

TOWN OF EDDINGTON, MAINE

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PLANNING BOARD

May 8, 2014

6:30 pm

MINUTES

CALL TO ORDER: Tom Vanchieri called Meeting to order at 6:30 pm.

ROLL CALL: Members present were Henry Hodges, Tom Vanchieri, Frank Higgins, Susan Dunham-Shane, Michael Shepherd, Craig Knight, Gretchen Heldmann, Charles Norburg, CEO and Charles Gilbert, Town Attorney.

MINUTES: Motion to accept the minutes of January 29, 2014 meeting as written.

By Susan/Henry 2nd Vote 4-0

Motion to accept the Minutes of the April 10, 2014 meeting with the amendments from Susan and Gretchen.

By Gretchen/Frank 2nd. Vote: 3 yes –1 abstained, Henry abstained because he did not attend meeting.

Motion to accept the Minutes of the April 24, 2014 meeting as written.

By Susan/Henry 2nd. Vote 4-0

Russell informed the Board that the March 27, 2014 minutes from the stenographer should be here at the beginning of next week.

UNFINISHED BUSINESS: Two items in question at the meeting are:

1. Whether the Arisimeek/ Butterfield Quarry Approval is valid if they have not obtained a permit because it is after the 90 days stipulated in the Ordinance?
2. If a crusher is allowed on the Arisimeek Site?

Susan had mentioned at the April 10, 2014 meeting that the only time the word crusher appeared in the Arisimeek Application was in the 3rd draft and it was never on the site plan drawing of the plan.

Charles Gilbert explained that sometimes a Board or Court makes a wrong decision. In his opinion there are 2 avenues that can be recommended for such a circumstance.

1. If time passes and a party thinks that an error was made by the judiciary body, that party is suppose to appeal. If it were not appealed, then the decision would have to stay as it was made. If it is appealed there are procedures to reopen a final decision. Due process would have to be followed and everyone affected would have to be notified. Fraud can be a reason to do this.
2. In order to render a binding decision, the Board has to have jurisdiction to do so. In this case the definition of what is a permitted use is clear and there was no interpretation. Where a Board acted clearly beyond its authority, then in that case that part of the approval is void because they cannot give him authority to do something they do not have power to do.

Frank Higgins said that nowhere in the Ordinance does it say that you cannot crush. In his Experience, a case of an application bringing a use before it that is not directly listed, does not automatically mean it is not allowed. Charles Gilbert explained that the Resource Extraction/Mining definition states: Any operation within a 12-month period where the principal use is the removal of more that 100 cubic yards of soil, topsoil loam, sand, clay, rock, peat or other like material from its natural location and than transports the product removed away from the extraction site. His interpretation of this definition is the plain meaning to 1. extract and 2. removal, with nothing mention in

the middle. Crushing in most Zoning Ordinances is considered an industrial process. Frank Higgins further questioned if the Town can defend a decision that crushing is not allowed and if so, how can dynamite be considered allowable when crushing is not. Mr. Gilbert explained that dynamite is part of the extraction process. Mr. Gilbert wanted to clarify that his decision on crushing was made back in October, long before this current issue came up. Frank H. asked how confident is Charles Gilbert that if the Planning Board makes a decision that this part of the approval is wrong, that it is a defensible decision. Mr. Gilbert said it is hard to predict how a case will be judged.

Susan Shane said that they approved an application in which they missed an important word. The word crusher appears only once. It was not in the first or second tries. She was not aware the word was there until she saw the Intent to Comply and it had crusher in it. Mr. Gilbert said it has to be clearly beyond their jurisdiction or if based on the Application and the Ordinance they had no authority to give crushing approval. The legal-factual ruling route would say they made a mistake and did something they were not authorized to do. Frank H. said that he had seen that it said crusher in the Arisimeek Application.

Tom Vanchieri said he didn't know which way to go. It started out as a bunch of rocks for the river and then they were going to just reopen an old pit and wanted a few rocks. And we thought that is not a bad thing to help a guy out, but his application was so bad it had to be turned away. And then I find that later on he is talking to another company, Hughes Bros., and they filled out his application and it was then that the crusher appeared. But he never told the Board he was working with Hughes Bros., and that they would purchase the land, which I think he knew. And I think that is an issue. We had approved it for Frank Arisimeek because he was just going to get some gravel out of it. Tom stated that this was his opinion.

Mr. Gilbert said that this is a separate issue, which he has stayed away from. Whether there was fraud, the paperwork he has seen indicate that the Purchase and Sales Agreement was issued on August 5, 2014 and the approval of the Arisimeek application in which another company had been mentioned was August 8, 2014. Frank Higgins asked how relevant it was that Mr. Arisimeek was dealing with a different business. The Planning Board approves uses. Mr. Gilbert said that it might become a question of fact that the Board will have to decide how to handle it. He does not feel he should tell them whether to ignore the facts or not. Mr. Higgins asked if the Board has any authority to ask who will be operating the quarry. Mr. Gilbert said that the issue of financial capability may have been looked at differently if they had known it would be operated by a different company and that the size of the operation will be different. Before the Board takes any action, Mr. Gilbert said they should allow the applicant and his legal representative to be heard.

Susan explained that they are dealing with the crusher issue right now and this would be an expensive court proceeding in which case the Selectmen may have a say in it. The discussion of if Mr. Arisimeek misrepresented himself is not an issue right now. Charles Norburg sent a letter to DEP because the drawing sent to them with the Intent to Comply was not the one the Planning Board approved and she would like Mr. Arisimeek to address that. She would also like to know if Mr. Norburg has heard anything from DEP. Susan also said she does not understand why it is necessary to use the Butilier right of way as shown in the paperwork to DEP after looking at further paperwork on the project. There is also the issue of whether Mr. Arisimeek's permit is valid because he paid his fee but did not get a printed form. Mr. Gilbert said it may be a CEO enforcement issue to address the Butilier right of way and whether the approved application agrees with the DEP notice.

Mr. Gilbert said that this is not before the Board tonight, but the application that is in suspense from the other applicant has as one of its premises the fact that the Arisimeek quarry would be superseded by the pending application. Thus, making determinations on the Arisimeek application may alter the pending application. The review of the 2nd application was done with the understanding that the Arisimeek quarry would not be operating out of Fox Lane and they would have a different entrance. Action on the Arisimeek permit will affect other people in the room tonight and so it may be ok to talk about it. Mr. Hamilton said it is not ok to talk about tonight. Action on the Arisimeek permit may affect the other permit in the factual way it was presented. Mr. Hamilton explained that Hughes said they would look into an alternate entrance if they were approved, but they were not approved. Mr. Gilbert further explained that the end result could be two quarries with two entry points on Rt. 9 if both

the Arisimeek and Hughes Quarries are permitted.

Frank Higgins asked if they could question Frank Arisimeek and David Butterfield and Mr. Gilbert said they could through their lawyer. Ms. Mary Dennison, Frank Arisimeek's attorney said she and Frank A. take great offense to the letter from Mr. Gilbert that accuses her client of fraud. She further stated that when Mr. Arisimeek and Mr. Butterfield came before the Board, Sargent was part of the plan but because of the delay of that process, Sargent was no longer interested in the rock because they could not meet the deadline for the Veazie Dam. They found another contractor who was interested in the rock and helping them with the quarry application. The final application identified the quarry site, its use, dust, and trucks, processing and crushing and was unanimously approved by the Board.

Ms. Dennison quoted a court case (Lane Construction vs. the Town of Washington) in which it was disputed whether a crusher or asphalt batch plant were part of a permit. It was ruled that the crusher was part of the permit because it was part of the excavation process and the batch plant was not part of the permit because it was an accessory use. She also informed the Board of another court case involving an approved permit that was final and a second application not final yet for a building in Rockport. They made some expansions to the building, but then decided they wanted to do a much bigger expansion. They went back to the Planning Board and that permit got a lot of input from abutters. That permit was denied. It went to the Maine Supreme Court and then back to the Planning Board to look at again. In the meantime the owners of the building continued to do the work to the building that the first permit was approved for. The neighbors appealed that action and it went to the Supreme Court at which time the Court said that the first permit is reliable. Even though the second permit involved the same property, it did not affect the first permit.

Frank Higgins asked if Mr. Arisimeek can operate his quarry. Ms. Dennison said that in her opinion, Mr. Arisimeek has a valid right to operate the quarry because he needed Planning Board approval, which he got. She said that according to our ordinance, the only things that require follow up on permits are Shoreland zoning, floodplains and subdivision. She further explained that Mr. Arisimeek told her he went to the office on August 9, 2013 and paid the \$100.00 fee due for the application and he asked Charles Norburg if there is anything else he needed to do and Charles said No. She does not believe that there is a subsequent piece of paper that would have been issued to him.

Gretchen Heldmann questioned the follow on permit concept as presented by the Hughes and Arisimeek attorneys, as she does not follow they are interpreting it. She explained her interpretation referencing the following sections in the Zoning Ordinance: Section 301 When a Permit is Required; Section 301.5 is Mineral extraction activities; 302 When a Permit is not Required; 303 Permit Review; 304 Activities Which Require Multiple Reviews and Permits; 305 General Permit Requirements and questioned how based on her reading of those sections that a general permit is not required, as those sections do not solely mention follow-on permits, they mention getting those other types of approvals (Shoreland, Floodplain, etc) concurrently with the regular site plan approval process. Ms. Dennison said that Frank A. paid the fee and he was not told that he needed a permit. Charles Norburg said that Mr. Arisimeek was to request it. Susan has always assumed that after the Planning Board approves an application, there is a paper issued by the Code Enforcement Officer for the approved use.

Ms. Dennison then questioned that if a permit is approved but the CEO makes no indication that a permit needs to be issued, the applicant would then lose the permit? Mr. Gilbert said that the conversation should be about the interpretation of the ordinance and not whether the CEO should have issued a permit. Ms. Dennison said that if this permit were denied because of this issue regarding the issuing of a form, this would definitely go to court.

Charles Gilbert explained that Hughes Bros., does claim rights under the Arisimeek permit and to that extent, their rights would be affected by a decision made tonight. Therefore hearing from all parties involved may be helpful now. Mr. Hamilton, Hughes Bros., attorney, said that back on March 24, 2014 he sent Mr. Gilbert a letter expressing concern with follow on permits needing to be obtained. He said that his understanding is that the reason for the requirement to get a permit within 90 days is in case there are other permits or action required by the CEO before a permit can be issued and each of these should be taken care of within 90 days. He also said that no one has established that there was an additional permit to be obtained. Frank Higgins asked if the Planning Board has any role in the discussion about the 90-day permit expiration. Charles Gilbert said the 90-day issue is between the

applicant and CEO.

Mr. Gilbert said the issue they can take action on is the crushing issue. He doesn't want the fraud issue to be part of the Board's decision. Under Maine Municipal guidance, a permit can be revoked because of fraud. The Board could only decide there is evidence to go further with this and then set a time and a date to move forward with it. The permit question is a CEO issue. The Hughes permit should not be discussed.

Susan Dunham-Shane would like to address Frank A. and David B. about the discrepancy in the drawing. Mr. Gilbert asked will it affect what they will do or not do. Susan would want to know the answer to the question because it would be a violation of what they approved. Mr. Gilbert said that would be an enforcement issue and that is not a Planning Board issue. Susan said that it stated in the deed that there is a 300-foot strip starting at the end of Fox Lane going south toward the quarry site for getting in and out of the property. She raises the question as to why they go across the Butilier property to get to the quarry. And Lot 25-6 exists as 25-11 and 26-6. Ms. Dennison objects because the Planning Board has zero jurisdiction in regards to this issue. This permit was discussed on April 10, 2014 and April 27, 2014 and she would like to request a copy of the minutes from that meeting. A Planning Board has jurisdiction as required by the Ordinance only. The Ordinance gives them authority to review applications and amend the Ordinance. This Board has approved a permit. If they are in violation of the permit that is an issue for Code Enforcement or Selectmen. The Board has no authority to discuss anything regarding this permit after it was approved on August 8, 2013.

Susan felt that the purpose of the Planning Board was to review applications and notices and to bring up any differences. In regards to the April 10, 2014 meeting, they had been told that Mr. Arisimeek would be at the meeting and she brought up the items then to find out what the choices are now. Frank Higgins said the town attorney told them they could go back and reconsider an issue in which they exceeded their authority. Mr. Gilbert explained that they have talked procedurally about what the issues might be and that they would meet tonight to discuss it. So they have followed due process in regards to the issues. What is done tonight is done after discussion and their rights to be heard.

Mr. Gilbert said the issue of the crusher can be discussed, but the issue of right and title cannot be discussed and it is closed. If they are going to do anything that will affect the permit, everyone affected must be notified. Mr. Gilbert feels it would be a mistake and go back through the Public Hearing process in regards to allowing residents to also speak to this issue. There is a specific issue and discussion should be limited to the crusher issue. Susan asked if she is correct to say that they did not follow the rules by not stopping the word crusher from the application? Does that also mean that the fact that they approved an application with a 5-acre square only but what was sent to the DEP included a different area, the Board is not allowed to say anything and it all goes to the CEO. Mr. Gilbert said yes and added that the DEP could also respond to it. The Board did their job by directing Mr. Norburg to write the letter to the DEP. The chain of command would not include the Planning Board. There are very limited issues on which the Planning Board can revisit a previously approved application.

Frank Higgins asked if Charles Norburg has the authority to enforce what this Board approved regardless of what was sent to the DEP and if the DEP approved a 20-acre quarry, Charlie can go up and tell them that they can only develop the 5 acres that were approved by the Board? Charles Gilbert said that he thinks that is true. Mr. Gilbert said under limited circumstances they can clarify a decision but not use it to change a decision. The CEO can go back to them and ask what they meant. He doesn't have to and he can interpret it himself.

Tom does not think they should discuss the crusher or anything further tonight. If they put a crusher up there it is up to Charlie to go up and tell them whether they can or cannot and then it goes to the proper authorities. Frank H. said unless the Board wants to take the position that they made an error in approving a project that included a crusher because the Board believes that crushing is not allowed by the Ordinance and they approved something they should not have. Frank H. continued that one way to settle this would be to do nothing and Mr. Arisimeek could take his crusher up there and Charlie N. could tell him to stop. Charles Gilbert wanted it noted that Charles N responded to that statement by saying "or he could tell them they could do it." In that case it will then be up to the neighbors to pursue their options. Frank H cannot support this Board going back and amending their decision and saying

that they made an error and saying that crushing is not allowed in the Ordinance because he is skeptical that that is defensible. Susan would like time to review this information from tonight to construct her debate.

Charles G said that if they decide that they made an error within their authority nothing can be done. If they decide that they made an error outside their authority they can discuss it. Michael Shepherd said they do not have to do anything as a Board, but they need to discuss whether or not crushing is allowed. He said they did make a decision at the review of the next application after Arisimeek stating that a crusher was not allowed. Frank H. said they do not know if the applicant removed the crusher because they agreed that crushing is not an allowed use, or whether it was her decision to remove it because she did not want to fight it. Mike said they reviewed two applications with the understanding that no crusher would be allowed.

Move that they cease discussion on the subject of the appropriateness or inappropriateness per our Ordinance for crushing on the site and reserve the right to revisit it at another time.

By Susan/Frank 2nd.

In discussion of the motion, it was noted that there was discussion on the Arisimeek/Butterfield Quarry and the Board has taken no action on it. And the motion was rescinded.

I move that we close all discussion of the Arisimeek/Butterfield Quarry and its permit at this time.

By Susan/Frank 2nd.

Above motion amended to add: and not reopen discussion of the subject without full notification of all interested and affected parties by normal meeting postings on the Town Website and email notification of the permit holders and their contracted operator via email **By Susan/Frank 2nd**

Amended to add: and the town's email notification list **By Gretchen/Susan 2nd Vote 4-0**
Vote on Full Motion 4-0

Gretchen said anyone that wants to be added to the Town's email notification list should ask Denise to be added to the list.

NEW BUSINESS: Charles Norburg has questions as to what the Planning Board would require before the application is submitted for a storage building for Autoworks. The Board said he needs an updated "As Built" with the proposed 3rd building, contour lines, increased impervious surface and everything else on the lot. Gretchen said the State of Maine is taking a closer look at impervious surface areas and he needs to know if he needs to get a state permit or not. Out of concern for him, it is better for him to get a permit then pay fines afterward.

OTHER BUSINESS: The Board will table the discussion on the Quarry and Mineral Extraction Ordinance tonight. They would like Denise to email each of them copies of the sample Ordinances and make a hard copy for Susan. (Bucksport, Hancock, Fayetteville and Westbrook)

STAFF REPORTS: Charles Norburg said it should be clear that the Planning Board does not issue permits. He would like it to note in the minutes that the Board has given the CEO instruction to issue a permit. He feels this should be done because many things approved by the Board require a building in which case he does issue a permit for a building. If he is not at a meeting, or no building permit is required for a particular application, putting it in the minutes the CEO has been advised of this approval and may issue a permit.

PLANNING BOARD COMMENTS:

PUBLIC ACCESS: Janet Hughes said that the fraudulent issue brought up in Mr. Gilbert's letter is very bothersome. Sargent was working with Frank Arisimeek to buy the rock from Frank A., which Hughes Bros. is interested in buying the land. All of the businesses in the area in this line of work have worked together for many years. Fraudulent activity is not something that should be associated with this kind of work.

David McCluskey asked if a test was done for rock crushing for sound in regards to the quarry before it was approved and the Board answered No. He then asked about the one acre to five acre approval for Mr. Arisimeek. Gretchen read the motion from the August 8, 2013 Minutes: Motion that the Planning Board finds this application complies with the requirements of our Ordinance Section 809.2 and therefore they approve the application subject to the applicants agreement to comply with all specific plans included in application with the understanding that the work will only be operated Monday through Friday from 7 am to 7 pm, the size of the quarry cannot exceed 1 acre without applicant providing evidence to the Town of full compliance with MDEP Performance Standards for Quarries latest edition and pay the application fee. Susan further explained that Mr. Arisimeek was approved for a maximum of 5 acres but could not go beyond one acre without DEP Intent to Comply. They do not have to come back to the Town for approval for each acre or 5 acres. Hughes Bros. was proposing a 10-acre quarry. After each 10 acres is developed, the owner must apply to DEP and meet their requirements before any further expansion. Mr. McCluskey explained that there is a lot of over burden on that initial 5-acre lot and the Board confirmed that they couldn't go outside that area. Charles Norburg would have to enforce it if they go outside the 5 acres. Mr. McCluskey asked if there will be any additional testing done, now that there is the possibility that they will be crushing and the Board said it will be up to Charles N. to enforce the sound regulations.

Mrs. Clewley asked what Charles Norburg's hours are at the Office and Charlie said Tuesday from 8:00 to 3:00 and Friday from 8:00 to 11:00. She then asked whom the residents call if they feel there are violations and the Code Enforcement Officer is not working and Charles told her the Town Manager and he would get a hold of Charles N.

Mr. Cicone said that hypothetically it is his observation, because there are questions now on whether a crusher is allowed, if a crusher had been included on their drawing with their application, it would have been more noticeable and less of a problem now. Susan said that she couldn't discuss the Arisimeek Quarry because he is not here.

NEXT MEETING: The next meeting would be on Thursday, May 22, 2014 at 6:30 pm.

ADJOURNMENT: Motion to adjourn at 8:40 pm.

By Henry/Frank 2nd. Vote: 4-0

Respectfully Submitted,
Denise M. Knowles