Westmoreland Zoning Board of adjustment
Minutes of July 24, 2013
These minutes were approved by the board on August 21, 2013

The meeting convened at 6:00 pm at the Westmoreland Town Hall. All Board members and alternates were present: Chairman, Peter Remy; Barry Shonbeck; Brian Merry; Russ Huntley; Nancy Ranson; Ernie Perham; Bill Campbell. Only the five regular members voted on the motions but the alternate members participated in the discussions. Bill Campbell had to leave the hearing early to attend another meeting.

The minutes of June 19, 2013 were reviewed by the Board members.
A comment by Patricia Rodrigues (page 14), was corrected by her to read, "Ms. Rodrigues said that the elder Mr. Graves bought the property , which became a sand and gravel operation, and cut through the railroad embankment and ignored the legal cut which was a cattle crossing."
Mr. Shonbeck made a motion to approve the minutes, as corrected, and Mrs. Ranson seconded the motion. All voted in favor.

The minutes of July 17, 2013 were reviewed by the Board members. Board member, Nancy Ranson, corrected a comment made by her to read, "The spirit of the ordinance is not to have NO sign. She quoted, "A business with no sign is a sign of no business."
Mrs. Ranson moved to accept the minutes as corrected and Mr. Huntley seconded. All voted in favor.

Graves Trucking Hearing

This hearing is continued from June 26, 2013, when the Board conducted a visit to the property in question. Graves Trucking, Inc. submitted an application to the Zoning Board for a Special Exception concerning Article III, Section 305.1 and Article V, Sections 501.A and 501.D and Tables 502 and 505; and Variances concerning Article IV, Sections 402, 414, and 445 and Article V, Tables 502 and 505 of the Westmoreland Zoning Ordinances. The applicant proposes to establish and operate a quarry to excavate bedrock at the property located off Old Route 12 North, Map 17 Lots 28/29 in the Commercial/Industrial and Rural Residential zones.

Mr. and Mrs. Tim Graves, owners of Graves Trucking, Inc. were present, and represented by Dick Fraser of One Source Properties and Permitting; Attorney Tim Britain of Cleveland, Waters, and Bass, PA; and Tom Key of Key Blasting and Drilling.

Chairman Remy asked the applicants if they wanted to say anything that hadn't been mentioned at the previous hearings. Attorney Britain wanted to make sure that Chairman Remy had received the letter from the New Hampshire Department of Transportation officially explaining the Crossing rights permit and the Temporary Use Agreements and the length and circumstances of their duration.
Chairman Remy acknowledged that he had received it and asked the clerk to read it into the record. It was read as follows:

The State of New Hampshire
Department of Transportation
June 17, 2013

Peter Remy, chair
Town of Westmoreland Zoning Board of Adjustment

Re: State owned railroad property, Graves Trucking, Inc.

Dear Mr. Remy,

At the request of Graves Trucking, Inc., I am writing with respect to (a) the Crossing agreement between the State of New Hampshire and George Graves dated as of March 29, 2013 (the "Crossing agreement") and (b) the temporary use agreement between the State of New Hampshire and Graves Trucking, Inc. dated as of March 29, 2013 (the "TUA"), both agreements concerning the Railroad Corridor and Westmoreland, New Hampshire that was formerly part of the Cheshire branch of the Boston and Maine Railroad ("Road Corridor"). As discussed below, absent a default by Graves trucking under the TUA or the reactivation of the railroad corridor for railway use, the state would expect the TUA to remain in place for access to the Graves Trucking property until such time as Graves Trucking requests otherwise.

The Railroad Corridor is owned by the state of New Hampshire pursuant to a release deed from Boston and Maine Railroad dated July 5, 1995 and recorded in the Cheshire County Registry of Deeds at Book 1530, page 715. The responsibility to administer the state's rights and obligations with respect to the Railroad Corridor resides with the Department of Transportation, Bureau of Rails and Transit.

Under RSA373:1, it is the "duty of every railroad to provide… Suitable gates, crossings, cattle passes and other facilities for the accommodation of persons whose lands are divided, or are separated from a highway by a railroad." RSA 373:1-a extends that duty to the state with respect to state owned railways. The Crossing Agreement and the TUA referenced above are intended to satisfy that duty with respect to the George Graves and Graves Trucking properties.

Under the terms of the Crossing Agreement, the initial term is for a period of 10 years ending on December 31, 2023 unless extended pursuant to section 5.3 of the Crossing agreement or terminated pursuant to section 6.1 of the Crossing agreement. Section 5.3 provides for indefinite renewal periods of 10 years each unless the permittee George Graves provides prior written notice of termination at least one year prior to the expiration of the term then in effect.

Similarly, under the terms of the TUA, the initial term is for a period of five years ending on December 31, 2018 unless extended pursuant to section 4.2 of the TUA or terminated pursuant to section 7.1 of the TUA.

Section 4.2 provides for indefinite renewal periods of five years each unless the permittee, Graves trucking, Inc. provides prior written notice of termination at least one year prior to the expiration of the term then in effect.

The Crossing Agreement and the TUA have different terms because the George Graves property, which is the subject of the Crossing Agreement, is immediately adjacent to the Railroad Corridor. The Graves Trucking property that is the subject of the TUA is one property removed from the railroad corridor. Typically, by state policy, TUA's have a term of one year. An exception was made in this case for Graves trucking.

Section 6.1 of the Crossing Agreement permits the state to terminate the Crossing Agreement upon any default in the due observance of performance of any covenant, condition or agreement to be observed or performed by the permittee, George Graves. The TUA has similar termination language. However, the two agreements are independent of each other, so that termination of the Crossing agreement would not automatically trigger a termination of the TUA.

The state also has the right to revoke either agreement upon 30 days' notice under section 6.2 of the Crossing Agreement in section 7.2 of the TUA. The revocation provisions are standard and required by the State in order to have flexibility to respond to changes in the State's use of the railroad corridor-primarily recommencement of active railway use of the Railroad Corridor should occasion for such use ever arise. Please be advised that there are no plans under consideration by the State to recommence active use of the Railroad Corridor. Moreover, in the event of termination under sections 6.2 or 7.2 by the State to restore use of the Railroad Corridor, the state would still have the duty to provide access to landlocked owners as required under RSA 373:1 and 1-a.

In short, absent a default by Graves Trucking under the TUA or the reactivation of the railroad corridor for railway use the state would expect that at the end of the initial term and the TUA will be renewed for the succeeding five year terms until such time as Graves struck in requests otherwise.

Please feel free to call me if you have any questions about the Crossing Agreement or the TUA. My telephone number is 603-271-2425 and my e-mail address is lbarker@dot.state.nh. us.

Very truly yours,
Louis A. Barker, Railroad Planner
Bureau of Rail and Transit

Attorney Britain also read a letter to him from Scott Giza and Jeffrey Scott who had previously signed a petition organized by Patricia Rodrigues detailing the neighbors' objections to the planned project. Mr. Giza

and Mr. Scott said that with further information they were no longer of the same mind and wished to have their names removed from the petition.

Mr. Fraser asked to make a correction to a statement he had made at an earlier hearing that a local quarry he had spoken about had a lifetime permit from the state. But when he had looked it up, the permit was only for twenty years.

Chairman Remy also asked for the three letters from Lois Nimke to be read aloud by the clerk. They are as follows:

May 20, 2013
Dear Sirs,

Concerning Graves Trucking excavating bedrock behind my property, I am very concerned by possible excessive noise. It has been very peaceful here and at my young age of 82 I hate to have to put up with the excessive noise.

I would like to say no but don't think my opinion would do much. The Graves seemed to think they have all the say in Walpole and Westmoreland. Anyway this is what I have to say.

Sincerely, Lois Nimke

May 20, 2013
Dear Sirs,

Some more things came to mind after writing my first letter.
I am wondering how long the excavation would take and also if he could enter on Wentworth Road. Now he comes through the old gravel bank onto Old Route 12 N. and the dust settles on everything. I do not want to make trouble, just want to have it nice. I have lived here 42 years, have nice neighbors, and am terrified to have to move.
Sincerely, Lois Nimke

May 27, 2013
Dear Sirs,

Something else has come to mind about the above excavation. My 2 acres of land is all on ledge. Even one corner of the cellar is on ledge. My bank in back is bordered by a fence. Beyond that fence a little way up to the old railroad road bed Graves land borders the road bed. The State owns this parcel of land from mine and Graves land.

If Graves decides to do blasting I am afraid this will affect my well which is in back of my house. Also there are trees at the top of my bank and some on State property. Blasting could loosen some of their roots and they could come down on my house. My house insurance covers disasters of nature and not this type of disaster. I do not have the money to fix problems to the house or a new well. This bothers me a lot. Have been losing sleep over it. I hope I won't think of anything else to bother you with. Sincerely Lois Nimke

Chairman Remy asked the applicants to address Mrs. Nimke's concerns. Mr. Key responded that there is a state requirement that any property within 250 feet of a blast must have a pre-blast survey. Although Mrs. Nimke's property is approximately 320 feet from the blast site Mr. Key will be happy to conduct a pre-blast survey on her property or any other neighboring property. He will also ask the insurance company to test the wells of anyone who is concerned about damage to their water supply. They will measure the gallons per minute, etc.
Mr. Shonbeck asked what recourse would Mrs. Nimke or any other person have if they had suffered damage. Mr. Key said that his insurance is there for that purpose. Mr. Fraser asked Mr. Key about his experience over the life of his career with damage to wells. Mr. Key said that in thirty-five years he had never had one claim of well damage. He has had the same insurance company for twenty-eight years.

Mr. Huntley asked about the noise and dust which the neighbors were concerned about. Mr. Fraser said that he had spoken previously about those concerns. The same machinery will be used so there will not be an increase in noise and newer regulations are in place to control the dust.

Chairman Remy asked where the trucks go. They leave the blast site by the private road and go to the sand and gravel pit where the rock is processed and from there toward Walpole.
Mr. Merry inquired about the number of trucks that would be loaded at one time.
Mr. Graves said that it will be one truck. They don't have more trucks than that at this time.

As the Board had no more questions, Chairman Remy invited the abutters to speak.
Pat Rodrigues, whose property has the deeded right of way for access to Mr. Graves'property introduced Attorney Rebecca Wagner of West Lebanon who would be representing her and her husband.
Attorney Wagner said she would like to address the specific criteria of the requested Special Exception.

1. Is this an appropriate site for the proposed use? Attorney Wagner said it is not, as the site is now used primarily in a recreational way, crossed by walkers and snowmobiles. She showed the Board pictures of the rail trail which crosses the entrance to the site. The trucks will be going back and forth across the same path as the walkers and snowmobiles.
2. Does it lower the property values? Attorney Wagner argues that it does. The life of the gravel pit is almost played out. Once it was gone, the neighborhood would be improved by its absence and make their homes more desirable and valuable. The quarry proposal means a continuation of the industrial use and lower the value of their homes.
3. Is the proposed use injurious, obnoxious, or offensive to its neighbors? Attorney Wagner says that the current use, if not injurious, is obnoxious and offensive to its neighbors and that harm will continue with the new proposed use. She mentioned the silt fence put up by the stream and how ineffective it is.
4. Is it hazardous to vehicles or pedestrians? Attorney Wagner repeated that there are trucks crossing the same path as walkers and snowmobiles.
5. The Zoning Ordinance requires that the recommendations of the Planning Board be taken into consideration so without a site review being done the Zoning Board does not have the authority to grant the special Exception.

Chairman Remy asked Attorney Wagner to point out the position of the rail trail in relation to the cut through the embankment. She pointed out that the cut was part of the trail. Now, walkers and snowmobilers must descend off the railroad bed and cross the cut and climb back up to the roadbed.
Attorney Britain said he doesn't think the trail is in the railroad corridor anymore.
Ms. Rodrigues said it is because the State owns a wider swath than just the railroad bed. The trail just isn't in the middle any more because of the cut.

Attorney Wagner also brought up the noise level ordinance which does not permit sound levels above seventy decibels, and the fact that Ms. Rodrigues' well is on a stratified aquifer according to the water resources map so blasting may affect the stratified aquifer.

Chairman Remy asked Ms. Rodrigues when she bought her house.
In 1996.
He asked the applicants if they would like to respond to Attorney Wagner's comments.
Attorney Brittain responded that Graves opened the pit in 1989 after receiving from Thelma Galen an easement across her property which had no end date. The specific purpose of the easement was to allow trucking traffic to cross it and go out to Old Route 12 North. Ms. Rodrigues purchased her property seven years after George Graves began extracting sand and gravel. In 1989 the State did not own the railroad embankment. It was owned by the Boston and Maine Railroad and was basically abandoned. It is true that no license was given to George Graves to cut through the embankment but that has been rectified by the State permit.
The neighborhood is partly industrial and partly rural residential. In both areas quarries are a permitted use. There is nothing incompatible about Graves Trucking and recreational use. As Mr. Fraser said the resource has to be taken where the resource lies. The town planners considered this when they permitted quarries in these districts.
The recreational activities are most likely to take place outside of the normal work hours and weekends. The quarry hours will be very regular and unlikely to include weekend work.
Peter Hicks was very professor-like in explaining the blasting and the wave frequencies of the sound and vibrations. The noise ordinance refers to continuous sound levels, not temporary sounds. And it is measured at the property line and not at the blast site.

Mr. Fraser wanted to clear up the statement that Ms. Rodrigues' well was sitting on a stratified drift. He referred to the state report on page 35 of the booklet. He said stratified drifts are created through glaciation. As a glacier retreats it deposits sand and gravel. There cannot be a porous bedrock which qualifies as an aquifer.
Attorney Wagner asks about the minutes of June 26, 2013 where Mr. Hicks the blasting expert said that the decibel level of the blast would be 100-120 decibels.
Chairman Remy asked for a letter from Mr. Hicks stating whether the figures mentioned were correct an asked the clerk to check the recording of the hearing.

Mr. Merry said it was his memory that the decibel level of the blast was higher than 70 but it was a temporary noise and not a continuous sound.
Mr. Merry inquired whether the trucks cross the Rodrigues property by the easement.
They do, so opening the new quarry extends the life of the easement.

Attorney Brittain said that the easement agreement is rooted in New Hampshire law. There is no limitation in the easement itself. It runs with the land.
Attorney Wagner does not argue with that. Her point is that the fair market value of the property will change with the opening of a new pit.

Mr. Shonbeck asked Mr. Fraser about the noise study he did and how he calculated the decibels.
Mr. Fraser said that he took studies which showed mitigating factors in the decibel levels, such as buffer zones, berms, and different types of barriers. He deducted the lower range of decibels for each mitigating factor to arrive at the calculation of the decibel levels which were under 70 decibels.

Chairman Remy asked Mr. Fraser to talk about the direction of the noise from the blast.
Mr. Fraser used the map to point out Ms. Rodrigues' house and the blast site. According to Mr. Hicks the blast will be sited so that the noise rises up and in the opposite direction from Ms. Rodrigues' house.

Abutter, Wes Staples, asked how far it was from the edge of the clearing where the blasting will occur to Ms. Rodrigues' house. Mr. Fraser measured it to be 600 feet at the closest point. Mr. Staples did not think there will be a noise problem.

Chairman Remy asks Mr. Graves to address the environmental issues concerning the stream.
Mr. Graves said that with the recent flooding he was concerned that the trees in the stream would block the large old stone culvert and cause a lot of damage so he had them pulled out.

Attorney Britain said that in light of the recent flooding there is definitely a need for a quarry to provide rock.

John Matthews, a local excavator spoke about the original intent of Mr. Graves to provide necessary rocks and gravel locally. One of the reasons is that the state developed quite an appetite for sand and gravel doing the repairs after the Alstead flooding. Mr. Matthews also sees the need in his work. Mr. Graves' intent was certainly not to devalue or upset their neighbors. Mr. Graves must be wondering what he got himself into. He added that the noise would be during daylight hours and not at nighttime, unlike a recent case heard by the Zoning Board.

Chairman Remy asked for other comments but there were none. He said that before the Special Exception could be considered, it was absolutely necessary to consider the Variance dealing with road frontage. Article IV section 402 states, "No land development may be permitted on lots that do not have required frontage on a public road, Class V or better.

Mr. Fraser said that he had laid out his arguments for each of the Variance criteria in his booklet, pages 16-20. He asked the Board's patience for reading the pages aloud. They are as follows:

TOWN OF WESTMORELAND ZONING BOARD OF ADJUSTMENT
VARIANCE REQUESTED FOR THE FOLLOWING:
Article IV, Section 402 (Required Frontage on Public Roads)
Article IV, Section 414 (Location of Driveway)
Variances are permitted by the terms of the zoning ordinance to prevent it from being unduly oppressive as applied to individual properties uniquely situated. (Loughlin,
15 New Hampshire Practice, Land Use Planning and Zoning (4"' Ed. 2010))
Granting a Variance will not be Contrary to the Public Interest
Granting a variance relative to the frontage required on public roads will be beneficial to the public interest by way of the proposed use being a potential aggregate source for the maintenance and expansion of the local and regional infrastructure. The aggregate products developed from the site will be available to towns and state government for use as sub-base road materials, ditch maintenance products (used in conjunction with Best Management Practices')stream or river bank stabilization projects, etc.) Also, the materials would be available to the private sector for all types of construction projects related to residential, commercial, or industrial development. Think back to the destruction caused by the flood of 2005 (which destroyed a large section of Alstead), Tropical Storm Irene in 2011 (massive destruction to many New Hampshire and Vermont communities), floods in May 2006 and April 2007 and a series of floods during the late summer and early fall of 2008. A majority of the destruction caused by those weather events relied mostly on quarry sites to provide materials needed for repairs.

By granting the variance, there will be an increase to the town's tax base. The Land Use Change Tax, / pursuant to RSA 79-A:7, will provide additional revenues to the town as the property is developed. In / addition, the town will be collecting additional revenues based on the amount of material excavated I annually, pursuant to RSA 72-B (a/k/a the Gravel Tax)

The location is uniquely suited for the proposed use. The attributes and geology of the land formation comprising the Graves Trucking property distinctively fit into those which are integral to a quarry site. The shallowness of topsoil to bedrock (see test pit data which is part of this booklet) and sloping topography make it ideal for such use. It should be noted the primary slope faces north, away from any dwellings in the general area. It is from this point the quarry will be established. The proposed use will seamlessly dovetail and ultimately replace the existing George Graves operation (for reasons articulated in the Project Description). In fact, the subject project will utilize the same earth moving equipment, haul trucks, aggregate processing equipment, and transportation routes currently used at the existing site. Material excavated from the project area will be transported to the existing processing facility via a private road, not impacting public roads or any dwellings proximate to the property. It is reasonable to conclude the project area is uniquely located for such use, for the activities described above have been a part of the greater locality for nearly a quarter century. The proposed project will be very similar to what the neighborhood has experienced/presently experiences. The only additional factor being introduced is the process of blasting the bedrock. It is very important to note that activity will occur on a very limited basis. Once the quarry site has been opened, blasting is expected to be limited to 2-3 shots per year. The event (blasting), in realistic terms, has a life measured in seconds. The process of drilling of holes to prepare for each shot will occur over a period of 2-3 days. The noise emanating from the drilling

equipment will be non-intrusive based in part on the mature vegetative buffer that exists along the property boundary. Please note the equipment is also equipped with a dust collector which will effectively address the associated potential issue of fugitive dust. All of the private landowner abutters have filed a statement indicating their consent to the proposed use of the property.

The use is consistent with permitted uses by Special Exception within the Commercial/Industrial and Rural Residential zoning districts. It would not alter the essential character of the locality, for activities similar or very closely related to that proposed have occurred in the immediate area for decades. It will not violate the spirit or intent of the zoning ordinance. It is clear that granting the variance will be beneficial to the public interest and will not alter the essential character of the locality or case a threat to public health, safety or welfare.

The Spirit of the Ordinance is Observed

According to RSA 674:17(h), one of the purposes on the zoning ordinance is "to assure proper use of natural resources and other public requirements;" RSA 674:17(j)II provides guidance relative to zoning ordinances and "encouraging the most appropriate use of land throughout the municipality." The provisions in the town's ordinance complement those sections of the RSA. The ordinance does provide as a permitted use the establishment of a quarry in both zoning districts (by special exception). The most appropriate use for the property was clearly articulated in the "Granting a Variance will not be contrary to the public interest" section of this document, namely the proximate location to an existing excavation site/aggregate processing plant site which will be utilized by the applicant, together with the nature of the bedrock geology, shallow depth to bedrock, and associated slopes making it an ideal site for a quarry.

In addition, the purpose clause referencing Article V, Section 501 A. (Commercial/Industrial District), states the district will allow for the establishment of manufacturing opportunities in the community. As the board is aware, the process of quarrying ledge stone entails a manufacturing process which simply makes large stones into sized, small ones. The applicant acknowledges the processing/manufacturing equipment is located on the adjacent property, but the fact remains that manpower (employees) is required to excavate the stone, operate loaders and haul trucks, and run the crushers, screens, and conveyors which are all part of the manufacturing plant. Without the quarry operation, there would be no need to offer continued employment to some employees, for as stated previously, the current George Graves excavation site is nearly depleted of aggregate materials and therefore the level of machinery and employees needed to run the operation would diminish.

The company could have proposed to do the manufacturing activity on site, but has elected to process the material at a point which is further from existing dwellings and has historically represented a non-impact activity to the surrounding area.

Under Table 505, Rural Residential Uses, the first permitted use by special exception is "quarry".
With consideration for the character of the area and the particular suitability of the intended use, the proposed quarry site is indeed the most appropriate use of the land. It is not contrary to the spirit of the ordinance and does not violate the ordinance^ basic zoning objective. The lot is not reasonably suited for other uses.

Granting the Permit Will Do Substantial Justice

As mentioned previously, the proposed use provides a benefit to the general public. Quarrying stone

provides aggregate products which are used by all towns and state government. In general, they are used for the maintenance and expansion of the local and regional infrastructure. The material will be available to towns and state government for use as sub-base road materials, ditch maintenance products (used in conjunction with Best Management Practices, stream or river bank stabilization projects, etc.) Also, the materials would be available to the private sector for all types of construction projects related to residential, commercial, or industrial development.

By granting the variance, there will be an increase to the town's tax base with Land Use Change assessments and collection of "Gravel Tax" fees. This added town revenue is a benefit to the townspeople.

Furthermore, as stated previously, granting the variance for the proposed development is consistent with the greater area's present use.

There is nothing to suggest that any loss to the applicant is outweighed by a benefit to the general public, therefore granting the permit will do substantial justice. The applicant acknowledges the board can place conditions on a variance which minimize or eliminate harm and provides that substantial justice is done,

Values of Surrounding Properties Are Not Diminished

It is important to note that a closely related operation (excavation) utilizing the same crushing equipment, trucks, truck routes have been ongoing for nearly 25 years (George Graves excavation site) relative to the surrounding properties. Notably, it has not had an impact to the continued development occurring along | Old Route 12 North.

The proposed project will be very similar to what the neighborhood has experienced/presently experiences. The only additional factor being introduced is the process of mining the bedrock. It is very important for the board to realize that blasting activity will occur on a very limited basis. Once the quarry site has been opened, blasting is expected to fee limited to 2-3 shots per year. The event (blasting), in realistic terms, has a life measured in seconds. The process of drilling of holes to prepare for each shot will occur over a period of 2-3 days. The noise emanating from the drilling equipment will be non-intrusive based in part on the mature vegetative buffer that exists along the property boundary. Please note the equipment is also equipped with a dust collector which will effectively address the associated potential issue of fugitive dust.

Operating the site utilizing the best Best Management Practices is paramount to the applicant and will be enforced by him with all contractors entering the site. The point is simple...protect the environment and the well-being of the neighbors and community by employing measures (Best Management Practices) which eliminate or effectively mitigate potential impacts (i.e. potential visual impacts, potential dust, potential noise, potential erosion and sediment control issues, etc.). Those measures have been articulated throughout the application materials.

The proposed project will be very similar to what the neighborhood has experienced for nearly a quarter century and presently experiences, and therefore there will be no diminution of surrounding property values, and granting the variance will not violate the spirit or intent of the zoning ordinance.

Literal Enforcement of the Provisions of the Ordinance Would Result in Unnecessary Hardship

Under RSA 674:33,1(b), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(1) No fair and substantial relationship exists between the general public purposes of the ordinance , provision and the specific application of that provision to the property; and j

(2) the proposed use is a reasonable one.

Alternatively, "unnecessary hardship" will be deemed to exist if owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict compliance with the ordinance, and a variance is necessary to enable a reasonable use of it. In this case, the applicant's proposed use of the subject property is reasonable and the property cannot be reasonably used in strict conformance with the town's zoning ordinance.

The zoning restriction as applied to the applicant's property interferes with their reasonable use of the property, considering the unique setting of the property in its environment.

The subject property is a land-locked parcel, and obviously does not have the ability to meet the town's zoning ordinance requirements for road frontage and driveway placement standards. The unique setting of the property simply causes it to be burdened by zoning restrictions in a manner that is distinct from other situated properties. In addition, the topography (slope) of the property with its shallow depth to bedrock, provide very substantial, i f not impossible to negotiate hurdles to using the property for those uses permitted in the zoning ordinance (C/I & RR zoning districts). Most of the uses involve development relative to site improvements by conventional earth moving equipment, and subsequently the construction of buildings both of which are not conducive to this site. Simply stated, the property cannot be reasonably' used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. The applicant wishes not to find himself in a situation whereby the ability to receive a reasonable return on his investment is compromised. The use would not alter the essential character of the neighborhood (as closely related activities have been part of the locality for decades). The property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.

*The general purpose of frontage requirements is to ensure appropriate spacing of improved lots to prevent overcrowding, and to create safe access by fire trucks, police cars, and other emergency vehicles. In the context of a use not related to improved parcels, these general concerns are not applicable and therefore should not preclude the intended use of the subject property as a quarry site. This is all the more true since the applicant has legal access to an existing public railway(**Old** Route 12 North) via a legal right of way and an established driveway entrance. See, e.g., Belluscio v. Town of Westmoreland, 139 N.H. 55 (1994) The use of the subject property as a quarry site is a permitted use (by special exception) within both zoning districts which bisect the property (Commercial/Industrial and Rural Residential zoning districts). By granting the variance relative to the property's unique setting and environment, the general purposes of the ordinance will not be diminished. The existing character of the neighborhood will be preserved by*

virtue of recent development projects along Old Route 12 and other long-standing, industry-related uses located proximate to the site (Graves & Hodgkins excavation sites). The subject use will simply dovetail with ongoing neighborhood development. The public good (for reasons stated previously) will not be compromised and the landowner will suffer unnecessary hardship should the variance not be granted.

SUMMARY STATEMENT

According to Loughlin, 15 New Hampshire Practice, Land Use Planning and Zoning (4 Ed. 2010), unnecessary hardship means that, owing to special conditions of the property that distinguish it from other properties in the area, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property and the proposed use is a reasonable one.*
In this case, the applicant's property cannot be reasonably used in strict conformance with the town's zoning ordinance. Therefore, a variance is necessary to enable its reasonable use.

Mr. Merry asked what makes this landlocked property unique, making it particularly appropriate for the proposed use?
Mr. Fraser replied that in addition to being landlocked it is sloped and the also the shallowness of the topsoil in relation to the bedrock. So it is an ideal use.
Mr. Merry said that the usual remedy for no frontage is to advise the applicant to buy the frontage he needs but in this case you cannot buy frontage from the State. And even if the State would sell you the land, the State doesn't have frontage either.
Mr. Fraser said that it correct.

Chairman Remy said the ordinance states that the applicant has to have five hundred feet of frontage. What distinguishes this property from any other decent landlocked property? Help the board to understand. Mr. Staples' property, beside yours, is also landlocked.

Mr. Staples said that he has frontage on a Class VI road. He went further and said that he does not believe that there should be any landlocked property because, as he understands it, you can request that the Selectmen lay out a road.

Attorney Britain said the uniqueness is the fact that it is landlocked. He suggested that other landlocked properties are also worthy of Variances if the frontage requirement keeps them from a reasonable use of the property. And I concur with Mr. Merry about the railroad and the intervening property. The purpose of the frontage requirements primarily was for protection of developed lots and also to provide access for safety and emergency vehicles. This proposal is to take advantage of a natural resource. It is not to build a house or other structure which do require spacing for emergency vehicles. For unimproved lots all of the concerns which frontage requirements addresses are not applicable. Long before anyone was thinking about zoning in Westmoreland when the land was being subdivided the remedy for landlocked property was to have access

through an easement which is exactly what this property has. It appears that granting a Variance for frontage requirement is perfectly appropriate for this particular property.

Chairman Remy said that Belluscio v. Westmoreland has a relationship to this property. The legislature has now taken care of those who took advantage of that.
Attorney Brittain said we need to keep in mind what Belluscio was all about. It was in the context of RSA 677:44 which talks about having frontage on a public road for an improved lot. The Graves property is unimproved. Belluscio was also decided in the context of someone who wanted to further improve his lot. In this area it is the only landlocked property bordered by the railroad corridor. The important thing that the court looked to was that there were private easement rights that benefitted the Belluscio property.
Chairman Remy said that the legislature recognized that it opened up a whole lot of land. So Belluscio was obviously correct.
Tabor v. Town of Westmoreland. That particular judge made the statement that if you could have a picnic on that land there was a use and therefore no hardship.
Attorney Britain said that he did not think that in today's court that would likely be a winning argument.
Chairman Remy told Attorney Britain again that he needed to help the Board understand why this property is different from other landlocked properties. As much as Attorney Britain says it is not going to be developed they are improving the land.

Attorney Brittain told Chairman Remy that Graves Trucking was not necessarily improving the land. They are excavating a resource and are benefitting from the use of the land. But it is not improving the land in the traditional sense that it is not building a structure. The purpose of a Variance is a safeguard against the taking of a property. And every case is unique. The decision on one case is not a policy setting for any other case.

Mr. Huntley asked if it would be impossible for the Selectmen to lay out a road to the property and improve the Class VI section to a Class V road.
Attorney Britain said it would be the jurisdiction of the Selectmen to consider. Whether they would lay out a road to benefit a certain property is something to consider. One of the requirements to a lay out is to have a public purpose to it. It is not used just to gain access to one property. Lay out petitions were more commonly used in the 18th century than they are now.

Barry Shonbeck asked what use it would be for the Selectmen to do a lay out other than to satisfy the Zoning Ordinance. What issue would be alleviated other than to satisfy the zoning requirement.

Chairman Remy said that would be the only purpose, to satisfy the frontage requirement.

Attorney Britain warned that once there was a layout it would open up a lot more properties which require town services. In addition, Attorney Britain said a layout would not solve the frontage problem because it could only go up to the railroad property and it would still not have frontage.

Chairman Remy asked the abutters for comments.

Attorney Wagner said the Board had hit the nail on the head. There is nothing unusual in New Hampshire about this property. There are a lot of landlocked properties in New Hampshire. There's a lot of ledge in New Hampshire. One can make money by using it for forestry. Mr. Graves bought the property knowing the limitations on its use and gambling that he would be able to use it.

Attorney Britain said that in 1944 Arthur Chickering sold the property and had no idea that in 1966 the town would adopt zoning ordinances.

Attorney Wagner pointed out that on page 14 of Mr. Fraser's booklet, he wrote, 'When the project is complete, the land will more easily accommodate the future use of the property for business or commercial development. The Charlestown Economic Development Association's quarry site off Flint road in Charlestown can be a model for such vision,"

Attorney Britain said that the state Supreme Court has said that the fact that someone purchases a property knowing that they may need to seek relief in order to use it is no excuse for denial. Each case must be uniquely considered. Self-created hardship is no longer a factor that the Board is supposed to consider anymore. What the Board should be considering is whether the proposed use of the land is reasonable.
It is reasonable because it is a permitted use. Is the Variance necessary to achieve that reasonable use? Yes, because there is no frontage. Relief from a frontage requirement is necessary. It is uniquely situated by being next to the railway. Is the Variance necessary to conduct that use? This is a textbook case of when a Variance should be granted.
Chairman Remy asked Attorney Britain to speak to the spirit of the ordinance.

Attorney Britain said that the spirit of the ordinance requiring road frontage is so that there is adequate space in between dwellings and sufficient access for emergency vehicles. Frontage requirements all arose in a context of improvements to property. In 1944 no one in Westmoreland was considering that in the late 1960's the town was going to adopt a zoning ordinance that would create a frontage requirement.

Attorney Wagner also said the spirit of the ordinance, in addition to what Attorney Britain said was to discourage landlocked properties.

Chairman Remy asked Attorney Britain to address the paragraph pointed out by Attorney Wagner concerning the future of the property.
Attorney Britain said they can only speculate about future use. The Board is only dealing with today. We don't know whether there ever will be a renewal of rail traffic.

Wes Staples commented that he was in favor of the project, that it was good for the town. It was in operation before the person who objects bought her property.

Chairman Remy responded that a lot had been learned from a fairly recent case of expanding a sand and gravel pit, a long process in which lawyers were involved. He understands that the value of surrounding properties might increase but they do not decrease and that is the criteria which the Board must go by.

Chairman Remy asked about the statement on page 17 of Mr. Fraser's booklet that all the abutters have indicated their consent to the proposed use of the property.
Mr. Fraser said that both statements from the abutters were included in the booklet on pages 25 and 26. The abutters are Wes Staples and George Graves.
Chairman Remy said that this must have been prior to Attorney Little's recognition of Ms. Rodrigues as an abutter because of the easement that crosses her property.

Mr. Merry asked the procedural question about the order in which the Board's votes would be taken; Special Exception or Variances first?

Chairman Remy said that the Variances would be voted on first.

Mr. Huntley asked why there was no application for a Variance from Article 441-1-e which said that "No excavation of blasting may take place within 200 feet of any street or any other property line." The applicant's plans show that the grading is within 200 feet of property lines.

Attorney Britain said that Section 441 applied only to sand and gravel operations and not to quarries.

Attorney Wagner said that the Ordinance [441]was passed for the town to be in line with [the State's Ordinance] 155.E. the town's Ordinance may refer only to sand and gravel but 155:e refers to 'earth', and lists sand, soil, rock and gravel and contruction aggregate produced by quarrying'. And since Section 441 was passed to align with State regulation 155.E, she argued that Section 441:e is certainly meant to include rock. This is an issue that needs to be addressed by the Planning Board.

Attorney Brittain argued that 441:e and 155:e are not the same and he submitted a memo to the Board on section 441.e and 155.E.
Chairman Remy said that it says quite clearly in the ordinance that no excavation or blasting shall take place within 200 feet of a public road or other property line".
Attorney Wagner pointed out that Section 441.A refers to the removal of 'natural material'.
Attorney Britain replied that it as matter of statutory instruction. He submitted the following memorandum:

MEMORANDUM
From: Timothy E. Britain, Cleveland, Waters and Bass, P.A.
To: Westmoreland Zoning Board of Adjustment
Date: July 24, 2013
RE: Zoning Application of Graves Trucking, Inc.

Graves Trucking, Inc. filed an application on April 1, 2013 regarding a special exception to establish and operate a quarry for the removal of bedrock from its property (Tax Map 17, Lot 28), and for variance relief from certain provisions of the Town of Westmoreland Zoning Ordinance (the "Ordinance") in connection with such use.

A question has arisen as to whether Graves Trucking also requires variance relief from Sections 441 and 441.1 of the Ordinance.

Section 441, entitled "Extraction of Soil, Sand and Gravel" states:

> In accordance with Chapter 155-E, in any district, the removal of soil, sand or gravel for sale, except when incidental to construction of a building on the same premises, shall be permitted only upon approval of a plan for the rehabilitation of the site by the Planning Board. In any district, the following provisions shall apply [referencing Section 441.1].

After review of the Ordinance as a whole, and particularly the provisions applicable to a quarry in Article V, Tables 502 & 505, it is clear that the provisions of Sections 441 and 441.1 apply only when the proposed use is to remove "soil, sand or gravel for sale". <u>The provisions of Sections 441 and 441.1 do not apply in the context of the extraction of "rock" from a quarry.</u>

It is important to recognize that RSA 155-E applies to "any excavation of earth." RSA 155-E:2. RSA 155-E specifically defines earth as "sand, gravel, rock, soil or construction aggregate ..." RSA 155-E:l. Application of established principles of statutory construction to Section 441 of the Ordinance requires the conclusion that the omission of the term "rock" from the text of said Section 441 indicates legislative intent to exclude from its provisions any project involving the removal of rock from a quarry. *See, e.g., St. Joseph Hospital of Nashua v. Rizzo,* 141 N.H. 9 (1996); *Belluscio v. Town of Westmoreland,* 139 N.H. 55 (1994); *Silva v. Botsch,* 120 N.H.600 (1980). This is all the more true as Article V, Tables 502 & 505 clearly distinguish quarry operations from sand and gravel excavations.

For the foregoing reasons. Sections 441 and 441.1 of the Ordinance do not apply to the application of Graves Trucking, Inc.

Mr. Shonbeck commented that in the previous sand and gravel case heard by the board, the board decided that the relationship of 'quarry' to 'sand and gravel' was that it was a quarry for sand and gravel. Attorney Britain said that the removal of rock is different from the removal of sand and gravel. Mr. Shonbeck agreed. He added that it comes down to intent.

Chairman Remy said that the Board would certainly get a legal opinion on that. Attorney Britain agreed that it didn't really have anything to do with the pending Variance.

Chairman Remy closed the public hearing and the board began deliberation on the two requested Variances. On the Variance from Article IV Section 402 concerning road frontage:

Chairman Remy went through the Variance for Article 4 seection 402 requiring 500 feet of road frontage. He asked the board members to speak to each criteria .

1. Will not be contrary to the public interest.

___Mr. Huntley said he did not see any public interest issues. It would not be contrary.

___Mr. Shonbeck agreed with Mr. Huntley. He, too, doesn't see frontage as a meaningful requirement in this case. Having frontage is connected to developing the land and this is not developing land, it is harvesting natural resources.

___Mr. Merry agreed.

2. Chairman Remy asked the board to speak to the spirit of the ordinance.

___Mr. Huntley said frontage is to control density and development of the area. This proposal does not impact that. No frontage is needed for forestry or planting Christmas trees. He did not think it is much different from any other natural resource.

___Mr. Merry agreed that the spirit of the ordinance is to not have high density. He lives in a part of town where the houses, like his 180 year old house, are very close together. The ordinance, rightly, is to prevent that kind of density all over town. He did not see a possibility of condominiums going up in the quarry pit.

___Chairman Remy said he did not foresee the state giving a permanent usage permit for that.

___Mr. Shonbeck said that the town has miles and miles of class VI roads. They did not want people to willy-nilly building houses along those roads because of the issue of supporting that many homes with services.

___Mrs. Ranson agreed and all agreed

3. Substantial justice will be done.

___Mr. Merry said that frequently it's easier to see injustice.

___Mr. Shonbeck said that it wouldn't be an injustice if it were granted.

All agreed.

4. There would be no diminution in the values of surrounding properties.

___Mr. Huntley said he doesn't see diminution. Speculatively, there might be an increase at some future time and it may be further out in the future but there is not a loss in value.

___Mr. Merry said that new homes have been built there since 1996 so the presence of the sand and gravel pit did not deter the people who built them. He did not see how this proposal will make it worse. It is kind of like a pre-existing condition in health.

___Mr. Shonbeck said he heard people comment that it was a very quiet area, even though the sand and gravel pit was in operation. Adding up the amount of time for the quarry; three blasting weeks per year with pre and post preparation and four or five days of loading the trucks with the blasted material, he estimated would be about six week out of seven months. Given the limitation of the operation he did not see a significant lowering of values, if any.

5. Unnecessary hardship would be caused due to the unique features of the land.

___Mr. Merry said the uniqueness is not that it is landlocked but the fact that the neighbor, the State, can't or won't sell the frontage and even if they did it would not solve the problem. There is still the railroad track preventing frontage.

___Mr. Huntley agreed that the railroad makes a situation which can't be remedied. the easement is already in placeand has been utilized all along. They are not asking to do something that is not allowed. Chairman Remy said usually the Board requires frontage to do it. People may want a 50 foot Vaniance or some such, not a 100% Variance as this applicant wants.

___Mr. Perham said he was reading the General Regulations about road frontage. Every bit of it has to do with a residence. ("Or business", Chairman Remy added.) He believes that whoever set up the frontage requirements set them up as intended for homes and businesses so that they would not be rubbing elbows with each other.

___Mr. Shonbeck agreed that it is the Railroad property that makes the property in question more unique. No amount of money can fix it. He believes there is hardship in the situation.

Mr. Merry asked a procedural question about whether any restrictions that might be put on the Variance should be put on before or after a vote is taken. Chairman Remy said the restrictions wwould be put on each element of the application..

Mr. Shonbeck said he guesses that the deeded access is the major restriction. What could the Board do about that? They can't change the deed. They could not put a sign up on land they do not own. The access is what it is.

Mr. Shonbeck asked about any restrictions on the width of the easement?

The document does not address it. Chairman Remy asked how wide is the used easement.

Mr. Graves said it is twenty feet, more or less, so two trucks could pass.

The public hearing was reopened and Attorney Wagner was invited to comment or ask a question.

Attorney Wagner said that Ms. Rodrigues pointed out that Lot 29 has frontage on a class VI road and it may be possible to purchase frontage from the owner of Lot 27.

Attorney Britain pointed out that the owner is not accessing a public road for the easement.

Chairman Remy called for a motion on the Variance.

Mr. Shonbeck asked about adding a restriction that would have the trucks turn right and not left upon leaving the quarry. Chairman Remy said that it might limit a situation where loads of rocks are required and they might need to get out to Route 12 quickly.

Mr. Huntley moved to grant the Variance from Article IV Section 402 requiring road frontage. Mr. Merry seconded the motion and all voted in favor.

The Board considered the second Variance requested: Article IV Section 414 which deals with the location of a driveway.

Chairman Remy said that since the trucks would be turning right onto the private road going to Mr. George Graves property for processing, the location of a drive way onto a public road does not apply.

Attorney Britain said that he must consider the trucks coming onto the property. Mr. Graves must come onto the property somehow. Access is through the easement.

Mr. Shonbeck said the location of the driveway must start at the deeded access. The Board can't put restrictions on a deeded access, can it? Mr. Remy said that would be overstepping the Board's bounds.

Mr. Huntley said that it's hard to have Graves Trucking enter on to a class V road if they just allowed a Variance to not have frontage.

Attorney Britain said that Section 414 does address access onto a private road.

Chairman Remy went through the criteria starting with the public interest.

All agreed that it would not be against the public interest. Chairman Remy asked why that was. Was this Variance even necessary? Mr. Graves has deeded access to a class V road or better. Hand this over to the Planning board.

Attorney Britain said that he would like the Board to act on the Variance.

Chairman Remy asked for a discussion of the spirit of the ordinance.

Mr. Huntley said that again it had to do with density. It went along with required frontage. And likely it has to do with safety, fire or emergency services. In this case there is a viable access used by enormous vehicles so there should be no problem with access for emergency vehicles.

Denial would result in unnecessary hardship to the owner due to the unique features of the land.

All agree.

Substantial justice would be done. All agree.

The value of the surrounding properties would not be diminished. All agree.

Mr. Shonbeck made a motion to approve a Variance from Article IV Section 414 regarding the location of a driveway. Mrs. Ranson seconded the motion and all voted in favor.

Mr. Shonbeck made a motion to continue the hearing until Wednesday, August 21, 2103 at 6:30 pm. Mrs. Ranson seconded the motion and all voted in favor.

Mrs. Ranson moved to adjourn and Mr. Huntley seconded the motion. All voted in favor.