

TOWN OF CUMBERLAND
BOARD OF ADJUSTMENTS AND APPEALS MEETING MINUTES
Thursday, November 8, 2018

Roll Call: Board Members Present: Andrew Black, Christian Lewis, Matthew Manahan & Michael Martin. **Staff:** Code Enforcement Officer Bill Longley & Administrative Assistant Christina Silberman. **Others Present:** Leah Rachin, Esq. (Counsel to the Board). **Board Members Absent:** Ronald Copp, Sr., Sally Pierce, Amanda Vigue & R. Scott Wyman.

Mr. Manahan served as Acting Chairman due to Chairman Wyman's absence.

Acting Chairman Manahan opened the meeting at 7 pm. Members of the Board introduced themselves.

Administrative Matters:

1. Review and Adoption of the Findings of Fact for the Interpretation Appeal for Randy and Elvin Copp heard at the October 11, 2018 meeting: The Board reviewed the draft Findings of Fact prepared by Attorney Leah Rachin for the Interpretation Appeal of Randy and Elvin Copp heard at their October 11, 2018 meeting. Board members recommended minor changes. Mr. Lewis moved to approve the Findings of Facts and Conclusions as initially circulated by Counsel and as modified by this discussion, seconded by Mr. Black and **VOTED, 4 yeas – unanimous, motion passes.**

Mr. Lewis moved to authorize Mr. Manahan, as Acting Chair, to sign the Findings of Fact and Conclusions as just approved when they are corrected by Counsel, seconded by Mr. Black and **VOTED, 4 yeas – unanimous, motion passes.**

TOWN OF CUMBERLAND BOARD OF ADJUSTMENT AND APPEALS
FINDINGS OF FACT AND CONCLUSIONS
APPEAL OF ELVIN AND RANDY COPP

BACKGROUND:

This is an interpretation appeal pursuant to § 315-77.B.1 of the Zoning Ordinance of the Town of Cumberland (the "Ordinance"). Elvin H. Copp and Randy Copp appeal a July 10, 2018 Notice of Violation ("NOV") issued to them by the Town's Code Enforcement Officer ("CEO") with respect to property located on Pointer Way as identified on the Town's tax maps as Map R07, Lot 57C (the "Property"). The NOV asserts that the Cops are engaging in the unlawful "Extraction of Earth Materials" because such extraction is not an allowed use in the Rural Residential District 2 Zone ("RR2 Zone") in which the Property is located. The CEO states that he received complaints about the processing and removal of earth materials from the Property and that he personally witnessed this activity. The Cops assert that they have not engaged in unlawful extraction because their activities are consistent with exceptions identified in § 315-49(F) of the Ordinance, which allow: (a) the extraction of earth materials "necessarily incidental" to construction for which a building permit has been issued; and (b) movement of earth materials from one portion of a lot to another. They also argue that the photos

and maps relied upon by the CEO in issuing the NOV do not support a conclusion that there has been a violation. They further claim that the NOV failed to properly apprise the Copps of the nature of the violation, which constitutes a violation of their constitutional due process rights.

The Copps' appeal was heard on October 11, 2018 at 7:00 p.m. The Copps were represented by Jeffrey Bennett, Esq. The CEO was represented by Natalie Burns, Esq. The Board was represented by Leah Rachin, Esq.

With respect to threshold issues, the Board concluded that: (1) the within appeal is timely (having been filed within the requisite 30 days under § 315-77(D)(1) of the Ordinance); (2) the Copps have standing to appeal (as the parties named in the NOV); and (3) abutters were duly notified of the proceedings and public hearing notices were published as required under § 315-77(C)(1).

After each side presented its case and members of the public were heard, the public hearing was closed. After a motion duly made and seconded and deliberations, the Board voted unanimously by a vote of 6 to 0 to deny the Copps' appeal. On November 8, 2018, the Board adopted the within findings of fact and conclusions.

MEMBERS PRESENT: Scott Wyman, Andrew Black, Christian Lewis, Matthew Manahan, Michael Martin, and Sally Pierce.

OTHERS PRESENT: Randy Copp, Nancy St. Clair, PE, Jeffrey Bennett, Esq. (counsel for the Copps), William Shane, Town Manager, William Longley, CEO, Natalie Burns, Esq. (counsel to the CEO), Leah Rachin, Esq. (counsel to the Board), and neighbors Tanya Marston and Robert Maloney.

FINDINGS OF FACT:

1. Elvin H. Copp is the owner of property located at Pointer Way, Cumberland, Maine and more particularly described on the Town's tax maps as Map R07, Lot 57C.
2. Elvin Copp's son, Randy Copp, is the party conducting the activities at issue in this appeal.
3. The Property is located in the Town's RR2 Zone.
4. Section 315-6(B)(1) of the Ordinance outlines the uses that are permitted in the RR2 Zone. "Extraction of Earth Materials" is not listed as a permitted use in the RR2 Zone.
5. The term "Extraction of Earth Materials" is defined in § 315-04 of the Ordinance as, "[t]he excavation and storage of soil, topsoil, peat, loam, sand, gravel, rock or other mineral deposits."
6. Section 315-49(F) of the Ordinance provides that the governing standards under § 315-49 relating to the "Extraction of Earth Materials" shall *not* apply to:
 - (1) Extraction necessarily incidental to construction, alteration, excavation, or grading for which a building permit has been issued;
 - (2) Extraction from one portion of a lot for use on another portion of the same lot or contiguous lot of the same owner; or
 - (3) Removal of topsoil from a site that is less than one acre in area during a one-year period.
7. Section 315-80 of the Ordinance provides, "It shall be the duty of the [CEO] to warn any person...of violations of this chapter... The [CEO] shall notify in writing the party responsible for such violation, indicating the nature of the violation, ordering the action necessary to correct it, and informing the party of his or its right to seek a variance or other relief from the Board...."
8. Section 315-77(B)(1) provides that upon appeal from a decision of the CEO, the Board of Adjustment and Appeals (the "Board") shall determine whether the decision is in conformity with the provisions of the Ordinance.
9. Randy Copp is building a single-family dwelling at the Property for which he was issued a building permit. The permit is still valid.
10. Elvin Copp purchased the Property in 2007. In 2010, the Town Council enacted moratoria on the extraction of earth materials in residential zones. In 2011, the town meeting approved amendments

to the Ordinance prohibiting such extraction in residential zones. An exception was created, however, to permit limited excavation “necessarily incidental” to construction to allow for such things as a construction of a driveway and movement of earth materials from one portion of a lot to another. See 315-49(F)(1) of the Ordinance.

11. In a prior appeal by the Cops heard by this board in 2016, William Shane (who is both the Town Manager and a licensed professional engineer) testified that in his professional opinion, it would take between 35,000 and 75,000 cubic yards of material to build a driveway to the proposed single-family dwelling. In the current appeal, Mr. Shane and Randy Copp both testified that they had set stakes throughout the Property approximately 6 or 7 years ago that identified the limits of where the driveway would be located.
12. We accept Mr. Shane’s testimony that those stakes established the general parameters for the driveway. Randy Copp agreed that the stakes were still present and that the GPS coordinates taken by Mr. Shane would represent the approximate center line of the driveway agreed upon. We find, therefore, that the parameters identified by the stakes provide a reasonable basis for determining the extent of excavation, in terms of both quantity and geographic location, that would be considered “necessarily incidental” to the construction of a driveway.
13. There is no conclusive evidence to establish the specific amount of materials Mr. Copp excavated from the Property. However, the overwhelming weight of the evidence leads to the conclusion that it well exceeds the 35,000 to 75,000 cubic yards contemplated when the stakes delineating the bounds of the driveway were set. We note that neither Mr. Copp nor his engineer Ms. St. Clair, could provide any information regarding the amount actually excavated. Ms. St. Clair testified that the first time she had ever been to the site was in June or July of 2018. When Ms. St. Clair was asked to provide an estimate based on her observations of the Property, Ms. St. Clair stated that she did not know and that she “could not hazard a guess.” When Mr. Copp was asked about how much was extracted, he also testified that he did not know and could not provide an estimate.
14. We find that Randy Copp received compensation for earth materials extracted from the Property, which when considered in conjunction with the totality of the evidence, is consistent with a commercial extraction operation. While Mr. Copp initially indicated that he did not charge for the materials themselves but only for hauling and loading them, Mr. Copp eventually conceded that he did receive compensation for the materials. When asked how much he received, he again testified that he did not know.
15. We find that Mr. Copp’s suggestion that the aerial photos submitted by the Town may have been fabricated to be unsupported by the evidence. We appreciate, as pointed out by the Cops’ attorney, that some of the aerial photos appear to have been taken from different distances. The differing perspectives results in one photo (Exhibit J) “zooming in” on the excavated area with the effect that it appears larger than in the other photos. Even factoring in these differences, we nevertheless find that the photos provide compelling evidence that the extent of the excavation well exceeds what is “necessarily incidental” to the construction of a single-family dwelling and driveway. Further, the photos show excavation boundaries that are well beyond the agreed-upon general parameters for the driveway’s location.
16. On June 6, 2018, the CEO responded to a complaint from a neighbor. From a vantage point on the neighbor’s lot located approximately 100 feet away from the property line, the CEO observed a bulldozer, a loader, and a screener. He also saw large stockpiles of earth materials that appeared to be recently processed. The materials and heavy equipment were located on a portion of the

Property that was not in proximity to either the proposed driveway or the house. He also witnessed a truck full of materials leaving the site.

17. We find the testimony of two neighbors, Robert Maloney and Tanya Marston, to be credible and persuasive. Mr. Maloney recounted how he hears extraction activities “all day long.” Ms. Marston testified that she can view the Property from her own property. Given that her father operated a gravel pit in the same general vicinity, she is familiar with the sounds and equipment associated with such operations. In addition to hearing substantial noise over the years from the Property generated from the heavy equipment discussed above, Ms. Marston has witnessed on many occasions, trucks being filled with earth materials and leaving the Property. She followed the trucks on at least three occasions and observed the materials being brought to other constructions sites.

CONCLUSIONS:

1. Based on the factual findings set forth above, we conclude that the Copps did not meet their burden under § 315-77(B)(1) of the Ordinance. They failed to establish that the NOV was inconsistent with the provisions of the Ordinance. To the contrary, we conclude that the weight of the record evidence compels the conclusion that Randy Copp is engaging in the unauthorized “Extraction of Earth Materials” as that term is defined in § 315-04 of the Ordinance.
2. We conclude, contrary to the Copps’ assertions, that the NOV clearly identifies the nature of the violation and the basis for said notice. We understand the limits of our authority with respect to making determinations on constitutional claims. *See Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶ 7, n. 5, 103 A.3d 556 citing 30–A M.R.S. § 2691 and 30–A M.R.S. § 4353(1) (“Pursuant to state law, municipal boards of appeal may assert jurisdiction only over the “precise subject matter” specified in the town charter or ordinance at issue.”) However, from a practical standpoint, we view the language of the NOV to be clear and unambiguous and more than sufficient to notify the Copps of the nature of the violation, the facts upon which the NOV was based, the consequences of the failure to rectify the violation, and their appeal rights as required under § 315-80 of the Ordinance.
3. Based on the testimony of owners of property in close proximity to the Property, the CEO’s personal observations, the testimony of William Shane, and various aerial photographs submitted by the CEO, we conclude that the Copps were engaged in the “excavation and storage of soil, topsoil, peat, loam, sand, gravel, rock, or other mineral deposits” on the Property, which use is not permitted under § 315-6(B)(1) of the Ordinance.
4. Contrary to the Copps’ assertions, we conclude that none of the exceptions set forth in § 315-49(F) apply here. While we agree that *some* of the extraction could be characterized as “necessarily incidental to construction, alteration, excavation, or grading for which a building permit has been issued,” the evidence supports a conclusion that the extent of the excavation of earth materials was extensive and well beyond the scope of what would be “necessarily incidental” to the construction of a single-family dwelling and an associated driveway.
5. On balance, we find the evidence submitted by Mr. Shane, the neighboring property owners, and the CEO to be more credible than that of Mr. Copp and his engineer. Neither Mr. Copp nor Ms. St. Clair could provide any information regarding the amounts of materials extracted from or moved around the Property. The aerial photos depicted extensive areas of materials extracted from areas that bore no apparent relationship to the road or the dwelling. Moreover, the fact that a neighbor observed on multiple occasions materials being removed from the Property to other constructions sites, in conjunction with Mr. Copp’s admission that he was on occasion being compensated for said

materials, supports a conclusion that he is engaging in an unauthorized commercial extraction operation on the Property.

6. We also note that the purported driveway construction has been ongoing for years, yet there is little discernible progress. Moreover, as discussed above, much of the extracted area observed by Ms. Marston and the CEO is not located in proximity to the staked location of the road and bears no apparent relationship to it. This supports a conclusion that the extraction (particularly in the area identified in the photos taken by the CEO) bears no reasonable relationship to construction that would be “necessarily incidental” to construction of the driveway.
7. Because the Copps failed or refused to submit a site plan to the Planning Board or to obtain the proper approval prescribed under § 315-49 for their extraction of earth material, we conclude that they are in violation of the Ordinance.
8. As a result, we conclude that the CEO did not err in issuing the NOV and that his decision to do so was in conformity with the provisions of the Ordinance, pursuant to § 315-77(B)(1).

DECISION

Based on the above Findings of Fact and Conclusions, the Board of Adjustment and Appeals decided by a vote of 6 to 0 to deny the Copps’ appeal.

Under § 315-77(D)(4), “an aggrieved party may appeal from the decision of this Board to the Superior Court, as provided for by statute.”

2. Approval of the minutes for the October 11, 2018 meeting: Mr. Lewis moved to adopt the minutes of the October 11, 2018 meeting, seconded by Mr. Black and **VOTED, 4 yeas – unanimous, motion passes.**

Adjournment: Mr. Lewis moved to adjourn the meeting at 7:15 pm, seconded by Mr. Black and **VOTED, 4 yeas – unanimous, motion passes.**

A TRUE COPY ATTEST:

Matthew Manahan, BoAA Chairman

Christina Silberman, Admin. Asst.