



TOWN OF CARVER

Zoning Board of Appeals
108 Main Street
Carver, MA 02330
Phone: (508) 866-3450 Fax (508) 866-3430

Meeting Minutes of Tuesday, September 28, 2021

7:00 PM

CARVER TOWN HALL

MEETING ROOM 1

Present: Stephen G. Gray, Chairman; Sharon Clarke, Vice Chairperson; Members: Frances Mello, Mark Poirier, and Frank Casey; Alternate Member: James Barrington.

Meeting Opened: 7:20 P.M. Delay due to Select Board Meeting going long in Meeting Room 1.

A. Zoning Board Meeting Minutes: Reviewed minutes of September 16, 2021.

Stephen G. Gray, Chairman, made a Motion to accept the Minutes of September 16, 2021, as written.
Voted and passed unanimously.

B. Stephen G. Gray, Chairman, acknowledged the use of a sign-in sheet as required by the Board of Health for purposes of contact tracing and asked all visitors to sign. Measures implemented by the Board of Health are for the safety of everyone, he said. He also reminded people that anyone who has tested positive for Covid-19 must quarantine for ten (10) days until a negative result is obtained.

C. Introduction of the Board: Stephen G. Gray, Chairman, next spent a few minutes introducing each Member of the Board.

D. Stephen Gray, Chairman, also mentioned that there was a new case coming in the pipeline so the next meeting was scheduled by Board Members for the date of October 26, 2021.

E. Public Hearing (Continued): Case 70-1-2R. Petitioner: VS MASS SMART TPD 1, LLC.

Pursuant to the authority granted to the Zoning Board of Appeals of the Town of Carver under M.G.L. c 40A, Sections 8 and 15, as well as under Section 5223 of the By-law, a Petition was filed appealing the decision of the then Building Commissioner for the Town of Carver on June 29, 2021 to revoke a building Permit issued on June 18, 2020 (Permit #: 2020-143). As grounds therefore, the then Building Commissioner found that the Petitioner had increased the height and tilt angle of a solar array that was being constructed at the site (72 Center Street) and that this violated the terms of the Site Plan Special Permit Decision #P-620-18-SP/SPR of the Town of Carver Planning Board, dated November 13, 2018.

Stephen G. Gray, Chairman, acknowledged this case had a lot of procedural history to it and undertook a recitation of that history for those attending and watching at home. As follows:

This matter involves a landowner in the Town of Carver, legal name Silva Family Nominee Trust, and Edward Silva is the Trustee of this Trust. He entered into a lease arrangement with 978 Solar Development, LLC, a company owned and controlled by Borrego Solar Systems, Inc., regarding a portion of his property located at 72 Center Street. On that property he has a cranberry farm and the lease arrangement was for the purpose of installing a 1600 KW DC solar array on a solar structural racking system. We have seen this type of system located on a number of bogs in the Town. The Building Permit for this solar array was issued by the then Building Commissioner on 6/18/2020 after site plan review and a Special Permit Decision of the Planning Board on 11/13/2018. The Planning Board made its decision based upon the plans submitted at that time. Subsequently, the control of this project was transferred by Borrego in March 2020 to a company called Valta Energy which owns/controls a limited liability company called VS MA SMART TPD1, LLC and it is that company that is the Petitioner in this case that is before the Board tonight.

Construction began on the solar array at 72 Center Street on Mr. Silva's property and was well underway pursuant to the Building Permit which was issued by then Building Commissioner following site plan review by the Planning Board back in 2018. However, the former Building Commissioner then revoked this Building Permit under which the solar project had commenced based on alleged violations of the Site Plan Special Permit Decision issued by the Planning Board. So, they got going and then complaints were made as the project was turning out differently, it was believed, than what had been allowed by the Planning Board in its earlier decision in 2018.

Specifically, the former Building Commissioner alleged in his letter of 6/29/20 that the Petitioner, now the subsequent company Valta, not the original one, Borrego, had increased the height and the tilt angle of the panels of the solar array with the height going from 8'8" to 11' 5/16" and the tilt angle from 25 to 35 degrees in violation of the Special Permit Decision of the Planning Board and the site plans submitted to it by Borrego back in 2018. Thereafter, the plans that eventually went to the then Building Commissioner before the project began, now owned/controlled by Valta, involved changes with regard to the height and tilt angle.

The then Building Commissioner issued a Stop Work Order on 10/21/20 and the Petitioner's representative for Valta appeared before the Planning Board on 4/27/21 and requested what was characterized as a minor modification that would allow the project to move forward without the necessity of disassembly and reconstruction which was alleged to involve considerable expense to Valta. Specifically, the Petitioner offered to decrease the maximum panel height to 10' 1" and the tilt angle to 25 degrees. This proposal, which was represented as a minor modification to the plan that had been filed in 2018, was rejected by the Planning Board despite the fact that the then Building Commissioner and the former Planning Director had recommended that it do so by letter, dated 4/27/21.

Thereafter, the former Building Commissioner revoked the Building Permit issued on 6/18/20 by letter dated 6/29/21. Accordingly, this project is now halted as there is no Building Permit. The issue comes down to whether the height and tilt angle of the solar array has been changed to such a substantial degree that the Building Permit should have been be revoked, or whether it really is little more than a minor modification under the circumstances. The Petitioner is asking this Board to step in and reverse the decision of the former Building Commissioner to revoke the Building Permit and to allow the project to go forward.

Frances Melo, Member, recused herself at this point, as she told the Board she has a personal conflict with this case.

Stephen G. Gray, Chairman, then stated that the new Alternate Board Member, James Barrington, would sit on this Case as a voting member so that the Board would have a full complement of 5.

Attorney D'Ambruoso, Counsel for the Petitioner, was recognized and remarked that the project had been permitted and constructed properly. He stated that, in hindsight, there would not have been anything the Petitioner would have done differently from a process standpoint.

Attorney D'Ambruoso then acknowledged the presence of Thomas Strong, Project Engineer for Valta Energy, who had traveled from California to be present at the meeting. Counsel instructed Mr. Strong to start a short video presentation regarding the history of the Case. It was reiterated that Valta applied for and received a Building Permit in 2020. It was argued that, from a practical standpoint, the height of the solar panels could not be brought down to 8'8" without incurring great expense. It was maintained that the Permit was revoked when the project was just weeks away from completion; after objections were raised by the landowner, the Petitioner was willing to reduce the height to 10' 1" and the tilt angle to 25 degrees. Further, counsel argued that the Petitioner did not really consider the change in height and tilt angle to represent a "minor modification" to the Plans submitted originally by Borrego to the Planning Board. Instead, it was stated that those Plans were for general reference/general use only with approximate height of the solar panels and that is what the Plans actually say on them. He then remarked that, subsequently, the Building Commissioner approved Plans showing the height and tilt angle increase after the project had been transferred from Borrego to Valta, and allowed the project to proceed.

Attorney D'Ambruoso reiterated that the Petitioner did not view the change in height and tilt angle to be a "minor modification" or a departure from what was approved and that the Petitioner built what was approved -- the Petitioner submitted Plans to the then Building Commissioner which were approved by him and he issued a Building Permit. He argued that the Petitioner complied with all the By-laws, including the one that states that height of structures cannot be greater than 35 ft. and the solar panels in this case were nowhere near that. He also remarked that solar cannot be unreasonably restricted or regulated per State law.

Stephen G. Gray, Chairman, asked if Mr. Silva, owner of the subject property, who was present at the meeting, if he wanted to speak.

Mr. Silva stated it would take several hours to tell everything to the Board. The height, he said, is not 11' 5/16". It is actually 11' 7".

Mr. Silva then asked if his narrative had been received by the Board and Stephen G. Gray, Chairman, acknowledged it had been received earlier in the day by all Board Members.

Mr. Silva explained the project had started with Borrego. All three sides of his farm are an active cranberry operation. He stated that the Planning Board had approved the Plans of Borrego, not of Valta, and the end result was that the solar panels were now a lot higher than what was approved originally. He said he went to the Building Commissioner to complain. He told Valta's contractor about the height issue, too, and that it had built the panels above the height of the dykes. He claimed that Valta had not spoken to him about anything and they just built what they wanted to build. Also, he said that the 11' 7" inch solar panels stick out on the side of the road and that he had equipment close to it. He remarked that it was all a

travesty and that if the panels are tilted more, they will extend even further onto the side of the road. Then they explain this is just a "simple" matter, he said.

Stephen G. Gray, Chairman, inquired whether Mr. Silva was referring to the bog road and he answered in the affirmative.

Mr. Silva then said that they wanted to install a fence. Initially, with Borrego, he stated that he told them if they could not build a system with enough kilowatts, he did not even want to proceed. They said they could get up to 600 KW but they would not be able to install a fence around it. Mr. Silva remarked that he wanted to go before the Planning Board and get the project approved without a fence so the 600 KW could be squeezed in there. Now he said he had panels sticking out to the edge of the road and they wanted to put in a fence also. Mr. Silva stated that he was the landowner and all they needed to do was come to him and ask. Borrego did its due diligence, he observed. It knew everything that was approved by the Planning Board. It knew what was required. He claimed that the previous project site manager was really upset about what Valta was doing. Then, he said Valta had their attorney send a Cease and Desist order to him (Mr. Silva) because it did not want him to speak to Borrego and that it did not want them coming to the project site. Mr. Silva admitted he had a lot of requirements before he agreed to this project on his land.

Stephen G. Gray, Chairman, told Mr. Silva that the Board understood his concerns and had read all the materials. He remarked that Mr. Silva had mentioned a few times that he did not want to waste the time of anyone; Chairman Gray assured Mr. Silva he was not wasting the time of the Board. He said that all of the Board Members were interested in what he had to say.

Stephen G. Gray, Chairman, then asked Mr. Silva what specific issue/s he had concerning his property, aside from the fact that he felt taken advantage of because the height and tilt angle of the solar panels had changed.

Mr. Silva said that the Petitioner had not gone before the Planning Board for the changes before installation.

Stephen G. Gray, Chairman, asked what is it that would satisfy you.

Mr. Silva stated that he wanted the project as approved originally.

Stephen G. Gray, Chairman, said to Mr. Silva that he seemed to want the solar panels at the height of 8' 8" and the tilt angle at 25 degrees. He asked what he would say to Valta's counsel, as he would state that the Petitioner has already reduced height and tilt angle. Chairman Gray said that counsel is going to come up here and say well, out of good faith, the Petitioner has already reduced the height to 10'1" which is only 15 inches more than what the Planning Board approved based on the original plans.

Mr. Silva then urged the Board to conduct a site visit at his property and suggested it would understand his concerns better if a visit was conducted.

Stephen G. Gray, Chairman, asked Mr. Silva again what would satisfy him. Was he prepared to compromise or did he insist upon the original plan that was approved by Planning Board? Again stating the Board had read all the submissions in this case, including Mr. Silva's letter to Valta dated August 25, 2020, he observed that Mr. Silva had listed a number of items he wanted to be addressed: landscaping type items, seeding bog banks, the road slopes, grading and leveling, silt fence, experienced excavator and telephone poles, restoring road to previous grade level, and more.

Mr. Silva said no one is overseeing this job, no inspector. Conservation did not come down, so I was policing the project, he claimed.

Stephen G. Gray, Chairman, said to Mr. Silva that the Board was there to hear him but needed a better understanding of what he was looking for to bridge differences and come to an agreement acceptable to both him and Valta.

Mr. Silva insisted that the Board needed to come to his farm. He stated that certain things were personal and that he did not want to have that discussion in a public hearing.

Stephen G. Gray, Chairman, said he believed the Board understood that, Valta, through its entity, VS Mass Smart TPD 1, LLC, had an obligation to install the solar panels in a manner which was in substantial compliance with the original site plan reviewed and approved by the Planning Board. He observed that Mr. Silva's position was that what was constructed eventually was not in substantial compliance with the site plan. He indicated to Attorney D'Ambruoso that he gathered from his slide presentation that the Petitioner believed that the site plans reviewed by the Planning Board were sufficiently detailed to give it a good idea of what it was voting on.

Stephen G. Gray, Chairman, went on to say that the Planning Board Decision which goes back to 2018 is conditioned on a number of items and Condition 2 states that the project had to be constructed as approved in the site plan. Any revisions would require approval from the Planning Board as a modification of that Decision. He said that the Petitioner attempted to obtain approval for such a modification and this was rejected by the Planning Board. Chairman Gray remarked that he understood the argument of the Petitioner to be that the plans submitted originally to the Planning Board were sufficiently detailed overall but that they were also hedged in certain respects because they said things like the information shown was for "general reference only" and the drawings and the height of the panels were referred to as "approximate." So he observed that the issue with this Case was whether the project had been constructed in substantial compliance with the Planning Board Decision based upon the language that was somewhat indefinite, as it is sometimes hard to come up with precise measurements every time. Or was the project not in substantial compliance because of the amount of difference in height and tilt angle as Mr. Silva indicated, and so was this really a substantial modification and was the Building Commissioner correct in issuing the Cease Order and right in revoking the Building Permit.

James Barrington, Member, addressed Attorney D'Ambruoso and said he would like to know why the decision was made to change the height of the solar panels from the plan the Planning Board had approved and who had made that decision.

Attorney D'Ambruoso stated that, in his opinion, it was common for solar developers and contractors to submit final construction plans that were not identical to plans approved originally.

Mr. Thomas, Engineer for Valta Energy, said that as with any project, they reviewed the drawings and looked for ways to increase the value of the project. One of these ways was to increase tilt, based on the angle of the sun in Massachusetts. Optimal angle for solar is 35 degrees and this was why the tilt was changed (from 25 degrees), as Mr. Silva indicated. Height was not thought to be a problem, as 35 feet is the maximum under the By-law. So he acknowledged that changes were made to the Plans and then they were submitted to the Building Department for approval. He stated that they did not believe they were in violation.

James Barrington, Member, asked Mr. Thomas if the land owner had been notified.

Mr. Thomas said that they had a lease with the landowner but was unable to answer the question beyond that.

Stephen G. Gray, Chairman, stated that the lease was assigned by Borrego to the Petitioner. Mr. Silva was not a signatory to that assignment.

Attorney D'Ambruoso stated that the assignment of the lease was permitted under the terms of the lease.

Sharon Clarke, Vice Chairperson, remarked that she had difficulty understanding the line highlighted in the slide presentation referring to "general reference only (referring to the original Plan filed with the Planning Board)." What does "general reference mean?" Does that mean you can show them a shed that is conforming at 600 square feet and for "general reference only" and then you build a 1200 square foot shed? Do you think that covers you, she asked?

Attorney D'Ambruoso thought this was a good question and answered by saying that it would be the job of the Building Department to make this determination, as it was responsible for reviewing submitted plans and issuing/revoking permits. He went on to say that if a developer could not rely on a duly issued building permit, it would serve no purpose.

Sharon Clarke, Vice Chairperson, observed that there were several issues in this Case that bothered her. She asked for the legal definition of "approximately."

Attorney D'Ambruoso said that he was not sure there is one.

Sharon Clark, Vice Chairperson, disagreed and said that the definition is "very nearly approaching accuracy or correctness, nearly precise, perfect or complete."

Attorney D'Ambruoso inquired whether that definition could be found in the Zoning By-law.

Sharon Clarke, Vice Chairperson, remarked that it could be found in a legal definition handbook that she had referenced. She suggested to Attorney D'Ambruoso that if his argument on behalf of the Petitioner was that the difference between 8' 8" and 11' 5/16" was within the meaning of the word "approximate," she was not convinced.

Stephen G. Gray, Chairman, interposed that Mr. Silva had stated that the height of the solar panels was actually 11' 7".

Sharon Clarke, Vice Chairperson, said that the Board did not have a copy of the lease agreement and that this bothers her. She stated that she suspected there was a clause regarding assignment but remarked that it was somewhat unprofessional to assign a lease in this situation to a completely different company and then not have it knock on the door of Mr. Silva, the landowner, to discuss the project and that this did not seem to her to be fair.

Attorney D'Ambruoso stated that the Petitioner disagreed strongly with the characterization there was no dialogue or attempted dialogue with Mr. Silva. He remarked that it had made quite a few attempts to no avail.

Sharon Clarke, Vice Chairperson, asked if the Petitioner had any email chains, records of phone calls, or contemporaneous notes supporting its position that attempts had been made to communicate with Mr. Silva.

Attorney D'Ambruoso said that he was sure the Petitioner could produce them if that were an issue. He stated that the Project Manager was probably in the best position to address this.

Greg Casey, the Project Manager for Valta, testified that he did, at one point, collect all these communications with Mr. Silva, and that he also had an onsite planning visit with the then Planning Director, James Walsh, the town engineer, and Attorney D'Ambruoso. At that juncture, he suggested that Attorney D'Ambruoso tried everything he could to negotiate some type of settlement to this dispute. He alleged that Mr. Silva stated to everyone that he had no intention to negotiate whatsoever and that there was nothing we could do to satisfy him. We tried, he said, we tried numerous times.

Sharon Clarke, Vice Chairperson, inquired of Attorney D'Ambruoso whether he or Valta had received some sort of outside pressure to go back to the Planning Board and ask for a "minor modification" to the original plans filed with the Planning Board.

Attorney D'Ambruoso said that he thought "direction" might be a better word.

Sharon Clarke, Vice Chairperson, asked what was that "direction" and where did it come from.

Attorney D'Ambruoso remarked that the dialogue came from James Walsh, Planning Director, trying to brainstorm in lieu of litigation and in light of the fact that the Petitioner was having trouble communicating with Mr. Silva. He suggested that even though Valta might not agree it was a "minor modification," he thought this approach could be productive. Counsel also said he believed Mr. Walsh may have been advised by Town Counsel along those lines as well.

Sharon Clarke, Vice Chairperson, inquired whether the Petitioner had decided to go forward with a request to the Planning Board for a minor modification approval.

Attorney D'Ambruoso responded in the affirmative, saying the Petitioner believed this could be a good compromise to a bad situation.

Sharon Clarke, Vice Chairperson, asked if this request for a minor modification approval was denied.

Attorney D'Ambruoso answered in the affirmative.

Sharon Clarke, Vice Chairperson, asked if the reason it was denied was because the Planning Board, in its opinion, did not believe this was a so-called "minor modification."

Attorney D'Ambruoso responded in the affirmative.

Mr. Silva testified again that Valta had not considered any of his concerns and did not care how he needed to take care of his farm, never told him anything, and could care less about him.

Sharon Clarke, Vice Chairperson, asked Mr. Silva if he could still farm and harvest his bogs despite the project construction and he answered in the affirmative.

Stephen G. Gray, Chairman, also inquired of Mr. Silva that if he could still farm his bogs, perhaps there was an issue like esthetics, or had the Petitioner overstepped in some way in what it planned to do, short of the height/tilt issue.

Mr. Silva said that the Petitioner had absolutely overstepped and that they had never talked to him.

Sharon Clarke, Vice Chairperson, addressed Mr. Silva and again asked in what manner had the Petitioner deviated from the original plans, other than the height/tilt of the solar panels -- had Valta done something that Borrego never intended?

Mr. Silva remarked that it was the height of things because there are implications due to this on account of the way they built the system. He again urged the Board to conduct a site visit.

Mark Poirier, Member, asked Mr. Silva how the height change might impact his ability to use his equipment.

Mr. Silva responded by saying the Board needed to come to his property and see for themselves.

Stephen G. Gray, Chairman, asked Mr. Silva how the taller solar array had affected him. Was he angry due to poor communication? The aesthetic of it? He said he wanted to try to get to the bottom of his objections.

Mr. Silva responded by saying that the project was not built the way it was supposed to be built and that this was not a minor modification situation.

Attorney D'Ambruoso interjected by saying that he believed Mr. Silva's point was well taken and that conversations needed to be had. He, too, was of the opinion that the Board should schedule a site visit.

Stephen G. Gray, Chairman (addressing Attorney D'Ambruoso) remarked that it was clear to him that there had been a breakdown in communications. He instructed all the parties to have conversations on how to get to a resolution. The height increase of 3.5 feet to the solar panels may not seem like a lot to Valta, he said, but it is to Mr. Silva. The Board will do a site visit and hopefully an accord can be reached. He remarked that if the Board is compelled to make a decision, someone in the room was going to walk away very unhappy. So, he observed this was their chance to get together and talk. He stated that, in his opinion, Mr. Silva was a reasonable person with reasonable concerns about being the victim of a "bait and switch" for lack of a better description. We know, too, Valta has its issues, he observed. He went on to say that he wanted Valta to speak to Mr. Silva and have a discussion on what it would take to come to a resolution. If that does not work, he announced the Board would make a decision. We will see the property, he stated. Valta is invited and all its representatives and maybe after we leave you can have your discussion. We will not be present as we do not deliberate in that setting because of the requirements of the Open Meeting Law. We will go out, we will eyeball it, and we will ask any technical questions we may have.

Stephen G. Gray, Chairman, told Mr. Silva that just by getting people to talk, the parties should be able to get to a satisfaction level. He implored him to keep an open mind, to talk to the folks from Valta, to go back to his letter which he sent them on 8/25/2020, which was very detailed with all his points. Talk to them about all those points, he urged.

Stephen G. Gray, Chairman, then asked if Valta decreased the tilt angle and they went to 15 degrees, would that make the project manageable?

Attorney D'Ambruoso stated that this would not be viable.

The Project Manager for Valta next promised to go back over its email chain.

Stephen G. Gray, Chairman, remarked that the Board was not looking for recriminations but communications.

Sharon Clarke, Vice Chairperson, asked if Valta had any equipment at the site.

The Project Manager for Valta responded that it had some electrical equipment, but did not have access to it currently.

Stephen G. Gray, Chairman, reiterated that face-to-face conversations needed to occur among the parties and that this would be helpful to Mr. Silva as well.

Stephen G. Gray, Chairman, moved to continue the Case to the date of October 26, 2021, unless Attorney D'Ambruoso for the Petitioner notified him of a resolution prior to that date.

The Project Manager for Valta inquired whether it would be allowed to take actual height and tilt measurements at the site visit.

Stephen G. Gray, Chairman, replied by stating that this would be acceptable, assuming Mr. Silva did not have any issues with that. He stated the parties needed to be communicating directly and not through him. He suggested that if they wanted to take measurements, they should talk to Mr. Silva and that there would be an opportunity for at least one more conversation between the parties at the site visit.

Stephen G. Gray, Chairman, inquired if any members of the public wished to speak on this Case. No comments were received.

Stephen G. Gray, Chairman, concluded by saying that it was rare that the Board had to deal with this type of case. He remarked that, in a manner of speaking, it was sitting in judgment of the Planning Board as well as in judgment of a Building Commissioner. It seemed to him that if the ZBA could encourage people just to talk, a point could be reached where all sides could be satisfied. Chairman Gray suggested to Mr. Silva that he bring a copy of his letter that explained all his various points and be prepared to talk.

The Board agreed to conduct a Site Visit on Saturday, October 16, 2021 at 9:00 AM. The landowner, Mr. Silva agreed, and confirmed the date and time of the site visit.

Stephen G. Gray, Chairman, requested a 5 minute break before the next scheduled case.

Stephen G. Gray, Chairman, returned the Board to public session. He stated that he understood that most of the many people present were present for the next case, Save the Pine Barrens against A.D. Makepeace, Inc.

Sharon Clarke, Vice Chairperson, remarked that during the break she had received a question from the audience concerning the reason why the next case was not heard first. She stated this was because the first case had been scheduled previously but had to be rescheduled due to a lack of a quorum that evening.

Public Hearing: Case No. 131-2. Petitioner: Save the Pine Barrens, Inc.

Pursuant to the authority granted to the Zoning Board of Appeals of the Town of Carver under M.G.L. c 40A, Sections 7, 8 and 15, as well as under Sections 2200 and 5223 of the By-law, a Petition was filed by Save the Pine Barrens, Inc. requesting enforcement of the Town of Carver By-law against A.D. Makepeace, Inc. due to alleged past and continuing commercial earth removal activities in the Residential-Agricultural District in the Town of Carver that are occurring both with and without an Earth Removal Permit. The sites in question are:

- 1). 59 Federal Road (Assessors Map 131, Lot 2-1C)
- 2). 46 Federal Road (Assessors Map 131, Lot 2-4)
- 3). Hammond Street (Assessors Map 131, Lot 1-4)
- 4). Golden Field Solar (Assessors Map 131, Lots 1-1, 1-2, 1-3, and 5-0)
- 5). Federal (a/k/a Tihonet) East Solar (Assessors Map 131, Lots 2-1, 2-2, and 2-3)
- 6). 0 Hammond Street Solar (Assessors Map 134, Lot 4-2)

Stephen G. Gray, Chairman, asked who was present for the Petitioner, Save The Pine Barrens Inc.

Attorney Michael O'Neil and Attorney Margaret Sheehan answered for Save the Pine Barrens, Inc.

Stephen G. Gray, Chairman, stated that the Board had reviewed all the paperwork associated with the Case. Before the Board got into the merits, he stated that he had some procedural concerns he wanted to address with counsel. He said he knew earth removal was allowed by right in the Residential-Agricultural District under the General By-laws of the Town, so long as it was for agricultural purposes. He pointed out that the Petitioner was now before the Zoning Board of Appeals and that it addressed zoning issues. He wondered whether the ZBA was the correct forum for this case. He remarked that there are six (6) properties of concern and three (3) have already been before the Earth Removal Committee for permits which had been granted under the General By-law; three (3) apparently had not. He inquired whether the Petitioner first should be before the Earth Removal Committee, as permits for this sort of thing fall under the General By-law and appeared to be outside the parameters of the Zoning By-law.

Attorney O'Neil stated that earth removal is permitted in the Residential/Agricultural district only with approval from the Earth Removal Committee. So if approval is not granted by the Earth Removal Committee, it is not a permitted use under zoning.

Stephen G. Gray, Chairman, again remarked that of the projects about which the Petitioner had concern, and there were six (6) of them, three (3) had been permitted already. At least for those three (3) that had not been permitted, he asked whether the Petitioner should first be in front of the Earth Removal Committee.

Attorney Sheehan said that the Petitioner had already been to the Earth Removal Committee a number of times and had addressed its concerns to them. Those concerns related to compliance with the permits that had been issued. However, she claimed the matter was now a zoning issue and strictly a zoning issue, as

earth removal was occurring for non-agricultural purposes and this was not a permitted use under the Zoning By-law.

Stephen G. Gray, Chairman, said that he understood the argument and believed the rest of the Board did as well. However, he remarked that he was still struggling with the idea this was a zoning case and not a case that should be brought before the Earth Removal Committee under the General By-law. Further, he noted that the Petitioner had other remedies if it did not receive the action/relief it was seeking from the Earth Removal Committee, including the filing of a lawsuit.

Stephen G. Gray, Chairman, addressed other Board Members regarding whether the Zoning Board of Appeals was the proper forum, as earth removal appears to fall under the General By-law and not the Zoning By-law. He remarked that the Town of Carver has two sets of By-laws, General and Zoning, and they each address different things. He stated the General By-laws were not "their house," but rather, they seemed to belong to a different house.

Frances Mello, Member, said that she had read through all the materials and that the Petitioner appeared not to have received any response to its concerns. She stated that she would like to know of any potential remedies for Town non-action other than coming to the ZBA seeking enforcement/relief.

Sharon Clarke, Vice Chairperson, stated that she, too, had read through the materials and inquired whether the Petitioner was asking the ZBA to compel the zoning enforcement officer to take action in this case.

Attorney Sheehan replied that the Petitioner was seeking a Cease and Desist Order against all A.D. Makepeace removal operations in the Town of Carver, as there had been illegal activities occurring in the Town for over 10 years.

Sharon Clark, Vice Chairperson, asked the Petitioner whether this had just come to its attention now.

Attorney Sheehan remarked that it had come to the attention of the Petitioner many years ago and that it had worked very hard to research all of the issues and to document all the violations it was prepared to prove. She stated the Petitioner had documentary evidence and a video that it wanted to show to explain its case, as well as an affidavit from an expert.

Sharon Clarke, Vice Chairperson, suggested that because the Earth Removal Committee had granted permits under the General By-laws, oversight was with them.

Attorney Sheehan disagreed and maintained that the land was being used for improper purposes (commercial mining of sand for the purpose of re-sale) and it was the Board's obligation to enforce the Zoning By-laws so as to prevent this.

Stephen G. Gray, Chairman, asked which Zoning By-law was being violated.

Attorney O'Neil alleged that Makepeace was not in compliance with the Table of Uses and that it was using land zoned residential/agricultural for commercial mining regardless of what the Earth Removal Committee permit stated.

Stephen G. Gray, Chairman, remarked that it appeared undeniable that permits in this instance were issued under the General By-laws under the jurisdiction of the Earth Removal Committee. He stated that it seemed to him that was a hurdle the Petitioner needed to overcome.

Attorney O'Neil again argued that the activities the Petitioner was prepared to prove were zoning violations, as they were a prohibited use.

Attorney Sheehan alleged Makepeace was using land zoned residential and agricultural for commercial mining activities regardless of what the Earth Removal Permits said. She said the Permits were granted on the premise that earth removal would be for agricultural purposes, including the building of cranberry bogs and reservoirs but that this was not occurring at all. Instead, she claimed Makepeace was conducting commercial earth removal activities and that the website of its wholly owned company, Reed Custom Soils, actually boasts that it has an infinite supply of fine soil which it is selling for commercial use.

Stephen G. Gray, Chairman, observed that the discussion was now starting to dive a little into the merits. He remarked that he was asked a couple of minutes ago what other remedies the Petitioner might have if the Board determined it was not the proper forum for this case. He mentioned that he had seen from the paperwork the Petitioner had filed that it was preparing to proceed with a so-called 10 person lawsuit. So, he stated the Petitioner clearly had an avenue straight to court if it chose to use it and it could ask for a TRO (temporary restraining order) without having to deal with the jurisdictional issue at the local level. Or, if the Petitioner wanted to stay at the local level, another possible option would be to get on the Agenda of the Earth Removal Committee and explain to it its current concerns. If it is unresponsive and the Petitioner believed it still had a winning case, then he said the pathway was even clearer and that would be to take the matter to court. But it was his opinion that the Earth Removal Committee might be the most appropriate, local board to address the issues presented by this Case.

Attorney O'Neil acknowledged that the Petitioner already had filed several notices under M.G.L. c 214, Section 7A (10 person lawsuit for alleged damage done to the environment).

Attorney Sheehan stated that the Petitioner had referred the matter to the Earth Removal Committee in March, April, May, June, and July 2021 and that it had also been on its agenda. She said it had presented all the pertinent facts to the Chairman and other Members of the Committee, both informally and formally, and no action to remedy alleged violations had been taken. She also discussed the three (3) Borrego solar sites where earth removal was conducted or was being conducted without a permit. She stated that Mr. Kane, CEO of Makepeace, had signed a Planning Board Application that earth would be removed from the sites under the "guise" that it was be going to be used for his cranberry bogs. The volumes of earth that have been removed are tremendous, she maintained. She alleged this was all a "ruse" and the Board could not choose to rest on a procedural excuse for not wanting to address this. Concluding, she claimed that there has been incredible destruction of a unique and globally rare pine barrens ecosystem and that this destruction threatens the water supply and that it is completely unregulated and in violation of the Zoning By-laws as well as the General By-laws relating to earth removal.

Stephen G. Gray, Chairman, addressed Ms. Sheehan and told her that he knew he was speaking for the rest of the Board, including the new Members, when he said that the Board does not look for excuses. If there is an issue that is properly joined and comes before the Board, it will be addressed. He then remarked that the Town has had the misfortune over the last year of having 3 or 4 Building Commissioners and that he suspected strongly that the current Building Commissioner who is now full-time and currently ensconced in office had not been contacted by the Petitioner. He asked if he were correct. He mentioned that the current Building Commissioner is Paul Boucher.

Attorney Sheehan stated that all she could say was that no one from that office had responded to the inquiries of the Petitioner.

Stephen G. Gray, Chairman, remarked that the former three Building Commissioners were no longer affiliated with the Town and no longer part of that office. He said he heard the frustration of the Petitioner and admitted that he would probably be frustrated, too. He stated that one of the ideas he had while listening was perhaps to reach out to the new Building Commissioner. He said the Petitioner might not think that to be an effective strategy, but as you heard in the last case, he is a big believer in communication and perhaps the new Building Commissioner, together with further outreach to the Earth Removal Committee and folks at A.D. Makepeace, might make for the best solution. Perhaps with some new faces, the Petitioner might be able to get a little bit further than where it had gotten so far. Also, he remarked that the Petitioner retained the option to go to court to obtain a temporary restraining order.

Stephen G. Gray, Chairman, next mentioned that he had one more procedural issue to address and that it went to what Attorney Sheehan had just mentioned which was her request of the Board for enforcement from the then Building Commissioner, via 3 separate letters sent to him dated April 6, 2021, May 13, 2021, and June 29, 2021. He remarked that under M.G.L. c 40A Sec. 7, the Building Commissioner has fourteen (14) days to act on a request for zoning enforcement and that this was cited in the paperwork of the Petitioner. He said he looked at the last of those three dates and at that point if the Petitioner had not filed an Application for enforcement with the appropriate Board and, in this instance, the ZBA, if the Petitioner continued to maintain that the ZBA was the proper forum, he observed that it had to get it to the ZBA within 30 days. The Petitioner appeared to have missed the filing deadline, he claimed, or what was the functional equivalent of the statute of limitations as to this case.

Stephen G. Gray, Chairman, promised that he was not looking for reasons to evade getting to the merits of this case. He stated for the record that the allegations presented are extremely serious and he thought that anyone reading the submissions and looking at the photographs would have a certain level of concern, as it is well-known in this day and age that climate change and environmental issues are very much in the forefront of everyone's mind and are being discussed in the political arena. He went on to say that the one objection he had was to any suggestion by the Petitioner that the Board would ever look for an excuse to evade getting to the merits of an issue if the issue was properly before it. He concluded by saying again that he believed the Petitioner was seeking enforcement of a General By-law which called into question whether the proper forum was the ZBA. And further, if it was determined that jurisdiction was properly with the ZBA, it appeared the Petitioner may have missed the statute of limitations.

Attorney O'Neil said he respectfully disagreed.

Stephen G. Gray, Chairman, stated that the filing deadlines were codified in state law, not local law.

Attorney O'Neil remarked that the previous letters sent by the Petitioner were not identical to the letter dated June 29, 2021 which was much more specific and demanded enforcement for six (6) specific sites. The other letters were more general and not as specific, he said. He also stated there was no response to any of the letters and the statute mandates that the Building Commissioner must respond.

Stephen G. Gray, Chairman, observed that a Building Commissioner has 14 days to respond from receipt of a letter requesting enforcement.

Attorney O'Neil maintained that there was no response to the earlier letters, and that was a defect right there. So therefore the Petitioner did a focused, specific request on June 29, 2021 which was not the same as the other letters, he claimed.

Stephen G. Gray, Chairman, reminded the Petitioner that Section 15 of M.G.L. c 40A requires that it get before the Board a request for enforcement on a zoning issue, assuming this was in fact a zoning issue, within 30 days of the expiration of the 14 days that state law, Chapter 40A, gives to the Building Commissioner to respond to a request for enforcement. He stated that he accepted that there was no response to any of those letters and he observed that was not a good thing and Carver could not be proud of that. He opined that part of the reason for the non-response might have been attributable to the fact there was a lot of turnover in the office of the Building Commissioner. However, for whatever reason, he stated there was no response and that triggered the 30 day period, referencing Section 15 under M.G.L. c 40A. He offered to read it to the representatives of the Petitioner but he said he was sure they knew it as well as he did.

Attorney O'Neil said he knew what it said but that the Application to the ZBA was filed within 30 days of the final letter of June 29, 2021.

Stephen G. Gray, Chairman, observed that the 30 day appeal period would have begun on or about June 30, 2021.

Attorney O'Neil stated that the applicable date would have been July 1, 2020 and that the appeal period of 30 days would have been from July 1, 2020.

Stephen G. Gray, Chairman, then stated that the end of the 30 days would have been July 30, 2021.

Attorney O'Neil agreed that under Section 7 of M.G.L. c 40A, the Building Commissioner would have had 14 days to respond and then the Petitioner would have needed to file its Application for enforcement within 30 days from the 14 day period. He argued that the Application was filed timely.

Stephen G. Gray, Chairman, maintained that the Application was still late and inquired when the case had been filed by the Petitioner.

Attorney O'Neil stated that the case was filed on August 16, 2021.

Stephen G. Gray, Chairman, disagreed and said the case was not considered filed until Sept. 2, 2021 and that was because the Application had been received on August 16, 2021 without the required filing fee. Hence, he stated that the Application was not perfected until the filing fee was paid. He acknowledged he had another Application dated September 2, 2021 from the Petitioner when the filing fee was finally paid. He concluded that it was his belief that the Petitioner was presented with very challenging procedural problems in this case.

Frances Mello, Member, said that the Application dated 8/16/2021 to the Zoning Board of Appeals appeared not to count.

Sharon Clarke, Vice Chairperson, observed that there was a lot of sloppy work involved with this case. A letter dated 6/29/2021 went to Robert Francis who left the Building Commissioner position in December of 2020. Mr. Banda started on January 5, 2021 and he left the position in August 2021. Both of these people worked part time hours. She then said she had been told that the then Planning Director investigated but decided not to take action on this matter but wondered if this had been conveyed to the Petitioner.

Attorney Sheehan responded regarding the filing fee issue and alleged that the reason for the delay in payment was because the Assessor's office was calculating the fee for the abutters list and it was suggested she wait until that was calculated before paying the filing fee.

Attorney O'Neil observed that there was nothing in the Application instructions that specified the paying of a fee.

Sharon Clarke, Vice Chairperson, again inquired whether the Petitioner had had any communication with the current full-time Building Commissioner.

Attorney O'Neil said the Petitioner filed the enforcement request which was the letter that the ZBA already had in its possession, dated June 29, 2021.

Sharon Clarke, Vice Chairperson, stated that the current full-time Building Commissioner had not yet been hired at that time. She mentioned that one of the issues she was having was that the Petitioner was asking the Zoning Board to compel the Zoning Enforcement Officer (Building Commissioner) to enforce a Special Permit of the Earth Removal Committee under a General By-law. She remarked that one of the complaints of the Petitioner was that it had no enforcement or response from the Zoning Enforcement Officer. She stated that the Town has had a full-time Building Commissioner since August 2021 and inquired if they had any conversation with him yet or if they even had picked up the phone.

Attorney Sheehan was not aware of the "revolving door" at the Building Commissioner's office but claimed she had picked up the phone a number of times and had not received any responses. She also said that she had filed some things in writing and in emails. She stated this was a serious matter and that it was quite incomprehensible to her as to why no one from the Town had replied to her, including the Earth Removal Committee.

Mark Poirier, Member, observed that the Petitioner obviously believed that this issue should be before the Board. However, he stated that the Board did reach out to Town Counsel and that it was her opinion that, without indication from the Earth Removal Committee that A.D. Makepeace was somehow in violation of its permit/s, there was little opportunity for the Zoning Board of Appeals to challenge the use or to enforce a permit issued pursuant to the General By-laws.

Attorney Sheehan pointed out that, to be clear, the Petitioner was not asking to enforce Earth Removal Permits, but rather, it was seeking enforcement of zoning by-laws that prohibit commercial activity on residential land. She stated that a person could claim that the activities that were occurring were under a permit, but the subject land was being used for a commercial operation in plain view.

Mark Poirier, Member, remarked that the Petitioner was alleging that this case falls under the Zoning By-law but everything he had heard so far indicated that it falls under the General By-law.

Attorney Sheehan argued that 3 of the project sites have no earth removal permit at all, so the Board could not rely on that "excuse" for those 3 sites.

Attorney O'Neil stated that this matter presented a clear zoning violation, as the Zoning By-law contains a Table of Uses which says that anything not permitted is prohibited. Earth removal is permitted in the Residential/Agricultural district only with the approval of the Earth Removal Committee.

Stephen Gray, Chairman, again pointed out that this approval was pursuant to the General By-laws.

Attorney O'Neil remarked that this was correct but that for 3 sites there was no permit and the only recourse was to the Board.

Stephen Gray, Chairman, wanted to return to what Vice Chairperson Clarke had mentioned previously about conversations. He said that assuming there were 3 mining operations that were ongoing without proper permitting or any permitting at all, he wanted to know if the Petitioner had thought about speaking to the Earth Removal Committee regarding these 3 specific operations and saying look, issue your permit or not, but we need some action taken on this so we can move forward and decide what we want to do.

Attorney Sheehan remarked that she wanted to clarify that those 3 sites where there was no earth removal permit -- most of the work was already done there and that this demonstrated how A.D. Makepeace had been skirting and evading the earth removal permits and also conducting commercial mining on residential land without permits.

Stephen Gray, Chairman, inquired whether A.D. Makepeace had discussed these 3 unpermitted sites with anyone from Pine Barrens or the Earth Removal Committee and the answer was in the affirmative.

Stephen Gray, Chairman, noted that in the submissions of the Petitioner it was alleged that there had been no action taken or any votes taken.

Attorney Sheehan commented that when Mr. Garrison as the Chairman of the Earth Removal Committee was first informed of the unpermitted sites, his response was to call Jim Kane at Makepeace and tell him that Jim's understanding of the earth removal by-law was wrong and that, yes, Makepeace did have to pay earth removal fees for sand and gravel taken from the property even if it was selling it to cranberry bog owners. That is recorded in the video.

Sharon Clarke, Vice Chairperson, inquired if this video was available and was told that it was.

Attorney Sheehan then remarked that she had photographs and could present live testimony from people like herself. She stated that she was an attorney with 38 years of practice in environmental law. She worked formerly at the Attorney General's office enforcing environmental laws. She said that she was not making this up and neither was the expert of the Petitioner, Patrick Garner, who himself had 30 years of experience as a hydrologist, soil expert, and wetlands scientist.

Stephen G. Gray, Chairman, thanked Ms. Sheehan and then recognized Member Casey on the issues of proper jurisdiction and filing deadlines.

Frank Casey, Member, first inquired whether the Petitioner desired to save pine barrens throughout the area and not just in the Town of Carver, as he was familiar with terrain that was similar in the Towns of Plymouth and Wareham.

Attorney Sheehan stated that the Petitioner, Save the Pine Barrens, Inc. is a non-profit membership organization whose mission is to protect, steward, and preserve the rare Atlantic coastal Pine Barrens forest, one of three on earth that extends throughout southeastern Massachusetts and throughout Cape Cod and part of the islands. That is its mission, she said.

Attorney Sheehan went on to say that the pine barrens in Southeastern Massachusetts are extremely rare and very fragile and they are characterized by large amounts of sand and gravel and by forests and soils

that have accumulated over tens of thousands over years. She claimed that when they are strip mined and trees are removed by clear cutting them and the vegetation and the stumps, too, millions of cubic yards of sand and gravel are removed that would otherwise provide protection of those soils and forests. She claimed that this sand and gravel somehow contributes to the sole source of drinking water for all 7 of the towns in the region. She alleged that unregulated strip mining was threatening the ground water supply and as the towns in the region were said to all rely on the Plymouth-Carver aquifer, she concluded that unregulated strip mining threatens this water supply and that this had been studied previously.

Attorney Michael Crossen, Partner at Foley & Lardner, Boston Counsel for A.D. Makepeace, was recognized and told the Board that he had been the attorney for Makepeace for about 20 years and was proud of working for it. He wanted to make the point that if the Board were to move beyond the jurisdictional issues, he would request that the Case be moved to a different time. His reason was that, in his opinion, it was unusual in a forum like this and in this context that the employees, the persons that work for a company, outnumbered the persons that came from various places around the commonwealth to listen to the argument of groups like Save the Pine Barrens, but they were present and he was sure they could not hear him and he doubted they could hear the Board Members (it is noted that the hearing room was filled to capacity and there was an overflow crowd extending down the hallway).

Attorney Crossen went on to say that he believed this matter ought to be resolved on the procedural issues, as the Petitioner could not make a colorable argument to support its claims. He stated that he wished to address the two procedural items raised, the second one first.

Attorney Crossen stated that it was incomprehensible to him that counsel for the Petitioner would make the arguments that it did regarding the 3 letters and missing filing deadlines. He remarked that 3 letters may have been sent but that it was wrong of the Petitioner to attempt to bootstrap itself forward to avoid the mistake it had made by not appealing to the Board after the first letter (dated April 6, 2021) and the failure of the Building Commissioner to make any response to that.

Stephen G. Gray, Chairman, said "or the second letter (dated May 13, 2021). What about the third letter (dated June 29, 2021)?"

Attorney Crossen claimed this was even worse for the Petitioner because of the question of timing and that it should have appealed and been judged by the date of the first letter pursuant to the statute.

Stephen G. Gray, Chairman, asked why that should be the case.

Attorney Crossen responded by saying that, as you pointed out already, the statute of limitations requires the Building Commissioner to respond within 14 days.

Stephen G. Gray, Chairman, inquired whether the clock restarted after the second letter was sent.

Attorney Crossen responded by saying that it does not because if that were the case, the Petitioner could give the Board another letter tomorrow to cure the defect and the reality is you simply cannot do that. That is not how the law works. That is one concern he said he had regarding the lapse of time issue.

Attorney Crossen continued by saying that the other point he wanted to make was that he found it incomprehensible that attorneys like him that have been practicing law for as long as he had would say to the Board they did not know there was a filing fee. There is always a filing fee, he said, as parties must

pay for the case to be published and for notice to those persons who are within the appropriate distance of the site.

Attorney Crossen next spoke to his other point concerning the first procedural/jurisdictional issue raised, which he said, in truth, he found especially compelling. He maintained that the General By-law makes it very clear that the committee with jurisdiction over earth removal is the Earth Removal Committee and, in fact, enforcement of the earth removal by-law is with the Earth Removal Committee. He stated that the Petitioner had argued to the Board that it should be able to come before it because this case presents a zoning issue since earth removal is referenced in the Table of Uses in the Zoning By-law. However, he pointed out that it was only noted there as a cross reference to the General By-law with direction that in a residential/agricultural district earth removal is allowed by right provided that one has received an earth removal permit from the earth removal committee under the General By-law. He remarked that this fact was indisputable. He offered to brief the issue for the Board, if necessary, despite the fact that he was aware that Town Counsel had already offered an opinion to the Board which supported his position.

Stephen G. Gray, Chairman, told the parties that after having sat on the Board for as long as he had and most of the rest of the other Members also for many years, it was sometimes the situation that he would disagree with Town Counsel. He observed that he did not march in lockstep with its opinion in every case. He observed that when the Board gets an opinion, it does pay attention to it. He acknowledged that the Board could be influenced by it or persuaded by it or, as in his case, sometimes not at all.

Attorney Crossen stated that it was his opinion that it was very clear where the jurisdiction lay in this case and it was not with the ZBA. He stated that he did not believe it was even arguable.

Stephen G. Gray, Chairman (addressing Attorney Crossen), remarked that The Pine Barrens folks appeared to be sincere and that they had expressed great frustration with the Town, most especially the Earth Removal Committee and the predecessor Building Commissioners, trying to get their attention. He stated that they now have come before the ZBA because they have not gotten anybody to pay attention in these other forums, despite what they feel is strong evidence that they have accumulated. So now they are here. If they are here improperly, he asked, where do they go?

Attorney Crossen stated that the Petitioner was before the ZBA improperly and if it believes it has valid claims to pursue, then it should return to the appropriate jurisdictional committee in this Town or go to Court.

Attorney Crossen stated that the reality was even though the Petitioner voiced its frustration, this was due to the fact that the Committee determining their claims (the Earth Removal Committee) found they were not accurate. The Earth Removal Committee declined enforcement. It was not that it did not pay attention or simply disagreed with the Petitioner. He observed that, yes, the Petitioner may well have an appellate right and it may well be able to go to Court but this forum, the Zoning Board of Appeals, was not the proper forum.

Stephen G. Gray, Chairman (addressing counsel for Save the Pine Barrens), observed that Counsel for Makepeace at the end suggested the very same remedies he had mentioned at the beginning of this case. Chairman Gray stated that the Petitioner could go to Court and apply for a Temporary Restraining Order or it could go back to the Earth Removal Committee and the new Building Commissioner and have at it again and if the latter approach did not satisfy it, go to court if it were so inclined.

Attorney O'Neil remarked that to apply for a temporary restraining order, one needed to show it had exhausted all administrative remedies.

Stephen G. Gray, Chairman, observed that was what the Petitioner seemed to have suggested.

Attorney O'Neil responded by saying that he was not suggesting that. He went on to say that with respect to the first point made by counsel for Makepeace, that is, that the Petitioner should have appealed to the Board following the sending of the first letter (dated April 6, 2021), he explained that the first letter was very different than the letter of June 29, 2021, and that the first letter was an omnibus letter not specific at all that just made a shotgun complaint about A.D. Makepeace and asked for cessation of all activities. Whereas, he said the letter of June 29, 2021 was very specific about 6 different sites and specific violations. He maintained that any argument that the appeal period should have been measured from the date of the first letter involved "two different species, two different animals."

Attorney O'Neil next turned to the argument concerning how the Petitioner could not know there was a filing fee. He responded by asking how was it to know? He said the Petitioner had looked carefully at all the instructions and no regulation had been published that there was a filing fee or how it was calculated and that the Petitioner paid the filing fee as soon as it knew what it was.

Attorney O'Neil next referred to comments that were made relating to the cross-reference to the General By-law in the Zoning By-law regarding earth removal activities. He again remarked that this was no argument at all because the Petitioner took the position that the violations alleged in this case related to use which is in the Zoning By-law and the fact that the Zoning By-law cross-references to the Earth Removal Committee and the General By-law does not divest the Board of jurisdiction or detract one iota from the fact that zoning violations are being alleged.

Attorney Sheehan again remarked that the Earth Removal Committee had not responded to the requests by the Petitioner for enforcement and that it has talked and talked about procedures and policies and how to improve enforcement mechanisms. She stated that counsel for Makepeace was absolutely wrong when he said that one of the remedies available to the Petitioner was that it should be going to the Earth Removal Committee when it had already been denied relief there. She stated that there has been no action from the Earth Removal Committee, despite the presentation of extensive evidence, except to go along with what she characterized as a "farce." She concluded by saying that if the ZBA wanted to ignore that evidence, that was its choice. However, she requested that the Board make a clear decision and take a vote whether it was denying or granting the request of the Petitioner for enforcement.

Stephen G. Gray, Chairman, stated that the use of the word "ignore" was a bit over the top and told counsel for the Petitioner that the Board did not ignore cases that are before it properly. He said what he was hearing in this case was a bit like the previous case, that is, at some point conversations were happening and then they stopped out of frustration. He remarked that he did not know which side was to blame for this, or whether it was both, but that a level of frustration was continuing. He wondered whether the parties would be willing to have a resumption of those conversations that were had earlier – is that something they would be open to?

Attorney Sheehan stated that the Petitioner was continuing to have conversations with various officials and members of the Town and that it had never ended any conversations whatsoever.

Stephen G. Gray, Chairman, asked counsel for Makepeace if he would be willing to continue having discussions with the Pine Barrens folks as to how best to address their concerns. He said he had seen in the

submissions there had been attempts to continue conversations with at least one Makepeace official that he believed had been referred to as the CEO.

Attorney Sheehan told the Board that she had never had any conversations with Mr. Kane and that all he had ever done was besmirch and slander her character.

Stephen G. Gray, Chairman (addressing Mr. Kane from Makepeace, who was present), said he remembered reading that he had a conversation at some point with the folks from Save the Pine Barrens. He suggested that conversations should fire up again to determine if there was a way to address their concerns, specifically, if there was any way to address the concerns they bring to this Board, not on the procedural issues, but rather, about mining going on at 3 sites that have not been permitted by the Earth Removal Committee and at 3 other sites where permits have been issued but mining is supposedly occurring for non-agricultural purposes which would not make them exempt.

Stephen G. Gray, Chairman, concluded by saying that, without getting into procedural or jurisdictional issues, he was asking Mr. Kane if he would be willing to have ongoing, constructive, and productive conversations with the folks on the other side to see if everyone could arrive at an understanding and an arrangement to address their concerns. He stated that he feared that regardless of what the Board did, this case would end up in court with the result that substantial legal fees would be incurred, as this was going to be a complicated and lengthy case involving a lot of evidence and it would not be good for the company either from a public relations standpoint – so all the more reason to have these conversations. He asked Mr. Kane if he would be willing to do that.

Mr. Kane replied that in order for us to have useful conversations, both parties have to be operating in good faith. “We will operate in good faith.”

Stephen G. Gray, Chairman, thanked Mr. Kane and told him that was all he needed to hear.

Mr. Kane then observed that the Earth Removal Committee had received a complaint previously and had scheduled a Saturday morning inspection of the 3 permitted sites that we say are operating within their permits and there was also an independent engineer present who we allowed on our property. Attorney Sheehan participated in those inspections as well and we were found to have been within our permits. He said Makepeace would be happy to meet with anyone.

Stephen G. Gray, Chairman, recognized that the parties had a lot to say on the merits of the case. He remarked that the conversation kept slipping in that direction and he needed to keep focused on the procedural/jurisdictional issues at the outset. He said he had identified a couple of those issues even before the Board had reached out to Town Counsel and that these issues would need to be considered by the Board if it were compelled to come to a decision. So in the interim he suggested a Continuance of the Hearing to allow for hopefully productive conversations to occur and he emphasized that these conversations needed to be constructive on both sides. He stated that if the parties returned and reported no progress, then the Board would make a decision.

Stephen G. Gray, Chairman (addressing Attorney Sheehan), told her that the Board would not duck this case and if she thought that considering jurisdictional or procedural issues was “ducking,” then she should know better. You and I are both attorneys, he said, and we know that the jurisdictional issue comes first.

Stephen G. Gray, Chairman, asked next for any comments from the public.

Sharl Heller, President of the Southeastern Pine Barrens Alliance asked the Board to allow the Petitioner to play its presentation which it had brought to the Hearing.

Stephen G. Gray, Chairman, responded by stating that the Board was not taking the position that it could not be shown because of procedural or jurisdictional issues, but rather, he was saying for the time being he wanted to hear from members of the public who had attended the meeting and because of the lateness of the hour, the Board might need to come back to that at its next meeting.

Frank Mand, Vice President of the Pine Barrens Southeastern Pine Barrens Alliance, stated that he was present because he was concerned about the protection and preservation of the pine barrens, a globally rare ecosystem. He remarked that his organization worked to build alliances and to educate people. He stated that its mission was the protection of the aquifer and the preservation of rare species and that there were over 200 rare species of plants and animals in this ecoregion that contributed directly to the quality of our air and the quality of our ground, the flowers that grow, and the birds we have. He said that once you start stripping away these things for temporary financial gain, great permanent damage is done. He stated that their alliances are with such other organizations as Mass. Audubon, Manomet, and Wildlands Trust. He observed that a municipal vulnerability preparedness grant through the Town of Plymouth had just been won, mainly organized by environmental groups in Plymouth. He told the Board that it was his belief that regardless of the jurisdictional issues involved in this Case that may prevent the Board from debating the merits fully, more needs to be done in the community and every community to protect and understand the value of the pine barrens ecosystem and how critical it is to protecting our quality of life – everyone's way of life.

Stephen G. Gray, Chairman, responded by saying that he believed he could speak for everyone on the Board that it understood how critical this area was, this pine barrens area. He remarked that the Board had read through all the paperwork, and that it "got it." But, as he explained, the Board was compelled to follow the law and so as sympathetic as it might be on the merits of an issue, and he said we have slipped into some of the merits tonight, he suggested we are putting the cart before the horse when we do this. Again, he said, "We get it." However, he announced the Board did not make decisions based on the personal views, or biases and sympathies of its Members – that is not what it does. Instead, it identifies the laws that are applicable and then applies them to the facts and follows wherever that takes them.

Seth Calhoun, resident of Tremont Street, Carver, and former employee of A.D. Makepeace, said that when the Pine Barrens people attacked A.D. Makepeace Company, they were attacking a company that has done more for the environment than any other organization or company in the area. He stated that he began working for Makepeace in 1950 and knew of many conservation projects in which it had been involved over the years.

Attorney Crossen then spoke and said that the reason the rest of the many people who were present were declining to comment was because they wanted allegedly to keep the discussion on the jurisdictional level and that they were as tired as he was.

Stephen G. Gray, Chairman, summarized by saying that he believed that a promise had made by counsel on each side and appropriate people from Makepeace that they would have some conversations that may or may not yield productive results, but that he wanted to see where those went. He was not inclined to have the Board make any decisions at that time concerning jurisdiction or procedure. He said that he thought those issues had been well discussed already and that it was unnecessary to go down that road again at this time. He stated that if the discussions that he referenced did not bear fruit then the Board would make a decision at least on the procedural/jurisdictional issues which is where it starts with all of its

cases. He mentioned again that the next meeting was scheduled for the date of October 26, 2021 and that would give the parties on both sides of the issues a good solid month to have some conversations that hopefully would yield positive developments and less acrimony and less frustration on the part of the Petitioner. He said that frustration, at least for him, came through loud and clear.

Vote to adjourn until October 26, 2021. All in favor. So moved.

The meeting was adjourned.