

Appeals Board Meeting
October 13, 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, Wes Daniel, Albert Hutchinson, Tania Amazeen-Jones, Bruce Fowles, Patrick Mellor, 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 September 8, 2016 summary as written, Charlotte Henderson seconded, all in favor.

Lowell Freiman stated the board would need to go into executive session for information and briefs from counsel. Dorothy Sainio motioned to move the Board into executive session to receive information from their counsel, Peter Drum at 7:02pm, Cathy Blake seconded, all in favor. Peter Drum asked if there were any legal questions about the documents

Dorothy Sainio motioned to move the Board out of executive session at 8:10pm, Charlotte Henderson seconded, all in favor.

Lowell Frieman stated that moving forward with this meeting the Board will allow appellants and applicants ten to fifteen minutes to give a synopsis of their briefs and then allow two to three minutes each to refute the opposing party's arguments.

Robert Marks started out with the case of Gensheimer v. Town of Phippsburg. This was a case that Mr. Marks claimed appellees claim would prevent the Planning Board from ever considering the Consent Decree. The case is a simple subdivision case as opposed to our case being a mining ordinance and land use ordinance case. It revolves around the first issue being how the Appeals Board treated the appeal. The key part of this is that the law court said, 'the decision of the Planning Board that we reviewed for abuse of discretion, errors of law or findings not supported by substantial evidence in the record. Substantial evidence exist when a reasonable mind would rely on that evidence as sufficient to support a conclusion.' Robert Marks stated that that is the crux of what we are talking about here. This case, no matter how you read it, does not say you can't go outside of the ordinance. That is what we heard from Patrick Mellor the last time we argued this case. Robert Marks stated Article 5, Mining Ordinance, application review, section 2 D 'the Planning Board shall consider the performance record of the applicant and those responsible of for management of the operation. Performance records shall include any prior violation, suspension or revocation of a permit issued under this ordinance or similar permit issued by any other agency of government and any other environmental enforcement history.' This suggests to Robert Marks that the Planning Board needs to go outside of the ordinance and find out what a person has done that might be on record in the DEP (Department of Environmental Protection) or the Bureau of Mining. We did this in the Lane case, where we found DEP violations and they were presented to the Planning Board it was part of the record all the way through. The Planning Board is instructed to consider the prior record. The prior record

would include prior violations. There was a violation of operating the pit in questions without a permit. There was a suspension, a Stop Work Order, and a violation of this Stop Work Order. All this led to court and the Consent Decree. Robert Marks reiterates from his brief where the Planning Board, after discussing what to do with the Consent Decree, someone made a motion which basically stated we won't use the CD in making that decision. That was on the March 29 tape at about 1 hour 3 minutes. Not only do we call that an error of law for disregarding as mandated that they look at it and consider it but also an abuse of discretion. They just decided that they will not look at past performance or past violations or suspensions and the Consent Decree. Robert Marks stated that was a terrible decision and should have been made at the pre-application conference. It was clear to the CEO who was part of the Consent Decree who filed the violation order and Stop Work Order, who was involved in the negotiation and determination of what was going into this Consent Decree. It was clear to him (CEO), at that point, that the work that was supposed to have been done, the reclamation plan which was to be approved by him had been not been approved by him and hadn't been done. Everything else, in Robert Marks' opinion, was a terrible waste of time.

The second area of the ordinance which also requires looking at past performance is Article 6 Section 1 D, minimum design and performance standards, 'the Planning Board shall consider the financial capacity, technical ability and prior performance of the applicant to complete all purposed activities'. The Planning Board basically said you have an operator, we trust him he doesn't have any violations. Of course, he was also an operator when the pit was operating un-permitted, that didn't seem to be a problem. Not looking at past performance, not looking at the Consent Decree was both an error of the law and abuse of discretion on the part of the Planning Board.

Robert Marks, responding to some of Patrick Mellor's points made in his brief, he doesn't really cite supporting evidence. He draws your attention to areas where issues were discussed and says that is enough, they discussed it. At one point he says, 'the Planning Board decision meanwhile was thorough and based on many discussions about road safety and traffic is evidenced by the following pages of its decision. Then he cites page 23, 'the Planning Board finds that the provisions of this section have been met on the fact that there will be no more than fifteen trucks per day and the Planning Board reviewed the submissions and input from the public and finds the provisions of this section and condition #34 have been met'. The question is; what was the supporting evidence? The supporting evidence, according to Patrick Mellor, is that they met for a few minutes and made a decision. That argument can be seen throughout. Regarding the road, we asked for a road safety survey, what was before the Planning Board was a road survey done for the purpose of prioritizing re-taring. If you look at the pictures that are in the book, of the road, you see potholes, a badly cracked road, you don't see a very good road. That is what there and what was relied upon as being adequate to support a finding that the road was adequate for fifteen trucks a day, despite public comment to the contrary.

Robert Marks stated that his brief covers the areas that we want to discuss in this area and he'll save some time for a rebuttal.

Patrick Mellor stated that Robert Marks and the appellants make a lot criticism to the Planning Board. On page 10 of Robert Marks' brief, 'the Planning Board did not concern itself with public comments'; page 11 'all of the information provided by the appealing parties was ignored by the Planning Board'; page 12 'the appellants complained that the Planning Board's, in dereliction of its responsibility, sadly exercised no due diligence'; page 14 'the Planning Board

ignored evidence'; page 15, 'the Planning Board ignored the concerns of abutter's regarding the dust, failed to rely upon competent evidence'; lastly, 'the Planning Board failed to evaluate how past performance controls future performance'. That is what they would like you to think, that because the CEO (Code Enforcement Officer) found, in his opinion, that there was a violation of the ordinance, issued a Stop Work Order that these applicants can't comply with the ordinances anymore. If someone makes a mistake, if in fact that mistake was made – Patrick Mellor's clients had appealed that decision and then negotiated the Consent Decree. There was never a finding by any court, despite Robert Mark's statements to the contrary, that there was any type of violation. There was a Consent Decree. That was discussed at length by the Planning Board. What actually controls future performance, which is everyone's concern, is the Planning Board and its decision along with thirty-three conditions that are attached to their approval. There were a minimal of seven full meetings that the Planning Board painstakingly went through this application. Robert Marks is right, substantial evidence is a type of evidence that would convince a reasonable mind. What Robert Marks is saying is that collectively the Planning Board does not have a reasonable mind and didn't look at the evidence. Patrick Mellor reviewed every meeting on the CD, the Planning Board spent an inordinate amount of time on every issue. Patrick Mellor read many of the thirty-three conditions aloud. These conditions control future performance, past performance does not. There is also a security bond – if something goes wrong the Planning Board took excellent/appropriate measures that it could be addressed by the town both from an enforcement standpoint and financial standpoint. They were thorough.

One of Robert Marks' arguments is not that the Consent Decree should be considered he argues on page 6 that 'the Consent Decree should be investigated'. That is not what is required from the Planning Board or Appeals Board. Article 5, Section 2 the mineral extraction application review, prior to the establishment of a mineral extraction activity and applicant shall apply for an approved mineral extraction permit. The application shall contain the following information where applicable – Patrick Mellor read A through C. In this D provision is where it says name, address and telephone number of the applicant and the Planning Board shall consider the performance record of the applicant and those responsible for the management of the operation. They shall consider, not investigate. There is no way that the Planning Board or Appeals Board is supposed to enforce, they shall consider it. Patrick Mellor stated that he could not site every time it was discussed but the citations that he did give of the Consent Decree and prior performance adds up to some time. The Consent Decree was discussed at the January 19, February 9, March 29, meetings. The issues were considered by the Planning Board.

On page 8 of Robert Marks' submission he says, 'the Selectmen, who represented the town in the Consent Decree, have the responsibility for administering or supervising the administration of licensing and permitting'. Robert Marks is right, the Selectmen do. He cites the Maine Municipal guideline which is correct. If they view there to be a violation of that Consent Decree they have every right to take steps to enforce it. It is not the Board's to prerogative or responsibility to do that. Fred Newcomb, the town attorney representing the town Selectmen and I (Patrick Mellor) had conversations and was put in writing (in the record) that the application is ready to be submitted. The reclamation plan was submitted which was required under the Consent Decree. We came to a pre-application meeting to make sure of that fact. They had talked with Bob Temple, CEO and Fred Newcomb and told the Planning Board they were ready to move forward and to make sure everyone was on the same page. They all agreed, at that time, to put forward the application. The application that had been submitted over the course of the last six months is sufficient. The Planning Board collectively they represent a

reasonable mind; they put a lot of time and effort into their decision. That's what is required. Patrick Mellor's clients have earned the right as tax payers, land owners, complying with the ordinance to get that permit. The Planning Board gave them the permit. It's now the appealing parties burden to convince you that there was an abuse of discretion or that there was some other error significant enough so that you could say the Planning Board was unreasonable. That did not happen.

On page 8 and 9 on Robert Marks' submission is untrue and the appealing parties are not allowing the facts to get in the way of their argument. They say 'there is intentional non-compliance with the Consent Decree'. 'There was willful non-compliance with the town ordinances'. That is completely inaccurate and there is nowhere in the record that it would suggest that. The only suggestion of non-compliance is the initial Stop Work Order, we get that. So work stopped and then there was an appeal to that decision which resulted in the Consent Decree.

Patrick Mellor stated he does not want a gravel pit in his neighborhood; the appellants do not want a gravel pit in their neighborhood, that's the reality. Every individual has property rights that are protected by state law and local ordinances. They are complying with the ordinance and have gone through due process that they are entitled to as well as the appealing party. There were public comments and respectfully considered by the Planning Board. The Planning Board determined that the applicant satisfied the requirements and the thirty-three conditions attached to this permit. The conditions protect the neighborhood adequately. The Planning Board does not have a choice but to follow the ordinances; similarly the Appeals Board doesn't have a choice either which the Town of Washington collectively has made and this is reasonable.

Patrick Mellor has been involved in many gravel pit applications both as a member of the Planning Board and as an attorney. The scrutiny that this small operation has been under is much stricter than what he has seen previously. He stated this as a matter of fact, not critically. The applicants have gone through a considerable expense, engineers, multiple meetings, attorneys and this Board should uphold the Planning Board's decision. There is ample evidence, ample record support for each of the issues for this Board to say that the Planning Board's decision was just and proper.

Robert Mark stated that Patrick Mellor misquoted his brief. He stated that on page 6 Robert Marks wrote that the Mining Ordinance provides in two sections and mandates the Planning Board to investigate the CD. He said to investigate the applicants past performance. There was another misquote. The thirty-three conditions, most of those that Patrick Mellor read, are boiler plate for a mining operation. They did not take special consideration; they just went along with the Finding of Fact. When he talked about the willful disregard to the ordinance he was talking about the 2012 application and the pre-application conference where many deficiencies in the application were pointed out. The application was never followed through but shortly after not following through with the application process and getting a permit work began at that pit. Initially, there was a claim that they didn't need a permit because they were just doing it for personal use and then the CEO found out that was not the case they were actually selling gravel. They continued to work and the CEO gave a Stop Work Order and that was not obeyed. Then the CEO had to do a violation of the Stop Work Order and that led them going into court and doing the Consent Decree. The Consent Decree required a reclamation plan approved by the Code Enforcement Officer and executed by them before any permit application could be filed.

Robert Marks stated there was a logical reason for this. They wanted the land to be restored to its prior state so that if, per chance, the Planning Board did not approve the plan or gave up again and did not follow through the work would be done, they would not have to be chased to come up with a reclamation plan and do it.

Robert Marks stated that past performance is a great judge of how these particular applicants are going to adhere to all the rules.

Exhibit 13 is a fairly good review of what was the matter with the reclamation plan that was submitted. Robert Marks does not understand Fred Newcomb's letter; he was the attorney for the town, he negotiated very set conditions and then he told the CEO that we could violate those conditions. Fred Newcomb stated in his letter that he usually represents town and it's unusual for him to represent a CEO. As a citizen of the town, Robert Marks is upset with that letter; maybe one of the problems with the Selectmen doing something is that one of the Selectmen is sitting here before you asking for this permit. That incapacitates the Select Board.

Patrick Mellor stated that Berkley Linscott was not a Selectman at that time when Fred Newcomb wrote the letter. The Consent Decree, to be accurate, requires that a reclamation plan be submitted and it specifically says that the September letter, marked as Exhibit E, with exception of paragraph five should be deleted. Paragraph five used to say; 'once the stockpile material is removed you or your contractor must begin reclamation of the un-permitted pit, that was specifically deleted pursuant to the Consent Decree and replaced with, 'a detailed reclamation plan shall be submitted to the Code Enforcement Officer'. That was done. There has not been a violation what it requires is the reclamation plan to be submitted. The Consent Decree does not have a lot of relevance because Fred Newcomb said he was in compliance. Prior performance can be a pretty broad spectrum and the Planning Board should consider it and they did. The other issues, dust, road there is nothing that would suggest the Planning Board made some kind of error of law. Patrick Mellor thanked the Board for their time knowing they put a lot of time and effort and he's hopeful he doesn't see them again in the near future.

Lowell Freiman asked who the operator of the pit was prior to the Stop Work Order. Berkley Linscott stated Ed Blake. Lowell Freiman asked who the operator was after it was suspended after the Stop Work Order. Berkley Linscott said they asked the Selectmen if they could get the material out of the pit that was already produced and that is just what he did. Ed Blake was the operator and will be in the future.

Peter Drum commented that both attorneys did a great job briefing the issues and going through the points of the dispute.

Peter Drum to Robert Marks, Let's assume, for a minute, that the Planning Board did consider the history also we'll assume they found that there was some sort of deficiency in the applicant's history. Can you point to any precedent or any turn in the statute or ordinance that would render a permanent approval possible or even within the discretion of the Planning Board to reject if that was found? Robert Marks stated he thought it was a compound set of facts that one keeps building on the other. However, if the applicants had complied with the Consent Decree, done the work that was supposed to have been done before, and got prior approval that would have changed some perspectives. Given the history, he stated if he were on the Board, he would take those breeches of the ordinance quite seriously and doesn't know if he could cleanse them from his mind in making a decision. Peter Drum asked if the Planning Board had found a

violation, even a willful violation that they could not then seek a permit that did comply with the law; let's hold out the issue of the Consent Decree for a minute, just the terms of the ordinance with what the Planning Board was tasked with. If the permit history revealed they had willfully violated could they then not be granted an approval if they complied with the terms of the ordinance otherwise? Robert Marks stated you would not know if they were going to comply with the ordinance otherwise. Peter Drum was asking if their permit complies with the terms of the ordinance would there be some reason why the Planning Board would not grant that. Robert Marks stated the reason would be their past history/performance was a negative. If you have an application for a company who wants to come in and has a lengthy history of spills, contamination of the aquifer and you give them a bunch of conditions that's not going to say that this careless company is going to follow them. Peter Drum stated he does not disagree with that. The issue is, someone decides to go and start building a house on a piece of land that they own, they put in a foundation, the CEO shows up and says stop work you have violated the ordinance by not getting a building permit, they say your right and get the building permit. Does the CEO have any authority to say to them no you cannot get the building permit for your building because you started building without a permit? That is not typically the way it works. With mining he could not find anything in the law that says that a prior violation prevents you. Peter Drum asked Robert Marks if he has found anything that does say that the prior history could be used to somehow stop a permit. Robert Marks stated he thinks that's what the ordinance says; it shall consider the prior history, violations, suspensions, revocations and the history with outside agencies, Article 2 5 D. Peter Drum stated he did not see any language in there that says that it shall reject it if it finds there is a negative application history. Robert Marks stated that when you consider something there are two ways to go; I consider this to be disqualifying or I consider this to be non-disqualifying.

Patrick Mellor stated that Article 6 Section 1 D, performance standards, there are two instances where prior performance was discussed. It needs to be read as a whole, it's to complete the activities. A Stop Work Order, with an assumption there was a previous willful violation which he totally disagrees with. This time the Planning Board had to consider prior performance to see if they could complete the activities. There is nothing to suggest they can't complete the activities. That is why they have a performance bond and provided all the information that they did with regard to how they are going to do the work. This was all considered by the Planning Board. In section D the Planning Board shall consider the performance of the applicant and those responsible for the management of the operation. There is nothing in the ordinance to answer the question that Peter Drum posed to Attorney Marks. There is nothing in the ordinance that would suggest that if there was a prior violation that the applicant couldn't get a permit if they were complying with the ordinance current. It's like double jeopardy, you get hit once you can't do the same activity if you are in compliance and have paid your dues, so to speak.

Robert Marks to Patrick Mellor, in the last section we were talking about there's an implication that if it's all negative and there is no redeeming social value there, you could reject it. Robert Marks stated he does not have the answer to how many times you could reject it.

Peter Drum stated that if you are going to limit someone's constitutional rights, in this case, you have to have a fairly specific set of language. It appears in other parts of the ordinance. Peter

Drum stated he is giving his legal concern, that's why he asked. You both (Robert Marks & Patrick Mellor) raise a valid argument, it will be up to the Board to determine.

Patrick Mellor stated the last sentence of his brief, before the conclusion, it is important to note that even if the Planning Board didn't make explicit findings, if there was sufficient evidence, in the record, the Board's decision will be deemed supported by implicit findings forester V. Westbrook case.

Peter Drum to Patrick Mellor, I don't think there was a performance bond, was there a letter of credit. Nancy Linscott stated it was a letter of credit. Peter Drum verified that it is a reserved letter of credit so the money is sitting in the account and can't be drawn on until the end of the project. Nancy Linscott said the money is set aside for the operation of the pit.

The next meeting will be schedule for October 27, 2016 at 6:00pm for deliberations.

Dorothy Sainio motioned to adjourn the meeting at 9:04PM.

Respectfully submitted,

Mary Anderson