

**KINGWOOD TOWNSHIP
BOARD OF ADJUSTMENT**

**MINUTES
September 13, 2017
7:30 PM**

CALL TO ORDER

The meeting was called to order by M.L. Haring at 7:31 PM.

PRESENT:

L. Frank
M.L. Haring
J. Laudенbach
P. Stepanovsky
D. Hewitt
C. Ostergaard
D. Pierce, Attorney

ABSENT: J. Mathieu

In order to ensure full public participation at this meeting, all members of this Board, and members of the public are requested to speak only when recognized by the Chair so that there is no simultaneous discussion or over-talk, and further, all persons are requested to utilize the microphones which are provided for your use by the Township. Your cooperation is appreciated.

Adequate notice of this meeting was provided in accordance with the Open Public Meetings Act by publication of the notice in the Hunterdon County Democrat on December 29, 2016 and Courier News on January 9, 2017 also by telefaxing copies of the notice to the Express Times on January 9, 2017. Copies of the notice were also posted in the Kingwood Township Municipal Building on December 15, 2016. The Board of Adjustment proceedings close at 10:30 pm.

NEW BUSINESS

M.L. Haring – Asked for comments or corrections to the July 12, 2017 meeting minutes.

P. Stepanovsky – Requested page 15 be changed to list the detailed restrictions set by David Pierce to ensure clear communication.

C. Osttergaard – Noted additional corrections to be made on page #3. The spelling of “Razberry’s”, “Mr. Kyle” and the wording of the last sentence on page #3 to read “is constrained”. Also, noted on page #5, section #6 the word “delineating” to be corrected.

D. Pierce – Added on page #5 the spelling of Barbertown-Point Breeze Road to be corrected.

No additional comments or concerns noted.

It was moved by D. Hewitt, seconded by J. Laudenbach and carried to approve the minutes of July 12, 2017 with the correction noted above. **On roll call to vote.**

Abstain:

Absent: J. Mathieu

Aye: J. Laudenbach, P. Stepanovsky, M.L. Haring, L. Frank, D. Hewitt, C. Osttergaard

M.L. Haring – Asked for comments or corrections to the August 9, 2017 meeting minutes. No concerns noted.

It was moved by D. Hewitt, seconded by P. Setpanovsky and carried to approve the minutes of August 9, 2017 with the correction noted above. **On roll call to vote.**

Abstain:

Absent: J. Mathieu

Aye: J. Laudenbach, P. Stepanovsky, M.L. Haring, L. Frank, D. Hewitt, C. Osttergaard

M.L. Haring – Announced Perini Properties L.L.C., Block 15, Lot 8.01

Mr. De Sapio introduced himself as the Attorney representing the applicant, Mr. Sargenti of Perini Properties. Mr. De Sapio explained Perini Properties has owned the former Lutz building on Route 12 for sometime. In 2014 Penn Jersey Equipment moved in with the Board of Adjustments approval. They are now moving out and a new tenant called Liebherr is interested in moving in, both companies do the exact same operation. Simply stated it’s the sale of heavy construction equipment. The Kingwood Township Ordinance #132-110 adopted in 2015 was discussed. It was noted that in the ordinance a preliminary site is required for all new non-residential developments, which this proposal is not. It also states that any proposal for modification of the footprint of structures used in an existing non-residential use, all proposals for modification to exterior conditions, and any change in non-residential use of a property. None of these apply because Liebherr is conducting the same type of business and operation. The application was presented to Zoning on August 1st for a zoning permit allowing Liebherr to move in and begin business due to the fact that there is no change in use. The Zoning Officer did not act on this application and suggested the applicant go before the planning board for a site plan. Mr. De Sapio explained that they are here tonight to appeal that determination by showing the Board that there is no difference between tenants and the business they conduct.

The following letter from David Banish was discussed.

To: Kingwood Township Zoning Board

From: David J. Banisch, PP/AICP

Date: September 12, 2107

Re: Perini – Eibherr USA, Co.
Block 15, Lot 8.01
EGVCO Eastern Gateway Village Overlay – Commercial / Artisan Subdistrict
BP Business Park Zone -
Request for Interpretation of Site Plan Exemption &
No Requirement for a Site Plan Application

-
1. The applicant is requesting an interpretation of Site Plan Exemption, Section 132-110A.(2), as pertains to a proposed change of use for a tenant at the subject property. The proposed tenant is Liebherr USA, Co., which is proposed to replace Penn Jersey. Penn Jersey received a determination of site plan exemption from this Board in 2014 on appeal from the zoning officer's decision of January 16, 2014, which denied the change of use and site plan exemption. The applicant seeks a Board of Adjustment determination that no site plan application to the Planning Board is required.
 2. According to the applicant, the Township's Zoning Officer would not make a determination when asked by the applicant for a site plan exemption. Instead, the applicant was subsequently directed by the Planning Board Secretary to submit a site plan application to the Planning Board. Applicant appeals this determination on the basis that the applicant feels that it is entitled to a site plan exemption. We disagree, for the reasons summarized below and more fully explained in this report.
 - a. As required by ordinance, the applicant has not submitted a site plan showing the existing / current conditions of the site. The portion of the building to be occupied by the prospective tenant (30,000 sq. ft.) is not shown on a copy of a site plan that was submitted by the applicant, which appears to be dated 1998.
 - b. As required by ordinance, there is no resolution of site plan approval accompanying the out-of-date site plan drawing that has been submitted. Without the site plan resolution of approval, the Board or Zoning Officer cannot determine whether the site conforms to the requirements of site plan approval as required for a site plan exemption.
 - c. Section 132-110A.(2) (a) requires that there be no unapproved deviations of site plan approval. Without a copy of a current site plan and resolution of approval, the Board cannot determine whether outdoor display of equipment for sale that has been situated in the front yard and possibly within the Route 12 right-of-way is authorized by site plan approval or if it is an unapproved deviation of any approval that may have been granted. The attached photograph identifies outdoor display of equipment in the front yard in October 2016 (Google).

- d. The May 2014 Zoning Board of Adjustment Resolution of Site Plan Waiver submitted with the application provides that equipment will be stored outside in the rear yard, (out of public view). As shown in the attached photograph, equipment parked or displayed in the front yard appears to be an unapproved deviation from the Board's site plan exemption requiring equipment to be stored behind the building (see Board's 2014 resolution).

On the basis of a. – d. above, the proposed change of use is not eligible for a site plan exemption under the provisions of the ordinance. It would appear that the advice to the applicant to seek site plan approval is appropriate and warranted given these deficiencies in the submission and the unapproved deviation from the Zoning Board's prior site plan exemption that was granted in 2014.

3. Section 132-110A.(2) identifies the basis upon which a site plan exemption may be granted in lieu of an application for site plan approval. Those provisions are cited below in regular text. Our comments on each requirement are inserted within the ordinance provisions in *italic text (thus)*:

132-110A. (2) In the event that there is a change in use in a nonresidential property, the developer may, in lieu of submitting a full site plan application, submit an application for site plan exemption on the appropriate form and accompanied by a copy of the most recent site plan on file and which received approval from the Planning Board or Board of Adjustment, a proposed floor plan for the new use, and the applicable application, and escrow fees. A site plan exemption shall be granted for a change in use only if the following criteria are satisfied:

- *Three separate plans were submitted with the application:*
 - A. *A "Location Survey, for Perini Properties, dated 5/16/12, prepared by Patrick H. Fatton, PLS for Heritage Consulting Engineers; and*
 - B. *A sketch of the site untitled, undated, author unknown, identifying "Perini LLC P.O. Box 3 Oldwick, NJ 08858" as the owner, and identifying 30,000 sq. ft. for "Penn Jersey" not showing a 2,000 sq. ft. office referenced in the application materials; and*
 - C. *"Site Plan, John L. Lutz Welding & Fabricating, Inc.", dated 5 or 6 /19/98, prepared by Stephen D. Ombalski, PE & LS.*
- *No site plan resolution of approval has been submitted with the application to confirm a prior site plan approval; and*
- *The drawing entitled "Site Plan" that was submitted does not identify site conditions as they exist on site at the present time. The 30,000 sq. ft. to be leased by a prospective tenant does not appear on the site plan.*
- ***On the basis that there is no current site plan showing the building to be occupied under the change of use proposed; and there is no accompanying site plan resolution of approval that has been submitted, it does not appear that the applicant has submitted the information required for a site plan exemption.***

- (a) The prior use had received site plan approval and no unapproved deviations from that site plan approval have occurred;

*The applicant received a site plan exemption from the Zoning Board in 2014. At that time, it was stated to the Board that the outdoor storage of equipment would take place in the rear yard. **Equipment storage along the Route 12 right-of-way in the front yard appears to be an unapproved deviation from the site plan exemption granted by the Board in 2014. On that basis, it does not appear that this application is eligible for a site plan exemption.***

(b) The developer provides proof that all real estate taxes on the property are current;

From Tax Collector's documentation submitted with this application, it appears that taxes are paid through 8/01/17 with the next tax payment due 11/01/17.

(c) The developer provides a certification that there are no anticipated or planned improvements and/or changes to the existing building or property. For purposes of this requirement, changes that are strictly cosmetic in nature, interior changes that do not result in any change to the size or footprint of the existing building and changes to the signage for the use shall not be considered to be improvements or changes to the building;

The "Statement to Board of Adjustment, Attachment to the Application", undated, submitted with the application states that "... there is no proposed change or modification to the footprint of the structures on the site, there are no modifications or changes proposed; to the exterior conditions, including but not limited to impervious coverage, grade, cut and/or fill and lighting. Water use and septic use will not change. There will be the installation of a sign." (sign to be 4' x 8' attached to the fence on the east side of the driveway)

The statement has not been provided in the form of a certification, as required by ordinance. However this could be easily rectified by the applicant.

(d) The change in use does not result in any increase in water consumption, septic demand or the number of required off-street parking spaces or off-street loading requirements; and

Parking and loading has not been addressed as required by ordinance, however, the statement cited in "(c)" above states that "Water use and septic use will not change."

(e) The use is a use permitted by the portion of the Zoning Ordinance applicable to the zoning district in which the property is situated as evidenced by a zoning permit issued by the Township's Zoning Officer.

No evidence of a zoning permit has been submitted regarding the use of the property conforming to the ordinance.

4. There are a number of requirements of zoning pertaining to site plan that do not appear to be addressed by the current condition of the site as indicated in the attached photo. Presumably, those conditions would be addressed with a site plan application. The use itself appears to be a conditional use in the zone, which may require conditional use variance relief.
5. Irrespective of whatever inconsistencies may exist between site plan requirements and the condition of the site, the site plan exemption submission materials required by ordinance have not been submitted to demonstrate an entitlement to a site plan exemption.
6. As pertains to the request for the Zoning Board of Adjustment that the applicant should not be directed to the Planning Board for site plan approval, that is difficult to determine for jurisdictional reasons because the proposed use appears to be a conditional use, which may require an application to either the Planning Board or Zoning Board of Adjustment, depending on whether all conditional use standards for the conditional use are met.
7. In summary, we believe that no site plan exemption should be granted and that submission of an application for site plan approval and possibly conditional use approval should be submitted by the applicant.

Mr. De Sapio reference the above letter and agreed that if the Board of Adjustment was to determine a change of use between the tenants Penn Jersey and Liebherr, then an application would be filed with the Planning Board for a site plan exemption or new site plan. However, tonight's request is for an interpretation and appeal of the Zoning decision.

David Pierce - Clarified that the Board is being asked tonight to interpret what the Kingwood Township Ordinance is requiring. Section #132-110 1A-D sets forth situations where a site plan approval is required. Section D contains an exception by stating except as provided in section 132-110 A2 below, which is the site plan exemption section. Any change in a non-residential use of a property. The change of use example given is of a fabricating business to a warehouse or store business. Mr. Pierce stated his legal opinion is that the board has to interpret the language of the Ordinance and determine when a site plan is necessary and what constituted a change in use. Additionally, opinion is that the ordinance is intended to exempt from the site plan requirement when there is not a change use. Another example is of an existing restaurant owned by a landlord and leased to the restaurant owner and a new restaurant later comes in, there is no change of use and therefore should require a site plan exemption. The professional opinion given is if the applicant can demonstrate that the use of Liebherr is essentially the same use as Penn Jersey then the interpretation would be that they are exempt from having to obtain site plan approval.

L. Frank – Asked for clarification if the ordinance asks for a “change of use” or “change of user”.

D. Pierce – Confirmed “change of use”. The difference between a site plan and site plan exemption was reviewed and examples given.

M.L. Haring – Stated the 2014 Resolution reads “substantially the same use” in multiple sections. The page showing the left and right sides confirm they are exactly the same.

Dennis Sargenti was introduced as the owner of Perini Properties L.L.C. and sworn in by Attorney David Pierce.

Mr. Sargenti – Stated he owns and manages the 90,000 square foot property on 9 acres with his wife. He was confirmed Penn Jersey leased 30,000 square foot of the building, 2,000 square foot of office and locker rooms. Penn Jersey has been the tenant since 2014 with Board of Adjustment approval until now. The principal service provided by Penn Jersey was a dealership for Volvo construction equipment. Mr. Sargentin gave the example of Cabotoa and John Deer to the product of Penn Jersey and Liebherr. A product range guide from Volvo was presented to the board marked as Exhibit A1. The proposed new tenant Liebherr is a large company from Germany that is in the same business of Volvo. The product range is basically the same construction equipment but not as broad as Penn Jersey. Liebherr is the parent company with one other location in Virginia, this would be first try in north east. Exhibit A2, a 2017 Mobile and Crawler Cranes catalogue was presented. It was confirmed that there would be no change in the building, septic or electrical use. A fresh coat of paint would be the only change to the exterior. There will be a parts department requiring frequent UPS deliveries. Also, a fleet of service trucks although all work is done off site.

Mr. De Sapio discussed the original Board of Adjustment resolution from May 14, 2014. #13 states Penn Jersey presented testimony indicating that its operation would consist of receipt and storage of heavy equipment from the manufacture and shipments coming in from Pennsylvania. Mr. De Sapio questioned Mr. Sargenti how Liebherr would be receiving product shipments. Mr. Sargenti confirmed through the Port on Newark. Mr. De Sapio asked if this was consentient with Liebherr with the exception of the manufacture. Mr. Sargenti confirmed it is consistent.

#14 determined that the construction equipment would then be ship to customer for use on the their job. Mr. Sargenti responded, Cranes comes in pieces and will be assemble on site and then be delivered to the customer.

#15 Penn Jersey operates with 5 employee spending 95% of the time in the field. Mr. Sargenti confirmed the employee ratio would be approximately the same but not certain. It is not anticipated that there would more.

#16 Penn Jersey represented it performs inspection of equipment and installation of options for end user. Mr. Sargenti confirmed Liebherr does the same.

#17 states on occasion Penn Jersey would return to the property with equipment for service if unable to service in the field. Mr. Sargenti confirmed Liebherr has the same practice.

Mr. De Sapio asked if an analysis was presented to the Zoning Officer in writing explaining how the operation of Liebherr was similar to Penn Jersey and if it was part of the application to the Board of Adjustment. Mr. Sargenti confirmed yes.

L. Frank – Questioned where the location of the showroom would be.

Mr. Sargenti confirmed in front of the building and that 64 large mature evergreen trees were planted along the front portion of the property to ensure any vehicle's parked in front of the build would not be visible from the road. Pictures were presented to the Board as Exhibits A3-A7.

C. Ostergaard – Questioned if the old fencing out front would be removed or fixed.

Mr. Sargenti confirmed it would be removed and neatly cleaned up.

M.L. Haring - Asked the board for additional questions or concerns. No comments noted.

C. Ostergaard – Asked for clarification that the board is determining no change of use.

P. Stepanovsky - Agreed no changes other than the possible amount of employees.

D. Hewitt – Confirmed in agreement.

M.L. Haring - Asked David Pierce for guidance on a motion.

D. Pierce – Explained the motion would be to find the interpretation of the ordinance agrees with the application and that if there is no change in use, then they are exempt from the site plan requirement. The board's determination of testimony and exhibits showing no change in use would then direct the Zoning Officer to issue a permit.

It was moved by D. Hewitt, seconded by L. Frank and carried to direct the Zoning officer to issue a zoning permit for the proposed tenancy of Liebherr USA Co. **On roll call to vote.**

Abstain:

Absent: J. Mathieu

Aye: J. Laudenbach, P. Stepanovsky, M.L. Haring, L. Frank, D. Hewitt, C. Ostergaard

OPEN TO THE PUBLIC

M.L. Haring - Called for comments from the public. *No members of the public in attendance.*

COMMUNICATIONS/REPORTS

August 2017 Zoning Report was presented.

July 6, 2017 Kingwood Township Committee meeting minutes noted as available for review.

ADJOURNMENT:

The meeting was adjourned with a motion by J. Laudenbach, seconded and carried by D. Hewitt. **All in favor.** The meeting adjourned at 8:15pm.

Respectfully submitted,

Kris Boxwell, Secretary