Ancram Zoning Board of Appeals
December 18, 2023
In Person and Via Zoom
Watch Meeting Online:
https://www.youtube.com/watch?v=Kt23zL7F2ew&t=181s

Board Members Present: Steve Olyha (Chair), Fred Schneeberger, William Lutz, Sharon Cleveland, Ron Brant, Carol Falcetti (Alt), Jim Stickle (Alt)

Board Members Absent: None

Others Present: Kim Garrison

Clerk: J Hoffman

Chair Olyha opened the meeting at 7:00 PM.

Minutes:

The meeting minutes from the previous meeting, on November 27, 2023, of the Zoning Board of Appeals were reviewed. Fred Schneeberger motioned to approve the minutes with corrections. William Lutz seconded the motion. All in favor, motion carried.

Correspondence:

At the last meeting a question arose regarding whether Ancram Opera House would need a front yard variance in addition to a side yard variance. Following a meeting with Ed Ferratto it was determined they would need a front yard variance. The Planning Board has also referred the Ancram Opera House Annex to the Zoning Board of Appeals because area variances are needed prior to granting their Special Use Permit. Ancram Opera House was removed from the agenda because they were travelling. They will be placed on the agenda for the January meeting.

Conflicts:

The Chair, Steve Olyha, asked if there were any conflicts Fred Schneeberger has a conflict and therefore will recuse himself from the O & G matter.

Due to Fred Schneeberger's recusal, First Alternate Carol Falcetti was designated by the Chair, Steve Olyha, to participate in the deliberations and decisions of the Zoning Board of Appeals on the O & G Appeal to substitute for Fred Schneeberger.

Old Business:

O & G Industries
Appeal of Town Zoning Enforcement Officer

208.-1.14.100 &207.-1-24
State Route 22

The Chair, Steve Olyha, stated that following advice of counsel the Zoning Board of Appeals had requested additional information from the Applicants regarding activities which had taken place. Further, Chair Olyha stated the Board intended to reopen the public hearing to allow the public an opportunity to comment on the supplement information provided by O & G.

The Chair swore in the Applicants.

The Applicants affirmed.

Kevin Brown presented on behalf of the Applicants.

Kevin Brown referenced the annual reports and read from the annual reports. He continued stating the reports did not show a lot of activity but they did show some and offered to go into more detail.

Mr. Brown noted that there were yearly administrative costs including DEC permitting, fees, filings with DEC to keep things current. These do not involve on-site activities but there is a lot of admin work that goes in with the bonds keeping the bonds going. As a result, there is approximately $10,000 - $20,000 dollars of expenses just to get the paperwork filed on a standard year.

Mr. Brown continued beyond that if they begin a new permitting cycle with DEC or the Town there is substantial cost preparing plans and getting reviews so there are a lot of administrative costs that are not kept as the day to day activity on the site it is activity at headquarters and with consultants preparing reports, and getting CAD drawings, which happens every five years.

Additionally every year there is keeping the bonds up, paying taxes, and everything else which is invested in the site.

The reports which were submitted pretty much identify what is happening every year.

The site is also being monitored.

Mr. Brown requested going through the company files to see what was available.

He stated that some of the information they found was referenced in Mr. Warren's affidavit.

Chair Olyha asked for activity which occurred after April 13, 2020. Chair Olyha continued that by activity he meant road maintenance, repaired fences, plowing, anything along those lines after April 13, 2020.

Kim Garrison clarified that was the date of adoption of the Zoning Law.

Chair Olyha continued that based on legal research the Scenic Corridor Overlay Zone Law could not be considered except starting April 13, 2020. The reason for that is that the Town Board effectively repealed the SCOZ in 2014 then reinstated it in 2020, which was a legislative action and that date of April 13, 2020 is the date the Zoning Law was filed with the state. So between 2014 and April 13, 2020 there was no SCOZ in effect.

Kim Garrison clarified that the district was present in the 2014 Zoning Law but there were no particular regulations until they were reinstated in 2020. As a result, the Board was looking for mining activities that occurred after it became a non-conforming use in 2020.

Mr. Brown introduced Richard Warren, Facilities Manager, to the Zoning Board.

Mr. Warren asked about the exhibit from 2019.

Kim Garrison clarified that it could be provided but the Board was really interested in the period between April 13, 2020 and 2023.

Richard Warren is employed by O & G Industries as Assistance Vice President of Facilities. He took on the responsibility of Land Use Permitting when his predecessor retired at the end of 2019. He had noted which were in the file given to him by his predecessor.

He mentioned that the mine is treated as a stockpile of materials or inventory.

For 2020 he does not have any activity other than knowing that there was a DEC inspection. He believes he reached out to Mr. Schneeberger to make sure that the gate could be opened for the inspector and asked if he needed to be present and the DEC said that was not a requirement. Then he received the annual inspection from him, which became part of the report that was required to be submitted to Ancram annually and was prepared by him and submitted for 2020.

In 2021 he has a record of a site meeting between himself, one owners, TJ, and Mr. Schneeberger on June 23. He has copies of those pages but his book contains other information. On June 23, 2021 there was a site visit between himself, TJ, and Mr. Schneeberger. They met in Connecticut and drove to the site. The meeting served as a mid-cycle preparation for applications. They verified the permit was posted in place, verified the chain and gate was secured as it was required to be. The visit served as a site inspection so they looked at the status of the trees verifying they were growing properly, which was a permit condition. There was nothing that needed maintenance or operations on the trees. Mr. Schneeberger gave Mr. Warren a tour of the entire property so he was able to see where there was overburden that had been pushed aside, stockpiled, waiting for ultimate reclamation of the site, showing where excavation had occurred previously, looking at where they would be operating next, which was information that he would be placing in the annual report of what was seen on-site and also that would be used to prepare the new application. That was the bulk. There were other activities he noted for Ancram such as signing on to an online Zoom discussion regarding solar in Ancram. He also checked with ownership because there was a project on the Palumbo property and he wanted to know if they needed to make any comment about that project. He stated that was pretty much the extent of his interaction with the mine operation and activities in Ancram.

Carol Falcetti asked to talk about “mining operations of a large mine.” She asked Mr. Warren to go through what is involved she asked because the SCOZ talks about mining operations not mining activity.

Mr. Warren responded that O & G had been operating mines for 100 years. The operations involve locating resources. inspecting a site drilling or excavating to see depth of potential materials to determine if there are valuable reserves on site, from that information then documentation is made, site plans are drawn up, which identify depth of materials of value, depth of overburden, which needs to be removed or placed out of the way to get to the resources, internal discussions of appropriate time frame, appropriate use of materials, sometimes a mine operation means removing material, screening it, sorting it by size, and sending it directly to a customer. Sometimes there is stone that requires crushing, which is then sized again for sale or consumption in production uses of concrete and asphalt. There are mine operations where the drill into solid rock and blasting to create material to crush, size, and sort for sale.

Carol Falcetti asked if drilling continued as excavation occurred and if that was an ongoing activity over the years.

Mr. Warren responded for most mine operations which are typically sand, gravel, and stone, there is not a shifting that changes the areas of bedrock or material that they are excavating within. As material is removed in daily, weekly, annual operations, they are investigating are they meeting the mapping, have they reached the bottom of an excavation, which is the depth the plan shows, or is there perhaps more material, or have they hit an area where they don’t want to go as far as the plan says because the material isn’t of quality. Assessments are made but there isn’t generally a need for additional drilling. Mr. Warren stated there was depth investigation done for water table investigation.

Chair Olyha looked up the Zoning Law definition of mining operation, which means activities conducted by an operator. He asked Kim Garrison about whether the Board should be concerned about the different definitions of operation versus activity.

Kim Garrison stated that it was within the Board’s discretion but stated they were probably one in the same where operations includes the activities.

Carol Falcetti concluded stating that she is seeing that there is a lot of activity other than excavation in a mining operation.

Mr, Warren responded that he has submitted two annual reports if not three based on his predecessor’s documentation and based on his verbiage so if in stating there was no mining activity the intent was there was no trucking of materials out of the mine but they certainly did not walk away from the mine. There is material waiting, reclamation is still necessary, there are activities that would be needed to be done to close the mine. So if he misstated there was no mining activity he should have said there was no trucking.

Kim Garrison asked if there was any activity in 2022.

Mr. Warren responded that in 2022 they were preparing the application and that is when they were informed that they were in danger and may not be within permitted rights. Within the time frame of the permit as they understood the permit, they removed 2,000 yards of material before the end of 2022.

Kim Garrison stated that she believed they stated the removal occurred in November of 2022.

Mr. Warren affirmed. They had begun removing some material and pushed harder because they were concerned by the way the application had fallen.

Chair Olyha stated that he had asked the Board to come with substantiated views so they could deliberate.

Kim Garrison reminded the public the Public Hearing would be reopened so the public could comment on the supplemental submissions.

Carol Falcetti began that she approached it from whether they were a non-conforming operation beginning in April 202[0]. This was based on whether they qualified as a mining operation. She states they are a mining operation and therefore qualify as a non-conforming use following the Zoning Law amendments of 2020. As a result, they have two years to work otherwise they have discontinued the non-conforming use. She believes that they did not discontinue their mining operation because they were preparing reports, doing inspections, which to her is all part of the mining operation. O & G did not discontinue the mining operation because they have been doing the work all along.

Kim Garrison clarified April 2020.

Chair Olyha thanked Carol Falcetti for her thoroughness, which allowed the Board the receive the legal opinion they had received which in turn helped them arrive at their decisions.

Sharon Cleveland stated she believed they had been mining all along. She checked and things were closed until June of 2020 due to covid, so they could not do anything during those months. She highlighted the other activities involve in a mining operation, which they were doing all the time.

Will Lutz stated that his biggest focus was always discontinuance. He read from a legal memo stating courts were consistent in finding mining presents unique circumstances as far as non-conforming status is concerned. It is often repeated by courts that by its very nature mining involves unique use of land. He stated that this unique circumstance is an important aspect of what the Board is looking at.

Chair Olyha asked Will Lutz what conclusion he had reached.

Will Lutz stated he believed that as a large company they require reserves available at certain times and maybe because of different product demand they had no use for the material but he does not believe the business discontinued their mining operation.

Ron Brant stated he believed that he did not see any reason why they should not be able to continue. He continued that it could not be seen from the road so it was hard to know when people were working on the site.

Carol Falcetti stated that work might not be seen but it could be heard.

The Chair asked alternate Jim Stickle for his perspective.

Jim Stickle said that there is a lot more involved than simply hauling material. They are involved with DEC, renewing permits, renewing bonds. Further, to discontinue the mine reclamation is still necessary. He believes the mining has not been discontinued because of the fees and payments to maintain doing business in New York especially with DEC.

Chair Olyha stated that he had spent hours going through hundreds and hundreds of pages of documents and such. After reading O & G's application he believed that it would be a straightforward decision. He believed the Zoning Law was very clear that receipt of a Special Use Permit turns a non-conforming use into a conforming use. He also considered the mine has a longstanding history of being a good neighbor. They have consistently reviewed their permits; they don't have complaints. He had not considered the environmental benefits of having a local mine, which were discussed. However, those factors are soft points and are not interpretation of the law, which is the task the Board is charged with. He continued the discussion also included the importance of intent. He believes it is clear the writers of the law and of the SCOZ intended that there'd be no mining there but that is not known for sure. Nothing in the records shows with certainty the intent of the drafters but he believes that is a fair assumption regarding the intent of the drafters. He continued that the Zoning Law is also clear when it states discontinuance in a two-year period. He further assumes that the intent there was to ensure that an abandoned business or activity could be quickly dealt with and that the standards for discontinuance are not limited to mines but apply to all non-conforming uses. He said that the Board got very deeply involved with the research done by John Lyons and Kim Garrison and thanked them for their support, which brought clarity to a number of the Board's questions. He learned an enormous amount during the process and got clarity on several points. For example, the Board got clarity on whether a Special Use Permit turns a non-conforming use into a conforming use, which he believed would have settled the matter up-front. It was clarified that a Special Use Permit does not turn a non-conforming use into a conforming use. The nature of a non-conforming use and a Special Use Permit are mutually exclusive therefore the argument the mine was a conforming use and the subsequent determination by the ZEO was incorrect is not valid. He learned a lot of clarification of the impact of the Special Use Permit. He was surprised to learn that the SCOZ could not be considered except starting on April 13, 2020 because the Town Board effectively repealed the SCOZ standards in 2014 and reinstated it as a legislative action. He believes the definition of discontinuance is at the heart of the discussion. A discontinuance requires a complete cessation of the use, which is very important. He just learned that municipalities have the option of enforcing zoning laws because it is discretionary. He also learned that

municipalities can make mistakes which can be corrected later as long as they are administrative mistakes as opposed to legislative mistakes. He clarified this point with an example that a building permit could be issued and then withdrawn and it would not be a protection to claim the permit was issued. He continued this was like the mistake of issuing Special Use Permits for this situation, which was a mistake but the fact that a municipality can revoke or correct that he finds interesting. He also learned the Board is charged with making a just and fair decision. He learned that it is a tenant of contract law that an ambiguous clause must be resolved in favor of the non-drafting party. His analysis comes down to the definition of discontinuance, which requires a complete cessation of the use. He does not see a complete cessation of the use and therefore the finding of the ZEO is not valid.

Chair Olyha asked the Board if there were any additional comments or questions.

Chair Olyha stated he believed there was a common consensus the ZEO's decision was something that should be overturned because the ZEO misinterpreted the law. He continued there was no way the Planning Board or ZEO could have had all the information the ZBA had without undertaking the process and that his opinion and the Board's opinion is not a criticism of the Planning Board or the ZEO. The ZBA spent months and probably hundreds of manhours going through the legal interpretation. He believes it is important for the Planning Board and ZEO to know they made the right decisions based on the information they had.

He again asked the Board if they were in complete agreement the ZEO's determination should be overturned.

Kim Garrison summarized the Board's statements that a discontinuance had not occurred because there were renewals, checking, security and stated she could draft a resolution. She stated the Public hearing would be renoticed and reopened at the January 22 meeting. Following the Public hearing the Board could proceed depending on whether their opinion changed.

Carol Falcetti stated that since there would be no permits going forward…

Kim Garrison clarified that the DEC would still have permitting authority.

Carol Falcetti continued that since she is a neighbor and chair of the Boston Corners working group she would like to see if a notification for the neighbors prior to exacation could be included in the resolution.

Chair Olyha stated that they could not put stipulations into the findings but that she was not precluded from making that request of O & G.

Carol Falcetti continued her second request of O & G was before and during the reclamation that O & G work with the Boston Corners group on a reclamation plan to preserve the boundary marker of the former New York, Connecticut, and Massachusetts boundary.

Fred Schneeberger asked if the boundary marker was in the buffer zone of the mine.

Carol offered to show Mr. Schneeberger the location of the marker.

Steve Olyha asked if there were any additional questions or comments.

The Zoning Board discussed the date of the January meeting.

The Zoning Board will meet on January 22, 2024 at 7pm.

The January 22 Zoning Board of Appeals meeting will include a Public Hearing, then a discussion of the draft resolution.

Jim Stickle asked if a zoning amendment would be necessary to avoid this issue in the future.

Kim Garrison stated the Board's finding would have set precedent but it would only apply to those similarly situated such as non-conforming uses within the SCOZ. She continued the resolution will include information regarding the precedent.

Chair Olyha stated that in the future the Planning Board will not be issuing Special Use Permits to O & G. Additionally, at some point a new Zoning Revisions Committee will review some of the issues that were highlighted during this process.

Chair Olyha once again thanked everyone.

The Clerk requested a motion to reopen the Public Hearing and assent from the Applicant to reopen the public hearing.

Mr. Brown assents to reopening the Public Hearing.

William Lutz motioned to reopen the Public Hearing on O & G on January 22, 2024 due to the supplement information provided by the Applicant. The motion was seconded by Ron Brant. Fred Schneeberger abstained. Motion carries.

The Clerk will notice the Public Hearing.

New Business: None

Sharon Cleveland motioned to adjourn the December 18, 2023 meeting of the Zoning Board of Appeals. The motion was seconded by Fred Schneeberger. All in favor, motion carried.

Respectfully Submitted,
J Hoffman
Clerk Town of Ancram Planning and Zoning Department