

REGULAR MEETING

Lebanon Township Board of Adjustment

April 8, 2010

Municipal Bldg 530 West Hill Road Glen Gardner, N.J.

The Lebanon Township Board of Adjustment was called to order at 7:32 p.m. by Vice Chairman Abe Abuchowski. Present were: Mr. Kozlowski, Mr. MacQueen, Mr. Nagie, Mr. Eberle, 1st Alternate Machauer, 2nd Alternate Maurizio, Attorney Gallina, Planner Bolan and Engr. Ted Bayer. Also present: Patrolman Jeff Lane **Excused:** Mr. Terzuolo and Mr. Perry

In compliance with the "Open Public Meetings Act" notice is hereby given that the Lebanon Township Board of Adjustment has scheduled a Special Meeting on April 8, 2010 at 7:30 p.m. to hear the continuation of the application of Michael & Fran Edwards. The meeting will be held in the Main Meeting Room in the Municipal Building. Notice of this meeting was published in the Hunterdon Review on March 31, 2010 and copies of the agenda were mailed to the Hunterdon Review, Hunterdon County Democrat, Express Times, Courier News, Star Ledger and posted on the bulletin board in the Municipal Building on April 1, 2010.

PRESENTATION OF MINUTES: March 24, 2010 Regular Meeting

Motion by Mr. Kozlowski and seconded by Mr. Maurizio to approve the minutes with minor correction. Unanimously approved by those eligible to vote.

March 24, 2010 Executive Session

Motion by Mr. Maurizio and seconded by Mr. MacQueen to approve the minutes as presented. Unanimously approved by those eligible to vote.

UNFINISHED BUSINESS:

Michael & Fran Edwards

Block #37 Lot #36.01

Off Road Welding

Little Brook Road RC 7½

417 Little Brook Road

Glen Gardner, N.J. 08826

CONTINUATION OF A PUBLIC HEARING Conditional Use for a Commercial Use

in a residential zone

Attorney Gallina noted that after the last meeting the board members made a request to have access to the objector's properties for a site visit. Attorney Gallina suggested opening the public hearing again to allow the board members to comment on their site visit. Motion by Mr. MacQueen and seconded by Mr. Nagie to reopen the public hearing at this time. Unanimously approved.

Vice Chairman Abuchowski asked the board for those who visited the site if they have any comments to make. Mr. Nagie said he visited the Edwards property on August 13, 2009 and found everything to be in place, the acetylene tanks were enclosed, building that was referred to on the Lavezzi property was not there and Mr. Edwards was inside welding. Mr. Nagie said he did not smell diesel fuel and it was a damp wet day. Mr. Nagie said he was on site for 20 minutes and talked to Mr. Edwards. Mr. Nagie said he went up on Backhus Estates Road but did not smell any diesel fuel and wanted to know how you tell the difference between the smell of diesel fuel and home heating oil. Mr. Nagie said on March 31st he went and did a site walk on the Columbro and Marino properties that border the Edwards property. He, Mr. Eberle and Mr. Machauer had been invited that morning. Mr. Nagie said that Mrs. Columbro was complaining about noise. Mr. Nagie said he heard the clang of one piece of steel and that was it. Mr. Eberle stated he also participated in the site walk on the Columbro property on March 31st. Mr. Eberle said there was no work going on when he was at the Edwards and when he walked up to the berm, he could see the houses thru the woods but they were not overly visible. Mr. Eberle said when he participated in the site walk on the Columbro property, he did hear a leaf blower and a fork lift. Mr. Machauer said while they were listening to the tapes from the March 24th meeting, Ms. Glashoff said she received a phone call from Mrs. Columbro asking if some of the board members could come over now. Mr. Machauer said he concurred with Mr. Nagie and Mr. Eberle that he could not heard any appreciable noise. There was no odor detected. The only noise they heard was a garbage truck on the road.

Mr. Maurizio said on Thursday April 1st, he and Mr. Kozlowski went to the Columbro property. They walked around and Mrs. Columbro gave them a tour. Mrs. Columbro took them down to the property line. They saw a travel trailer and a truck came in with a delivery. Mr. Maurizio

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asked Mrs. Columbro what type of heat she had and her response was oil heat. Mr. Maurizio said that home heating fuel is #2 fuel like diesel fuel. Also, since the Edwards had planted trees along their property line it might not be a bad idea for the neighboring houses to plant some trees on their property which would create a double buffer. Mr. Kozlowski stated he went with Mr. Maurizio on April 1st to the Columbro property. They walked back to the border of the two properties. They went back up to the Marino property to view from his deck. While they were on the deck a truck pulled in to the Edwards which was a diesel truck turning around. But the noise level was not that loud. Mr. Kozlowski said since he went to the Columbro property and thought he should also go to the Edwards property which he did on Monday April 5th and was surprised of all the stuff there that you can not see from the Columbro property. Mr. Kozlowski said that the light in question is no longer there.

Mr. MacQueen stated that he went to the Columbro property on Saturday April 3rd. Mr. MacQueen said he never did make it to the Edwards property. Mr. MacQueen did note that he had been on the Edwards property many years ago when Mr. Winters owned the property that had construction equipment. While on the Columbro property they walked down to where the berms and trees are. There was no noise because no one was around. The Edwards were home but there was no activity. At the conclusion of the board's comments on the site visit, Vice Chairman Abuchowski asked if there were any questions by the attorneys. Attorney Gruenberg did not have any questions of the board. Attorney Lavery stated that he did not feel there was a need for the attorneys to visit both the sites. When open to the public for questions of the board, there were none. Vice Chairman Abuchowski then opened the hearing to the public for comments. A resident who lives at 419 Little Brook Road said she doesn't see or hear anything from the Edwards property.

At this time, Planner Bolan was sworn in to give testimony on behalf of the board. Planner Bolan stated he had done a report about a year ago in 2009 and it will be the focus of what he will say in his testimony. Regarding the criteria, the board should be considering in this variance and what the case law that is operable for Conditional Use that was said about those criteria's. It is a little different than your typical Use Variance. Planner Bolan said he had attended the meetings that Engineer Chmielak testified on April 22nd and June 10th. Planner Bolan said that he did not attend the meeting on September 23rd but read the transcript where Planner Zimmerman testified for the objectors. He also reviewed the report that was submitted by Engineer Chmielak on December

3, 2008 along with a supplemental report on April 22, 2009 that was submitted. Planner Bolan said the variances that the board is considering, the deviations from the Conditional Use standards. One is the outside storage materials, two is the number of non-resident employees and last from an amendment to the Home Occupation Ordinance from last October 22nd is an absolute size of the accessory or principal building that can be used for the Home Occupation. The square footage per the ordinance is 2000 square feet and the applicant's building is 2150 square feet which exceeds the square footage in the ordinance. There is a Supreme Court decision that differentiated a Use Variance from Conditional Use standards from the more typical use variance of a use that is not permitted in the zone. The primary things that

came out of that decision, it is the focus of the board should be on specific deviations from the conditional use standards. It is up to the board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of site for the conditional use. The conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address problems. The three items are: outside storage, size of the building and the number of non-resident employees. The applicant has to demonstrate that the site continues to be appropriate and suitable despite the failure to conform to those conditions.

It does not require the D1, Use Variance, it requires a particular suitability determination that the site is particularly suited because the use is permitted and the deviations are only related to the conditions. That is the positive criteria for the use variance. Under the negative criteria which is the second prong that there should be no substantial detriment to the public good or substantial impairment of the intent and purpose of the zoning plan and zoning ordinance. The Court said the focus is on the affect on surrounding properties in order to grant the variance for the specific deviations from the conditions imposed by ordinance. The board must be satisfied the granting

of a conditional use variance for the specific project at the designated site is reconcilable with the municipality legislative determination that the condition imposed on all conditional uses in that zoning district. There is a standard in the ordinance regarding nuisance. There are specific standards in the ordinance relating to nuisance elements and none have been shown to be in violation of the standards in the ordinance. Regarding Coventry Square, the Court has

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emphasized that the board has to reconcile the granting of this variance with legislative with those variances from the conditional use standards. With the legislative determination, the

standards should be imposed and must focus on affect on the surrounding properties for the specific deviations being requested. The board should look at whether there are conditions they can imposed in their approval to insure that the deviations from the conditional use requirements do not cause substantial detriment to the public good or substantial impairment to the intent and purpose of the zoning ordinance. Planner Bolan said if the board gets to the point of making a motion, you may want to consider conditions that relate to the variance running with the land. Planner Bolan said that from testimony that 90% of the work perform is not on site but done elsewhere. Also, to consider hours of operation is difficult because of the possible emergency aspect of these operations or some of the functions of the purposed use. In a residential zone the board can decide what would be appropriate hours of operation and the lighting. Planner Bolan noted that when the Planning Board was working on the lighting ordinance, residential zones were excluded because it was a difficult issue to deal with. At the conclusion of Planner Bolan's testimony, the board had questions of the Planner.

At the conclusion of the board questions, Engineer Ted Bayer was sworn in to give testimony. Engineer Bayer informed the board that he and Engineer Risse went to the Edwards property to do a site inspection on March 26th. The purpose of the visit was to familiarize himself with the site and to compare the conditions of the site with what is on the site plan. Engineer Bayer said he wanted to identify the berms, the screening, lighting and to make sure the site plan was accurate. They found that the berms and the screening are in place. They did not see the light fixture which was shown on the plan and shown on the barn. At conclusion of Engineer Bayer's testimony, the board had questions. Mr. Kozlowski asked about the pipe underneath the driveway. Engineer Bayer said the pipe is clearly visible as you drive up the driveway. The pipe and concrete is well within the Edwards property. Mr. MacQueen asked about the drainage. Engineer Bayer said the drainage pattern is from right to left or west to east, across the property and towards the northeast corner of the Edwards property. The pipe was put in to enhance the natural drainage course and flows off the Edwards property to an area to the east. Mr. Machauer asked if this was the course of the drainage and was it mutually beneficial to both property owners meaning the Edwards and Lavezzis. Engineer Bayer said yes. Mr. MacQueen asked how long the pipe has been there. Engineer Bayer said many seasons. Mr. MacQueen then asked about the concrete and if it could have been laid at a later date. Engineer Bayer said it could have been but he saw no evidence that there had been any repaving of the blacktop.

Vice Chairman Abuchowski opened the hearing to the public for questions. Planner Bolan asked if the pipe in question is the same one on the plan. Engineer Bayer said yes. There were no questions from the public. After a brief discussion, Vice Chairman Abuchowski announced that the board will take a recess at this time, 8:20 p.m.

When the board reconvened at 8:32 p.m., Attorney Lavery for the objectors gave his summation. Attorney Lavery referred to case law on home occupations. One is Adams vs Del Monte, a septic company which did not belong in a residential zone. Generally a home occupation is customary carried on in a dwelling unit or an accessory building by the family members and one or two additional persons which is in the Cox book on Zoning and Law Use. The court recognized the principal purpose of a home occupation is to permit only such light occupations in the home so that it does not change the character of the building from a home to a business or an industrial establishment. In the Adams case, the court found that a septic tank cleaning service was not a home occupation. Attorney Lavery referred to the testimony of the applicant's Planner. Attorney Lavery stated that the accessory structure on the property which the business is being operated in is 500 square feet bigger than the principal residence which is the principal use on the property. The residence is not subservient to the business, the business use is subservient to the residence. That is two principal uses on one lot. Attorney Lavery said there has been an illegal business operating since 1998. Just because you operate an illegal business for a number of years that doesn't make it right. The only time an illegal business comes into play is when it can be proven that the business existed before zoning and it would be a pre-existing non-conforming use. The applicant has to prove that the business predated zoning.

Attorney Lavery said the applicant testified that he has a 175 ton break press. Mr. Edward's has testified that he uses 100% of the accessory building. Attorney Lavery referred to testimony from April 22, 2009. Mr. Edwards testified that he has a 3 bay garage, one bay for an office, one has a car lift and the other is

open with several drill presses, two wire feeder welders, tig machine and a 175 ton break press. Attorney Lavery also referred to other sections of the transcript from April

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22nd. He then referred to the amended Home Occupation Ordinance adopted on October 21, 2009 and the standards that apply and the applicant still does not meet those standards. Attorney

Lavery referred to the notice problem which was raised by one of the board's professionals. Besides putting in the notice for those variances needed, an additional variance was also needed. In Lacey vs Pearl-Mark it states that isn't acceptable, you have to re-notice. Attorney Lavery noted the applicant's property is undersized for the zone it is in which is RC 7½, and it does have some impact on whether variances should be granted. RC stands for Resource Conservation Zone. The RC zone is there to create larger lots to promote open space and to allow a welding shop in the middle of a residential neighborhood is not promoting open space. Attorney Lavery said the board should go back to the Master Plan and ordinances to see what should be in the RC zone. This business is not a Home Occupation. Attorney Lavery spoke on the noise and nuisance element and even though members of the board went out for a site inspection lasting up to 45 minutes, his clients have to live with this everyday. They all purchased homes in a residential zone and all the homes around them are residential lots. It's not like they moved to an industrial zone and moved next to a business. The applicant has been working outside of the garage; they have steel stacked up, forklift, acetylene tanks and employees on site. If the board approves this application, there will be a business bigger than the house operating off of that property. It will allow two principal uses on the lot. Attorney Lavery noted that the Zoning Officer had submitted a report to the board and during testimony of their Planner, he tried to enter some of the information from the report into evidence and was unable and had to make an OPRA request from the Township. Attorney Lavery said he was entitled to comment on the report and said when he asked to have the Zoning Officer subpoenaed, the board ignored him. Attorney Lavery briefly went over the points he made in his summation and at the conclusion of his summation, Attorney Gallina had Attorney Gruenberg give his summation on behalf of the applicant.

Attorney Gruenberg thanked the board for all time spent on this application over the past year. He noted the board took the time to go to the applicant's property and the objectors property on their own time. Attorney Gruenberg said they presented expert testimony from the Engineer, Planner, Noise Expert and studies. The objectors did not present any noise studies, or engineering testimony. Attorney Gruenberg said their Planner and the board's Planner agree on what the standard is and that this is a Conditional Use variance case. The application is not a Use Variance application like the objectors say. The ordinance allows for conditional use which is a permitted use subject to conditions. This is what the applicant has been operating on their property since 1998. The applicant did not get approval back in 1998 but are asking for it now since the issue has been raised. There are a lot of people in the Township in the same situation. Attorney Gruenberg noted there are 3 standards that they have applied for. The Township last

fall changed the Home Occupation Ordinance which makes the applicants' home occupation and use of the property more conforming. Attorney Gruenberg reviewed for the board the Home Occupation Ordinance. They are in a permitted accessory building with some small outside storage area. The ordinance now reads that you can not occupy more than 2000 square feet. The existing building is 2150 square feet. The standard for non-resident employees states no more than 2. The applicant is asking for one additional non-resident employee. Attorney Gruenberg stated they presented detailed engineering testimony from Mr. Chmielak and detailed planning testimony from Mr. Chmielak as to the conditional use standards and how this is still despite these deviations this is still an appropriate use pursuant to the ordinances. Attorney Gruenberg referred to the testimony of Planner Zimmerman which he stated this application was a Use Variance because the size of the building was 2150 square feet instead of 2000 square feet by ordinance. Attorney Gruenberg pointed out that Planner Zimmerman did not know that the Township is in the Highlands Preservation area and that there is a house on the neighbor's property since he had referred to it as a vacant lot. Mr. Chmielak went thru each one of those standards in a detailed nature and notwithstanding these minimal deviations from the Conditional Use Ordinance, the applicant's property remains appropriate for this type of use. Attorney Gruenberg said he is willing to discuss any conditions the board will want. Attorney Gruenberg said the Edwards have tried to make the neighbors happy. The detailed landscaping, moving items inside, shielding the light, then taking the light down.

Attorney Gruenberg stated that Lebanon Township has a mix of residential and home occupation uses. The Edwards' use of the property is in keeping with type of community that the Township has established. When members of the community and the Township needed an important piece of equipment fix, they called Mike Edwards. Attorney Gruenberg reiterated that these are minimal deviations from these 3 conditional use standards and it does not change the fact that this is the type of use that continues to be appropriate in the zone. These deviations do not cause a detriment to the public good and they do not substantially impair the intent and purpose of zone plan and zoning ordinances. Attorney Gruenberg said that the Edwards have been here for a long

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time and in today's economy to prohibit them from being able to make a living for the way they have done could have a devastating impact on their family. The Edwards are asking for the board to grant these minimal deviations and approve the 3 variances as well as site plan approval.

At this time, Vice Chairman Abuchowski asked for a motion to close the public hearing. Motion by Mr. MacQueen and seconded by Mr. Nagie to close the public portion of the hearing. Unanimously approved.

Phone Conf. w/Bd Sec & Zoning Officer

b. Court Stenographer \$200.00 – Attend Mtg 4/8/2010

Total: \$545.00

Motion by Mr. MacQueen and seconded by Mr. Eberle to approve the bills as presented.

Unanimously approved.

CORRESPONDENCE:

- a. Ltr. From Attorney Gallina to Attorney Lavery
- b. Home Occupation Ordinance 2009-08 adopted 10/21/2009
- c. Memo from Engr. Risse

Being no further business to come before the board, nor comments from the public, motion by Mr. MacQueen and seconded by Mr. Nagie to adjourn the meeting at 9:50 p.m. Unanimously approved.

VICE CHAIRMAN ABE ABUCHOWSKI

GAIL W. GLASHOFF, BOARD SECRETARY