



CASCADE
--- TOWNSHIP ---

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CASCADE TOWNSHIP BOARD-ATTORNEY MEETING: MATHY REZONE REQUEST

UNOFFICIAL BRIEFING NOTES: AUTHORIZED BY CASCADE TOWN BOARD

November 12, 2014

Members Present: Supervisors Atkinson, Heathman, Laures, Clerk/Treasurer Brown

Guests Present: Mr. Ihrke (TCPA), Mr. Peter Tiede (Township attorney)

THIS DOCUMENT CONTAINS THE UNOFFICIAL NOTES OF THE NOVEMBER 12, 2014 MEETING BETWEEN THE CASCADE TOWNSHIP BOARD AND THE TOWNSHIP ATTORNEY MR. PETER TIEDE. THESE NOTES ARE NOT THE OFFICIAL TOWNSHIP MINUTES. THESE NOTES ARE PROVIDED FOR THOSE NOT ATTENDING THE MEETING TO UNDERSTAND THE CONTENT AND CONTEXT OF THE MEETING. THESE NOTES ARE SPECIFIC TO THE REZONE REQUEST BEFORE THE TOWNSHIP.

THIS DOCUMENT HAS BEEN AUTHORIZED FOR RELEASE BY THE CASCADE TOWNSHIP BOARD CHAIRMAN.

Meeting Notes:

Mr. Laures noted the assertion of Mathy that the parcels are contiguous and they have been mining on some of the parcels for many years. Mathy cannot show continuous use. The question is if the parcels are all contiguous are they all one operation.

Mr. Tiede noted this is a question of factual matters and legal questions. Case law does not provide an answer to allowing operations to cross parcel lines.

Mr. Tiede noted any use that has taken place does not create a legal right to continue if the use was not legal at the time. I.e. if the grandfathered legal non-conforming use was interrupted for a year a resumption of the use does not create a continuing right.

Mr. Laures noted Mathy would be the first to say they cannot prove continuous use on the North set of parcels.

Mr. Ihrke noted Mathy owns the land on which the asphalt plant sits in the south quarry. Mathy does not wish to relocate the asphalt plant. This is the issue for Mathy.

Mr. Ihrke opined that Mathy has their court battle prepared but understands they must attempt to work through the township process before proceeding as a judge would ask them if they had first asked the township for permission.

Mr. Ihrke noted Mathy cannot show evidence of continuous use in the North parcels.

Mr. Lares stated Mr. Hinderman of Wilmar Investments as much as admitted they cannot prove continuous use.

Clerk Brown noted a previous communication from Mathy to Mr. Canan (Olmsted County Attorney) stating continuous use could not be proven.

The county ordinance came in to effect in 1976 that rendered the mining a non-conforming use. Can continuous use from 1976 be proven? No.

Up to 1998 Olmsted County had said the use was non-conforming continuous use.

Mr. Heathman suggested his view is if we agree to the request then we can put our conditions on the request.

Mr. Heathman asked if we as a board have any legal basis to deny.

Mr. Tiede noted there is a legal question and a factual question. If we believe they have continuous use we do not have any basis to deny. The letter from the county does not prove continuous use.

Mr Lares restated Mathy cannot prove extraction every year since 1998 but that Mathy asserts the North and South are all one contiguous operation and thus extraction every year from the North is immaterial.

Mr. Tiede feels there is no clear answer and a judge would have to decide.

Mr. Ihrke opined that Mathy would assert the plans for 55th st has forced Mathy to move to the North location.

Mr. Tiede noted the letter from the county stating a desire for the aggregate is just like a neighbor letter saying we want it. It is not a legal thing.

Mr. Lares noted there has been significant development around this area (2/3 surrounded) and the project has the ability to affect a lot of lives.

Mr. Lares noted the South operation has exhausted the hard rock aggregate.

Mr. Tiede suggested several ways a judge may rule is that Mathy would be allowed to continue at the intensity of the current operation (i.e. if there is no blasting today there cannot be blasting tomorrow) or a judge may rule it is a mine so leave them alone. Mr. Tiede does not believe a judge would rule the mine can continue without controls but it could happen in which case we cannot apply conditions. Odds are 50-50 on the question of expansion. Odds are less than 50% chance the mine will get carte blanche.

Mr. Brown raised the EIS concern raised by a resident suggesting that an EIS is mandatory because of the claim that the quarry is all one contiguous operation.

Mr. Ihrke noted he had contacted the EQB to determine if an EAW was required for the mining as the original EAW was for the water. The EQB stated we could not make them perform another EAW.

Mr. Lares asked if we should send Mathy a letter stating an EIS is required if we are to believe their claim that it is all one contiguous operation. Mr. Tiede suggested we could do that. Mr. Ihrke suggested we review the statute language as he knows of no sand mine that has been subject to an EIS.

Mr. Heathman asked what we have with teeth to allow us to deny the rezone. No clear answer stated.

Mr. Tiede will do the research on the EIS to determine what our options are.

Mr. Laures asked how much we could require in the way of a GDP and other plans before a zone change. Mr. Tiede stated we could ask for that information to take into account with the decision.

Mr. Laures noted we are likely to have a lawsuit with any decision we make. Mr. Tiede stated we just need to get our facts and make the best decision possible. In court the township can say we made the best decision possible. Mr. Tiede advised against trying to make too many deals, just follow our process.

Mr. Tiede stated there are so many items in consideration it would be defensible if the township rezones and then works on permit if we believe there has been continuous use. The township could also go the opposite direction.

Mr. Atkinson asked if we go to court, and our resources are limited, could we ask those wanting to go to court for permission to assess them the court costs. Mr. Brown noted we have insurance if we get sued. Mr. Atkinson stated a desire to make sure the residents have skin in the game. If the township has to sue to enforce a decision against mining the cost would be paid all by the township.

Mr. Brown asked how we deal with the impact on property values due to the quarry. Mr. Tiede stated that except in extreme circumstances that is not the township's problem. Mr. Brown noted that is an evaluation criteria in the ordinance. Mr. Tiede noted it is factor but care must be taken in putting too much weight on this.

Mr. Laures noted the mine owners have had an expectation of what to expect and the neighbors have had their own set of expectations and did not expect a quarry.

Mr. Heathman asked what good an EIS would be as it only delays a decision. Mr. Heathman stated he is ready to vote with the people but needs a solid reason.

Mr. Laures asked would it be better to be sued before or after the zone change. It is always better to be sued.

Mr. Laures noted if we deny the zone change and the mine keeps going we have to pay for enforcement.

Mr. Ihrke stated that if an EIS is required then all zoning actions stop.

Mr. Brown asked if an EIS halts all zoning activity could we use the interim to update the zoning ordinance for more protections. Mr. Tiede stated it was possible but could also be done through a CUP.

Mr. Laures feels it is worth a letter from our attorney to Mathy's stating we want to see an EIS if they are claiming all one contiguous operation. If Mathy claims it is just a south and north parcel then their argument for continuity is lost. Mr. Laures feels we need what they feel the facts are. Mr. Laures wants to make sure we follow up on the letters from the constituents.

Mr. Atkinson asked about estimates for lawsuit costs. Mr. Tiede feels our case could be more difficult due to questions of fact and law and would not follow a typical course of summary judgment. Mr. Tiede feels there will be more work to establish facts and a typical cost through district court could be \$50K. If it is appealed, which is likely, it could be a six figure case. Mr. Brown noted that the township has insurance and if the township is sued we would pay less than 20% on a \$100K case. If the township sues to enforce a denial the cost would be 100% from the township.

THIS CONCLUDES THE NOTES OF THE TOWNSHIP AND ATTORNEY DISCUSSION OF THE
REZONE APPLICATION

Submitted: Michael Brown, Clerk/Treasurer