



ZONING BOARD OF ADJUSTMENT

WILTON

NEW HAMPSHIRE 03086

ZBA Chairman Tom Mitchell called the July 12 meeting to order at 7:35PM. Members present were Neil Faiman, George Infanti, Cindy Harris and Grayson Parker. Also attending were alternate members Roger Wellington, Steve Blanchard and Joanna K Eckstrom (secretary). Press represented by Ron Bitten and Peter Ferrand. Mitchell announced the two hearings as Granite State Concrete - Appeal from Administrative Decision and request for Variance and Gerald Mazur and Robert Manning requests for Special Exception and Variance.

Granite State Concrete Co Inc. William Drescher, Attorney for the applicant presented testimony. Drescher noted that many of the facts he wished to present to the Board related to both applications at hand - the Appeal from the Administrative Decision and the Variance. If ZBA agreed with the Building Inspector's decision to deny building permit, the Variance would be necessary. Neil Faiman suggested that Drescher present the facts relative to the Appeal from Administrative decision and then, if necessary, proceed with testimony re: variance. Consensus of Board that this would be good procedure.

Drescher introduced himself as an attorney from Milford whose client is the MacLellans and Granite State Concrete. Messrs John G MacLellan Jr - Vice President, Phil Tuomala - Engineer and Peter MacLellan - operator of the Milford facility would also answer questions in the matter. Peter Leishman, authorized agent for the MacLellans was unable to attend, however, an affidavit from Leishman was included in the information package.

Drescher said the info package contains an affidavit from John MacLellan which sets forth Granite State's position for the case, a site plan prepared by Tuomala; photo exhibits; aerial photos; letters from previous employees/users of the Wilton facility etc. The information package was presented to the Board and has become part of the permanent record. Photo and plans were posted for Board and audience.

Drescher said Granite State is (and has been) engaged in earth removal/excavation and processing business with several operations in NH and Mass. They have owned the Wilton site since 1973. It was purchased from Lovell Wright and MacKay who operated the gravel pit from 1965 to 1973. Wright and MacKay also owned the Milford plant which Granite State now owns. Drescher insisted that the site had always been and still is a gravel operation.

The parcel is 73 acres without road frontage. It is accessed via private road from Route 31. Property does have approximately 1100' railroad frontage on boundary of property. All rock removed from site has been via trucks which pass through railroad underpass, past PVA-EPVA onto 31 south. Trucks, Drescher said aren't pleasant but they are fact of life. Railroad has come to Town via Peter Leishman. State of NH has bought the land (tracks) and Leishman's business is

2

Milford-Bennington railroad. It doesn't pay to have railroad without customers. Paper mill in Bennington is not enough to make railroad profitable; but Granite State could put it into black. They can not ship big stones, boulders in railroad cars because hopper can't have stones larger than 3". Drescher continued, State is very excited about railroad. Leishman has signed lease contingent upon being able to service Granite State. Granite State needs crusher to reduce size of material to make it usable in railroad cars.

Drescher emphasized not here for permission to run a business they have legally engaged in since 1973 (they are grandfathered). They're here for rock crusher. (If crusher is denied, Granite State's business will continue - removing material from site by trucks).

Wilton Town Counsel, Silas Little presented several opinions to the Planning Board in the matter, Drescher said. The law allows for some flexibility regarding pre-existing non-conforming uses. Wilton Building Inspector denied the permit on May 14 and referred the matter to the Planning Board. Planning Board, Drescher said, discussed the issue of variance. Little's opinion said the laws are unclear. There are cases both for and against allowing rock crusher. One side says (addition of) rock crusher is not expansion of use; others argue it is. Wilton Planning Board insisted a variance was necessary and through motion by David Stein, that Board agreed that Granite State's use of property was not grandfathered. Drescher quoted from the minutes of the May 17 Planning Board meeting. Drescher said if Planning Board decision was not challenged, Granite State would not be able to operate at all. This is reason for their suit, to protect their rights to appeal, and continue their business. Drescher said the Town did not present any evidence against Granite State's claims during its hearing. They had to sue the town so they would not lose their right to appeal. Granite State believes firmly that the rock crusher is a legitimate extension of its business therefore ask that the Building Inspector's decision be over-ruled. He cited RSA 6:47 and FN83, Anderson's law of zoning and Hawkins vs Talbot as two contrary opinions. One allows pre-existing non-conforming use of gravel pit to put in rock crusher without (its) being considered an unreasonable expansion of the use. Another says the rock crusher would be allowed as long as the original nature and purpose of the undertaking remains unchanged. Granite State believes the nature and purpose of the original use will be unchanged by the rock crusher, therefore do not believe variance would be necessary. Drescher gave another example, Hampton vs Bruce in which a video parlor was the subject of discussion. Re: diminishing assets such as gravel, Drescher said there are three approaches: one says the operation can only go deep (within the confines of the original dig); another says you can expand within the property bounds; and finally the approach that allows reasonable expansion relative to the nature and purpose of the original use.

Roger Wellington asked if rock crusher would expand size of operation. Drescher said no. It's same in nature and purpose to original use. Rocks, gravel, sand gets mined there already.

They would only be reducing size of material (for loading railroad cars).

Tom Mitchell asked how much material (aggregates) removed from site now. John MacLellan said 3000 tons a day. Will rock crusher increase amount of material removed from site. MacLellan - no.

Howard Gotham, Curtis Farm Rd resident asked if rock crusher would take trucks off road. All of Granite State's trucks (now removing rock to Milford plant) would be off road.

Marie Louise St Onge, Curtis Farm Road didn't see how crusher would take trucks off road. Drescher replied that the train will happen. The crusher isn't needed for the trucks but it is needed for train. If the railroad doesn't come, then trucks will continue to remove the material from site.

Norm Charette, PVA an abutter, noted problems with concrete. Asked if crusher there would they be selling aggregate (for concrete) from that site. Drescher and MacLellan said no, material would go to Milford plant, as it already does, for further processing. The Milford site is the primary crushing site.

Anthony Perfito, Isaac Frye Hwy did not agree that this case was same as video parlor. He argued that this will be processing material, therefore an expansion of use. Drescher responded he used case of video parlor for its language "nature and purpose of the use".

Neil Faiman said the Minnesota case was more applicable here than the Mass one with respect to expansion of use. But he didn't see how the case relates to earth extraction. Drescher said they contend that rock crusher is not unreasonable expansion. That it is permissible change in non-conforming use that has not altered the nature and purpose.

Patricia Henderson, Curtis Farm Rd, said noise is very disturbing to her. Drescher said that noise will be dealt with in the variance part of the hearing. Mitchell confirm that noise in issue to be addressed within the five criteria for variance.

Richard Greeley, citizen, felt that since crusher would not be making a finished product, would only be reducing material to utilize railroad, then this is not expansion.

Tom Newbold, Curtis Farm Rd, said he believes this is clearly expanded use, that it is processing, not removal. Felt issue should be deferred to the Courts rather than have this Board decide.

Steve Blanchard asked how many trucks used now. John MacLellan said about fifteen trucks, one hundred round trips a day to move 3000 tons to Milford plant. How many trains (trips) would it take. Peter MacLellan thought same material could be moved by train with 10 to 15 cars, 1 to 2 round trips a day.

Roger Wellington asked what was "original nature and purpose" of this operation. Drescher said gravel, rocks, blasting, quarrying since 1975. Statements from Wright and Mackay show that blasting pre-dates current operations.

Tom Mitchell asked when MacLellans did any blasting after 1966. MacLellan said in the early 80s.

Alec MacMartin, Vice Chairman of Planning Board, said that in interrogatories, MacLellan said they blasted in 1983.

Minot Ring Planning Board member saw two questions to issue: 1. How did grandfathered (gravel) activity become a mining operation blasting up bedrock. And 2, assuming the rock crusher may be accessory, isn't there a substantial change in use when you blast aggregate out of bedrock. He thought they're engaged in gravel operation; that you "scoop" it out of ground. Sees them as running into rock, then blasting.

Drescher replied that material that you blast is not distinguished between "earth", "rock", "gravel" - it's all earth material. He quoted the Town's and the State's definition of "earth removal" which are the same. He added that the same activity has gone on at this site since 1966.

Ring argued that this was expanded use.

Lura Provost, abutter, agreed with Ring. Said the level of activity has increased. There is expansion she said, now it's mining. She questioned zoning and how this activity is allowed there.

Drescher responded that it is and always has been residential and agricultural zone.

Ms Provost continued that at Planning Board meeting some board member, she thought, suggested Granite State was running out of gravel. Response was that they had 73 acres and not running out. She asked why do you blast if you're not running out? Why was there no activity when she went up to see site?

(Review of minutes of Planning Board 5/17, show that question was asked by abutter Elizabeth Raymond, directed to and responded by Peter Leishman re: running out of gravel. Leishman emphatically stated they weren't running out, they had 73 acres there.)

Mitchell directed proceeding back to matter at hand, to determine whether or not Building Inspector made error in denying permit.

Marie Louise St Onge asked MacLellan if a boulder is the same same after its been crushed. Said it may be question of semantics, but she feels crusher is an additional activity at the site.

Mitchell addressed Ms St Onge saying that what they want to do is facilitate movement of the material (by the crusher). This Board must decide if this new thing (crusher) is indeed an expansion of use.

Patricia Henderson said Wilton voters spoke clearly and emphatically when given the option of rezoning this area to industrial.

Tom Newbold saw pressure because work had begun on railroad, locomotive already in town. Begged that Board not be influenced by the conditions, pressures placed on it. He asked which of us was an expert in railroads to determine whether or not indeed the railroad equipment must have material crushed.

Faiman asked Drescher if he could and would present evidence that the crusher is incidental, customary use on the site.

Drescher said he'd spoken with people at length. He insisted that all Granite State wants to do is render stone to a size that is usable by railroad. The cars they intend to use are the

only kind available to them. He added that they will continue to remove what material is there; if they don't have the crusher, they won't have the railroad. Trucks will continue to be used.

Grayson Parker had some experience in railroad/freight. Said the technology is available and cars exist which can be picked up and overturned to dump their loads. But this equipment is expensive.

Mitchell asked MacMartin what transpired at Planning Board. MacMartin said they were there with Site Plan. Planning Board did not feel it was appropriate to address site plan at the time without a variance. Mitchell's impression was that Planning Board intent was to remove Granite State's grandfathered rights to conduct its business. (He referred to minutes of 5/17, "Stein moved that () be required to file for permit" and "that () obtain variance." MacMartin said it was not Board's intent to deny GS it's rights to do business. Relative to the site plan, Granite State had permission to do some things, but relative to the new excavation ordinance Granite State needed to "register" within the 6 month time frame.

Andrew Neilson, Captain Clark Rd, felt they are changing operation to improve extraction efficiency. Asked what would prevent them from coming back next year for something else?

Speaking for Granite State, John MacLellan said he has owned property since 1973. The site has been used to supply his own company's needs for sand, gravel, etc. The business was and is gravel, stone, earth products. the reason for the rock crusher in Wilton is to remove trucking. Trucking is probably the most intrusive part of their operation. they do not intend to change Wilton operation to retail. They only want to change their method of transportation. Their retail is in Milford. The same amount of material being removed from site now by truck will be removed by rail.

Mitchell advised Neilson that should Granite State want to do anything different in the future, the same process would apply - building permit, ZBA, Planning Board, etc, depending on the application.

Steve Blanchard said that recently the Planning Board concluded that a screen was incidental to the gravel operation being considered. He sees Granite State's application similarly.

Wellington asked what life expectancy of pit was. MacLellan said 20 years, possibly more.

Mitchell closed discussion to the audience so Board could discuss and decide whether Building Inspector's decision was good. In defense of Building Inspector, Faiman suggested that since decision made in good faith, Board decide whether or not decision should be over-ruled.

Mitchell saw question of expanded use a very gray area. Building Inspector was within jurisdiction to deny.

Parker concurred that what is expanded use is cloudy.

Faiman noted courts go both ways. Where crusher has been determined to be illegal (expansion) has been when commercial processing goes where it has never previously existed. In this case, crusher should be seen not only as accessory to gravel pit but also to transportation.

Cindy Harris said this is case of extreme accessory use, particularly with respect to noise.

Mitchell and Blanchard argued with Ms harris that the same amount of material is coming out. Blanchard added he has a gravel pit where the screen makes far more noise than crusher.

Faiman countered that a rock crusher isn't that noisy. Truck noise is worse.

Harris also noted blasting. Parker said they're not expanding. Harris continued that since it's so gray Board should get advice of Town Counsel.

Joanna K Eckstrom thought this was advance in technology, not expanded use. Cited push lawn mower versus gas powered or ride-upon. This is not expanded use if same goal is accomplished.

Wellington thought it would be easier to expand use with railroad there. Also added that since town voted against zoning this industrial, doesn't this indicate it doesn't want industrial use there. This may be the case, but Town can not prohibit someone from continuing his business because of zoning changes.

Mitchell agreed the only reason for rock crusher is to utilize train.

Faiman saw this as accessory to excavation and transportation. Suggests approval be conditional that if railroad goes, so does crusher. He was asked to put this in form of motion.

Cindy Harris moved to continue deliberations until Board had Town Counsel opinion. There was no second.

Faiman moved to reverse decision of Building Inspector and grant building permit conditional that products (of the crusher) only be removed by rail and that upon cessation of the railroad, the crusher would be removed within 180 days. George Infanti seconded. For clarification, the motion was read back by the secretary.

Vote on the motion: Infanti - yes, because the original meaning and purpose of use the same; Cindy Harris - no, this is change to non-conforming use; Faiman - yes - this is clearly incidental to the combined processes of extraction and transportation, and not expanded use in his opinion; Mitchell - yes - not an expanded use; only purpose for crusher is to facilitate transportation of material; and Parker - no - this is expanded use, an illicit extension of use and new enterprise. Vote was 3 to 2 in favor of reversing Building Inspector decision.

Mitchell advise abutters and audience of their right to appeal the decision within 20 days. Said new evidence (something not available at this hearing) or technical error would be necessary to rehear the case.

Ms St Onge invited anyone to come for coffee regarding noise from the site. Felt it inappropriate for Board to disallow discussion of noise by audience when it discussed it amongst themselves.

Andy henderson said if there isn't anymore noise, there'd be no problem, but he was concerned that noise was not discussed during hearing.

Mitchell advised that noise was not germane to discussion re: overruling Building Inspector; this would be discussed in site plan review. He advised that Planning Board was forum for that. Secretary announced that case is on agenda for 7/19 meeting.

7

Tom Provost argued that Faiman used noise in his discussion and that Faiman said it's ok to discuss noise on the Appeal. Mitchell defended Faiman and the Board saying it may have been discussed but it was not used as basis for decision. The case was concluded.

¶ insert (see below)

Manning and Mazur was called. Alec MacMartin represents applicants request for variance and Special Exception. Original proposal was for two back lots, two fronts lots but because of wetland constraints only one back lot would be created. The variance request was for frontage - required is 450 feet; they have 449. Special exception was for siting driveway (private) to serve the lots. Required is 200 between drives; they have 140 feet.

Faiman asked why drives were being placed as shown. MacMartin responded they didn't want to adversely impact on one lot. The driveways will be somewhat staggered rather than perpendicular to others in area.

Abutter Harry Dailey cited his on-going lawsuit with the Town re: his driveway. The court says his driveway is legal.

MacMartin cited the five criteria relative to the variance. There'd be no diminution of property values; there are three houses there now. Public interest would be served because productive use would be made of vacant land and they're creating lot in substantial compliance with ordinance. Hardship is that they're 1 foot short of req'd 450 ft. Also lot is narrow.

Abutter Andrew Neilson pointed out error in property ownership on the maps presented and said abutter Robert Willett had not been notified. After some investigation, it was determined that indeed all abutters had not been notified and the hearing was rescheduled until August by which time all abutters shall have been notified. The abutters present, Neilson, Dailey and Ralph Chapman, did not see any problem with plan as presented but will return in August.

Board briefly discussed upcoming applications in light of recent decision or clarification by Planning Board in Question 2 of ordinance.

Minutes of previous meeting were unanimously approved. Faiman suggested that language in notice to abutters needed some improvement grammatically. Eckstrom noted that verbiage is taken from sample format in ZBA red book.

Motion to adjourn at 10:15 unanimous.

Respectfully,


Joanna K Eckstrom

¶ insert text - Drescher reassured audience that ZBA was not the final step in approval process. Said Granite State would need to go to Planning Board for Site Plan approval. Noise issue would be germane at Planning Board reviews.

Tom Provost argued that Faiman used noise in his discussion and that Faiman said it's ok to discuss noise on the Appeal. Mitchell defended Faiman and the Board saying it may have been discussed but it was not used as basis for decision. The case was concluded.

Manning and Mazur was called. Alec MacMartin represents applicants request for variance and Special Exception. Original proposal was for two back lots, two fronts lots but because of wetland constraints only one back lot would be created. The variance request was for frontage - required is 450 feet; they have 449. Special exception was for siting driveway (private) to serve the lots. Required is 200 between drives; they have 140 feet.

Faiman asked why drives were being placed as shown. MacMartin responded they didn't want to adversely impact on one lot. The driveways will be somewhat staggered rather than perpendicular to others in area.

Abutter Harry Dailey cited his on-going lawsuit with the Town re: his driveway. The court says his driveway is legal.

MacMartin cited the five criteria relative to the variance. There'd be no diminution of property values; there are three houses there now. Public interest would be served because productive use would be made of vacant land and they're creating lot in substantial compliance with ordinance. Hardship is that they're 1 foot short of req'd 450 ft. Also lot is narrow.

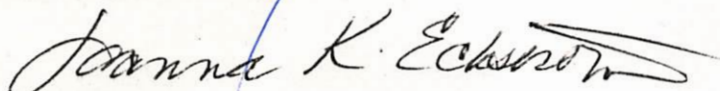
Abutter Andrew Neilson pointed out error in property ownership on the maps presented and said abutter Robert Willett had not been notified. After some investigation, it was determined that indeed all abutters had not been notified and the hearing was rescheduled until August by which time all abutters shall have been notified. The abutters present, Neilson, Dailey and Ralph Chapman, did not see any problem with plan as presented but will return in August.

Board briefly discussed upcoming applications in light of recent decision or clarification by Planning Board in Question 2 of ordinance.

Minutes of previous meeting were unanimously approved. Faiman suggested that language in notice to abutters needed some improvement grammatically. Eckstrom noted that verbiage is taken from sample format in ZBA red book.

Motion to adjourn at 10:15 unanimous.

Respectfully,


Joanna K Eckstrom