

Appeals Board Meeting
August 4, 2016, 2016

Present: Bob Temple, Cathy Blake, Lowell Freiman, Charlotte Henderson, James Kearney, Dorothy Sainio, Peter Drum. Public: Nancy Linscott, Jon Whitten, Jr., Berkley Linscott, Robert Marks, Wesley Daniel, Rosemary Fowles, Debbie Bocko, Albert Hutchinson, Henry Sainio, Ann Manson, Any Thompson

Lowell Freiman called the meeting to order at 7:00pm with roll call.

Dorothy Sainio motioned to accept the July 14, 2016 summary as written, Kathy Blake seconded, all in favor.

Lowell Freiman started the public hearing asking the Board if speaking should be limited or let each person have time to say what they want to say. It was decided that during the public hearing to let each person speak freely, with respect.

This case is an Administrative Appeal put forth by Suzanne White, Deborah Bocko and Bruce and Rosemary Fowles regarding the Washington Planning Board Approval for gravel pit extraction operation on McDowell Road owned by Nancy & Berkley Linscott.

There are five voting members in this quorum; Charlotte Henderson will sit in for Norman Casas who is not present. At the preconference hearing it was determined that this Board has jurisdiction over this matter and the Applicants have standing though all the applicants were not present due to family/medical concerns.

Lowell Freiman explained the appellant/representative will give testimony without interruption. Any interested parties will ask questions through the chair. The interested parties will have an opportunity to present their case. The board can call their own witnesses. The appellant(s) will be able to ask the interested parties questions through the chair. Please identify yourself before speaking. Lowell will read the letter from Burton "Sonny" Ludwig that he dropped off before the meeting. The public hearing will close and then it will be decided when deliberations will begin.

Peter Drum, Attorney for Appeals Board, asked that comments be directed to the chairman, arguments between folks will not be tolerated, and everyone should be respectful.

Rosemary Fowles, representing she and husband, Bruce live on McDowell Road directly across the street from the pit for 23 years. She stated that they have been through the digging that they had done removal, and screening. Rosemary wanted to state this to reiterate that they and the other abutters have standing. She had submitted written testimony and asks that the Board take notice.

Rosemary brought up the Consent Decree, exhibit #10, a court order between the Town of Washington and Berkley and Nancy Linscott. The Planning Board, part of the Town of Washington, didn't concern themselves with it, not something they needed to address. However, it is a binding document and it has not been amended or gone back to court to discuss it. The

Consent Decree states that they must comply with certain things they must do: ex: build a proper berm, slops at a certain angle and cover it with grass. Once in compliance then the Linscott's could apply for a permit, then possibly more digging could begin. They are not in compliance; the slope is still rocky and has not been seeded over. The berm is woefully inadequate as shown in the pictures you can see the dirt from the road. The CEO mentioned it would not have passed. If they are not in compliance with the Consent Decree, technically, this application should never have been allowed. They should not have been allowed to have an application by a court order by the Superior Court of Maine. Rosemary has other points to make as to why this case should be overturned.

Rosemary has submitted pictures of the road condition. The road must be safe and convenient. There are places where it is not safe and is not 18 feet in parts. Two places – Mitchell Hill Road meets McDowell Road where there is a grass triangle in the middle and the more important and dangerous is where it goes onto Rt. 220, very narrow. Between Mitchell Hill Road and Route 220, the way the trucks would go, there are a couple of hills, hidden drives, blind spots and overhanging of trees blocks what is coming down the road. If a truck is coming and can't be seen until the last minute the other vehicle might try to pull over to the inadequate shoulder, in some places. The condition of the road, especially on the hill before Rt. 220 is cracked. There is no competent evidence from the Planning Board to show the road is adequate and safe. The Planning Board was to consider environmental concerns not just on the pit but into the surrounding areas through dust, air, noise. There is a letter, exhibit #2, requesting that the Planning Board look into the environmental concerns. Living across from the pit, Rosemary said the dust was incredible when they were digging before and they couldn't open their windows. Maine is known for having a lot of radon and arsenic in the water. Her concern is that some of the Radon could be coming out which sticks to particles and gets into your lungs; could be very harmful to the abutters and animals. Right behind their land is a protected wet land, how will this affect the animals there. These environmental concerns were not addressed properly. It shows that it was not considered by the Planning Board and could be reversible error. Page 12 in the Mining Ordinance talks about past performance of the applicants must be considered. It also said it in the check list of the Planning Board. This operation started without a permit not just for personal use. There was a Stop Work Order, exhibit #6 and the violation of the Stop Work Order, exhibit #7. The Consent Decree, a court order, was not complied with. The past performance does not bode well for future performance. In the brief she talks about why this may be so important. There were a lot of things that needed to be done to make sure the ground water was not affected by all the environmental hazards mentioned. There are supposed to be a certain number of trucks; no one will be monitoring – past performance is very important in this case. Rosemary feels that this was not taken into consideration by the Planning Board, again, reversible error.

Deborah Bocko read a portion of the Consent Decree “This is an agreement between the parties involved in court litigation to result a dispute over which the court had jurisdiction. In the agreement of that, parties has transformed into court order which binds the parties”. There were efforts made by people in town to sort of put this on the wayside. This is a binding agreement and that never should have happened. In this case the Town of Washington represented by the Selectmen took the applicants to court for initiating the gravel pit without first obtaining a permit and thereafter allegedly violating two cease work letters. The applicants, per the Consent Decree, were to reclaim the land by July 1, 2015 before filing an application, exhibit #10.

Logically the town wanted to have the land restored to its prior violations state. The applicants agreed to that and the court mandated it. Deborah said it makes sense that the town would want the land back to its prior state in case the application did not go through. The Planning Board, an Administrative Board of the Town, exhibit #28 pages 2 & 3, one member argued that the Consent Decree was a court order that did apply to the Planning Board. The only responsibility that the Planning Board had was to the fair administration to the town's ordinances. That's not the case; the Consent Decree was the law of the case in Knox County. As represented in the March 29, 2016 Planning Board Summary, the Planning Board decided that the Consent Decree had nothing to do with the Planning Board's decision, exhibit #28. The Planning Board erroneously took the position that the applicants could either reclaim the land first or file a reclamation plan thus subverting the intention of the courts decree. The decision of the Planning Board ignored the possibility that the applicants application could be denied and that the land might never be restored. The determination of the Planning Board ignored its obligations to obtain or receive evidence of the past performance of the applicants in regards to Planning Board permits. It's in the Mining Ordinance and application that past performance be considered. If the Consent Decree was reviewed they would have found at least two court ordered obligations that were imposed upon the applicants were breeched 1) reclamation be accomplished by 7/1/14 (still not done); 2) this be accomplished prior to filing a request for a permit. This decision by the Planning Board changed the dynamics of the applicants hearing deliberation. Their past illegal activities were ignored by the Planning Board that acted as if there was not past only future. For the Planning Board to have not done its due diligence is a reversible error. Deborah asked the Board if they will read all the letters and submission so she doesn't have to go through them in detail. Lowell Freiman said the Board has familiarized themselves with everything in the packet and she could reference/highlight what she wants. Deborah's concern, again, is the environmental impact on the water which also has uranium. There are more problems with uranium being released into the ground water from drilling, digging, disturbing the bedrock versus hand dug wells. In the Findings of Facts the Planning Board decided that because the pit is internally drained that no water testing was necessary unless there was an accident such as a gas spill. If no testing has been done to begin with what would we base it on. She has had her wells tested and before she bought the previous owner needed to put a filter in the house for drinking water. There is already a problem so potentially, if there is a lot of bedrock being disturbed, it could be more of a problem. She noticed that in the Findings of Facts a lot of decisions were based on the applicant's statements. There were not a lot of submissions to back the statements. The Planning Board accepted the two letters one from Department of Inland Fisheries & Wildlife and the other from the Department of Agriculture, Conservation & Forestry, "according to the information currently in their biological conservation data system there are no rare botanical features documented specifically in the project area." The lack of data is a reversible error. Some of the Findings of Fact addressed the road pertain to where they are going to intersect to McDowell Road from Mitchell Hill. Rosemary Fowles had mentioned the entrance of Rt. 220 and McDowell which is not addressed in the Findings of Fact has bad visibility. There have been many cars/trucks forced off the road where there is nowhere to go. She does not believe the road is adequate and the Mining Ordinance do provide that if it's not adequate the applicants must make it adequate. Will the road sustain the truck traffic? Because there is no documentation Burton "Sonny" Ludwig's trucks cannot be compared to Linscott's trucks.

While reading the packet you'll realize a lot of things the abutters asked for, from the Planning Board, were not done.

Rosemary Fowles stated that she realizes there are other pits in Washington but most pits are not so close to the road or across the street from a house. That why this is a concern, the effects from this pit are going to be a lot worse for this town than those on a state road or a bigger set back.

Lowell Freiman made reference to a letter that went out to the defendants from the court decree which specifies what has to happen in the reclamation plan. The letter is exhibit #14.

James Kearney asked Bob Temple if he stated at a public hearing that the Consent Decree has not been completely implemented. Bob said they came up with an agreement, the applicant submitted a reclamation plan which he said didn't address all the issues at which time it sat in limbo. The town attorney said they had a right to go ahead and file an application which is exactly what they did. James asked Bob if the Consent Decree has been totally implemented, yes or no. Bob said, no.

Dorothy Sainio asked Bob Temple if the Consent Decree said they had to do so and so and so and so, now you're saying that as long as they presented that reclamation plan then they didn't have to do that, is that what you're saying. Bob said the reclamation plan, the jest of what the attorney's letter was meant to do – the applicants would apply for a permit, have a plan and the Planning Board would approve it and that plan would be in compliance with what the Consent Decree called for. If the Planning Board approved the reclamation plan it would satisfy that. Basically, it was the reclamation and the screening that were the issues.

Jon Whitten, Jr., Engineer with Plymouth Engineering, representing Nancy & Berkley Linscott. They are here for the four subjects of appeal. He has been involved in the project for over one year. The first application was submitted one year ago tonight as a small pit then reapplied for a medium pit, over the course of working of the applicants. The medium pit is less than five acres in size. They have met the standards of the ordinance for a medium pit. They worked diligently on the 61 page document summarizing all the standards. They feel they are in line with the Consent Decree based on the March 2, 2015 letter, exhibit #15. The applicants are clearly given permission by the town attorney, Fred Newcomb, III, "nothing to prevent your clients from filing the required application for mineral extraction permit". That application includes a reclamation plan that meets the town and DEP standards which includes a buffering plan that meets the town's requirement for a site impervious buffer which is above and beyond the initial berms on the property. The Planning Board process requested the buffers be enhanced which the plan includes.

As far as the road safety they have reviewed the stopping site distances for the intersection of the gravel pit itself with Mitchell Hill Road and Mitchell Hill with McDowell Road. Along McDowell Road they made sure it is 16 feet wide paved road with 2 foot shoulders. They found, areas that were measured, 18 feet of pavement with 1 foot shoulders. They found vegetation should be cleared down the road to the left for further stopping site distance to make that intersection more visible for the truck drivers and other drivers on the road. The intersection at

Rt. 220 is a Y intersection which the paved part may be less than 18 feet wide but there are two avenues to get on the road.

As far as environmental hazards they stand by the Findings of Fact and submittals. They have contacted the required state agencies, paid their fees like every other gravel pit applicant does and received the letters that the Planning Board reviews and found they met standards as the Findings of Fact state.

This pit is just less than five acres on a forty acre piece of property. The excavation area is set back past the minimum standards of the town regulations. They are not digging right next to the road. There is past disturbance near the road that will be reclaimed as the plans indicate. The actual digging is going to take place further back into the property. The buffers will be constructed as part of the process to keep the site lines from cars and pedestrians on McDowell Road from actually looking into the pit itself. As far as dust debris the operator/applicant has to follow the town regulations. The regulations are enforced by the town's Code Enforcement Officer the same as the other 31 gravel pits in Washington. They don't feel they are asking for any particular specific favors when they met the standards. Dust control will be done with water no calcium chloride will be used due to comments from the neighbors to try to minimize contaminants of the use of calcium chloride. The truck traffic is limited to 15 trucks per day, operator will follow the rules of the ordinance. A copy of the permit will be onsite at all times so there would be no excuse for someone not knowing the rules and regulations of the gravel pit. There is a plan to control/prevent/clean up any environmental spills. Nothing will be stored on site (oil, gas) so potential of spills is small. The digging is limited to at least five feet above high seasonal ground water. DEP considers this protection in itself for any environmental hazards entering ground water. There are no wetlands delineated on the property. There is an intermittent stream upgrade from the site. The pit itself is graded to be internally drained so that no rain water will flow off, soil particles will not leave the site. We feel that this is a safe operation as any other gravel pit that's regulated by this ordinance. The Findings of Fact stands for itself; standards are being met. The technical and financial capabilities of the operator/applicant have submitted letters testifying to their current violation record which is nothing. The Consent Decree has been ruled on by the courts is considered a non-current violation. The applicants moving forward with their permit for a gravel pit meets the standards is a way to full fill their Consent Decree. The applicants have been working with the town since the ruling came down; paid their fees, built buffers, and continuing to promise to move forward with further buffers and regulations to make sure the operation is to code.

Deborah Bocko doesn't have any issue with the width of the road. Her concern has been that there is no base of the road and parts are already falling apart with the traffic now. Without proper bedding for that road will it withstand the increase of traffic with the heavy trucks? Most of the other pits are on state roads. The burden of this road falls on the town. The Consent Decree, if brought back to court, what would the judge say about the town lawyer saying the consent decree doesn't need to be followed. It's a legally binding document.

Suzanne White asked is 15 truck-loads road trips? Lowell Freiman confirmed 15 round trips.

Lowell Freiman asked about the reclamation and buffers to date and the time frame when it will be accomplished. Berkley Linscott stated they have been locked out of the pit for 2 years so they have not worked in the pit. Jon Whitten showed the approved plan and explained the 1st phase,

done to meet the ordinance will be done with in the 1st few months. The reclamation plan is to slope everything 2 ½ - 1 with loam and seed to revegetate. Only 3 acres will be open at one time to be reclaimed as they go.

Dorothy Sainio stated the reclamation plan has been submitted which the Consent Decree does say but part E of Consent Decree says ‘the defendants are free to apply for a mineral extraction permit once their property is in compliance. Is the property in compliance? Jon Whitten said it’s coming into compliance with this permit. James Kearney said, that’s not what the Consent Decree says. Jon stated he understands, the applicants moved forward based on their communications and efforts to come into compliance. Based on the communications brought back to them from the town attorney they were advised that this was an allowable application, from the 3/2/15 letter. James Kearney asked Peter Drum said he doesn’t understand how our town attorney, on his letter of 3/2/15, “I have checked with the CEO and it is my understanding that there is nothing to prevent your clients from filing the required applications for a mineral extraction permit.” That is in direct conflict with the judge’s order of 12/23/14 which says the defendants, Part E, are free to apply for a mineral extraction permit once their property is on compliance. James did not see any correspondence between the judge, at this case, and the town attorney to change the order. Peter Drum stated the only way he could comment on that is in executive session.

Lowell Freiman asked for confirmation on the measuring of Rt. 220 and McDowell Road including the Y or each side of the Y to the side of the road. Jon Whitten said he didn’t measure the road there but has driven through many times. He said it appears that each leg of the Y is at least 12 feet wide. Lowell asked if each side would have a vehicle coming in and out at the same time. Jon said there are multiple ways to enter and exit that area. Charlotte Henderson said both sides of the Y are made to go in one direction.

Dorothy Sainio asked how wide the trucks are. Jon Whitten said they are 8 feet wide. There are concerns for the walkers and runners on the road. The applicants agreed to use only ½ of McDowell Road.

Deborah Bocko, exhibit #14, regarding no access to the pit; this letter specifically says what they can and can’t do and the dates to comply. To say they could not complete the work that was ordered to her seems erroneous. If it was not done by the time specified then it was by their own default it did not get done. The Consent Decree on page 3 of 4 at the bottom they are acknowledging everything that is in there and are party to it.

Peter Drum confirmed with Jon Whitten that the Linscott’s are the applicants but not the operator of the pit and are the applicants under the prior Consent Decree. Peter Drum asked Jon if it’s his opinion that the Consent Decree has been in compliance by the Linscott’s up to the 7/1 deadline. Jon’s opinion is that they are still working to come into compliance of that decree as illustrated by the various letters and communications over the last two years. Peter Drum asked because in the summary from 9/8/15 Planning Board meeting, minutes not always accurate, it was presented that Jon had represented to the Planning Board that the conditions of the old extraction had been met per court order. Is that a correct statement? Jon understands that they had built berms on the property which were presented on the original plan per the Consent Decree and had

reclaimed portions of the property and this application was allowed by the Consent Decree as a continuing order. He thought the applicants were following through with the Consent Decree by applying and finalizing the reclamation plan with the Board. Peter Drum asked Jon if the applicants fulfilled their obligations for 7/1, did they do it or not do it. The conditions are in a 5/25/13 and 9/5/13 letter. Jon prepared a reclamation plan and submitted it. It was reviewed and comments came back from the Code Enforcement Officer. A fair amount of contention at the time between the town, applicants with the court order and that there was a feeling that the reclamation plan would never be approved and would continue on. Jon said the process of applying for an application in keeping this rolling was moving with the intent of the decree. Peter Drum asked Jon if the summary from 9/8/15 should say 'could be met if the application is approved'.

Peter Drum confirmed with Berkley Linscott that he has not been into the site because it's been locked, how the berms were built. Berkley stated the berms were built before the Consent Decree. Peter Drum asked if there was a court order did you get council that you had to come back and get a permit in order to perform that court order. Berkley said they never went to Superior Court it went through Mediation. The mediator, Paul Gibbons, told the Linscott's to pay \$4,000.00 to wipe the slate clean. Berkley asked what does 'wipe the slate clean' mean. Peter Drum said he's not sure what the mediator meant but there was a court order on 12/23/14 by a Superior Court Justice which has all the force of a court judgement. Nancy Linscott said she would have her lawyer, Patrick Mellor contact Peter Drum.

Lowell Freiman asked if anyone in the public has anything to say.

Robert Marks, attorney in town, as a member of the public will make a comment about Fred Newcomb's letter outside executive. The letter does not mention the Consent Decree. It states at the beginning that he usually represents towns but in this case he seems to be representing the CEO, not sure who he is speaking for. He states that the CEO found objections to the reclamation plan and goes on to say according to the CEO there is no reason why an application can't be made and let the Planning Board sort it all out. This seems to be strange advice under the circumstances and it's going to be up to the Appeals Board to determine whether or not the Planning Board made the mistake by following that advice. The Vanner Road pit brought up is on a town road. Several things happened during the process of that petition 1) the state made improvements on Rt. 17 which is where the trucks would ingress/egress, they put in an extra lane going down the hill to make it easier to make the turn onto Vanner Road; 2) the applicant, Lane, agreed that one out of every three times the first 6/10th of a mile the road had to be repaved they would do it. There was quite a burden placed on the town and the Planning Board recognized that the extra lane put in on Rt. 17 was probably going to be a safety concern. That level of inspection did not occur from what he read in the packet that was sent out. From what Mr. Linscott just said that it was a choice not to comply to get the reclamation done by the date agreed upon. He chose to keep the pit locked though once you get a permit you can proceed at your own risk. The two things that had to be done: the reclamation plan had to be filed by 1/1/15 and the reclamation had to be done by 7/1/15. In order to comply the Consent Decree clearly stated these had to be done before application. Get the land back to before the violations that way if the Planning Board decides not to grant the permit at least that part would be done. Robert's guess is that this was taken by the attorneys on both sides to a judge, explained what the

agreement and mediation was, filed a mediation agreement and then one of the two attorney drafted something for the judge.

Albert Hutchinson stated that Berkley Linscott had a Stop Work Order so he couldn't go in to work in the pit. How could he fulfill the requirement? Albert doesn't feel he could.

Deborah Bocko said the Stop Work Order was address in exhibit #14.

Rosemary Fowler had submitted pictures, copied in black/white, already in exhibit. She would like the Board to see the color photos written on the back where they have been taken. Exhibit #27 and #28 shows that someone had cut the trees back to have a clearer vision of Rt. 220.

Lowell Freiman read Burton "Sonny" Ludwig's letter as a public comment basically stating he is a property land abutter of the Linscott's pit he observed from the time the pit was operated under the previous permit that the operation had no apparent effect on my family or property. a) I understand the operation is small project; b) I also understand that all traffic is to be routed to Rt. 220. I have lived on my property for about 70 years, the road is paved therefore no dust, the road is adequate speed limit 30mph; c) the pit is gravel and stone not sand or loam therefore very little dust is going to be generated; d) I understand that the crushing of stone is limited to 15 days per year maximum, going to get a little noise from the crushing that's about 4% of the year it's possible that the crushing will be less than 15 days. I also understand that the pit can only be open from 7am – 5pm and the pit will not be operated every day. This will minimize the impact on abutters. During the spring months McDowell Road is posted to heavy loads, so operation will be slower in those months; e) I believe that the Linscott's have abided by any and all the towns requests and believe they will in the future; again, no ill impact to the Ludwig family or property.

Lowell Freiman asked if there were any other comments from the appellants, interested parties, public, or Board.

James Kearney motioned to close the Public Hearing at 8:30pm, Dorothy Sainio seconded, all in favor.

Dorothy Sainio suggested a site visit. Lowell Freiman stated a public notice will go out that the Appeals Board will meet at McDowell Road/Rt. 220 for a site visit on August 25th at 6:00PM before the start of deliberations at 7PM in the Bryant Room.

Dorothy Sainio motioned to adjourn the meeting at 8:35PM.

Respectfully submitted,

Mary Anderson

