

MINUTES OF THE ZBA PUBLIC HEARING

TOWN OF CHARLEMONT

August 16, 2004

Members Present:

Joe Wagner
Tom Shields
Eric Dean

Others Present:

Earl Bowen
Attorney Philip Lombardo, counsel for Earl Bowen
Attorney Joel Bard, Counsel for Planning Board
Charlotte Dewey, Bill Stephens, Planning Board Co-Chairs
Ursula Nebiker, Planning Board member
Dan Miller, Planning Board member
Trevor Mackie, Planning Board Associate member
Jim Cerrone, Building Inspector
Phil Banks and son
Attorney Michael Pill, counsel for Phil Banks
James Gariepy, Select Board Chair
Pam Hazlett, Bill and Norma Coli, concerned citizens
Gary and Christina Mitchell, abutters

1. Chair Tom Shields convened the hearing at 7:07 p.m. Bill Coli wanted to know when deliberations would occur because, as he recalled at the last meeting (hearing), the meeting was held, Bill did not remember any questions being asked and then at the next meeting, the Board announced it's findings. Bill understood that deliberations need to take place in an open meeting. Joe Wagner stated that at the last meeting, triplicate copies were made of everything, the Board members studied them on their own, then they came back in for the next meeting for the decision. The vote was taken at the meeting. Joe assured Bill that the deliberations would take place in an open meeting this time, there will be no question and answer session, but they will just have an open meeting (continuation of hearing). Joe wanted it made clear they did not meet in the interim between the meetings.

2. Joe Wagner reads the hearing notice as it appeared in the West County News. Joe also notified those present that the hearing was properly posted for two consecutive weeks. The ZBA decided to use the following Agenda procedure:

1. Chair calls meeting to order
2. Public notice is read
3. Applicant's presentation (allowed 15 mins)
4. Opponents presentation (allowed 15 mins)

5. Abutters presentation (5 mins each)
6. Other interested parties presentation (5 mins each)
7. Applicants rebuttal
8. ZBA chair closes hearing, schedules a date to disclose decision.

3. Joe asked for the applicant's presentation. Attorney Lombardo, representing New England Investment Corp, began by reading a memorandum of their argument (see copy attached to minutes. Complete document in Earl Bowen file), which he distributed. In essence, the Memorandum states that there was no lapse in the permit, the Building Inspector is merely treading over the same ground as in November of 2003, he did not conduct a thorough investigation, and had he done so, he would have realized there was no lapse. Documents to support this are attached to the memo. Attorney Lombardo closed with asking the ZBA to uphold the appeal by NEIHC's appeal and rule in favor again.

4. Town Counsel, Attorney Joel Bard asked to speak briefly, in an effort to provide guidance to the Board and the speakers. Joe stated that in attempting to stick to the agenda, it would be best if Mr. Bard waited. Attorney Philip Lombardo stated that perhaps it would be best to hear Attorney Bard out, as he had not used his full fifteen minutes. Attorney Bard wanted to remind the Board that their most important role was to find facts. Was the permit exercised within the two years? What kind of activity occurred? What constitutes substantial use? Attorney Bard also reminded the Board that questions would have to be asked in a public forum.

5. Jim Cerrone, local inspector, was representing Jim Hawkins, Building Inspector, who could not be present. Jim stated that he has not been involved directly but wanted to tell the Board that Jim Hawkins felt that the concerns presented to him by the Planning Board proved there was not substantial use over the two year period and the gravel pit therefore violated the Special Permit criteria.

6. Bill Stephens gave his presentation for the Planning Board. Bill's wanted to give the ZBA and interested parties a chronology of things as they transpired from the last meeting in November of 2003 up to this point. After the ZBA granted the appeal to Mr. Bowen at the last hearing, the PB had the option to appeal that decision. The PB agreed to do so, in public meeting, but reluctantly, because they felt it was something that could have been worked out with the applicant and themselves. In order to proceed forward, the PB had a meeting with the Select Board in December 2003, to discuss. The SB wondered if there was a possibility of working the issue out between Bowen and the PB. Chuck Bellows, SB member, contacted Mr. Bowen and both Mr. Bowen and the PB had an open and friendly discussion, came up with some conditions that would satisfy both Mr. Bowen and the PB, the PB felt that with the spirit of cooperation of that meeting, they drafted a list of conditions for Mr. Bowen to give to his counsel. The conditions included everything that was discussed in the meeting, with the

exception of one additional condition, that the PB asked that there not be any staging of trucks on Zoar Road from the standpoint of safety. Because Mr. Bowen expressed a willingness to go forward, the PB decided to forgo the appeals process and hoped after that, to be able to get together and have a special permit hearing, based on the conditions they had come up with jointly, and then they could put this all to rest. PB decided to meet with the SB, Mr. Bowen and the respective counsels. The PB scheduled a hearing to sit down all together to discuss all the issues with counsel in place. The meeting was scheduled for May 5, 2004. On the 4th, the Board received a letter from Mr. Bowen stating that he felt there was not enough communication between Mr. Lombardo and Mr. Bard, and he was unprepared to go forward with that meeting. This came as a shock to the PB and there was a lot of discussion about that meeting, where it was going to take place, and the PB members had taken time off to attend the meeting and were really looking forward to making this happen and in fact it did not. Even at that point, when it seemed as though they were at an impasse, the Board continued to appeal to Mr. Bowen on several occasions, to come back to the table to hammer out a SP. The Planning Board has never historically had a problem with gravel pits, they have granted every gravel pit application that has come down the pike since Bill has been on the Board. Recently the PB renewed Mr. Schechterle's gravel pit permit, so the perception that the PB is unwilling to grant Special Permits for gravel pits is a serious misconception about the PB, as they have always been willing to work with the applicant, the abutters and so forth. At this point, since Mr. Bowen was unwilling and rejected summarily all the conditions previously agreed upon, the PB had nowhere else to go but to move forward with a Cease and Desist. The PB had all along maintained that there has been a lapse in that Special Permit, there has never been a substantial use of that gravel pit, that any activity that took place, traveled over an illegal road prior to that variance that the ZBA granted in November of 2003, and that in fact, Mr. Bowen having come forward with a SP application concurs that the PB did not feel there was a SP in place at that time. Bill stated that he just wanted to point these things out to the Board, that the PB is continuing to try to work with Mr. Bowen and would like to work with him, to come up with a SP that is agreeable to themselves and to him. Bill further pointed out that the PB's contention at the original hearing and up to this point was the use of the crusher. The PB came more than half way in their conditions, they were willing to give Mr. Bowen twice what he had asked for, for time to use the crusher because he felt he needed to use it for a certain amount of time to process the stone that was left from blasting Zoar Road, back when the road was done. So they offered up more than a fair share of time for Mr. Bowen to clean up the site. Bill also pointed out that at no time during the two year period, when this alleged operation was in place, was there a crusher being used during those two years, the PB certainly feels there was a lapse of any use of any crushing operation and would like the ZBA to respect and recognize that. Bill stated that he, on the behalf of the PB would appeal to the ZBA to reject Mr. Bowen's appeal, in an effort to recognize that the PB has in fact done their homework and has been reaching out to Bowen to give him a SP that would benefit us all, and to save the process of litigation that would cost the community

money. Presumably, the PB would pursue it further if they have to, but would rather not, they would like the ZBA to work with them, deny the appeal, and hope that the PB, the ZBA and Bowen can get back to the table for a SP that will work for him, the abutters, and the people of Charlemont. Bill Thanked the ZBA.

7. Charlotte Dewey made her presentation, for the Planning Board (copy included with minutes). Charlotte quoted bylaw Section 23.3-“A special permit shall lapse 24 months after the date of granting of the permit if a substantial use thereof has not sooner commenced except for good cause...” (section 17 of Chapter 40A MGL) Charlotte provided dates and figures to support insubstantial removal of gravel from the pit. Charlotte also pointed out that both abutters and the PB agree there was no crusher on site or in use prior to 6/1/01. Mitchell’s records support this by stating there was no crusher until 8/7/01. Charlotte closed by stating that the PB works to protect the interest of property owners and abutters, as well as uphold the bylaws of the town. Despite their attempts to work with NEIHC, no progress has been made, thereby forcing the PB and Building Inspector to issue the Cease and Desist.

9. Joe asked if any abutters wanted to comment. Attorney Michael Pill, representing Phil Banks, made a presentation. Mr. Pill began by handing out copies of the Handbook of Massachusetts Land Use and Planning Law (s. 10.10), which pertains to lapses of special permits or variances (MGL ch. 40A s.10). Mr. Pill introduced himself to the Board and stated that he is representing Phil and Mary Ellen Banks. Mr. Pill confirmed that what the state statute does is confirm what Joel Bard and the PB told them; that taking a few yards[of gravel] out [of the gravel pit] is not a substantial start of construction, and urged the ZBA not to be led astray by “the drips or drabs in the bucket” [the small amounts of gravel taken out, per Bowen’s documentation] but at the whole picture. Attorney Pill felt that the PB did an excellent job putting the facts into perspective in giving them the basis for the best possible analysis, and Charlotte gave them the section of the Zoning bylaw that refers to the substantial use requirement. Attorney Pill mentioned the Town Officials efforts to make peace with Mr. Bowen and also pointed out that the tragedy in long litigation is that the only winners are the lawyers; everybody else loses when money starts going down the drain. The town has other options, such as non-zoning and earth removal bylaws, and even if Mr. Bowen wins this battle, he can be regulated with a non zoning wetlands bylaw. This issue can just go on and on for years with cost and ill will building. Mr. Pill closed by stating that he hoped one the one hand, that the ZBA will uphold the Cease and Desist order, but on the other hand, that Mr. Bowen will hear the message that hopefully, there will be winners besides the lawyers. Attorney Pill thanked the Board.
10. Joe asked any other abutters or interested parties for comments. Bill Coli spoke up, to reaffirm his hope that there will be substantial discussion about the factual issues at a public venue, as that is the appropriate action for the ZBA to take. There was some discussion as to what the Board would do if they had questions

or needed more information for their decision. Attorney Bard suggested that keeping the hearing open would provide opportunity to ask questions, or to submit documentation, that way they are legally allowed to accept this documentation.

11. Jim Gariepy wanted to express the feeling that the Selectmen have is that there were negotiations and they thought this problem had gone away. Jim wanted it known the Selectmen are in full support of the PB. Jim felt that the facts did warrant a C+D and, as a Selectman and a citizen, he hoped that the ZBA would look over the facts very carefully.
12. Joe Wagner stated that the Board will hold the meeting open and reconvene for a discussion and interviews, if needed. It was noted that, as the meeting/hearing had been formally posted, all the Board needed to do was to set the date for the continuation of the hearing, and it would be covered. After some consideration, the continuation of the hearing was set for August 30, 2004, after the hearing for the variance for Mohawk Park, at 7:45 p.m. Bill Coli questioned that given that this will go on for a week or two possibly, is it legitimate that the gravel operation continues under a C+D, during that time? Attorney Bard addressed the question by stating that if Towns try to shut down operations while the appeal is pending, the courts usually suggest waiting until the administrative appeal is decided. It is Attorney Bard's opinion that it is difficult to shut down operations, and the Town runs the risk of fines, if the gravel pit is not found to be in violation.
13. Joe asked for the rebuttal. Attorney Lombardo stated that in terms of discussions that may have been had [between Bowen and the PB and SB], he felt it unfair to ask the Board to make a decision based on the discussions between the parties and how the talks broke down. Attorney Lombardo wanted to point out that they were not looking to be in the position of making one party look bad. Attorney Lombardo further stated that they have gotten some information together from the operators, with data that relates to before and after the time period. Attorney Lombardo also asked the ZBA to keep in mind that what drives a business is the market, and the ability to do what you can do, when you can do it and that must be taken into consideration. What is "substantial use, and what needs to be focused on is the activity that took place. What Attorney Lombardo is asking is that the ZBA determine that this permit was used during the time following its issuance.
14. Attorney Pill, in a final statement, felt that Charlotte Dewey gave the correct analysis based on his research of what substantial use means. Substantial can only be looked at in terms of overall operation and can only be seen in relation to the overall picture. With respect to the settlement negotiations, Attorney Pill feels that the way that was directly relevant, was that if Mr. Bowen and his attorney, have been reiterating that why was this being brought up now, this was all decided last year? Attorney Pill did not feel it was, it wasn't the issue before them, but to the extent that it was, there's something a lawyer would call Appellate Issue,

something that is open-ended under Massachusetts law, what's called the Proceeding in Equity, which is a particular branch of the law, and if indeed Mr. Bowen's negotiations, which he then backed out of, are the reason why the PB and Phil and Mary Ellen Banks, did not appeal at that time, then as a matter of what is called Equity Jurisprudence, does that bar Mr. Bowen from now coming in and trying to suggest that it was all decided, when it was by his own conduct, in apparently leading Town officials and his clients into believing that an agreement was going to be in place to resolve this, and after the 20 days passed, and it couldn't be appealed, changing his position dramatically, now that is something the lawyers could fight all the way up to appeals court. He (Attorney Pill) does not feel it is appropriate to say "you can't consider it" It is fair to say that if Mr. Bowen stops trying to say lets keep looking backwards and we're just going to decide this on the merits now, then we will throw out the prior business and indeed, what went on with him and the other Town Officials, goes out the door with it, but he [Bowen] can't say "it's unfair to consider that" and at the same time "this was all resolved last time around." Attorney Pill is just trying to put his cards on the table by letting him know the argument he will be using if we go beyond here.

15. Joe moves to adjourn the hearing at 8:02 p.m. and continue on August 30, 2004 at 7:45 p.m. Joe Wagner thanked everyone for showing up and expressing their interest in this matter.
16. The Board read the mail and reviewed the Open Space and Recreation Plan and the Community Development Plan.
17. The Board signed the minutes of the last meeting. Business having been concluded, the meeting is adjourned at 9:15 p.m.