

Westmoreland Zoning Board of Adjustment
Draft Minutes of November 20, 2013 Meeting
These minutes were approved by the Board on December 18, 2013

Present: Chairman Peter Remy, Brian Merry, Barry Shonbeck, Russ Huntley, Nancy Ranson, Ernie Perham.

Chairman Remy opened the meeting at 7:05 pm and directed the Board to review the minutes of the previous meeting (September 18, 2013).

Barry Shonbeck noted a few minor typographical corrections to be made. He made a motion to accept the minutes with the minor corrections noted. Nancy Ranson seconded the motion and all voted in favor.

At 7:30 PM Chairman Remy opened the hearing. The business of the hearing was to consider a motion brought by Attorney Rebecca Wagner on behalf of her clients, Patricia Rodrigues and John Corduff to reconsider the Board's decision of September 21, 2013 to grant a special exception to Graves Trucking, Inc. to operate a quarry at their property off of Old Route 12 North, Map R17 Lots 28/29.

Chairman Remy asked the ZBA clerk to read Attorney Wagner's motion. The clerk read the following:

LAW OFFICE OF REBECCA A. WAGNER

RECEIVED

OCT 21 2013

JAL

PHYSICAL ADDRESS

1 Oak Ridge Road, Suite 2LL-A
West Lebanon, NH 03784

MAILING ADDRESS

1 Oak Ridge Road, # 12B
West Lebanon, NH 03784

Phone: (603) 643-8050

Fax: (603) 643-8055

E-mail: nhconservationlaw@gmail.com

Admitted to Practice in New Hampshire

October 18, 2013

VIA ELECTRONIC MAIL and HAND DELIVERY

Westmoreland Zoning Board of Adjustment

Chair Peter Remy et al.

780 Route 63

PO Box 55

Westmoreland, NH 03467

RE: Motion for Rehearing of Graves Trucking, Inc. Special Exception

Dear Chair Peter Remy, Mr. Brian Merry, Mr. Russ Huntley, Ms. Nancy Ranson, Mr. Barry Shonbeck, Mr. Bill Campbell, Mr. Ernie Perham, and Clerk Jackie Cleary:

Per RSA 677:2, my clients, Ms. Patricia Rodrigues and Mr. John Corduff are hereby applying to the Westmoreland Zoning Board of Adjustment (the "Board") for a rehearing of the special exception approved for Map R17, Lots 28 and 29 at your September 18, 2013 hearing. As you know, my clients reside at 52 Old Route 12 North in Westmoreland, NH. Their property is separated from Lot 28 only by a railway bed, and, further, their property will be directly affected because Graves Trucking, Inc. (Applicant) will cross over their property via an access easement. There is no question that my clients are directly affected by the ZBA's decision to grant the special exception for a quarry on Lot 28, with associated construction and access on Lot 29. Further, this Motion is timely filed as it is delivered via electronic mail on October 18, 2013, on the 30 day deadline set by RSA 677:2.

First and foremost, as you know, this Board is permitted to approve special exceptions when such special exceptions can "be made in harmony with the general purpose and intent of the Zoning Ordinance," and *only if* the applicant can prove:

1. The specific site is an appropriate location for such use.
2. Such approval would not reduce the value of any property within the district, or otherwise be injurious, obnoxious, or offensive to the neighborhood.

3. There will be no nuisance or hazard to vehicles or pedestrians.

4. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.”

Westmoreland Zoning Ordinance Article III, Section 305.1(B). Further, as you know, Lot 28, where the quarry will be located, is partially zoned Commercial/Industrial and partially zoned Rural Residential. Both of these districts allow quarries by special exception. *Id.* at Table 502 and Table 505.

This Board held numerous meetings on the Applicant’s application for variances and a special exception, including visiting the proposed site. This Board is to be commended for its attention to this process and the time it gave in order to weigh whether to permit this quarry. However, the Board’s decision on this matter was illegal and unreasonable for the following reasons.

First, this site is not an appropriate location for a quarry. Lot 28 itself is arguably landlocked, though it does have ample means of ingress and egress over or through surrounding properties. Further, while the Board declined to accept this argument, Petitioners argued that this quarry can be considered an extension of the Graves gravel pit operation located primarily in Walpole on Walpole Map 1, Lot 16. Of course, since this Board declined to consider the Applicant’s quarry as such, even though the Applicant described it as fitting “hand in glove” with Mr. George Graves’ gravel pit, (Application at page 10), it will be considered as a stand-alone property. As such, this Board has permitted an intensive use of a property that is wholly surrounded by state-owned or individually owned properties, some of which are residential and one of which is used for public recreation. Further, it is important to note that this quarry will be the only quarry in this Westmoreland neighborhood, and that it will be the only operation to conduct blasting near these residences.

While this Board declined to treat this quarry as an extension of the Graves gravel pit, it did make much of that pit’s existence in the area. In short, this Board treated Lot 28 as an appropriate location because there were similar uses in the neighboring town (which Petitioners alleged has expanded into Westmoreland, unpermitted, though the Board would not accept testimony on this point). However, this Board does not appear to have acknowledged and taken into account, first, that this quarry would be the first and only of its kind within this neighborhood in Westmoreland, and, second, that there are important differences between a

quarry operation and a gravel pit operation – namely, that blasting is required for this quarry, generating very loud though apparently short-lived noises, and that such operation would leave a sheer ledge and bowl scarring the land after it has been stripped of resources.

Further, the Board noted that more houses have been built in the area even though gravel pits are permitted to operate on the other side of the border in Walpole, and inferred based on this that such gravel pits had not harmed the value or quiet enjoyment of the residents, so the subject quarry, though closer in proximity and though requiring blasting, should not either. However, the Board failed to take into account that this increase in residences and the approaching termination of Mr. Graves' gravel operation, (*Id.*), has made this area increasingly residential rather than commercial, and that, therefore, adding the only quarry and the only use with blasting in this part of Westmoreland was not appropriate. Finally, the Board declined to determine that such an operation would be detrimental to the neighboring properties because of the increased traffic such a quarry would generate, which will inevitably cross the Petitioners' property, as well as the added noise and potentially harmful dust and other pollution it could generate. This Board relied on the Applicant's assertion that noise and dust will be controlled and pollution managed, even though Applicant stated that he obtained his experience in excavation from working at the Graves gravel pit and even though the Petitioners and another nearby resident explained that this was not true of the project with which this quarry would "fit hand in glove." *Id.*

Finally, Petitioners pointed out that Westmoreland's Water Resources Map indicates that there is a stratified drift aquifer underlying Petitioner's property and also part of Lot 28, but Applicant's expert denied this. Based on testimony, it appears both maps were produced using the same state software. However, it seems the Board was persuaded by Applicant's testimony on this point. The Board did condition approval of the special exception on the Applicant offering well testing on Petitioners' and another neighbor's properties, which would address whether any damage occurs to their drinking water. However, this does not address whether there is a stratified drift aquifer and whether it would be impacted by blasting and the removal of ledge. While this is mostly a question for the Planning Board, the existence of a stratified drift aquifer and whether it would be impacted by Applicant's project goes to whether the location is appropriate. As such, and given that both Westmoreland's Map and the Applicant's map used the same state software, it was error for this Board to accept Applicant's expert's determination

rather than probe more deeply into this issue or recommend that the Planning Board probe more deeply into this issue.

For these reasons, the Board should have determined that this location was not appropriate for a quarry and denied the Applicant's special exception. It did not, and this was unlawful and unreasonable.

Second, the Board determined that there would be no reduction in value to surrounding properties if this quarry is permitted, and that it would not be injurious, obnoxious or offensive. This was also in error. As was stated above, Petitioners and another neighbor testified that the Walpole gravel pit already impacts their quiet enjoyment and that they anticipate this quarry to be no different, and, indeed, would be worse in that it involves blasting, with its intrusive pre-blasting testing, and is in closer proximity. However, the Board was swayed by Applicant's assurances that the quarry would not generate uncontrolled dust and pollution and that any noise would be directed away from the residences or that it would be too short-lived to be detrimental.

Further, as was also mentioned above, the Board determined that because more houses were near the Walpole border on the other side of which Mr. Graves' gravel pit operates, then there has been no detriment to house values since others apparently have no difficulty selling the homes or lots there; there was no consideration of whether the houses sold for more or less fair market value than others in the area not located near gravel pits, though neither party submitted evidence on this point. Additionally, the Board noted that, in a prior hearing for a sand and gravel pit expansion in another part of Westmoreland, that a study was introduced there that indicated values are only reduced when the first pit comes into existence, and that no more value is lost when it is expanded. The Board reasoned that, since gravel pits already exist just across the border in Walpole, that the addition of a quarry within the Westmoreland town line would have no impact on value since any value was lost when the other pits started operations. Further, the Board was not swayed by Petitioners' argument that the value of their home has been steadily increasing as the Graves gravel pit nears ceasing operations, which, according to Applicant, would be in the relatively near future, and that, by permitting this quarry, the Board had negated any of those gains. All of this was in error.

Additionally, the Board also determined that there would be no nuisance to vehicles or pedestrians. This, too, was in error. As stated above, operating this quarry would very likely increase traffic over Old Route 12 North, which both Graves and the Applicant use for access to

their lots. The Board was presented with information regarding the use of the defunct railway bed as a rail-trail for public recreation. However, the Board felt that there would be no nuisance to any public users since trucks currently pass through the railway bed to access the Graves gravel pit and there have yet to be any accidents or complaints.

Finally, Westmoreland's noise ordinance prohibits any "permanent use" that would emit noises over 70 decibels. Westmoreland Zoning Ordinance, Article IV, Section 438.1. Although the matter was raised by Petitioners, this Board determined that the blasting, even though Applicant's expert stated it would exceed 70 decibels, would not violate this noise ordinance because it would not be permanent. However, the ordinance refers to a permanent use, which this quarry will be. It does not refer to a permanent noise, of which the blasting admittedly will not be, although it will occur, according to the Applicant, an estimated 2 to 3 times annually, or perhaps more. Application at page 10. Because the quarry is a permanent use that will produce noise in excess of 70 decibels, it violates Westmoreland's noise ordinance. Thus, the Board's decision to the contrary was also in error, and therefore unlawful and unreasonable.

Thank you for your attention to this matter.

Sincerely,



Rebecca A. Wagner
NH Bar ID 20514

After a short pause Chairman Remy asked the clerk to read Attorney Britain's objection to the Motion. It is as follows:



CLEVELAND, WATERS AND BASS, P.A.

ATTORNEYS AT LAW

TIMOTHY E. BRITAIN, ESQUIRE
(603) 224-7761 EXT. 1038
(603) 224-6457 FACSIMILE
BRITAIN@CWBPA.COM

Two CAPITAL PLAZA, P.O. Box 1 137
CONCORD, NEW HAMPSHIRE 03302-1 137

October 28, 2013

VIA EMAIL AND FIRST CLASS MAIL

Mr. Peter Remy, Chairman
Zoning Board of Adjustment
Town of Westmoreland
780 Route 63
P.O. Box 55
Westmoreland, NH 03467

RE: Zoning Application of Graves Trucking, Inc.

Dear Mr. Remy:

Enclosed for filing please find Graves Trucking, Inc.'s Objection to Motion for Rehearing filed by Patricia Rodrigues and John Corduff.

Very truly yours,

A handwritten signature in blue ink, appearing to read "T. E. Britain", is written over a light blue circular stamp.

Timothy E. Britain

TEB/lb

Enclosure

cc: Rebecca Wagner, Esquire (nhconservationlaw@gmail.com)
Mr. Timothy Graves, President, Graves Trucking, Inc.
Mr. Richard A. Fraser, One Source Properties & Permitting, LLC

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

TOWN OF WESTMORELAND
ZONING BOARD OF ADJUSTMENT

IN RE:

SPECIAL EXCEPTION APPLICATION OF GRAVES TRUCKING, INC.
FOR TAX MAP R17, LOT 28,
OWNED BY GRAVES TRUCKING, INC.

**GRAVES TRUCKING, INC.'S
OBJECTION TO MOTION FOR REHEARING FILED BY PATRICIA RODRIGUES
AND JOHN CORDUFF**

NOW COMES Graves Trucking, Inc. ("Graves" or the "Applicant"), by and through its attorneys, and respectfully objects to the document entitled "Motion for Rehearing of Graves Trucking, Inc. Special Exception" (the "Motion"), filed on behalf of Patricia Rodrigues and John Corduff (collectively, the "Movants"), challenging the September 18, 2013 decision of the Town of Westmoreland Zoning Board of Adjustment (the "Board" or the "ZBA"), granting the Applicant's application for a special exception¹, and states as follows in support thereof:

Introduction

1. On April 1, 2013, Graves Trucking, Inc. filed an application for a special exception pursuant to Article III, Section 305.1, Article V, Section 501(A) and (D), and Tables 502 and 505 of Town of Westmoreland Zoning Ordinance (the "Ordinance"), to establish and operate a quarry on its land located off of Old Route 12 North (Tax Map R17, Lot 28 – the "Property"). The Property is located partly in the Commercial/Industrial (C/I) Zone and partly in

¹ Movants apparently filed their motion by email and hand delivery on October 18, 2013. However, Movants' counsel did not copy undersigned counsel on her email and posted the motion by first class mail. Undersigned counsel did not receive the motion until October 24, 2013.

the Rural Residential Zone. The area of the Property in the C/I Zone is adjacent to the State of New Hampshire railroad corridor that was formerly part of the Cheshire Branch of the Boston & Maine Railroad (the "Railroad Corridor") and proximate to Old Route 12 North.

2. The Board held public hearings regarding the Application for Special Exception on June 19, 2013, June 26, 2013 (in connection with a site visit to the Property), July 24, 2013, August 21, 2013 and September 18, 2013 (the "Public Hearings").

3. After extensive testimony by the Applicant and its experts, and after hearing arguments presented by both the Applicant and the Movants, on September 18 the Board evaluated the evidence, considered the arguments, deliberated, and unanimously voted to grant the special exception requested by Graves.

Legal Standard for Granting a Motion for Rehearing

4. Pursuant to N.H. RSA 677:2, the Board should only allow a rehearing if there is good reason for a new hearing stated in the motion. See N.H. RSA 677:2. It is well-settled that "no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he or she can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons." See The Board of Adjustment in New Hampshire, Office of Energy and Planning, Revised October, 2012, at Pages IV-4 through IV-5.

5. "The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created." Id. At Page IV-5. Indeed, "[a] person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant

the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time." Id., at Page IV-4 (Emphasis added).

6. The Movants have identified no new evidence or information which was not available to them on and prior to September 18, 2013, nor have they identified any prejudicial legal or technical error.

No Grounds Exist for a Rehearing

7. The Movants, whose residence is located in the C/I Zone, first argue that the Property is not an appropriate location for a quarry because it is landlocked. See Motion at Page 2. However, this argument is of no merit since (a) Graves has both easement and license right to access a public highway; and (b) on July 24, 2014 the Board granted variance relief to Grave from the frontage and driveway location requirements of the Ordinance. As evidenced by the uses permitted by the Ordinance, the Town of Westmoreland long ago legislatively determined that the quarry use requested by Graves was appropriate for this location.

8. The Movants next argue that the Board improperly determined that Property was an appropriate location for a quarry because the Board took into consideration other commercial uses of surrounding properties. See Motion at Page 2. In particular, the Movants claims that the Board should not have considered the existing gravel pit located on land owned by The George R. Graves Trust in Walpole, New Hampshire (the "George Graves Property"), which is adjacent to the Property. The Board's evaluation of this and other surrounding uses was clearly appropriate because the George Graves Property has been continuously used as a gravel pit and rock crushing plant for over 25 years, with Old Route 12 North as the primary trucking route for the transport of materials. The commercial activities associated with the proposed use of the Property as a quarry are identical to those associated with a gravel pit. It is also important to

note that almost all of the residential properties along Old Route 12 North were constructed after gravel operations commenced on the George Graves Property. The Movants purchased their house in 1996, while gravel operations on the George Graves Property had been ongoing for approximately 8 years.

9. In response, the Movants claim that a quarry use is different from a gravel pit use because blasting may be used to establish and operate a quarry. See Motion at Page 3. While technically true, the Movants overstate the distinction. The Movants presented no expert or other professional testimony in support of their claims. In contrast, testimony presented by Graves' noise and blasting experts clearly established that the blasting activities associated with the proposed quarry use by Graves would be infrequent (blasting is expected to be limited to 2-3 shots per year), and each blast would be of an extremely limited duration (less than one second), and the blasting would be conducted in compliance with the Ordinance. The Movants therefore attempt to argue that the noise associated with blasting is a permanent use. See Motion at Page 5. However, the Movants' argument conflates rare temporary activities associated with a use with an actual primary and permanent use. The permanent use of the Property is not blasting but rather the operation of a quarry which largely involves the loading and removal of rock, the same type of activities associated with a gravel pit. Almost all of the material removed from the Property will be trucked over internal road on the Property to the George Graves Property for processing. Finished materials will be trucked from the George Graves Property over Old Route 12 North in accordance with current activities.

10. The Movants next argue that the Property is not an appropriate location for a quarry because there is a stratified drift aquifer underlying the Property according to the Town's Water Resources Map. See Motion at Page 3. Once again, however, the Movants are wrong, as experts for Graves demonstrated that the alleged aquifer is actually located to the south and west

of the Property. The map included within Graves' application (Page 35) is the map required to be used by the State of New Hampshire Department of Environmental Services for Alteration of Terrain Permits. This map clearly shows that the closest aquifer to the Property is the Connecticut River. Moreover, the Alteration of Terrain Bureau within the State of New Hampshire Department of Environmental Services has already determined that the proposed quarry use would have no detrimental impact to water resources in the area and therefore has issued an Alteration of Terrain Permit for the project. As before, the Movants presented no expert testimony in support of their claims.

11. Next the Movants argue that the Board erred by determining that there would be no reduction in value to surrounding properties from the proposed quarry use. The Movant's arguments are mere speculation. Further, the Movants once again presented no expert or other professional testimony in support of their claims. The Board properly concluded that granting the special exception would have no adverse impact to surrounding property values.

12. Finally, the Movants argue that the Board erred by determining that there would be no nuisance to vehicles or pedestrians. In connection with this argument, the Movants claim, without any expert or professional evidence, that the quarry would increase traffic on Old Route 12 North. As stated above, almost all of the material removed from the Property will be trucked over internal road on the Property to the George Graves Property for processing. Truck traffic from the George Graves Property over Old Route 12 North will remain at existing historical levels.

13. In terms of impacts to pedestrians, the Movants' claims are again without merit. Apart from the fact that the Movants presented no details as to the nature and level of use of the Railroad Corridor for public recreation, the Movants' argument overlooks the fact that the Railroad Corridor is owned by the State of New Hampshire and that the State granted crossing

permits to Graves and George Graves to cross the Railroad Corridor with commercial vehicles in connection with commercial gravel pit activities. As such, the actual property owner (the State), who would generate virtually all of the pedestrian traffic for the area, did not object to the application for special exception and facilitated the same with the crossing agreement. This stands as strong evidence of a lack of hazard to pedestrians.

14. In summary, the Board thoughtfully considered all of the issues set forth in the Motion during its deliberations on September 18, 2013 and fully and properly evaluated the criteria appropriate to the requested special exception.

15. For the foregoing reasons, the Motion is entirely devoid of merit and must be denied.

Incorporation by Reference

16. The Applicant hereby incorporates by reference the contents of its application and the attachments, as well as all verbal and written comments made by Tim Graves, Dick Fraser, Tom Key and Peter Hicks during the Public Hearings.

Reservation of Rights

17. The Applicant hereby reserves the right to amend and/or supplement the arguments made in this objection, orally or in writing, and to raise any additional arguments, at future hearings and/or proceedings on the Motion or otherwise.

WHEREFORE, the Applicants respectfully request that this Honorable Board:

1. DENY the Motion for Rehearing; and
2. Grant such other and further relief as is just, equitable and appropriate.

Respectfully submitted,

GRAVES TRUCKING, INC.
By and through its Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: October 28, 2013

Timothy E. Britain NH Bar #0332
Two Capital Plaza
P.O. Box 1137
Concord, NH 03302-1137
603-224-7761

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing pleading to Rebecca Wagner, Esquire, counsel for the Movants, this 28th day of October, 2013.

When the clerk had finished reading both documents Attorney Britain asked as a point of order for the record the date when Attorney Wagner's motion had been filed with the Westmoreland town Office. Chairman Remy said that he, too, had been wondering when the motion had been filed. He asked the clerk to check the date on the document she had read.

The clerk stated that it had been stamped October 21st by the town's administrative assistant. The clerk said that her e-mail document had been delivered over the internet on October 18th, the last day of the deadline for filing.

Attorney Wagner certified that she had hand delivered the motion to the town hall on Friday, October 18th to the person sitting in the town office.

Attorney Britain quoted case law to the Boards members which said that they must deny a re-hearing if the motion is not submitted within the thirty day period starting with the notice of decision.

Mr. Remy asked the Board members for their thoughts in order to reach consensus whether to accept the motion since the date of its delivery had been stamped outside of the 30 day period.

Mr. Merry asked if the Board could hear the merits of the case and determine later whether the deadline had been met or not. He, himself, would prefer to hear the arguments of the motion and the arguments against the motion that night. Mr. Huntley and Mr. Shonbeck agreed with Mr. Merry. Ms. Ranson and Chairman Remy also agreed to hear the merits of the case and deal with the date the motion was delivered at a later time.

Chairman Remy directed the Board to consider Attorney Wagner's objections beginning with the appropriateness of the site.

Mr. Merry said that he had concluded through the site visit and all of the testimony that it was an appropriate site.

Mr. Huntley said that he did not see anything new or different in Attorney Wagner's arguments.

Chairman Remy agreed that he did not see anything new in Attorney Wagner's objections. He said that only one set of witnesses had been called and they spoke in favor of the proposal. Perhaps there could have been arguments against the proposal but they were not heard from. Mr. Shonbeck and Ms. Ranson agreed that they did not see any new arguments in the motion. Chairman Remy called for a motion.

Mr. Huntley moved to deny the motion for a re-hearing.

Ms. Ranson seconded the motion. All voted in favor of denying the motion.

Mr. Remy asked Attorney Britain to go over the case law which applied to the 30 day deadline. Attorney Britain went over two cases.

In the first case, Cardinal Development, the petitioner's attorney filed or faxed the motion for re-hearing on the 30th day after 5:00 pm and although no time is exactly stated in the statute, the court ruled that after the end of business hours was not timely filed. The Superior court ruled it did not have jurisdiction to hear the case.

A more recent case deals with when one starts counting the 30 days. In this case no written decision was issued until a couple of weeks after the hearing and the petitioners started counting the thirty days from the day the written decision was posted. The court ruled that it was filed untimely because it should have started the thirty days from the day after the hearing.

The ZBA clerk asked for direction in how the decision should be noticed, on the merits of the case or on the date discrepancy. It was agreed that it should be noticed on the merits of the case.

Mr. Merry urged that the Board try to discover the discrepancy between the stamped date on the hand delivered motion and the testimony of Attorney Wagner.

Attorney Wagner said that it is important to find out because it will affect the timing of any appeal to the Superior Court.

Mr. Shonbeck made a motion to adjourn at 8:30 pm.

Mr. Huntley seconded.

All voted in favor of adjournment.

Respectfully submitted by Jacqueline Cleary, Zoning Board Clerk

