

Stacy Quirino CTC  
TOWN CLERK

TOWN OF EAST HAVEN, CT  
ZONING BOARD OF APPEALS  
MINUTES OF A SPECIAL MEETING  
AUGUST 10, 2017 7:00 PM EAST HAVEN SENIOR CENTER

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

MEMBERS NOT PRESENT: NONE

ALTERNATES PRESENT: MICHAEL SMITH  
VINCENT LETTIERI

ALTERNATES NOT PRESENT: DAVID GERSZ

STAFF PRESENT: ALFRED JULLO - ATTORNEY  
CHIRSTOPHER SOTO - ZEO  
KIRSTIN FRANZMAN - SUBSTITUTE CLERK

Please refer to stenographers' transcript(s) for complete minutes of this meeting.

Chairman Falcigno called the meeting to order at 7:04 P.M. and after a roll call was taken, he stated they had a quorum. A motion was made to temporarily appoint Alternate Member Vincent Lettieri as Vice Chairman in the absence of Vice Chairman Hennessey. The motion was made by Chairman Falcigno, seconded by Mr. Smith, and unanimously approved by a roll call vote. Mr. Hennessey arrived a few minutes later and Mr. Lettieri did not need to serve as Vice Chairman.

**APPEAL HEARING #17-18**

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

*\*\*Note: all letters and documents referenced in these minutes are on file, and can be reviewed, in the Planning and Zoning Office \*\**

Attorney John Conway submitted copies of the Town's evidence for this hearing to the clerk. Evidence consisted of documents in paper form as well as a computer disk/CD. Attorney Peter Alter, for Farm River Rock, did not have any objections to this submittal. Attorney Conway stated that he had now concluded his presentation for this matter.

Irene Macholl of 9 Mill Road, North Branford submitted an affidavit on behalf of Mr. Paul Tancreti with his statement about the history of the Barberry Road property. This affidavit was for the purpose of OPPOSING the appeal. The affidavit was read into the record by the clerk.

Attorney Alter began his rebuttal but re-introducing himself for the record and introducing Attorney Robin Pearson, both of the law firm Alter & Pearson, LLC, as well as John Patton, managing member of Farm River Rock and One Barberry Real Estate Holding.

Attorney Alter stated that this evening he would be offering his rebuttal to Attorney Conway in a continuation of the Public Hearing from the previous week. He stated that their request to the Board is to determine the matters of law and that the facts of the case are not in dispute.

Attorney Alter stated that there is no question that Mr. Patton has been operating a quarry on the site since 2013 and that he has removed trees and constructed a berm in the process of normal operations of his business. The questions that need to be answered are: Is the Zoning Board of Appeals bound by the decision issued on November 10, 2014 by the previous ZEO Frank Biancur? Does Section 31 of the Town Zoning Regulations apply to this quarry operation as noted in Mr. Soto's Cease and Desist orders? And can the Town of East Haven regulate a quarry operation?

Attorney Alter stated that from his team's research that the ZBA is bound by Mr. Biancur's decision, that Section 31 does not apply and cannot apply and he would go into more detail as to how they came to that conclusion, and that the Town can regulate the quarry operations however the current method is flawed and new regulations would need to be developed. He would again go into more detail and provide his explanation as to that opinion. As part of his explanation was referencing a letter dated February 2016 from Attorney Mark Branse to Town Attorney Joseph Zullo which was included in the documents submitted to the clerk and can be viewed in the Planning & Zoning Office. He contends that the provisions set forth in the current language of Section 31 would prevent the operation of the quarry. Attorney Alter also contends that by applying under Section 31, and waiving their pre-existing non-conformity which was stated to exist by Mr. Biancur, is a trap.

Attorney Alter then submitted into the record a letter dated August 9, 2017 from Attorney Robert Fuller addressed to the Zoning Board of Appeals supporting their opinions on Section 31. This letter was read into the record by Attorney Alter.

Attorney Alter went on to contest Attorney Conway's statement that the ZBA would be able to rule on the decision of Mr. Biancur due to his subsequent legal issues, details of which which Attorney Conway submitted evidence of in his document submission to the Board. He stated that it was his opinion that the decision of the former ZEO cannot be revisited and that the Board does not have the authority to rescind that decision, and to do so would be considered a "collateral attack" which would be explained in more detail by Attorney Pearson. He then read into the record a letter from Attorney Branse addressed to Attorney Pearson regarding his dealings with the former owner of the property What T F, LLC.

Attorney Alter stated that these two letters corroborate his claim that the ZBA cannot overturn Mr. Biancur's decision nor can the quarry fairly apply for a special exception under the existing Section 31 of the Zoning Regulations and still operate as a quarry.

Attorney Alter submitted blasting records, which is above and beyond the blaster permits previously submitted to the board, as well as an affidavit from the blasting contractor speaking to the conditions and safety of the blasting conducted to contest Attorney Conway's claim that there has been unsafe blasting on the quarry site. Also submitted was a Certificate of Achievement in Safety awarded to Farm river Rock by the United States Department of Labor Mine Safety and Health Administration for 2016.

Attorney Alter and his team then presented photographs to help illustrate the geographical location of the property in relation to other neighboring properties both in the Town of East Haven as well as neighboring Town of North Branford. One property specifically called out is one by Mr. Joseph Carfora and is located on Barberry Road as well. Attorney Alter contends that Mr. Carfora's property is at a considerable enough distance from the quarry property to have been affected by the quarry's operations when it comes to blasting.

Also submitted was an analysis of the telephone complaints submitted by Attorney Conway as part of his presentation for this hearing. Their analysis showed that the complaints about blasting and the effects of said blasting came in more than a month after the last date of blasting on the quarry site. He also stated that in the time that the quarry has been in operation since 2013, that there had been no complaints that they were aware of. During that timeframe there had been more than 30 blasts conducted and large quantities of material were being removed from the site. The complaints only began, he said, when news of these hearings became public. Attorney Alter contends that for an operation such as this to receive so few complaints, that that operation is being run properly.

Attorney Alter then addresses Mr. Soto's contention that the property owner, Mr. Patton, was unresponsive and uncooperative in complying with his requests and/or demands. In support of Mr. Patton's responsiveness and willingness to cooperate, Attorney Alter submitted maps approved by Mr. Soto for the subdivision of the land, and an Assessor's map calling out the area as "Quarry Area". He stated that even after these maps were filed that no official from the Town came forward to say that a quarry could not be there. In addition, maps were submitted to Town Attorney Joseph Zullo on a separate occasion. Because of this, he feels that Mr. Soto's and Attorney Conway's claims that Mr. Patton never provided maps for the site is false.

Attorney Alter also provided a copy of a contract signed by Mr. Patton with the firm of Milone & McBroom and dated May 3, 2017 for the creation of plans for the site. This was pursuant to a meeting that Mr. Patton had with the engineers at that firm on April 25, 2017, the same day that Mr. Patton had with Mr. Soto and Town Engineer Kevin White. That contract was signed by Mr. Patton on May 11, 2017. He stated that on May 9, 2017 Mr. Patton received another cease and desist order from Mr. Soto and that Mr. Patton was not given sufficient time to comply with the first request for engineered plans. These plans are now complete as well as a Stormwater Pollution Prevention Plan.

Attorney Alter stated that one of Mr. Soto's concerns erosion and sedimentation control and that he (Mr. Soto) felt that the methods Mr. Patton was employing for this purpose were potentially dangerous. Submitted in refutation of Mr. Soto's claims were Farm River Rock's permit approval from DEEP for stormwater discharge (valid until September 30, 2018), an email from Steve Vitko, Watershed Protection Specialist with the Regional Water Authority approving of the controls put in place on the site, and a memo from Milone & McBroom confirming that the erosion and sedimentation controls in place on the site are sufficient.

Attorney Alter then addresses the issue of Municipal Estoppel. He states that "A person is entitled to rely on the actions of a Town" meaning that if, based on what that person has been told by the Town, he or she signs contracts and invests money in a project, the Town cannot then come back and say that he or she cannot continue said project because the official who originally gave permission was incorrect in doing so. He then submitted evidence, going back to 2006, to support that Mr. Soto and other town officials were aware of the quarry operations well before the cease and desist orders were issued.

He contends that in all that time, none of the Town Officials who received these notifications voiced any concerns about the existence of the quarry. Submitted by Attorney Alter are the minutes of the Mayor's Code Enforcement Committee's meetings for all meetings during the years of 2012 through 2017 to demonstrate that the quarry operations were discussed on several occasions and concerns were raised, however none of these discussions or resulting concerns were ever brought to the owner of the quarry or to his lawyers. The concerns were "kept secret".

One specific incident mentioned was during the fall of 2015 when a blasting permit was requested, the quarry was told that they could not perform and more blasting until that December. Attorney Alter said that they feel that the quarry was told this because the Town did want any blasting happening at this time because there was an upcoming election.

All of this documentation is submitted, he said, was to show that there were many opportunities for the Town to raise and address concerns about the quarry operations. During that time period, none of those concerns were brought to Mr. Patton or his attorneys in an attempt to remedy them. Because he was not prevented from operating in the first place and for such a long period of time, Attorney Alter contends that even if the Board decides that Mr. Biancur's decision was incorrect and invalid, the principle of Municipal Estoppel protects Mr. Patton's business.

Attorney Alter then introduced his partner Attorney Robin Person to make her presentation to the Board. Attorney Pearson discussed several cases of Collateral Attack and the responsibilities of a Zoning Board of Appeals in an appeal of a cease and desist order. Documentation of the cases discussed we submitted into the record. She also gave a summary of how and where the Board derives its authority per the Connecticut State Statutes Section 8-6.

Attorney Pearson explained to the Board that they are not to rely on or show deference to Mr. Soto's decision in making their determination on this case. That they are to look at the evidence submitted with fresh eyes and make a *de novo* decision based solely on what has been submitted to them during these proceedings and that innuendo is not to be considered as their decision is made. She submitted two court decisions to support these statements, one by the appellate court and one by the supreme court, as well as a summary of CGS Section 8-6 with notations of cases for support of its subsections.

Attorney Pearson stated, and provided previous court decisions of, the issuance of a cease and desist order cannot be used to reverse the decision of a previous ZEO or Zoning Board/Commission which had not been appealed within the original appeal period. This would be a collateral attack.

Attorney Alter then submitted his team's entire packet of documents including maps and photographs to support their appeal. Also submitted to the record was Attorney Alters concern over the involvement of Attorney Al Zullo in this case. He contends that Attorney Zullo was involved from the beginning and should not be advising this Board in this matter, specifically related to a letter referenced the the minutes for the May 9, 2017 Code Enforcement Committee that was to be devised by both Attorneys Zullo (Al and Joseph) and ZEO Soto regarding the Towns plan in reference to the quarry. Attorney alter then introduced quarry owner John Patton to make a statement for the record.

Please see the stenographer's transcript for Mr. Patton's statement as a hard copy was not provided.

At the conclusion of Mr. Patton's statement Attorney Alter stated that they had concluded their presentation for this appeal and stated that all submitted documents are for both this appeal and appeal #17-20.

Chairman Falcigno asked if any Board member would like to make a motion to officially accept all documents submitted as being for both appeals. Mr. Thomas made a motion to accept the testimony and evidence from #17-18 and have it also apply to #17-20. Mr. Porto seconded the motion. Motion carried unanimously.

Chairman Falcigno stated that the Board would entertain a short rebuttal from Attorney Conway and would hear from any members of the public who would like to speak either for or against the appeal before closing the public hearing. Attorney Alter reserved the right to make a short response to Attorney Conway should he feel it relevant. The Board then took a short break of approximately ten minutes before proceeding.

Chairman Falcigno called the meeting back to order and asked Attorney Conway if he would like to make a short rebuttal statement. He did and proceeded to make said statement. He referenced the photographs that showed what he called a substantial change to the landscape since the date that Mr. Biancur issued his decision and that said changes were the basis for Mr. Soto's cease and desist order. He also stated that the appellant chose not to follow the steps put forth in the cease and desist for applying for the special exception needed to slash trees.

Attorney Conway referenced the photograph submitted of a large rock in the road adjacent the quarry and that said rock ended up there due to the activities on the quarry property that were proceeding without proper permit. He also referenced the testimony of neighboring residents with safety concerns due to the operations on the quarry property which in part led to the issuance of the April 20, 2017 cease and desist order. He stated the the May 9, 2017 cease and desist order was issued due to continuing safety concerns after seeing the photograph of the ledge/cliff that is completely devoid of trees. After this order, the owner still chose to not apply for the special exception.

In reference to Judge Fuller's opinion, Attorney Conway asserted that there is no reference to a case where an appellant was issued a cease and desist where applying for a special exception was a condition of their continued operation and chose not to apply for the special exception because they felt it did not apply to them.

Attorney Conway's final point was regarding Mr. Soto and the good faith of his conduct. His urgency to act as drawings and plans were not submitted as he requested was valid. He emphasized this by stating that the plans that were requested were only just received that night.

Chairman Falcigno asked the Board if they had any questions. They did not. He asked those in attendance from the public if there was anyone there to speak in favor of the appellant. There was not. He then asked if anyone would like to speak in opposition of the appellant. The following members of the public came forward:

- Al Purzycki of 106 Borrelli Road, East Haven came forward to express his displeasure with the situation and concerns for property values, road safety due to the size of the trucks entering and leaving the property in relation to the current width of Borrelli Road, and to dispute the statements Mr. Biancur based his decision on in 2014. Other concerns expressed by Mr. Purzycki were that all of the evidence of safety measures for the quarry were from the past 30 days rather than going back to the inception of the business in 2013, and that Attorney Alter's testimony about there not being any neighboring homes closer than that of Mr. Carfora is inaccurate as he lives directly across the street.

- Rosalie Cronan of 424 Totoket Road, North Branford spoke to the historical use of the land extending back to before the 1970's and states that the land was used as a dairy farm and had never been used as a quarry.

- Irene Macholl of 9 Mill Road, North Branford came forward to express her concerns about spillage of rocks and other materials from the trucks that have just left the quarry as they turn the corner near her home. She stated that the spilled material had broken windows on her home on several occasions requiring her to replace them.

Chairman Falcigno then invited Attorney Zullo to speak to him recusing himself due to conflict. Attorney Zullo stated that his position of not recusing himself hadn't changed. He said that his involvement in the Code Enforcement Meeting in question was regarding the implementation of fines for zoning violations in general and not specifically related to the quarry. As for the letter referred to in the minutes called out by Attorney Alter, Attorney Zullo stated that on the date of that particular meeting, he was not in the state and therefore not at that meeting and does not know why his name is in the minutes.

Chairman Falcigno again asked the members of the Board if they had any question. Mr. Thomas asked Attorney Alter's team for clarification on the Lallier case and why their client couldn't apply for a special exception under Section 31. The clarification on Lallier was regarding a decision that had not been appealed within its initial appeal period cannot then be challenged later on. Regarding not being able to apply under Section 31, Attorney Alter states that the provisions of that section would prevent the normal operation of the quarry business and a regular Planning and Zoning Commission could not grant that exception because they do not have the authority to override Zoning provisions.

Mr. Thomas then asked Attorney Conway a question about the existence of wetlands on the quarry property. Attorney Conway stated that he submitted documents that showed that other agencies had concerns over wetlands. The question was then addressed to Mr. Soto who stated that a small quadrant of the property was labelled as wetlands on the Town's Geographic Information System (GIS). Attorney Conway then spoke to the condition of waiving the right of a pre-existing non-conformity when applying for a special exception and that there are new laws in the process of being written that would address these situations.

One additional member of the public came forward in opposition:

- Debbie Johnson of 919 Thompson Street, East Haven came forward expressing her concern that she felt that the public had no knowledge that an appeal of Mr. Biancur's decision could have been filed. She was informed that the notice was published in the New Haven Register, rather than the local town newspaper. Chairman Falcigno contended that Ms. Johnson had spoken at the previous hearing and stated that this was all a hoax. The record showed that he was correct.

After confirming that there were no other members of the public interested in coming forward to speak, Chairman Falcigno closed the public hearing for Appeal #17-18. He then explicitly stated that at the next meeting where the Board will discuss and deliberate, that there will be no public comment accepted.

#### **APPEAL HEARING #17-20**

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

Chairman Falcigno opened the hearing.

Mr. Thomas made a motion to accept the testimony and evidence from #17-18 and have it also apply to #17-20. Mr. Porto seconded the motion. Motion carried unanimously.

Chairman Falcigno closed the public hearing.

Mr. Porto made a motion to adjourn the meeting. Mr. Thomas seconded that motion. Motion carried unanimously.

Chairman Falcigno adjourned the meeting at 9:42 pm.

Respectfully submitted,

Kirstin Franzman  
Substitute Clerk

Attachment

Attachment #1

The following members of the public appeared and spoke **IN OPPOSITION** of Appeal # 17-18:

Name:

Al Purzycki  
Rosalie Cronan  
Irene Macholl  
Debbie Johnson

Address:

106 Borrelli Road, East Haven  
424 Totoket Road, North Branford  
9 Mill Road, North Branford  
919 Thompson Street, East Haven