

**EAST AMWELL
ZONING BOARD OF ADJUSTMENT - MINUTES
Municipal Building – 7:30 PM
September 14, 2010**

Call to order and compliance with the Open Public Meetings Act

The regular meeting of the Board of Adjustment was called to order at 7:30 PM on September 14, 2010 in the Main Meeting Room of the Municipal Building, 1070 Route 202/31, Ringoes, NJ by Administrative Officer Andrews.

In compliance with the Open Public Meetings Act, Ms. Andrews announced this was a regularly scheduled meeting pursuant to the Annual Meeting Notice as published in the January 21, 2010 issue of the Hunterdon County Democrat, filed in the Township Clerk's Office, and posted on the Bulletin Board on September 7, 2010.

Roll Call and Agenda Review

Present: Sherrie Binder
Nancy Cunningham – Chair
Gael Gardner
Paul Gavzy
Kendra Schroeder
Anne Williams – Alt. #2

Absent: Gloria Frederick
Sue Posselt
Diana Garrett – Alt. #1

Presentation of Minutes

A motion by Paul Gavzy, seconded by Kendra Schroeder to approve the minutes from the Board's 8/10/10 meeting was approved with some revisions noted and Anne Williams abstaining.

Presentation of Bills for Payment

A motion by Gael Gardner, seconded by Sherrie Binder, to pay the vouchers as listed on the agenda was unanimously approved.

Correspondence

It was noted that the correspondence will be dealt with as it comes up over the course of the meeting.

Applications to be Deemed Complete or Incomplete

There were no applications listed on the agenda for completeness.

Applications for Public Hearing

Continuation: Michael & Audrey Fiscor – B:40 L:51.05 – 157 Mountain Road: Appeal of Zoning Officer's Action

It was noted that Board Member Anne Williams recused herself and stepped down from the dais because the company she works for is the listing agent on the home for sale across the street from Mr. Fiscor's property.

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Present for the application was property owner Michael Fiscor and his Attorney Kevin McManimon. Also present was Attorney Arnold Lakind on behalf of opposing neighbor Grey Jones of 170 Mountain Road.

Chair Cunningham noted that last month's meeting ended just before Mr. Jones provided his testimony. Grey Jones of 170 Mountain Road came forward. He was sworn in and provided color copied stapled sets of 8" x 10" photographs depicting various logging activity allegedly taking place on Mr. Fiscor's property. Attorney McManimon noted that he objected to some photos in the array because he believes they were taken in the Fall of 2009 when there was a pending dispute between the Township and Mr. Fiscor regarding the milling of wood and since then the issue has been resolved and Attorney McManimon claimed the photos are no longer relevant and could substantially prejudice Mr. Fiscor's position.

It was noted that all of the photos were taken sometime between the Summer of 2009 to the present. They were marked accordingly:

Exhibit O-1: A color copied photo depicting pick-up trucks parked in front of Mr. Fiscor's property.

Exhibit O-2: A color copied photo depicting stacks of wood.

Exhibit O-3: A color copied photo depicting stacks of logs with the sawmill shown to the left.

Exhibit O-4: A color copied photo depicting the sawmill with the "Stewardship Forest" sign in the foreground.

Exhibit O-5: A color copied photo depicting a large red truck loaded with logs.

Exhibit O-6: A color copied photo depicting a stack of finished, milled boards.

Exhibit O-7: A color copied photo taken at dusk, depicting work going on late into the day.

Attorney Lakind argued that based on Mr. Jones' testimony, the milling is still going on and he believes all of the photographs are relevant to the operation taking place on Mr. Fiscor's property.

Attorney McManimon referred to Exhibits O-5 and O-7 asking Mr. Jones if he had seen the truck depicted in the photos since last year. Mr. Jones said he didn't think so. Attorney McManimon again objected to these two photos claiming they were taken during the time a dispute was going on that has since been rectified. Attorney Lakind withdrew Exhibits O-5 and O-7.

Mr. Jones commented that he supplied the photos which were taken from his home, across the street. He said this milling activity is situated directly across the street, close to the road and is the "mountain residential" view that his home now has. Mr. Jones remarked that the milling started in June or July of 2009 and is not what he believed would take place in a "mountain residential zone" when he purchased the land and chose to build a home. He continued commenting that Mr. Fiscor's property doesn't conform to any of the basic setbacks or other regulations in the "mountain residential zone."

Mr. Jones also commented that the number of trees removed from Mr. Fiscor's property exceeds what the ordinance allows and indicated that even though Mr. Fiscor has a Forest Management Plan, he doesn't believe it precludes local zoning. Mr. Jones said he believes Mr. Fiscor's plan allows for up to 2 acres of trees to be clear cut annually and said that any aggressive tree cutting eliminates the forest canopy and could result in excessive water runoff. Mr. Jones continued commenting that the milling and tree processing activities create a noise pollution that dramatically affects his quality of life from *inside* his home. He stated that in his opinion the use of milling equipment to produce finished lumber changes Mr. Fiscor's operation from forest management to a commercial processing activity. Mr. Jones concluded his comments by saying that Mr. Fiscor's operation has dramatically affected the character and feel of what he believes is one of the most beautiful mountainous, residential zones in the area.

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Attorney McManimon clarified that the proper name of the zoning district in which Mr. Jones and Mr. Fiscor live is the “Sourland Mountain Zone,” not the “Mountain Residential Zone.” Mr. Jones agreed.

Attorney McManimon referenced Exhibits O-1, O-2, O-3, O-4 and O-6 saying Mr. Jones testified that these photos depict typical activity on the property that still takes place today. Mr. Jones indicated that was correct. There was some discussion of Exhibit O-1 depicting parked pick-up trucks. Attorney McManimon commented that the trucks are not parked there every day. Mr. Jones commented that Mr. Fiscor’s workers are parking somewhere because they are not walking or getting picked up.

Attorney McManimon asked Mr. Jones if he was familiar with the Township’s right-to-farm philosophy. Mr. Jones said he had heard of it but that he wasn’t familiar with it. Attorney McManimon asked Mr. Jones if he knew East Amwell claims to be a farming community. Mr. Jones said, “Yes.” He asked if Mr. Jones had visited the Township’s website. Mr. Jones said, “Yes.” Attorney McManimon had no further questions.

Chair Cunningham asked if there were any other members of the public who wished to comment on the application.

Arthur Slack of 101 Mountain Road came forward. He was sworn in and stated he could attest to the noise issue saying it sounds like a commercial business and remarked that if the Board considers this activity to be farming and allows this operation to continue in a residential zone then residents may be able to appeal their taxes.

Jim Rosso of 145 Mountain Road came forward. He was sworn in and expressed that it is his understanding that Mountain Road is a residential area. He said the noise from Mr. Fiscor’s property is a nuisance and he believes he is running a commercial operation that should not be allowed in a residential zone.

A motion by Gael Gardner, seconded by Paul Gavzy to close to the public was unanimously approved.

Ms. Binder asked Mr. Fiscor to explain Exhibit O-1 depicting the parked pick-up trucks. Mr. Fiscor explained that he does have workers helping him on occasion. He said the photo is of the vehicles of some people who came to the property to conduct arbor operations. He commented that typically his property can accommodate several parked vehicles.

Ms. Binder asked Mr. Fiscor if what is depicted in Exhibit O-4 is what she would see if she were to drive by the property. Mr. Fiscor said, “...not necessarily, this photo was taken during a moment of intense activity during this period of time. We had an order—a contract to fulfill, we were operating under the understanding that we were allowed to bring in wood from offsite and other properties...typically wood coming off of our own property is not as intensive as this.” Ms. Binder asked Mr. Fiscor if he works on contract. Mr. Fiscor said, “We get business from various sorts of different entities.” Ms. Binder clarified that a customer places an order and Mr. Fiscor fills it. Mr. Fiscor said, “Yes.”

Mr. Gavzy asked Mr. Fiscor why he picked this specific site on his property, so close to the road, to conduct the milling activities. Mr. Fiscor explained that the work site area was there when he purchased the property from the previous owner and there were no homes existing across the street when they

submitted their Forest Management Plan. Mr. Fiscor said Mr. Jones's house was built after his Forest Stewardship Plan was approved and he had established his operation. He said they moved into the property in 1999 and have been conducting operations consistently since then.

Attorney Waterbury asked Mr. Fiscor when he began milling. Mr. Fiscor stated he began milling in 2009 with the portable mill he currently uses. From 2000 to 2009 he commented he was using an Alaskan Mill which operates with chain saws, not a band saw. He indicated again that all activity has always taken place in the same work site location on his property.

Ms. Binder asked Mr. Fiscor what caused him to change his milling operation in 2009. Mr. Fiscor stated, "The efficiency of the machine...it enables us to handle the commodity at a rate at which we can be profitable and utilizing the machine actually diminishes our activity in the woodland canopy because we bring an inherent value with wood that is milled with a machine such as this."

Ms. Schroeder commented that Mr. Fiscor indicated (*during the 8/10/10 meeting testimony*) that he takes approximately 10 trees out per month—Mr. Fiscor interrupted saying it was 10 trees per year. Ms. Schroeder asked how long the mill is in operation per month. Mr. Fiscor commented that he believes the mill has about 90 operating hours on it since 2009 which is why he doesn't understand how people can call it a commercial operation. Mr. Fiscor indicated he has other facilities that can support commercial operations and isn't interested in conducting one on the Sourland Mountain.

Chair Cunningham asked Mr. Fiscor if he was using the Alaskan Mill when he was producing product for other people. Mr. Fiscor said he did on occasion and added, "That's what made me aware of the commodity value and exchange." Chair Cunningham indicated that what she was trying to determine was whether or not Mr. Fiscor moved from the Alaskan Mill to the portable mill equipment because he started getting an increased workload from outside orders. Mr. Fiscor said the thought process behind purchasing the portable mill was the understanding that there is a market for cut wood and his current mill cuts better quality boards than the Alaskan Mill.

There was some confusion expressed by Board members over the amount of trees Mr. Fiscor actually cuts down on his property. During the testimony at the meeting last month Mr. Fiscor had indicated he cuts approximately 10 trees per month. However, a few minutes ago Mr. Fiscor remarked that he cuts down 10 trees per year. The Board asked for clarification. Mr. Fiscor stated, "We would *mill*...10 quality trees over the year. We *cut down* and we cull approximately 10 trees per month." Ms. Gardner asked what happens to the other 110 trees that are cut. Mr. Fiscor commented, "We may put those up on the deck if there is a desire or a uniqueness to that species of tree or that tree might go on to further use...for firewood."

Chair Cunningham asked how long it takes to mill a tree. Mr. Fiscor explained that it depends on the size of the tree. He said, "It takes about a day to do approximately 1000 board feet...a log that's 24" in diameter and maybe 20' long."

Ms. Binder referred to page 12 of Mr. Fiscor's Woodland Management Plan and asked if someone comes to the property and actually identifies each tree to be cut prior to its removal. Mr. Fiscor said, "Yes." Ms. Binder clarified that although each tree to be cut is identified, the trees Mr. Fiscor wants to mill, are not necessarily identified for that purpose. Mr. Fiscor said, "That is correct, however my understanding is...those trees are identified—the ones with the high economic value, they can be targeted as well and they can be harvested...there is a right to farm and harvest the trees that are on ones property."

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Attorney Waterbury noted for the record that although the public comment portion of the meeting had been closed, Attorney Lakind would be allowed to make a summation closing statement.

Attorney Lakind came forward and stated that the decision the Board has been called upon to make is whether or not Zoning Officer McManus made the proper decision in issuing a notice of violation and this question turns upon whether or not Mr. Fiscor's milling operations are in compliance with his Woodland Management Plan. It was Attorney Lakind's opinion that they are not in compliance. He pointed out specific sentences from pages 7, 10, 12 and 13 of the plan supporting that he is not in compliance with his Woodland Management Plan. Attorney Lakind stated that the only document that dictates a resolution of this matter is the plan and the plan is clear that Mr. Fiscor can use culls, he can use them only for on-site use and he can use them only for fence posts. Attorney Lakind commented that the determination of the Zoning Officer should not be reversed.

Attorney McManimon came forward for his closing remarks. He read the following statement, "Welcome to East Amwell. We are a rural farming community known for its commitment to the preservation of farms and open space. It is a right-to-farm Township. Its non-farming residents respect normal farming activities and its impact on their lives." Attorney McManimon stated, "Anyone in the world who visits the Township's website is greeted by those words." He asked the Board to remember the importance of this statement when they consider Mr. Fiscor's appeal. He explained the issue is whether or not Mr. Fiscor's utilization of the sawmill is a woodland management activity conducted pursuant to his plan in order to qualify for farmland assessment.

Attorney McManimon urged the Board not to be swayed by the emotional comments from residents complaining about noise. He said their complaints are not evidence and have no legal bearing on the decision before the Board. He added that without their comments the Board is left with Mr. Fiscor's Woodland Management Plan that when viewed in the context of the relevant provisions of the Township's Land Management Ordinance along with testimony from Mr. Fiscor and his plan author, Les Alpaugh can only lead to a conclusion that utilization of the portable sawmill is a woodland management activity conducted pursuant to the Fiscor Woodland Management Plan. Attorney McManimon commented that the Board must accordingly dismiss Zoning Officer McManus's 2/25/10 Notice of Violation. He remarked that failure to do so will be a direct violation of the Township's right-to-farm philosophy.

Attorney McManimon stated that the relevant Land Management provision is 92-89:D-4 which lists conditional uses in the Sourland Mountain District such as an agricultural use. He said that when all of the conditional use definitions are read together one can conclude that in the Sourland Mountain District farmers must demonstrate that they meet the criteria outlined in the conditions, but the Land Management Ordinance specifically exempts woodland management activities. He clarified that the Township has essentially deemed woodland activities to be an outright permitted use. Attorney McManimon noted that one of the purposes of Mr. Fiscor's plan is to qualify for farmland assessment and he must sell at least \$500 worth of product from his land every year—therefore, he said, "By definition, all farms are commercial enterprises and Mike's farm is no different."

Attorney McManimon referred to page 1 of the Fiscor Woodland Management Plan saying, "The Plan is designed to meet the stewardship goal of the landowner and the requirements of the Farmland Assessment Act of 1964...it also says that one of his objectives is to utilize and increase the productive capacity of the forest in a conservative manner to yield income." Attorney McManimon referred to page 10 of the Plan

saying, “The management activities outlined in this plan will improve the property’s aesthetic appeal...by its very terms the plan is an outline.” He referred to page 12 and read, “All trees to be removed will be designated by Forestry Consultants prior to culling.” Attorney McManimon noted that Mr. Fiscor does not indiscriminately cut down trees and he stated there is a natural limit to what can be cut. He continued reading from page 12 saying, “The goal is to produce high quality products from timber species and to sell firewood from less desirable species.” Attorney McManimon indicated the Board cannot deny that that provision makes it clear that the plan contemplates more than simply producing firewood.

Attorney McManimon referred to pages 12 and 13 of the Fiscor Woodland Management Plan saying, “...as Mr. Fiscor’s capacity and knowledge grow it may be possible to utilize some of the larger diameter culls by engaging a portable sawmill owner to saw fencing or other rough boards for use on the farm.” He noted again that the terms of the plan contemplate the use of a portable sawmill. He also commented that it is important to note that the sawmill in question first started being used in August 2009 and currently has less than 100 operating hours on it.

Attorney McManimon indicated he felt compelled to respond to a written statement Mr. Jones had previously submitted to the Board several months ago where he suggested that there is some measured amount of activity that is appropriate in order to qualify for farmland assessment and that the activity on Mr. Fiscor’s lot exceeds that measured amount. Attorney McManimon remarked that there is no support of the law for the contention that there is a limit to the activity that Mr. Fiscor can conduct in order to qualify for farmland assessment. He stated, “That’s like telling McDonald’s they can only see X number of hamburgers.” He said more importantly to note is that, “There is simply no standard presented...by which you can say his activities are more intense than are necessary or otherwise permitted.” He concluded by saying that Mr. Fiscor’s operation is a commercial enterprise as all farms are and for the Board to uphold the Zoning Officer’s determination the Board will be denying Mr. Fiscor the same right that is afforded to every other resident in the Sourland Mountain District. He said, “I urge you to honor the Township’s policy to protect farmers and reverse the Zoning Officer’s determination.”

Attorney Waterbury commented that the issue before the Board is narrow. She stated, “Your Land Management Ordinance makes agricultural uses conditionally permitted uses in the Sourland Mountain District. Typically conditional uses require conditional approval from the Planning Board, however the Sourland Mountain District also contains an expressed carve out that states, ‘woodland management activities conducted in order to qualify for farmland assessment do not require Planning Board review’ so the legal question is, is this a woodland management activity that is being conducted for farmland assessment? If you recall at your August meeting I started out by telling you that in order to qualify for farmland assessment, the woodland management activities must be conducted in accordance with a specific woodland management plan. This is where we get down to the narrow factual issue that this whole question turns on, which is: Are Mr. Fiscor’s milling activities consistent with his Woodland Management Plan? That is really the core issue that you as a Board have to answer. If you find that those activities are in fact consistent...then in my opinion Planning Board review is not necessary...if however the milling activities are not consistent...then I don’t believe it comes under the carve out in your Land Management Ordinance .”

Chair Cunningham commented that based on the facts presented and noting that in over 30 pages of Mr. Fiscor’s Woodland Management Plan there is only one reference to sawmilling which is specified for milling of wood for “use on the farm” that she believes the sawmilling far exceeds and is not at all consistent with Mr. Fiscor’s plan.

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Ms. Binder commented that she agreed the sawmilling activity is excessive and does not fall within Mr. Fiscor's plan because he has been able to qualify for farmland assessment for the past 9 years prior to having this sawmill.

Ms. Gardner commented that the sawmilling activity seems to be inconsistent with Mr. Fiscor's Woodland Management Plan and she made a motion, seconded by Paul Gavzy to uphold the Zoning Officer's decision which was approved by roll call vote.

Roll Call Vote: Gael Gardner: Yes, Paul Gavzy: Yes, Sherrie Binder: Yes, Kendra Schroeder: Yes, Nancy Cunningham: Yes.

Anne Williams returned to the dais at this time, 9:15 PM.

Old Business

There was no old business listed on the agenda.

New Business

There was no new business listed on the agenda.

Comments of the Board Members

Ms. Gardner complimented Attorney Waterbury on an excellent summation of the Fiscor matter.

Attorney Comments

There were no comments made by Attorney Waterbury.

Open to the Public

A motion by Sherrie Binder, seconded by Kendra Schroeder to open to the public was unanimously approved. Frances Gavigan of 123 Wertsville Road came forward and commended the Board on their actions and deliberations this evening.

A motion by Gael Gardner, seconded by Kendra Schroeder to close to the public was unanimously approved.

Adjournment

A motion by Paul Gavzy, seconded by Kendra Schroeder to adjourn was unanimously approved.

The meeting adjourned at 9:20 PM.

Maria Andrews, Administrative Officer