

APPROVED
CANDIA ZONING BOARD OF ADJUSTMENT
MINUTES OF October 23, 2012

Place: Town Hall; Meeting room

Call to Order: 7:00 pm

Members Present: Boyd Chivers, Chairman; Judith Szot, Vice Chair; Ron Howe; Frank Albert; Ingrid Byrd; John Easter, Alt, Amanda Soares, Alt

Members Absent: Bob Petrin, Alt.

Pledge of Allegiance

Approval of Minutes

Members Sitting for Approval of Minutes: Boyd Chivers, Chairman; Ron Howe; Frank Albert; Ingrid Byrd; J. Szot

MOTION: I. Byrd made a motion, seconded by F. Albert to approve the minutes of July 24, 2012 as amended. The motion carried with a vote of 4-0-1. J. Szot abstained.

Case 12-592 Applicant: Kevin Cole, Candia Sand & Gravel LLC 321 Route 27, Raymond NH 03077; Owner: Same; Map 407 Lots 66 & 71; for a use variance under section 5.01 Sand Gravel and Borrow Excavating Operations: to allow a gravel pit and rock quarry to continue its operation within the residential zone.

Chair Chivers asked to discuss the merits for the case before the Public Hearing was opened. He said in this case with its long history with the town he felt the case required some summary and a procedural decision on the part of the Board on whether to proceed with a public hearing and to consider the merits of the application. He said they have been litigating with the applicant since at least 2002, over the grandfathered right and expansion of map 407 lot 66 and removal of material from lot 71. He said the applicant is seeking a variance to permit excavation on both lots 66 & 71.

Chair Chivers said he wants the Board to first consider whether in fact to defer any further consideration of this application until such time the applicant complies with the outstanding orders of the Rockingham County Superior Court. He said on November 26, 2002 the court found the grandfathered pit was limited to Mr. Cole's predecessor at 4 acres and sited no blasting or crushing on site and the court also ordered the reclamation of the non conforming areas of lot 66 and lot 71. On February 11, 2003 Rockingham County Superior Court permanently enjoins the respondent from blasting or crushing on lot 66 and from excavating beyond the designated 4 acre area without a permit. On August 4, 2003, the court awarded \$700.00 to the Town of Candia for expert cost incurred in the preparation of the hearing. On May 3, 2005 the same court orders a reclamation plan for lots 66 & 71 to be submitted by July 1, 2005 and a penalty of \$100 a day for plans not filed by that date, next the court orders a \$60,000 bond to be posted with the court as partial security for the reclamation plan and lastly all costs associated with the review of the reclamation plan not to exceed \$800.00. On June 21, 2006, the court also orders legal fees to be paid to the town not to exceed \$1,000.00 and the court assessed a \$10,000.00 fine and ordered payment of engineering fees.

Chair Chivers said he cannot see how this Board can entertain or consider this application or its merits in light of the applicants continued defiance of the courts orders. Chair Chivers said he recommends to the Board that they defer the consideration of the application until such time the applicant is in compliance with the orders of the Court, obtains relief from the orders or obtains modification of the orders.

F. Albert said there are other facts that I am sure the Board would want to hear regarding the applicant.

Chair Chivers said the Board will take testimony as to the procedure not the merits of the case because the public hearing has not been opened.

Chair Chivers said noncompliance is the issue before the board. F. Albert said he felt the same way he did after reading 20 pages but after talking to the applicant he said he heard a whole different side. He said he is not a lawyer and cannot say some of things that went on were illegal but they were certainly inappropriate and a conflict of interest. He said we are talking about a viable business which is a necessary business for any small town not about a tattoo parlor or bar. He said they are doing a grave injustice not to hear the applicant's side on reasons why they may not have complied.

J. Szot said the ZBA no longer has jurisdiction because of the Rockingham Superior Court orders. She said these orders supersede what they are doing here tonight. She said the applicant has to comply with court orders before the ZBA can hear their case. R. Howe said he is in agreement with J. Szot and Chair Chivers. I. Byrd said she is also in agreement that they have to follow the court orders.

Chair Chivers opened the discussion to speak to the process only.

Joe Coronati from Jones & Beach Engineers Inc., representing the owners of the Raymond Sand and Gravel, said they will address the 5 items mentioned. He said that is why they are here tonight. He said they have complied with all five items. He said the bond is subject to the next step. He said they submitted a reclamation plan that was reviewed by town engineers and approved in 2007. He said engineer fees of \$1200 were paid to Stantec and the \$10,000 fine was placed as a lien on the property which was agreed to by the court. Mr. Cole said they cannot start the reclamation because they are not allowed to blast and that is why they are here tonight before the Zoning Board for a blasting permit.

Chair Chivers said they have examined everything. Mr. Cole said you have examined your side not ours. F. Albert said it is not what it appears on the surface. J. Coronati asked to show the time line of their compliance. Mr. Cole said with the approved reclamation plan, without blasting they cannot change the contours. Chair Chivers said they could haul material back in and shape the slopes. J. Coronati said the plans have been drawn showing existing contours and proposed contours that have been approved and blasting is required to make the contours and they are not allowed to import.

I. Byrd said she wanted to see in writing a statement, were they have complied with all of the judge's orders. J. Coronati said part of the judge's orders is to reclaim the site which they are trying to. He asked if they could review the documents that they have brought to see that they are trying to comply. I. Byrd said no, I want a document from the court saying they have complied.

Chair Chivers said he is not going over 10 years of litigation tonight to determine if whether they have complied. J. Coronati said they have been trying to comply.

A. Soares said the BOS has met with counsel and their reclamation plan has not been approved by the BOS. K. Cole asked then why do we have a letter dated 2007 from the Town Attorney saying the plan is approved? A. Soares said the BOS had questions on the amount that has to be removed in the reclamation. K. Cole said their engineers answered that question. She said according to counsel you have not answered that question and your reclamation plan is an excavation and blasting plan which is not acceptable to the site and is not a reclamation plan because you are not allowed to blast per the court. She said the present BOS is not agreeable to your reclamation plan and that they need to work on a better plan. K. Cole said the plan was

gone over by Town engineers and their questions have been answered and they have a letter from town counsel saying the reclamation plan was approved in 2007. A. Soares it is not acceptable to the BOS.

Chair Chivers said the issue before the board is to consider the application tonight and continued there are enough reasons not to consider. K. Cole said he understands. Chair Chivers said there are plenty of reasons for you to get together with BOS and agree on what the situation is and when this board gets confirmation from our lawyer and BOS then the Zoning Board of Adjustment will be free to consider this application.

K. Cole asked who accepts the reclamation plan. Chair Chivers said it will come from a recommendation of our counsel.

F. Albert said that is part of the problem because what would you say if you found out that town counsel just happens to be the attorney for the applicants largest competitor? S. Szot said be really careful what you say and don't go any further. Chair Chivers said leave F. Albert alone. J. Szot said it is slanderous and libel Frank be careful. F. Albert said everyone should hear more from the applicant and it is the absolute truth. Mrs. Caley from Raymond NH said nobody wants to hear that the BOS have a personal vendetta.

Mr. Cole said we are not at a BOS meeting, we are at the ZBA. A. Soares said I understand that but we have the say and our town attorney has not approved the reclamation plan. K. Cole said the ZBA has the say tonight at this meeting. A. Soares said I am the BOS and our town attorney has advised us...K. Cole said he has lived this and first he was told by the BOS, the Selectmen had the approval to allow blasting then they were told the ZBA had the approval to allow blasting, then the Planning Board and now they do not know where they have to go for the blasting permit.

A. Soares said I understand your problem but you owe the town several thousands of dollars in back taxes and you have haven't paid any of your fines, why should we allow you to blast. Chair Chivers told Amanda he was going to rule that out of order. He said whether they paid or owe taxes is irrelevant and is a whole different department and to keep it separate. K. Cole said thank you. Chair Chivers asked Mrs. Caley to address her comments to the Board and will direct her questions to the right place. Mrs. Caley apologized and said she was curious to what fines she was referring to. Chair Chivers said it was the \$10,000 fine. Mrs. Caley said the Board does not know the whole story as there are two sides to every story.

Chair Chivers said he is relying on record he had today. He said he did not go and talk to the applicant. K. Cole said did you read where they took my tax dollars for the excavation fine and signed 3 years running? Mrs. Caley said you only saw what someone wanted you to see.

Chair Chivers asked if anyone else had a comment as to the process and whether to consider this application tonight. K. Cole said you are already going to deny it so why bother.

J. Coronati asked to speak on items brought up, he read from a letter from Upton and Hatfield dated June 21, 2007, third paragraph, *"Finally now that the bankruptcy matter is behind us, and the restoration plan has been approved, subject to conditions, by the Town's engineers, you must proceed with the restoration of the illegal excavation on Lots 66 & 71, in accordance with the terms of the Superior Court's final orders."* He said this is from Upton and Hatfield and Bart Mayer and it clearly states an approved plan. I. Byrd said when? J. Coronati said June 21, 2007. I. Byrd said it is now five years later. He continued following the letter addressing the conditions that Stantec put forth. He said all of the conditions were met so they now have an approved reclamation plan. He said in 2007, you may recall was not the best year in land development history and the work could not be done right away and there was no need for gravel as all of the construction ceased at that time. So in January and February 2011, they submitted letters to the town that they were ready to start the reclamation. They received letters back saying they could not start the

reclamation plan. He said they tried repeatedly and sent multiple letters to the town requesting they would like to start reclamation according to the approved plans. He said the plans clearly show blasting in the contours and said any engineer or any person who can read a plan, or built a house or septic would know what a contour looks like on a USGS map and you can clearly tell by reading the plan that you cannot leave 100 foot rock faces safe, you have to flatten them out and put them to a 3 to 1 or 2 to 1 and put benches in them. He said all of this is in the reclamation plan which also clearly shows proposed existing grading. F. Albert said and the town has not allowed you to do this.

J. Coronati said they have been trying to start since the beginning of 2011 and said the bond will be posted once they are permitted to start the reclamation plan. He said the court order also clearly states that no blasting is to be done on site without approval from the town. He said we have approval from the town attorney to do the reclamation and we are here tonight to get a variance to blast. He said they have not been getting anywhere and now 2 years have gone by trying to do the reclamation that was ordered by the town and approved by the town and now 2 years later they are still at a standstill. He said and now you are telling us you won't hear the case? He said if you want to get the reclamation done or any work onsite done the town has to acknowledge that they already have an approved reclamation plan.

Chair Chivers said stop right there. Let me read a letter dated September 16, 2011 last paragraph, *"In this letter and others your regularly refer to an approved plan by the BOS, that is simply not the case."* He said I am not sure how much clearer you can get. The BOS was never advised of the proposed contemplated excavation of this site. I don't know how much clearer it gets then this. J. Coronati asked then why did Bart Mayer in his letter in 2007 say it was approved? Didn't the BOS state he had the right to review and approve it and the town engineer had to review and approve it? Which one do you believe?

Chair Chivers said it has to be approved by the selectmen, you just heard from the selectmen it has not been approved, that is where it is right now. J. Coronati said they have already made an application to the selectmen, met with the Steve Dunbar and selectmen in a meeting where they presented the reclamation phasing and they were told they had to go the Zoning Board to do any blasting. He said are now you telling us to go back to the selectmen for a plan that we feel is already approved? Chair Chivers said it hasn't been approved it is pretty clear. J. Coronati said how is it clear? Chair Chivers said from the letter. J. Coronati said you won't even look at the letter I gave you that says it is approved. Chair Chivers said that is June of 2007 this is four years later. J. Coronati said you can't just change your mind four years later, we never submitted a new plan it is the same plan.

Chair Chivers asked the applicant if they had anything new. R. Howe asked if their intent was to do more than reclaim. J. Coronati said for two years we have tried to work with the town to reclaim, submitted letters, talked to the building inspector because they want to go forward but haven't gotten anywhere. He said the court order states that any blasting or crushing done on site will need approval from the town so we are here to talk about opening the excavation that has been ongoing and the reclamation and are not here solely for the reclamation. J. Szot said there is nothing in the application about reclamation and she read, *"To allow gravel pit and rock quarry to continue in its operation within the residential zone."* She said to continue its operation and according to court orders you have taken everything you are allowed out of lot 66 and lot 71 was never to be touched and it was. She said you want to either expand onto one or both the lots and the court said you were not allowed to. J. Coronati said unless the town approves it. He said like any property in NH that seeks a ZBA or Planning Board approval. Chair Chivers asked if I. Byrd had any other questions and she said had heard enough. J. Szot said no and wanted to make a motion.

F. Albert said I do not know why we are refusing to listen to them, they need town approval. Chair Chivers said opening the hearing and hearing them has a presumption that we would approve this at some point. Mrs. Caley said you should hear them out, you rudely interrupt them and you can't approve it unless you hear what they have to say. Chair Chivers said they would be happy to hear them once he complies with

the court orders. Mrs. Caley said he can't have conversation regarding how he has cleared these hurdles because you are not willing to listen to him. He wants to tell how he has met what is on the list but you won't let him speak. Chair Chivers said alright thank you. Mrs. Caley said you are not even letting him speak to even explain. She said from an outsider's perspective he is trying to explain and without the explanation you won't have the ability to understand.

Chair Chivers said we are talking about taking the next 30 days and having Mr. Cole and the town and the selectmen agree to what the state of facts are and then once we get confirmation and all the issues have been resolved, this Board would be happy to open this hearing and hear what everyone has to say on the merits of this case.

Mrs. Caley I think what Mr. Cole is saying and his engineer is saying is that they have gone around with this group several times and unless someone makes a change in the cycle it will continue to go around. R. Howe said it is not up to the ZBA to make this change. Chair Chivers said thank you and I understand what you are saying. Mr. Cole said they did the reclamation, they were told the Town of Candia would not approve it because they wanted their engineer to approve it, which is Stantec and they did. He said they paid \$1200.00 for them to review the plan. He said the court order clearly specifies that Candia Selectmen will approve it and they opted to use Stantec. This is all in black in white. He said he is sick of going around in circles. He said he has done everything he has been asked to do. He said he will post the \$60,000 bond when he starts work. He said he has wasted all last year and wasted his engineer's time. Mr. Cole asked what is funny, it's not funny it is not your money. J. Coronati asked would you post a \$60,000 bond if you couldn't go to work. Chair Chivers said he is not the one who has been illegally operating for the last 10 years. Mr. Cole asked him how he could make that statement because they have been working in Raymond. R. Howe said because the court says you are. Mr. Cole said has the court been on my property? Has anyone been on my property? Where is our equipment? It is in Raymond. What are you referring to? Chair Chivers said thank you Mr. Cole that is enough. Mr. Cole said what are you referring to sir? He said I would like to know why this gentlemen said we have been illegally operating for the last 10 years. Chair Chivers said I made that statement. Mr. Cole said how does the court know? R. Howe said they came up with a summary judgment. J. Coronati said that is for work prior to 2003 there has been no work done in Candia since. R. Howe said I didn't say there was. K. Cole said Candia's Building Inspector has been welcome on our property at any time. He has been in and out of our property numerous times and he asked has the Building Inspector ever given a report saying they were doing anything illegal in Candia? R. Howe said I am not aware and didn't say you were you. He asked if Mr. Cole had anything else to say and he replied it won't matter anyway you won't listen.

MOTION: J. Szot made a motion, seconded by R. Howe, to defer the consideration of the application until such time as the applicant has either demonstrated compliance with or obtained relief from Rockingham County Superior Court orders dated November 26, 2002, February 11, 2003, August 4, 2003, May 3, 2005 and June 21, 2006.

F. Albert said they are jumping the gun here and doing a grave injustice. J. Szot they need proof that that the applicant has complied with the court orders or seek relief from the orders. F. Albert said that cannot happen because no one will permit them to do the work. He said the court does not give permission to blast the town does.

The motion carried with a vote of 4-1-0. B. Chivers, J. Szot, R. Howe and I. Byrd in favor. F. Albert not in favor.

K. Cole Jr. asked if he could ask one more question. He asked does the town want the property. He said we can't keep spending money to stay in business; we have spent a lot of money and in the last 2 years going round and round and asked how far they wanted them to go. Chair Chivers said they cannot answer

that. He said if they wash their hands of the property the town will have to reclaim. Chair Chivers said that is beyond the scope of the board. F. Albert said if the town has to correct the 100 foot cliffs the tax payers end up paying for that. J. Cole Jr. said he does not know where to go from here. R. Howe said the selectmen will be your answer. J. Cole Jr. said they have been trying to work with them all last year and they were told to go to the ZBA for relief for the blasting.

Chair Chivers said the meeting is over with. J. Coronati gave Chair Chivers a copy of the 2007 Upton & Hatfield letter that referenced the approved reclamation plan. Mrs. Caley kept remarking she felt it was like communism. I. Byrd said she should not be talking she is not a Candia Resident. J. Coronati showed his letter which spells out everything they had done per the court orders. Chair Chivers said he had no knowledge the \$10,000 fine was paid to the town. J. Coronati said there is a lien on the property they have been trying to tell the Board that was accepted by the judge. Chair Chivers said he was sorry but there was nothing in the record. J. Coronati said nothing will happen on the property and it will stay that way if they cannot do the reclamation. He said the board did not know what they proposed because they would not hear them. He said he will send all their letters of their correspondence with Bart Mayer. Chair Chivers asked if the Board members had anything else to say. Hearing none closed the discussion and went on to other business.

Other Business

SNHPC Workshop November 5, 2012

Chair Chivers said SNHPC is having a workshop Monday November 5, 2012 7pm on updates to the standards for granting variances post simplex. The Supreme Court changed some of the standards for granting variances and he encouraged the Board members to attend

Adjournment

MOTION: B. Chivers made a motion, seconded by J. Szot, to adjourn. The motion carried with a unanimous vote of 5-0-0. The meeting adjourned at approximately 7:45 pm.

The next scheduled Zoning Board of Adjustment meeting is November 27, 2012.

Respectfully submitted,
Sharon Robichaud
Recording Secretary