

PGCPB No. 00-119(C)

Permit No. NCU-80563-99U

Prince George's County Certification of Nonconforming Use Permit No. 80563-99U

Applicant: Cherry Hill Construction, Inc., Owner  
Location: North side of Sheriff Road and east of Marblewood Avenue  
Request: Certification of a nonconforming surface mining operation

### C O R R E C T E D R E S O L U T I O N

WHEREAS, on December 16, 1999, Cherry Hill Construction, Inc., filed an application for Certification of a Nonconforming Use for approximately 71.5 for a certification of a nonconforming surface mining operation in the I-1 and I-2 Zones; and

WHEREAS, the advertisement of the public hearing was posted on the property in accordance with Section 27-244(f)(4) of the Prince George's County Zoning Ordinance; and

WHEREAS, the application for Certification of a Nonconforming Use, also known as Case #NCU-80563-99U, was presented to the Prince George's County Planning Board by the staff of The Maryland-National Capital Park and Planning Commission on Thursday, June 22, 2000, for its review and action in accordance with Sections 27-244(a)(1) and (f)(1)(A) of the Prince George's County Code; and

WHEREAS, the Technical Staff Report released May 24, 2000 recommends DENIAL; and

WHEREAS, on June 22, 2000, having considered the recommendation in the staff report and heard testimony from the staff and applicant, the Prince George's County Planning Board ~~\*disagrees~~ [agreed] with the staff analysis and recommendation.[and adopted the same as its own.]

NOW, THEREFORE, BE IT RESOLVED, that pursuant to the provisions of Subtitle 27, Prince George's County Code, the Prince George's County Planning Board APPROVED Nonconforming Use No. 80563-99U.

BE IT FURTHER RESOLVED, that the findings and reasons for the decision of the Prince George's County Planning Board are as follows:

- A. Location and Field Inspection: The property is located immediately southeast of the Town of Cheverly. It is on the north side of Sheriff Road, the east side of Marblewood Avenue and the west side of Cabin Branch Drive. It has frontage on those three roads. The property is currently being mined.

\*Denotes correction  
[Brackets denote deletion]  
Underlining denotes addition

- B. History: The property was placed in the I-2 Zone on November 29, 1949, when it was incorporated into the Maryland-Washington Regional District. At that time, surface mining was a permitted use in the I-2 Zone. The property has retained its I-2 zoning designation.
- C. Request: The applicant requests certification of a nonconforming surface mining operation. The use became nonconforming on January 25, 1955, when the Zoning Ordinance was amended to require a special exception for surface mining in the I-2 Zone.
- D. Surrounding Uses:
- Northeast - Industrial uses in the I-2 Zone.
- East - Industrial uses, including warehousing, in the I-1 Zone.
- Southeast - Industrial uses in the I-1 Zone.
- South - Single-family detached residences in the R-55 Zone.
- Southwest - The Chapel Oaks Volunteer Fire Department in the I-1 Zone.
- West - Industrial uses in the I-1 Zone.
- Northwest - Single-family detached residences in the R-55 Zone.
- E. Certification Requirements: Certification of a nonconforming use requires that certain findings be made. First, the use must either predate zoning or have been established in accordance with all regulations in effect at the time it began. Second, there must be no break in operation for more than 180 days since the use became nonconforming. Section 27-244 sets forth the specific requirements:
1. **In general, a nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) certifies that the use is really nonconforming and not an illegal use.**
  2. **Application for Use and Occupancy Permit:**
    - a. **The applicant shall file for a use and occupancy permit.**
    - b. **Along with the application and accompanying plans, the applicant shall provide the following:**

- (1) Documentary evidence, such as tax records, business records, public utility installation or payment records and sworn affidavits showing the commencing date and continuous existence of the nonconforming use.**
- (2) Evidence that the nonconforming use has not ceased to operate for more than 180 consecutive calendar days between the time the use became nonconforming and the date when the application is submitted or that conditions of non-operation for more than 180 consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations or were due to the seasonal nature of the use.**
- (3) Specific data showing:**
  - (i) The exact nature, size and location of the building, structure and use.**
  - (ii) A legal description of the property.**
  - (iii) The precise location and limits of the use on the property and within any building it occupies.**
- (4) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.**

F. Documentary Evidence: The applicant has supplied the following documentary evidence:

1. Letter (Kohanzadeh to McDonald), dated February 10, 1972. This letter from the Department of Inspections and Permits to Capitol Clay Products, required all work on the property to stop until the proper permits were issued.
2. Letter (Kahler to Novak), dated February 16, 1972. This letter was a response to the previous letter requesting that the Department of Inspections and Permits hold any further action because the property owner was making efforts to comply with the County Code.
3. Letter (Novak to ■Gentlemen■), dated February 22, 1972. This letter was a response to the previous letter stating that the Department of Inspections and Permits required all work to stop until permits were issued.

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4. Approved Grading and Sediment Control Plan, March 1972.
5. Two Ben Dyer Associates work orders: # 3468, dated June 19, 1972, and #3874, dated August 11, 1972, providing, according to the applicant, ■compelling evidence that the grading permit for mining operations was issued sometime between June 12 and June 19, 1972.●
6. Photocopies of three aerial photographs, dated February 1973, January 1976 and March 1992. These photographs show the existence of the sediment control basin in the location shown on the grading and sediment control plan.
7. Memorandum, Wilkerson to Iglhaut, dated April 11, 1991. This memorandum, sent as an internal M-NCPPC referral response on a Preliminary Plat application that was subsequently withdrawn, notes that the property originally contained the West Brothers Brickyard and that in 1991 the property contained several heavy industrial uses, including Brandywine Sand and Gravel, Arundel Asphalt and Dico Concrete Construction.
8. Memorandum, Wilkerson to Jordan, Page 1 only, dated February 3, 1998. This memorandum also identifies the property as the former West Brothers Brickyard.
9. Affidavit of Robert A. Bilo, signed December 1, 1999. Mr. Bilo affirms that he was the president and senior partner on American Resources Management Group Limited Partnership (ARMG) in 1985, which subsequently purchased 88 acres to continue mining. He affirms that ARMG continuously mined the property from 1985 to 1988. A break from 1988 to 1993 was the result of a pending lawsuit. Cherry Hill Construction resumed mining operations in the fall of 1993. From 1994 to the present, Cherry Hill Construction has mined on the property.
10. Affidavit of Edward W. Lyle, dated November 22, 1999. Mr. Lyle affirms that he was president of West Brothers Brick Company. He states that West Brothers Brick Company acquired the site and began brick making in 1944 and extracted clay from the site between 1944 and 1971. He affirms that West Brothers sold the site to ARMG in 1985.
11. Affidavit of Dennis P. Goss, dated November 30, 1999. Mr. Goss affirms that from 1980 to 1986 he was employed with Arundel Asphalt Products Company, Inc., where he personally viewed mining operations or purchased clay from the property known as West Brothers Brink Company. He stated that his viewing of mining and/or purchasing of clay was ■continuous in nature and dictated by market forces.● He concluded by stating that it never appeared that the property owner abandoned the mining operation.

12. Affidavit of John Spivey, dated November 30, 1999. Mr. Spivey affirms that from 1973 to 1983 he was employed with Brandywine Sand & Gravel, where he personally viewed mining operations or purchased clay from the property known as West Brothers Brink Company. He stated that his viewing of mining and/or purchasing of clay was ■continuous in nature and dictated by market forces.● He too concluded by stating that it never appeared that the property owner abandoned the mining operation.
13. Affidavit of Peter Babb, dated November 30, 1999. Mr Babb affirms that from 1972 to 1979 he was employed with Marvaco, Inc. Like the previous two affidavits, he also personally viewed mining operations or purchased clay from the property known as West Brothers Brink Company. He stated that his viewing of mining and/or purchasing of clay was ■continuous in nature and dictated by market forces.● He too concluded by stating that it never appeared that the property owner abandoned the mining operation.
14. Affidavit of Vaseleos Colevas, dated December 10, 1999. Mr. Colevas affirms that in 1950 he became employed with Arundel Supply Company and that in 1954 he became president of Arundel Supply. Arundel Supply provided ready mix concrete for the property. He further affirms that in 1954 West Brothers Brick Company owned and operated a clay mining and brick manufacturing company on the property, mining clay and making bricks for the Safeway Warehouse constructed in 1954. Further, between 1975 and 1986 he affirms that he was ■regularly there on a daily working basis● and witnessed the continuous mining of clay at the site.

Based on this evidence, the applicant provides the following timeline:

1944 - 1971	West Brothers Brick Company, Inc., purchased the property and mined from 1944 - 1971.
1971 - 1985	West Brothers conveyed 36 <sup>7</sup> acres to Capital Clay Products, Inc., and Capital mined from 1971- 1985. (In the early 1970s portions of the property were conveyed to Hutchinson Brothers, Marvaco, Brandywine Sand and Gravel and Arundel Asphalt Products.)
1985 - 1988	American Resources Management Group (ARMG) purchased the property from West Brothers and mined from 1985 - 1988.
1988 - 1993	Metro Development Management Group v. American Resources Management Group. During this court case, mining operations ceased.

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1993 - 1998	Cherry Hill Construction Company contracts with ARMG and mined the property from 1993 - 1998.
1998 - present	MDE Site Complaint SC-0-99-0026 filed. <u>*(This complaint triggered the certification process.)</u>

G. Town of Cheverly: The Mayor and Town Council of the Town of Cheverly has submitted a letter in support of the certification. In its letter, the town recommends the following conditions be attached to the approval of this application:

1. **No streets within the Town of Cheverly will be used for any commercial transportation to or from the site of the strip mining.**
2. **Litter and refuse on the property bordering Marblewood Road and 62<sup>nd</sup> Avenue and bordering the residential areas in the Town of Cheverly shall be cleared once every month.**
3. **The 1977 Covenants running with the land (regarding the West Brothers Brick Company, Inc.) must be strictly adhered to. In particular, regarding this project:**
  - A. **No vehicular access to or from the strip mining site shall be opened onto Marblewood or 62<sup>nd</sup> Avenue or any area bordering the Town of Cheverly (except pedestrian or bicycle access).**
  - B. **The use of the property for strip mining shall not damage or disturb the buffer established in the above Covenants, i.e., the buffer that consists of 100 feet of undisturbed wooded areas next to the residential areas of Cheverly and the 50 feet of undisturbed wooded areas bordering on 62<sup>nd</sup> Avenue and Marblewood pursuant to Exhibit B attached. (Not attached to this staff report.)**
  - C. **Noise shall register no more than 70 dBA as measured from the outer edge of the buffer along Marblewood and 62<sup>nd</sup> Avenue or within the Town of Cheverly.**
  - D. **Outdoor storage of equipment, vehicles, etc., shall be screened from the residential areas.**

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While the \*Planning Board [staff] agrees that these conditions will help the use be more compatible with surrounding uses, compatibility is not an issue in nonconforming use cases. It is doubtful, given that certification of a nonconforming use is a permit issue, that any conditions would be enforceable. However, the applicant \*stated [started] these \*are [as] part of covenants the applicant is party to and they will and do comply.

Two breaks in service are noted in the record. From 1988 to 1993, the \*owner [property] was enjoined from engaging in mining operations \*on the property during litigation. That five-year break was beyond the owner's control and represents an acceptable break in operation. Further, the applicant has been prevented from operating since 1998 under a citation from the Maryland Department of the Environment, \*which triggered this certification process.

While the applicant's documentation was heavily oriented toward the more recent years, it is not at all unreasonable that older records would be harder to come by. The Planning Board is persuaded by the large amount of documentation and the testimony of Vaseleos Colevas, a former employee and president of the Arundel Supply Company. Mr. Colevas, who has no financial interest in this property testified and provided a sworn affidavit that he was personally aware of mining activity on this property since the early 1950s. Mr. Colevas and other experts testified that the mining of clay is both seasonal and market-driven. Given the large amount of evidence in support of the application and the lack of any against, the Planning Board is satisfied that a mining operation has operated continuously on this site since January 25, 1955, except for breaks which were beyond the owner's control or breaks that were seasonal in nature. Therefore, the application satisfies the criteria for approval. [and is approved.]

BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council of Prince George's County within thirty (30) days following the final notice of the Planning Board's decision.

\* \* \* \* \*

This is to certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner McNeill, seconded by Commissioner Boone, with Commissioners McNeill, Boone, Brown and Hewlett voting in favor of the motion, at its regular meeting held on Thursday, June 22, 2000, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 20<sup>th</sup> day of July 2000.

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Trudye Morgan Johnson  
Executive Director

By Frances J. Guertin  
Planning Board Administrator

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