

SEP 28 2009

# Zebley Mehalov & White, P.C.

Attorneys at Law

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1253-012  
MMM:mau

September 24, 2009

Gretchen A. Mundorff, Esquire  
WATSON MUNDORFF BROOKS & SEPIC  
720 Vanderbilt Road  
Connellsville, PA 15425

Mr. Louis J. Curry  
Post Office Box 449  
Uniontown, PA 15401

Robert P. Ging, Jr., Esquire  
2095 Humbert Road  
Confluence, PA 15424-2371

Mr. Charles D. Curry  
Post Office Box 449  
Uniontown, PA 15401

Mr. John M. Heath  
6 Clark Street  
Belle Mead, NJ 08502-4612

Amerikohl Mining, Inc.  
Dunbar Township  
ZHB 09-12

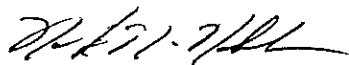
Gentlemen and Attorney Mundorff:

Enclosed you will find copy of Notice of Land Use Appeal which we filed on this date on behalf of Amerikohl Mining, Inc.

Sincerely,

ZEBLEY MEHALOV & WHITE, P.C.

BY



Mark M. Mehalov  
Mark@Zeblaw.com

Enclosure



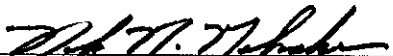


4. The properties are zoned "A-1", Agricultural-Rural, under the provisions of the Fayette County Zoning Ordinance.
5. Appellant filed with the Fayette County Zoning Hearing Board a petition for a special exception to conduct surface mining operations on the aforementioned properties.
6. Hearings were held before the Fayette County Zoning Hearing Board on March 18, 2009, April 29, 2009, and June 10, 2009. The Fayette County Zoning Hearing Board denied appellant's petition by written resolution on August 26, 2009. A copy of the Fayette County Zoning Hearing Board's Resolution 09-12 denying appellant's petition is attached hereto and marked as Exhibit "1."
7. The action of the Fayette County Zoning Hearing Board in denying the petition was arbitrary, capricious, an abuse of discretion, and contrary to law in that:
  - a) Surface mining operations are permitted by special exception in an A-1, Agricultural-Rural Zone. The evidence sufficiently established that appellant was entitled to a special exception.
  - b) The Board erred in finding that appellant failed to meet the burden of proof and that the proposed surface mining operation has the potential to adversely impact the health, safety, and welfare of the residents of the adjoining and surrounding area.
  - c) The Board erred in finding that appellant's proposed surface mining operations are in conflict with Article V, Performance Standards, of the Fayette County Zoning Ordinance.

- d) The Board erred in finding that appellant was required to provide 100% assurances that the health, safety, and welfare of the public would or could be protected; thus, imposing a higher burden of proof upon appellant than what is required by law .
- e) Favorable action on appellant's petition would not have an adverse effect on the health, safety, morals, or general welfare of the community as defined by the Fayette County Zoning Ordinance.

WHEREFORE, appellant respectfully requests that this Honorable Court reverse the cited action of the Fayette County Zoning Hearing Board and direct that appellant be granted a special exception as requested in its petition or, in the alternative, be granted a hearing *de novo* or be remanded to the Fayette County Zoning Hearing Board to receive additional evidence.

ZEBLEY MEHALOV & WHITE, P.C

BY 

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Date: September 23, 2009

## FAYETTE COUNTY ZONING HEARING BOARD

### RESOLUTION 09-12

#### Amerikohl Mining, Inc.

**WHEREAS**, Amerikohl Mining, Inc., 1384 State Route 711, Stahlstown, Pennsylvania, filed a petition before the Fayette County Zoning Hearing Board; and

**WHEREAS**, said petition requests the Board to grant a Special Exception for a Surface Mining Operation on properties zoned "A-1" Agricultural-Rural; and

**WHEREAS**, properties concerned, owned by Louis J. and Charles D. Curry, PO Box 449, Uniontown Pennsylvania and John M. Heath, 6 Clark Court, Belle Mead, New Jersey are located along Camp Carmel Road, approximately one mile northeast of the intersection of said Road and Kingin Hill Road, Dunbar Township, Fayette County, Pennsylvania and are shown on Fayette County Zoning Map as District 9, Map 39 and Lots 1 and 2; and

**WHEREAS**, the Fayette County Zoning Hearing Board finds the following facts:

1. Under the Zoning Ordinance of Fayette County, a Surface Mining Operation is permitted requiring Zoning Hearing Board approval in an "A-1" Agricultural-Rural Zone.
2. The Petitioner plans to conduct a surface mining operation on an approximate 213.5 acre portion of the subject properties by utilizing the block cut method of mining with concurrent back-filling and anticipates being on site for approximately two (2) years and will reclaim the site as agricultural / pastureland.
3. The Petitioner plans to have approximately twelve (12) employees working from between the hours of 5:00 a.m. to 10:00 p.m., Monday through Friday and an occasional Saturday for the proposed mining operation. Trucking will be between the hours of 6:00 a.m. to 4:00 p.m.
4. The Petitioner plans to utilize two (2) bulldozers, three (3) front-end loaders, two (2) rock trucks, two (2) backhoes and various reclamation and support equipment for the proposed mining operation. During evening hours of operation, the Petitioner will utilize strobe type backup warning devices.
5. The Petitioner plans to conduct blasting, only after public notice and approval has been granted by the Department of Environmental Protection, between 8:00 a.m. and dusk. The Petitioner also plans to notify users of the trail and nearby ponds of the intent to blast.

6. The Petitioner plans to utilize contract and company owned haulers to transport approximately thirty (30), twenty-three (23) ton loads of coal from the site per day, which will exit from the site onto Camp Carmel Road to T.R. 547 to T.R. 792 to S.R. 1055 (Dunbar-Ohiopyle Road).
7. The Petitioner plans to bond any roadways with weight limitations, and the haul road from the site will be paved with gravel before it intersects with Camp Carmel Road. A road grader will be on-site at all times to clear debris from the road if required. Also, Camp Carmel Road will be upgraded and areas in front of residential dwellings will be paved or tar and chipped and water will be utilized to suppress dust along Camp Carmel Road.
8. The Petitioner plans to erect signage at the haul road exit / entrance of the subject properties, which will indicate that all trucks must be tarped prior to leaving the site. Truck operators found to be in violation of this requirement will not be permitted to haul materials to or from the site.
9. The Petitioner will not have any truck traffic on the haul route during the time of school bus activity.
10. The Petitioner's past mining operations have affected water supplies in the past and the Petitioner immediately replaced the water supply with a temporary supply, and permanent water supplies were either developed or agreements were reached with the landowners.
11. The Petitioner is insured with Rockwood Casualty Insurance Company of Pennsylvania, which would cover any type of water loss that may be created due to the proposed mining operation on the subject properties.
12. The Petitioner currently holds thirty-nine (39) mining permits in Fayette County of which thirty-four (34) are reclaimed, four (4) are active and (1) one is inactive, with all receiving Special Exception Approval.
13. The Petitioner testified that Rockwood Casualty Insurance Company of Pennsylvania would insure the surface mining operation in the amount of one million dollars per occurrence and umbrella coverage of ten million dollars.

14. The Petitioner's mining permit is currently in the review process before the Department of Environmental Protection and has been notified by the Department of additional information required to complete the permit application.
15. An objector requested that the hearing be adjourned and continued, so as to afford the objectors the opportunity to secure legal counsel. The Board granted the request.
16. A number of individuals expressed concerns regarding the potential for negative impact that may be created from the proposed surface mining operation on the subject properties. The concerns are as follows:
  - a. The loss or contamination of the water shed which provides water to individuals in the Fayette and Westmoreland County areas.
  - b. The affect on fish and other aquatic life and sport fishing.
  - c. The economical impact on businesses that are dependent upon the river and area businesses from the potential of tourism loss.
  - d. The impact upon the users of the trail.
  - e. The impact upon tourism to the trail and river areas.
  - f. The potential for physical injuries to users of the trail and other surrounding natural resources due to blasting.
  - g. The impact upon the bio diversity of the area.
  - h. Fragmentation of the habitat of both wild life and plant species.
  - i. The impact upon Ohiopyle State Park.
  - j. The increased potential for accidents resulting for truck traffic.
17. The Board continued the hearing to afford all concerned parties the opportunity to be heard.
18. The Petitioner waived all applicable time limitations for the continuance of the Hearing.

19. The Board finds that the Petitioner has failed to meet the burden of proof and the proposed surface mining operation has the potential to adversely impact the health, safety and welfare of the residents of the adjoining and surrounding area and therefore, the request is denied for the following reasons:
  - a. The proposed surface mining operation on the subject properties is in direct conflict with Section 1000-102. County development objectives A. 5, of the Fayette County Zoning Ordinance, which states "To protect the environment of the County by giving special attention to preserving and promoting the County's natural assets such as woodlands, streams, rivers and steep slopes" The aforementioned Section gives the Board grave concerns given the close proximity of the proposed use on the subject properties in relationship to several of the County's most signature and vital resources the Youghiogheny River, surrounding recreational areas, such as hiking / biking trails, fishing and swimming area, the Ohiopyle State Park, and the site itself in the form of plant and wildlife. The Board finds that whatever the degree for potential negative impact upon the aforementioned natural resources, no degree of negative impact, regardless of how small it may be, would be acceptable to be placed upon one of the most sensitive and vital areas of Fayette County. The Board weighed heavily upon the property rights of the individuals and Boards responsibility and duty to protect the natural assets and resources of the County in the rendering of this decision.
  
20. The Board also finds the proposed surface mining operation on the subject properties to be in conflict with Article V, Performance Standards, of the Fayette County Zoning Ordinance:
  - a. Section 1000-503 Noise: The Petitioner testified as to projected decibel levels at the perimeter of the subject properties, based on mining activities at other sites, but failed to provide expert testimony to assure compliance with this Section.
  - b. Section 1000-507 Air pollution: No assurances or studies were presented by the Petitioner or expert testimony to establish compliance with this Section.
  - c. Section 1000-510, Water pollution: The Petitioner offered speculative testimony regarding acid mine drainage, thermal pollution, endangerment of aquatic life and sedimentation and its potential negative impact on area water courses and contamination of the Youghiogheny River. Again no expert testimony was offered to determine compliance with this Section.
  - d. Also, the Petitioner testified that during times of blasting on the subject properties, that there was a chance for debris and projectiles to enter upon the adjoining bike / hike trail and other public attractions of the area. The Petitioner did not have any written plans or agreements to protect and warn trail users and others in the area of the intent to blast.

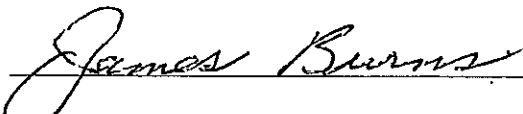
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**Amerikohl Mining, Inc.**  
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21. The Board finds the above-mentioned Sections and facts do not and can not provide one-hundred (100%) percent certainty that the health, safety and welfare of the public would or could be protected. In such a sensitive area of our County, no less than one-hundred (100%) percent assurances would be acceptable.

**NOW, THEREFORE BE IT HEREBY RESOLVED**, by the Fayette County Zoning Hearing Board, the petition of Amerikohl Mining, Inc., after due consideration, be **denied**.

  
\_\_\_\_\_  
Jim Killinger, Chairman

\_\_\_\_\_  
Date: 8/26/09

  
\_\_\_\_\_  
James Burns, Secretary

\_\_\_\_\_  
Date: 8/26/09

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY,  
PENNSYLVANIA

AMERIKOHL MINING, INC.,	:	
	:	
Appellant,	:	
	:	
vs.	:	
	:	
FAYETTE COUNTY ZONING	:	
HEARING BOARD,	:	
	:	
Appellee.	:	No. _____ of 2009, G.D.

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that a copy of the within document was served as follows:

1. Service by Hand Delivery.

David A. Bukovan  
 Chief of Zoning  
 Office of Planning, Zoning and  
 Community Development  
 Fayette County Courthouse  
 61 East Main Street  
 Uniontown, PA 15401

2. Service by First Class Mail, Postage Prepaid

Robert P. Ging, Jr., Esquire  
 2095 Humbert Road  
 Confluence, PA 15424-2371  
*Attorney for Objectors*

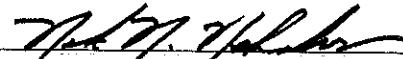
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*Solicitor for Fayette County ZHB*

Louis J. and Charles D. Curry  
P.O. Box 449  
Uniontown, PA 15401  
*Landowner*

John M. Heath  
6 Clark Court  
Belle Mead, NJ 08502-4612  
*Landowner*

ZEBLEY MEHALOV & WHITE, P.C.

BY



Mark M. Mehalov, Esquire  
Attorneys for Appellant

Date: September 23, 2009