

Appeals Board Meeting
November 3, 2016

Present: Bob Temple, Cathy Blake, Lowell Freiman, Charlotte Henderson, James Kearney, Dorothy Sainio, Peter Drum. Public: Wesley Daniel, Berkley Linscott, Nancy Linscott, Henry Sainio, Suzanne White, Robert Marks, Deborah Bocko

Lowell Freiman called the meeting to order at 6:15pm with roll call. Charlotte Henderson will sit in, as a voting member, for Norman Casas.

Dorothy Sainio motioned to accept the October 27, 2016 summary with corrections, Cathy Blake seconded, all in favor.

Lowell Freiman stated that the business, at hand, this evening is to go back to the last two issues; the dust and other environmental issues. Lowell Freiman said Patrick Mellor wanted some time.

Patrick Mellor stated he was not here at the last meeting and was informed by the applicant that the issue of the road was something that was discussed at some length. Patrick Mellor wanted to make sure the Appeals Board members were aware of the multiple instances where the road issues were discussed; Planning Board Meetings - 1/19 at 1 hour 39 minute mark until the meeting was adjourned the road condition/road survey was discussed; 2/9/16 at the 57 minute mark the road survey and the issues required under the mining ordinance were discussed; 4/12/16 at the 1 hour 23 minute mark the road and road system was discussed although Mr. Mellor said he thought that was under Article XI, Site Plan Review, Section 6 it may have been some different quantitative/qualitative issues but letting this Board know, none the less; 4/26/16 at the 55 minute mark the road, again, was discussed at length by the Planning Board.

Patrick Mellor cited two state statutes 23 MRSA Section 3651 highways, town ways and streets legally established shall be opened and kept in repair so as to be safe and convenient for travelers with motor vehicles. It doesn't say residential motor vehicles or commercial motor vehicles it just says motor vehicles. Patrick Mellor stated, that this question about if it's found that the town road is not sufficient for someone's business enterprise there is a question about who is responsible for making it sufficient. 29A 2395 that goes into instances, section 4, the municipal officers can designate public ways and impose restrictions similar to those made by DOT, so that's the type of powers that have been given to municipalities. If the road can't handle big trucks, like the trucks that are currently on that road, it can be posted. That's an equal application of the law to all trucks that would be on that road rather than simply these land owners.

Back in 2013, Seth Goodall was doing work for the applicants and he wrote a letter which reads 'a prohibition of truck traffic by the town on McDowell Road directly violates Maine Statutes and the Linscott's state and federal constitutional rights including the takings and equal protection clauses. Such an action by the town subjects it to potential law suit and significant damages including costs of attorney's fees of the challenger as was seen recently in Karen Smith vs Town of Edgecomb. In this case the Town of Edgecomb was liable for significant damages and the cost of attorney's fees as a result of the towns attempt to block travel for trucks over a town road to a gravel pit owned by 'our client'. The Maine Supreme Court has stated that the right of access to someone's property over a public highway/town road is a

property right and cannot be taken away or damaged without just compensation.’ Then Seth Goodall mentioned the statute that Patrick Mellor just gave the Board. Then Seth Goodall talks about equal right of all to use public streets for purposes of travel. Maine law does not differentiate between motor vehicles, types of vehicles, commercial trucks vs passenger vehicles, etc. Lastly, Seth Goodall mentions the second statute 30A MRSA 3001, the town has the authority under its home rule to enact traffic ordinances on local roads to keep big trucks off those roads if they are going to be damaged.

In short, Patrick Mellor wanted to make sure that the Board of Appeals had the entire, or as much as he could provide in terms of the law and that the letter from Seth Goodall was sent on behalf of the applicants back in 2013 when they started this process.

Robert Marks stated the first point that Patrick Mellor made was he pointed out three sessions in which the road was discussed. Robert Marks said clearly the Board's findings, last week, were not whether there was a discussion, it was whether there was adequate evidence to support the findings. The Board found, correctly, that there wasn't adequate evidence to support the findings. Robert Marks stated that it's a sense of irony that he now hears Patrick Mellor going outside the ordinance to outside documents stating laws to try to convince this Board that your decision was wrong when several weeks ago, when he was here, he said you can't go outside of the ordinance and look at the Consent Decree. Robert Marks stated that Patrick Mellor can't have it both ways. What the Board did was not akin to the case that was cited in that letter Patrick Mellor read. There has been no barring of the applicant's right to use the road. There has been no determination that trucks cannot use the road. The only determination that this Board made was that they did not satisfy the ordinance by providing the details and the requirements cited in the ordinance. If they had done so there wouldn't be an argument. Clearly the point being, was there support in the evidence that you looked at for the findings that were made, in this case you found that there wasn't any support.

Patrick Mellor stated Mr. Marks suggested I said the Board should not look at state law, that's inaccurate. What Patrick Mellor said he said was that the Board shouldn't look at a court order, state law is something the Board needs to be aware of and to honor but a judicial decree is not something this Board can enforce.

Robert Marks stated that as long as the topic is on the table he'd like to suggest that the Board reconsider its issue of its determination that the Consent Decree doesn't apply to this case.

Patrick Mellor objected, saying it's been decided.

Robert Marks stated, so is the road.

James Kierney said, "Mr. Chairman, I think it's time to stop this."

Peter Drum stated that they have had their comments, we can go into executive session for ten or fifteen minutes. **Dorothy Sainio motioned to move into executive session at 7:30pm, Charlotte Henderson seconded, all in favor.**

Cathy Blake motioned to move out of executive session at 7:42pm, Dorothy Sainio seconded, all in favor.

Lowell Freiman read the original appeal issue #III. Environmental Hazards that could impact abutters was not adequately considered by the Planning Board in coming to their decision, in full. Separately, the appellant's attorney raised two other issues, we need to separate these out. Lowell explained that the Board needs one motion that says did the Planning Board follow the ordinance/law and a separate motion to ask if there was sufficient evidence, in the record, to support their decision. **Peter Drum suggested a positive motion on the law, that the Planning Board properly found that the emission of dust, dirt, fly ash, fumes, vapors or gases which could damage human health, animals, vegetation or property at any point beyond the lot line of the commercial or industrial establishment creating emission properly found that it was prohibited. Peter Drum stated the Board could break it off into different sections. The second motion would be, did they have substantial evidence on the record to make that decision. Charlotte Henderson moved the motions, Dorothy Sainio seconded.** Peter Drum reminded the Board, just because you made the motion doesn't mean you can't disagree with it. It's helpful to start with 'they did do it right' and if the Board finds that they didn't then amend the motion. Discussion ensued. The Board reviewed page 17 of 61 in the Findings of Fact, Section 2. Abutter Protection.

Lowell Freiman stated it meets the ordinance, there's information there, they followed the ordinance and asked the questions that they needed to.

Dorothy Sainio stated that they received letters and it seems the Planning Board didn't read the complete letters.

Lowell Freiman asked if she was referring to the dust or the other environmental issues. Lowell said they are just discussing the dust.

The Planning Board properly found that the emission of dust which could damage human health, animals, vegetation or property at any point beyond the lot line of the commercial or industrial establishment creating emission properly found that it was prohibited. Lowell Freiman confirmed that this would be upholding the decision the Planning Board has made. **Lowell Freiman called for a vote: four in favor, one opposed.**

Lowell Freiman stated the second part of the motion; is there sufficient evidence, in the record, to support the findings. Charlotte Henderson moved this portion of the motion. Patrick Drum offered for the Boards consideration that the applicant did state that they would be using water, they would comply with the calcium chloride application in order to limit dust. Where this is not exactly an evidentiary standard that they have already met their application statement which can be considered an affirmation on the record and, therefore, if they violate that and don't meet the dust requirements. If they don't meet the dust requirements the town can always cite them for the violation. This Board needs to decide whether or not it's factually substantial enough.

Dorothy Sainio stated that in listening to the tapes she thought the Planning Board said they did away with them using calcium chloride.

Patrick Mellor clarified that one of the appellants had an issue with calcium chloride so the applicant agreed that they would not use it and they would use water to keep the dust down.

Lowell Freiman asked for a vote: four in favor, one opposed.

Lowell Freiman asked the Board to familiarize themselves with the next issue, page 14 of 61 in the Findings of Fact G. Natural Resource Protection.

Dorothy Sainio stated that in the letters it read, ‘prior to any future site disturbances we recommend additional consultation with the municipality and other state resource agencies including the Maine Natural Areas Program and Maine Department of Environmental Protection in order to avoid unintended protected resource disturbance’.

Lowell Freiman made a motion that the Planning Board correctly applied the ordinance with regard to Natural Resource Protection, Dorothy Sainio seconded.

Dorothy Sainio stated that the Planning Board had these letters but didn’t read them completely, there are paragraphs that she didn’t hear at all in the tapes. Were the letters really considered? ‘According to the information currently in our biological and conservation data system filed there are no rare botanical features documented specifically in the project area. This lack of data may indicate minimal survey efforts rather than confirmed absence of botanical features, you may want to have the site inventoried by a qualified field biologist.’ They didn’t even talk about that; the Planning Board said they had a letter. They had no research on it.

James Kearney stated he thinks the letter is a good suggestion, however, he doesn’t see anything in the ordinance that requires the Planning Board to take that letter into consideration. He thinks it’s something the Planning Board could have used as a performance standard. He doesn’t see that it requires them to.

Lowell Freiman stated he read the letters differently; in that the letters are not really conclusive it doesn’t say that there not those kinds of areas. He thinks that anything more is done that more investigation and information need to be collected and collated. He reads it as the absence of this is saying it’s a protected area not because they’ve collected the data, they just don’t know. To his way of thinking the ordinance was not properly followed.

Charlotte Henderson stated that this whole thing is that a lot things had no basis and information to compare to and the Planning Board made some kind of judgement, that things were okay instead of saying well if we got a survey of the Natural Resources then we would have something to compare it to. Throughout this has not happened.

Lowell Freiman asked for a vote: 0 in favor, 5 opposed; unanimous vote.

Lowell Freiman stated the second part of this motion; is there sufficient evidence, in the record, to support the findings. Charlotte Henderson moved this portion of the motion.

Dorothy Sainio stated that what she has heard and read the Planning Board had letters from people that said they had no record of anything that we had in town being environmental. They had letters suggested, to her mind, that they should have somebody look at it, put their feet on the ground and look at it and they didn’t.

Lowell Freiman had the same take on it. He thought the letters were specific in saying more should be done, somebody should go, look and inventory. The appellants raised the same sort of questions.

Patrick Mellor wanted to make a recommendation that Section G. Natural Resource Protection that that be read aloud so we are all talking about the same thing so that it’s on the record that this Board is making a decision that has not been complied with and we are all aware of what we are talking about.

Peter Drum suggested the Board look at the site plan and the ordinance on the issue on Natural Resource Protection. It’s appropriate to look at the law in the Mining Ordinance as a fair standard.

Lowell Freiman read aloud page 14 of 61 in the Findings of Fact G. Natural Resource Protection.

After part 1 was read, Patrick Mellor reiterated 'if it has been identified'. This is not applicable; it has not been identified as a critical natural area.

Dorothy Sainio stated, we don't know if it has or not, nobody has gone to look.

Lowell Freiman continued to read part 2 and 3 of G.

Patrick Mellor stated as a matter of law it says if. 'If' any portion has been identified by the Maine Natural Areas Program. That's not the applicant's responsibility, it has not been identified by the Maine Agency so therefore it's not incumbent upon them to do anything additionally. It's a precedent that's a necessary precedent in order for that to apply.

Peter Drum stated that the Board is able to interpret that statement. He said Patrick Mellor brings up a valid argument about what it means but he'll let the Board interpret the statement.

Charlotte Henderson gave an analogy; 'if we were being asked to see if Henry needed to have his toenails cut, first of all we would need to know whether anybody has ever done it before or whether they need it or anyone has ever taken a picture of it before'. You just don't do it without basic information. You can't just look at a piece of property and say well we don't really know if there are any natural resources here no one has researched it yet. The Planning Board had the authority to ask for that information, if they thought they should.

Peter Drum understands Charlotte Henderson's point. He thinks the point that Patrick Mellor is trying to make and probably the way the Planning Board viewed this is that it says, very plainly in the letter, for example; according to the information currently in our biological and conservation data system files there are nowhere botanical features documented in specifically the project area. The Planning Board probably could have gone beyond that statement and said we don't know what's there go ahead and have a biologist come in and look. There are some practical problems with that. If this were a 45 or 100 acre pit he would have said that absolutely that should have occurred but the Board also needs to weigh that against this being a less than 5-acre pit. Was it incumbent upon the Planning Board to do that? Did the Planning Board, in order to comply with the ordinance, have to go that extra step and get a biologist or did they rely on this letter properly to say the precondition has not been met? This is what this Board needs to struggle with in terms of the factual analysis.

Robert Marks ask for a right to respond, what Peter Drum said may be perfectly right in the absence of several letters from an abutter saying that there was a rare begonia on her property, there was around 85 nesting pairs of birds and other wildlife. Robert Marks said he thinks that tips the balance and suggests to the Planning Board, all we have are two letters saying basically a negative, we don't know but we haven't identified anything. The abutter says, there are some serious environmental issues on my property that could be affected by this development. The letters just stating a negative are not enough.

Patrick Mellor stated that each of those G 1 – G 3 say 'if' any portion to be developed includes areas mapped/identified by MDIFW, 'if' that exists then the 'if' never happened in those three. The Maine agencies didn't map or identify them so the prerequisite doesn't exist.

Lowell Freiman stated that he understands the point Patrick Mellor is making.

Dorothy Sainio stated the abutter said, for instance, two kinds of lady slippers, we know lady slippers are on the endangered list. To her, if she had been on the Planning Board, the first thing she would have done was either gone and looked herself or have someone else look. The Planning Board didn't do anything.

Lowell Freiman stated given how those letters are written, both from the agencies and the abutters, he thinks that resources should have been brought in to take the next step; having a botanist or other people come make a determination.

Dorothy Sainio stated that this Board doesn't know if the gravel pit would hurt them or not but someone that know more about it should have made a decision.

James Kearney stated that he does understand Patrick Mellor's point basically does/did the Planning Board work within the ordinance and that's the only thing. It might possibly be that we need to change that ordinance. If the abutters had come forward with a biologist that stated emphatically that there were forty pairs of leach turns or something and a small wetland, it might then behoove the Planning Board to actually take that more seriously than I've seen the bird or there are lady slippers out there. The Planning Board then may have/could have but they didn't. As suggested a pit of less than 5 acres as opposed to one of 50 or 100 acres possibly carries more weight. The ordinance basically suggests that the Planning Board did not have to take that into consideration.

Peter Drum stated as a matter of law when we look at Planning Board decisions you have to say, if there was a basis for the Planning Board to find what they found. If there is evidence on both sides, then the Planning Board is somewhat to be granted their discretion. Here is another issue, there were eleven Planning Board meetings on this application over 13 months. Had the appellants wished to get this property designated as a special area they had plenty of time to lobby Maine DEP or IFW or other organizations to come in to look at the property and decide whether it should be added to the map. That can happen pretty quickly if someone is raising a red flag and says there are critical species here. The issue is, as a policy matter, do you think that the ordinance requires the Planning Board to take anybody to extract gravel and say you need to hire a biologist to come and prove that there is nothing there. It's clear that these areas are not mapped that way so it might be because the state didn't have enough money it might be for many, many reasons but is the Planning Board going to do that in the future and should they based on the language in the ordinance. That's what this Board needs to review. Again, James Kearney is right, if you don't like the result in this than that might be a reason to change the ordinance. If you think the ordinance already says what you want it to say and you think that it requires a biologist, then you can find that but he would be more secure defending that decision in court if it said that an absence of information means that they need to gather information and he doesn't see that here.

Lowell Freiman made a motion to go into executive session at 7:30pm, Charlotte Henderson seconded, all in favor.

Dorothy Sainio made a motion to go out of executive session at 7:36pm, Cathy Blake seconded, all in favor.

Lowell Freiman made a motion to withdraw his previous motion.

Charlotte Henderson made a motion to reconsider the prior vote, James Kearney seconded, all in favor; unanimous decision.

Motion on the table, Did the Planning Board meet the legal standard of the ordinance for Natural Resource Protection, James Kearney seconded.

James Kearney stated that he would have liked to see more detail but he thinks the Planning Board met what the ordinance requires.

Lowell Freiman stated he feels the same way after thinking about it and getting some more information he thinks that the Planning Board followed the ordinance as it is written. As a sidebar, he thinks, at some point, that needs to be written out in a different way, with more oversight in that area.

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

Dorothy Sainio made a motion that the Chairman, Lowell Freiman, be allowed to sign the Findings of Fact so the rest of the Appeals Boards does not have to come back, Charlotte Henderson seconded, all in favor.

Patrick Mellor, for clarity, asked if the last issue regarding Natural Resource Protection typically the Board would break it into two.

Lowell Freiman thanked Patrick Mellor as they need a vote on the sufficient evidence part of the last motion.

Lowell Freiman made a motion that there was sufficient evidence, in the record, to support the decision that the Planning Board made for Natural Resource Protection, Charlotte Henderson seconded, all in favor; unanimous decision.

Dorothy Sainio made a motion to adjourn the meeting at 7:40pm.

Respectfully submitted,

Mary Anderson

