

Stacy Quinn, CTC TOWN OF EAST HAVEN, CT
TOWN CLERK ZONING BOARD OF APPEALS
MINUTES OF A SPECIAL MEETING
JULY 13, 2017 7:00PM EAST HAVEN SENIOR CENTER

MEMBERS PRESENT: ROBERT FALCIGNO-CHAIRMAN
GEORGE HENNESSEY-VICE CHAIRMAN
DONALD THOMAS
JOSEPH PORTO

MEMBERS NOT PRESENT: NONE

ALTERNATES PRESENT: VINCENT LETTIERI
MICHAEL SMITH

ALTERNATES NOT PRESENT: NONE

STAFF PRESENT: ALFRED ZULLO-ATTORNEY
CHRISTOPHER SOTO-ZEO
SUSAN IANNONE-CLERK

Refer to stenographers' transcript for complete minutes of this meeting.

Chairman Falcigno called the meeting to order at 7:00 P.M. and after a roll call was taken he stated they had a quorum.

APPEAL HEARING # 17-18

APPELLANT: One Barberry Real Estate Holding; Property Concerned: 1 and 99 Barberry Rd; *Appeal of Cease and Desist/Action of Z.E.O. (amended cease and desist order for the slashing of trees)*

Attorney Peter J. Alter, Alter & Pearson, LLC, represented One Barberry Real Estate Holding LLC and Farm River Rock, LLC. He provided a packet of Exhibits to each member of the board, for the record and to Attorney Conway who represented ZEO Soto. Also present was John Patten, member of Farm River Rock and manager of One Barberry. Atty. Alter asked that the materials presented at this hearing be carried over to hearing #17-20. He stated that when referring to the appellant it would include One Barberry and Farm River Rock.

Attorney Alter explained this hearing was about protecting property rights and the fairness in determining a question of law. It's their position that ZEO Soto actions towards the quarry are legally unsupportable. He stated because of these actions the appellant has had a negative financial impact on their quarrying operation. It is every quarry's legal right to mine either by existing as a legally non-conforming use, or as a use approved through a zoning regulation process.

He stated Attorney Mark Branse, who represented the past owner (Mark DiLungo) in obtaining the quarry property as a legally existing, non-conforming use, provided an opinion letter (Exhibit D) in favor of this use which could not be subject to zoning regulations by the Town of East Haven and the Board was now bound by this prior ruling.

Attorney Alter went on to read a letter (Exhibit A) dated November 10, 2014 from Frank Biancur, Jr. (prior Planning and Zoning Officer) determining the property use was a legal pre-existing non-conforming use and had no zoning issues and should continue without interference from the Town. If anyone should question if any improper action occurred that caused this letter to be issued because of Mr. Biancur's subsequent legal problems, then they should provide proof for the record of any wrongdoing. Also provided was Mr. Biancur's decision legal notice published in the New Haven Register (Exhibit B) and recorded document (Exhibit C) in the East Haven Land Records. He stated there were no appeals made within 30-days of the publication, therefore the decision was final, could not be later overturned and bounds the Town as the law. He said Mr. Soto made it clear he would not have reached the same decision as his predecessor, but his opinion does not matter. Also provided was an affidavit (Exhibit E) from George Mingione the prior zoning officer, who stated the property was recognized as a pre-existing non-conforming use property for rock excavation and quarry. Attorney Alter then mentioned a memo (Exhibit F) dated October 27, 2014 from the town assessor Mr. Milici who recognized the pre-existing non-conforming use for the property.

As explained by Attorney Alter, quarries are developed with a substantial commitment of time and money. There is a difference between a topsoil, sand and gravel excavation vs. a true quarry operation. The board should understand the magnitude of the damage caused by Mr. Soto's orders. He then presented a survey of the property (Exhibit G) done by Gardner & Peterson Associates. A virtual tour of the quarry was presented with aerial photos (Exhibit H). All traffic exits on the North Branford side of the property. Stockpiles of materials were done before the cease and desist order. Hillside showing where trees were removed. Operations were not concealed. Disassembled crushing plant complied with Mr. Soto's orders. Construction of a 2,000 l.f. x 6 ft. high berm, silt fence and hay bales prevent rocks from coming down the hill. The Tax Assessor was aware of the activities and increased taxes. The Fire Marshall was also aware as he issued 37 blasting permits (Exhibit I) on a regular basis. From 2013 to 2017 Farm River Rock operated the quarry with no questions from any Town official.

The 3 bases which the board should overrule the cease and desist orders: 1. Legally existing, non-conforming use not subject to current zoning regulations; 2. Municipal estoppel; and 3. The property owner has constitutionally protected vested rights in the continued use of its property.

Attorney Fuller from Wilton and retired State of Connecticut Superior Court Judge, read from his letter (Exhibit J) to address the legal issues. He stated that when the legal notice of determination was posted in the newspaper and no appeal was made that the result was a final decision on status of the use of the property for the pre-existing nonconforming use. They have a vested right to expand use. Quarry operation has diminishing assets and natural expansion over the entire property. Section 31.1 regulation does not apply and can't require a temporary special exception for use by a quarry operation. Excavation limits do not apply to quarrying activities. He agrees with Atty. Branse's letter.

Attorney Timothy Hollister, from Hartford, 35 years in land use law. He summarized his letter (Exhibit K) stating that the cease and desist orders are illegal and should be reversed by the ZBA and the suspension of the business should be terminated. He agrees with Atty. Branse and Atty. Fuller. A quarry operation expectation is that it will continue to grow. Mr. Soto is trying to apply special exception to a non-conforming use, but the zoning commission could not regulate their expansion. The quarry should operate safely carried out through municipal ordinances such as the blasting permits and not by zoning regulations and permits. A vested nonconforming use does not have a limitation on that use and could not be terminated by a special exception regulation. Section 31 applies to new use not pre-existing non-conformities.

As to the Amended Cease and Desist/Stop Work Order date April 21, 2017 Attorney Alter stated the Appellant took it seriously and complied with to the extent legally possible. He ceased tree removal and after discussions with Mr. Soto and the town engineer constructed the berm at a cost in excess of \$30,000. The Appellant asserts no "slashing of trees" has occurred and it is not the same as tree removal although Mr. Soto believes the two phrases are interchangeable but his order is unnecessary and erroneous. The definition of Slashing of trees (Exhibit L) is a forestry term which materials are left on the ground. Nothing was left on the ground therefore slashing of trees never occurred. If Mr. Soto meant "clear cut", then the quarry had every right to cut the trees. It is not possible for a legally existing non-conforming quarry to comply with Section 31 (Exhibit M) of the zoning regulations, it is not legally possible for the Planning and Zoning Commission to approve a Special Exception and such a requirement cannot be legally imposed by the ZEO. The Cease and Desist/Stop Work Order should be vacated.

Attorney John Conway represented Mr. Soto. He requested the hearing be left open to another night since he had just been given the materials.

Attorney Steven Sosensky was there with some members of the public. He stated that it would be disadvantageous for anyone to comment until they could hear the town's side. Attorney Zullo agreed and explained that if anyone wanted to comment tonight, they could also comment again at the next meeting.

In Favor: none

Oppose to: none

Attorney Alter suggested another special meeting.

Donald Thomas made a motion to continue the hearing and set a special meeting on August 3, 2017. Joseph Porto seconded the motion. Unanimous motion carried.

APPEAL HEARING # 17-20

APPELLANT: One Barberry Real Estate Holding; Property Concerned: 1 and 99 Barberry Rd; *Appeal of Cease and Desist/Action of Z.E.O. (excavation/grading of topsoil, sand, and gravel)*

Chairman Falcigno opened the hearing.

Donald Thomas made a motion to accept the testimony from #17-18 and have it also apply to #17-20. Joseph Porto seconded the motion. Unanimous motion carried.

Attorney Alter stated the appellant complied with the order date April 21, 2017. In regards to the order of May 9, 2017 the appellant ceased mining and quarrying operations. The Board must determine the validity of the alleged fact that the first time Mr. Soto was at the quarry was on May 8, 2017, but rather was on the site on numerous other occasions. He said Mr. Soto knew he did not have the power to overrule the November 10, 2014 decision of Mr. Biancur, but issued the order anyway. Farm River Rock has been forced out of business because of these orders. Loss of income of \$15,000 per day, equipment sold to pay debt and employees laid off. Couldn't deliver on customer contracts and loss of business opportunities. Both orders should be vacated.

In Favor: none

Oppose to: none

Donald Thomas made a motion to continue the hearing and set a special meeting on August 3, 2017. Joseph Porto seconded the motion. Unanimous motion carried.

Chairman Falcigno adjourned the meeting at 8:36 PM.

Respectfully submitted,

Susan Iannone
Clerk