

NORTH BERWICK PLANNING BOARD

MINUTES OF PLANNING BOARD OCTOBER 26, 2023

Present: Chairman Jon Morse, Anne Whitten David Ballard, Mark Cahoon, Jack Olea, Justin Perry

Also Present: Matt LeConte, Attorney Ben Plante, Mark Reed, Rebecca Reed, Neil Rapoza, Michael Traiter-Murray, Michael Peverett, Nick Curtis, Don Davis, Kathryn Harrison, Lincoln Harrison, Joe Mavodones, Jackie Garafolo, Gina Plachaucz, John G., Chris Plachaucz, Jerry, Klausman, Cheryl Klausman, Scott D., Jane D., Susan Pike, Steve Molello, Jack Cooper, Steve Morse, P. Murray, Jo K., Maurice Dolbac, Steve Young, Barry Stevens, Eric Regan, Cheryl Hoffman, Brandy McTaggart, Karen Veit, S. Regan

1. Call to Order:

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

2. Review Previous Minutes: October 12, 2023

David Ballard motioned to approve the Minutes of October 12, 2023 as amended. Anne Whitten seconded the motion. VOTE: 6-0

Chairman Morse asked Jack Olea and Justin Perry to recuse themselves and take a seat with members of public in relation to Curtis Sand and Gravel, LLC.

Current Business:

3. Public Hearing:

Re-review amended application from January 26, 2023 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 and including East Pit consisting of 9.5 Acres and West Pit consisting of 4.2 Acres.

Neil Rapoza of Civil Consultants who is appearing on behalf of Curtis Sand and Gravel, LLC. He stated that since he was last in front of the Board, they have engaged with Inland Fisheries & Wildlife to come up with the best approach to handle the one last remaining condition and those changes are now reflected in the Plan. The only change to

the plan since the last review was the reference to the Blanding turtle testing site findings and they have provided all correspondence with Inland Fisheries & Wildlife.

Chairman Morse opened the Public Hearing at 6:38 p.m.

Jo Kilborn of 439 Bauneg Beg Road stated she feels that gravel importing and exporting on that road would create a lot of disturbance for residents and would disturb the neighborhood.

Sue Pike of 165 Little River Road read a letter she prepared marked as Exhibit #1 held in the file.

Jack Olea stated that Derek York, who is a biologist for the Maine Fish & Wildlife, prepared a report and in 2022 he received a significant grant and Jack puts a lot of weight on his opinion and recommendations.

Joe Mavodones, who is the attorney representing Lincoln and Kathryn Harrison stated he has submitted a series of letters over the last two years and wants to address three key topics. The first issue is the protection of the Blanding turtle and urges the Board to enforce the 250-foot buffer. The second issue is the proposed accessory uses of this project and the third topic is additional conditions that they think should be part of this permit. In regards the Blanding turtles, there is no dispute that they are an endangered species and need to be protected. He stated that a condition needs to be put in place to enforce the 250-foot buffer. In regards to the accessory uses, any importation of material is contradictory to the zoning ordinance. He references section 5.2.2 of the ordinance and stated it does not discuss crushing and that should not be allowed. He also stated that the Harrisons, who are abutters of the location, feel the proposed hours are overbroad and unnecessary. They do not feel early mornings or weekends should be allowed and they feel the bond amount should be more and there should only be one bond.

Gina Plachanez, who lives on Dillingham Road, and agrees with everything that Sue Pike and Attorney Mavodones said. She also stated how truly disappointing it is that the Board did not respect the hours they suggested and allowed Mr. Curtis to work more than 40 hours per week. She feels that the Board is not listening to the residents.

Cheryl Hoffman stated the land should be placed under a conservation easement and that a board member from the Great Works Regional Land Trust has tried twice to contact the owner through his email and would like to work with him to help protect this land so that his children can be proud that he saved the wetlands and turtles. She also stated that this site is at the end of road of single-family homes and wants the Board to consider that.

Shannon Regan who lives on Dillingham Road stated she is concerned about Curtis obeying the rules imposed on him and wants to know who is going to police that and feels the neighbors should not have to do that.

Brandy McTaggart who lives on 81 Abbott Road stated she and her husband moved to that location because they wanted an unspoiled piece of land to live, hunt and fish on. She stated she is homeschooling her children there and feels listening to the gravel pit noise

will affect her children's education. She is also vehemently against the hours proposed and asked that they be curtailed

Karen Veit stated that she lives on Bauneg Beg Road and indicated she was one of those who blazed the new trail and stated the noise bounces off the mountain and the time and money the town has invested will be spoiled by the noise.

Jim and Joy McIntyre live on 21 Abbott and moved there three years ago from New Jersey. He stated he feels bad for Mr. Curtis who bought this land expecting to do whatever he needed to do but this project does affect the local community. He stated that he leaves for work very early and feels the trucks will create more potholes. He feels that everyone needs to work together.

Justin Perry, who lives at 661 Beech Ridge Road stated that his two big issues regarding this project are the hours, which he feels seem greatly inconsiderate to the members of the community and he feels that it has turned from a gravel pit to now a manufacturing site with the importation of materials. He feels that does not seem appropriate for the area or in line with the ordinance and bringing offsite material in to create a new product to sell is basically manufacturing and that is not allowed in the farm and forest zone. He would encourage the Board to consider all of this.

Michael Traister, who is Nick Curtis' attorney, was before the Board back in January when the approval was granted subject to conditions. He stated that Nick started this process two years ago and he would like to remind the Board that Geoff Aleva tried very hard with both DEP and IFNW for 8 or 9 months trying to get an answer as to what IFNW's view as to the Blanding turtles and was unable to get a response. Geoff did submit his email chains showing all efforts he made. He was told along the way that there were no issues with the turtles as far as DEP was concerned. When they did not get a response, they came back before the Board and on the day of the meeting, was told that a letter will be received. They did discuss the hours and crushing and approval was given subject to getting a non-adverse letter from IFNW within 30 days. When the letter was received there were some comments made but not requirements imposed. Attorney Traister indicated that as we sit here today, there is no additional permit required from DEP or from IFNW with respect to the turtles. All state and federal permits that Nick Curtis is required to obtain, have been obtained. The letter made a comment to avoid disturbance within 250 feet to an extent practicable and that is not a setback requirement. He also stated that after the February letter was received, Geoff Aleva had extensive back and forth with Mr. Lindsay from IFNW and that is what resulted in the final statement in the April letter. The only documented location on the project site where a turtle has been found is within the wetland that does have a 250-foot setback applied. He states that Mr. York has basically stated that wetlands 1 and 3, although turtles have not actually been identified there, could potentially serve as habitat. He also is not imposing any requirements. Attorney Traister stated that IFNW has no authority to impose any requirements and feels that is critical to understand. He also wants to make sure the Board is aware that in Mr. Aleva's submission bringing this matter back before the Board, he included a letter from his office addressing the Blanding turtle issue and the letter from Mr. Lindsay.

Attorney Traister stated that if the Board looks at Attorney Chow's letter, she advised the Board to reopen the record and hold a public hearing on the new issues received from IFNW and is not advising the Board that this is a complete do-over. The Board has already decided everything including the crushing, hours, importation of materials and the Blanding turtle issues do not impact any of those issues. The Board needs to apply the ordinance criteria and when looking there, there is no criteria that the Board is authorized to address that have anything to do with endangered species protection. Attorney Traister also stated that Attorney Mavodones' 18-page letter references no ordinance criteria cited by them on which they argue that the Board can impose restrictions on endangered species and they are silent on that. He would suggest that is because there is none.

With respect to accessory uses, he would direct the Board to the Town attorney's letter which states the Board did have authority to approve uses and advised the Board that the proposed use is integral to the primary use. He references the definition of accessory use as being 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.

He stated that as far as they are concerned, there are no issues and this has been a long process for Mr. Curtis and he has cooperated, addressed every issue, provided every piece of information requested and that it is time to grant final approval to the project and request that the Board do that. He indicated that suggested additional conditions of approval should not be granted and they are not unlimited and has to be something that furthers an ordinance criteria and he indicated none exist.

Jon, who lives at 315 Bauneg Beg Road stated the Board has a difficult decision and have to consider the people concerned and bothered by this project.

Jack Cooper, who lives at 504 Little River Road in Berwick, stated that his opposition is that he has lived in the area for over 40 years and see the loss of habitat and loss of access as far as hiking and hunting on behalf of himself and other sportsmen.

Jack Olea wanted to point out that Attorney Traister stated that the biologist from IFNW does not have the authority to impose anything but Jack feels just because he is not able does not mean he wouldn't want to.

Chairman Morse closed the Public Hearing at 7:30 p.m.

Attorney Plante stated that a good place for him to start is where things stand procedurally. He stated that in January, the Board orally voted to approve the Applicant's project and the Board conditioned that approval on there being no adverse response received within 30 days from IFNW. Not long after the Board's oral vote and within that 30 days, the Board did in fact receive a letter from IFNW in which they recommended that the Applicant limit disturbance around Wetlands 1 and 3 to a distance of 250 feet from the edge of the wetland. He stated that after IFNW's letter was received, Attorney Chow wrote a letter to the Board opining that the Board's condition of approval was not

met because IFNW did in fact issue an adverse response. He indicated that the Board's vote never became final. Attorney Plante agrees with Attorney's Chow's assessment and ultimately where that leaves things procedurally is that this application is still pending before the Board and no final decision has been reached. He feels one important thing for the Board to keep in mind is that Planning Boards and other agencies have the inherent power to reconsider actions previously taken.

Attorney Plante indicated that the threshold issue that the Board must address is IFNW's February 10th and April 13th letters and more specifically, whether the Board feels whether the Applicant has adequately addressed IFNW's recommendations and concerns or whether those recommendations and concerns have not been adequately addressed.

Attorney Plante's perspective is whether or not IFNW has the authority to impose this 250-foot buffer condition on the Applicant or not, the question really comes down to whether the Board has the authority to impose it consistent with IFNW's recommendation. He stated it is his opinion that the Board does have the authority to impose a condition requiring the applicant to implement the 250-foot buffer around Wetlands 1 and 3 to ensure that this proposal does not adversely impact or impair an endangered species that has been identified in the area or on this site. He does agree with Attorney Traister that the Board's authority to impose conditions of approval is not unlimited and any conditions must be reasonable and directly related to the governing standards.

Attorney Plante references 6.9.6 of the Zoning Ordinance which are factors applicable to conditional uses. Section b. states "*Before any conditional use permit may be issued, the Planning Board shall make written findings certifying compliance with the relevant Performance Standards in Article 5 of this Ordinance*". Attorney Plante also references 5.2.2 of the Zoning Ordinance which relates to Earth Material Removal and directs the Board to the language in a. *Filling, grading, lagooning, dredging, excavation, processing and storage of soil, earth, loam, sand, gravel, rock, peat or any other mineral or organic deposits, which would result in erosion, sedimentation, or impairment of water quality or fish and aquatic life, is prohibited.* Attorney Plante stated he feels that a broad reading of aquatic life would include a turtle.

Attorney Plante indicated that it is up to the Board to look at York's report and the recommendations of IFNW and decide whether or not it is appropriate to require the Applicant to implement a buffer around these wetlands or not. That would be a starting point for the Board and addressing that issue first will dictate where things go from there. If the board does decide that it wants to impose a 250-foot buffer around these wetlands, that will drastically change the project to such an extent that the Board has to reassess the approval standards that it previously went through.

Chairman Morse feels that if a 250-foot buffer were to be put on Wetlands 1 and 3, the turtles are still going to travel where they want and a 250-foot buffer would require Mr. Curtis to have to redesign his whole project. He feels a buffer is not going to protect these turtles. The only thing that is going to protect the turtles is not allowing the gravel pit which is not going to happen.

Anne Whitten stated that she feels if they put in the 250-foot buffers, it pretty much takes away everything that Mr. Curtis wants to do and everyone in the audience wants to stop him from doing what he wants to do. She feels this is not Pike but a small gravel pit and he can only work out of one gravel pit at a time and when it is done, he has to close it up. She stated she feels he is not going to be there for 50 years and he is not going to be working there 40 hours a week because the gravel pit is too small. Anne stated that this is putting the Board between a rock and a hard place. She stated we have to take the face value of everyone in this room and taking Mr. Curtis on face value, she feels he wants to do everything right and does not want to harm the people but simply wants to use his land as a gravel pit as allowed by the Town. She states that this decision cannot be made tonight and does really not know where to go with this.

Mark Cahoon stated that the Board's requirement is that he work one acre at a time and when he starts his third acre, he has to start fixing up the acreage that has been disturbed. He feels that the turtles are not the issue. As far as the residents thinking that road only belongs to them is not the case and his land is not their land and feels he should be able to have his pit there. He also personally feels the buffer already in place is sufficient.

Matt LeConte stated that Nick Curtis is the owner of the property and this is not about just him. He could take that land and sell it as soon as he gets approval and this is no different than a subdivision before you with a great applicant and a great engineer as it could be sold the next day to someone else. Matt also stated that Geoff Aleva did spend numerous hours trying to reach out to IFNW because the Board requested a statement from them. This has been going on for more than two years and the first Public Hearing was October 14, 2021 and if the Board needs to take a little more time to digest all of this information that is important but the Board has to think about the Town, the town people, the owner, any future owner.

David Ballard's opinion is that he does not see that this is allowable with the way the ordinance is written. Anne Whitten stated that if you take your heart out of it and look at the actual ordinance, it says that we have to protect aquatic life so it would not be allowed.

Michael Peverett, from Civil Consultants, asked the Board to look at the last letter from Scott Linsay of April 13, 2023. He references the second paragraph which states: *"It is my recommendation, though not a requirement, that ground disturbance be limited as much as practicable within 250 feet of Wetland 1 and 3 referenced in attached report. This will help maintain the habitat of these wetlands such that negative impact on a known population of endangered Blandings turtles will be minimized. During some follow up discussion with the Applicant's consultant, revisions have been made to the plan addressing these concerns. As indicated in the Plan's Mineral Extraction Note 22 the work will be phased with the east pit worked and restored before work commences on the west pit. This will minimize the extent of ground disturbance at any one time. Also, any observed evidence of potential turtle nesting will be marked and flagged and MDIFW staff will be notified. This will limit potential disturbance of a turtle nest of species of turtle will be difficult to determine. In addition, I have learned that the permissible open pit area per town standards is limited to two acres which is less than the DEP standard. The applicant would still bear some responsibility under the Maine Endangered Species*

Act for any Blandings or spotted turtles which are killed during the operation of the gravel pit if this recommendation to avoid take is not complied with”.

Michael Peverett stated his stance is that based on the correspondence with IFNW, they have addressed it and this letter is Mr. Lindsay’s acknowledgement that they have addressed these concerns. He was in possession of these plans when he wrote that letter.

Attorney Plante stated it is up to the Board to make their own judgment as to what is being said in these letters and just because inconsistent conclusions could be drawn from this evidence does not mean that the Board’s interpretation is wrong. He thinks that the April 13th letter may make what was ultimately recommended and the February 10th letter a little less clear and to some extent it seems he is walking back what was previously said but the facts still remain that the recommendation is there and he certainly acknowledged what the applicant was proposing is a way to address some of the issues.

Mike Peverett stated that is not what it says. Attorney Plante stated that as a point of order, the Chair has made it pretty clear that he will invite you to speak when he wants you to and does not believe this is a free-for-all while the Board is discussing the issue. Nick Curtis interrupted saying that he’s up there swinging it one way. Chairman Morse stated he let them talk out of turn and he shouldn’t have but the Board and their attorney should be the only ones talking. Attorney Plante stated his job is not to influence the Board one way or the other but to advise what is legally permissible and defensible.

David Ballard feels that he couldn’t let it go forward until he sees a plan that works toward what was recommended. Matt LeConte does not feel a decision should be made tonight and everything needs to be taken into consideration. Mark Cahoon feels they should look at what a plan looks like showing a 250-foot buffer.

Neil Rapoza stated that the recommendation is limited disturbance and requests a buffer over the larger wetland but does not mention a buffer or set back in the smaller wetlands. Chairman Morse asked what does a limited disturbance look like in a gravel pit. The front of the pit would be worked first so the remaining acres would be disturbed. The two acres could be within 10 feet of the wetland and have limited disturbance. Chairman Morse stated that if a large portion of wetlands are not being disturbed, a large buffer would not be needed.

Matt LeConte suggested that the Board give the applicant exactly what the Board would like to see on the revised plan or any variations so the Board can ultimately make a decision.

Mike Peverett stated the letter says limited disturbance and does not say no disturbance.

Anne Whitten motioned to table this application until December 14, 2023 until the applicant comes back with new plan to include the 250-foot buffer and the incremental staging of excavation plans. David Ballard seconded the motion. VOTE: 4-0

Other Business:

Adjournment:

Mark Cahoon motioned to adjourn the meeting at 9:25 p.m. Anne Whitten seconded the motion. VOTE: 4-0

Matthew LeConte
Planning Coordinator

Respectively submitted,
Jennifer Berard, Stenographer

Chairman Jon Morse

Anne Whitten

David Ballard

Mark Cahoon

Justin Perry

Jack Olea