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AB minutes February 14, 2013

Town of Washington Board of Appeals

PO 408, Washington, ME 04574

February 14, 2013

The meeting opened at 7:02 pm.

Present were: Chairman: Norman Casas; Vice-chair/Secretary: Henry Chapman; Members: Dorothy Sainio; Lowell Freiman; Alternates: Jim Kearney and Chris Vigue; CEO Bob Temple. Absent: Member:George Carlezon Attendees: Henry Sainio; Ted Johnston and David Studer.

Mr. Casas appointed Mr. Vigue to sit for Mr. Carlezon. Mr. Casas noted that tonight was a pre-application meeting with Mr. Johnston about the variance appeal, not a pre-hearing meeting which would take place if an application were submitted..

Mrs. Sainio moved to accept the **minutes of January 10, 2013**. Mr. Chapman seconded and all voted in favor.

Old business

: Mr. Temple said the Appeals Board had finished its consideration of changes to the Appeals Board Ordinances. Mr. Casas noted that there would be a public hearing on the changes and they could be modified then if necessary.
New business

: Mr. Casas noted that J.C. Stone is seeking a variance to dig beneath the water table on the rock lot off of Old Union Road. It is still owned by Burton Ludwig. Mr. Johnston said he was in process to get a variance from the Department of Environmental Protection (DEP) to dig beneath the water table Mr. Temple had advised him to ask the Appeals Board first. Mr. Johnston said that since the DEP requires the same public hearing and public notices as the Town, it made sense to combine them to avoid confusion. He would probably not get the DEP variance before the Town issued one, although it would not be unusual for the Board to make it a condition for issuing it. Mr. Casas said the Board would be listening to the public and the members of the Board before going forward. Mr. Temple explained that J.C. Stone was seeking a variance of the Town ordinance as well as that of the State. The Town had put in a variance provision so that anything that required a variance would have to come before the public in the Town. He cited an occasion when a variance had been given by the State and it had never come to the Town.. The Town had not gotten approval from the DEP to adopt an ordinance, but now the DEP had authorized the Town to adopt one. The DEP has authorized the Town to administer the ordinance as well as that of the DEP. Mr. Studer thought that was just in the Shoreland and this lot was not in the Shoreland. Mr. Temple said he still had been required to register the entire Mineral Extraction Ordinance with the DEP before he could enforce it. Mr. Johnston explained that the concern was with the level of expertise which might conflict with the State. Mr. Temple noted that he consulted Mark Stebbins from the DEP on any problem.

Mr. Studer asked the Board for two minutes to speak. He distributed copies of his statement of opinion. He contended that the case should not be presented to the Board and that J.C. Stone did not have standing. Mr. Temple noted that the Appeals Board had to hear the variance request before the State did. Mr. Studer said that had nothing to do with whether J.C. Stone could come before the Appeals Board for what they want. Mr. Casas explained that this was a pre-application meeting which was a courtesy and to ensure that everyone is on the same page. Mr. Studer said that was begging the question. Mr. Casas said the Board would take that up at the pre-hearing and this was only the pre-application meeting. Mr. Studer said they should not file an application. Mr. Casas said that was not for the Board to decide. Mr. Kearney asked why since he thought the Appeals Board heard appeals for variances. Mr. Casas corrected: the Board hears appeals and variances. Mr. Studer said it was a variance from something that had been granted. He contended that this had never been granted. Mr. Johnston said J.C. Stone did have a current permit. Mr. Studer said that if they had a current permit, what they were proposing was either an expansion or an amendment and it had to go to the planning Board first. Mr. Casas thought there might be legal counsel needed on that point, but he would continue with the meeting to get things organized. Mr. Studer said that if they did not have standing, the present meeting was for nought. Mr Casas said that would not be determined at this hearing.

Mr. Kearney questioned the process. Mr. Freiman explained that this was a pre-application meeting and determination of standing would not take place until the next meeting. Mr. Kearney wondered why the Planning Board was not hearing the case first. Mr. Temple felt the Board needed a legal opinion and that would come out of tonight's meeting. Mr. Studer cited the Land Use Ordinance (LUO) p. 130. Article XII .3.B. (Variances): To approve, approve

with conditions, or disapprove appeals for variances from the strict enforcement of the provisions of this Ordinance only as they relate to the space and bulk standards of the district regulations and the performance standards of this Ordinance according to the terms of Section 5 of this Article. A hearing shall not be granted to allow a use or an expansion of a use in a district in which the use is prohibited. He said if the Board could only approve variances of the bulk and space standards, they were asking for something completely different. Those have to do with setbacks, etc. This was different. Mr. Johnson challenged that this was not the applicable section. Mr. Studer was advised to go to p. 132, section 5 and decide which provision A, B, C, or D applied. Mr. Johnston said they were applying for a variance that came under 5. A Mr. Studer did not think A applied as this did not refer to performance standards. Mr. Johnston did not agree.

Mrs. Sainio moved to continue the pre-application meeting and when they had the pre-application meeting, they could establish whether the applicant had standing. Mr. Vigue seconded. All voting members voted in favor. Mr. Casas said Mr. Studer's submission would be placed in the record. Mr. Studer said there was more to it. That was just out of the LUO, but if they looked at the Mining Ordinance, he did not think J.C.Stone had a certificate of legal operation (CLO). Mr. Studer did not think they had a permit under the Mining Ordinance Mr. Johnston said they did. Mr. Temple said they would ask for a legal opinion from Maine Municipal Association (MMA). Mr. Casas felt the Board might get its own legal opinion depending on what the Selectmen thought should be done.

Mr. Johnston distributed a map showing the area that had been excavated. It showed 112 acres in the whole parcel with less than three acres open. He explained the three ponds, and said the regulation was to maintain five feet above the water table, but here the water was trapped. They are pulling out large flat rocks and there can be no blasting. The mine was relatively small in scale. The water from one pond is pumped to another above it every morning. It seeps back down and thus gets recycled over and over. He indicated where the old grout pond was reclaimed and several other closed areas as well. Now they were proposing to go into ground water. For years the DEP had said they did not think it was, but now they do because the water is stained. That requires a permit. They are temporarily in non-compliance, but with permission to operate until this year after which they must shut down.

Mr. Johnston explained the process. Workers drill a series of holes in which they place a compound which splits the rocks. There are natural beds four to five feet deep. The rock is then lifted out from the layer of sediment which had been trapped. The sections are twelve by five feet and two of these would last all year. The whole area they were proposing to work was 28 acres as indicated on the reverse of the map. Mr. Casas noted that they were still quite a distance from the heath. Mr. Johnston showed a dotted line for a temporary storage pond which would move to accommodate the size of the quarry, They proposed to move laterally throughout the lot, although it was unlikely that the whole 28 acres would be available to be opened because of the contours, the grade was steep and water seeks its own level. It would therefore be likely to be done in phases. They had done a year of background study and had drilled wells 100 or more feet deep and had been taking samples to test for water quality and water quantity. They measured water quantity every quarter, nine times. It was heavier in the spring. They had sent water samples out to the State to gauge the quality. They had actually been able to measure the water contours under the land. All of this information is in a draft report which they would provide to the Town as part of their application. They would also provide drawings to show what the post development pond would look like. The State has standards to ensure provision of habitat and safety for egress if someone or an animal should fall in. Monitoring of water levels and water quality would continue throughout the project. They would be testing for materials such as lead, hydrocarbons, and metals. These reports are sent to the State yearly. Mr. Johnston noted that this pit was unlike those mined for aggregate to create asphalt or foundation work. This pit is mined for building stone. He said that at one time Maine was one of the largest producers of granite and cut stone in the United States. Mr. Vigue asked what J.C.Stone's revenue was yearly. Mr. Johnston said they were around \$4,000,000 and they liked to limit it to that since beyond that sum they were chasing dollars. If they did anything contrary to what the Town allows, it would cause them great risk in their business as far as what they could sell. Their major markets are with what they call lead certified architects, and if they have any environmental issues those markets will not purchase the product. He added that J.C.Stone had worked with Mr. Temple and done a lot to improve the quality of the lot since they began the work. They have an exclusive lease with the owner and had done a lot of reclamation. If Mr. Temple suggests anything when he comes for yearly inspections, they act on it right away. All quarries previously not registered with the DEP are now registered. They have been doing all the paperwork for storm water control. It was pretty extensive and they had learned that it is also expensive for a small business.

Mr. Studer stated that when the pit first came before the Planning Board in 1993 he had been the CEO. He said none of the rock mining had been contemplated then. They were just going to pick up rock off the top. As far as he knew, the owner had not been back to the Planning Board for any permit or extension of use that included what had just been discussed. He thought they must be in violation of their permit. His interpretation of the LUO and the Mining Ordinance was that they must come to the Planning Board before they came to the Appeals Board. At the least they should come to the Planning Board for an extension of use under their original permit. It meant an amendment under the current LUO. It was an expansion of use if they wanted to mine under the water. Additionally, the ordinance in effect in 1993 did not have any of the standards now required. He admitted they might be grandfathered for their permit of 1993, but not for an expansion of use. No matter how they approached the situation, he thought they had to come to the Planning Board first.

Mr. Chapman recalled that several years ago in a similar case, the determination was that as long as the mining was within the footprint, the operation was permissible. It did not matter whether the operation was sand and gravel or rock, both were considered a mineral. He said he had not heard anything yet that made him believe the applicant was in violation of what he had been doing for a number of years. He asked for Mr. Temple's opinion. Mr. Temple had not written him up for any violation, but said he had not picked up on the five feet (below the water table.) He had not found a copy of the original permit and therefore had not read the original conditions. Mr. Studer explained what he knew. There was a record of an approval for picking up the rocks from the ground. There were two erosion control ditches and no ponds. He said the Planning Board did not really do findings of fact until he became CEO. He had put something together at the time. George Vanderverter had been chairman at the time, and records were not always kept in the Town Office. Thus, records sometimes went missing. Mr. Studer noted that he was sure because he was there at the time, that the purpose of the operation was to pick up rocks from the surface. They were going to plant trees then. It was not as extensive as the present operation Mr. Chapman thought that had nothing to do with this. He said they were in the mining business which entailed excavation of material. He said the operation was the same, and was smaller, not bigger. He was going down, not sideways. Mr. Casas said the record showed that Mr. Ludwig had stated that he was excavating five to six feet. Mr. Johnston said there was no restriction on the permit except that they not be open more than three acres at a time and they had not exceeded that. The permit was what was in the law and the applicant had gone to court to establish that they had the right to continue operating.

Mr. Temple noted that the Appeals Board could remand this case to the Planning Board for review, and if the parties were not satisfied, they could appeal it. The other possibility was to grant or deny the variance. Mr. Studer said the question was whether the applicant had jurisdiction and the legal advice would tell them, but standing was the issue that needed to be resolved. Mr. Casas pointed out that the Board was only trying to get up to speed, look at the

issues, but make no decisions tonight. They were familiarizing themselves with the case and wanted to provide any needed information to the applicant. Mr. Temple would email them a copy of the by-laws and a checklist of the points they would review for completeness after receipt of an application. The other action was to ensure standing. He noted that Mr. Johnston had access to the ordinances on line. The Board's policy was to be as transparent as possible. Mr. Chapman suggested that Mr. Johnston look at the copy of the variance standards so he could see for himself whether he met them. Mr. Johnston had received a copy already and felt he could meet the standards, but was waiting to see whether there were any changes when they came up for a vote so that they did not get caught "midstream."

Mr. Johnston then explained the legal history of the property. There had been a court case in 2001 -2002 involving LaSelle and Ludwig. Mr. Casas was familiar with it and said part had been the trucking in of rock. Mr. Johnston noted that in the definitions, there was a reference to extraction of flat rock. He said it did not involve blasting so there was no aggregate and the rock was not broken rock. The sections are separated by sediment so the rock could be lifted from the ground. He noted the difficulty of taking rock that was solid and had to be separated into flat sheets. There were no beds over five or six feet. There are fines and other materials that naturally fracture the rocks and allow them to be lifted right up. Mr. Kearney wondered why the Board did not have any information prior to tonight so they could understand the situation. He asked whether J.C.Stone had a certificate of legal operation (CLO). Mr. Temple did not know of one. Mr. Johnston said the Ludwigs had told him they did have one and would send him a copy. Mr. Kearney thought the Board should see that information before continuing. Mr. Temple said the CLO might in some cases have been issued by the CEO. He could not find the CLO records but that did not mean they did not exist. He did have a set of what went on before the Planning Board. He cited the Marriner case in which they knew they did not have to get a CLO, but wanted to get it anyway. There were seven or eight small pits not licensed by the State which had been given a CLO by the Planning Board. He was unable to find the CLO for the Ludwig pit and was concerned about it. Mr. Studer raised the point that the LUO under which the permit had originally been issued, had been repealed and replaced by the current one. He asked what that meant in regard to all the grandfathered pits. He said that if one of those pit owners wanted to make a change and had to come before the Planning Board, he would have to comply with all the new rules. He noted that the Mining Ordinance said unless one possessed a CLO which grandfathered him, one would have to get a mining permit. He said the current project never had a Mining Ordinance approval. If it did not have a CLO, it would be required to get a permit under the Mining Ordinance. There might be standards in the new LUO that did not allow any of this activity. Mr. Chapman contended that the project was not expanding and the footprint was smaller than originally. Mr. Studer felt there were many unanswered questions and that there should be a legal opinion about the process for the project to move forward. He did not necessarily object to what was being done, but process meant everything. Mr. Casas asked Mr. Studer whether he wanted to consult with the rest of the Planning Board to decide if they wanted to bring an initiative before the Selectmen. Mr. Studer knew of one who would agree, but said that the Planning Board was not supposed to be involved in an enforcement issue, they just reviewed standards. Mr. Kearney said going to the Selectmen would not be enforcement, it would be getting involved in an administrative process. He thought Mr. Studer could just tell the Selectmen his opinion that the administrative process was not moving correctly.

Mr. Temple reminded Mr. Studer of the Dave's World case in which the Planning Board found that the case did not have to be reviewed under the LUO because there was no longer a conditional use in the LUO. Mr. Studer noted that they had come and gotten a permit from the Planning Board, but this project had not come before the Board since the conditional use permit granted in 1993. It was entirely different. Mr. Casas noted that there had been a citation in 2001 for bringing in palletized stone when it was not permitted. Mr. Johnston said he would send the Board some information supporting their position. He noted that the facility had been inspected annually and did meet the standards of the current LUO as far as setbacks etc. were concerned. The only issue was the groundwater. Experts would disagree on that issue, but he said the company was willing to comply with whatever the Board required. They were not concerned about review because of the actions that Jamie Carle has taken. Mr. Casas noted that the permit requires a twice yearly inspection. Mr. Johnston said the facility was always open and they had complied with all suggested actions. He could address any issues in the present LUO in the application. Mr. Studer thought they needed to go first to the Planning Board. with all of that. They might approve the whole thing. Mr. Johnston said they would do whatever the Town prescribed.

Mrs. Sainio thought they should pursue the routine they usually did and if necessary would send it to the Planning Board. Mr. Vigue asked whether that was the process. Mr. Casas was not certain. He said the by-laws indicated that the Board could not make a decision until they had held a pre-hearing conference followed by a public hearing, after which they could make a decision. However, he felt some of the procedure would depend on legal counsel. Mr. Chapman felt there was no need to hire counsel at this point. Mr. Casas thought there some issues and said they would work out the answer with the Selectmen. He felt there was some information such as standing that the Board needed before they could hold a pre-hearing, so they could not wait until then to hire counsel. He noted that Mr. Johnston would have to decide the ordinance under which he would seek a variance. Mr. Studer contended that it would have to be both the LUO and the Mining Ordinance as he would be frozen into one if he went to the other. Mr. Chapman moved to set a pre-hearing. Mr. Casas said that could not be done until they had an application. Mr. Temple thought it could be done in March depending on the counsel. Mr. Johnston noted how important it was for his company to know the Town's expectations, whether to go to the Planning Board or the Appeals Board. It would be costly to act before they knew those expectations and they would rather wait for counsel. He hoped to tell Mr. Carle and the DEP since the DEP had given them a lot of consideration in regard to groundwater. Mr. Freiman felt it made more sense before the Board moved one way or the other for the Board to seek legal counsel. Mrs. Sainio agreed. Mr. Vigue agreed, but noted the cost of counsel. Mr. Freiman moved that Mr. Casas approach the Selectmen and ask them to retain an attorney to pose the question of standing, and if there is standing, which direction the Board should go next, whether to the Planning Board or the Appeals Board. Mrs. Sainio seconded. Mr. Casas noted that Mr. Johnston was always free to approach the Planning Board. Mr. Chapman felt the sticking point was that J.C. Stone could not produce a permit that showed the Ludwig property was being legally mined and they had the right to do that, all would be fine. Mr. Johnston said they did have that permit. Mr. Chapman said the contention was Mr. Studer's opinion that the Planning Board should review the case first. Mr. Casas said that was true, but the problem was also whether the activity is an expansion or a change of use. Mr. Chapman felt the expansion argument did not hold since the map showed a smaller footprint than for the original pit. Mr. Chapman recalled that going down had not been considered an expansion in the Marriner case. He said the determination was that removing sand and gravel was not different from removing rock since both were considered minerals. The Board had found that Marriners was still operating within the footprint and let the company continue its operation.

Mr. Studer noted that the Ludwig pit was supposed to be flat rock mining in the beginning. Mr. Casas said the contention was that it is still flat rock, just bigger. Mr. Chapman thought rock had nothing to do with it. Mr. Studer said it was not originally a quarry. It might be today, but was not then, and thus was a change of use. Mr. Casas felt mining, quarrying, excavating were used interchangeably. Mr. Johnston asked which appeals variance would be considered since their firm wanted to wait and file under the adoption of the new one. Mr. Casas explained that the intent was to repeal the Appeals Board section of the five ordinances and have a stand-alone Appeals Board ordinance which was the same for all. That would eliminate the need to choose which Appeals Board section of

which ordinance to use. Mr. Chapman noted that Mr. Johnston had asked which section he should look at in the Mining Ordinance, and the current ordinance was dated March 30, 2012, and was a viable ordinance. Mr. Casas said they were willing to wait until the new ordinance was in place. It was explained that the time frame is after Town Meeting at the end of March. Mr. Freiman's motion was approved by Mr. Casas, Mrs. Sainio, Mr. Freiman, and Mr. Vigue. Mr. Chapman voted against. The motion passed. Mr. Johnston advised that the Appeals Board is permitted to make conditions on a permit to update it.

The meeting adjourned at 8:20 pm.

Respectfully submitted

Liane Chapman

Recording Secretary.

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