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**TOWN OF MOUNT DESERT
PLANNING BOARD MEETING MINUTES
February 9, 2022
Town Hall Meeting Room,
21 Sea Street, Northeast Harbor and via Zoom**

Board Members Present: Tracy Loftus Keller, Chair William Hanley, Meredith Randolph, Christie Anastasia, David Ashmore

Public Present: Gerald Shencavitz, Alison King, Judy Ayles, Attorney for the Planning Board James Collier, Lincoln Millstein, Fran Leyman, Celeste, Attorney for the Applicant Ed Bearor, Pam Bowie, Janet Leston Clifford, Attorney for Hans Utsch and Julia Merck Matt Manahan, Joanna Krasinski, Kelly O'Neil, Carey Kish, Donna Reis, Dick Broom, Attorney for Hall Quarry Residents Roger Katz, Maureen Maguire, Lotus, Howard Colter, Betsy, Jeff Gammelin, Andy Odeen, Jan Coates, Elizabeth Roberts

This meeting was a hybrid of in-person attendance and on-line attendance via Zoom and was recorded.

I. Call to Order 6:00PM

Continued from January 12, 2021

Chair Hanley called the Meeting to Order at 6:00PM. Board Members were noted.

II. Quarrying Licensing Application:

Public Hearing

A. Quarrying License Permit: #001-2014

OWNER(S): Harold MacQuinn, Inc.

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

AGENT(S): Stephen Salisbury, Herrick & Salisbury, Inc.

LEGAL REPRESENTATION: Edmond J. Bearor, Rudman Winchell

LOCATION: Off Crane Road, Hall Quarry

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

PURPOSE: Review Quarry License Application

It was reiterated that the Public Hearing is closed. The intent of this meeting is to determine whether the Planning Board has anything further to address on the issue and to work towards a final Motion.

Attorney Collier advised at the last meeting that if there were other reasons to deny the Application they should be included in the final Motion. Attorney Collier advised that it was not necessary to address the final items on the Application checklist not yet addressed if the Board intends to deny the Application. He could not identify anything left on the checklist that the Board must address. He believed the Board was able to deny the Application.

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Two Motions made on January 12, 2022, were read:

MS. RANDOLPH MOVED, WITH MR. ASHMORE SECONDING, THE LAND USE ZONING ORDINANCE HAS BEEN FOUND BY THE MOUNT DESERT PLANNING BOARD TO APPLY TO THIS APPLICATION (SEE BOARD MOTION OF OCTOBER 20, 2021, REGARDING SAME). SPECIFICALLY, SECTION 6.B11.2 REQUIRES THAT ALL PRIVATE ROADS THAT SERVE TWO OR MORE LOTS MUST MEET STREET DESIGN AND CONSTRUCTION STANDARDS OF SECTION 5.14 OF THE SUBDIVISION ORDINANCE. THE QUARRYING LICENSING ORDINANCE SECTION 6.2A2 REQUIRES THAT THE OWNER AND OPERATOR ENSURE THE MAINTENANCE OF ALL INFRASTRUCTURES, STRUCTURES, AND THEIR SITES. THE EASEMENT (BOOK 7146, PAGE 329) PROVIDED BY THE APPLICANT SPECIFIES THAT CHANGES IN CONSTRUCTION OR MAINTENANCE MUST BE APPROVED BY THE FEE LANDOWNER. AS IT IS IMPRACTICAL TO OBTAIN APPROVAL THE FEE LANDOWNER'S APPROVAL TO REPAIR AND MAINTAIN THE ROAD FROM TIME TO TIME ONGOING, THE APPLICANT HAS NOT SHOWN SUFFICIENT EVIDENCE OF TITLE, RIGHT, AND INTEREST AS IS REQUIRED BY QUARRYING LICENSING ORDINANCE ARTICLE 6, SECTION 6.1C.

VOTE:

- TRACY LOFTUS KELLER: AYE*
- CHRISTIE ANASTASIA: AYE*
- MEREDITH RANDOLPH: AYE*
- DAVID ASHMORE: AYE*
- CHAIR WILLIAM HANLEY: AYE*

MOTION APPROVED 5-0.

MS. ANASTASIA MOVED, WITH MS. RANDOLPH SECONDING, THE APPLICANT HAS A DUTY TO ENSURE THE MAINTENANCE OF ALL INFRASTRUCTURES, STRUCTURES, AND THEIR SITES PER SECTION 6.2A2 OF THE QUARRYING LICENSING ORDINANCE BUT THE APPLICANT CANNOT FULFILL THAT DUTY BECAUSE OF THE LIMITATIONS OF THE AFOREMENTIONED EASEMENT.

VOTE:

- CHRISTIE ANASTASIA: AYE*
- MEREDITH RANDOLPH: AYE*
- DAVID ASHMORE: AYE*
- TRACY LOFTUS KELLER: AYE*
- CHAIR WILLIAM HANLEY: AYE*

MOTION APPROVED 5-0.

1 Mr. Ashmore struggled with the fact that the Applicant did not provide data on noise
2 levels at the property lines as required in Section 6.2J of the Quarrying Licensing
3 Ordinance (QLO).

4
5 Attorney Collier argued that the Board voted on Section 6.2J. He did not recommend re-
6 visiting the Section for further discussion, though it is possible to do so. He doubted doing
7 so would improve the Board's Motion. Attorney Collier did not believe noise levels at the
8 property lines came up during the discussion as a potential reason to deny. Re-opening
9 the discussion would require the Board to the issue without input from other parties, and
10 vote on that issue only. Attorney Collier felt it unfair to return to the issue and revise it
11 after it has been voted on, particularly after so much time as passed since the initial vote.

12
13 Mr. Ashmore maintained that nevertheless the Applicant did not submit this information
14 as required by the QLO.

15
16 Ms. Anastasia recalled at the last meeting questioning whether the issue with the road
17 easement is so overriding that it supersedes issues like Noise. If the road issue supersedes
18 other issues, perhaps it is all that is necessary to include in the Motion.

19
20 Mr. Ashmore believed it may be possible to correct the road issue. It should be made
21 clear there are other issues that should be addressed.

22
23 Attorney Collier argued that the Motion on Noise states that the standards of 6.2J have
24 been met. Mr. Ashmore maintained that the Board was advised by Attorney Collier during
25 the Application review process that they could revisit any portion of the Application.

26
27 Attorney Collier did not believe it good practice to revisit an issue unless new evidence
28 has been presented.

29
30 Ms. Anastasia theorized that each item on the checklist could be voted on and one could
31 still conclude that the overall intent of the Application did not serve the community on a
32 broader scale.

33
34 Attorney Collier disagreed. There is caselaw on such action. In order to do what Ms.
35 Anastasia is suggesting the Board would have to create a standard citing evidence in the
36 record defining the Town's general health, safety, and welfare, and then point to evidence
37 in the record supporting how the Application does not meet that standard. Attorney
38 Collier cautioned that such a thing is rarely done and is subject to attack. He cited, as an
39 example, property values. If real estate professionals had presented evidence that
40 property values would be less with the quarry in operation, then that fact could be used
41 as evidence to support such a Motion. There must be evidence in the record supporting
42 the purpose. Attorney Collier did not recall evidence of real estate values submitted as
43 evidence.

44

1 Chair Hanley read Section 1.2 Purpose of the QLO:

2 *The purpose of this Ordinance is to put into law minimum removal and*
3 *reclamation standards and municipal procedures to regulate the quarrying*
4 *of rock or stone while at the same time respecting the rights of pre-existing*
5 *operations. These standards and procedures are intended to protect the*
6 *public health, safety, and general welfare; and to minimize the adverse*
7 *impact of quarrying to the Town, abutting property owners, citizens of the*
8 *Town, and wildlife and natural resources by:*

9
10 *A. Preserving and protecting surface and groundwater quality and quantity*
11 *for current and future use of the town and/or its residents.*

12
13 *B. Preserving the Town's natural resources, property value, and their future*
14 *ability to be an asset to the Town and its residents.*

15
16 *C. Controlling the amount of potential pollution which can be discharged*
17 *into the Town's environment.*

18
19 Regarding General Welfare, Attorney Collier suggested a Motion noting the various
20 residents of Hall Quarry that have testified that they moved to the area for the quiet,
21 natural environment, and that such an environment is the nature of Hall Quarry and that
22 their general welfare is negatively impacted by the Applicant's proposed use. The Motion
23 the Board intends to make must be tied to evidence submitted.

24
25 Ms. Randolph had no doubt property values near the quarry would depreciate with an
26 operating quarry in the neighborhood. However, the entire Application process led down
27 a step-by-step path per the Application standards. There was never an occasion for the
28 residents to bring forth real estate professionals to provide evidence. The Application
29 process never included a point at which to consider general welfare or issues like
30 protection of property values.

31
32 Ms. Loftus Keller pointed out that Hall Quarry residents submitted a wealth of documents,
33 each offering testimony to their experiences with both property values and health
34 matters. Ms. Randolph agreed; a sizable amount of evidence and testimony was
35 submitted by the residents and at some point, property values were discussed. There
36 was no context within the Application process allowing for such concerns to be addressed.
37 Chair Hanley agreed; these were more anecdotal submissions that threaded throughout
38 the public comment portion of the process, but there is no specific review standard
39 addressing the issues stated in the Purpose.

40
41 Attorney Collier cited a case, "The Town of Washington Versus Lane", which notes that
42 the standard is whether parties involved had the opportunity to bring up the issues. It is
43 not up to the Board to invite argument. The public had considerable opportunity to
44 speak.

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Ms. Randolph disagreed. Reviewing the Application has been a step-by-step process dictated by the Checklist. There was never a definitive point where an issue like land values was introduced for discussion where the neighbors could identify it as an opportunity to make a presentation. The process has taken years, and residents were allowed the chance to make submissions on specific subjects. The Board was led through the Application process, and the residents were given no reason to believe there was an opportunity for them to present on items outside the Application Checklist. Attorney Collier asserted he informed those in attendance that experts on property values could be brought in to testify. He opined that any attorney that felt additional issues not on the agenda should be talked about should have somehow made sure those issues were addressed. There have been years of opportunity to request discussion of additional issues.

Mr. Ashmore was convinced the quality of life of those residents living near the quarry will be adversely affected by quarrying activity. This falls under the Purpose of protecting public health. Chair Hanley referenced the many emails and letters from residents addressing quality of life. Quality of life has been an ever-present commentary from abutters and there is record of their testimony.

Attorney Collier suggested a Motion on quality of life citing testimony provided by residents. A review of past Minutes would show some of that testimony. Ms. Randolph noted testimony was presented specifically addressing health.

Attorney Collier cautioned that from the Applicant's perspective, they have met the Application standards. The Board is now saying the Application is denied based on failing to make the residents happy.

Mr. Ashmore felt it would be difficult to approve the Application after receiving the testimony from the residents. The Purpose in Section 1.2 has not been addressed. Chair Hanley believed the Purpose section is key to revisit during final deliberation of the Application. He agreed the Board never made a close review of the Purpose because the Application process implied a specific pathway. The Board was given to understand that at the end of the process the Board could, in final deliberations, revisit whatever they felt necessary. Section 1.2 is one of those items.

Ms. Randolph pointed out that the Board is required to review the Application as if the quarry, as proposed in the Application, were pre-existing. The activity in this quarry has been such that for the past 20 years a neighborhood grew up around it not realizing it was an active quarry. Real estate agents sold property around the quarry telling buyers it was an abandoned quarry. It might be argued that by virtue of their choices the quarry owner led the community to believe the quarry was not in operation. The QLO was not designed to deal with new quarry activity. The activity proposed is quite different than what was historically occurring.

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Chair Hanley recalled the LUZO now allows a smaller minimum lot size in Hall Quarry. Potential development density can increase. Per the Purpose as stated in the QLO, the impact the quarry has on Hall Quarry can intensify if the population grows. Through years of consideration, the Board heard from a group of residents regularly. Very specific information and testimony has been submitted. Perhaps referring to specific abutters and their comments over the years would strengthen a Motion.

Attorney Collier worried that reviewing submittals or old Minutes to find specific references would be time consuming and may necessitate another meeting.

Ms. Anastasia agreed with Chair Hanley. There has been significant anecdotal testimony and submissions on various standards. She did not believe the standards were presented in a way that specifically ties to health.

Attorney Collier reiterated that the Board voted that the standards in the QLO were met. Chair Hanley argued that the Board never touched on the Purpose, due to the specific direction the QLO Application Checklist takes the process.

Attorney Collier opined that the Purpose is a guide on how to understand the standards. With regard to Noise, the Board can use the purpose as a guide; noise should not lower property values, disrupt the neighborhood, etc. The Purpose shows how to interpret the standard, but it is not a standard.

Ms. Randolph argued that when considering the standard of Noise, the Board was compelled only to vote on whether or not the Applicant was using best practicable means to reduce noise. The Board could not discuss what was deemed too much noise. The purpose of the Ordinance is to protect health and welfare, but the standard only required proof that the Applicant was making an attempt. The standards are contradictory to the Purpose.

Attorney Collier reiterated that the Board voted on noise. Ms. Randolph argued the vote was taken based on the restrictions of the standard's wording, but not within the context of the Purpose. Counsel specifically instructed the Board not to discuss requirements outside of what was stated in the standard.

Attorney Collier opined that the Board could have stated that the noise was bad for the health and welfare of the neighborhood and require the Applicant put a dome over the entire operation. The Board could have looked at health and noise as pollution while discussing the standard. Instead, the Board voted that the options presented met the standards.

Ms. Randolph was given to believe there was nothing in the Ordinance regarding noise that could be enforced beyond the Applicant's assertion that they were trying their best

1 to reduce noise. There are no criteria in the QLO for measuring whether or not the
2 standard is met. Ms. Randolph pointed out that Attorney Collier's suggestion that health
3 and noise pollution could have been reviewed was never suggested as an option during
4 discussions. Further, the Planning Board relied on Attorney Collier's advice; they were
5 led to believe that they could not address the standard in the way Attorney Collier is now
6 telling them was possible.

7
8 Attorney Collier stated that the Board can make a Motion to deny based on testimony
9 presented by neighbors. Attorney Collier did not believe such a Motion would further the
10 final Decision.

11
12 Ms. Randolph believed such a Motion should be included. Chair Hanley agreed; such a
13 Motion recognizes that the Board acknowledges the Hall Quarry residents' input
14 throughout the process. Additionally, it will provide a more human component to the
15 Motion.

16
17 Mr. Ashmore added that the Board focused attention on the neighbors living in just one
18 direction. At some point there could be neighbors around the entirety of the quarry. That
19 possibility's never been discussed.

20
21 Work on drafting a Motion ensued.

22
23 Attorney Collier did not believe a potential increase in residential density has anything to
24 do with the Application. Mr. Ashmore suggested the potential for increased density
25 shows the trend in the area for denser development which would impact the area, making
26 it more residential than it currently is.

27
28 Attorney Collier confirmed there is caselaw and MMA information regarding referencing
29 testimony regarding health, safety, and general welfare. One could reference "numerous
30 instances", but numerous instances must be easily found. If alleging safety concerns, one
31 must be able to site true safety hazards, such as specific injury or other damage, including
32 psychological.

33
34 Chair Hanley argued that density of development is a criterion for a subdivision. Density
35 changes are possible. This provides context to the issue.

36
37 Ms. Randolph suggested referencing activity not compatible with a residential
38 neighborhood. The specific activities proposed in the Application were not historically
39 used in the quarry, despite the fact that the quarry must be considered a pre-existing
40 activity. Mr. Ashmore suggested including in the Motion that the area is residentially
41 zoned.

42
43 Motions were drafted and modified several times.

44

1 Ms. Anastasia drafted the following Motion:

2 *Ms. Anastasia moved that looking at and thinking of Section 1.2 of the*
3 *Quarrying Licensing Ordinance and based on the testimony of abutters and*
4 *numerous neighbors over the years, that their health and general welfare*
5 *would be adversely impacted by sharing a residentially zoned*
6 *neighborhood and community with an operating quarry; and which*
7 *adverse impact is likely to be exacerbated by decreases in minimum lot*
8 *area and resulting increasing density, therefore the Board denies the*
9 *Application.*

10
11 Attorney Collier drafted the following Motion:

12 *Thinking and considering Article 1.2 of the Quarrying Licensing Ordinance,*
13 *the Board heard testimony over many years from numerous neighbors,*
14 *which testimony is in the record in several locations, that they lived in a*
15 *quiet rural residential neighborhood – indeed, the quarry is proposed for*
16 *an area that is zoned Residential One, where industrial uses are generally*
17 *not allowed - and that their health, especially their healthy state of mind,*
18 *and general welfare were and will be negatively affected by quarrying*
19 *operations. Therefore, I move that the Application should be denied as the*
20 *quarry use would negatively impact the public health and general welfare*
21 *of the surrounding residential neighborhood.*

22
23 Attorney Collier felt his Motion was simpler without reference to future potentiality and
24 without reference to the zone.

25
26 Chair Hanley suggested the Motion tie back to the Purpose of the QLO.

27
28 Ms. Randolph suggested including in the Motion the fact that the use is a nonconforming
29 use in a residential zone.

30
31 Discussion ensued regarding whether to include in the Motion future residential density
32 increases. Attorney Collier restated that it was a bad idea to include envisioning
33 something that might happen, making a false speculative. Chair Hanley did not believe it
34 was speculation; the framework for increased density is there. Attorney Collier stated it
35 would be impossible to present an application that meets the standards of today and also
36 any future standards. Ms. Randolph agreed. The neighborhood is likely to develop
37 according to what is there. If the quarry is allowed to move forward, there will likely be
38 less development around it. Development will be in response to the conditions.

39
40 Mr. Ashmore did not feel it was projecting into the future to state that the allowable
41 density has been increased, which could affect more people. Ms. Randolph noted that if
42 people move in when the quarry is in operation, they will move in knowing there is an
43 active quarry. The problem is for the people who moved in not knowing there was an
44 active quarry in the area. This will change the way the Town develops.

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Attorney Collier explained his Motion was intending to reflect that the quarry will negatively affect the residents, per their testimony, and the Application should be denied because it does not fit in with the neighborhood. This will tie it directly with the purpose stated in the QLO. Attorney Collier felt his Motion had a slightly better chance of holding up in court.

MS. RANDOLPH MOVED, WITH MS. LOFTUS KELLER SECONDING, THINKING AND CONSIDERING ARTICLE 1.2 OF THE QLO, THE BOARD HEARD TESTIMONY OVER MANY YEARS FROM NUMEROUS NEIGHBORS, WHICH TESTIMONY IS IN THE RECORD IN SEVERAL LOCATIONS, THAT THEY LIVED IN A QUIET RURAL RESIDENTIAL NEIGHBORHOOD – INDEED, THE QUARRY IS PROPOSED FOR AN AREA THAT IS ZONED RESIDENTIAL ONE, WHERE INDUSTRIAL USES ARE GENERALLY NOT ALLOWED - AND THAT THEIR HEALTH, ESPECIALLY THEIR HEALTHY STATE OF MIND, AND GENERAL WELFARE WERE AND WILL BE NEGATIVELY AFFECTED BY QUARRYING OPERATIONS. THEREFORE, I MOVE THAT THE APPLICATION SHOULD BE DENIED AS THE QUARRY USE WOULD NEGATIVELY IMPACT THE PUBLIC HEALTH AND GENERAL WELFARE OF THE SURROUNDING RESIDENTIAL NEIGHBORHOOD.

VOTE:

- MEREDITH RANDOLPH: AYE
- TRACY LOFTUS KELLER: AYE
- CHRISTIE ANASTASIA: AYE
- DAVID ASHMORE: AYE
- CHAIR WILLIAM HANLEY: AYE

MOTION APPROVED 5-0.

MS. RANDOLPH MOVED, WITH MS. ANASTASIA SECONDING, BASED ON THE PREVIOUS THREE MOTIONS SITING OUR REASONS TO DENY THE APPLICATION, I MOVE THE APPLICATION BE DENIED.

VOTE:

- MEREDITH RANDOLPH: AYE
- CHRISTIE ANASTASIA: AYE
- TRACY LOFTUS KELLER: AYE
- DAVID ASHMORE: AYE
- CHAIR WILLIAM HANLEY: AYE

MOTION APPROVED 5-0.

III. Adjournment

MS. ANASTASIA MOVED, WITH MR. ASHMORE SECONDING, TO ADJOURN THE MEETING.

VOTE:

- CHRISTIE ANASTASIA: AYE
- DAVID ASHMORE: AYE

- 1 TRACY LOFTUS KELLER: AYE
- 2 MEREDITH RANDOLPH: AYE
- 3 CHAIR WILLIAM HANLEY: AYE
- 4 MOTION APPROVED 5-0
- 5
- 6 The Meeting adjourned, at 7:49PM.