

**Town of Mount Desert Planning Board
Planning Board Meeting Minutes
Meeting Room, Town Hall
6:00 pm, June 13, 2017**

Public Present

Laurie O. Shencavitz, Gerald Shencavitz, Debbie Musetti, Janet Leston Clifford, Janet Ellis, Peter Aylen, Judith E. Aylen Stephen Salsbury, Attorney for the Shencavitz' and the Aylens Daniel Pileggi, Attorney for the Applicant Ed Bearor, Katie Foster, Applicant Paul MacQuinn, Maureen McGuire, Dick Broom, Seth Singleton, Nat Fenton, Fran Leyman, H. Scott Stevens, Jack Katz, William K. Bowie, Pam Bowie, Andrew Odeen, Jeff Gammelin, Carey M. Kish, Cathy Willey, Jan Coates, Kelley O'Neil, Betsy Roberts, Joanna Krasinski, Steve Krasinski

Board Members Present

Chairman Bill Hanley, Dennis Kiley, Meredith Randolph, Dave Ashmore, and Lili Andrews

Also present were Attorney for the Planning Board James Collier, CEO Kimberly Keene, and Recording Secretary Heidi Smallidge

I. Call to Order

Chairman Hanley called the meeting to order at 6:03 pm.

II. Minutes

MAY 11, 2017: MS. RANDOLPH MOVED, WITH MR. ASHMORE SECONDING, TO APPROVE THE MINUTES AS PRESENTED. MOTION APPROVED 5-0.

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: Edmond J. Bearor, Rudman Winchell

LOCATION: Off Crane Road, Hall Quarry

TAX MAP: 007 **LOT**: 075 **ZONE(S)**: Residential 2

PURPOSE: To hear evidence, including public comment, on the issue of whether the use is "grandfathered" (i.e., a lawfully pre-existing nonconforming use).

This was a continuation of the meeting scheduled May 11, 2017, and therefore no public notice was necessary. No conflict of interest was found.

Attorney Collier suggested hearing from anyone among the public who had new information to offer.

Attorney Bearor hoped the applicant would be allowed to respond to the comments made at the

1 previous meeting. He reminded the Board of the comprehensive evidence and paperwork
2 supporting the quarry's existence submitted to the Board. Furthermore, the Moratorium set on
3 the quarry was also proof the quarry was in existence. Citing the LUZO definition of Mineral
4 Extraction, Attorney Bearor opined that picking up materials and transporting it away was deemed
5 quarrying.
6

7 Attorney Bearor felt the quarry was an existing use and should be allowed to continue the
8 permitting process. Mr. Bearor felt the Minutes of September 2014 made it unambiguously clear
9 that the quarry was deemed Grandfathered and he asserted that no new information was
10 presented at the May 11, 2017 meeting. The Board has been more than accommodating
11 regarding allowing the public to speak. Attorney Bearor argued against reconsidering
12 Grandfathering. Voting against Grandfathering creates a threshold matter that essentially
13 negates the last two years' worth of work. Attorney Bearor felt the better choice was to continue
14 with the process that's been in play. He requested the Board review the past Minutes and the
15 Applicant's submittals.
16

17 Applicant Paul MacQuinn explained that MSHA is the federal agency overseeing mining
18 operations. All of Mr. MacQuinn's pits and quarries fall under a single registration number,
19 registered to his Hancock site. Only hours at the crusher at that site are recorded. There's never
20 been a crusher or other type of large equipment at Hall Quarry.
21

22 Kelly O'Neil stated she found evidence of three numbers registered to the Applicant. In her
23 research, they appeared to be region-specific rather than tied to a machine. She has learned that
24 two site visits per year are required with MSHA. Mr. MacQuinn asserted hours are recorded
25 under the one registered number tied to the crusher. MSHA is looking for manufacturing
26 equipment and safety measures. Mr. MacQuinn noted there were no other requirements tied to
27 each site. Everything is reported to Hancock per their system. This is because Hancock is where
28 they process the rock. Extractions are not required to be reported.
29

30 Mr. Kiley inquired about the Mine Data Retrieval System materials received at the last meeting.
31 There appears to be a mine ID number specific to Hall Quarry, and it records operation hours.
32 Mr. MacQuinn stated the Hall Quarry number in question was registered to Freshwater Stone.
33 Per the system, no hours of use were recorded prior to 2011, when the lease with Freshwater
34 Stone was entered. Mr. MacQuinn reiterated hours in the quarry did not need to be logged. Mr.
35 Kiley expressed confusion over the fact that Freshwater Stone started recording work in the
36 quarry as the company was required to do so, yet MacQuinn's was not required to record work in
37 the quarry. Attorney Bearor affirmed that there are not registration numbers tied to each quarry
38 MacQuinn's owns. Instead, there's the MSHA data. Mr. MacQuinn stated that Freshwater Stone
39 registered a number, tying it to Hall Quarry, thereby requiring work there to be recorded.
40

41 Discussion ensued regarding the reason for the difference.
42

43 Attorney Pileggi reiterated that work in the quarry has consisted of picking loose rock from the
44 quarry. The definition of quarrying includes the act of separating stone from the bedrock and
45 removal of stone. Therefore, there was no quarrying prior to 2011. There was quarrying in 2012,
46 albeit unlawful. Attorney Pileggi reminded the Board that their job is to apply facts to the existing

1 law and make a determination. Convenience to the Appeals process should not be a
2 consideration in making that determination.

3
4 Attorney Collier opined the process should be:

- 5 - discussion of existing quarrying activity vs. unlicensed quarrying activity.
- 6 - discussion of a lawfully pre-existing non-conforming use and any act of quarrying activity.
- 7 - discuss the question of whether the Applicant is Grandfathered.
- 8 - if the Applicant is Grandfathered, discussion of what exactly he is Grandfathered to do.

9
10 Chairman Hanley suggested the Board should hear any new commentary, close the public
11 hearing, and then determine whether there's a consensus to re-determine the Grandfathering
12 issue. He asked the public for any last additional information.

13
14 Hall Quarry resident Seth Singleton referred to Attorney Bearor's submitted statement referring to
15 Hall Quarry residents as having voluntarily moved near the quarry. He maintained that no Hall
16 Quarry resident was informed there was an active quarry in the neighborhood at the time they
17 moved in. Mr. Singleton voiced his concern regarding property values affected by the quarry. He
18 submitted his statement for the record.

19
20 Ms. O'Neil reported that she talked with the Town Assessor recently and was told she'd receive a
21 discount on her property because of its proximity to the quarry.

22
23 Hall Quarry resident and abutter Gerald Shencavitz confirmed the Assessor has determined
24 properties have declined at least 10% in value due to the quarry.

25
26 Hall Quarry resident Janet Leston Clifford requested the Planning Board re-visit their previous
27 decision, considering the new data received.

28
29 Hall Quarry resident Betsy Roberts confirmed she was not advised there was an active quarry
30 when she purchased her property.

31
32 Hall Quarry resident and abutter Judy Aylen reported she has lived in Hall Quarry since 1990.
33 There was no sign of active quarrying for much of that time.

34
35 Hall Quarry resident Maureen McGuire reiterated that they have lived in Hall Quarry for 18 years,
36 and were told there was no quarry in the area when they bought their property. She added that
37 as soon as noise from the quarry started up, they would have complained. There were no
38 complaints because there was no noise.

39
40 Mr. MacQuinn reiterated that only equipment like a screener or crusher have to be registered,
41 and that type of equipment was never in the quarry. Discussion revisited the question of how the
42 two businesses registered the quarry and what type of reporting was required.

43
44 Hall Quarry Resident and abutter, Peter Aylen, reported that he researched state requirements
45 for a quarry and for reporting such an operation. He learned that any quarry over an acre in size,
46 including areas previously quarried and adjacent land, should have been registered and recording

1 their activity. Given these criteria, the quarry should be considered approximately six acres in
2 size. Mr. Aylen felt that at that size, the quarry has possibly been operating illegally. However,
3 Mr. Aylen reiterates he never saw the quarry in operation. Mr. Aylen sent a letter to the Planning
4 Board which included this information.

5
6 Mr. Gammelin stated his company has taken steps to minimize noise, including new noise
7 mitigating equipment. It is not his intention to be a problem in the neighborhood. If allowed to
8 work the quarry, he would do his best to minimize the noise. Ms. Clifford noted the equipment is
9 only part of the issue. Trucks, rocks falling, and other ancillary sound contribute to the noise.

10
11 Chairman Hanley closed the Public Hearing.

12
13 There was a short recess.

14
15 Attorney Collier suggested the Board discuss whether they want to reconsider their past decision.

16
17 It was the consensus of the Board that they understood the issue of the quarry better after the
18 lengthy review.

19
20 MR. ASHMORE MOVED, WITH MS. ANDREWS SECONDING, TO REVIEW AND
21 RECONSIDER THE QUESTION OF GRANDFATHERING AS DISCUSSED, AS WELL AS THE
22 MOTION MADE AT THE MEETING DATED SEPTEMBER 16, 2014, THAT MOTION BEING:
23 "...THE BOARD CONCLUDED BASED ON THE EVIDENCE SUBMITTED, THAT THE
24 APPLICANT WAS A LAWFUL NON-CONFORMING PRE-EXISTING USE. THEREFORE, AS A
25 LAWFUL NON-CONFORMING PRE-EXISTING USE THEY ARE ELIGIBLE TO APPLY UNDER
26 6.1 OF THE QUARRYING ORDINANCE AS AN EXISTING QUARRY ACTIVITY."

27
28 MOTION APPROVED 5-0.

29
30 The question was opened for discussion by the Board. Discussion ensued regarding what the
31 Board should address first.

32
33 It was agreed to first address whether the quarry was a lawfully pre-existing, non-conforming use;
34 i.e. whether the quarry was Grandfathered.

35
36 Ms. Randolph noted that a non-conforming use cannot be allowed to become more non-
37 conforming.

38
39 Attorney Collier referred to the Turnback Creek Preservation v. Kennebunkport, and Frost v. Lucy
40 cases. The court said in the case of Turnback Creek v. Kennebunkport, "*where the original*
41 *nature and purpose of the enterprise remained the same, and the non-conforming use is not*
42 *changed in character, the increasing amount or intensity of the non-conforming use within the*
43 *same area does not constitute an improper expansion or enlargement of any non-conforming*
44 *use."* Attorney Collier took this to mean that if (for example) the quarry's non-conforming use was
45 cutting stone and the activity of cutting stone stopped and was reduced to only picking loose
46 stone up, then one could say the previous non-conforming use of cutting stone was ended and no

1 longer Grandfathered. But the quarry was Grandfathered to continue to pick up stone. Returning
2 to cutting stone could be considered an expansion of use.

3
4 Mr. Ashmore agreed with Ms. Randolph that the definition should be addressed first. Attorney
5 Collier felt that it needed to be determined if the quarry can apply as a matter of jurisdiction – is
6 there unlicensed, existing quarrying activity? And what does that mean?

7
8 It was the Board's consensus that the quarry must first be deemed Grandfathered - an
9 unlicensed, pre-existing quarry - in order to apply for a license.

10
11 Attorney Collier felt the next question was to determine whether the quarry is Grandfathered, and
12 if it's Grandfathered, what is it Grandfathered for. Was it a use that was permitted and then
13 outlawed? Or was it a use that did not require a permit? Attorney Collier noted that per Mr.
14 MacQuinn, the Applicant was quarrying stone and picking up stone in the 1970s and 80s, and
15 there was no license to be had at that time. Additionally, it must be determined whether there
16 were any breaks in the activity of quarrying that would render the quarry not Grandfathered.
17 Does the definition of quarrying include both cutting and carrying stone, or does the definition
18 include cutting stone only?

19
20 Chairman Hanley Stated that the Board decided the activity of quarrying includes the acts of
21 cutting and carrying stone. Attorney Collier agreed, but noted that Mr. Kiley and Ms. Randolph
22 abstained from the vote. Mr. Kiley felt the definition of quarrying should be the acts of both cutting
23 and carrying stone within a certain time span. Attorney Collier mentioned that neighbors to the
24 quarry have alleged there were long periods of time where stone was carried out, but none was
25 cut. The receipts and paperwork seems to support that. Ms. Randolph noted that some of that
26 paperwork comes down to a single stone sold out of the quarry in a year or more's time.
27 Additionally it's been determined that pink stone comes from quarries other than Hall Quarry. Mr.
28 MacQuinn confirmed there were different sources of pink stone, but those receipts in the
29 submittals included only Hall Quarry stone.

30
31 Chairman Hanley asked Attorney Collier whether the Board needed to acknowledge the definition
32 of quarrying to mean both cutting stone and carrying it away. And is cutting stone, but not
33 removing it from the quarry for years, still considered quarrying. He felt the Board would have to
34 review the receipts relative to the validity of the definition being used.

35
36 Mr. Ashmore opined that a rock cut and left for decades before being carried away did not
37 constitute quarrying. Mr. Kiley agreed that the sequence of both cutting and carrying must occur
38 within an agreed-upon time frame.

39
40 Attorney Collier offered that the point of non-conformity laws is to remove non-conformities when
41 you can, to protect the landowners' rights. In the case law of Frost v. Lucy, *"In determining
42 whether an activity is within the scope of a permitted nonconforming use, consideration must be
43 given to the particular facts of the case, the terms of the particular ordinance, and the effect which
44 the increased use will have on other properties. Usually local Boards of Appeal are entrusted
45 with the function of deciding whether the described limits of the system within the exercise a legal
46 discretion for their regulation applies to a given situation in the manner of its application. In*

1 *discharging such responsibility, ordinarily local Boards of Appeal are endowed with a liberal*
2 *discretion and their action is subject to review by the courts only to determine whether it was*
3 *unreasonable, arbitrary, or illegal.”*

4
5 Ms. Randolph felt that during much of the time the use of the land was not so much cutting and
6 carrying as it was storage. Mr. Kiley felt use should be a valid consideration in planning, and the
7 definition of quarrying must be clear.

8
9 Attorney Collier noted the definition of quarrying had been determined to be cutting and carrying
10 stone. He mentioned the Land Use Zoning Ordinance clearly states that uses abandoned for
11 more than 18 months are considered ceased. Case law from 1918 shows the span of time can
12 be considerably more.

13
14 It was noted the Applicant has the burden of proof. Mr. Kiley noted that the ordinance states
15 activity must occur within an 18-month period. And the Town’s definition of quarrying is cutting
16 and carrying. He felt both activities in the definition must occur within the time stated in the
17 ordinance. Chairman Hanley worried this was dictating how a business must operate. Attorney
18 Collier felt the use was being defined by the ordinance. Mr. Kiley maintained that there is a clear
19 definition, and a clear timeframe. It should be clear whether the Applicant is in compliance or not
20 within these standards. Mr. Kiley felt the Board did not have the freedom to decide the standards
21 set were not appropriate or ignore them. Ms. Randolph noted that carrying stone could
22 theoretically still happen. The question of abandoned use only affected the cutting of stone.
23 Chairman Hanley worried that the rules are not relative to operating a quarry. Attorney Collier
24 stated that, per the previously mentioned Turnback Creek case, to qualify for Grandfathered
25 status it must be shown that the use existed prior to the enactment of the zoning provisions
26 prohibiting the use, and that the use was actual and substantial. And the use must reflect the
27 nature and purpose of the use prevailing when the zoning legislation took effect and not be
28 different in quality or character as well as in degree from the original use for different in kind in its
29 effect on the neighborhood.

30
31 Chairman Hanley noted that the basic nature of the operation – handling stone – has continued.
32 The Applicant did not, for example, start farming trees on the property. Mr. Kiley did not feel
33 cutting stone and carrying stone away were interchangeable.

34
35 Ms. Randolph felt that Grandfathering was to protect an activity that has always been done. And
36 if the recent activity in the quarry had always been done, the neighbors would not have
37 complained.

38
39 Ms. Andrews pointed to the Grandfathering qualifications of “actual and substantial” use. The
40 activity in the quarry could not be defined as substantial. Chairman Hanley felt the intensity of
41 use was based on demand and would fluctuate.

42
43 Attorney Collier noted the previously mentioned case law that addressed an expansion of use,
44 versus a change in use. Mr. Ashmore noted the case law notes that you can expand, provided
45 you are doing the same activity and not affecting the neighbors. The Town’s ordinance states the
46 use will not be expanded. Attorney Collier noted that an increase in intensity of use is not

1 considered an expansion.
2

3 Mr. Kiley reiterated that the Town's requirement that stone must be cut and removed within each
4 18-month period. He suggested the Board review with an eye to the appropriate amount of
5 activity. Ms. Andrews noted that hearing the case law, she does feel there is for the change in
6 the use. However, she felt conflicted with the requirement of both cutting and carrying over the
7 somewhat arbitrary time frame of 18 months. Ms. Randolph said the Board is not making new
8 code, they are using the code in place, which states 18 months.
9

10 MR. KILEY MOVED, WITH MS. RANDOLPH SECONDING, TO DEFINE QUARRYING AS THE
11 EXTRACTION AND REMOVAL OF STONE WITHIN 18 MONTHS TO MEET THE
12 GRANDFATHERING STANDARDS PRIOR TO 2009 AND AFTER 1978, OR TWELVE
13 MONTHS AFTER 2009.
14

15 Discussion ensued regarding the definition. Mr. Kiley felt the removal of stone in the quarry was
16 acceptable. Stone extraction was the problematic issue. Attorney Collier suggested voting on
17 the definition as presented, thereby denying the Application as presented, because the Applicant
18 has not met the definition. As for picking up stone, the carrying of stone is not considered
19 quarrying, and not an issue the Planning Board must deal with at this point.
20

21 After lengthy discussion, MOTION WAS APPROVED 4-1 (HANLEY OPPOSED).
22

23 MR. KILEY MOVED, WITH MS. RANDOLPH SECONDING, BASED ON THE DEFINITION OF
24 WHAT THE USE OF QUARRYING AS THE BOARD HAS DETERMINED TO BE AND THE
25 TIME PERIODS REQUIRED TO BE A GRANDFATHERED USE, BASED ON THE EVIDENCE
26 SUBMITTED TO THE BOARD BY THE APPLICANT, THE APPLICANT HAS NOT MET THE
27 STANDARD AND IS THEREFORE NOT A GRANDFATHERED USE, THUS THE APPLICANT
28 IS NOT AN EXISTING ACTIVE QUARRY AND HAS NO STANDING TO APPLY FOR A
29 QUARRYING PERMIT. MOTION APPROVED 5-0.
30

31 MS. RANDOLPH MOVED, WITH MR. KILEY SECONDING, BASED ON THE FOREGOING
32 MOTION, THE APPLICATION IS DISMISSED. MOTION APPROVED 5-0.
33

34 **VI. Adjournment**

35
36 CHAIRMAN HANLEY MOVED, WITH MR. KILEY SECONDING, TO ADJOURN THE
37 MEETING. MOTION APPROVED 5-0.
38

39 Meeting was adjourned at 9:08 pm.
40
41