ms. Magee.

Motion by Dr. Carson, seconded by Mr. Williamson, and carried unanimously to approve the agenda. Motion carried 5 – 0.

Motion by Mr. Chorman, seconded by Dr. Carson, and carried unanimously to approve the Minutes for the August 19, 2019, meeting. Motion carried 5 – 0.

Motion by Dr. Carson, seconded by Mr. Williamson, and carried unanimously to approve the Findings of Facts for the August 19, 2019, meeting. 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.

PUBLIC HEARINGS

Case No. 12370 – Ann Sammons seeks a special use exception for a garage studio apartment (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the north side of Greenwood Rd., approximately 0.38 miles west of Sussex Hwy. (Rt. 13). 911 Address: 8619 Greenwood Rd., Greenwood. Zoning District: AR-1 Tax Parcel: 530-4.00-18.00

Ms. Bulkilvish presented the case and stated that the Office of Planning and Zoning received one letter in support of and none in opposition to the Application and one mail return. The Applicant is requesting a special use exception for a garage studio apartment.

Ann Sammons was sworn in to give testimony about the Application.

Ms. Sammons testified that a pole barn was constructed for farm equipment and a pool house; that an in-ground pool was constructed and the pool house will be used to keep foot traffic out of the house; that the parcel is over 28 acres; that the nearest neighbor is several hundred yards away; that the request is for a garage studio apartment of less than 600 sf.; that the purpose is to serve as a pool house where meals can be prepared for grandchildren; that there are 3 poultry houses on the property; that there is ample parking; that there is no intention to rent the apartment; and that the use will not substantially affect adversely the uses of adjacent and neighboring property.

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

Dr. Carson moved to approve Application No. 12370 as the Applicant has met the criteria for granting a special use exception and the proposed use will not substantially affect adversely the uses of neighboring and adjacent properties.

Dr. Carson moved, seconded by Mr. Chorman, and carried unanimously that the **special use exception be granted for the reasons stated**. Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12371 – Samantha Whaley seeks a special use exception to operate a day care center (Sections 115-23 and 115-210 of the Sussex County Zoning Code). The property is located on the north side of Johnson Rd. approximately 500 ft. east of Cedar Creek Rd. 911 Address: 20675 Johnson Rd., Lincoln. Zoning District: AR-1. Tax Parcel: 330-15.00-63.09

Ms. Bulkilvish presented the case and stated that the Office of Planning and Zoning received no correspondence in support of or in opposition to the Application and zero mail returns. The Applicant is requesting a special use exception to operate a daycare center.

Samantha Whaley was sworn in to give testimony about the Application.

Ms. Whaley testified that she and her mother currently operate a home daycare at this location; that they have operated the home daycare for twelve years; that there have been no complaints; that they are increasing the number of children to nine; that the request is for a daycare for twelve children; that the daycare currently has 2 employees who live on site; that an additional employee may be required when the number of children is increased to twelve; that the hours of the operation will be 6 am – 5 pm, Monday to Friday; that there is adequate parking; that there will be a fenced in outdoor play area for the children; that Fire Marshal approval has been received; the state licensing is applied for and will be approved following zoning and other agency approvals; and that the use will not substantially affect adversely the uses of adjacent and neighboring properties.

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

Mr. Williamson moved to approve Application No. 12371 as the Applicant has met the criteria for granting a special use exception and the use will not substantially affect adversely the uses of adjacent and neighboring properties.

Mr. Williamson moved, seconded by Mr. Chorman, and carried unanimously that the **special use exception be granted for the reasons stated**. Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

Case No. 12372 – Carlos Martins & Michelle Downing seek a variance from the corner front for an existing structure (Sections 115-34 and 115-182 of the Sussex County Zoning Code). The property is located on the northeast corner of Todd Dr. and Hassell Ave. in the Bayview Park subdivision. 911 Address: 34956 Todd Dr., Bethany Beach. Zoning District: MR. Tax Parcel: 134-20.12-6.00

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 and zero mail returns. The Applicant is requesting a variance of 7 ft. from the required 15 ft. corner front setback for a platform for a generator. The generator does not require a variance but the platform requires the variance as it is above the first floor.

The Board found that the Applicant was not present.

Motion by Mr. Workman, seconded by Mr. Williamson, and carried unanimously that **Case No. 12372 be moved to the end of the agenda.** Motion carried 5 – 0.

Case No. 12373 – Christian & Constance Brauer and Andrew & Christine Malaney seek an appeal of a determination by the Planning Director (Sections 115-208 and 115-209 of the Sussex County Zoning Code). The property is a portion of the parcel located on the southeast corner of N. Old State Rd. and Fleatown Rd. 911 Address: 11671 Fleatown Rd., Lincoln. Zoning District: HI-1/GR. Tax Parcel: 230-19.00-111.00 (Portion)

Ms. Cornwell presented the case.

Mr. Sharp stated that this is an appeal before the Board; that the Board will act like an appellate body; and that appeals are governed by certain sections of the Code. Mr. Sharp read the State statute regarding appeals and explained the procedure to Board members. Mr. Sharp stated that administrative bodies have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions; that, if a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such a literal interpretation could not have been intended by the legislature; that this case is regarding a property near Ellendale; that the land is zoned Heavy Industrial (HI-1); that the Applicant applied for site plan approval in June; that there was correspondence between the neighbor's counsel and the Applicant's counsel; that the Applicant Trinity Commercial Holdings, LLC, received site plan approval from the Planning and Zoning Commission on August 8, 2019; that the neighbors have filed an appeal to this Board on August 22, 2019; that the neighbors have also filed an appeal of the site plan approval to County Council; that the appeal to County Council has been stayed pending the outcome of this appeal and the appeal to County Council is not before the Board; that there are three issues that have been

raised by the appellants and those issues are as follows:

1. Whether the Director erred in not requiring the Applicant to apply to the Board for a potentially hazardous use;
2. Whether the Director erred in not requiring the Applicant to apply for a special use exception; and
3. Whether the Director erred in allowing the site plan process to proceed.

Mr. Sharp stated that certain sections of code are pertinent to this appeal, specifically §§ 115-110 and 115-111; that the issue before the Board is not whether a special use exception should be granted; that the issues before the Board are narrow; and that the focus is only on whether the Director erred in her decisions.

Ms. Cornwell, Christian Brauer, and Constance Brauer were sworn in to give testimony about the Appeal.

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. Witsil described the location of the property in question and stated that a portion of the subject property (approximately 6 acres) was rezoned in 1986 to HI-1; that the Brauers are in attendance tonight; that the appellants live near the site; that the proposed use requires a potentially hazardous hearing or a special use exception hearing before the Board of Adjustment; that this hearing is not whether a potentially hazardous permit or a special use exception should be granted; that this hearing is 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; that this is a three-part appeal; that the appeal is 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 H-I Heavy Industrial District; that the Code outlines the purpose of the Heavy Industrial district; that potentially hazardous uses are listed in §115-111 of the Code; that §115-111 requires that the use or manufacture, compounding, processing or treatment of cement, lime, sand or gravel may be located in an H-I Heavy Industrial District only after the location and nature of the use shall have been approved by the Board of Adjustment; that 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; 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; that the Potentially Hazardous Use hearing is required even if the proposed use is located in a Heavy Industrial District if any doubt exists; that the applicant must demonstrate that the public health, safety, and welfare have been protected; that the HI-1 district allows for any use permitted in the LI district; that the Planning & Zoning Commission never addressed whether the use was similar; and that the application before the Commission was for a central mixing and proportioning facility.

Mr. Robertson stated that there was no hearing before the Commission; and that the Commission reviewed the site plan as an other business item and the agenda item lasted 2-3 minutes.

Mr. Witsil stated that there was no public hearing before the Commission; that Chaney Enterprises applied for a central mixing and proportioning plant but the proposed use is not a central mixing and proportioning plant; that the proposed plant is a concrete batching plant; that the Director did not refer the application to the Board; that concrete batch plants are identified under §115-210 as a special use exception; that a concrete batch plant is not specifically allowed in the HI-1 district but is permitted as a special use exception in lesser districts; that the HI-1 district allows for uses in the LI-1 district; that correspondence was sent to the Director explaining the issues with the request; that there is no doubt that the property is zoned HI-1; that his clients purchased their lots in 2005; that the zoning was in place at that time; that, on July 18th, Samantha Bulkilivish of the Planning & Zoning Office sent a letter requesting information; that Chaney thereafter submitted additional information; that the description of the facility as given by Chaney's attorney James Fuqua identifies the facility as a concrete batch plant and not a concrete mixing and proportioning facility; that cement will be used or compounded as part of the process; that cement, sand, and gravel are essential elements to the concrete production; 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; that a potentially hazardous use hearing is required for all items listed in §115-111; that the nature of the materials used in the process of Chaney's proposed use requires a hearing under §115-111; that §115-111 is an additional safeguard to the uses listed in §115-110; that cement is a fundamental component of concrete; that, if allowed, Chaney will be able to operate the facility without any restrictions or conditions such as hours of operation or lighting; and that the plant is not in operation.

Mr. Robertson stated that there are no conditions imposed on permitted uses.

Mr. Witsil stated that a similar facility operated by the applicant in Lorton, Virginia, is a concrete batching plant; that the Board previously heard an application for Southstar, L.P., and the Board granted a special use exception for a concrete batching plant; 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; 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; that the Board has general powers to impose conditions on uses like this under §115-

212; that he does not know why the Code identifies the concrete batch plant and the concrete mixing and proportioning plant differently; that the two plants use the same materials; that 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; that there is not much difference between the two types of plants; that concrete batch plants cause more harm than concrete mixing and proportioning plants due to when the water is added; that he was initially confused about the difference when he wrote an earlier letter to the Director; that Chaney has the burden of proving that this facility does not create any more objectionable influences than a concrete mixing and proportioning facility; that the Director erred in not requiring this additional information; that doubt exists about the proposed use; that nothing was mentioned by the director at the Planning & Zoning Commission meeting about the concerns raised by Mr. Witsil; that no conditions were imposed on the use; that the Director has not issued a written decision; that the appeal was filed within 30 days as required under §115-208 and §115-209; that the Appellants are aggrieved parties; that the proposed facility will detrimentally affect their health, safety, and welfare; that the use will affect their property values; that the Director should have directed the application to the Board for a potentially hazardous use hearing; that there is little Delaware caselaw on point; that in Lowes v. Sussex County in 2002 the Superior Court determined that no public hearing is required for a site plan approval; that the issue in the Lowes case did not apply to a special use exception or a potentially hazardous use; 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; that neither of those decisions resulted in a referral to the Board of Adjustment; that a highly industrial concrete facility has been approved without consideration of how objectionable influences will affect neighbors; that the property is located in a rural, residential area; that the Board should be able to impose reasonable conditions on the project; that this appeal is not a delay tactic; that no temporary restraining order has been filed; that his clients believe an error was made by the Director; and that the imposition of conditions is necessary.

Mr. Brauer affirmed the statements made by Mr. Witsil as true and correct.

Mr. Witsil stated that they are prepared to argue that the concrete batching plant is more dangerous than a concrete mixing and proportioning facility; that based on the facts presented the Appellants request that the Board of Adjustment determine that:

(1) 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);

(2) 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;

(3) 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.

The Board took a five (5) minute recess.

Mr. James A. Fuqua, Esq. presented to the Board on behalf of Chaney Enterprises, LLC. and submitted exhibits as part of his presentation.

Mr. Fuqua stated that Chaney Enterprises is the owner / operator of the concrete plant; that the Director's determination should be affirmed by the Board; that the proposed use is a permitted use in the HI-1 district; that the district is a heavy industrial zone; that the property has been zoned HI-1 since 1986; that §115-109 states the purpose of the HI-1 zoning district; that §115-110 lists the permitted uses in the HI-1 district; that §115-110 has 3 sections and all sections are permitted; that §115-110(c) lists permitted uses and lists "concrete products and central mixing and proportioning plants"; that §115-110(c) also allows for similar industrial uses involving the manufacture, compounding, processing, packaging or treatment of concrete; that a concrete batching plant is similar to a concrete mixing and proportioning facility and has no greater impact; that the 2 types of plants are permitted uses in the HI-1 zoning district; that the fundamental rule of statutory construction is that the plain meaning of the statute controls; 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; that no error occurred in the Director's decision; that concrete batch plants are identified as a special use exception in the LI-1 district; that the property is zoned HI-1 – not LI-1; that concrete batch plants are not identified as needing special use exceptions in the HI-1 zone; 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; that the Board has no authority to amend the existing zoning code; that §115-210 addresses the Board's authority to grant special use exceptions; that §115-210 notes that the special use exceptions are specified in each district; that concrete batching plants are identified as special use exceptions in 8 different zoning districts; that §115-114 does not authorize concrete batch plants as a special use exception in the HI-1 zone; 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; that the ordinance is plain and clear; that a concrete batch plant is not authorized as a special use exception in the HI-1 zone; that the HI-1 zone is the logical place where a concrete batch plant would be located; that a special use exception for a concrete batch plant in an HI-1 zone is not required because the use is a permitted use; that there a difference between concrete and cement as explained in his letter; that they are different

products; 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; that the manufacturing of cement is a potentially hazardous use which would require Board approval under §115-111; that the Applicant's process does not include the creation of cement; that the Applicant makes concrete and concrete includes rock, stones, sand, pebbles, and cement; that cement makes up about 10-15% of the mass of the ingredients of concrete and water is added to the mixture; that a concrete plant consists of equipment to store, weigh, and load concrete ingredients into a concrete transport truck; 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; that the cement is an ingredient in concrete; that there is no heating involved in the creation of concrete; that cement is not being made on the site; that a central plant premixes the concrete ingredients with water before loading onto the truck; that a batch plant loads the dry ingredients into the truck where water is added and the ingredients are mixed in the truck; that a central plant is a large facility that makes big mixes of concrete; that a batch plant involves the creation of a singular batch; that Mr. Witsil submitted a letter dated August 8th confirming this; that the only difference between the two plants is when the water is added; that §115-110(c) authorizes as permitted uses by right central plants and similar uses having no greater impact; that there are no conditions required for permitted uses; that the two types of plants are identical except when water is added; that Mr. Witsil has acknowledged that the two types of plants are "interchangeable"; that zoning laws are interpreted in favor of landowners; that, if there are 2 reasonable interpretations of zoning laws and there is doubt, the doubt must be resolved in favor of the landowner; 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; that the plain meaning of statute controls; that the plain meaning of the statute is that both concrete batch plants and central plants are permitted uses; that a statute is ambiguous only if it is reasonably susceptible to different interpretations; 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; that the argument raised by Mr. Witsil creates an absurd result; that Board approval for this use is not needed; that a special use exception for this use cannot be applied for because it is not authorized as a special use exception; that the Appellants' argument ignores the plain meaning of §115-110(c); that there is no doubt that what is proposed is a concrete plant; that the Director makes the determination as to whether doubt exists; that the Applicant is not creating cement; that concrete batch plants are not recognized as potentially hazardous uses in any other district; that the Appellants' argument that the concrete batch plant is a hazardous use would create an absurd result; that the Director did not commit error; that the proposed use is permitted under §115-110(c); that the proposed use does not require a special use exception; that it was appropriate to submit the site plan to the Planning & Zoning Commission; that, as to the first appeal issue, 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; that, as to the second appeal issue, 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 §115-110C

of the County Code and the Director's decision should be affirmed; and that, as to the third appeal issue, 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.

Kyle Murray was sworn in to give testimony about the Appeal. Mr. Murray affirmed statements made by Mr. Fuqua as true and correct.

Ms. Cornwell testified that, in July 1986, the property was rezoned to HI-1; that, in June 2019, a site plan application was filed; that, pursuant to §115-110(c), the Planning & Zoning Office processed the site plan application; that §115-110(c) lists the permitted uses and one of the permitted uses is concrete products or central mixing and proportioning plants; that the doubt referenced in §115-110(c) applies to similar industrial uses not otherwise specified; that §115-111 does not apply in this situation; that the Applicant sought relief under §115-110 and the proposed use is not a potentially hazardous use; that a central plant and a batch plant use identical materials; that Mr. Witsil noted that the two plants are interchangeable; that Commission granted preliminary approval for the site plan at its meeting on August 8th; that §115-210 refers to special use exceptions as are identified in each specific zoning district; that §115-114 does not identify a concrete batch plant as a special use exception in the HI-1 district; and that the use is a permitted use and a special use exception is not required.

Mr. Robertson presented to the Board on behalf of the Planning and Zoning Department and specifically Ms. Cornwell. Mr. Robertson stated that the three questions before the Board are as follows:

1. Should the Director have required a potentially hazardous use public hearing?
2. Was the Director's decision not to refer Chaney Enterprises to a public hearing for a special use exception an error?
3. Should the preliminary site plan be declared null and void?

Mr. Robertson stated that he agrees with Mr. Fuqua and Ms. Cornwell; that words and the Code have meaning; that Mr. Witsil has cherry-picked portions of the Code to fit his clients' argument; that the property owners and the County need predictability on how Code sections are interpreted; that the Board does not have jurisdiction to hear an appeal of a decision of the Planning & Zoning Commission; that site plans appear as Other Business items at Commission meetings because they are permitted uses and no public hearing is necessary; that, once preliminary site plan approval is received, the applicant must obtain other state agency approvals prior to final site plan approval; that §115-110 lists permitted uses; that §115-110(c) identifies concrete products and central mixing and proportioning plants as permitted uses and any similar industrial uses; that batching and mixing facilities are interchangeable; that there is no doubt as to the use; that the County must rely on what the Code states; that property owners are entitled to rely on the plain meaning of the Code; that the HI-1 district incorporates the permitted uses in the LI-1 district

which include agricultural uses; that there is an agricultural use notice which is similar to the language in §115-110(c); that, 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; that this an absurd result; that the "doubt" clause comes into play when something was not specifically listed; that the "doubt" clause would come into play for a new product or use that is similar to the permitted uses and the Director had doubt about the nature of the use or process; that predictability in the Code is important; that §115-111 identifies potentially hazardous uses; that §115-111 specifically states that it does not apply to the uses "listed above" which include the concrete uses discussed in §115-110; that a logical reading of §115-111 is a safety valve; that §115-210 does not apply to this situation either; that §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; 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; that the result would be absurd; that he agrees with Mr. Fuqua's arguments; that Mr. Witsil's arguments, if accepted, would create a dangerous precedent; and that the decision of the Director should be upheld.

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; that she is unaware of similar determinations made by the Director in a case similar to this; and 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.

The Board took a five (5) minute recess.

Mr. Witsil stated that there is a reasonable doubt as to the application of §115-110(c); that concrete batch plants are not listed in §115-110 because they are different from central mixing plants; that he made an error in his previous correspondence with the Director; that a concrete batch plant creates more objectionable influences than a central mixing plant; that he clarified his error in his August 8th letter after he spoke with an expert; 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; that the special use exception argument he raised is likely "far-fetched"; that no evidence has been provided that a concrete batch plant creates no more objectionable influence than a central mixing plant; 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; that there is doubt; that Chaney failed to truly identify its plant in the application; that Chaney is not proposing a central mixing plant; that Chaney is proposing a concrete batching plant; that cement is listed as a potentially hazardous use in §115-111; that cement is an ingredient for concrete; and that, even if it was a central mixing plant, a potentially hazardous use hearing would be necessary.

Mr. Robertson stated that, in both concrete batch plants and central mixing plants you have storage of the same materials, hoppers to mix ingredients, and trucks to deliver the concrete; 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; that he fails to see the difference between the two uses; that HI-1 is the most intensive zoning district in the Code; that the HI-1 zone discourages residential and commercial uses; 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; and that, since the use is a permitted use, it does not trigger a special use exception hearing.

Mr. Fuqua stated that Chaney Enterprises is a reputable business; that concrete batch plants are authorized as special use exceptions in 8 other districts; that it is not authorized as a special use exception in the HI-1 district because it is a permitted use; that it was originally submitted as a central mixing plant; and that the question is when was the water added.

Mr. Brauer testified that he understands the points made by Mr. Fuqua and Mr. Robertson; that he does not understand why the property was zoned HI-1; that he and his neighbors purchased their homes after the property was re-zoned; that he works in construction; that his attorney has raised some good points; that he questions where the water is coming from and the amount of water being used; that he understand that the HI-1 is the most intensive use; and that he was not aware the property was zoned HI-1 when he purchased his lot.

Norma Shelton, Robert Sullivan, and Paul Reiger were sworn in to give testimony about the Appeal.

Ms. Shelton testified that she lives near the site; that she is concerned about dust and noise; that her husband works for Chaney Enterprises and he knows what it will be like; that her home will be ruined; that people live near the site; and that she was not aware the property was zoned HI-1.

Mr. Reiger testified that the Code is not consistent with definitions for public stables; that there are conflicts in the Code; that, if the use is listed in §115-210, it should come to the Board as a special use exception; that public stables are listed as a special use exception; that he thinks the Director should be consistent with her interpretations; and that errors in the Code should be addressed by the Board.

Mr. Sullivan testified that the plant should be allowed; that the previous owner had a sign up for 10 years identifying the property as HI-1; and that he lives very close to the site.

The Board found that three parties appeared in support of and one party appeared in opposition to the Appeal.

Mr. Workman moved to table Case No. 12373 until the November 4, 2019, meeting, to allow Board members enough time to review all the documentation submitted.

Motion by Mr. Workman, seconded by Mr. Chorman, carried unanimously to **table this case until the November 4, 2019**. Motion carried 4 – 1.

The vote by roll call; Mr. Chorman – yea, Mr. Williamson – yea, Dr. Carson – nay, and Ms. Magee – yea.

The Board took a five (5) minute recess.

Case No. 12372 – Carlos Martins & Michelle Downing seek a variance from the corner front for an existing structure (Sections 115-34 and 115-182 of the Sussex County Zoning Code). The property is located on the northeast corner of Todd Dr. and Hassell Ave. in the Bayview Park subdivision. 911 Address: 34956 Todd Dr., Bethany Beach. Zoning District: MR. Tax Parcel: 134-20.12-6.00

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 and zero mail returns. The Applicant is requesting a variance of 7 ft. from the required 15 ft. corner front setback for a platform for a generator. The generator does not require a variance, but the platform requires the variance as it is above the first floor.

Bryan Elliott was sworn in to give testimony about the Application.

Mr. Elliott testified that he works for Insight Homes; that the property already has variances which were granted in 2018; that a 7 ft. variance is being requested for the platform making it an additional 2 ft. from what was previously granted; that the property is a small lot with a unique shape which affected the placement of the house; that the lines are not perpendicular; that it cannot otherwise be developed as the mechanical room on this side of the home and the generator would not be as efficient if it was moved to another location; that this was not created by the Applicants as they did not create the shape of the lot; that it will not alter the character of the neighborhood; that there are no neighbors on this side of the dwelling; that there is a common area adjacent to this side of the lot; that there is a large gap between the edge of paving of Hassell Drive and the property line; that generators cannot be placed under the house; that the garage is enclosed; that, if the generator was moved, it would create a power drop; that the house is elevated to raise the house above the flood plain and to comply with flood zone requirements; that it is the minimum variance that will afford relief and allow for a generator; and that, though approved for a rear yard setback, the Applicants changed the design of the house and did not take advantage of the variance for the rear yard.

Mr. Reiger, who was previously sworn in, gave testimony in opposition of the Application. Mr. Reiger testified that he has concerns regarding continued variances on small lots who already

received relief under the small lot ordinance.

Ms. Cornwell clarified that the corner front setbacks did not receive relief under the small lot ordinance and remains at 15 ft.

Mr. Reiger testified that he understands the request; that the request is more understandable and that he is now in support of this Application.

Mr. Elliott testified that the property has odd lot lines and the first floor is small.

The Board found that one party appeared in support of and no parties appeared in opposition to the Application.

Mr. Williamson moved to approve Application No. 12372 as the Applicant has met the criteria for granting a variance

Mr. Williamson moved, seconded by Mr. Chorman, and carried unanimously that the **variance be granted for the reasons stated**. Motion carried 5 - 0.

The vote by roll call; Mr. Chorman – yea, Mr. Workman – yea, Mr. Williamson – yea, Dr. Carson – yea and Ms. Magee – yea.

ADDITIONAL BUSINESS

Ms. Cornwell presented the Board of Adjustment public hearing dates for 2020.

The Board held a brief discussion regarding the permitting process.

Meeting was adjourned at 9:30 p.m.