Zoning Hearing Board
Lower Saucon Township
Town Hall
March 19, 2012

MINUTES

The meeting was called to order at 7:00 p.m. by Vice Chairman Ted Griggs.

Roll Call

Present at the meeting were Vice Chairman Ted Griggs, Secretary Keith Easley, and Board Members Lachlan Peeke and Austin Kunsman. Chairman Jason Banonis was absent. The Solicitor, George A. Heitczman, was also present.

Minutes

The Board had before it for approval the minutes of the meeting of February 20, 2012. Mr. Easley moved to accept the minutes as submitted. The motion was seconded by Mr. Kunsman and passed by a vote of 4 to 0.

Bills

The Board had before it for approval a bill from the Morning Call for advertising the meeting of February 20, 2012, the Court Reporter's bill for attendance at the meeting of February 20, 2012, and the Solicitor's invoice for the month of February, 2012. Mr. Easley moved to pay the bills as submitted. The motion was seconded by Mr. Peeke, and passed by a vote of 4 to 0.

Variance Appeal of Paul & Karen Kane - Variance 03-12

Chris Garges, having been sworn, testified that Applicant would like to construct an in-ground swimming pool at property he and his wife own at 1564 Surrey Road in the Township. It is located in an R40 zoning district. The

proposed pool will encroach into the required side yard setback. The lot is approximately 1.04 acres in size and contains a floodplain along its southern boundary. The property contains a single family dwelling and attached garage (built in 1989). The existing coverage is 6,433 ft^2 (15.7%). The proposed coverage 7,984 ft^2 (19.5%) will not exceed the maximum allowable coverage of 25%. The existing dwelling is approximately 20-25' from the property line. Applicant is attempting to fit the pool in between the property line and the existing sewer line that runs through the center of the rear of the property. Applicant will need approximately 10' of relief from the required side yard setback of 30' required by §180–35B of the Zoning Ordinance.

Mr. Garges testified that the property was properly posted and that Township Council took no action.

In response to a question from a member of the Board, Mr. Garges testified that the building currently existing on the lot encroaches into the required side yard and the pool will not present a further encroachment.

Mr. Kane was sworn and testified that he agreed with the presentation given by Mr. Garges. He said that the sewer line runs in the middle of his rear yard and on one side of the sewer line there is an old septic tank which he did not wish to disturb. The proposed location is really the only one that is feasible for a pool.

There was no one in the audience who wished to be heard concerning the matter.

Mr. Peeke moved, seconded by Mr. Kunsman, to grant the variance as requested. The motion passed by a vote of 4 to 0.

Variance Appeal of Alex Patullo - Variance 03-10
Remanded by Commonwealth Court

This appeal was continued from February 20, 2012, hearing in order to allow the parties to submit briefs for consideration by the Board which was done.

The Solicitor gave a brief summary of the positions of the parties, and the Board discussed various theories propounded by the parties.

After discussion, Mr. Kunsman moved to grant the requested variance on the specific ground that the construction and features of the building that is at issue represent unique physical circumstances justifying the grant of the variance in order to enjoy a reasonable use of the property. The motion was seconded by Mr. Peeke and passed by a vote of 4 to 0.

Variance Appeal of Michael & Tracy Kiefer - Variance 03-11

This matter was a continuation of the hearing last held on February 20, 2012.

Attorney Monahan noted for the record that Mr. Banonis was absent. He stated that if the matter did not terminate with this hearing, he would have no objection to Mr. Banonis reviewing the transcript of this hearing in order to join in the ultimate vote. Attorney Treadwell on behalf of the Township stated he agreed with that, and Attorney Opthof on behalf of the Objectors raised no objection.

The hearing then continued directed toward a determination by the Board whether the Notice of Violation would be upheld.

Mr. Kiefer was sworn and testified that he did not own the property in question, but was occupying it under a lease-purchase agreement from the owner, David Metzger. He identified Applicant's Exhibit A-1 as a copy of that agreement.

Mr. Kiefer said he moved onto the property in 2005 and the property contained a farm, a number of trees, a barn, and a residence. He and his wife and their three children reside in the residence.

Mr. Kiefer said he would describe himself as a contract farmer. He digs trees, buys trees, and plants trees. He believes that the zoning has been the same, agricultural residential, for some period of time.

He stated that he has three employees and has had the same number of employees for years. He had originally operated in Bucks County, and then for a period of time on a property in Lower Saucon Township. Former Zoning Officer Charles Senich had given him a permit to do so. He has purchased garden businesses and used that land for growing trees.

Mr. Kiefer referred to Township Exhibit T-6, an aerial photograph, which shows a tree farm operated by Lou Pector to grow trees for his development business. He noted that Mr. Pector does not own the equipment needed for planting or harvesting trees and uses other individuals, such as himself, to do this.

Mr. Kiefer says that he does not sell to individuals, but sells to garden centers and developers and contractors.

He said the Township was well aware of his business activity as he dug some trees for a developer in 2004 or 2005 and then donated them to the Township. He charged only for the bags and burlap, not for his work.

He stated he has 11 vehicles on the property and they all are individually registered as farm vehicles except for his two personal pickup trucks. His equipment includes four trailers and two tandem axle tree stake trucks each approximately 20 feet long.

Mr. Kiefer testified that the prior use of the property was as a tree farm and nursery. He stated that the prior owner, Helms, had a nut tree business and was very active in promoting the propagation and cultivation of nut trees.

Mr. Kiefer said he grew up in Williams Township approximately 6 or 8 miles from where he is now located, and he has been running a nursery business his entire life. He considers his business to be a tree farm and a nursery as he has no green houses. He believes that the Ordinance definition of "nursery" is really a garden center.

He stated that it is also a part of his business to haul the agricultural products of other individuals.

Mr. Kiefer identified a number of exhibits directed toward showing the

prior use of the property. Applicant's Exhibit A-5 is a Morning Call article dated March 12, 1989, describing the Helms's nut tree farm. Applicant's Exhibit A-6 is a publication, "Walnut Notes," which is a federal publication listing where one can find native trees and it listed Mr. Helms's property. He identified Exhibit A-7 as a Morning Call article from February 12, 2004, giving the obituary for one Glenn Helms which noted that he was raising 17,000 nursery trees. He identified Exhibit A-8 as a publication entitled "Nut Shell," dated March 1996, which was a nut growers publication.

Attorney Monahan told the Board he believed that the definition of "agriculture" in the Municipalities Planning Code would preempt the zoning ordinance definition, §180-5B. He stated his position that this was not a nursery within the meaning of the Zoning Ordinance but a tree farm and remained a tree farm and agricultural use as opposed to the Township's contention that it is a nursery use.

Mr. Kiefer identified Exhibit A-9 as a letter dated February 28, 2007, from the Northampton County Conservation District. He stated that at this time they found that the property was required to install a track pad to remove mud from the trucks to keep it out of the roadway. He stated that at this time the Zoning Officer Mr. Garges had been present and had seen Mr. Kiefer's business in operation. The requirement of a truck pad had raised an issue as to multiple driveways, and that issue was resolved.

Mr. Kiefer also testified the Township was completely aware of what he was doing as several cease-and-desist orders or Notices of Violation had been issued, Exhibits A-10 and A-11 concerning his failure to obtain an occupancy permit and a deck permit, all of which matters were resolved. At that time nothing was said about him having to have a site plan for his agricultural operation.

Mr. Kiefer identified Exhibits A-13, 14, 15, 16, 17, and 18, as photographs of the property showing the trees, including walnut trees, Helms had planted there many years ago. He also identified a photograph showing grafted trees growing

on the property. He identified Applicant's Exhibit A-19 as an aerial photograph that he obtained from Mr. Garges showing the property in 2005.

Mr. Kunsman questioned whether people who grow crops and fruit trees needed a permit, as he wondered why if they did not, Mr. Kiefer should need one.

Mr. Kunsman referred to several orchards and farms in his immediate area and was told these may well have been developed prior to zoning.

On cross-examination by Attorney Treadwell, Mr. Kiefer stated that the owner of the property, Mr. Metzger, had bought the property from a Mr. Korpics not from Helms directly. He did state that he believed Glenn Helms grew trees on the property.

Mr. Kiefer also testified that most of his income is derived from harvesting trees in other areas, not from harvesting trees on his property. He testified that the name of his business is Kiefer's Nurseries, and that the business address is in Weatherly Pennsylvania. He testified that his three employees report to work on the Lower Saucon property that is here at issue. He again described what he does as contract farming.

Attorney Opthof stated her clients' position that Helms's work on the property had occurred many years ago, and that since that time the farming use had been abandoned. No trees had been harvested for many years until Mr. Kiefer came to the property.

The Board received into evidence all of the exhibits that had been marked.

Mr. Garges testified that before Mr. Kiefer came to the property, it was vacant. As a result of a driveway issue and other issues regarding occupancy permits, he became aware of the increasing use of the property and believed that it was not an agricultural use but was a commercial nursery use, and he issued the Notice of Violation.

A member of the audience, Margaret Opthof, then stated that she believed that what was there is not a nursery but a tree farm which is not kept in a neat and tidy fashion. She stated these are not nut trees but landscaping trees that are being

hauled in and out. She believes a site plan should be required so there could be a buffer to protect surrounding property owners such as herself. She stated the house had been improved by Mr. Kiefer. She said he told her he does not wish to be tied to a site plan so he can remain flexible.

Mr. Lawrence Opthof testified that when he moved there the farm in question was not an operating farm. He said that Glenn Helms was then living at the YMCA and William Helms lived on the farm until Glenn came to the property, and Glenn died shortly thereafter.

Mr. Opthof said that he believes this is a staging area for Mr. Kiefer's operation in other areas.

Attorney Monahan noted that if the Board upheld the Notice of Violation, he would then wish to present evidence requesting a variance from the site plan requirements, but that if the Board did not uphold the Notice of Violation then a variance would not be required.

After discussion, Mr. Kunsman moved to uphold the Notice of Violation dated January 6, 2010, as being properly issued by the Zoning Officer, and to find that Mr. Metzger is in violation of the Zoning Ordinance of Lower Saucon Township as set forth in the Notice of Violation.

The motion was seconded by Mr. Peeke and voted upon by the Board.

Mr. Easley and Mr. Kunsman voted in favor of the motion and Mr. Griggs and Mr. Peeke voted against the motion. The motion therefore failed to pass.

In a case where variance is at issue, a divided vote of the board leaves the status quo undisturbed; however, this is a slightly different matter in that the Pennsylvania Municipalities Planning Code in §10616.1(d) states that "In any appeal of an enforcement notice to the zoning hearing board, the municipality shall have the responsibility of presenting its evidence first."

The parties were invited to submit memoranda within 10 days as to the legal effect of the tie vote. Upon receipt of these memoranda the Solicitor of the Board will render a written opinion.

Old Business

There was no old business before the Board.

New Business

There was no new business before the Board.

Adjournment

There being no further business before the Board, Mr. Peeke moved, seconded by Mr. Kunsman, to adjourn the meeting. The motion passed by a vote of 4 to 0 and the meeting adjourned at 9:23 p.m.

Respectfully submitted,

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George A. Heitczman
Solicitor

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