

# **NORTH BERWICK PLANNING BOARD**

## **MINUTES OF PLANNING BOARD JANUARY 26, 2023**

**Present:** Chairman Jon Morse, Anne Whitten, Mark Cahoon, Justin Perry, Scott Carpenter, David Ballard

**Also Present:** Matt LeConte, Emily Sorkin, Devin Sorkin, Michael Traister, Nick Curtis, Mike Peverett, Clarke Fenner, Tiffany Chase, Owens McCullough, Caitlyn Abbott, Karyn Fisette, David Fisette, Jerry Kausman, Susan Jackson, Stacy Chilicki, Jay Phinney, Kate Phinney, Chester Cofey, Gina Nachowicz, Hannah Bonnie, Mark Patterson, Catherine Lanctot, Brian Fernald, Miranda Fernald, Jesse Noyes, Kathryn Harrison, Cheryl Hoffman, Lincoln Harrison, Jack Olea, Patricia O'Connor, Michael O'Connor

1. Call to Order:

Chairman Morse called the meeting to order at 6:30 pm.

Chairman Morse moved Scott Carpenter to full voting status for tonight's meeting.

2. Review Previous Minutes: N/A

3. Current Business:

3.1 Public Meeting:

Mike & Susan Sorkin

864 Oak Woods Road, Map 008, Lot 16

Proposed In-Law accessory apartment in 2<sup>nd</sup> floor of detached 2 car garage.

Located in the Farm and Forest Zoning District.

Devin Sorkin addressed the Board. He is the son of Michael and Susan Sorkin. They are planning on an accessory dwelling unit about their detached two-car garage. He feels they have submitted everything that is required. Chairman Morse asked about a separate soil test and Devin stated he has provided a separate soil test.

Devin stated there is a kitchen, bathroom, one bedroom and a separate office space. The office space does not provide for a closet. Anne stated on the permit it states two bedrooms. Matt stated the minimum for detached is 180 gallons. If it was not attached, the minimum requirement would be another 120 gallons. The fact that it states two bedrooms has no bearing on his permit.

Matt advised the Board that the detached two car garage is currently under construction at the present time. Because of the time year, they decided to get a building permit to build so they could get a foundation in the ground.

Chairman Morse had Devin confirm the measurements as being 28x30. Chairman Morse says that is 840 square feet, and the permit says 650. Devin stated that part of this is unlivable space as it is just stairs on the outside to get inside and there is some unlivable area that may have been included but that can be taken out. There is an unheated hallway that needs to be taken out.

Matt stated that escrow should be set at \$150.00, and a public hearing is not required. Also a site walk is not necessary.

Mark Cahoon asked if they were going to be using the same well as the house and Devin stated that they do have a report stating that the pressure of the well is sufficient to provide water for both. Matt confirmed that he was all set on the required paperwork.

Anne Whitten motioned to set the escrow at \$150.00 for Mike & Susan Sorkin at 864 Oak Woods Road, Map 008, Lot 16. Scott Carpenter seconded the motion. VOTE: 5-0

### 3.2 Public Meeting:

Sebago Technics on behalf of Aspen Power Co.

Valley Road, Map 004, Lot 006-13

Request for a Conditional Use Permit to install a 1.999 MW AC Solar energy facility on the recently subdivided lot from the Oak Woods Subdivision. The parcel is located in Village B Zoning District.

Owens McCullough, Civil Engineer is present on behalf of Sebago Technics. He stated Caitlyn Abbott, another engineer from Sebago Technics is present as well. Tiffany Chase from Aspen Power and Clarke Finner, who is affiliated with Aspen Power. Owens stated that the Applicant is an LLC formed by Aspen Power Partners for this particular project. Mark Paterson is the land owner. Owens referenced the subdivision that was recently approved which is how they are now able to go forward with this project. They are getting their frontage from Butler Road. Owens stated tonight they are looking to introduce everyone to the solar project, set the escrow amount and then a public hearing so they can go forward from there.

Owens stated that the solar project is a small community solar project that is 1.999 acres due to the fact that it has to be under 2 acres. Aspen Power Partners has already applied and received their inter-connect from the power company and have gotten CMP approval. Owens stated they also have another solar project in Berwick off from Route 236 that should be up and running at the end of March. The cost of this project is approximately \$2.7 million to build the project. Owens stated this site is bounded by three separate roads, to wit: Oak Woods, Valley Road and Butler Road. Owens referenced a drawing which lays out the location and stated it comprises about 31.7 acres

of land. He stated the type of solar ray is what they call a tracker ray solar array which is a single access solar array that moves with the sun very slowly. These are about 25% more efficient than the fixed tilt type. The project will have an access road that will come in from Valley Road where there will be some inverters and a transformer pad. Owens indicated that solar panels generate DC current, and they have to convert it to AC to put back into the grid. He indicated the power that will be coming out of the solar runs through a 20-foot-wide easement that goes to Oak Woods which will be the point of inter-connect which was approved by CMP and stated that will all be underground. There is also underground electric that runs to the tracker systems. Owens stated that this project involves about 18.8 acres of occupied developed area. They did file all the required paperwork with the DEP, NRPA, Maine Department of Inland Fisheries & Wildlife, Maine Historic Preservation Commission, Maine Natural Areas Program and Indian Nations and included all of their reports. Pure Power requires that from the edge of the solar panels out, they will need about 100 feet of cleared area due to the shaded areas. Owens stated that after about 20 years, the panels are 80 – 85% efficient but still very valuable and productive and they will continue them on for up to another 20 years. Technology will have changed at that time, and they will be replaced. He stated that the glass in the panels is all tempered glass and designed for the extreme weather. The solar farm will be monitored remotely for efficiency and entirely fenced in with an orchard fence, allowing smaller animals access in and out. He indicated that abutters have been notified and there was an informational meeting as well. Owens stated that they have done all due diligence required before they filed the application with the Town. They are still waiting for the report from Maine DEP Tier 2. They are required to file a decommissioning plan which they have filed and were issued approval. He indicated there when they get through the approval process, there will be a bond that will need to be posted for decommissioning. He believes the bond amount is \$74,000 they are required to post for the DEP and the Town would also be named a part of that bond. Matt stated that final value will be double-checked but believes the local bond may be higher and will be determined at a later date as one of the final conditions of approval. Owens also indicated that the access road is a gravel access road that comes in and is 20 feet in total width for emergency vehicles and will defer to the Town to see what the requirements are per the Fire Chief. Matt stated he will be forwarding this on Monday to the Fire Chief and will report back. Owens stated that the road will be maintained and plowed by a company. Owens stated that the solar farm does not generate any noise and also, the panels contain an anti-glare glass coating so there will be no issues with glare. David Ballard inquired about the application stating they will not exceed 70 decibels and Owens confirmed that they will not exceed the requirement and there will be a small hum which could only be heard if directly near the panels and the hum will drop considerably at night because they will not be generating electricity at night. Owens indicated that once the project is able to start, there would be a six-to-nine-month timeline for completion.

Anne Whitten inquired about an I-39. Tiffany Chase indicated that an I-39 is a study that is conducted in conjunction with CMP and ISO New England and all the projects in the area are clustered and determine how those projects are going to impact the overall transmission grid and then make a determination to see if any improvements

need to be made. Cluster Studies are taking about two years to get through and are expensive and some projects are never going to be able to interconnect. Tiffany stated that this project came back positive in that there is no cost associated with the upgrade and there is no time associated and this is actually the only project in the cluster that did not have a 3 to 7 year wait and is able to proceed. There is an I-39 approval in the application.

Anne Whitten inquired where this power goes and who gets to use it. Tiffany stated that the power goes back locally onto the surrounding grid and then they get subscribers who subscribe to get the power at a reduced rate.

Anne Whitten asked about hours of operation when they start construction of the project. Tiffany stated they will follow whatever hours the ordinance allows for the Town.

Anne Whitten also asked about the impact of the animals that live in the area now before the project starts construction. Owens stated that Maine Inland Fisheries & Wildlife are the experts on that type of thing, and they have completed their paperwork on that. They, along with other agencies review all impacts and determine if any critical or endangered habitat and the letters received indicated there were no danger to endangered habitats. Anne asked about the critters such as squirrels, woodpeckers, and other non-endangered animals and feels that needs to be looked into as they will most likely be asked about this at a public hearing. Mark Cahoon asked if Maine DEP do “boots on the ground” for the parcel or do they use “Google Earth”. Owens stated they sometimes do both but do not always actually go to the site. Mark Cahoon would like to see current evidence of “boots on the ground” in this case.

Mark Cahoon also inquired about indirect wetland and stated that the plan shows solar panels in the indirect wetland and feels that should not be allowed. Owens stated that they had a much larger array originally and were able to go to the trackers which have more efficiency and were able to lessen the overall impact. The DEP allows for the solar panels over the indirect wetlands, and it is a standard operating procedure.

David Ballard inquired about the 25-foot power line outgoing, and the cemetery and Owens stated that is a state statute and believes it is dictated by the electrical code. David Ballard asked that that be double-checked and validate that. David also asked why the two maps presented do not match. Owens clarified that the last page is a boundary survey and Dana Libby had overlayed a prior version of the solar array and it included the fixed tilt layout instead of the trackers. Owens stated that all of the calculations are based off of their plans, not Dana’s. Owens stated for clarity, there will be updated maps so there will be no confusion.

Matt inquired about the square footage of the occupied area and asked if the occupied area is only where the panels sit or is the stated occupied from the fence in. Owens stated that it actually includes the clearing, and the DEP has made a determination that the occupied area has to include everything that is being managed and maintained as part of the solar array.

Justin Perry asked what exactly the rationale to clear land for solar panels as it seems counter-productive in his opinion. He feels they are destroying trees and removing any chance of carbon absorption for profit. Tiffany Chase stated that there are very few parcels that meet all the criteria. The biggest issue is the substation capacity and circuits feeding into it. There are very few sites that have prefaced power and that the substation actually has capacity, and the circuit is large enough to handle it. She stated they go through an unbelievable number of sites to find one that actually works and fits all criteria. She also indicated that they are limited as far as prime farmland goes so that limits the majority of parcels. Tiffany stated there are several components to try and site a project. Tiffany feels the property that can be used for agricultural purposes make people much more upset. Owens stated that the whole purpose of solar is create sustainable energy. David Ballard stated it would be helpful to receive a photo of what the orchard fence would look like and what the abutters would be looking at. Owens stated that on the larger site plan there was topography included.

Chairman Morse asked if it may be possible to obtain some photos from a drone instead of the Board doing a site walk there in the snow. Owens stated that is something they could provide.

Matt indicated that it has been determined that initial escrow should be \$10,000.00 and the Public Hearing could be scheduled for February 23<sup>rd</sup>.

Anne Whitten asked if it was possible for the public to send an email beforehand regarding any questions or concerns, they may have, which would minimize the length of the public hearing. Matt stated that any questions in writing could be presented one week prior to the public hearing. Owens stated he would prefer that they go to Matt first and then forward on to him. Matt stated that could absolutely happen. Any other questions could be asked at the Public Hearing. The Public Hearing is where any member of the community will be allowed to ask any questions.

David Ballard motioned that regarding Sebago Technics on behalf of Aspen Power Co., Valley Road, Map 004, Lot 006-13 that escrow be set at \$10,000.00 that the public hearing be scheduled for February 23, 2023. Mark Cahoon seconded the motion. VOTE: 5-0

- 3.3 Public Meeting:  
Curtis Sand and Gravel, LLC  
Stub Marsh Road – Map 009, Lot 039 & 051  
Continued review of a Conditional Use Permit for Mineral Extraction use w/  
crushing and importation of material for processing. The Applicant has proposed  
the development of two mineral extraction locations on including East Pit  
consisting of 9.5 acres and West Pit consisting of 4.2 acres.  
21 Main Street, Map 018, Lot 19

Geoff Aleva from Civil Consultants is representing Curtis Sand and Gravel, LLC for this proposed project off from Stub Marsh Road. Geoff stated the last time they were in front of the Board, they had review with discussion of having an on-site biologist from Fish & Wildlife come out and look at the property back in April. He stated they had a meeting with that biologist who indicated that he would get back to them within a week about what, if any, restrictions or buffers there would need to be around the proposed gravel pit, but they never heard back from him. Geoff stated that he will provide the email chain he will forward to Matt for the record which document their attempts at getting information since April 2022. Geoff indicated he now has an email from Mike Clark at Maine DEP Mining, who controls the permitting process for gravel pits. That email from Mike Clark reiterates that they do not have any concerns with respect to what is being proposed. Geoff used that email and sent it on to the Director of Inland Fish & Wildlife and have not heard back from them. Geoff indicated that they have a DEP approval for what is being proposed. Geoff read the email into the record as follows:

*From: Clark, Michael S*

*To: geoff@civcon.com*

*Cc: Kluck, Erich*

*Subject: RE: STUBB MARSH - GRAVEL PIT (2032700)*

*Date: Wednesday, August 3, 2022 11:08:07 AM*

*Hi Geoff,*

*I talked to our Division Director this AM and he confirmed that he is NOT in any pending conversations with DIFW and confirmed that DEP's position still stands as I have stated – that the Operator of this pit has filed a complete NOITC and all relevant habitat (mapped IWWH habitat) or other issues relative to the Performance Standards for gravel pits have been addressed.*

*Hope this helps,*

*Mike*

*Michael S. Clark*

*Mining Coordinator*

*Bureau of Land Resources*

*Land Division*

*Maine Department of Environmental Protection*

*17 State House Station, Augusta ME 04333-0017*

*(207)441-1136*

Matt stated he spoke to Mike Clark on the telephone, and he forwarded his email on to Scott Lindsay requesting that Derek York, the biologist review the site. Matt indicated that today, he spoke to a person higher up the chain with IF&W, who were surprised that they had not gotten back to the Town with anything in writing and he ensured that some statement would come through. Matt understands that there are no major concerns raised by Maine Inland Fisheries & Wildlife. Anne Whitten stated she spoke to someone there as well who indicated the map that Mr. Curtis had provided was correct and they did not have any issues. Matt stated an excessive amount of due



diligence has been done to try and make sure that the IF&W does not have any concerns with the site. Geoff stated the last email he sent was on December 29, 2022. Prior to that he sent an email on December 6, 2022, December 7, August 3, July 29, June 28, June 7, May 23, two on April 28, April 19 and April 7, 2022. He indicated April 7 was the date they had the meeting on site with the biologist.

Geoff stated they have addressed the concerns of Underwood and adjusted those issues to the bottom of the gravel pit elevation. They have had discussions with Town staff about being able to monitor the ground water. As part of the DEP permit, they are allowed to excavate to whatever depth there is provided that they maintain a 5-foot buffer between the high water table and the bottom of the pit. Everything has to remain internally drained. That is indicated on the plan.

Geoff discussed another issue that was raised which was Sunday usage. They have added a note to the plan that indicates that Sunday usage would be an emergency use and it has to be dictated by a state, federal or local jurisdiction that that there will be a notification provided to the Town giving an explanation of what the emergency is/was.

Geoff stated that there was a memo from the Code Enforcement regarding their proposed accessory uses and there was a statement that they agreed with which was crushing should be allowed on the property. They do not agree with the determination that importation of limited materials is not an accessory use. Geoff stated Curtis has a land use attorney who is present, who will talk about their interpretation of the ordinance and how they feel the proposed importation of limited material to make certain products that are not in the pit using the materials that are there and items that are brought in, follows the ordinance allowances for accessory use. Geoff indicated they would like to present their opinion to the Board regarding accessory use and should be allowed. He stated that in certain instances, there are different gradations of the sand and gravel that come out of the earth and sometimes it needs to be mixed in with larger gravel or topsoil or loam needs to be mixed in and that was proposed in this project. They wanted an opportunity that, if needed, they could bring in some of those materials to mix and make a certain product that meets a standard and any kind of road gravel, storm water media, or any kind of mixed product has a certain ASTM standard which is a nationwide requirement that dictates how to mix and grate and what percentages are required. Geoff stated that if we look at what the ordinance allows, North Berwick is very restrictive in that it only allows two acres of open pit area and indicated that it would not behoove the client to bring in material to make giant stockpiles if he is not going to use it right away. Matt stated that we are comparing our ordinance and we are talking about gravel pits. He stated that this use is not a gravel pit and that the Town of North Berwick does not have a gravel pit use. He stated that the use Curtis applied for, the conditional use application is a mineral extraction to extract minerals from the earth. As part of that mineral extraction, the direct accessory use would be the crushing of that larger material. Matt consulted with the town attorney and determined that importation of material does not have anything to do with extracting. He could see that in a gravel pit, but this is not a gravel pit, it is an extraction of material and that is what was proposed to be done.

David Ballard asked if he was only bringing the material in to help with the extraction and feels he is not bringing in material by itself to strictly sell outright, he is only bringing material in to help the process of mineral extraction. Nick Curtis gave an example of the Town of North Berwick having a road project out to bid and there are MDOT spec materials required to do that job, and the gravel in his pit is to sandy and he cannot get it to pass for whatever reason, he would need to bring in rock or ledge from another site to mix in with his materials so the job could be done in Town. Matt indicated in the alternative, he could bring it to a processing facility or a gravel pit where that mixing can take place.

Mike Peverett from Civil Consultants wanted to discuss the process of how they got to this point. He stated the Town Manager issued a Memo to the Planning Board which stated that rock crushing, in his opinion, is allowed and the accessory use of processing off-site material was not allowed. Mike stated the Town Manager had no justification for that but simply said it was not allowed. Mike disagreed with his opinion and they discussed it and then it was presented to the Town Attorney. Mike indicated the Town Attorney wrote a letter dated April 19<sup>th</sup> that does not anywhere state it is not allowed but gives the Board guidance on how to make the decision. He stated what he asserted at the last meeting was that it is not the Town Manager's role to decide whether it is an acceptable accessory use or not, but rather the Planning Board's role. Mike feels that the Planning Board needs to now make a determination of whether this meets an accessory use. Mike stated that they have brought their attorney to tonight's meeting to address the ordinance and give their side of how they feel it does in fact meet the accessory use. Mike indicated he has not seen anything on the record to imply that the Town's attorney stated it was not allowed. Matt LeConte stated that, through consultations, he, as the Code Enforcement Officer, an enforcing the Code of Ordinances, he felt it is not allowed. Geoff Aleve reiterated that he felt the Town's attorney ultimately gave the Board the opportunity to review and since they have the applicant's attorney here tonight, they would like to be able to have him explain their thought process on that.

Matt LeConte stated that if a Planning Board approves a use, aspect or project that does not fall in line with the ordinance, that is a conflict. Chairman Morse stated that he believes the ordinance allows it. Mike Peverett stated that Matt asked for a legal opinion from the Town Attorney and the Town Attorney did not state that it is not an accessory but gave guidance to the Board to make the determination and it is the Board's role to determine what meets the ordinance and what does not.

Attorney Michael Traister stated he represents Nick Curtis. Anne Whitten asked what the legal definition of an accessory use is. Attorney Traister directed the Board to the Town's Ordinance definition of an accessory use which is "*a use that is incidental and subordinate to the principal use and when aggregated shall not subordinate the principal use*" Attorney Traister stated that it is incidental and subordinate to the principal use, which in this case the mineral extraction. He stated the law court has further given the Board guidance to how to reach a conclusion as to what is an accessory use. The case law from the law court says that the tests and factors are as follows: 1)



whether the use is dependent on the principal use; 2) has a reasonable relationship to that primary use and 3) is commonly understood or related to the principal use. Attorney Traister asked is this bringing in a material to mix to meet standard dependent on the principal use? Yes clearly it is, he is pulling out material and mixing it, it is not a separate unrelated use. Is there a reasonable relationship to the use? Again, yes, it is required by regulation and clearly related. Is it understood to be related to the principal use? Yes, this goes on in pits, extraction sites or operations regularly. He does not think it is common for an operator such as Mr. Curtis to have to acquire a separate site simply to mix other materials. Attorney Traister asked the Board if the ordinance allowed a use such as a dairy farm, are we really saying that we can extract the milk from the cow, but we cannot process that milk or add whatever ingredients the government tells us must be added to sell that milk on the market? He also gave the example of a maple syrup farm or operation, asking the same types of questions. He feels that this should absolutely be allowed, not only as an accessory use but the ordinance also allows this use as a similar use. The Ordinance does not say that the only use allowed is the specifically expressed use set forth in the zone but provides flexibility and latitude so that there is the ability to fully accomplish that expressly permitted use.

Anne Whitten touched on Attorney Traister's comments regarding dairy farms and maple syrup operations and how they would have to follow government laws in regards to what is required and asked what government laws are there that state the applicant in this case, has to add these materials to his mineral extraction operation. Attorney Traister's understanding is that there is a national code and regulation, as Geoff Alea explained, that certain products have to have certain composition in order to be used. Anne Whitten read the definition of a mineral extraction which is "*crushing and separating ore into valuable substances or waste by any of a variety of techniques*". Anne asked if just going for a mineral extraction permit, is to just extract the mineral. David Ballard stated yes, that is correct but are we going to allow the second piece to that which is the secondary use to process the material to make it sellable. Chairman Morse stated he does not see what the problem is with bringing in materials that he needs to make the product sellable. David Ballard agreed and stated the Board should be concentrating on perhaps the hours of operation, noise levels, dust, etc. Chairman Morse stated those could be stipulations and conditions.

Mark Cahoon stated this process was started with just a permit for mineral extraction and as the meetings went out and the community came with their opinions and concerns, and now it has expanded to bringing in materials to mix and crush. He stated that the Board agreed to mineral extraction but it has snowballed since then. Mike Peverett stated that rather than sneak this in as part of the original permit, they wanted full disclosure, due to neighbor concerns. They do not want to see trucks coming in loaded and not know what was going on. He stated that is why this was all specifically brought up. Mike deferred to Dwayne Morin's Memo to the Board dated 12/09/21 which he stated as follows:

*"I offer the following information for the Planning Board's consideration; crushing operations have existed in other Earth Removal projects within the Town of*

*North Berwick - Gerrish Pit, Putnam Pit and Quint Pit. This would be considered as a use similar to a conditional use as the material is still being removed from that particular site and not material being processed from an off-site source.*

Geoff Alevea stated that if we look back at the delay of why we stopped coming to the Board in April until now, it is because of the delay in getting the response from Inland Fisheries & Wildlife. Once they had that ball rolling and waiting for that, as Mike stated, it was clear to be able to have everything on the table and offer full disclosure. Every other town that surrounds North Berwick allows bringing in material to mix and make product to meet DOT specs, in mineral extraction and gravel pits. He stated that DEP allows 5 to 10 acres of open area and North Berwick allows only 2 acres so there is a lot of control from the Town. David Ballard stated he had two points which were: 1) the original application stated the proposed use was a gravel pit and the projected description was the development of mineral extraction and 2) he also stated that he believes there is nothing prohibiting the crushing process in North Berwick. Matt stated what Dwayne indicated in his memo was that there has never been an approved importation of materials. Matt stated that the Board needs to vote on the remaining items and if they cannot make a decision on an item, then they need to table it to seek more guidance.

Mike Peverett stated the previous planning consultant was advised to come up with something to present regarding the Sunday hours but he did not do that. Geoff Alevea stated he came up with the note on the plan, after discussions with Matt, that there has to be notification and it has to be a state, federal or local authority that authorizes the Sunday operation and that the Town would be notified of that occurrence. Matt indicated that maybe the Board needs some time to deliberate themselves on each of the items. Chairman Morse stated that if they feel they need another meeting to discuss everything, they could. Mark Cahoon stated he would like to get this all done tonight if possible.

Chairman Morse inquired about the reclaim proposal. Geoff Alevea stated they have no issues with what the Town has proposed which is a letter of credit for the reclamation cost. Chairman Morse felt it was too much money. The performance guarantee set by the Town is \$14,413.00 to reclaim the pit. Matt stated this recommendation was from Dwayne and Underwood as well, through their discussions.

Mike Peverett read into the record a portion the letter dated April 19, 2022 from Attorney Amy K. Tchao of Drummond/Woodsum as follows:

*Dear Dwayne:*

*This letter is in response to a set of questions posed by CEO Matt LeConte in relation to an ongoing application for a conditional use permit (the "Application") for an earth moving/mineral extraction use on April 1, 2022. Specifically, we understand that the applicant, Curtis Earthworks (the "Applicant"), is seeking to amend its Application to include two additional uses that the Applicant frames as either accessory uses or uses similar to the earth moving/mineral extraction use: (1) to utilize a crusher to crush material that is being excavated, and (2) to import off-site gravel and/or earthen materials to the site to process into mix with on-site materials for manufacture and use in off-site projects. As an initial matter, it is the Planning Board's job to apply the facts presented in any application to the relevant legal standards and*

requirements imposed by local ordinance and state statute. Ultimately, questions of whether a conditional use permit application does or does not meet the requirements imposed by town ordinance must be resolved by the Planning Board. At all times, the burden of proof is on the Applicant to demonstrate that the Application comports with the Town ordinance. We note that under the Town's Zoning Ordinance ("Ordinance"), "mineral extraction" is defined as "any operation within any twelve (12) month period which removes more than one hundred (100) cubic yards of soil, topsoil, loam, sand, gravel, clay, rock, peat, or other like material from its natural location and to transport the product removed [sic] away from the extraction site." Ordinance, Section 3.2. The term "Earth Removal," the defined term contained in the Town's Land Use Table, is identical to the definition of "mineral extraction," except that it applies to the removal of more than 25 cubic yards (instead of 100 cubic yards under the "mineral extraction" definition). "Accessory structure or use" is defined as a use or structure that is incidental and subordinate to the principal use or structure. Accessory uses, when aggregated shall not subordinate the principal use of the lot. A deck or similar extension of the principal structure or a garage attached to the principal structure by a roof of a common wall is considered part of the principal structure." Rock crushing and mineral importation and processing are not defined or discussed in the Ordinance. While "uses similar to conditional uses" are allowed as conditional uses in the Town's Zoning Ordinance Land Use Tables, that term is also not defined in the Ordinance.

With this in mind, the questions we received were: (1) Can crushing activities be permitted as part of the "mineral extraction" conditional use application either as an integral part of the principal mineral extraction use or as an accessory use? ; and (2) Can the importation of off-site materials for processing/crushing on-site be permitted as part of the conditional use application either as a use similar to mineral extraction or an accessory use?

## DISCUSSION

1. Can crushing activities be permitted as part of the Applicant's conditional use application for a mineral extraction operation?

It appears that the Planning Board could determine one of four things as to the proposed rock crushing use: (1) that it is permitted as an integral part of the permitted mineral extraction use; (2) that rock crushing is an accessory use to the principal mineral extraction use; (3) that rock crushing is a use similar to mineral extraction; or (4) that rock crushing is none of these things and therefore is unpermitted.

The Law Court's decision in *Lane Construction v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, may be instructive in this case, as it speaks closely to the question whether and in what circumstances rock crushing is an integral part of a mineral extraction operation or could be permitted as an accessory use to mineral extraction. In that case, the planning board was reviewing a gravel extraction use that would also include rock crushing. Like here, that town defined mineral extraction, but that definition did not include rock crushing, nor was that term defined or referenced elsewhere in the ordinance. While the planning board did not find that rock crushing was accessory to the mineral extraction use, the board did determine that the two uses went "hand in hand" and therefore that rock crushing should be treated as part of the principal mineral extraction use. The Lane Court upheld the planning board's factual finding despite there being no distinction in the town's ordinance between a principal use and a use "integral" to that principal use, because the planning board found that rock crushing and

*mineral extraction in a hard rock quarry were not distinct processes, “but rather that rock crushing [was] an integral part of mineral extraction[,]” and therefore rock crushing was allowed as part of the mineral extraction use. Id. ¶ 15. The Law Court also noted that “the determination of whether a particular activity—rock crushing—is part of a more comprehensive use—quarrying—is greatly informed by the relevant factual determination made by the Planning Board.” Id. ¶ 13. The upshot of the Law Court’s decision in Lane is that the determination as to whether rock crushing is a distinct use, a use integral to mineral extraction, or an accessory use in a particular situation depends on the factual determinations made by the Planning Board in relation to the Town’s applicable ordinances; the case does not lay down a rule that will apply in all factual scenarios. The Law Court case also did not address whether the processing of imported materials could similarly be treated as an integral part of the mineral extraction operation.*

*a. Integral Uses - Here, as in Lane, the Planning Board may need to look at the nature of the mineral extraction operation proposed here in order to determine whether rock crushing is part-and-parcel of principal mineral extraction use. In Lane, the mineral extraction operation involved a hard rock quarry where presumably a rock crusher would be used with some frequency to process on-site materials. Here, the Applicant specifically proposes mineral extraction of aggregate materials for construction purposes, i.e., sand and gravel primarily, and the amount of rock present on-site that would need to be processed/crushed is unclear. The Applicant notes in its application materials that the proposed crushing activity would be “required to reduce the size of the rock in the unprocessed material to provide gravel materials that meet certain [regulatory] requirements.” If, based on its review of the record, the Planning Board agrees with this assessment of the need for crushing as an integral part of the extraction operation, then that would likely be sufficient to determine that the proposed rock crushing is integral to the principal mineral extraction use and therefore falls within the scope of the conditional use permit.*

*b. Accessory Uses- Under the Town’s ordinance the Planning Board must determine whether a proposed accessory use “is incidental and subordinate to the principal use.” Any accessory uses, when aggregated, must also not “subordinate the principal use.” In making this accessory use determination, the Law Court has laid out the factors that a fact-finder might consider for this question, including “the size of the land area involved, the nature of the primary use, the use made of the adjacent lots by neighbors, the economic structure of the area and whether similar uses or structures exist in the neighborhood on an accessory basis.”*

David Ballard felt he could stop reading there and indicated that if we follow what they did, they count it as part of the principal use, not even accessory. Mark Cahoon wanted to hear what the Town Attorney’s opinion and recommendation was for the record.

The rest of the letter reads as follows:

*Town of Shapleigh v. Shikles, 427 A.2d 460, 465 (Me. 1981). Discussing language virtually identical to the Town’s, that court noted that the essence of an accessory use or structure by definition admits to a use or structure which is dependent on or pertains to a principal use or main structure, having a reasonable relationship with the primary use or structure and by custom being commonly, habitually and by long practice established as reasonably associated with the primary use or structure. Id.*



*The Planning Board may therefore consider whether rock crushing is “dependent on” or “pertains to” the mineral extraction use, and whether these uses are customarily associated. One factor the Planning Board may wish to consider is whether the material to be processed or crushed is from on-site or off-site; it would seem that a closer relationship to the principal extraction use could be established if the material being processed is from on-site. The Planning Board may also wish to consider the relative amount of land to be utilized for each use, and/or whether similar operations in the area utilize such uses. These are questions of fact whose resolution must rest with the Planning Board, and the Applicant bears the burden in demonstrating that the proposed use would in fact be accessory. Here, the record appears to support that rock crushing at least “pertains to” mineral extraction, insofar as the crushing is a required step for the larger excavated materials to be made marketable. The letter provided to our office also indicates that these crushing uses are utilized in other nearby locations engaging in this same kind of gravel extraction activity. What would remain are factual determinations as to whether the proposed rock crushing would be subordinate to the primary extraction use, based on the relative size and scale of the proposed operations. For example, if the site contained only a small quantity of rocks that required crushing relative to the total extracted material and the need for crushing was only intermittent, these factors may support a finding that the crushing use is accessory. As discussed in more detail below, the Planning Board may alternatively consider whether rock crushing is a use similar to a conditional use (i.e., mineral extraction). The analysis of that question would be the same as described below. 2. Can the importation of off-site materials for processing be treated as an accessory use or a use similar to mineral extraction?*

*Based on the materials presented, the Applicant also seeks to import materials on-site for mixing with on-site materials to manufacture different materials than would be made possible by simply crushing the on-site rock into smaller components. Again, the question here would be whether this could be treated as integral to the mineral extraction use, accessory to that use, or “similar to” that use. If it is none of these things, then it would not be a permissible conditional use.*

*a. Integral Uses Here, there appears to be less support for the proposition that the proposed use is “integral” to mineral extraction. Unlike in Lane, this proposed activity would require the importation and use of unextracted, off-site materials. The Planning Board would need to make a factual determination that this proposed use is integral or essential to the on-site extraction process. The Applicant has not appeared to assert that this is the case. b. Accessory Uses*

*The analysis above as to the determination of an accessory use would apply here as well: does the use “pertain” to mineral extraction, or is the production of secondary materials too far removed from the extraction process; is this type of use customarily associated with a gravel extraction use; is the proposed use, along with any other accessory use effectively subordinating the principal extraction use? Here, it is unclear what proportion of the proposed processing would be of on-site versus off-site materials. To the extent that the Planning Board determines that on-site rock crushing is an integral use, the Board would need to determine how much on-site crushing/processing is anticipated, versus what amount of processing would be required for any imported material. If the off-site processing effectively subsumes the principal on-site processing use, then it could not be treated as an accessory use. Therefore, before the Planning Board makes a determination on whether the importation of off-site materials for crushing/processing is a permitted accessory use to the extraction operation, it would be reasonable for the Planning Board to require the Applicant to provide evidence to the Board as to the quantity of on-site material that will likely need to be processed in proportion to the*



quantity of off-site material that the Applicant wishes to bring on-site for processing. Ultimately, depending on the evidence, the Board could also impose conditions of approval to ensure that only a certain proportion of processing may come from imported material. In any event, to be treated as an accessory use, the Applicant would need to demonstrate that this proposed use is in fact incidental to the proposed principal use. c. *Similar Uses* If the Planning Board determines that the use is neither integral nor accessory, the final question would be whether it is a “similar” use. Regarding this “similar use” determination, the Law Court has noted that a key factor is whether the proposed use “is similar to and no more objectionable than the uses expressly permitted in the zone.” *Your Home, Inc. v. City of Portland*, 432 A.2d 1250, 1262 (Me. 1981). In determining whether the importing and processing of materials is similar to another conditional use allowed in the zone, the Planning Board may therefore wish to consider whether this activity would have a greater intensity or impact on the site or surrounding area than the specifically allowed use. Again, this is a factual determination for the Planning Board to make based on the information available to the Board, and the burden remains on the Applicant. The Board may consider, for example, whether the importation of materials from off-site would create a greater amount of traffic or a greater intensity of traffic than a simple extraction use, for example, whether the number of trucks laden with materials would be greater than an extraction use, since materials would now be transported in two directions—in and out—rather than out only. The Planning Board may also consider whether this use would create more dust, noise, or other undesirable effects than the mineral extraction use alone would create. If the answer is that the relative negative impacts would be greater than those of mineral extraction alone, then the Planning Board may determine that this is not in fact a “similar use” but a separate principal use that is not permitted in this district. We are happy to discuss any of the above in more detail as needed, or to answer any additional questions as they may arise.

*Sincerely,*

*Amy K. Tchao*

David Ballard motioned that regarding Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051, the hours of operation are Monday through Friday, 7:00 a.m. to 6:00 p.m.; Saturday 7:00 to 3:00 p.m. and Sunday there are no hours as it is for emergency only and the Town will be notified for emergency Sunday use for federal, state or local authority only and the Code Enforcement Officer will be notified of that request. The crushing operations will be Monday through Friday 7:00 a.m. to 5:00 p.m. on an as-needed basis. Mark Cahoon seconded the motion. VOTE: 5-0

Chairman Morse then stated a motion was in order for the applicant to bring in materials for the crushing and processing of materials. David Ballard believes the use of the other materials is already in the operation of extraction and does not feel a motion is necessary. Anne Whitten feels a motion is necessary.

David Ballard motioned that regarding Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051, the extraction, crushing, processing of on-site and off-site materials is allowed: Mark Cahoon seconded the motion. VOTE: 4-1

Chairman Morse wanted to discuss the performance guarantee and feels \$14,000 an acre is entirely too much money. Nick Curtis stated the loom has to stay there anyway and it is only 2 acres open at a time. David Ballard asked if this was paid ahead or if it is a bond. Chairman Morse stated it is a letter of credit from the applicant's bank and it appears on his credit report. Geoff Aleva stated the large pit is 7.8 acres with only 2 acres being able to be open at a time. The Town wants that value per acre x 7.8 for the whole pit area up front. Geoff's interpretation by looking at other bond requirements for mineral extraction pits, bonds are based on the amount of open area not the whole acreage. Anne Whitten asked what harm is it to set it at \$14,000.00 like recommended? Mike Peverett stated it is a knock off his credit. It will take \$150,000.00 off of his available credit line for his business. Chairman Morse feels \$9,000 per acre is sufficient. Mike Peverett stated, to protect the public, they are making the assumption that Nick Curtis is going to intentionally completely ignore the rules and excavate the entire pit without any reclamation. It is important to note that the Town and the Code Enforcement Officer has some level of responsibility to make sure that he does not do that. Geoff Aleva felt it would be best if the Board made a motion on what they want the reclamation amount to be per acre so that can be a note on the plan.

Anne Whitten motioned that regarding Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051, the reclaim gravel excavation for this project be set at \$167,200.00. David Ballard seconded the motion. Motion failed.

Mark Cahoon motioned that regarding Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051, the reclamation guarantee be set at \$9,000 per acre for a total of \$72,000.00 for the first phase. Scott Carpenter seconded the motion. VOTE: 4-1

Mark Cahoon motioned that regarding Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051, the reclamation guarantee be set at \$10,000 per acre for a total of \$40,000.00 for the first phase. Scott Carpenter seconded the motion. VOTE: 4-1

Mike Peverett feels they have done their due diligence to get a response from IF&W. Anne Whitten stated that Matt has one last call out to them and was advised they would get a response from them so she would like to see that letter. Mike asked if they could make that upcoming letter from IF&W a condition of approval to not hold up on the approval of the project. If that letter has something that drastically changes the project, then we could revisit this.

Anne Whiten motioned that we approve the application for Curtis Sand and Gravel, LLC, Stub Marsh Road – Map 009, Lot 039 & 051 for a Conditional Use Permit for Mineral Extraction use w/ crushing and importation of material for processing on the condition that there is no adverse response received within 30 days from IF&W. David Ballard seconded the motion. VOTE: 4-1

**Reminders: Next Planning Board Meeting – February 9, 2023 - 6:30 P.M.**

4. Other Business: N/A

5. Adjournment:

Mark Cahoon motioned to adjourn the meeting at 9:55 p.m. David Ballard seconded the motion. VOTE: 5-0

Matthew LeConte  
Planning Coordinator

Respectively submitted,  
Jennifer Berard, Stenographer

Chairman Jon Morse

Anne Whitten

David Ballard

Mark Cahoon

Scott Carpenter

Justin Perry