

**Town of Mount Desert Planning Board
Regular Meeting Minutes
Meeting Room, Town Hall
6:00 PM, November 20, 2019**

Public Present:

Howard Colter, Attorney for the Planning Board James W.J. Collier, Esq., Gerald Shencavitz, Laurie C. Shencavitz, Andy Odeen, Jeff Gammelin, Attorneys for the Applicant Katie Foster, Ed Bearor, Attorney for the Shencavitz' and Aylens Daniel Pileggi, W. Keith Bowie, Steve Salsbury, Maureen McGuire, Scott Stevens, Charlotte Singleton, Abigail Curless, George Gilpin, John MacDuffie, Elizabeth S. Roberts, Jeanie Gilpin, Dick Broom, Stephanie Clement, Joanna Krasinski, Steve Krasinski, Jan Coates, Fran Leyman, Carey Kish, Kim Heist, John Kelly

Board Members Present:

Chair Bill Hanley, Joanne Eaton, Tracy Loftus Keller, Dave Ashmore, Christie Anastasia, Meredith Randolph

I. Call to order 6:00 p.m.

Chair Hanley called the meeting to order at 6:00 PM.

It was noted this meeting was a continuation of the November 6, 2019 Planning Board Meeting. No Public Notice was necessary.

Board Members were noted. Tracy Loftus Keller is an Alternate, Non-Voting Board Member

II. Quarrying License Application

Public Hearing:

A. Quarrying License Permit #001-2014

OWNER(S): Harold MacQuinn, Inc.

OPERATOR(S): Fresh Water Stone & Brickwork, Inc.

AGENT(S): Steven Salsbury, Herrick & Salsbury, Inc.

LEGAL REPRESENTATION: Edmund J. Bearor, Rudman Winchell

LOCATION: Off Crane Road, Hall Quarry

TAX MAP: 007 **LOT:** 075 **ZONE(S):** Residential 1 (R1)

PURPOSE: Quarry License Application – Section 6.2 Performance Standards for Existing Quarries – J. Noise

Chair Hanley disclosed for the record, that he has worked with Attorney Daniel Pileggi's law firm, Acadia Law, and has consulted with Attorney Pileggi on personal matters unrelated to the quarry. The Board found no Conflict of Interest on the part of Chair Hanley.

1 Attorney Bearor asked what the procedure for the meeting would be. He hoped for the chance
2 to talk about the Applicant's latest submission. Attorney Collier requested Chair Hanley apprise
3 those in attendance of where the process now stands. Chair Hanley summarized the process so
4 far; the Applicant has presented, the public has had a chance to ask questions, abutters
5 Shencavitz and Aylen have had a chance to present, and the public were allowed to ask
6 questions. Other members of the public were now allowed to make their presentations.
7 Attorney Collier stated that at the end of this process, the Applicant should be allowed the
8 chance for rebuttal. At that point the hearing can be closed, and the Board can begin
9 Deliberations.

10
11 Attorney for the Shencavitz' and Aylens, Dan Pileggi, noted that the Applicant has presented an
12 argument that the Ordinance provision pertaining to Noise is not enforceable. Such an
13 argument is not within the Board's consideration; the Board must apply the Ordinance as they
14 find it. The Standards must be applied to the best of the Board's ability, following the laws set
15 by the Town's voters. Constitutional decisions cannot be made at the Municipal Board level.
16 The State Supreme Court has regularly upheld qualitative review and performance standards
17 similar to this Noise Standard. The phrase "no significant adverse impact" on a wide variety of
18 issues has been upheld. Constitutionality is not determined on whether an ordinance could
19 have provided more specific guidance by defining each term, but on whether it contains
20 sufficient standards for which people of ordinary intelligence can understand. This Ordinance
21 provides that. This Ordinance calls for using Best Practicable Means for attenuating noise,
22 referencing State and other standards. This standard is easily understood, and evolves with the
23 industry, and can be applied. Attorney Pileggi offered examples of similar situations using
24 qualitative review and performance standards. An ordinance can be deemed unconstitutionally
25 vague only if it sets guidelines that force people of ordinary intelligence to guess at the meaning.
26 "Best Practicable Means" is not guessing.

27
28 Attorney Pileggi added that the Applicant has suggested they would be cutting a single piece of
29 granite at a time. Evidence submitted by the Applicants shows that stone extracted by the
30 Applicant on June, 2011 through July 5, 2011 – a total of 23 days – totals 400 tons of granite
31 allegedly extracted using the wire saw. This is 7.65 cubic yards of extraction per day during this
32 timeframe. This appeared to be more volume than cutting and removing a single rock at a time
33 would suggest.

34
35 Attorney Pileggi stated that in order to approve the Application with regard to Noise standards,
36 the Board must find that the Applicant has proven Best Practicable Means of noise attenuation
37 are being used. The burden is not on the Board to figure it out. The Applicant must show
38 standards, and then show why their efforts represent the Best Practicable Means of noise
39 attenuation. A review of the Applicant's process shows that first the Applicant did nothing; the
40 Applicants claimed they were not making the noise. They then stated they would use hay bales
41 to attenuate noise. No modeling or testing for this method was provided to the Board for
42 review. When hay bales were deemed inadequate, the Applicant proposed a barrier made of
43 wood and acoustic material. No evidence has been provided that this barrier has been used in
44 the industry and no modeling was presented to the Board for review. Testing has shown that

1 the barrier reduces noise in one direction. However, the barrier design makes noise worse on
2 the sides and behind the barrier.

3
4 Mr. Pileggi reminded the Board that Ms. Aylen made reference in her letter to a manufacturer
5 of commercial mining sound attenuation equipment used in the industry.

6
7 The Board is entitled to proof of Best Practicable Means standard. Attorney Pileggi asked the
8 Board to apply that standard.

9
10 Chair Hanley asked for opening statements from the public.

11
12 Hall Quarry resident Steve Krasinski asked the Board how they know what excessive noise is, or
13 when noise becomes excessive. Employing metrics to monitor noise will provide those levels.
14 He hoped the Board would employ metrics and standards to measure the noise from the quarry
15 and require a means to monitor noise. What matters is the level of noise the residents must
16 endure after mitigation. Noise must be monitored to determine the levels. He reiterated that
17 the Board has the right and duty to protect the residents. The Applicant began operations
18 without regard to the neighbors, arrested neighbors found on the property, and refused to
19 allow an open forum on the property to witness noise mitigation efforts. This has created a
20 level of distrust among the residents. This makes it difficult to trust the Applicant will abide by
21 rules set. There must be a way to measure and monitor noise levels. The Applicant has argued
22 that if Best Practicable Means are employed, their Application cannot be denied, and that the
23 noise standard in the Ordinance is impermissibly vague. What do Best Practicable Means mean
24 for a quarry operation set in the middle of a residential area.

25
26 Mr. Krasinski asked that if the Applicant employs Best Practicable Means, and there are still
27 adverse effects on the neighborhood, and there is an absence of metrics and monitoring, then
28 where do the residents stand? Best Practicable Means appear to be a moving target. Mr.
29 Krasinski reiterated the Board has the right and duty to protect the residents.

30
31 Mr. Krasinski suggested accepting the Application with conditions, such as metrics and
32 monitoring. The protection of the abutters, neighborhood, park, and Town must be prioritized
33 over the cost of metrics and monitoring. Sound limits should not be set based on what's
34 profitable to the Applicant.

35
36 Hall Quarry Resident Elizabeth Roberts voiced confusion over the difference between an
37 opening statement and a statement. Attorney Collier noted that traditionally, opening
38 statements are in regard to procedure. He suggested moving to presentations from the public.

39
40 Ms. Roberts purchased two acres of land in Hall Quarry in 2002 and built her home in 2006. She
41 is opposed to granting a permit to the Applicant. She built in the area because of the peaceful
42 environment, and because she trusted the zoning in the Town. When she purchased her land,
43 she was aware there was once quarrying in the area, but she knew quarrying hadn't occurred in
44 years, and it wasn't occurring in 2002. She echoed the fact that the Planning Board has a

1 responsibility to the residents. The Application process has now taken five years, proving the
2 complexity of the issue. She felt that the residential community grew up after historic quarrying
3 operations ended, at which point the Town deemed the area residential and sold lots to that
4 effect. She hoped that before the Planning Board makes any decision, they acquire very specific
5 information on the amount and type of sound that will be generated when granite is being cut
6 and when all the equipment is being run under normal operating conditions, and then moved to
7 trucks to be removed from the site.

8
9 Ms. Roberts was at the August 29, 2019 and November 6, 2019 meetings where sound experts
10 made presentations. Ms. Roberts is not satisfied that the presentations provide enough
11 quantitative and qualitative information to educate the Board to know with certainty the levels
12 of noise that will be made by the process of granite removal and transportation. Ms. Roberts
13 suggested that perhaps modeling as previously suggested would help provide the quantitative
14 and qualitative information necessary. Regardless, she felt the Board required the help of an
15 independent sound expert. Facts must be gathered and assessed before a decision is made.
16 This decision will affect the Town for generations, and it should not be rushed.

17
18 Once the sound levels are ascertained, it needs to be clearly determined that the levels will not
19 cause hearing loss. Ms. Roberts hoped the Board was aware of the importance of the physical
20 health of the Hall Quarry residents. Additionally, she reminded the Board of the financial
21 aspects associated with the decision being made. She hoped the property values of Mount
22 Desert would be a higher priority than the profit of quarry operation. There are other sources of
23 granite in quarries not located in residential areas.

24
25 Ms. Roberts stated the purpose of the Quarrying Licensing Ordinance is to protect the health
26 and safety and general welfare of residents. She reminded the Board that the area in question
27 was not proven by the Appeal Decision to be a pre-existing active quarry.

28
29 Ms. Roberts felt she and other Hall Quarry residents have provided specific objectives and
30 measurable reasons for opposition to approving the quarry Application.

31
32 Hall Quarry Resident Fran Leyman, representing Janet Leston Clifford who was not in
33 attendance, reminded the Board that Ms. Leston Clifford presented a document at the August
34 29, 2019 Meeting. Summarizing from that document, and referencing the Quarrying Licensing
35 Ordinance, Section 6.2, stating that reducing noise must be done through Best Industry Practices
36 to the extent permitted by State and Federal laws. She asked what are the State and Federal
37 laws to be followed? Does the CEO have a list of these laws? Does the Planning Board have a
38 list of these laws to consult? What information does the Planning Board have, other than the
39 information provided by the Applicant? Are there points at which State or Federal laws should
40 be applied? There can be no questions as to the intent and purpose of the Quarrying Licensing
41 Ordinance. Ms. Leyman referred to Article 1, Section 2 of the Ordinance, where protection of
42 public health, safety, and general welfare and minimizing the adverse impact of quarrying to the
43 Town, abutting property owners, citizens of the Town, and wildlife and natural resources,
44 preservation of the Town's natural resources, property values, and their future ability to be an

1 asset to the Town and its residents and controlling the amount of potential pollution which can
2 be discharged into the Town's environment. Ms. Leyman informed the Board that Noise is a
3 form of pollution.

4
5 Ms. Leyman stated the acoustic ecology of Hall Quarry is a natural resource and a current and
6 future asset to the Town. This asset determines in part the property values now and into the
7 future. Ms. Leyman stated that the Planning Board has a responsibility to current and future
8 residents of the Town. The Planning Board and CEO have the burden of enforcement of
9 application of relevant laws to control noise pollution. Noise pollution will be carried into
10 Acadia National Park, across Somes Sound, and into other areas.

11
12 Ms. Leyman asserted it was the Planning Board's responsibility to enforce the ordinances of the
13 Town of Mount Desert to protect current and future quality of life. The Planning Board must
14 determine what is an acceptable level of noise pollution in a residential neighborhood. She
15 suggested the Board visit the quarry when the Applicant has all the equipment running. No
16 measurements have been taken when all the equipment is running. When all equipment is
17 running, Ms. Leyman could not hold a conversation with neighbors on the road. Something
18 must be done so the Board can make an intelligent, informed decision. The level of an allowable
19 amount of noise must be determined. She hoped the Board would educate themselves, going
20 to the State if necessary or contact other Towns in similar situations, to learn what Best
21 Practicable Means of noise attenuation are. The Board must educate themselves to make a
22 decision.

23
24 Chair Hanley read Section 1.2 of the Quarrying Licensing Ordinance:

25 *1.2 Purpose The purpose of this Ordinance is to put into law minimum removal and reclamation*
26 *standards and municipal procedures to regulate the quarrying of rock or stone while at the same*
27 *time respecting the rights of pre-existing operations. These standards and procedures are*
28 *intended to protect the public health, safety, and general welfare; and to minimize the adverse*
29 *impact of quarrying to the Town, abutting property owners, citizens of the Town, and wildlife*
30 *and natural resources by: A. Preserving and protecting surface and groundwater quality and*
31 *quantity for current and future use of the town and/or its residents. B. Preserving the Town's*
32 *natural resources, property value, and their future ability to be an asset to the Town and its*
33 *residents. C. Controlling the amount of potential pollution which can be discharged into the*
34 *Town's environment.*

35
36 He then read Section 62.J, Noise:

37 *J. Noise The best practicable means of reducing noise shall be employed which may including the*
38 *use of sound reduction equipment, acoustic enclosures or sheds, limiting on-site speeds to no*
39 *more than 10 mph, or other best industry practices for noise attenuation, to the extent permitted*
40 *by state and federal laws and regulations.*

41
42 Hall Quarry Resident Keith Bowie voiced his opinion that noise expert for the Applicant Joe
43 Smullen's findings were limited in scope and data.
44

1 Mr. Bowie read again portions of Section 1.2 of the Quarrying Licensing Ordinance and Section J,
2 Noise - both sections noted earlier in the Minutes in their entirety. He stated it was the Board's
3 obligation to ensure residents that the Board will uphold these standards. Sound expert for the
4 Shencavitz' and the Aylens, Charles Wallace, stated that there are practicable ways to address
5 the residents' concerns. The Applicant has not demonstrated that their plans to reduce noise
6 will be sufficient to keep the noise levels within the guidelines established by reputable sources
7 cited in Mr. Wallace's presentation.

8
9 Mr. Bowie stated that if the Town of Mount Desert is to control the potential noise pollution in
10 the environment, then it is essential that the Planning Board establish measurable sound level
11 limits that can be monitored reliably throughout the day. The Planning Board must consider the
12 present ambient sound levels experienced in Hall Quarry during the day and evening and then
13 set limits no more than 10 decibels over measured ambient levels.

14
15 Mr. Bowie stated the Applicant's neglect in collecting appropriate data in the neighborhood is
16 inexcusable.

17
18 Abutter to the Quarry Jan Coates stated she has been in Hall Quarry since 1974. She built her
19 house in 1991. She stated she is gravely concerned about the health and general welfare of the
20 Hall Quarry community, people, natural resources, wildlife, serenity, and property values should
21 a license be granted. Hall Quarry was zoned Residential in 1978. The area has grown
22 significantly since that time. A quarry operating within this thriving residential community
23 seems incompatible. Ms. Coates is alarmed at the lack of information regarding the measures
24 proposed to mitigate equipment noise. There are no decibel levels included on the equipment
25 list. Only selected pieces of equipment have been tested by the Applicant. Modifications to the
26 equipment, such as the addition of mufflers, have been suggested, but no evidence of their
27 effectiveness has been submitted. Ms. Coates felt the Board could not determine the impact of
28 quarrying on the community without evidence of the noise levels produced by the multiple
29 pieces of equipment operating simultaneously. The Applicant has the burden of proof, and the
30 Board has the ability to make requests of the Applicant, including requesting the Applicant hire
31 an independent noise expert to model equipment proposed for use in the quarry and determine
32 what modifications are required to meet any decibel standard the Board might set.

33
34 Ms. Coates pointed out that Expert Charles Wallace provided a detailed report and measures of
35 ambient noise in the quarry. He provided the impact of different decibel levels on the human
36 ear. Ms. Coates felt ambient noise is the logical place to create a baseline against the impact of
37 quarrying equipment noise. She requested the Planning Board closely examine both expert
38 noise reports submitted. She cautioned the Board that they have the authority and duty to
39 outline steps to be taken by the Applicant to measure and mitigate equipment and operation
40 noise, and to establish a standard and system of oversight and accountability.

41
42 Hall Quarry Resident Charlotte Singleton asked the Board to consider whether they would move
43 to Hall Quarry. Some residents live within 25 feet of the quarry and it will operate every day.
44

1 Hall Quarry Resident Kim Heist stated that the lack of evidence submitted by the Applicant is
2 appalling. She built her home in 1989 and the area was zoned residential. Ms. Heist is in
3 disbelief the issue is even up for question. The Applicant has had years to provide the evidence
4 and they have not.

5
6 Hall Quarry Resident Maureen Maguire echoed the statement of Ms. Singleton and Ms. Heist.
7 With a quarry in the neighborhood, there is a chance she may not be able to sell her home. She
8 reiterated her past statements, that the noise is a problem, and vibration can be felt shaking the
9 house. There is no way to quantify the vibration, whether it is reduced, or how it affects
10 residents. She reminded the Board this is an industry trying to work in a residential area. There
11 are other, non-residential areas the Applicant can quarry. She reminded the Board that the
12 Town is supposed to protect its natural resources. The stone in the quarry is also a natural
13 resource and deemed rare by the Applicant. Perhaps it should not be given away to the
14 detriment of tax paying residents.

15
16 Abutter to the quarry Gerald Shencavitz stated that on the Town Record it is noted that a Hall
17 Quarry resident bought her house for significantly less than its property value. She was not told
18 about the quarry at the time of her purchase. Mr. Shencavitz stated this was proof of dipping
19 property values due to the quarry.

20
21 Chair Hanley asked for other public comments.

22
23 Ms. Leyman argued that if any other noise-generating activity was started in the neighborhood,
24 neighbors could complain and police could prohibit that activity. Yet this long-term loud activity
25 was being allowed to continue.

26
27 There were no further public comments.

28
29 Attorney Bearor reminded the Board that a memorandum and proposed decision have been
30 submitted to the Board.

31
32 In response to Attorney Pileggi's comments, Attorney Bearor noted the case citations Attorney
33 Pileggi used, with regard to the case in Lincolnville the Board did not deny the Application on the
34 basis of the standard Attorney Pileggi noted. The Board approved it and the neighbors appealed
35 it. Denying an application based on a vague standard is what results in consequences. Approval
36 based on a vague standards does not. Attorney Bearor pointed out several cases cited in his
37 submittal.

38
39 Regarding the rate of extraction noted earlier in the discussion, the time noted included a period
40 of time when the Applicant was removing loose stone previously quarried. The number would
41 have been inflated because of that.

42
43 With regard to Mr. Krasinski's statements regarding Best Practicable Means being a moving
44 target Attorney Bearor agreed it was a moving target. The Board has the choice of facing the

1 reality that the citizens of Mount Desert approved the Quarrying Licensing Ordinance. The
2 Ordinance is in place, and the Board must deal with it as is. Attorney Bearor agreed the
3 standard was vague and indecipherable. The Public could have enacted an Ordinance
4 prohibiting mining, but they did not. The Quarrying Licensing Ordinance approved by the Town
5 has a Purpose section. That Purpose includes respecting the rights of the Quarry Owners. It is a
6 balancing of rights. The Ordinance notes that following approval of a Quarry Application, the
7 Applicant must return every five years. If problems have arisen in that time, or if the Applicant
8 is not following provisions set, then there will be repercussions at that time.

9
10 The Applicant has offered five Conditions in their memorandum. Attorney Bearor was confident
11 that the Applicant will be able to overturn any challenge to this section through the Appeals
12 process. This is because the Town does not have a noise ordinance. The Applicant is willing to
13 abide by the things they said they would do, but they do not have to.

14
15 If the Applicant must appeal any challenge to this section and that appeal is overturned, the
16 conditions proposed by the Applicant do not have to be honored if the ordinance is deemed
17 invalid.

18
19 State and Federal standards have been mentioned. Attorney Bearor re-read part of Section J –
20 *“to the extent permitted by State and Federal regulations”*. This does not mean the Board
21 imposes State and Federal regulations. Attorney Bearor interprets this to mean that the Board
22 can’t insist on things not permitted by State and Federal regulations. Backup alarms can not be
23 prohibited, for example.

24
25 Attorney Bearor cited cases regarding an issue being impermissibly vague. The term “natural
26 beauty” is indefinable. Equally, a decibel can arbitrarily be set as a requirement. The Ordinance
27 does not call for that nor allow it. It could have been included in the Ordinance, but it was not.
28 The standard as written is what must be adhered to. The lawcourt does not permit the Board to
29 set its own numerical standards.

30
31 The Applicant has taken what they believe to be practicable steps to reduce noise, and they are
32 part of the Applicant’s proposed decision.

- 33
34 - Construction of an earthen berm, as suggested by the Quarrying Licensing Ordinance
35 - Updating all the muffling measures on equipment used
36 - Portable sound barriers, deemed by both noise experts as effective at noise attenuation
37 - Limiting the time of operation, including no extraction in July and August, total extraction
38 days per year limited to 65, Hours of operation limited to 7am to 4pm, and no drilling before
39 8am
40 - Limits on using equipment simultaneously
41 - Limits on vehicle speeds while operating
42 - Loading stone behind barriers and berms
43

1 All of these proposed noise attenuation conditions were put forth by Mr. Wallace during his first
2 presentation.

3
4 Attorney Bearor has provided a draft decision to the Board. It includes all the conditions noted.
5 If the Board chooses to deny the Application on the basis that the Applicant does not meet this
6 particular standard, then the Applicant will appeal, and the standard may very well be found
7 void for vagueness. If deemed void for vagueness, there is no standard at all, nor limitations.

8
9 The Applicant is currently offering to do these things. A review will be made in five years, and if
10 the Applicant is not sufficiently doing what was promised the renewal can be denied. Attorney
11 Bearor asserted the position proposed by the Applicant is reasonable and defensible.

12
13 Ms. Leyman requested Attorney Collier address the issue of whether setting decibel levels
14 would render the Section of the Ordinance void for vagueness should it be appealed. Attorney
15 Collier stated the plan is to close the Public Hearing. Attorney Collier will then discuss what he
16 believes the procedure is and will address Attorney Bearor's points at that time.

17
18 Chair Hanley closed the Public Hearing.

19
20 Attorney Collier addressed Attorney Bearor's statements and submittals. He agreed Attorney
21 Bearor was correct in his assertion that this was a lawful Ordinance enacted by the voters. The
22 Board has the right to presume the Ordinance is lawful. Within this zone the use of quarrying is
23 allowed. Regarding the issue of Noise, there is no Noise Ordinance in the Town of Mount
24 Desert. The fact that there is no Noise Ordinance is a separate matter.

25
26 To figure out how to look at any standard in an Ordinance, and in particular the Quarrying
27 Licensing Ordinance, the Purpose is the guideline to refer to. In this case there is a specific
28 Ordinance with specific standards. The Chair has read the Purpose. The standard of Noise must
29 be understood through the context of the Purpose of the Ordinance. The standards of the
30 Ordinance direct how the Purpose is attained.

31
32 Has the Applicant shown that they have met the standard? The standard stated is that Best
33 Practicable Means of reducing noise shall be employed. The Applicant has the burden of proof
34 to show what the Best Practicable Means of reducing noise are, and that they are going to be
35 employed. If it is unclear what those Best Practicable Means are, then Board Members can
36 employ personal knowledge of the subject, refer to the submittals and statements presented
37 during this process, or an expert can be hired to assist with the determination. An expert can
38 come to discuss the issue with the Board, or parts of the Application, and proposed conditions
39 can be sent to an expert for an opinion.

40
41 If the Standards are deemed to have been met, then conditions may be put in place to keep the
42 Applicant in compliance with maintaining the Best Practicable Means for reducing noise. The
43 Board may impose the conditions listed by the Applicant, and others as well. When looking at
44 imposing conditions, those conditions must be tied to items in the Quarrying Licensing

1 Ordinance. This is done through referring to the Purpose, looking at testimony presented about
2 the state of the neighborhood, and tying conditions to the Purpose.

3
4 Regarding the point brought up previously about quantitative and qualitative standards, and
5 Attorney Bearor's point regarding winning with vague standards versus losing with vague
6 standards, the law court notes that if there is a standard that looks vague but can be interpreted
7 in the context of the Town and the testimony received, then analysis can be tied to the standard
8 and conditions to what is sought in the Ordinance. Through testimony the state of the
9 neighborhood can be determined and it can be related to the standard. This creates a standard
10 based on what looks initially to be vague, thus avoiding it being determined vague. It's a
11 complex procedure.

12
13 With regard to the standard at hand, Attorney Collier did not agree that it was vague.

14
15 Attorney Collier stated that any conditions imposed must be enforceable. For example, setting
16 noise limits that must be overseen on a continual basis is not enforceable without personnel on
17 hand to listen to the noise on a constant basis. Additionally, standards must be lawful. For
18 example, a condition prohibiting backup alarms on vehicles would not be lawful. And finally,
19 Best Practicable Means must be reasonable. For example, the Best Practicable Mean might be
20 to put a dome over the operation. A decision must be made on what's reasonable to expect of
21 the Applicant. This determination is governed by the Purpose as stated in the Ordinance and
22 the state of the neighborhood. A louder neighborhood might not be able to expect as much as a
23 quiet neighborhood.

24
25 There is no defining definition of "reasonable". It means essentially what a reasonable person
26 could expect, and it's contextually driven.

27
28 Regarding conditions, Attorney Collier felt the Board had wide latitude. The Quarrying Licensing
29 Ordinance is new, and has no precedent.

30
31 Ms. Eaton asked about the list of concessions the Applicant has submitted. Would the Board
32 have to add each item as a condition, or are they considered to be a part of the Application?
33 Attorney Collier advised they be added as Conditions.

34
35 Regarding Qualitative Standards, Attorney Collier stated it was difficult to include a decibel level,
36 or another such hard and fast measure. Such an attempt would be overturned in an Appeal.
37 For example, a condition setting noise levels at ten decibels above ambient noise could be
38 overturned because the Ordinance does not state this level; the voters did not set this level. If
39 the Board wants to attempt to set such a level, they could try by using neighbors' testimony
40 regarding their quiet lifestyle and the amount the noise bothered them, and therefore, a decibel
41 level will counteract this disruption. If the Board is determined to have a standard for noise, a
42 Noise Ordinance should be drafted and added to the Warrant for a vote. Amending the
43 Quarrying Licensing Ordinance to include noise levels would not be as effective because the
44 Ordinance is already in place. It would have to be determined how an amendment would affect

1 the Application in place. In the absence of a noise ordinance, the Board can set standards and
2 conditions based on the Ordinance and the neighbors can sue for nuisance.

3
4 Chair Hanley asked for Attorney Collier's opinion placing a quantitative constraint on the decibel
5 level set as a condition of approval and technically relative to the Purpose of the Quarrying
6 Licensing Ordinance and the testimony of the neighbors, and relative to a specific item within
7 Section 62.J. Attorney Collier reiterated decibel level was not in the noise standard. He advised
8 the Board against setting a decibel level. If the Board insists on doing so, there would have to be
9 numerous Findings of Fact, and a very strong Motion crafted as to why a decibel level was set.
10 Nevertheless, Attorney Collier concurred with Attorney Bearor's opinion that such a condition
11 was very likely to be overturned during appeal.

12
13 Attorney Collier reiterated that such a condition would have to be tied back to the Purpose and
14 to the testimony of the neighbors. It would have to be found that the use is so obtuse and so
15 annoying, that the Board had no alternative but to set quantitative standards. Attorney Collier
16 reiterated his opinion that such a Condition would very likely be overturned upon Appeal.

17
18 Chair Hanley noted two items –

19
20 First, the Applicant has submitted a proposed decision to the Board for their use. It includes
21 Findings of Facts, Conclusions of Law, and proposed conditions to set. And in the context of a
22 potential sound expert being involved, if the Board determined it was necessary, The Board
23 could use the expert to verify the submittal included the Best Practicable Means for noise
24 attenuation.

25
26 Second, whether the Board will set further conditions beyond what is proposed by the
27 Applicant.

28
29 Ms. Randolph noted the many discussions about the difficulty in measuring sound relative to the
30 various locations. Decibel levels can't be set because the Town has not set decibel levels, and
31 sound changes depending on where one is. The Applicant has proposed to do many things.
32 Sound attenuation is a moving target depending on many variables of quarry operation. She
33 wondered if the Board could set a decibel standard based on the Applicant's testimony; if the
34 Applicant has stated they can keep decibel levels to 62, can the Board set that level as a
35 condition. Sound monitoring can be set up around the quarry to ensure such a level is being
36 followed.

37
38 Ms. Eaton listed what noise attenuation efforts are included in the Ordinance: sound reduction
39 equipment, acoustic enclosures, limiting vehicle speed to 10 miles per hour. Chair Hanley felt
40 this was where a third-party sound expert's opinion would be helpful. An independent sound
41 expert can review what has been proposed by the Applicant to determine whether the
42 suggested conditions are the limit to what can be done, or whether more is possible.

43
44 Enforcement is an issue regardless of whether decibel levels are set or not.

Ms. Loftus Keller suggested the Board site to federal laws such as the United States Department of Labor or Occupational Safety and Health Administration. These organizations speak to decibel levels; therefore, the Board does not have to. An expert would be able to provide the appropriate sections of federal law to site.

Chair Hanley noted that any quantifiable condition would have to be tied back to the Ordinance Purpose. Attorney Collier again strongly discouraged the Board in setting a quantitative standard. He felt Ms. Randolph's idea was a good one, particularly if the Applicant were to agree to such a condition in writing and amend the Application to state that at no time during the operations would the quarry decibel level exceed that level. Agreement from the Applicant would make it more difficult to appeal a decision. The Board could then adopt it as a Condition. The site would then require monitoring. Without the Applicant's agreement, the Board's condition would most likely be deemed untenable upon Appeal.

Mr. Ashmore was not convinced that the Applicant is using the Best Practicable Means for noise attenuation, however he is not qualified to make that determination. An independent expert is necessary to verify that what's been presented are the best practicable means. Mr. Ashmore added that not all equipment changes may be for the better. Ms. Randolph felt that if the Applicant agreed to a noise level they can live with equipment that is louder would be prohibited based on the set noise level.

The Board was in consensus that an independent noise expert was necessary. Once an opinion is obtained, perhaps a decibel level could be agreed upon by the Applicant. Ms. Randolph felt the residents had the right to be sure the Applicant is doing their best, and what to expect.

Attorney Collier felt that an independent expert should be give the Application and the Conditions offered by the Applicant and tasked with in determining whether these are Best Practicable Means.

Attorney Bearor reiterated the Applicant refuses to pay for an independent expert.

Attorney Collier pointed out the Technical Review in Section 4.4. *"The Planning Board may require the owner/operator or his authorized agent to deposit in escrow with the Town an amount of money sufficient to cover the costs for any professional review of the application that the Planning Board may feel is reasonably necessary to protect the general welfare of the Town. This escrow payment shall be made before the Planning Board engages any outside party to undertake this review and to make recommendations to the Planning Board..."*

An expert would have a limited role, being given the Application and suggested Conditions, and making a determination on whether these are the Best Practicable Means. If the Applicant refuses to pay for the expert, the Board has the right to deny the Application.

1 Mr. Ashmore inquired of the Applicant why, despite Section 4.4's statement, would the
2 Applicant state they are unwilling to pay for an expert.

3
4 Attorney Bearor stated the issue will always be a moving target. The decision is the Planning
5 Board's call. It is a matter of interpreting the Ordinance. It would be more prudent to send the
6 materials to a lawyer for interpretation. An expert is being called to interpret the Ordinance,
7 which is the Board's job. Chair Hanley felt this was why specificity was key. A recommendation
8 on the issue, and an opinion on the information submitted by the Applicant was all that was
9 necessary of the expert; no presentations or meeting attendance.

10
11 Discussion ensued among the Board and Attorney Collier regarding what specifically an expert is
12 required for.

13
14 Attorney Collier noted that a Motion could include that given the many concerns of the
15 neighbors that noise, if allowed to go unchecked, would be an unreasonable burden on them,
16 and to protect the welfare of the community, the Board requires an expert to better understand
17 what the best practicable means are. This would tie the Motion to the general welfare of the
18 neighborhood.

19
20 Chair Hanley stated that within the bounds of Section 4.4, Technical Review, the Planning Board
21 is requesting that a sound expert be retained for the purposes of giving an opinion

22
23 Ms. Randolph asked what the process was if the Applicant refuses to pay for an expert.
24 Attorney Collier felt the Board could deny the Application based on their refusal, and in all
25 likelihood the Applicant would appeal the decision. Attorney Bearor argued this was another
26 issue that could be declared void for vagueness. Attorney Collier requested Attorney Pileggi's
27 opinion.

28
29 Attorney Pileggi felt that it was clear from Section 4.4 the Board has the power to ask for an
30 expert opinion on whether a technical aspect of the Application meets the standard, and
31 whether there are other means to meet the standard. What happens after that is not a
32 concern. If the Board requires this in order to deliberate and make a decision, it's the Board's
33 prerogative. If the Applicant refuses to accommodate the requirements of Section 4.4, the
34 Board should deny the Application.

35
36 Attorney Bearor stated the Applicant will not even entertain such a request unless the Motion is
37 crystal clear about what the expert is being asked to do. The Board will find the professional
38 and return to the Applicant with a number. If the Applicant does not agree with either the
39 terminology of what is being requested, or the number, the Applicant will say no.

40
41 Ms. Randolph asked, in light of Attorney Bearor's assurance that the request will be rejected,
42 could the question of setting a decibel level be discussed, based on the information received,
43 and statements from the Applicant.

44

1 MR. ASHMORE MOVED, WITH MS. ANASTASIA SECONDING, A FIVE-MINUTE BREAK. MOTION
2 APPROVED 5-0-1 (LOFTUS KELLER IN ABSTENTION).
3

4 There was a five-minute recess of the Meeting.
5

6 Attorney Bearor stated the Applicant is prepared to make a proposal on decibel levels. The
7 Applicant is not prepared to do so immediately. Discussions will first have to ensue with the
8 Applicant's sound expert, and Harold MacQuinn Inc., as well as Attorney Bearor and Freshwater
9 Stone. The four will discuss creating a proposal, if quarry owner Paul MacQuinn is not opposed
10 to the idea. He suggested the Board take the same amount of time to create a Request for
11 Proposal for a noise expert. If the Applicant receives a cost for an expert's service, the Applicant
12 may be willing to agree to that as well. The Applicant will have to know what the scope of the
13 service is and cost before they can agree.
14

15 The discussion of a Motion ensued.
16

17 The Board was in consensus that Section 4.4 of the Quarrying Licensing Ordinance technical
18 review is worthwhile to pursue.
19

20 Ms. Randolph suggested the Board make a Motion to continue the meeting to pull the
21 information together regarding what the Board will be asking of the Applicant and the cost.
22 Perhaps the sound expert could assist with the language regarding what is needed, as well as
23 cost. With this information being ready for the next meeting.
24

25 Attorney Collier agreed Attorney Bearor's idea had merit. If the Applicant agrees to what the
26 Board considers a reasonable decibel standard, the Code Enforcement Officer can use a sound
27 meter or otherwise monitor the area, and other tools of enforcement at her disposal. In the
28 Ordinance itself there is Section 8.2, Annual Review which states "*An annual compliance
29 inspection shall be conducted by the CEO prior to the anniversary date of the license. The CEO
30 shall issue a Report of Inspection Compliance, provided he/she determines that the license holder
31 has not deviated from the approved plan. If the CEO determines that the license holder has
32 deviated from the approved plan, the CEO shall issue a Report of Inspection Non-compliance. An
33 annual compliance inspection fee shall be as determined by the Board of Selectman in the Town
34 of Mount Desert fee schedule. Reports shall be provided to the Planning Board, the Selectmen,
35 and license holder.*" Additionally, after five years, a review is made and the Applicant can be
36 denied for renewal if they have not complied with the Ordinance. If the Applicant is consistently
37 on the margin of the set decibel levels or over the level, the Town would likely have reasonable
38 cause to deny a license renewal.
39

40 MS. RANDOLPH MOVED, WITH MS. ANASTASIA SECONDING, TO ASK THE APPLICANT TO
41 PROPOSE A SPECIFIC DECIBEL LEVEL THAT THEY WOULD AGREE IN WRITING TO BE LIMITED TO
42 AS A CONDITION OF APPROVAL OF THE APPLICATION.
43

1 It was pointed out that a third-party expert would be able to assist in determining if the decibel
2 level was reasonable.

3
4 Attorney Bearor noted the Board has been presented with their sound expert's findings. They
5 want to review those submittals so that anything the Applicant proposes is consistent with
6 those findings. Ms. Randolph noted the Board would have to process what is proposed. The
7 decibel levels will have to be safe for the neighborhood.

8
9 The question was brought up whether the Motion was relative to Section 1.2, Purpose, or
10 Section 62.J, Noise, of the Quarrying Licensing Ordinance. Attorney Pileggi noted that since the
11 Applicant has agreed to this, a Continuation of the meeting to a future date to hear their
12 presentation was all that was necessary. The Motion did not need to be complicated. The
13 Motion can refer to the Applicant presenting additional information in relation to Section 62.J.
14 An additional Motion can be made regarding the use of experts.

15
16 There was no further discussion.

17
18 MOTION APPROVED 5-0-1 (LOFTUS KELLER IN ABSTENTION).

19
20 Attorney Collier shared a potential draft Motion: "Pursuant to Quarrying Licensing Ordinance
21 Section 4.4, that the Town Attorney in concert with the Code Enforcement Officer engage an
22 expert in sound to determine with a specific request to report to the Planning Board in writing a
23 for a small quarry of 1 -2 acres what are the best practicable means of reducing noise using the
24 means as described using Quarrying Licensing Ordinance Section 6.2J, and given the application
25 submitted and the conditions proposed by the Applicant, does the Applicant in your professional
26 opinion meet the standard."

27
28 Ms. Randolph felt that a Motion on what, specifically, a sound expert will do for the Board will
29 be more clearly defined only after the sound expert is found and can advise the Board on what
30 they can do. Attorney Collier disagreed. The Board must direct Attorney Collier or the Code
31 Enforcement Officer to hire the expert. Ms. Randolph felt the situation was that a sound expert
32 would be contacted and told what the Board is looking for. That sound expert may be able to
33 advise the Board or add more detail or direction to what the Board asks for. Ms. Randolph felt
34 the Motion perhaps should not be created until after this occurs. Attorney Collier felt that if the
35 Board was going to direct Attorney Collier or CEO Keene to find a price quote, then some
36 direction is necessary regarding exactly what an expert is being asked to do.

37
38 Attorney Collier cautioned that what could happen is – subject to the Applicant agreeing to
39 provide a decibel level – an expert could provide a price regarding what they can do, but it
40 would be vague, unless there is a very specific Motion as to what the Board is asking them to do.
41 Then Attorney Bearor will object to the amount because what the Board asked the expert to do
42 is vague. Alternatively, asking a sound expert to review the Application and standards, to
43 determine if the Applicant has met the standard would be more general.

44

1 It was agreed the memorandum dated November 15, 2019 would be referenced. Ms. Randolph
2 felt the expert could also be asked for clarity on the impact of the noise. Even if the Applicant
3 comes back with a decibel level, the Board still does not possess the technical knowledge make
4 a determination on that decibel level. Chair Hanley felt that was the next level. We ask an
5 expert for the best practicable means of noise attenuation, we get from the Applicant a
6 proposed decibel level, and then the two parts are threaded together to determine noise
7 attenuation relative to the decibel level. Ms. Randolph felt it needed to be included when
8 approaching a noise expert. We need to ask the sound expert to give the Board advice on
9 decibel levels and the proposed noise attenuation efforts within the context of Section 62.J.

10
11 Attorney Collier protested such a request was too broad. It would be difficult to defend should
12 a decision be appealed. Despite the discussion by the Applicant and the Hall Quarry residents
13 about sound, the comparisons of noise versus sound is not relevant.

14
15 Chair Hanley asked if a sound expert's analysis can achieve a decision on whether what the
16 Applicant is proposing for sound mitigation achieve a decibel threshold level. Attorney Collier
17 thought it could. Ms. Randolph asked for clarification that Attorney Collier felt it would be
18 pertinent to ask about what the impact of a decibel level is only if the Applicant agrees to set a
19 decibel level. It is not relevant to discuss sound in general, or the nature of sound.

20
21 Ms. Randolph felt that if the Applicant proposes a decibel level, the Board must determine
22 whether this level is safe for the Town will require assistance in understanding the number
23 proposed.

24
25 Attorney Bearor stated the Applicant would be reluctant to proceed if this was the route the
26 Board decides to take. Attorney Collier agreed with Mr. Bearor. Attorney Collier stated the only
27 way to get to quantification is as a condition of the Application for which the Applicant
28 voluntarily agrees, otherwise he believed the Board should avoid quantification. Attorney
29 Collier cautioned against asking for an opinion on whether the level is achievable or a good
30 place to be. It's a discussion to have when creating a noise ordinance. An expert should just
31 review what the best practicable means for noise attenuation are and do these conditions meet
32 them. Otherwise the Board is treading into the realm of setting standard, in which they have no
33 role.

34
35 Chair Hanley asked how the Board knows that a specific decibel level proposed is right or wrong.
36 Attorney Collier agreed such a question could be asked. Ms. Randolph stated that was what she
37 meant. Section 1.2, Purpose, states the Board must protect the public health, safety, and
38 general welfare.

39
40 Chair Hanley asked if the Motion could state the Board would reach out per Section 4.4, for a
41 professional review of what has been identified in the memorandum dated November 15, 2019
42 as being the Best Practicable Means, per Section 6.2J. Attorney Collier felt the Board could do
43 so if they were sure they understood what they were asking for. Attorney Collier did not care

1 for the Motion. Ms. Eaton suggested the Board could also ask for the pros and cons of
2 alternative decibel levels.

3
4 Chair Hanley felt the expert needs to explain how the information submitted is relative to
5 Section 62.J, and how is it relative to the proposed decibel level. And how is the decibel level
6 relative to Section 1.2, Purpose, of the Quarrying Licensing Ordinance.

7
8 Ms. Randolph noted she did not have a grasp on how decibel levels drop off over distance. The
9 question is how much noise is there beyond the quarry property lines. Ms. Randolph felt the
10 balance between room enough for a quarry to get the work done, yet protection of the
11 neighbors is the Board's responsibility. Ms. Eaton noted the sound is going to be measured or
12 monitored.

13
14 Chair Hanley felt the Motion required several layers. Mr. Ashmore wanted answers to the
15 questions of whether the equipment the Applicant proposes to use best practicable means to
16 noise attenuation. He did not feel confident the ten feet high three-sided barrier was truly best
17 practicable means for noise attenuation. Attorney Collier felt his proposed Motion would cover
18 that point.

19
20 Attorney Collier felt his Motion asked the expert to determine Best Practicable Means, and,
21 given the Application, has Best Practicable Means standard been met? Opening the discussion
22 up to an analysis of decibels and sound. An answer to these questions could vary largely in size
23 and information. What can the Board do with that question, other than perhaps have the
24 Expert come in to discuss the issue. Ms. Randolph suggested perhaps the Board needs to do
25 their own research. Attorney Collier agreed there are large amounts of information available on
26 sound. There's been much information submitted from both sides, and many studies have been
27 referred to. Mr. Collier felt the Board Members could research through the information
28 presented and reach an understanding of the mechanics of sound, even if it required another
29 meeting. Attorney Collier reiterated that the first two parts of his Motion were more defensible.
30 The Town can ask the expert to provide a price for determining the Best Practicable Means for
31 noise attenuation at a small quarry and does the Application plus the proposed conditions meet
32 those Best Practicable Means.

33
34 Attorney Collier noted that the Board was concerned that the decibel level proposed by the
35 Applicant is the best decibel level. Ms. Randolph felt context was necessary to understand and
36 have confidence in the number.

37
38 Attorney Collier proposed creating a Motion that engages an expert to address the two items he
39 previously mentioned. At the next meeting the Board should have a price quote, and the
40 Applicant may have a decibel level determined. Then the Board can proceed. The Board can ask
41 the sound expert to provide more information if deemed necessary. In the meantime, Chair
42 Hanley can ask Board Members to study the materials presented to see if they can come to have
43 a good understanding on the concept of sound and decibel levels.
44

1 Attorney Bearor asked for clarification that the materials the Board intends to study are the
2 materials in the record, and no new, independent research would be made. Attorney Collier
3 concurred. The Board agreed with this suggestion.

4
5 A lengthy construction of the Motion ensued.

6
7 MS. EATON MOVED, WITH MS. ANASTASIA SECONDING, PURSUANT TO QUARRYING LICENSING
8 ORDINANCE SECTION 4.4 THAT THE TOWN ATTORNEY IN CONCERT WITH CEO KEENE ASK AN
9 EXPERT IN SOUND FOR A PRICE QUOTE FOR A WRITTEN REPORT ON THE FOLLOWING TWO
10 MATTERS: #1 - FOR A SMALL QUARRY OF ONE ACRE WHAT ARE THE BEST PRACTICABLE MEANS
11 OF REDUCING NOISE, USING THE MEANS DESCRIBED IN QUARRYING LICENSING ORDINANCE
12 SECTION 6.2.J. #2 – GIVEN THE APPLICATION, AS SUMMARIZED IN A MEMORANDUM FROM
13 THE APPLICANT TO THE BOARD DATED NOVEMBER 15, 2019 AND THE CONDITIONS PROPOSED
14 BY THE APPLICANT HOW WELL HAS THE APPLICANT MET THE STANDARD OF THE BEST
15 PRACTICABLE MEANS OF REDUCING NOISE.

16
17 Attorney Bearor voiced concern over Part Two of the Motion. He felt this was the decision of
18 the Board, and not an expert.

19
20 MOTION APPROVED 5-0-1 (LOFTUS KELLER IN ABSTENTION).

21
22 Discussion ensued regarding continuing the meeting. It was deemed that in the absence of CEO
23 Keene, a calendar of available dates and times was not available. It was agreed the meeting
24 would be extended to a date to be determined by poll.

25
26 MS. RANDOLPH MOVED, WITH MS. ANASTASIA SECONDING, TO TABLE THE MATTER TILL A DATE
27 AND TIME TO BE DETERMINED. MOTION APPROVED 5-0-1 (LOFTUS KELLER IN ABSTENTION).

28
29 MR. ASHMORE MOVED, WITH MS. EATON SECONDING, TO ADJOURN THE MEETING. MOTION
30 APPROVED 5-0-1 (Loftus Keller in Abstention). Meeting was adjourned at 8:56PM.

31