MINUTES OF THE ZBA PUBLIC HEARING

TOWN OF CHARLEMONT

October 12, 2004

Members Present:
Eric Dean
Mark Ledwell
Bill Coli
Absent:
Craig Leonard, associate member

Others Present:
Earl Bowen
Attorney Phillip Lombardo
Bill Stephens
Charlotte Dewey
Ursula Nebiker
Dan Miller
Attorney Joel Bard
Phil Banks
Ruth Cannavo
Gail Ober, of the Recorder
Pam Hazlett
Suzanne and Ted Willard
Norma Coli

Eric calls the meeting to order at 7:10 p.m. and explains what tonight's procedure will be. Mark Ledwell made a motion to give each of the Applicant and opponents 10 minutes for their final presentations. Motion is moved and seconded and passes unanimously.

Attorney Lombardo (from here on referred to as Atty. L.) stated that they have no further documentation to submit and that he felt what was given at the last hearing was sufficient. Atty. L. also expressed some concerns over the process of the hearing thus far. Last week it was mentioned that Joe Wagner resigned from the ZGA for health reasons, however Atty. L feels that the chain of events since that time, have proven it not that simple. It was felt that Joe Wagner resigned instead, as a result of a complaint brought against him, in a letter to the Select Board (SB), by Pam Hazlett, stating that he had interests in a gravel pit, and that he was against the Planning Board. A letter was sent to Joe, by the SB, asking for a response to the allegations. The resulting letter was Joe's resignation, on the 29th of September. Atty. L. feels it was misleading that they were

informed Joe resigned for health reasons. Atty. L. further mentioned that in various copies of minutes, Bill Coli was on record to have taken a position against the gravel pit, in the past, and given the public statements made by him, was it really fair that Mr. Coli hear and decide on this case? Atty. L. wanted to bring this to the Board's attention.

Mark responded that he did indeed nominate Bill Coli to the Board, and that the Board has had a lot of turnover, however, this is legitimately based upon recent unfortunate incidents. Mark went on to state that Mr. Shields (former Chair) did in fact lose his mother recently and that Mr. Wagner is in fact battling with Cancer. The reason Mark chose not to nominate Craig Leonard was because of his employment with Lane Construction, a gravel business, and the possible conflict of interest this could bring about. Mark further commented that it was unfortunate that Atty. L. did not present this evidence last week, when the ground rules were set about no further documentation being submitted. Further, some of the documentation submitted by Earl Bowen last week presents Mr. Coli as taking the position of a neutral party, and those were the only documentation submitted to the Board. Mark finished by stating that it is unfortunate that the turmoil that has taken place has happened at such a critical moment, but that the SB appointed Bill and himself for a good reason; they have some experience working on other Boards and would hopefully be able to assist the Chairman, who is a new member, with the burden of deciding this case, so that the Applicant may get a fair shot. Again, it is unfortunate that the Applicant chose the 11 ½ hour to present this evidence, when it could have been done at the last meeting. Mark added he feels the facts will speak for themselves.

Atty. L. stated that he swore an oath to represent his client in the best way possible, and if there is the possibility of a conflict of interest, he was duty bound to look into it. His intent was not to bring further documentation, simply to ask if there was the possibility of a conflict and they asked that of Bill C. last week, to which he stated no. Atty. L. stated he was not dismissing the Board's integrity, but the issue is whether or not, as a Board member, Bill thinks he should be hearing this case. This is a very simple question. We'll just leave it up to Mr. Coli to explain.

Bill Coli responded, stating that it was in his nature to overlook slights, real or perceived, and so, will overlook the implication that he was being deceitful about his position. "The Select Board (SB) had time to find, and even solicited members for the ZBA. The SB knows what you know [about his statements in the minutes] and saw no reason why I shouldn't serve. I assured Mr. Bowen that I could and would keep an open mind to the facts." Bill explained that his previous concerns and opinions were to the fines ticking up during the time Mr. Bowen was operating under the Cease and Desist. He clarified that he did not say fines were called for. In the past, Bill has gone on record saying that if Earl came in for a Special Permit, there was no reason he shouldn't have gotten it. Bill added: "I signed off on a curb cut to his road, and have taken no position on *this* issue here, which is substantial or insubstantial use of the gravel pit between April 2, 1999 and April 2, 1999 and April 2, 2001. I was asked if I can judge fairly and, I can and I will make a decision based on facts."

Joel Bard noted that on the grounds of conflict of interest, the only thing that stands is the conflict of interest law. Joel felt that the comments made satisfy that law.

Atty. L. said that they will answer any questions the Board may still have.
There was some question as to a date that was struck out on one of the logs, which Earl stated appeared to be a clerical error, on the part of the Secretary at the time.
Bill C. questioned whose logs the gravel pit logs were, Paulson's or Mitchell's?
Earl explained that they were Ted Paulson's logs and that Rob Mitchell had copies and sent them to Earl, upon request. More discussion ensued regarding the logs, checks received, and the validity of them.

Eric Dean mentioned that the Planning Board said they didn't have the information before the [Dec. 5, 2003 gravel pit] hearing, and went on to say that the reason they didn't have it was because they didn't ask for it. Eric stated that he was the one who said "was this gravel bank working and felt yes, it was, bring some statements forward and lets find out." He stated he was the one that got this rolling, as to whether something was happening or not.

Mark Ledwell made an observation that much of this information came after the fact, the Planning Board (PB) expressed disappointment that they didn't have information before the hearing, but it didn't seem to come to anybody in time. "The hearing was held on December 5(2003) but Paulson's stuff doesn't show up until January, so how could anyone have shared any information, if it was after. Earl clarified that it was January 2003?"
More discussion ensued as to the submission of documents; invoices, logs and checks.
Mark interjected that he would like to leave some of this discussion for the deliberation and limit the intake of information, so that the Planning Board can give their presentation.
Charlotte presented a history and clarification for the ZBA to consider. (A copy of which is included in the minutes, due to its lengthy content.) The nature of this statement being a history of 300 Zoar Road; all the changes of use from previous owners, the change of ownership, and the lack of the owners to follow through with Special Permits. Charlotte also mentioned the unsafe road that the gravel business was taking place over. Communications or lack thereof, between the PB and Mr. Bowen was also mentioned, as well as the fact that crushers are not allowed in town, and that there was no usage of the crusher within the two years. Charlotte further stated that there may have been use, however not "substantial" use, and that the C+D should remain in effect.

Bill Stephens began by thanking the existing Board members for serving as they have and how they stepped up and filled the positions so quickly. Bill also wanted to speak to the integrity of the Board members, as he knows most of them well and has no question on their integrity. Bill apologized for being short with Mr. Bowen and Mr. Lombardo at last week's meeting. Bill went on to say that the PB asks the ZBA not to lose sight of the fact that the activity took place over an illegal road, no conditions of the original Special Permit (SP) have been met, so that any activity that took place in that operation that was not in compliance of a SP, and the PB feels that any operation or removal should not be considered, as the operation was not in compliance at that time. Bill also said that Mr.

Mitchell knew there was problem with a SP not being in place and was looking at a C+D by the Building Inspector, however, the PB waived that in the hopes that Mr. Bowen would come in and do so. Bill stated there has never been any crushing at that operation and in no way is there any record of any crushing. The PB would like to point out that this has been a sticking point with Mr. Bowen and the PB throughout the entire process. The concerns were not about him operating a gravel pit, it was the crushing operation that was the sticking point. Bill pointed out that, as is reflected in the documents before the ZBA, at a meeting with the SB and Mr. Bowen, in the conditions that they drew up, the PB was willing to give Mr. Bowen double the amount of time he had asked for a crusher to process the material up there. Bill also asked the board to consider the possibility of a split decision, and lifting the Cease and Desist (C+D) off the gravel operation, but keeping it in place for the crusher. Bill added that the PB certainly doesn't wish the ZBA to find there was substantial use, but that this [split decision] is an option. Bill also pointed out that when the C+D was issued by the Building Inspector (B.I)., [at this point, Bill was warned his time was almost up], the Zoning Enforcement Officer felt that, even after seeing the list presented by Mr. Bowen, that there was not substantial use and that the permit has lapsed.

Mark questioned if there was ever a C+D issued against Mitchell, to which Bill S. replied there was not and added that the PB does not feel Mr. Mitchell had a permit.

Earl Bowen stated that Mr. Mitchell's Attorney, Frank Carcio, responded to that and challenged it.

There was then much discussion as to whether a permit runs with the property or with the owner. When Atty. Bard attempted to answer this, Atty. L. questioned if he was speaking on behalf of the PB or as Town Counsel. Atty. B. stated that he has told the ZBA all along that he would assist them in procedural questions, but if the Boards took opposing positions, then he would represent the PB, as he has been doing so for a year now. Atty. B. stated he will continue to answer matters of procedural nature, as Mr. Lombardo has felt free to do so as well.

Atty. B. addressed the question at hand by stating that this is more than a procedural question, and will give his opinion on it, and invited Atty. L. to do the same. The following is Atty. B.'s statement:

"A special permit like this need not necessarily be a permanent business asset, it's really up to the S.P. Granting Authority to lay down the ground rules when they grant the permit, the confusion here is because it's not clearly stated one way or another. The permit here was to Ted Paulson, leaving an attorney in my firm conclude initially that it was personal to Ted Paulson, however, Atty. L. spent a lot more time on the question than we did and produced a substantial file of material that showed a pattern where the [Planning] Board in some instances, will put in specific language saying _____holds this permit, but when _____ relinquishes the property, the permit expires. I'm not quoting, but in essence, where the case of the Paulson permit, it simply said to Ted Paulson, it didn't say anything more. So, frankly, we have given an opinion on this issue with all due respect to us, we are right 99.9% of the time, at least, but we're not a court, or judge and jury and so it's not the final word. So…for permits like this, it is not at all uncommon to be personal to the property owner, so it could go either way, but it would appear that it is running with the land, was not personal to Mr. Paulson, but I wouldn't

want it left that that is the final word on the subject. That's certainly the current thinking."
Bill Coli argued that failure to comply with the conditions is not why the permit lapsed, that is irrelevant to this issue. Bill further stated that in the previous ZBA decision, those two conditions were not a reason to support the C+D. Bill also stated that the contention of the PB is that it lapsed, failed before Mitchell took it over.
Earl Bowen commented that it would reflect that Mr. Mitchell did purchase it within a two year period from what was the original perception, so the question of whether or not Mitchell had a permit, is relevant. More discussion as to ownership and Mr. Bowen's exhibit D affidavit ensued.
Mark asked if anyone had a record of the purchase, and Charlotte replied April 20, 2000.
Bill Stephens wanted to point out that the PB disagrees with the ZBA on the position of whether or not there is an ownership issue or not. The PB was given conflicting opinions from Town Counsel (T.C.) The first, upholding the PB's position, that in fact the SP ran with the applicant. Another opinion came from Kopelman and Page, unsolicited from the PB, that changed that position, which they have failed to get a final answer on, so until that point is contested in court, can one be certain, that he did indeed have a permit that ran with the property when Mitchell purchased the property, and Bill S. felt that was very important, and is relevant, therefore, that the conditions, as they were in place, do support the fact that there was an illegal operation, because they were not in compliance with any of those conditions.
Eric Dean questioned if that was why the PB writes the decisions now to go with the person.
Bill S. answered that historically, as long as he has been on the Board, the permit was always written to go with the applicant, however, over time, and perhaps human error, it somehow got left out. The PB who served at the time of the Paulson permit will testify in court that the permit ran with the applicant. The fact that that line went from the hearing process, to a draft, to the Town Clerk, without review, was a regrettable oversight. It is now boiler plate on the computer now.
Atty. B. just wanted to point out that if this question were to end up in court, that the testimony of a longtime member, and Chairman of the Planning Board, would be directly relevant testimony.
Eric pointed out that when the PB issues a SP, should they not then follow up with a two year review?
Bill S. agreed, and ideally, there would be calendars on the wall for the next five years that the date could be written in on. With the current workload of the PB, it has been difficult to follow up with them. Further, the PB felt that nothing had happened and there was not need for review, because as far as they knew, nothing was ever done to the road, and it was believed that Mr. Paulson had sold Mr. Mitchell the property.
Charlotte wanted to make one more point with Mr. Coli bringing up that the conditions were not part of the lapse, that the PB has also been told by T.C. that even though the conditions were not the issue, they were somewhat of an issue, because not one single condition was met, leaving clear evidence of non-use.
The ZBA asked if anyone else had questions.
Atty. L. commented that it's not relevant whether some conditions, all conditions, were satisfied or not, the question is whether there was substantial use. Atty. L. went on to say

that to say that not one condition was met doesn't make any sense, as there were many conditions which were met, such as hours of operation, noise control etc. The bottom line being, if there were issues with the conditions, they are not relevant to this discussion.

Mark announced the closing of the public discussion, so that the Board could discuss and deliberate and perhaps interact and ask questions if needed. Mark wanted clarification that the time frame in which to complete the process after the hearing started was one hundred days, and that the clock started on July 9th, which is the date of Mr. Bowen's appeal. One hundred days would be October 17th, and as this date falls on a Sunday, the deadline would then fall to the following day, the 18th, which is Monday. More discussion ensued as to the deadline.

Mark stated that it was unfortunate that the original meeting date to reconvene the previous hearing was set for October 25th, which would have been beyond the time frame. Atty. L. stated that both he and Atty. B. had made the meeting, not realizing that it was past the 100 days allowed. Mark observed that although there is an unfortunate clash between the PB and Mr. Bowen, that there really is not a great distance between the positions, and one would hope that the gap can be bridged.

Mark asked if the curb cut was approved, and Bill Coli said that it was, as well as the paving of 150 feet, which had to be done as part of the condition.

Mark stated that it was unfortunate Jim Hawkins was not present. Mark questioned the Town's bylaws regarding the removal of ledge, as he read that it was illegal.

Charlotte stated that the PB has never been approached about the removal of ledge.

Atty. B. stated that the Zoning Bylaw is silent [on that issue] it just says commercial, industrial etc uses require a permit, and he considers this under commercial or industrial. In looking to the terms of the SP itself, this one states permission to operate a gravel bank, the question being, how do you interpret "gravel bank." This could be removal of gravel and could also be the removal of ledge.

Bill Coli questioned if one makes gravel by crushing stone, or would one use a stone crusher to size gravel and where the ledge from Zoar road come from.

Earl stated that he believes that was what was sold to the Town of Charlemont. And said that what the Board needs to look at is that nothing is supposed to be removed outside the footprint of the gravel pit. This material was brought to the site and is in the footprint of the existing gravel pit. This is a product that is able to be sold and this town does not have bylaws as far as earth removal. Earl went on to say that this is considered by other towns, and was in the documents submitted to the ZBA. Earl also wanted to point out that the SP was also allowed to have a crusher, it was to crush that ledge and he felt that to say that you were able to crush but weren't able to sell it, was kind of a stretch.

More discussion around the wording of the SP ensued.

Bill C. stated that his question is still unanswered. Bill asked of Earl "Do you take that ledge and make gravel out of it, or do you make crushed stone, what product do you make or do you sell it straight as ledge?"

Earl stated he could make several products with it; smaller sized ledge, retaining walls, crushed stone or crushed gravel. More discussion ensued as to the nature of the material that can be milled from a gravel pit.

Bill C. had a procedural question, that his understanding was that the appropriate procedure was to have a roll call vote to either keep the hearing open or to close the hearing and if the hearing was closed, the ZBA would deliberate at that point in public. Mark interjected that at that point they will choose to make a decision or not, and would do so by Roll call vote.
Atty. B. reminded them that they have a deadline of next Monday, unless and extension was agreed upon.
Bill Stephens wanted to make a point that there is three acres twenty feet deep of ledge that came from the blasting of Zoar Road. Bill further commented that that material (ledge) is probably more marketable than gravel and there was no activity or interest in selling or crushing that ledge. Bill S. wanted to point out that there is a market there, and in two years, a very marketable product could have been sold, and there was never any crushing or intent to crush in those two years. Bill also reiterated that the ZBA could possibly make a split decision on the issue [C+D lifted for the gravel operation, but held in place for the crusher], and that possibly either attorney could assist with that.
Mark determined that there was a crusher present, but within the two year period, crushing never occurred.
Earl Bowen responded to Bill Stephen's point about the crusher. Mr. Bowen agreed that there was a very marketable product there, but wanted to point out that to own a crusher is very expensive, and not every outfit does have a crusher. If an outfit does come, the basic requirement for any of these operations is ten thousand cubic yards, so unless one had an order that added up to that, it would not be cost-effective.
Atty. L commented that it was a Business Use permit, the gravel business.
Mark asked if there is a Town bylaw that selling of ledge is not permitted in this town. Charlotte replied that we have no uses that have ever allowed it. Mark further asked if it was written specifically in the bylaws that it is not allowed. Charlotte stated that it was not. Bill Coli remarked that there is no specific bylaw that allows it, it is silent.
Suzanne Willard asked for a definition of selling ledge. The stone that is up there is ledge and Suzanne asked if ledge was not a permanent thing. They blasted that ledge and it then became rock, it isn't ledge anymore. Bill C. stated that the use of the term ledge was because that was what appeared on Mitchell's log.
Dan Miller pointed out that it is not gravel, though the permit says gravel.

Open discussion having been concluded, Mark made a motion to close the public hearing. A roll call vote was taken and goes as follows:
Eric: yes, BillC.: yes, Mark: yes. Motion passes unanimously. Public hearing is closed at 8:43 p.m. The Board takes a break to deliberate.
The meeting reconvenes at 8:48 p.m.
Eric Dean calls the meeting to order again and mentioned that one concern that he has is that when the [PB] issues a permit and they don't follow through with it, within the two year time frame, it doesn't seem fair to the next person purchasing. Eric went on to say that whether or not the PB and Mr. Bowen came to an agreement or not, is a hard issue, is not really the issue here.
Bill Coli agreed that the PB should do their follow-ups, and it is probably a simple matter of putting it on a computer or some way to have it tracked. However, this is not relevant

to the question of use. It isn't fair to expect the applicant to come to the Board when the permit is up.
Mark interjected that the legal burden is on the Board. In fairness to the Board, 6 month, 1 year, or 2 year reviews, depending on the activity, is pretty tough to follow up on.
Bill Coli stated that the wording is important, and that if instructed, Carlene could keep track of when a review is up and notify the Board, and had a 6 month, or one or two year review been done, then maybe we wouldn't be questioning if the pit was really operating or not now.
Mark presented his thoughts on the issue by stating the following:
"The question really is was this an operational gravel pit, during the two year period. The word we're being asked to figure out is 'substantial. That seems to be the case. Frankly, maybe I'm not reading this well enough. Part of the difficulty of this is that , in the permit it doesn't define anything about how much material, how much you're supposed to take out, it's all about limiting factors; hours of operation, days…[goes on to list several conditions of the permit] It is never defined for us in the application. We asked the question before and we do not have an earth and gravel removal bylaw, apparently that's coming. The question of gravel, is it gravel, is it ledge? I'd like to address that. I believe gravel is a generic word. Out of a gravel pit, you get all kinds of products. I interpret gravel bank to be earth removal, which is defined by other towns but not by us. I have never been to a gravel pit that just did gravel, as a product of the business all these things [gravel, sand stone etc]come out of the same chunk of land, that would be my first argument as to what was going on there or not. We talked about crushing and if there was any going on. We've talked about the logs and looked at them. I call them a "compilation" because they are not anything sophisticated and that's because they are not from sophisticated businessman. Ted Paulson has a spread sheet, Mitchell typed this, frankly, my guess is that this information came in this form as a request by Mr. Bowen to demonstrate this is being used. Paulson gave Mitchell some information to demonstrate that this had value to him, he was getting a buck a yard. That's not money. As far as that goes, Ted Paulson operated this pit for years. Mr. Bard said something last week that remains with me, one of the intentions of the ZBA, having been a volunteer appointment board with local citizens on it, is that you have a specific and a general knowledge of business, that we're not out of town experts, with people who make a judgment based on that, and that we have cursory and anecdotal past knowledge. With that in mind, I can tell you point blank, Ted Paulson took gravel out of that property and used the pit for years, and secondly, he continued to do so. The PB made a point that that property had a history of uses, while that does not pertain to this, it does pertain to the fact that Paulson was a dreamer of a businessman. He failed at most of the businesses he tried. These records are the best he could come up with. Mr. Mitchell, you would think is more of a businessman, but knows the value of a business. This appears to me he was asked [by Bowen] to give information about using material, and he took out hundreds of yards, but it is not a ton of material. What is substantial here? Substantial is relative to what it is. This is a mom and pop small business gravel pit. This is not Mitchell's operation in Northfield, or Lane or Willard's; it is not a big place. This was a bank of convenience for Mitchell. It seems clear as a bell that, maybe there's complications that if you are not using it legally, you're not using it at all, that on the side, looking at the information on the bylaws of other towns. These certainly don't show, it is a flippant logic to me to say "that means it's

substantial, it's more than ten yards." No. this is minimum conditions to require a special permit, that's all. However, it does mean the PB did the right thing that Mitchell needs a permit for the road. So he did that and got his conditions. These conditions are far less specific than they are five years later. We, however get to decide again, on the usage. This place was clearly used and I think given the size of the place, it was substantial for a small operation. Ted only got a dollar a yard for the material. While you can make a good living, and I bet you can even get very wealthy in the gravel business if you are in the right place, with the right backing, the right market. But for the end user, the cost is all about the trucking. In a small town, in our small area, the demand is not that great and it's more difficult, that's why Ted couldn't do it. He ran a business there, he sold it to Mitchell, Mitchell ran a business there, for this town, one of the substantial banks, but I really think that on that basis, we would have to vote to overturn the Building Inspector's Cease and Desist order, based upon the permit going into lapse because of non-use of the property."

Eric Dean stated that that was how he looked at it also, and went on to say "When you don't own a piece of equipment, and you depend on somebody else and when another contractor comes in and they buy the material from you, you dig it out of the bank, you take it to the closest place, you gear yourself according to that, because trucking is the killer. Not everybody has eighteen wheelers or whatever to move that. Basically, it's convenient to people in town. That is why the town themselves bought ledge/rock from the pit, it was convenient for them. I would have to say myself, that it was used in that time frame. Like we said, it's not like it was Lane or another big company. That's where I stand with it; it was substantial at that time."

Bill Coli took a different view: "Well, I tried to refer to the dictionary to see if it gave us any help and there are several definitions for substantial; *of, relating to, or having substance*. That doesn't help us any. *Not imaginary.* This is definitely not imaginary, this is real. *Solidly built, strong. Ample, as in a substantial dinner*. And then the one that I think is most relevant, *being of considerable importance, value, degree, amount or extent.* And that produces another word, considerable. *Considerable; large in amount, extent, or degree* [Webster's 2, New Riverside Dictionary, 1984. Houghton Mifflin Co.]. Not a trivial amount, large in mass, in scope and so forth. I wrestled with this question of what is a considerable amount. Clearly what you are saying about the demands of a pit is the trucking is the big issue, so nobody's going to buy something out of this pit and truck it down to South Deerfield. Presumably, whether the consumer gets charged less or not, somebody's going to be making more money because they are trucking it five miles instead of thirty five. So I understand that the local pit is going to largely serve the local area. It strikes me that nobody would buy that pit if it was only capable of producing barely enough money to buy yourself a Grande Latte every day of the week, at Starbucks. So I refer here to the Maximillian job, from the early permit, the one that was dated 6-16-83, where they open a gravel pit to remove approximately 60,000 cubic yards of gravel. I have no problem seeing that as a substantial use. There were statements in the minutes that Earl was planning to take out between 55,000 and 75,000, and it wasn't clear to me…was that a year?

Earl Bowen felt his statement was misquoted by the PB. During that time, we were trying to ease their concerns about our gravel pit operation, and there was a lot of numbers that were asked. “That number represented, perhaps, somewhere near where the ledge, the amount of material that was hauled to that site from the Zoar road project. I think that’s where that number came from.”
Mark asked if that was approximately in a year.
Earl Bowen stated In a good year, it is reflected in Mitchell’s logs, perhaps. It’s indicative of what’s going on that year, but in most years, probably a lot less. We haven’t sold as great a deal of material, of course we had the C+D, but it is as the market bears. One year you may sell one thousand cubic yards and another year you may sell ten thousand. I think that my statement was misquoted.”

Bill Coli stated that he saw someone from the PB shaking their head, and that there is a difference of opinion on that, Bill went on to say From approximately 7/28/01 to 6/26/02, which is just about a year, Mitchell took out 5100 cubic yards. Bill continued that he’s not certain whether that is a substantial use or not, but related it to the maple sugaring operation. Bill went on to give an example of someone having several thousand taps, if one set ten percent of that, that’s not a substantial use, as one couldn’t make enough money to pay for the process. Bill referred to Mr. Lombardo’s point, that there was a business operating in that locating, during this time, and stated it was well taken, but that it would be comparable to one tapping two or three hundred trees in a couple thousand tree maple operation. Bill pointed out that he didn’t feel this would make a successful business operation.
Mark questioned if it had to be a substantial business here. More discussion ensued as to the wording of ‘substantial’ and ‘considerable’ use. Bill further argued that in his understanding of what would constitute a substantial business use; this would not be a substantial use because it does not result in a substantial business. According to Bill, and the numbers reflected in the documents, at best, the business would bring in only one to two thousand dollars a year.
Eric mentioned the Paulson’s had the trailer park and were making money from that, as their primary business, the gravel was extra money. A lot of people in this town did that. This is not a large area and a lot of people who lived here didn’t make big money, they did what they could.
Bill stated again, and took the stand that, he felt that there was use, but not substantial use. The pit was not used to its fullest possible capacity.
Mark’s view is that there was beneficial use, it was being operated, it was sold, and therefore it was substance.
More discussion ensued about small businesses and what constitutes substantial use, with Mark and Bill taking very differing views.
Bill Coli asked of Mr. Bowen if ten thousand cubic yards would be a floor to get someone to come and move material from a gravel site.
Mark Ledwell told Bill he felt it inappropriate to have any direct interaction at this point, unless asking a specific question.
Bill apologized.
Mark cautioned that, as a board, the ZBA has to be careful not to set ourselves up for another Board appeal, but should look to promote a compromise.

Mark observed that he and Bill C. appeared to be at “loggerheads” over the term substantial use and feared setting the precedent for the PB and every SP holder in this town, that they can be challenged as to what is substantial use. Mark reminded the Board that we are not here as experts on the amount of material crushed and hauled and values and business terms, we are here to look at our town’s bylaws, and what is the intention? Mark commented that one does not obtain a SP and you do something with it, and a lot of people fail at that effort. And Mark argued that that was the spirit with this pit, that there was activity, directed towards the requested permit, and that’s what substantial use is.

There was more discussion between Mark and Bill C. as to what the floor was for substantial use, as there are no Town guidelines or bylaws on the subject.
Bill felt their disagreement was “is approximately one thousand yards in the floor or above the floor?” And Mark feels the disagreement was on Bill’s misunderstanding of what “substantial use” describes. Mark felt it was enough demonstrated use by the permit holder that he did do what he received the permit to do.
Bill C. reminded Mark that Mr. Bowen did not do anything with the crusher, which was on the SP, so observed that he did not do at least one of the things he had proposed to do with his business. Bill reiterated that he cannot say that substantial use has taken place in this gravel pit. Bill did agree with Mark that there was definitely a benefit to the town to have Mr. Bowen selling material, as opposed to having to order from out of town and have it trucked. Bill still argues the extent of use, and while he noted that he respected both Mark and Eric, he has yet to be convinced that approximately a thousand yards coming out, relative to either amounts that have come out of there previously, or the amounts that could come out of there potentially.

Eric remarked that when the Board goes to write another permit, they could decide that it is not being used, and yank it.
Bill C. commented that in discussions [and reflected in the minutes] between the PB and Mr. Bowen, there was evidence that this was not to be a small operation.
Eric commented that he didn’t feel that there should be comparisons between the previous owners of pits and the current owner, as far as activity.

There was more discussion as to the definitions again.
Eric commented that if someone gets a building permit and does not start building within a two year time period, the permit is invalid, however if one obtained the permit and then put in three piers and did nothing else, that is still use, activity commenced.
Bill argued that the building code does not use the term substantial use, therefore it is not relevant.
Based on the fact that there was agreement between the Board members that the crusher was not used, Bill C. made a motion that the Board vote to uphold the C+D because the crusher and screener use was not commenced at all, and 1048 cubic yards was not substantial use, based on what was taken out previously and what has potential to come out of the pit. Mark seconded the motion, but felt the Board needed to discuss it more. Mark went on to say that it was a fatal error of the bylaw to interpret it based upon specific numbers, quantities, dollars, or whatever type, Mark felt that this sets up the ZBA and possibly the PB for inappropriate micromanagement of a business.

After more discussion, Mark stated that he was against upholding the C+D order.
More discussion ensued, and it was decided by the Board to cut off the debate and vote on the motion to uphold the Cease and Desist order of the Building Inspector.
The roll call vote goes as follows:
Eric-No
Bill C.-Yes
Mark- No
Mark Ledwell called to the Board's attention section 40A, section 14. and stated that the Board has the power to exercise the compromise solution and that the ZBA can change or modify the order and what they are being asked to vote on, in whole or in part. Mark went on to say that they cannot change the permit, but they can consider the Building Inspector's decision, and Mark noted that he respects the B.I and would reluctantly overturn his decision, but felt that there was a misunderstanding of what the SP process is. Mark suggested the Board consider modifying the order, they could consider a stay, consider putting this [C+D] off, leaving it in effect, giving the PB and Mr. Bowen an opportunity to get back to the table and work out a compromise for everybody's long term benefit.
Bill C. stated that he would much rather see the both parties come back to negotiations over the terms of the SP, rather than this all going to court, but Bill sees no way to come up with a compromise that will accomplish keeping this out of court. Bill asked Mark what he suggested would be a compromise.
Mark suggested voting on a 90 day "stay", which leaves the C+D order in effect, however suspended for 90 days, which gives the parties an opportunity to work things out, as they have been working at this for years, and have been close to an agreement.
Bill C. asked what stays in effect, since two of the three voted to overturn the motion, does the overturned motion stay in effect for 90 days until they can reach compromise, and why would there be any effort to reach compromise if the motion is overturned?
Mark felt they could craft the language in such a was that if they failed to come to an agreement on a new SP within 90, then the existing C+D goes into effect. Mark felt this was reasonable.
Bill C. questioned if procedurally doing so would put them out of the 100 days from the date of Mr. Bowen's appeal, to the time that a decision has to be made.
Mark stated that they have in fact made the decision tonight, so it is within the 100 days.
Bill wanted to clarify that, in effect, since the members could not come to an agreement, the C+D stays in place.
Mark said no, not if we craft something else. As it stands right now, the C+D remains in effect.
Bill clarified that what Mark is suggesting is to leave the C+D in effect, contingent on the compromise of a new SP being applied for and granted within 90 days?
Mark said that what he is saying is to waive the C+D (reverse it) for a period of 90 days only. And then it would be contingent upon granting of a new SP.
Joel Bard questioned what would happen if, at the end of 90 days, there weren't a new SP?
Mark said that then the C+D order would go into effect.
Bill Coli stated that he would certainly welcome a resolution that resulted in a SP with appropriate conditions that allowed NEIHCO to operate the gravel pit. Bill reiterated that

he does support the Mr. Bowen's operation of the gravel pit and went on to say if we can craft this in such a way, that if 19 days from now, an appeal to this response comes, and there is no compromise being sought, and the C+D order is still standing because we fail to overturn it.
Atty. B. wanted to clarify that the motion was to stay the Cease and Desist order for 90 days, and then if no SP is issued within 90 days then the Cease and Desist order would take effect again. Joel agreed with this and said the BI would have the authority to do so.
Attorney L. was concerned that if an appeal was filed, and they lose their rights to continue this issue, their leverage with respect to the SP falls away. They would then have to go and apply for a new SP.
Joel suggested that if no SP is issued satisfactory to the parties, then a new C+D order shall take effect, that the Building Inspector will issue, which will then give Mr. Bowen a new appeal period from that time.
Atty. L. wanted to be sure that there would be no prejudice by their failure to file an appeal on this particular C+D order.
Atty. B. felt the idea would be to craft this with the understanding that the BI would issue a new C+D order, and that would be a new C+D order, and there should be no reason why a new C+D order would not be appeal-able.
Atty. B. asked if the C+D order would expire 90 days from now.
Mark stated that the intention was to create a 90 day period where this C+D will be put on hold and that this is an opportunity to finalize some negotiations.
Atty. L. just wanted to make sure everyone's rights were protected.
Atty. B. stated that it would be best to craft it in a way that Mr. Bowen doesn't appeal.
It was agreed that 90 days would not be adequate, and so it was decided to make the time frame 110 days.
Atty. B. asked to suggest some wording and came up with the following proposal:
The ZBA will stay the Cease and Desist for 110 days for the purpose of permitting the Planning Board and New England Investment Holding Corp. to reach an agreement on the terms of a Special Permit; provided that if a SP is not agreed to within 110 days, the BI shall issue a new Cease and Desist order, which order may be appealed to the ZBA, pursuant to G.L. c.40A, sections 8 and 15.

The Board takes a break to allow the parties to consider this, and then reconvened.
Atty. L. asked to speak to his discussion with Joel [Bard] regarding procedure. Atty. L. stated that he and his client appreciate the sentiment in terms of trying to institute negotiations, but felt that what was being proposed was unfamiliar ground and they are just not sure legally, that it might end up putting "all of us in the soup." Atty. L. further stated that it may not be as beneficial ultimately, to his client, and they probably should just have a decision one way or the other. Atty. L. again acknowledged and appreciated the sentiment to get the parties to work together.
Bill Coli wanted to clarify that the most direct thing would be to let the decision be the decision, and not pursue the motion due to concerns of the shaky legal question of it.
Joel observed that in the wording "let the decision be the decision"; the Board had not made a decision.
Bill stated that the Board voted one in favor of sustaining and two opposed to sustaining the C+D order, which we were told had to be unanimous one way or the other.

Joel stated it would have to be unanimous to reverse the decision of the B.I. It would be plainer now to have a motion to overturn the BI, since Bill's motion to uphold failed 2-1, so nothing was voted. Now there needs to be a motion to overturn the BI and that would pass 2-1, but because it's not 3-0, it would fail. The two motions together would give the complete record.
Mark stated that at some point they need to come back to the Board, but this is what his motion does, that is, the second half of this. People may choose to appeal, or may not be happy with it, but Mark felt this was the reasonable thing to do; it still gives the parties an opportunity to think about it, or to just appeal it. Nobody's rights are taken away. Mark maintains that he still puts his motion out again, and if it is shaky legal ground, then it is.
Bill C. stated that if the applicant has concerns about it, it goes against what they were trying to accomplish, it will bring the board back to the same place they were initially, with the three of them hearing the same evidence. Because Atty. L. and his client did not agree, Bill C. was unsure now.
Bill asked Mark if he was suggesting putting the motion back out.
Mark said that he was.
Mark again made the motion to **stay the Cease and Desist for 110 days for the purpose of permitting the Planning Board and New England Investment Holding Corp. to reach an agreement on the terms of a Special Permit; provided that if a SP is not agreed to within 110 days, the BI shall issue a new Cease and Desist order, which order may be appealed to the ZBA, pursuant to G.L. c.40A, sections 8 and 15.**
Motion was moved and seconded. A roll call vote goes as follows:
Eric-Yes.
Mark-Yes.
Bill C. -Yes.

Meeting adjourns at 10:51 p.m.