

Appeals Board Meeting
October 27, 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, Suzanne White, and Deborah Bocko

Lowell Freiman called the meeting to order at 6:17pm with roll call. Charlotte Henderson will sit in, as a voting member, for Norman Casas.

Robert Marks requested three corrections to be made on the last summary. **Dorothy Sainio motioned to accept the October 13, 2016 summary with corrections, Charlotte Henderson seconded, all in favor.**

Lowell Freiman stated that the Board is at the point that we will look at all the material in the record, go through the ordinances one at a time to see if the decisions that were made by the Planning Board met the standard of substantiated evidence in the record, and were their decisions contrary to the ordinances as written or the law. Lowell summarized the two ways the Board can review and decide. After discussion, it was decided to use one of the briefs and go backwards. There are four areas. Peter Drum stated that the Board can look at each area, look at the Mining Ordinance for the regulations, look at the Land Use Ordinance if you think those apply, and then go from there. Each issue is based on the original appeal.

Issue #1 **The Consent Decree was not followed and thus no application for a permit is allowed.** Charlotte Henderson read the whole issue so the language could be cross referenced. Lowell Freiman said that there will be discussion about was the decision one that followed the ordinance or was it a violation of law and was there sufficient evidence in the record to support the finding. Peter Drum recommended that the Board refer to the arguments of Mr. Marks and Mr. Mellor, just review what they said and entertain what their arguments are with regard to that issue. **James Kearney made a motion that the Planning Board did not have the legal authority to review the application because of the Consent Decree, Dorothy Sainio seconded.** Discussion was ensued.

James Kearney said his statement is reasonably true, however, he firmly believes that the Consent Decree has not been followed. When Mr. Mellor commented on this a number of times neglected to read the last line of the Consent Decree that the judge issued; ‘The Defendants are free to apply for a mineral extraction permit once their property is in compliance, and the Defendants are free to pay the fines and to bring the property into compliance at any point before July 1, 2015’. James does not believe they have done so but the Planning Board or Board of Appeals does not have a legal authority to do anything about that. Basically, maybe it’s up to the Selectmen and/or the judge.

Charlotte Henderson stated that that was her impression as well, even though it’s obvious that the Consent Decree was not followed, it is not the responsibility of the Planning Board or the Appeals Board. The Planning Board chose to treat that as irrelevant. Which it was not.

Lowell Freiman stated that the Consent Decree predates all of this and probably should have been resolved before it made it anywhere. Be that as it may, it didn’t happen and he tends to agree, not sure if it’s the purview of the Planning Board or this Board to somehow enforce the Consent Decree but throughout all of the presentations both by the engineer and Mr. Mellor that the inference was that everything was taken care of, there was nothing that was outstanding and that was just disingenuous and misleading. Also, the Planning Board made a conscious decision to consider to not considering the Consent Decree. Lowell stated that he doesn’t know that this Board is in a position to say that they didn’t do some consideration, there was some.

Dorothy Sainio said that one of the members of the Planning Board stated that he wasn’t happy with the Consent Decree issue.

James Kearny wondered if the Planning Board had a copy of the Consent Decree.

Lowell Freiman said they said they should see a copy but he doesn't think there was any real discussion about it or what the implications were. The discussion was to not consider it and kick it down the road and let someone else decide. There seemed to be that the junior members of the Planning Board that kept bringing this back up.

James Kearny said someone said this is beyond us; it's been taken care of. James thought he was relying on Fred Newcomb's letter, completely; this is just a speculation. They didn't have the justification to do anything about it nor do we, hence his motion.

Peter Drum has a proposed finding of fact; James Kearney withdrew his motion. Peter Drum moves that the Consent Decree was not followed by the Planning Board James Kearney said so moved. **The motion on the table is The Consent Decree was not followed by the Planning Board.** Lowell asked the Board to discuss on this particular issue. Charlotte Henderson totally agrees. Lowell stated that it's absolutely clear to him that they disregarded it. **Lowell Freiman asked for a vote – all in favor, unanimous decision.**

Peter Drum will break the motion into two parts. Now we know the Consent Decree was not followed by the Planning Board the next question becomes did the Planning Board have the right to deny the application based on the Consent Decree? **The motion is the Planning Board did not have the authority to deny the application based on the applicant's failure to adhere to the Consent Decree, James Kearney moved, Charlotte Henderson seconded.** Discussion ensued.

Lowell Freiman explained that we are deciding if it was in their authority, if it's consistent with the ordinance. Peter Drum explained that what the Board is looking for in the ordinance is something that says that the Planning Board can deny an application if it finds that either the history of the applicant or the failure to follow another court order. Peter Drum suggested looking through the Mining Ordinance (page 8 D) and look at the conditions that talked about the applicant's history. Lowell Freiman stated that you couldn't say that there was no consideration but he doesn't think that the consideration was very intense or scrutinizing at all. How much if somebody had not followed things or how many violations that you would hold it against the person and not let them apply for a permit. It is clear to Lowell that the operator was the operator that was involved when there was a Stop Work Order and the operator that was involved after the Stop Work Order was in place and is the operator that's going to be operator in record in the future. Clearly he does not have a great track record and all of the court proceedings that happened in terms of Stop Work Orders and Violations and ultimately not following through the plans and Consent Decree probably speak to history but doesn't think it reaches the threshold of saying that someone should not get a permit if they comply with what the ordinances are today. The Planning Board put enough dollar money aside so that if there was some violation that the money would be there for reclamation and other things. Past performance does matter. Maybe in this instance it's not exclusionary to granting a permit.

James Kearney stated that the ordinance doesn't seem to give a remedial action concerning that. The Planning Board could have put more conditions on the operator. There doesn't seem to be a remedial method of saying no, we simply will not hear the application because this person has been consistently in violation of the town ordinances and the Stop Work Order. Is there a method to put a bond or just a letter of credit? Peter Drum explained it typically would be a stand by letter of credit which would basically put that money aside until the permit was satisfied and the applicant would get their money back. Performance bonds are different; you buy a bond if the bond is violated the bond hold comes in and does the work to fix it. In this case, they did get a letter of credit for \$8,700. Lowell Freiman asked if this was a sufficient amount. Bob Temple said yes, it was.

Peter Drum reiterated the question on the table: The Planning Board did or did not have the authority to deny the application based on the applicant failure to adhere to the Consent Decree. That is the specific question the Board is trying to answer, at this point, that way going through it we know exactly what the findings of fact of law are.

Dorothy Sainio said, getting back to the Consent Decree, one of the things that they were supposed to have a berm. The Planning Board decided they were not going to go to look at it together, they were each individually going to go look at it but as she listened to the summaries she didn't hear them once come back to

that that they had gone to see it, they didn't mention it again. We don't know if there is an adequate berm there or not. James Kearney explained that there is a berm there but from years ago, to the best of his knowledge has nothing to do with the judges Consent Decree. That's what he required but it was not done.

Lowell Freiman asked if anyone knows if there was a condition that before this permit could get started that it would be completed. Clearly the Consent Decree stated that the work had to be done and then apply for a permit. Now that there is ostensibly a permit is there some condition, in the permit, that say the work must be done first?

James Kearney stated the Planning Board thought that the court case was over. He doesn't believe that they realized the work was not adequately finished.

Dorothy Sainio and Charlotte Henderson said the Planning Board didn't think they needed to do anything in regards to the Consent Decree.

Charlotte Henderson said reading, it's unclear to her, and whether there was some sort of restriction on the Planning Board to not grant a permit if the Consent Decree is not followed. That's why the Planning Board was able to set the Consent Decree aside.

Peter Drum explained, in law, they have what they call cannons of construction which has something to do with construing ordinances or laws. In general, it says the drafter of the law or ordinance is the entity passing (town); ambiguities in the law or ordinance are construed against the drafter because the drafter is the one who has the obligation to make sure the laws are clear. If you don't find a clear ability for them to deny the permit on that basis, then one does not exist. His legal advice is that he does not find a clear way to reverse a permit in the ordinance.

James Kearney stated that the ordinance says the applicants past performance can be looked into and then leave it.

Peter Drum agreed and gave an example.

Lowell Freiman asked for a vote – all in favor; unanimous decision (Dorothy Sainio revoked her opposed decision after the explanation).

Charlotte Henderson made a motion that the Planning Board did consider the financial capacity, technical ability, and prior performance of the applicant to complete all proposed activities, Dorothy Sainio seconded. Discussion ensued.

Lowell Freiman stated the track record is dismal and all the factors between starting to apply for a permit, followed through, Stop Work Order, violation after the Stop Work Order, not adhering to the Consent Decree, having the operator who is originally there also being the same operator there after the Stop Work Order/violation and for that same person to be the person in the future doesn't bode well. It doesn't rise to a level that would make one say, the way he reads the ordinance, that they should not be given a permit.

Charlotte Henderson stated she feels the same way.

Lowell stated that the consideration was cursory because he thinks the Planning Board looked to the engineer and he said everything's good, there's no violations and whatever there was would have been taken care of.

Peter Drum stated that that may be an issue for a second finding on whether the evidence is substantiated. In terms of the consideration the first thing the Appeals Board needs to decide is was it considered at all.

Lowell stated it was superficial but it was considered.

Dorothy Sainio said there was a letter from the operator stating that he didn't have any violations; so they did consider it.

James Kearney stated it was not considered in depth. Again, Mitch Garnett said that was the past and was involved in the court case.

Lowell Freiman asked for a vote – all in favor; unanimous decision.

Peter Drum stated that it was brought up whether the Planning Board had substantial evidence in the record in terms of their finding. We have to look at the Findings of Fact and review what they looked at; page 11 of 61 where the Findings of Fact start. Peter Drum reminded the Board that when they are considering this not to forget it's not just the written application it's also all of the tapes, all the meetings – each of these issues were discussed.

Lowell Freiman read page 7 of 61 D and page 30 of 61 R – Technical and Financial Capacity from the Findings of Fact. The finding from the Planning Board was that the applicants have the financial and technical capacity to carry out this project in compliance with the provision of this ordinance and the approved plans.

Peter Drum said this is the consideration. Other materials are Exhibit 1 a letter from Plymouth Engineering, Inc., applicant's site plan which shows the limits, letter of credit, additional notes on McDowell Road, a statement from Edward Blake that swears he has not violations, and a statement dated 8/18/2015 signed by Mr. & Mrs. Linscott stating they have the financial ability to guarantee reclamation of the pit which includes Ed Blake will run the excavation operation and relates to the environment aspect (they have a spill prevention and response plan for the plan-that's technical), provide emergency contacts and proposed Findings of Fact order to the Planning Board which the Planning Board largely, if not, completely adopted which the Board reviewed at this meeting. Based on the statements after reviewing this material and the tapes what the Board needs to decide; did the Planning Board properly consider what they were required to under the ordinance.

Peter Drum stated the motion on the table is **the Planning Board's decision that the applicants has the financial capacity, technical ability, and prior performance to complete all proposed activities.**

Lowell Freiman stated that the Planning Board considered but seemed to be superficial and cursory. The Planning Board didn't ask probing questions. There was little information but sufficient enough to support their findings.

James Kearney clarified that the motion is about the financial ability.

Peter Drum said it includes the performance history too. Was their findings substantiated by the evidence provided to them that this Board has in the record?

James Kearney clarified that the applicants and operator are different people. The applicant doesn't have the past history of not finishing things. The applicants put up the performance bond.

Peter Drum asked if he thinks that supports the finding.

James Kearney stated that the fact that the \$8,500. performance and the possibility of owning the property. He's not sure if they have the technical ability or not.

Peter Drum stated that they submitted plans on how big it was going to be.

James Kearney said the plans from the engineering company seem fine.

Lowell Freiman reiterated that there was little talk about it on the part of the Planning Board. Do we, as a Board, say we think they didn't ask enough, you need to ask more?

Peter Drum stated that if this Board finds that the Planning Board, as we are going through this, didn't meet one of their obligations or substantiate what they did you can remand the decision to them to solve that issue. So far, on the three questions that we've had the Board has upheld the Planning Board, though you may not have liked it, essentially, but there was a findings of fact on the Consent Decree, the Planning Board didn't have the authority to deny the application, finally they did consider the terms in VI 1 D – Technical Capacity/Performance History/Financial Ability. Now you are looking at was there substantial evidence on the record to prove those issues. You could look at the statement by the Linscott's saying we have the ability and say that's enough or you could say it's not enough. Those are this Board's choices.

James Kearny asked if there was a motion that we supported the Planning Board couldn't deny the application because the Mining Ordinance doesn't give a method of punitive/remedial action because of past performance.

Peter Drum stated that was only for the Consent Decree. The Board is not considering their past performance, generally; you had two questions on the initial findings.

James Kearny reiterated that it doesn't seem that the ordinance gives a method of moving beyond simply finding someone had past violations.

Peter Drum stated he thinks that is right but it is a different question than the one the Board is considering, now. Was there enough proof for their finding, on the record, that the applicants have the technical, financial and performance history to complete the project? Was there enough proof on the record on those three issues for the Planning Board to make their finding that they complied with? Peter Drum explained further; the letter of credit could address the financial, the engineers plans, letters, survey, spill prevention plan could address the technical ability to execute this project, both the applicants and operator have had violations with no standing violations could address prior performance.

Peter Drum read a clear mandate for the Planning Board: The Planning Board may approve the application only if the applicant or agent is in compliance with all other Town of Washington or State of Maine permits for mineral extraction activity.

Lowell Freiman stated we have found that the Planning Board implemented the ordinance, the way the ordinance is written. Now, we are trying to determine is there sufficient credible evidence in the record to support the finding that the Planning Board put in the Findings of Fact.

Peter Drum said the Board is looking at whether there was evidence that the prior performance, of the applicants, would indicate that they would complete the proposed activity.

Lowell Freiman asked for a vote The Planning Board decision that the applicant had the financial capacity, technical ability and prior performance to complete all proposed activities was supported by substantial evidence on the record, 3 in favor, 2 opposed.

Issue #2: The safety of the roads is not adequate to sustain the increased traffic that will be generated.

Robert Marks reiterated the definition of substantial evidence for clarification – substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion.

Lowell Freiman read issue #2 aloud. The Board will find two parts 1) ordinance/law 2) sufficient evidence.

Peter Drum asked the Board to look at a copy of the survey – size of the extraction area and property, number of acres and determine the road condition in the Mining Ordinance that would apply. Peter Drum asked Mr. & Mrs. Linscott how large the property is. Mr. Linscott said 35 acres, Mrs. Linscott said there are two separate deeds; where the pit is its 35 acres and the extraction area is 4.3 acres. Mining Ordinance page 15 continued on page 16 E. 1, 2, & 3 Road Design, Circulation and Traffic. There is a section about the Planning Board requiring engineering impact studies, however, that is only on pits larger than 5 acres. As long as this pit doesn't expand beyond 4.3 acres then that would not apply. They do have a condition that it shall have a minimum travel surface width of 16' and 2' shoulders, they have made that finding. However, the Board needs to look at the rest of the traffic impacts to be considered and also the standards of the top in Section 1 to determine if the Planning Board correctly found that those standards were being followed.

James Kearny clarified the difference between a road condition survey and an engineering survey.

Peter Drum stated it says 'shall' require a road condition survey. There was some sort of road condition survey that was provided. It is not in the notebook.

Lowell Freiman clarified that was a town maintenance report not a road survey.

James Kearny stated that someone asked the Planning Board was there any other heavy traffic. Mr. Ludwig hauls stones out of there. Jon Whitten, engineer, suggested the road is fine but there is no documentation or evidence that he ever did a survey or study. There is no indication of how many inches of paving is on the road.

Peter Drum stated his legal interpretation is that anytime it says 'shall' it means that the Planning Board has to do this, it's a duty. If the standards that state 'shall' are not met, then it doesn't get approved. What the Board needs to look at is two issues; 1) did the Planning Board make the appropriate finding, 2) was their finding substantiated on the record. In this case, those two sections and the section discussed whether there was a road condition survey maybe quite important in terms of establishing whether the Planning Board was correct on the law in approving the application. Take your time and look through all the materials.

Charlotte Henderson made a motion that the Planning Board did not follow this ordinance in finding positively for it Section 2 Performance Standards-All Operations letter E Road Design Circulation and Traffic, Dorothy Sainio seconded. Discussion ensued.

James Kearny stated there doesn't seem to be any evidence at all that they discussed these items. There is no documentation that they went out there and actually surveyed the situation.

Peter Drum stated there is a record of the site visit.

Lowell Freiman stated they went singularly not collectively. It seems that there shall be a road survey was not followed and that there was not one that came close to being a road survey. There was not traffic survey of what it is and what it might be in the future. Nobody spent any time to really understand the integrity of the road and what difference fifteen round trips (how much they would weigh/how big are the trucks). Not being an engineer he would wonder what the impact would be on the roads and who winds up footing the bill for it.

Dorothy Sainio stated the Planning Board didn't take into consideration the traffic coming onto Route 220. That road is narrow going north, could be dangerous.

James Kearney asked how many trucks are involved each day, going back and forth.

Lowell Freiman clarified that it's fifteen round trips which equals thirty trips a day.

James Kearney said a road survey would find if two trucks or a truck and a car could safely pass onto/off of Route 220 intersection.

Lowell Freiman stated that the Planning Board took what the engineer said as fact and didn't really investigate. Technical input is needed to understand this.

Dorothy Sainio stated besides the gravel trucks they will also have trucks filled with water to spray the pit to keep the dust down, trucks to refuel the equipment, which would mean more trucks.

Lowell Freiman stated that the appellants raised all sorts of concerns and put in letters. He didn't find anything in the record where anyone in the hearings other than the appellants that the Planning Board brought it up and said we should think about these things and discuss it and see if there is a way to address these concerns.

James Kearny agreed and said the Planning Board ignored it.

Peter Drum asked the Board to look at the arguments of Mr. Marks and Mr. Mellor. Peter Drum asked the Board to look at page 8 of 27 he then asked the applicants if they have a plan that evaluated the road, there wasn't an attachment in the book. That is the one piece of evidence that the Board does not have. Mrs. Linscott said she may have it at home. This is a proposed finding of fact, not the final finding of fact.

Lowell Freiman asked for a vote – all in favor; unanimous vote.

Charlotte Henderson clarified that the Planning Board should have followed all of these.

Peter Drum stated the Board needs to find if there is sufficient evidence on the record to support that they looked at this and found that it was correct. Those standards are not specifically referenced the issue is that the issue of road safety is critical and those are safety conditions. Take a look at the law and make sure that those were complied with. If those findings were not found then the Board needs to consider what to do about that.

Charlotte Henderson asked if this is where we send it back to the Planning Board to get specific measurements that tell if these conditions are met or not. It's a country road and you can stomp your foot on the edge of it and break off a hunk of tar.

Lowell Freiman stated there was some discussion about some of these things. It seems that a lot of the information was taken on faith that the engineer said, we met those things.

James Kearney stated there is no documentation.

Dorothy Sainio stated that none of the dimensions were mentioned.

Peter Drum said, if you look at the regulation, the Planning Board 'shall' acquire a road condition survey. At the very least we need a road condition survey that showed these impacts.

This Board is to make the decision.

Lowell Freiman made a motion - There was not sufficient evidence in the record to support passage of E 1 a-f., Dorothy Sainio seconded.

Peter Drum stated if there were plans presented and someone can come forward and say these were the plans that were presented they can always ask you to reconsider this motion.

Lowell Freiman remembers only site distance and stopping distance being mentioned. The Board reviewed the maps that were in the record.

The motion is amended by Dorothy Sainio - E 1 C was met and does comply and is substantiated by evidence on the record, James Kearney, all in favor.

Dorothy Sainio made a motion that the Planning Board didn't give enough evidence that meets E 2 a, Cathy Blake seconded.

Lowell Freiman stated there is no baseline.

Cathy Blake stated the only certainty is the school bus twice a day.

Lowell Freiman asked for a vote - all in favor; unanimous vote.

Dorothy Sainio made a motion that the Planning Board didn't give enough evidence that meets E 2 b i.-vi., Cathy Blake seconded.

Peter Drum stated that they made an affirmative finding on E 2 iv.

Dorothy Sainio stated that the width is different in some places. If you go out that road some places are narrower than others.

Charlotte Henderson stated no one measured the road and wrote down what they found.

Dorothy Sainio said there is no evidence that they did.

Lowell Freiman stated the ordinance clearly says 'shall' require a road condition survey of the town road. The only thing we have is the survey of maintenance by the Selectmen and Road Committee, not considered a road survey which would be more detailed.

Dorothy Sainio stated that survey is for what road would be tarred next.

Lowell Freiman stated that without a baseline, how you make a determination by way of gaging and what to anticipate.

Lowell Freiman asked for a vote – all in favor; unanimous vote.

James Kearney made a motion – That the Planning Board didn't consider E 2 c, Dorothy Sainio seconded, all in favor; unanimous vote.

Lowell Freiman made a motion that there is not sufficient evidence on the record to support the Planning Board's decision that the applicants complied with E 2 c, Dorothy Sainio seconded, all in favor; unanimous vote.

The next meeting is scheduled for November 3, 2016 at 6PM.

Dorothy Sainio motioned to adjourn the meeting at 9:03PM.

Respectfully submitted,

Mary Anderson

