

1 **TOWN OF MOUNT DESERT**
2 **PLANNING BOARD MEETING MINUTES**
3 **March 24, 2022**
4 **Town Hall Meeting Room,**
5 **21 Sea Street, Northeast Harbor and via Zoom**

6
7 Board Members Present: Chair William Hanley, Tracy Loftus Keller, Meredith Randolph, David
8 Ashmore, Christie Anastasia

9
10 Public Present: Howard Colter, Janet Leston Clifford, Elizabeth Roberts, Fran Leyman, Carey Kish,
11 Steve Krasinski, Joanne Krasinski, Attorney for the Planning Board James Collier, Attorney for the
12 Applicant Ed Bearor, Attorney for Hall Quarry Abutters Daniel Pileggi, Attorney for Hall Quarry
13 Residents Roger Katz, Attorney for Hans Utsch and Julia Merck Matt Manahan, Gerald Shencavitz,
14 Judy Ayles, "Midnight", Maura Santoli, Celeste Lindsey, Zorina, Maureen Maguire, Seth
15 Singleton, Dick Broom, Pam Bowie, David Shields, Linda Bradford, Jane Shelton, Andy Odeen,
16 Kelly O'Neil

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

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

22 Chair Hanley called the Meeting to order at 6:00pm. Board Members present were noted.

23
24 **II. To review, approve and sign the Findings of Facts and Conclusions of Law for the Harold**
25 **MacQuinn, Inc. and Freshwater Stone & Brickwork, Inc. Quarrying License Application.**

26 CEO Keene confirmed adequate Public Notice. Abutters were notified.

27
28 No Conflict of Interest among the Board was found.

29
30 Attorney James Collier stated the Board's February 9, 2022 conclusion did not include
31 Findings of Fact and Conclusions of Law on every standard in the Application. Attorney
32 Collier's drafted Findings and Conclusions touch on just the items discussed at that meeting.
33 His Draft was sent to the various parties. Attorney Matt Manahan replied with several
34 suggestions:

- 35 - Some grammatical and stylistic changes, with which Attorney Collier complied.
36 - Attorney Manahan requested his clients be recognized as having standing. The Planning
37 Board never agreed to recognize Attorney Manahan's clients as parties with standing and
38 therefore Attorney Collier did not include such a recognition.
39 - Attorney Manahan suggested including a statement within the Findings that the Board is
40 making no determination on other criteria for approval or disapproval and that other
41 votes are preliminary, in an effort to clarify to any future reviewing body the Board's
42 intent.

43
44 Attorney Collier agreed that some attorneys prefer to clarify when an action is not being

1 taken. He did not believe it necessary. Additionally, he does not want to limit the Board by
2 including such a statement.

3
4 Chair Hanley inquired about the other sections the Board has voted on. Attorney Collier
5 advised that if the Board desires reference in the Findings to other votes the Board has made,
6 then further review of the record will be required to create and discuss new, more
7 encompassing Findings. Such a change would likely require an additional meeting.

8
9 Attorney Collier stated that in reviewing an application such as this, a position held in the
10 beginning of the process may change due to additional information received during the
11 process. Caselaw is clear that if the Board does not state the votes are final, then the votes
12 are preliminary, and the Board can change them at a later date. Attorney Collier included
13 only pertinent discussion in his Findings and Conclusions.

14
15 Attorney Collier's draft contains four findings relative to the two topics deliberated on at the
16 February 9, 2022 meeting. Attorney Collier confirmed the Board's final vote is relative only
17 to the Findings of Fact and Conclusion of law made at the February 9, 2022 meeting, and
18 therefore all other preliminary decisions are not finalized.

19
20 Attorney Manahan believed it wise to state that those preliminary motions were in fact
21 preliminary, and that the Board's decision is not based on those preliminary votes. Attorney
22 Collier maintained that leaving it out avoids both sides of the argument and keeps the
23 Findings simple and succinct.

24
25 Mr. Ashmore noted that some of the decisions made were made by Planning Board members
26 no longer on the Board. How would this affect any potential new findings?

27
28 Attorney Collier advised that caselaw states that decisions made by different Planning Board
29 members due to member turnover stand.

30
31 Hall Quarry resident Howard Colter noted the draft refers to the community of Hall Quarry
32 and abutters of the quarry. The issue encompasses the community of Mount Desert as a
33 whole and therefore the whole Mount Desert community should be included in the Findings.
34 Chair Hanley felt the February 9, 2022 motion addresses the larger community with regard
35 to Section 1.2 of the QLO, which looks at the broader picture of impact on the community.

36
37 Discussion of which parties had standing ensued. Attorney Collier was not inclined to address
38 the question of identifying standing regarding Attorney Manahan's clients as the Planning
39 Board never made such a decision. "Standard" is intended to mean abutters, and adjoining
40 residents, and in some cases includes residents within an identified radius. Cases have come
41 to include the "neighborhood", and there have been cases questioning what is considered
42 "neighborhood". Standing is limited to those directly affected. Attorney Collier did not
43 believe residents of Somesville or Northeast Harbor could be considered to have standing in
44 the case.

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Hall Quarry resident Steve Krasinski asserted this issue affects the health and welfare of the Town.

CEO Keene read one of the February 9 Motions:

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.

Chair Hanley read Section 1.2 of the QLO:

1.2 Purpose

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

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

B. Preserving the Town’s natural resources, property value, and their future ability to be an asset to the Town and its residents.

C. Controlling the amount of potential pollution which can be discharged into the Town’s environment.

Chair Hanley believed the Planning Board addressed the bigger issue of impact on the Town.

1 The Board does not have to recognize standing beyond the proximity to the quarry. These
2 are two separate issues. Attorney Collier agreed. The neighborhood is the standard set by
3 the law court. Impact to someone outside the neighborhood area must clearly proven to gain
4 standing.

5
6 Mr. Krasinski argued that noise was discussed only in connection to abutting property
7 owners. It affects the entire neighborhood. It also affects Attorney Manahan's clients across
8 the sound. He hoped he was not excluded from participating even though he is not an
9 abutter. Attorney Collier explained that the findings state that all Hall Quarry residents
10 represented by an attorney are determined to have legal standing.

11
12 Hall Quarry Resident Janet Leston Clifford asked about those Hall Quarry neighbors not
13 represented by an attorney. Attorney Collier explained those not represented by an attorney
14 must appear before the Board of Appeals and the Court. The law is clear; such neighbors
15 would have standing before a court, if they appear before the court to state who they are,
16 that they are opposed, and why they are opposed. Attorney Collier stated this applies to all
17 neighbors who, over the course of the discussion regarding the Quarry Application have
18 appeared before the Planning Board and stated who they were, that they are opposed, and
19 why they are opposed. He was unsure whether having provided a letter was sufficient.

20
21 Ms. Randolph felt she had not yet heard a compelling reason why not to include Attorney
22 Manahan's suggestion. If there's an extra step that can be taken perhaps it should be taken.

23
24 Attorney Collier argued that the Planning Board spent years avoiding taking a final position,
25 other than the ones included in the final Findings presented. Board members have stated
26 throughout the process that the votes taken by the Board are not final. This last-minute
27 insertion insinuates that the votes taken by the Board are, in fact, final. Attorney Collier felt
28 it better to leave the Planning Board as much flexibility as possible. Should the case be
29 remanded to the Planning Board for further discussion, this allows for each item to be
30 reviewed and a final Motion created.

31
32 Ms. Randolph believed Attorney Manahan's suggested wording makes clear that none of the
33 previous motions and votes were final votes, and the decision was based only on the items
34 included in the Findings currently before the Board. Attorney Collier suggested that
35 conversely, the previous findings made through the process might be determined to be final.
36 He preferred to keep the possibility open by saying nothing.

37
38 Mr. Ashmore asked whether a court could consider the previous votes final votes. Attorney
39 Collier asserted they can, but he did not believe they would because the Planning Board did
40 not state they were.

41
42 Attorney Bearor believed the record will speak for itself. Discussion was held on every
43 standard and the votes will stand for whatever the court decides they stand for, whether final
44 or preliminary. Attorney Bearor did not believe the actions taken over years of discussion

1 were preliminary. The votes were clearly considered and discussed, and the Planning Board
2 chose not to revisit any. Putting such a statement in the record at this late date will not
3 outweigh the record.

4
5 Attorney Manahan cautioned that Attorney Bearor could argue to the court that the Board
6 made their final decisions. For the Planning Board to protect against the court issuing a
7 permit in response to Attorney Bearor's arguments, they should state that final
8 determinations have not been made.

9
10 Attorney Collier believed his job was to reflect what the Board was doing. The Board did not
11 state at the last meeting that all decisions were final or not final.

12
13 Attorney Katz supported Attorney Manahan's suggestion. In past discussions, it was stated
14 that each of those individual votes were subject to final votes, and those final votes have not
15 taken place. This is a one-sentence amendment to acknowledge that final votes have not
16 taken place and clarifies the history of the matter.

17
18 Ms. Anastasia felt the statement at the bottom of the Motion made at the February 9, 2022
19 Meeting addresses the fact that the Findings of Fact and Conclusions in the motion were what
20 led to the decision. She did not see a reason to add a statement identifying what Findings
21 were final or preliminary.

22
23 Ms. Randolph pointed out that as discussion progressed new information was presented.
24 Because of this the Board wanted the ability to review further. It's important for the Board
25 to clarify votes were preliminary based on the information in their possession at the time and
26 Ms. Randolph sees no reason not to do so.

27
28 Ms. Loftus Keller saw the merits of both choices. Could such an additional statement be
29 misconstrued?

30
31 Ms. Randolph believed that in the event the Findings of Fact and Conclusion of Law is denied
32 by the court, this statement will ensure the court recognizes the Board wants the ability to
33 continue their review should the court reject their decision.

34
35 Attorney Bearor doubted additional information warranting changes in decisions previously
36 made has come to light during discussion. He's never heard of a Board returning for further
37 review of an application to determine whether or not decisions made require further
38 finalization.

39
40 Ms. Randolph pointed out that new attorneys and new legal representation was introduced
41 during the lengthy process. If new parties feel they have more information, it should be
42 discussed. Attorney Bearor disagreed. The time for such review has passed. The votes made
43 by the Board are final votes, made after much deliberation.

44

1 Mr. Ashmore reiterated that Attorney Collier advised that issues discussed previously can be
2 revisited. If issues can be revisited, then they cannot be considered final. Attorney Bearor
3 argued that if one wants to revisit an issue, then it should be done at that meeting or at a
4 meeting immediately following. Revisiting an issue years after voting makes no sense.

5
6 Hall Quarry Resident Carey Kish asserted that Attorney Collier stated to the Board that items
7 can be revisited at any time during the process. These statements can be found in the record,
8 and he witnessed them during meeting attendance. This fact suggests that nothing was final.

9
10 Attorney Pileggi suggested that the revised road design with different specifications
11 submitted by the Applicant changes stormwater drainage and is an example of changing
12 conditions requiring the Board to revisit a section of the Application.

13
14 Attorney Collier maintained that the Board should not do what it is not required to do. He
15 saw no need for doing so. Mr. Ashmore felt the fact that there are three attorneys in support
16 of adding the statement was a viable reason for doing so.

17
18 Chair Hanley noted the Board has spent years listening to testimony, listening to consultants,
19 and trying to be as inclusive, fair, and open to comment. It was his opinion that the decisions
20 made were deliberate. However, the statement came up multiple times during the process
21 that, at the end of discussions, the Board had the ability to revisit items they felt required
22 further review. He felt that unless the Board can state a need to revisit an issue or section,
23 the decisions should stand.

24
25 Chair Hanley read Attorney Manahan's suggested additional wording:

26 *"That the Board makes no determination with respect to whether the Application meets any*
27 *of the Applicable performance standards for existing quarries, in Article 6.2, with the*
28 *exception of Article 6.2a2 discussed above or any of the performance guaranty requirements*
29 *in Article 7."*

30
31 Mr. Ashmore reiterated that he asked several times throughout the process and was given to
32 believe that if there was an issue to be revisited it could be. He did not recall hearing that
33 revisiting an item was specific to new evidence presented. In light of this information, he was
34 inclined to agree that perhaps Attorney Manahan's wording did not need to be included.

35
36 Attorney Bearor felt it disingenuous that the Board is even contemplating suggesting that all
37 Motions are preliminary except the one item the Board found against the Applicant. He asked
38 if this was the Planning Board's practice with other Applications they've heard.

39
40 Attorney Collier clarified that his previous statements were that, in general, the Planning
41 Board should hold with their votes. It would be unreasonable and unfair not to hold with a
42 vote. However, if new information or a change to the application created a change in
43 circumstance, that would be considered extraordinary, and the Board could then reconsider.
44 It profits no one to review and vote on a standard and then revisit it.

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Chair Hanley confirmed that other than on rare occasions, usually procedural issues, votes stand. It is not standard practice to revisit an issue unless there's something new, something the Board realized was missed, or some procedural error.

Attorney Collier did not support committing the Board to Attorney Manahan's statement. It should not be suggested that anything on the Application can be changed at any time. What has been done is in the record and can speak for itself.

Attorney Manahan worried Attorney Bearor will argue before a court that the Board's Findings and decision are invalid. If Attorney Bearor wins that argument, he could then request the court issue the permit, based on the fact that all other standards have been voted on. Attorney Manahan agreed the standards were voted on after significant work, but it is clear other evidence has been submitted recently, including stormwater. The Applicant changed their Application, and the Board did not review that potential new evidence, knowing their decision was being made with respect to the road issue. Maine courts have asked that points be made clear. If the members of the Board want to have the Application remanded back to them, rather than the court making a decision on it, then they should consider including the wording. The sentence is simply stating the Planning Board has not made their final decisions on these standards.

Chair Hanley believed that if the sentence was added at this late-hour moment, it may be perceived as weakening the ground the Board has covered. Attorney Manahan disagreed; the wording would strengthen the Board's position by making it less susceptible to reverse on appeal. Attorney Manahan worried Attorney Bearor will argue that the Board made determinations on the factors and the court should issue the permit. Adding his suggested wording provides extra insurance that such a thing won't happen.

Attorney Bearor agreed with the Board Chair that accepting Attorney Manahan's wording now, at a meeting that was to be a simple vote on what was said at the February 9, 2022 meeting, will likely weaken their position, and the Court will likely see through the move. He suggested the Board sign the document prepared by their attorney as presented.

Ms. Randolph preferred, in the event the Board's decision is overturned, the Application to come back before the Board. She does not want the court to simply issue the permit.

Attorney Collier did not believe the court would issue the permit. For a permit to be issued, the court would remand the Application to the Planning Board for further review. The Board has more work to do on the Application's review. Items such as Performance Guaranties and Reclamation and setting conditions must be done; the court would send the issue back for further proceedings and findings.

Chair Hanley pointed out the Application has been remanded to the Planning Board once already. The suggestion that the court would simply grant the permit is not how the process

1 has worked historically.

2
3 Attorney Manahan disagreed; the fact that there is evidence the Board has not considered
4 does not mean the court will remand the Application back to the Board, unless his wording
5 is added. While the Court will not issue the permit, it can order that the permit be issued,
6 based on the conclusion that the Board has addressed all the approval criteria. It's safer to
7 include his wording to ensure it does not happen.

8
9 Ms. Anastasia said she has not heard a compelling argument either way with regard to
10 including the additional wording. If there's not a compelling reason one way or the other,
11 then Ms. Anastasia saw no reason not to leave the document as it was presented.

12
13 Mr. Ashmore believed the addition of the sentence should not be made.

14
15 Ms. Randolph thought the Motion made at the February 9, 2022 Meeting was the conclusion.
16 If an addition had been suggested at that time, it would have been discussed, however the
17 Motion was deemed complete. Ms. Randolph believed the Quarry Discussion ended with the
18 February 9, 2022 meeting. Further, the court should see that there are outstanding decisions
19 and remand it to the Board for further review, if deemed necessary.

20
21 Chair Hanley agreed. If the Board modifies their final finding at this point, it weakens their
22 standing on the issue, unless the Board determines they are not at the point of conclusion. It
23 stands in the record that the Board has the opportunity to revisit what they feel is necessary
24 to revisit.

25
26 MS. ANASTASIA MOVED, WITH MS. RANDOLPH SECONDING, THE MOUNT DESERT PLANNING
27 BOARD STATEMENT OF FINDINGS AND CONCLUSIONS FROM WEDNESDAY, FEBRUARY 9,
28 2022 ARE APPROVED AS WRITTEN.

29 VOTE:

30 CHRISTIE ANASTASIA: AYE
31 MEREDITH RANDOLPH: AYE
32 TRACY LOFTUS KELLER: AYE
33 DAVID ASHMORE: AYE
34 CHAIR WILLIAM HANLEY: AYE
35 MOTION APPROVED 5-0.

36
37 **III. Other**

38 There was no Other Business.

39
40 **IV. Adjournment**

41 MS. RANDOLPH MOVED, WITH MS. ANASTASIA SECONDING, TO ADJOURN THE MEETING.

42 VOTE:

43 MEREDITH RANDOLPH: AYE
44 CHRISTIE ANASTASIA: AYE

- 1 TRACY LOFTUS KELLER: AYE
- 2 DAVID ASHMORE: AYE
- 3 CHAIR WILLIAM HANLEY: AYE
- 4 MOTION APPROVED 5-0.
- 5
- 6 The Meeting adjourned at 7:42PM.
- 7