

Appeals Board Meeting
September 8, 2016

Present: Bob Temple, Cathy Blake, Lowell Freiman, Charlotte Henderson, James Kearney, Dorothy Sainio, Peter Drum. Public: Nancy Linscott, Berkley Linscott, Henry Sainio, Robert Marks, Jon Whitten, Jr. Wes Daniel, Albert Hutchinson, Patrick Mellor, Rosemary Fowles, Suzanne White, and Deborah Bocko

Lowell Freiman called the meeting to order at 7:00pm with roll call. Charlotte Henderson will sit in, as a voting member, for Norman Casas.

Dorothy Sainio motioned to accept the August 25, 2016 summary as written, James Kearney seconded, all in favor.

Lowell Freiman motioned to move the Board into executive session to receive information from their counsel, Peter Drum at 7:02pm, Dorothy Sainio seconded, all in favor.

Dorothy Sainio motioned to move the Board out of executive session at 7:49PM, Charlotte Henderson seconded, all in favor.

Lowell Freiman stated they will try to move through deliberation until 9PM. The meeting will move on giving the appellant's and interested parties a chance to go back to the original points on the appeal to try to point out for this Board where you think the specific pieces of information are that speak to the points that you're raising either saying that there was not sufficient evidence or that the decisions were contrary to the ordinances.

Rosemary Fowles believes the brief she had submitted had that specific information.

Peter Drum stated that the ordinance lays out the evidential standard for the Board of Appeals. That standard is if they find that a decision of the Planning Board is either unsubstantiated on the record or contrary to the ordinance then they have a variety of remedies they can pose. We are basically asking you to reiterate, in ten or five minutes, what you believe specific performance standards that were misstated or misquoted or not substantiated on the record. Your brief does go into some detail about what you feel is incorrectly decided and if you want to go with that argument, that's fine, we won't take away from you. He knows that Mr. Mellor will make his remarks known tonight because we prevented him from addressing the Board at the last meeting.

Rosemary Fowles stated that the first argument was the Consent Decree was not followed. As she had mentioned the Planning Board represented the Town of Washington and that was a court ordered document between the Linscott's and the Town of Washington. There was no reason it was to be overturned or not be followed, it was an error of law that the Planning Board did. The second argument is the safety of the roads and environmental hazards. They made their determinations on the lack of evidence. Rosemary stated that the Planning Board did not have adequate evidence to make the decisions that they made. Her last argument is the Planning Board did not take into consideration the past performance of the applicants. That is in the

Mining Ordinance and it was not addressed at all. She tried to point out some of the evidence that they ignored.

Deborah Bocko stated that the Consent Decree was entered into the record by the applicants. It became part of the Planning Board record and was brought up on more than one occasion. Mr. Mellor said it is not an issue and the town and applicants addressed these concerns through a Consent Decree that has been complied with. Deborah would like it proved that it has been complied with because as far as she can see it has not been complied with. It came out in the Planning Board that they submitted plans to do some of the work which were rejected because they were not approved and Mr. Linscott said he could not get in there to do the work. The Planning Board said it was a legally binding document but it wasn't their purview to enforce the Consent Decree which the appellants agreed but the Selectmen should have enforced it. That should have been followed with the Selectmen and Town. As far as the fact that the Consent Decree was there and it said that they could not submit an application until the Consent Decree was taken care of. We're saying the Planning Board should have looked at that.

Robert Marks stated that he has just been retained in the last couple of minutes to make an argument here. The interested party gave a brief last week noting the case Gensheimer vs Town of Phippsburg . One of the things the court found in that is the Appeal Board can, on appeal, look at whether the Planning Board abused its discretion, committed any errors of law, or made findings not supported by substantial evidence of the record. Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion. The first point on appeal is a question of abusive discretion or errors of law when the Planning Board rejected the introduction of the Consent Decree; for two reasons, the Consent Decree was pertinent on the past performance if the party, essential for the Board to take into consideration that this area was operated without permit, Stop Work Orders had to be filed and that it resulted in a litigation that was submitted to court as an agreement between the parties one of the agreements being that before they applied for a permit, for their mining operation, they had to get into compliance with the reclamation. They did not. How this is not relevant as past performance is beyond me but it's also the law of the county. That Consent Decree was a court order based on an agreement of the parties and it was violated. Robert Marks states it is incredibly pertinent either as an abusive discretion by not considering the Consent Decree or an obvious error of law. When Robert read the appellant's submission last week, there position paper, he noted that the claim was made that there was sufficient evidence for all of the issues that were being questioned for example the safety of the road, adequacy of the air and a couple of other areas. What he found about the brief was that there was no reference to any evidence being put in that would be relevant to those areas. He stated that the Planning Board did was just say, he says it's okay, it's okay. For these reasons, Robert Marks states he thinks the appeal should be granted and this case should be sent back to the Planning Board with a mandate for them to reconsider the areas that are questioned here and reconsider the whole application in light of the Consent Decree.

Patrick Mellor stated that the first thing that stood out for him was the volunteers in our community; Jim Bowers, Jesse Casas, Mitch Garnett, Steve Ocean, Dave Studer, Dave Williams had no fewer than eleven meetings scheduled for this applicant for this application. To suggest that they didn't address these issues during those meetings is not accurate. These individuals

take their job seriously and even though they shouldn't have, in Patrick's opinion, considered the Consent Decree, as one of the appellant's indicated, that's a Selectmen issue. If there is an issue it's not for a Board of Appeals or the Planning Board to try to enforce it. It is not within their authority by state statute or local ordinance. The Planning Board did look at it. Patrick has read over the minutes where there are examples that the Planning Board did discuss the Consent Decree. As far as the prior performance, the ordinance says 'the Planning Board shall consider financial capacity, technical ability and prior performance of the applicant to complete all purposed activities.' They had a small pit that had been used in the pass and they started digging out of it and apparently too much so there was a stop work order. Then the town and the applicant resolved their differences through the consent decree. There is nothing about their prior performance that would suggest that they can't comply and complete the proposed activities. Patrick stated that the financial guarantee has been provided which is an insurance to the town that they can comply with the proposed activities. As stated in his most recent submission, when there was concern that the application wouldn't be accepted Patrick Mellor asked for a pre-application meeting with the Planning Board. The town attorney, Mr. Temple, and the Planning Board agreed that would be the right way to go. The Planning Board Meeting Summary, Exhibit 18, states the appropriateness of the submission of the application and talks about their prior works. The Planning Board considered it over the course of eleven meetings. Patrick Mellor stated to suggest they didn't look over the facts, if he were on that board, he would be insulted by that. Patrick Mellor agrees with Robert Marks that if he had found each part of each meeting that went with each of the arguments that the appellants made and pointed out those to everyone. The burden is not on the Linscott's, the burden is on the appellants to show you that the Planning Board didn't have the evidence or look at it or they made some decision that was contrary to the ordinances. They didn't, they did it right and thoroughly. If there is an issue about that Consent Decree then the Selectmen can take it up with the Linscott's. That's their purview, respectfully not the appellants "No Board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified precise subject matter". Your record will reflect what the Planning Board has done to get to this point. To send the application back to the Planning Board to make more findings after all of the meetings and effort they have put into this is Patrick Mellor states it's shortsighted and unnecessary.

Peter Drum questioned Patrick Mellor about the provision that discusses prior violations is on page 8 D of the Mining Ordinance, "The Planning Board shall consider the performance record of the applicant and those responsible for the management of the operation. The performance record shall include any prior violation, suspension, or revocation of a permit issued under this ordinance or similar permit issue by any other agency of government and any other environmental enforcement history". In looking at that it does differ with the section that Patrick Mellor pointed out. Peter Drum asked in terms of what Patrick Mellor's applicant submitted and what the Planning Board heard on that issue. Patrick Mellor stated that one of the things submitted, that's in the record, the Planning Board specifically asked for letters from the applicant and Ed Blake, operator, basically stating this is what I do, plan to do, and to the best of their knowledge were not in any violation of any ordinances or environmental laws. That's is one of the steps that was taken. The minutes of the meetings are in the record.

Patrick Mellor pointed out that the Board of Appeals or the scope of the appeal is limited to the Consent Decree, road traffic, environmental concerns or technical capacity. Peter Drum stated that technical capacity is the fourth element which includes prior history. Patrick Mellor stated that there is no question the Planning Board did consider the performance record of the applicant. They asked questions about it, contemplated it, and talked about it “the Planning Board shall consider the performance record”. The Planning Board complied with that provision. Peter Drum stated that there was no vote on the applicant criteria. It appeared to Peter Drum, that the Planning Board did not review the Consent Decree. Is there something in the record that they did go over the prior violations? Patrick Mellor stated they spoke specifically about the Stop Work Order in multiple instances. There are multiple references to the Consent Decree. Patrick Mellor asked if the section that Peter Drum is referencing listed in the appellant’s issues. Peter Drum stated it is. Patrick Mellor reiterated that the Planning Board ‘shall’ consider it. If going through all of the minutes you don’t think it was considered we are not on the same page they clearly did consider the Consent Decree. Patrick Mellor did not go back to find every reference each of the, however many meetings, this was discussed, seven or eight, and site that for this Board. It’s not the applicant’s burden. It is the burden of the appellants to show this Board that the Planning Board did not look at it. Patrick Mellor stated he would be happy to take the time now to go through and site each instance when the Consent Decree or Stop Work Order is mentioned. Peter Drum stated he would be happy with whatever the Board wants to do. He also suggested formal briefs could be submitted, where they say this is where we believe it was met. Patrick Mellor sited Exhibit 28 mentions it explicitly, top of page 2 and page 3. There are entire paragraphs about it. Patrick Mellor stated in exhibit 28 alone there is no question the Consent Decree is discussed at length.

Lowell Freiman asked the Board if it would be helpful to have each of the parties submit something to us that sites where it is that they think the proof was or wasn’t to support their positions. **Dorothy Sainio motioned to have the parties submit something to the Board that sites where it is that they think the proof was or wasn’t to support their positions, Cathy Blake seconded, all in favor.** James Kearney stated that it is a good idea but does not just want a list of where the word Consent Decree is mentioned doesn’t do any good. The Consent Decree is not discussed, in depth at all, simply mentioned. Peter Drum both sides would make their argument that either or both of the conditions and the ordinance are met by the record on each point. A lot of this happened in the meetings and not on paper. There wasn’t a court reporter to take down what was said.

Patrick Mellor asked if there are copies of the plans and letters that were provided by the applicant. Peter Drum stated that the initial meeting where we agreed upon evidence. He had advised the Appeals Board the only materials to be considered are those that were on the Planning Board record. Based on that advice, I have to rely on the Planning Board and Bob Temple to tell him which of these elements have to come out. For example Peter Drum is not sure if the photographs were provided to the Planning Board. If they were not provided then those photographs should come out. He has adopted that ruling for the town.

Rosemary Fowles asked to speak to the photographs. They were not provided to the Planning Board. The Planning Board, per her request, looked at the site and the road. She gave the pictures to the Appeals Board to say that they didn't adequately consider the width and condition of the road so that you could see. Peter Drum stated based on the language in the ordinance the only thing they can consider is what is in the record. If there is a site visit on the record then I think we can do a site visit of where the Planning Board went. If there is not a site visit on record then we cannot do a site visit. Patrick Mellor stated that the Planning Board, as finder of fact, made a site visit and they made factual determinations based upon their physical visit to the site. Those factual findings can't be overturned. Patrick Mellor has reviewed some of the minutes and there are explicit discussions where Mr. Temple and the Planning Board involved. The pre-application talked about the Stop Work Order (Exhibit 18). These are minutes but the person taking them is not getting every word. Peter Drum stated the Appeals Board need to find that the finding is substantiated on record – not just discussion of it. The language is that “the Board of Appeals in modifying or vacating a previous decision must decide that the previous decision was contrary to the ordinance or not substantiated by the evidence in record”. We can consider only what is in the record as good or as bad as the Planning Board minutes are, that's what we have.

Jon Whitten, Plymouth Engineering, stated that the first meeting they had with the Board of Appeals regarding evidence he asked if the Planning Board application and everything was part of the review of the Board. He was told yes and stated then they would stand by that as their evidence. Everything submitted as part of the application is part of the record. Peter Drum agreed.

Charlotte Henderson wanted to clarify the idea that the Planning Board discussed all of these various issues is great but there doesn't appear to be notations about what their conclusion was after they discussed it which is what she thinks Peter Drum was trying to get at. Patrick Mellor said as long as they discussed it that's all we need to know. Charlotte said if, for instance, they went and looked at the road and the road was or was not looking like it would hold the work load then that's what we would be looking at. Not just the fact that they looked but what did they think after they looked. That's what she believes is the substantiated evidence.

Robert Marks, looking through the record, to find every mention of Stop Work Order, Consent Decree is not a worthwhile endeavor. In Exhibit 28, which Patrick Mellor referred to, the statement is made, “the Planning Board decided that the Consent Decree has nothing to do with our decision”. Whatever they said before that didn't make any difference, they decided it has nothing to do with it and from the appellants point of view it is completely relevant because the past work history was that they were doing work without a permit, there was a Stop Work Order, and there was an agreement. Even if you don't look at the Consent Decree the Planning Board should have found out, and it's admissible, what the agreement was with the town. The Planning Board took the position that it didn't make any difference whether they reclaimed it before or after the permit which ignores the point that the application could be denied. If the application is denied where is the incentive on the applicant to ever reclaim that land? The incentive for the reclamation was get it back as close as it could be to the condition that it was before the violations took place and then come to the Planning Board with a clean record and having done everything and file the application. Past performance, the history of violations is essential to

mandate that the Planning Board had. They decided that all conversation about all past history stopped after Exhibit 28 when they said it has nothing to do with our decision. It would be helpful to the Appeals Board for the two or three areas that were highlighted in Rosemary Fowles letter to pick out what was said if there is any substantial evidence to support a finding. Our feeling is that those issues were glossed over. There are tapes from the meetings.

Deb Bocko stated the Planning Board were basically going on the town's ten year survey for the road plan. By their own admission, the town said that was not the purpose of that survey. The Planning Board, because they had to check off that they looked at it, they accepted that piece of work from the Roads Committee. What the appellant's were asking for was to find out if the road was safe and it was going to withstand the extra traffic. There is no 'bed' to that road. Time and time again, in their letters and meetings, wanted engineers to look at the road to determine that it is actually structurally sound for the load it will have to carry. The tax payers will bear the burden of the cost of maintaining that road. It's one of the few pits that is on a road that is not state maintained. The Planning Board did not have anything to back up their findings. It is the same thing with the Consent Decree, it was decided that it didn't apply but they never discussed the Consent Decree at length. Deb stated that the rules didn't apply; operating without a permit, ignore a Stop Work Order, ignore the second Stop Work Order. The appellants wanted assurances that if this application was approved who would monitor then or would they have the same attitude that 'they can do what they want'. The rules should apply to everyone.

Suzanne White stated she attended most of the Planning Board meetings and has great respect for the members. She had served on the Planning Board in Appleton for twelve years and knows how much work it takes. She reiterated that the Planning Board could have saved a considerable amount of time by considering the Consent Decree. You can do a lot of work and get nowhere no matter how competent and experienced people are.

Patrick Mellor spoke about the two provision being discussed are Article 6 1 D of the Mining Ordinance 'the Planning Board shall consider the financial capacity, technical ability, and prior performance of the applicant to complete all proposed activities' and Article 5 2 D 'the Planning Board shall consider prior performance'. Those are the only requirements regarding prior performance. Patrick Mellor stated the confusion may be that some would like the Planning Board or the Board of Appeals to enforce the Consent Decree. There is a big difference in considering it and talking about it and enforcing it. They clearly considered it in at least two meetings. They also, in their findings discussed the Stop Work Order and prior performance of the applicant making a finding of fact to effect. Patrick Mellor agreed to do the briefing. By the wording of the ordinance this is not a massive hurdle to clear. With regards to the other issues that have been raised he would submit that the Board of Appeals should make a finding that the Planning Board's decision and their findings were adequate to support their approval on the other issues.

Lowell Frieman stated that it is the four issues sited in the appeal. That is what we are asking you to make citations related to so you can narrow the scope that way. Peter Drum explained, for example there was not enough evidence to find that there were safe road conditions.

The recorded meetings will be copied on a CD or electronically and sent to each of the Appeals Board members and the other parties by Mary Anderson.

Peter Drum explained the appellants are arguing what the appeal was filed upon and on whether there was substantiated record on the issue or not and whether it was contrary to the ordinance or not.

Peter Mellor suggested that we don't set a date for the submission to be due until we have copies of the records.

Robert Marks said the first task will be to listen to the Planning Board meetings and then write a brief.

The next meeting will be schedule for either October 13th or 20th, 2016.

James Kearney motioned to adjourn the meeting at 8:50PM.

Respectfully submitted,

Mary Anderson