

MINUTES OF CLINTON TOWNSHIP BOARD OF ADJUSTMENT

[www.township.clinton.nj.us](http://www.township.clinton.nj.us)

PUBLIC MEETING

March 24, 2014

PRESENT: Tom McCaffrey, John Matsen, Sharon Stevens, Wayne Filus, and Sharol Lewis.

PROFESSIONALS: Kendra Lelie, Planner, Jon Drill, Attorney, and Rebecca D'Alleinne, Administrator.

ABSENT: John Lefkus and Dave Roberts.

CALL TO ORDER

Chairman McCaffrey called the meeting to order at 7:31PM.

PUBLIC NOTICE

This is a public meeting of the Zoning Board of the Township of Clinton, County of Hunterdon and State of New Jersey. Adequate notice of this meeting has been given in accordance with the Open Public Meetings Act in that an Annual Notice was published in the Hunterdon County Democrat and the notice of and agenda for this meeting was posted on the bulletin boards in the Municipal Building and outside the Planning and Zoning Office on the 1st Floor of the building and faxed to the Hunterdon County Democrat, the Express Times, the Courier News, the Hunterdon Review, and the Star Ledger, no later than the Friday prior to the meeting.

NEW BUSINESS

Vouchers

Chairman McCaffrey moved and Wayne Filus seconded a motion to approve the vouchers for payment. The Board concurred unanimously. John Matsen noted that one of the professional's vouchers had not indicated notification of the applicant or identified the individual who had incurred the charge.

MINUTES

Sharon Stevens moved and Wayne Filus seconded a motion to approve the minutes of January 27, 2014 as corrected. John Matsen, Tom McCaffrey and Sharol Lewis abstained and the remainder of the Board members concurred unanimously.

Sharon Stevens moved and Wayne Filus seconded a motion to approve the Executive Session minutes of December 9, 2013 as amended. John Matsen, Tom McCaffrey and Sharol Lewis abstained and the remainder of the Board concurred unanimously.

Sharon Stevens moved and Wayne Filus seconded a motion to approve the Executive Session minutes of January 27, 2014 concerning litigation, as corrected. John Matsen, and Tom McCaffrey abstained and the remainder of the Board concurred unanimously.

Sharon Stevens moved and Sharol Lewis seconded a motion to approve the Executive Session minutes of January 27, 2014 concerning personnel matters, as written. The Board concurred unanimously.

## RESOLUTIONS

### **RESOLUTION AUTHORIZING DEFENSE IN HENSFOOT DEVELOPMENT CORP. V CTBOA AND ZINN REALTY**

Jon Drill stated that there was one change in the date that needed to be made. Sharon Stevens moved and Sharol Lewis seconded a motion to approve the resolution as written. Members in favor: Stevens, Lewis and Filus.

## SELECTION OF CONFLICT PLANNER

Chairman McCaffrey reported that he and Mr. Matsen had interviewed Joseph Burgis for the position. John Matsen commented on Mr. Burgis's experience in planning matters. They recommended that the Board appoint Burgis Associates as its conflict planner. Sharon Stevens moved and John Matsen seconded a motion to appoint Mr. Burgis as the conflict planner. The Board concurred unanimously.

## EXTENSION OF TIME

### **BENCH/FOX MEADOW PROPERTIES, LLC**

Resolution 32013-02, Application #2008-12

Mr. Gallina, Esq. introduced himself on behalf of the applicant and stated that his client was requesting an extension of time to obtain permits, due to economic issues. Mr. Drill reported that #2010-20 was the original resolution of approval and that #2013-02 was the successive resolution. Mr. Gallina discussed Condition #12 and asked that the Board extend the deadline, noting that they might ask for an extension of 18 months to 2 years. Jon Drill discussed the statutory issues involved, and Mr. Gallina noted that there had been no change in the zoning, as per the planner's memo. Mrs. Eunice Bench was sworn and reported that there had been no changes to the railroad crossing. John Matsen moved and Sharol Lewis seconded a motion that the Board grant an additional two years. Members in favor: McCaffrey, Matsen, Stevens, Lewis and Filus.

Chairman McCaffrey recused himself from the following application and left the meeting.

## APPEAL OF THE ZONING OFFICER'S DECISION

### **VALLEY BROOK FARM, Block 7, Lot 2**

Guy De Sapio, Esq. introduced himself on behalf of the owner and applicant, Richard Pfauth. Mr. De Sapio explained that the operator of the farm stand had been before the Board in November to appeal a zoning violation and that the Board had reversed the Zoning Officer's decision on Oct. 28, 2013. He indicated that the Zoning Officer had subsequently issued another citation that the use was not permitted in the zone. He further noted that the operator would not be continuing the operation in the future. Mr. De Sapio stated that Mr. Pfauth was asking the Board to determine whether the use could continue. He noted that there had been a number of changes in the zoning over the years and expressed the opinion that the sale of agricultural products was incidental to an agricultural use. He noted that there was no structure involved, but that there was a temporary tent for shelter on the property. Mr. De Sapio listed the different zones that had been imposed over the years. He asked the Board to consider whether the use was permitted or nonconforming as opposed to whether the lot was too small. He reported that the operation was on Rt. 22 and was not out of sight. Jon Drill pointed out that there was a dwelling on the property. Mr. De Sapio stipulated that the applicant would not be using the house.

Lewis Ercolano, Jr., Joseph Pfauth, Richard Pfauth and Kendra Lelie, Board Planner were sworn. Joseph Pfauth discussed the use on his parents' property, noting that he had briefly lived in the house in 1986 and 1987. He reported that Mr. Ercolano sold Christmas trees and used the "upper lot" for parking. He stated that they sold Christmas trees and flowers, characterizing the use as an overflow from the adjoining property, Block 7, Lot 3.

Exhibit A-1 (Existing Farm Stand) was marked into evidence. Mr. Pfauth reported that Block 7, Lot 3 was never owned by the Pfauth family, stating that Mr. Ercolano rented Lot 2 from the Pfauth family and used it primarily for parking. Wayne Filus asked about the business that had been conducted on the adjoining property as opposed to the property in question. Mr. Pfauth stated that he had seen Mr. Ercolano conducting transactions on both lots. Kendra Lelie asked about the time that the dwelling was used as a home, and Mr. Pfauth stated that it had never been used as an office.

Objector's attorney Walter Wilson, Esq. asked whether the Pfauth parking lot had been used for the excavating equipment. He responded that they had parked equipment there. Mr. Pfauth stated that 2008 was the last time that the house was rented and noted that he had purchased a tree from Mr. Ercolano when he lived in the house. He stated that Mr. Ercolano had conducted transactions on Lot 2, noting that there was power in the house which had been used by Mr. Ercolano for transactions and to power the well.

Mr. De Sapio submitted the following exhibits: Exhibit A-2 (Land Use Ordinance 1982, Revised 1983), Exhibit A-3 (1983 Zoning Map), Exhibit A-4 (Ordinance 435-90), Exhibit A-5 (OPRA Request), Exhibit A-6 (Zoning Map, 1990) and Exhibit A-7 (1999 Zoning Map) were marked into evidence. He commented that the reality was that from 1989 or so, the property was continuously used by Mr. Ercolano for the sale of nursery stock, indicating that he felt it was incidental to an agricultural use. Mr. De Sapio expressed the opinion that a farm product was not just raised on the farm

and was marketed. The ordinance changed in 1990. He noted that the ROM-1 permitted uses were still permitted under the ROC zoning. The zoning change in 1990 stated that for retail sales, the minimum lot size was changed to 50 acres. He noted that there had never been a zoning violation issued in all of the years that Mr. Ercolano had been there. Mr. De Sapiro expressed the opinion that it was an agricultural use under the ordinance. He discussed the potential use of the dwelling, noting that the applicant would need a variance to use the house. He asked that the Board determine that it was an existing use which could be continued.

Walter Wilson asked Joseph Pfauth about the taxes on the property and he responded that he did not know. Mr. De Sapiro stated that the property was not assessed as farmland.

Mr. Wilson expressed the opinion that the use was not accessory to the house, and that there has never been approvals for any other than a residential use, noting that there were already two uses on the property: a house and parking for the excavation company. He referred to the resolution from the Board hearing, Resolution #2013-20, noting that on page three there was a "finding" that Mr. Ercolano began to engage in retail sales in 1985. There was a second "finding" that he began to lease Lot 2 in 1988 and in 1991 began to use the property as a part of his retail nursery items business. Mr. Wilson made the point that the ordinance did not say a use can be considered accessory to another lot; that the accessory use and the principal use must be on the same lot. He read the definition of "farm" and indicated that the operation was a retail use, not an agricultural use, noting that none of the items sold were grown on the property. He indicated that the electrical source was from the house, and the water for the outdoor retail operation was from the well of the house. Mr. Wilson expressed the opinion that another retail entity could come to take over the operation without approvals, if relief were to be granted to the applicant. He pointed out that there was still a third use on the lot by the excavation company. Vice Chairman Matsen requested information from the definition section and Jon Drill read it into the record.

Kendra Lelie stated that their report had been based on the prior resolution and some of the findings. She discussed whether the operation was an agricultural use or a retail use. She commented that the zoning officer's violation ticket did not discuss his rationale in detail. Jon Drill read aloud from the Resolution #2013-20. He commented that there were two ways for the Board to consider the appeal. First, the Board could consider whether the use was a permitted agricultural use or an agricultural use accessory to an agricultural use. The second way that the Board could view the matter was whether in 1990 the agricultural use was permitted. The ordinance change added a permitted use as a store or shop for retail use. Ms. Lelie stated that the only way to be considered permitted was if the operation was a pre-existing, non-conforming use. Mr. De Sapiro stated that he could provide testimony from the owners. Ms. Lelie expressed the opinion that it was the crux of the matter, because no one had testified as to exactly what the operation entailed. Mr. Wilson didn't think it was an agricultural use, but that the issue was whether the operation was a principal use on the lot or was it accessory to Lot 3.

Mr. De Sapiro stated the sale of agricultural products on Lot 2 was the principal use. He commented that the ordinance didn't say that the use must be a farm, noting that it was a principally permitted use. Sharon Stevens stated that she heard nothing about retail sales in the ordinance. Mr. De Sapiro noted that the interpretation should consider

whether one had to have a shop or a building for retail business. Chairman Matsen expressed the opinion that one could have a retail use on 50 acres or more, or a store or shop on less than 50 acres. Jon Drill stated that the case came down to whether or not the operation in November 2013 was a principally permitted agricultural use. He read the definition of "agricultural land".

Mr. De Sapio suggested that "truck farming" was bringing the product in from someplace else. Mr. Wilson discussed truck gardening, expressing the opinion that it consisted of products grown in pots on the property, commenting that every vacant lot along Route 22 and Route 31 could have sales of garden products and Christmas trees if the concept was taken to the logical conclusion. Mr. De Sapio stated that a new operation would require site plan approval. Jon Drill disagreed with his assessment, noting that retail sales must be a lawfully created use, and that it was not permitted in the zone. Kendra Lelie expressed concern as to whether retail sales qualifies as an agricultural use. Mr. Drill summed up that there were two arguments: the operation was a principally permitted agricultural use today, because the current ordinance permitted agricultural use. He noted that the argument was that the use was for a "truck garden" and/or "other" agricultural uses. He stated that the second possible argument was: for a shop, 50 acres was not a "use" requirement and that a "store or shop" did not require a building. Vice Chairman Matsen called a recess at 9:35PM. The meeting was called to order at 9:42PM.

Lewis Ercolano, Jr. reported that he had conducted an operation on the property selling trees, flowers and mulch. He stated that many of the things that he sold were growing, noting that none of the items were growing in the ground, but in containers. He expressed the opinion that if the plant grew significantly, he considered that he had grown it. Mr. Ercolano stated that they had container shrubs and perennials, indicating that he would purchase the items and care for them. He discussed his operation on Lot 3. He noted that on Lot 2, he had used a cash register to sell the items. He reported that he continued to sell products on Lot 2 after January 2013. Mr. Ercolano noted that in the spring he would sell flowering shrubs and perennials, and in the fall mums and pumpkins, along with bags of mulch and bulk products. Vice Chairman Matsen stated that he understood that the testimony at the last hearing as to the dates was not exact. Wayne Filus asked whether the intention was to grow the products, and Mr. Ercolano stated that some sold immediately and some did not. He discussed the items that he kept and sold later, estimating that it was 10 percent of the sales. He stated that he put some items in a greenhouse on Lot 3.

Walter Wilson asked about whether mulch had been sold on Lot 2, and Mr. Ercolano responded that he had done so before 2012 in the area south of the house. Christopher Nusser was sworn, stating that he was an engineer for the applicant. Exhibits O-1 through O-4 were introduced. Mr. Nusser stated that he obtained the aerial photos prior to October 2013, with the lot lines supplied by the DEP website. Exhibit O-1 (1995), O-2 (2002), O-3(2007), and O-4 (2012) were all aerial photos of Lot 2 and the vicinity. Mr. De Sapio asked about the time of year of Exhibit O-1, and Mr. Nusser estimated that the photo had been taken in spring or summer. He noted that the 2002, 2007 and 2013 photos were taken in fall or winter. Mr. Ercolano examined Exhibit O-1 and drew in the area that he was using on Lot 2 during that time period. He marked the area that he used on Exhibits O-2, O-3 and O-4. He testified that he had a cash register and transactions occurred on the property. It was determined that the aerials should not

be marked into evidence at that time. Sharon Stevens asked about product on the site in 2012 and Mr. Ercolano responded that the use of the property had increased over the years. Sharol Lewis asked whether the business had closed down and he responded that it had.

Walter Wilson asked about the ground surface underneath the plant material and Mr. Ercolano stated that it was mainly gravel. Joseph Pfauth stated that he had purchased the Christmas tree in 1987 on Lot 2. Mr. Nusser offered his credentials, which were accepted by the Board. He stated that he had obtained the aerials from the DEP GIS website, and the series of photos were marked into evidence. He indicated that he had been retained by the adjoining lot's owner. Mr. DeSapio commented that there were multiple uses on Lot 3, noting that it was an agricultural and retail use, stating that both were principal permitted uses.

Guy De Sapio expressed the opinion that the Board should look at the totality of the picture and use common sense, noting that there was no simple definition of agriculture. He commented that agriculture had evolved, and that common sense should be used, noting that no agriculture lasts all year, but grows and goes to market. He stated that the ordinance didn't say that only farms were permitted, but agricultural uses "such as farms". Mr. De Sapio indicated that for 20-30 years, the applicant had conducted an agricultural operation. He expressed the opinion that the retail sale of agricultural products must be considered agriculture. He noted that the ordinance said that one could have retail sales, but must have 50 acres for stores and shops. Mr. De Sapio commented that if the Board determined that it was a retail use, then it was too small, but has been used for 27 years. He expressed the opinion that the Board could find that it was a pre-existing agricultural use.

Mr. De Sapio stated that, if Mr. Wilson was allowed to speak after his summation, he would like to reserve the right to comment. Mr. Wilson commented that the retail operation was not permitted, unless one had 50 acres. He discussed the residential use, noting that they were not using the building, but only for electricity and water. He expressed the opinion that other similar operations would occur. Mr. Wilson noted that the use was as an expansion of a non-permitted use. He expressed the opinion that the mere sale of agricultural products did not make it an agricultural use. He pointed out that the use was not related to the other two existing uses.

Mr. De Sapio stated that he was not appealing to the Board's sympathies, but to common sense and the facts. He pointed out that there had been no changes to Lot 2 and that the operation was permitted. The Public Hearing was closed.

Jon Drill summed up the applicant's two arguments for the Board to consider. First, that the use at the time of the zoning officer's summons was a permitted agricultural use. The second argument was that the operation was a permitted retail shop or store. He read paragraph 7 from Resolution #2013-13 into the record. He suggested that they first consider whether the operation was the retail sales of landscape nursery items and secondly, whether it could be characterized as a retail sales aspect of an agricultural use.

Vice Chairman Matsen stated that the retail use was on less than 50 acres, so it was not a permitted retail operational use. He expressed the opinion that it would require a use variance, commenting that one couldn't have a store or shop without a building. Sharon Stevens discussed the different kinds of agricultural uses. She stated that the 50

acre requirement was a use variance. Wayne Filus agree that a shop or store was a physical requirement and Sharol Lewis agreed.

Vice Chairman Matsen noted that the township ordinance was drafted before the Right to Farm Act had been adopted. He commented that the ordinance was not as well drawn as it could be, noting that a farm had a very wide range of activities. He discussed the definition of a farm including 5 acres, with one acre for a house and noted that the ordinance did not envision that a property of that size being classified as a farm. He discussed the Right to Farm determination and noted that the applicant would have to go to the Agriculture Board. Sharon Stevens commented that the use was agricultural, but not a principally permitted agricultural use. Wayne Filus indicated that the bulk of the use was to sell an agricultural product, but that they were not engaged in agriculture. Sharon Lewis disagreed and expressed the opinion that it was a principally permitted agricultural use.

Sharon Stevens moved and John Matsen seconded a motion to affirm the zoning officer's decision. Members in favor: Matsen, Stevens and Filus. Members opposed: Lewis.

#### ADJOURNMENT

Sharon Stevens moved and Wayne Filus seconded a motion to adjourn, and the motion passed unanimously. The meeting was adjourned at 11:15PM.

These minutes were approved on April 28, 2014.

Rebecca E. D'Alleinne, Administrator