

**TOWN OF ALTON PLANNING BOARD
MINUTES 2019
SEPTEMBER 24, 2019 – SPECIAL MEETING**

APPROVED

Members Present:

Roger Sample, Chairman
Drew Carter, Member
Tom Hoopes, Member
Bob Regan, Member
Russ Wilder, Member

Others Present:

Jessica A. Call, Town Planner
James Sullivan, Esq., Attorney for the Planning Board
Jason Reimers, Esq., Attorney for the Conservation Commission
Andrew Sullivan, Esq., Attorney for Keith Babb/Green Oak Development, LLC
Keith Babb, owner of Green Oak Development, LLC

CALL TO ORDER

Mr. Sample called the meeting to order at 6:00 P.M. Mr. Wilder recused himself for these proceedings and sat in the audience. Mr. Sample asked if the Mr. Babb was present. Mr. Sample asked if anyone knew if Mr. Babb and Attorney Sullivan were coming. Scott Williams, from the audience, stated that he was informed by Mr. Babb that he would arrive in ten minutes.

Mr. Hoopes MOVED that the Board adjourn the meeting at 6:03 P.M. until the applicant and his attorney arrived. He amended his motion to include, arrival within a reasonable amount of time.

Bob Regan seconded the motion, and it PASSED unanimously.

The meeting reconvened at 6:13 P.M., upon Mr. Babb and Attorney Sullivan’s arrival.

APPOINTMENT OF ALTERNATES

APPROVAL OF AGENDA

1. Public Hearing

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| Case # P17-24 Green Oak Realty Development LLC, Andrew H. Sullivan, Attorney, Agent | 398 Suncook Valley Road Map 5 Lot 72 | Request for determination of abutter status of the Alton Conservation Commission |
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The applicant is requesting the Board make a determination regarding the status of the Alton Conservation Commission as an “Approving Abutter” for the purpose of issuance of an Excavation Permit.

Attorney Reimers, agent for the Alton Conservation Commission, and Attorney Sullivan, agent for Keith Babb/Green Oak Development, LLC, came forward to present the case. Attorney Sessler was seated at the table with the Board.

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Attorney Sullivan shared that he had two questions for the Board. 1. Was the Alton Conservation Commission was an approving abutter or not? He thought that the State Statutes and the Town's Excavation Regulations were clear. He thought that the Commission had abutter status for receiving notice, but did not have status as being a consenting abutter. He pointed out that the requirements for the abutter list included abutters and holders of conservation easements. He noted that these entities would be listed in different categories. The State Statute talked about "real property", not personal or property rights, but ownership. He noted that during the Site Plan, Subdivision, and Variance application process that the Town did not seek advice for holders of right-of-ways and other easements. They may get notice, but they did not have any more rights than just being a person receiving a notice. He maintained that there was no abutter consent status to receive an approval letter from the Alton Conservation Commission on this matter. He thought that Mr. Babb had fulfilled Conditions Precedent #5 in the Notice of Decision that gave him conditional approval.

Attorney Sullivan pointed out that the Board had the right to waive any criteria requirement in the Excavation Regulations under certain circumstances. He shared that there would be serious economic hardship to Mr. Babb if they were forced to shut down. Mr. Babb just put out a bid to work at a project in Barnstead, and they underbid to get the job. The Purpose, according to the Excavation Regulations was to safeguard public health, safety, and welfare while providing opportunities for excavation. It did not mean to exclude opportunities. He talked about how strict conformity of the Regulations would create an unnecessary hardship to Mr. Babb and a waiver would not be contrary to the spirit of the ordinance. He noted that Mr. Babb's hardship was that he had been in operation for 10 years, he had started to reclaim the pit with a 1:1 slope. He stated that the slope had been in existence for several years and that the Conservation Commission was just brining that issue up now. He pointed out that the second reason a waiver could be granted was that specific circumstances relative to the applications and conditions of the land indicate a waiver would properly carry out the spirit and intent of the ordinance. He stated that the pit was very clean and he wanted the Board to let Mr. Babb continue operating.

Attorney Sullivan stated that he drafted a letter dated August 5, 2019, on behalf of Mr. Babb to the Conservation Commission, which stated that large boulders would be in place before December 1, 2019, and he noted that it was already taking place. Aggregate would be poured to fill in the spaces between the boulders. The grade would be sufficient for stabilization but without any particular slope. Attorney Sullivan noted that under 155-E:5, there was no grade requirement. He also noted that Mr. Babb was going to perform this work without an engineer's review, but was willing to provide a \$20,000 bond to make sure the work was completed by December 1, 2019. In the Conservation Commission's rebuttal letter dated August 14, 2019, they stated that they wanted a 2:1 slope and the completed restoration should be inspected and approved by the Town's consulting engineer and the Code Enforcement Officer prior to the Conservation Commission's approval. Attorney Sullivan did not think that was required or necessary.

Attorney Sullivan thought that if a waiver was not granted by the Board, then Mr. Babb was going to out of business and in order to protect himself and his lenders, he would have to start suing everybody. Attorney Sullivan noted that he was confident that he would prevail in court. If Mr. Babb was allowed to continue working, he would not have a financial hardship, and may potentially lose in court, but it could not be predicted. Attorney Sullivan also noted that the State could close him down. If the Conservation Commission prevailed at tonight's meeting, what would they gain. It would get them nothing. There was a lot going on with this case, but it boiled down to, A. There was nothing in the Statute or the

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Excavation Regulations that the Conservation Commission had the ability at a consenting abutter, and B. There was more than enough information given to the Board for them to find that the gravel pit has operated with the suggested conditions and it was sufficient to grant a waiver, if a waiver was required.

Jason Reimers, Esq., of BCM Environmental Land Law, was representing the Alton Conservation Commission. He handed out some pictures of the slope and a copy of RSA 477 to the Board. He noted that the Excavation Regulations and RSA 155-E were clear that the Regulator shall not grant a permit for excavations within 50 feet of a disapproving abutter. He noted that there could be no dispute that the excavation was within 50 feet, and in fact it was up to the property line. The photos showed that the excavation was up to the property line. Other photos showed an orange ribbon on some of the trees that marked the property line, and in a couple of the photos, it depicted a tree that had fallen into the excavation. Attorney Reimers shared that the Conservation Commission noted that in different parts of the boundary excavation has encroached onto the Conservation's property. He noted that the Board could not issue a permit for an excavation permit for an excavation within 50 feet of a disapproving abutter.

Attorney Reimers agreed with Attorney Sullivan that RSA 155-E did not define an abutter. The Alton Excavation Regulations define an abutter by direction of RSA 672:3. That definition was someone "who's property is adjacent to the gravel pit". The words who's property obviously referred to the owners of the property. The statute did not limit owners to the fee owners of the property. The Town of Alton, through its Conservation Commission was the title owner of a Conservation Easement Deed on the abutting property. A Conservation Easement is a property interest, it had significant value, it was recorded at the Belknap County Registry of Deeds; the world was on notice that the Town had a Conservation Easement on this piece of property. One of the few enabling statutes for Conservation Easements, RSA 477:47, notes that conservation restrictions are interests in real property and documents creating such a restriction shall be deemed a conveyance of real estate. Attorney Reimers pointed out that when Attorney Sullivan noted that only real property abutters received owner status, he agreed, but when the fee owner, Barbarossa, gave the Conservation Easement to the Town in 1990, the fee owner gave up most rights to use the 86 acre property. No commercial activities can occur except with regard to certain forestry and agriculture. No residences could be built. No businesses could be built or conducted. The soil could not be disturbed. The only reserved rights that were listed were that the land owner may maintain the utilities, create ponds for agriculture or fire protection, post against vehicles, and in certain situations, hunt or allow for hunting. The fee owner could not prevent public access. The Conservation Easement only allowed the Conservation Commission to deny public access. A significant level of control was given to the Conservation Commission through this deed because only they could restrict the public from entering the property, which their rights applied to the entire property in perpetuity, they must monitor and protect the property, and they could bring suite to remedy a breach of the Conservation Easement, even if it was the fee owner. If a third party breached the Conservation Easement, the suit did not have to involve the fee owner.

Attorney Reimers stated that the abutter definition in the Regulations referred to a person whose property adjoined the property that was the subject of the application. The Conservation Commission was a significant owner of a significant real estate interest in the abutting property. Under RSA 477:47, which stated that Conservation Easements were real property interests, and RSA 672:3, which noted the definition of an abutter, the Conservation Commission is an owner and an abutter. As an abutter, they were afforded the status of either being an approving or disapproving abutter under RSA 155-E and the Alton Excavation Regulations.

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Attorney Reimers talked to another attorney, Andrew Isles, Esq., who used to represent the gravel mining industry, and was involved in drafting the initial RSA 155-E Statute and the amendments to it. Attorney Reimers asked Attorney Isles about a conservation commission being an abutter under RSA 155-E, he said, of course they would be. Attorney Isles noted that the Conservation Easement was on the entire piece of property, it was a recorded document at the Registry, and the Conservation Easement also gave a lopsided control to the Easement holders, versus the landowner. Attorney Reimers stated that he strenuously disagreed with Attorney Sullivan's position in his letter that having the Conservation Commission hold an abutter status was a ludicrous position.

Attorney Reimers noted that NH case law also supported the Conservation Commission's conclusion, which he had previously cited with "Appeal of Michele", NH Supreme Court. They were deemed owners of the property because they were holders of an exclusive use easement, and therefore they could apply for a dock permit. The Court stated that the term "owner" encompasses property interests other than fee ownership.... The Court also stated that possession was not a requirement in an ownership interest in land. The Conservation Commission's control over the abutting property to the excavation pit was similar to the control that the easement holder in "Appeal of Michele" had. The Court further stated that "a grantee takes by implication whatever rights are reasonable necessary to enable it to enjoy the easement beneficially". In order for the Conservation Commission to fulfill their duties, they must have the right as an owner for purposes of the Excavation Regulations. Attorney Reimers pointed out other types of easement and right-of-ways, but this Conservation Easement was nothing like those. There are three (3) types of easements that are given elevated easement status by both RSA 477:47 and by the Town's definition of an abutter, which were, Conservation Easements, Preservation Easements, and Agricultural Preservation Easements. Therefore, if the Board was to decide in favor of the Conservation Commission as a holder of a Conservation Easement having abutter status, it would not set a precedence for every type of easement.

Attorney Reimers referred to Attorney Sullivan's August 13, 2019, letter. Attorney Reimers first noted that in Section 13, A, 2 of the Alton Excavation Regulations, which noted the abutters list that there were various entities mentioned. He wanted it noted that this section used the word abutters very loosely. The abutters list should include the names and mailing addresses of the applicant; owner; all abutters as indicated in town records, the Belknap County Registry of Deeds, etc., holders of conservation, preservation or agricultural preservation restrictions, compiled not more than five (5) days before the date of delivery of the application; and the names and address of every licensed professionals. Attorney Reimers pointed out that within the semicolons for abutters it listed all abutters as shown in town records, Registry, and holders of conservation, preservation, and agricultural preservation restrictions; they were all lumped into that one category of abutters. It was not redundant to list holders of conservation easements separately because it ensured that the holders of conservation easements on property under consideration were also notified. If holders of conservation easements were not listed on a property on which an application for an excavation permit was filed, they would not get notice of the application. It left no doubt that conservation easement holders must be notified. Attorney Reimers also pointed out that this section about notice and the abutters list, it was not the controlling law. The controlling law was the definition. Another point that Attorney Reimers made about the August 13, 2019, letter was about how an application would get to an appeal process. He pointed out that Attorney Sullivan would rather have the Board deny the disapproving abutter status for the Conservation Commission, and then have the Conservation Commission put in an appeal, rather than the Board siding with the Conservation Commission and having Attorney Sullivan have to put in an appeal. Attorney

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Reimers thought that was improper to weigh that into their decision. Mr. Babb may seek attorney fees and lost business revenue, but that should not influence the Board's decision. The Board's decision should be based on how they interpreted the Statute. Attorney Reimers noted that if the Board thought that the language of the Statute included the Conservation Commission as an abutter, they should vote that way and not based on any other considerations.

Second, Attorney Reimers pointed out that the Board could not grant waivers in this case. Waivers could only be done from Sections 6. Minimum and Express Operational Standards, 7. Minimum and Express Reclamation Standards, and 8. Incremental Reclamation, of the Excavation Regulations. The Board did not have the authority to grant a waiver from any provision in the Regulations, and if they could they could grant a waiver from the notice provision, but the Board would probably not agree. Attorney Reimers pointed out that the disapproving abutter provision was one that the Board could not waive, and if they did, it would be a reversible legal error. To confirm that point, he looked to RSA 155-E, which had an exception, Section 155-E:5-B and had similar language. The Regulator may grant an exception in writing to the standards contained in 155-E:4-a, E:5, and E:5-a for good cause shown. Under the Statute that gave the Board authority, they could grant waivers from either of the three (3) standard Sections. The Sections in the Statue mirrored the three (3) Standard Sections in the Excavation Regulations. Attorney Reimers thought that Mr. Babb did not quite deserve a waiver because he did not satisfy the criteria. Mr. Babb brought this upon himself by excavating to the property line, less than 50'. The waiver must carry out the spirit and intent of the Regulations. Waiving protections when the Mr. Babb went right up to and possibly over the property line would not carry out the spirit and intent of the Regulations. This was a de facto prohibited project under the Regulations and the Statute. Allowing a prohibited project was contrary to the spirit of the Regulations. Attorney Reimers further noted that the applicant stated they should get a waiver because the applicant had been operating with the existing slope for a long time without the Town enforcing its Regulations. He did not think that was a sufficient basis. The 50' from a disapproving abutter and 10' from an approving abutter requirements had long been the law. The applicant ignored them at its own peril and ignorance of the law or history of getting away with it was not the basis for a waiver. These consideration had nothing to do with, "the conditions of the land", and that was what that waiver request must be based on, that there was conditions of the land that would form the basis for a legally defensible waiver.

Attorney Reimers now referred to Attorney Sullivan's letter dated August 5, 2019. Number 1. stated that the applicant would place large boulders on the current vertical excavation slope located where the Green Oak land met land subject to the conservation enable 10' deep setback before the new slope began. According to minutes from a meeting back on May 21, 2019, it was noted that the applicant's ultimate intention was to go from there, straight down. That would leave the large boulders leading to a large cliff and water. Number 2. stated that aggregate would be poured over the boulders to fill in the spaces but with no guarantee that the aggregate would stay in place and no obligation to replace or replenish or restore the aggregate if it washed out. Attorney Reimers stated that the Conservation Commission did not think that would end up being a stable slope and if the aggregate were to be washed out, boulders would be left next to conservation land with big gaps in between. Number 4. stated that the grade of the boulders would be sufficient for stabilization but without any particular slope percentage required. Attorney Reimers did not think that the Conservation Commission was unreasonable in wanting a 2:1 slope, and the Deed to Green Oak Development, LLC, required a 2:1 slope. In the last paragraph of the August 5, 2019, letter, it noted that the applicant would be the sole decision maker as to when the work had been satisfied and once he opines to the Conservation Commission that the work was completed.

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Attorney Reimers did not think that anyone would agree to that. He did not think that the person who was in violation of the Statute and the Deed should be the one who unilaterally would say when the work was satisfied. He did not think the Board had the ability to grant a waiver for this.

Attorney Reimers pointed out that back on May 21, 2019, the Board voted to grant the applicant his permit even though the applicant was in violation of Section 6., G of the Excavation Regulations for having slopes greater than 1:1 without a fence. Attorney Reimers wanted the Board to find that the Conservation Commission was an abutter, that they deny all waiver requests, deny all relief requested by the applicant, and to deny the application for an excavation permit.

Attorney Sullivan noted that he worked with a lot of commercial properties, and pointed out that the leasee would have complete control over the property, they paid all of the taxes, maintained the property, etc., but they did not have the authority to sell the property, only the owner could sell the property. A Conservation Easement holder may have many rights to the property, but the fundamental right of the property was alienability, the right to sell it. Mr. Steele had the right to sell the property, not the Conservation Commission. The Conservation Easement Deed for the Barbarossa land stated, there should be no mining, quarrying, excavation or extraction of rocks, minerals, sand, topsoil or other similar materials on the property. No such rocks, minerals, gravel, sand, topsoil, or other similar materials shall be removed from the property. Attorney Sullivan pointed out that the restriction was the use of the property, not the use of someone else's property. The Deed talked about the "Property". The Deed itself talked about, of the "Property", and noted that aggregate could not be excavated or removed from that property. It identified that property. RSA 477:47 talked about an interest in real estate, it was not a fee. There were many interests, like a mortgage. He asked if mortgagees were noticed and did not think they were. Interests like ground leases and right-of-way easements, all of these interest holders did not own the property, therefore, they could not sell the property, which was a pivotal point. The abutter had ownership and alienability rights and did not think that with this criteria, the Conservation Commission had abutter rights. It did not state anywhere that a holder of an easement was an abutter for consent purposes. Every State referenced in the Regulations was for notice purposes. The Conservation Commission only received notice because they were an interested party, like himself and the Engineer who prepared the plans. There was nothing noted that gave the Conservation Commission or the other people noted any rights in that regard.

Attorney Sullivan referred to the waiver request. In RSA 155-E:5-B. Exceptions, talked about the fact that the Regulator may grant an exception to 155-E:4-a. Attorney Sullivan pointed out that 155-E:4-a, II, was the 50' boundary of disapproving limitation. He thought that the Board did have the ability to grant the waiver. What the applicant proposed did not impair the spirit of the ordinance. He noted that some of the pictures that were presented were a year old and he was not sure how they were obtained and thought that someone must have trespassed. Attorney Sullivan did not think they were indicative of any impairment of the spirit of any ordinance. He pointed out that this was not a restrictive ordinance, it was an accommodation ordinance. It gave the ability to look at and address the safeguards of public health, safety, and welfare while providing reasonable opportunities for excavation. He stated that he had not heard anything at this meeting that stated what the applicant had done was detriment to the safeguard of public health, safety, and welfare. The Board was supposed to address everything that was presented and to provide opportunities for reasonable excavation. The applicant was the only functioning pit in town, and there was a need for his services, aggregate, and his product, otherwise, it would cost more for everyone in the surrounding towns. What would the public health, safety, and welfare gain by shutting

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down the excavation pit, which was a pivotal question; the answer was, nothing. Attorney Sullivan maintained that the Board find the Conservation Commission was not an abutter and did not have consent power. Alternatively, if the Board did find the Conservation Commission had abutter status, he thought that the Board had the right and the duty under their own Regulations and RSA 155-E to waive any requirement that required the Conservation Commission's consent before they signed the plan.

Attorney Reimers agreed that no excavation within 50' of a disapproving abutter is in RSA 155-E:4-a, but it is also repeated in E:4, which can't be waived. He thought that some things in other parts of the Statute were brought together into E. 4 and were elevated into an unwaivable Section. The waiver section in RSA 155-E definitely did not mention E. 4, so it did not make any sense that a provision in that Section could be waived just because it was listed elsewhere. Attorney Reimers noted that his argument did not include as an abutter, lesser easements. He also agreed that selling property was a huge stick in the bundle of property rights. This was a reference one would learn at law school, sticks in a bundle was a right of possession or to sell it. A Conservation Easement gave a lot of those sticks to the Conservation Commission, but it did not give them the right to sell the land itself. The definition of abutter could restrict that to fee owner, but it did not and the Court recognized that in the "Appeal of Michele". The Conservation holder in that case without the right to sell the underlying fee was an owner. The same results should be held in this case.

Attorney Reimers noted that he wrote a lot of Conservation Easements, and they regarded what could take place on the "Property", and he almost always capitalized the term, the "Property", on which the Conservation Easement restricted land. These easements almost always had nothing to do with other property because it was a land owner selling the development rights from what they could do on their property. I had nothing to do with whether a Statute gave that person rights. He noted that his own personal deed for his house did not mention anyone else's property, but his was still an abutter to his next door neighbor even though his deed did not say anything about that property.

Attorney Sullivan noted that in the "Appeal of Michele", that case made a pivotal distinction that holder of an easement had ownership attributes in that Statute. He shared that each Statute sometime had their own definitions. In that Statute, the Court stated they were treating it as owner. He thought that this Statute was inapplicable to this Conservation Easement

Mr. Sample wanted to confirm that the Conservation Easement that was currently in place was for the abutting piece of property, and not for the applicant's property. Attorney Reimers stated that the Conservation Easement Deed discussed what could take place on the Barbarossa property, but his argument was about the abutter status, not what took place on the property. He noted that a property owner would be an abutter because they were next door to the property owner in question. Mr. Sample stated that the Conservation Easement did not give control over the neighbor's property. Attorney Reimers stated, no, that was what the Excavation Regulations were in place for. Mr. Sample was disappointed that the Board had to convene at tonight's meeting because there were some offers on the table and he thought that things could have been worked out.

Mr. Sample opened public input.

Russ Wilder, member of the Alton Conservation Commission, came to the table. He stated that he had walked the conservation property over the last ten years, and the pit owner was very gracious to let the

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Conservation Commission walk on his land to view the boundary. The big thing was that the Conservation Easement ran with the land, so if the land was sold, the Town or Conservation Commission was still going to be in charge of the values in that Conservation Easement. A major things that the Commission observed over the last year, and this was notified to the State but did not act upon it, was the fact that the wetlands next to the pit had been drained because the water table had been lowered next to it. The wetlands were one of the conservation values on the land. In defending the Conservation Easement, when the Excavation Regulations were updated, the Conservation Commission thought this was an avenue where they could fix the problem of having the excavation right up to the property line addressed. He stated that what needed to be done was the permeability of the wall needed to be restored so the wetlands could return because they were a value on the land. He though that the major reason why the Conservation Commission did not want to accept the offer from Attorney Sullivan was because it was going to be a permeable wall, therefore, it would not restore the wetlands value on the land. This is an activity on an adjacent property that is affecting the conservation values on the land that the Town was charged with to protect, that was all they were trying to do. The Conservation Commission did not want to put the applicant out of business. They made an offer that they thought was acceptable to go 10' from the property lines so they would be in compliance with the Excavation Regulations, and install a stable slope with lot permeability in order to restore the wetlands. The restoration should not just be a pile of boulders.

Mr. Sample asked how the applicant's actions drained the wetland. Russ Wilder explained that when the hole was dug in the ground, the water table will drain into that hole. The material was holding that wetland in place before it was dug out. Mr. Sample asked if the missing water would be in the new hole. Russ Wilder noted that the water would be pumped or drained out, and the elevation of the property would come into play. The drop into the pit was about 20', but it only had to be about a 4' to 5' difference in the water table for the wetland to start draining out. The wetland was a conservation value that was sold as part of the whole process, it was an LChip project, and tax deductions were taken; it was not just a simple easement. Mr. Sample asked if the water level was studied over the years and wondered if the level went up and down. Russ Wilder stated the wetland was located above the high wall was. It was a wooded wetland with hummocky and red maple trees, and when the water table was reduced due to the excavation, the wetland dried up.

Attorney Sullivan stated that the baseline report back in 1990 when the Barbarossa Conservation Easement was granted, under the condition of land it was noted that there was a gravel pit on abutting land presently owned by Robert & Matilda Hussey. It was downstream from the Barbarossa land and should have no impact on the stream corridor. Attorney Sullivan stated it was a gravel pit and things may happen. It has now been twenty years later and the Conservation Commission knew the gravel pit was in place, and now they could not just say they did not like what was happening. He did not think that was right. He noted that the applicant was installing a berm roughly consisting of a 1:1 slope with a 14' setback from the property line. Russ Wilder thought that if the slope was made of material that would preserve the wetlands again, that would be fine. Keith Babb asked if Russ Wilder could confirm if the wetlands were located in the back corner of the pit. Russ Wilder referred to the section of the pit where some of the flagging had fallen in, right where the line was that had the trees with the blazes on top of the slope, just in behind that section was where the wetland was located. This was also where the detonation cord and blasting caps were located. Keith Babb referred to the back corner. Russ Wilder noted not way in the back corner, about halfway down the wall on the right. Keith Babb stated that clay was a permeable material, which would retain water. Russ Wilder thought it should be a designed wall.

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He also thought that Mr. Babb presented a designed wall previously in his closure plans. Keith Babb stated that he never presented a closure plan; what he presented was a plan so he could continue to operate that would be modified. Russ Wilder thought that there was a provision in that plan for a slope. Keith Babb stated that there was a provision for a slope, but it was drawn at a 3:1, which was going to be resubmitted at a 1:1 slope. Russ Wilder wanted the slope to be safe. Keith Babb stated that a 1:1 was a standard slope used by the Highway Department and they were able to use a mower. Russ Wilder stated that was a 45 degree slope was it was pretty steep. Keith Babb stated that he could walk up the slope because he had half of it done. Russ Wilder stated that if the slope did not have a clay core or some type of clay barrier in the back as it was built up, it would not restore the wetland, and that was why the Conservation Commission rejected his offer. Keith Babb stated that the Conservation Commission could have stated what they wanted instead of just rejecting his offer; it would have saved him \$1,000 an hour sitting in this room.

Attorney Reimers responded to Attorney Sullivan's comment about baseline documentation. He noted that the baseline documentation report, which was a document associated with the Conservation Easement, noted that there was a gravel pit next door, but it should be assumed that the gravel pit owner would be operating within the law, rather than going right up to the property line. Mr. Sample thought that there were a couple of issues, but thought in the end, it was to resolve the issues. He noted that the Board would take his considerations in mind.

John Dever, III, Code Official and private citizen, came to the table. He noted that he was not a citizen of Alton, but the ramifications of a decision at this meeting could extend throughout the State when it comes to the viewing of easements in conservation lands. He pointed out that comments were made to Section 20., 1. that strict conformity would pose a hardship and that a waiver should be to the spirit and the intent of the regulations. The unnecessary hardship was self-imposed. Mr. Babb had been operating pits for years and years and the State Statute had been in place for years, and the State law stated that even if there was an approving abutter, an excavation could only be as close as 10' to the property line, unless there is permission from the abutter to get closer to the property line. It did not state anywhere that an excavation could cross over the property line. He stated that Mr. Babb did not have permission from the Steele's to be closer than 10'. Mr. Dever stated that was a legal issue that he was going to address at a late time. He thought that as a longstanding pit operator that Mr. Babb should be familiar with the laws on excavations. A comment was made that the Town was excluding Mr. Babb's operation, but the Town was not, they were asking him to comply with the Regulations. Mr. Dever noted that the Town's Excavation Regulations were not enforced for a number of years, but then the Board decided it was time to update the Regulations and to seek compliance from the operators in the Town. The spirit and the intent of the Regulations is to allow operations and these activities, but with the protection of the Town, its residents, and the environment in mind. Mr. Dever noted that he had walked what he thought was the property line and was not sure if he was trespassing because it was not posted. He was going by the directions that Dave Hussey, previous owner of the pit, had told him he could find the blazes on the trees that indicated where the property line was, and there were areas where those were gone. One of Mr. Babb's argument was that he had been doing this all along and why should he comply because he was already at the property line and did not think it was a big deal. Mr. Dever stated that at one point there were no excavation laws, and the legislature and the State decided to enact them, and codes, regulations, laws, and rules were updated all the time. Rules and Regulations were put in place for protection. Mr. Dever thought that Mr. Babb had shown any inclination to work with the Town. The original application had been submitted two (2) years ago, and it has gotten nowhere. The Board of

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Selectmen though it was appropriate to not sign the Intent to Excavate, Mr. Dever issued a violation, and then some progress happened, but since there had been none to date. Mr. Dever noted that he was told this morning that Mr. Babb was working on the slope, but that was a recent development.

Mr. Dever pointed out that if Mr. Babb was to start up a new pit, he would have to abide by the State's DES Regulations regarding Alteration of Terrain, Wetlands Impact and everything else, he would have to abide by the regulations that were in place today, not the ones that were in place when he started in the business. This was not a simple decision. The Town was the holder of the Conservation Easement and the Conservation Commission were the stewards, they were responsible for it. If the Board ruled against the Town, the effects of that decision would not just stay locally. The Board was elected by the townspeople to protect their interest in all matters of the establishment and operation of business activities in Alton. Mr. Dever sat in on the ZBA meetings, and one of the criteria that the Board had to take into consideration when making decisions was whether or not substantial justice would be done, how much would one suffer for someone else's benefit. If the Board decided that the Conservation Commission was not an abutter, it did nothing for the Town and gave Mr. Babb a free license to do what he wanted. Mr. Dever thought that the Board should rule against this request. He pointed out that there was no point in having conservation land if the local Board was going to ignore the purpose of it.

Mr. Dever stated that in one of the places that a definition of an abutter could be found was in RSA 676:4, (2),(d)(1), which included an applicant, holders of conservation, preservation, or agricultural preservation restrictions, and every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the Board. This language is mirrored in the Board's Regulations. Mr. Dever pointed out that a holder of an easement did not really have a say on what occurred on an abutter's property, but if there was a deeded right-of-way easement, that abutter had a definite say as to what happens and if his easement was restricted or abused. Mr. Sample thought that if an abutter had a recorded easement on his land, it could not be argued, but the Conservation Commission did not have an easement on Mr. Babb's property. Mr. Dever pointed out that the Conservation Easement was a recorded document that the Conservation Commission had ownership of.

Mr. Dever also pointed out that a comment was made about reasonable opportunities. He noted that reasonable opportunities have been provided. Mr. Babb had been in operation this whole time and he still is in operation. When Mr. Dever issued his violation dated April 19, 2019, 20 days later he could have issued a Decease and Desist Order and then 15 days later apply to the Court to have that Decease and Desist Order enforced. At that point Mr. Babb's doors would have been closed, but he did not go forward with that because Mr. Babb is currently in the appeal process. In the Conservation Commission's original letter to Mr. Babb, stated that they wanted particular things done in their offer and attempted to work with him. Mr. Babb's response was, I'll do, I'll do it my way, I won't guarantee it, and I'm the one who says it's right when it's done. Mr. Sample asked if that comment was to the Conservation Commission's original offer. Mr. Dever stated that was Mr. Babb's response to the Conservation Commission's initial offer. Mr. Sample thought that sounded like the same language to the current offer. Mr. Dever stated that Mr. Babb was going to use the boulders from Mr. Hussey's project, put aggregate in it, but he would not guarantee that it would stay, and when he was done, Mr. Babb would be the one to say it was done right, which was the offer dated August 8, 2019.

Mr. Regan asked for a point of clarification. The offer from Mr. Babb was dated August 5, 2019. He stated that the rebuttal offer from the Conservation Commission was dated August 14, 2019. Mr. Dever

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stated that the August 14, 2019, letter was the Commission's response to Mr. Babb's offer of August 5, 2019. The original letter from the Conservation Commission was dated May 8, 2019. This letter was in regards to their abutter status. In order for the Conservation Commission to agree to be an approving abutter up to 10' to the property line, they wanted Mr. Babb to correct the property line buffer violation, and within the 10' setback to the property line they wanted him to submit a restoration plan stamped by a professional engineer that would show restoration of the entire boundary adjacent to the excavation to comply with RSA 155-E:4, II. The plan would show a restored 10' buffer along the entire boundary with a 2:1 slope beginning at the edge of the 10' buffer. The restoration shall be completed by September 30, 2019. Acceptance of the plan and certification will be by the Code Enforcement Officer in consultation with the Conservation Commission. The other two items were that the abandoned trailer would be removed and they had to clean up some blasting debris that was located on the Conservation Easement and to prevent debris from being from being ejected from the property during future operations. Normal blasting operation used mats to prevent debris from being blown onto the abutter's property. There was a clear effort to remedy the situation and three months later, Mr. Babb responded with his August 5, 2019, offer. Mr. Dever stated that if he was to go out to the property and observed that Mr. Babb was not in compliance, at minimum, with the 10' buffer, then Mr. Babb was in violation of the law and the Town's Excavation Regulations. Even if the Board ruled whether or not the Conservation Commission held an approving abutter status, Mr. Babb still had to comply with the law. Mr. Dever's recommendation is that the Board not make their findings against the Town because everything that he had seen or read up on, or learned over the last several months was that the Conservation Commission did have approving abutter status. Mr. Hoopes asked if Mr. Dever had a copy of the Conservation Easement Deed. Mr. Hoopes thought that when the State bought the property, the Conservation Easement was donated to the Town, and Jim Washburn was the one who had the Conservation Easement transferred to the care and custody of the Conservation Commission. Mr. Dever noted that he had not done research. Mr. Hoopes thought that if the Conservation Easement was in the care and custody of the Conservation Commission that implied a level of control.

Attorney Sullivan stated that RSA 674:2 (d)(1) addressed the Planning Board's requirements to give notice, it did not define abutter as another status except as a recipient of notice. He noted that the self-imposed hardship was not because the excavation on that side of the pit had occurred prior to the 2017 change. He stated that this was a class example of government regulation coming down and making the parameters different that was had been operated on before. Attorney Sullivan thought that the Steele's letter gave permission for Mr. Babb to go into the 10' setback, and Mr. Babb confirmed. If the Board voted against the Conservation Commission's rights regarding the approving abutter status, the abutter would ultimately be a questions of legal interpretation. He pointed out that Section 20. of the Excavation Regulations talked about waivers and exceptions. The exceptions under 155-E:4-a had standards, but the waiver section stated, a waiver of any specific requirement shall not be construed as a waiver in full or in part of any other requirement. There was a distinction in the Excavation Regulations between waivers and exceptions. He noted that the exception was somewhat limited, but the waiver was not. He thought that the Board had the right and obligation to exercise the waiver in this circumstance. Even if there was no hardship, #2 of Section 20. stated that specific circumstances relative to the application, or conditions of the land indicate that the waiver will properly carry out the spirit and intent of the regulations. Attorney Sullivan stated that Mr. Babb was asking for a waiver on a signature on an application to move forward, and whether or not the Board took the Code Official's stance into consideration, this was not a code issue. Attorney Sullivan noted that he was going before the Board to have an application signed, and under one provision, the Board had the right to waive it, and the duty to waive it so they could

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reasonably provide opportunities of excavation without detriment to the public health, safety, and welfare of the Town.

Attorney Reimers stated that the Excavation Regulations had waivers and exceptions, but they were both to the standards. RSA 155-E only called it exceptions. Taking the position of a reference to a waiver would allow the Board to waive any part of the Regulations just did not make sense. What Attorney Sullivan was asking was to have the Board essentially waive the rights that this Regulation gave to abutters. He completely disagreed to Attorney Sullivan's definition of the scope of the Board's waiver rights. Attorney Reimers noted that the Code Official spoke to the public health, safety, and welfare, and it was clear that Mr. Babb did not demonstrate that things were safeguarded.

Attorney Sullivan stated that the Board had the ability to impose conditions. He stated that the history of the gravel pit should be addressed, but today was about how to move forward. He stated that he was offered possibilities to ensure public safety while providing properties to continue excavating. It was up to the Board to say either yay or nay. Mr. Sample stated that the Board made a mistake in the past on a decision in an unnoticed hearing, but in that decision they saw an operation that was going to have to cease operation unless it could continue operating. The Conservation Commission wanted things done and when the Board made their decision, it was for the two entities to work together to figure things out, but now that option was gone. He thought that the Board had to make a decision on the abutter status but was hesitant to have to address that. He thought that the Board could go down a better road that worked out for everybody that got the pit into the Conservation Commission's favor and got Mr. Babb back to work. Mr. Sample noted that the Board was going to consult with their attorney on this issue.

Thomas W. Varney, P.E., came to the table. He noted that he was asked to prepare the Alteration of Terrain by Mr. Babb a few years ago because there was a complaint that came from DES for the pit. He prepared a comprehensive plan that showed the layout of the pit, and on the front page it indicated all of the history of permitting and activity of the pit that took place from the beginning of 1989 up until it was sold by Mr. Hussey to Mr. Babb. He noted that plan was submitted to the Town and sat for a long time, and the only one that he heard from was the Conservation Commission, and not the Planning Board. There was information indicated on the plan about the vertical line that was at issue tonight, and some other information that someone could have picked up on, but nobody did. Some time goes by and then Mr. Babb received a letter in the mail stating that the Alton Excavation Regulations were updated and needed to comply. Mr. Babb asked Mr. Varney to prepare plans again and everything was on there. As Mr. Babb went along with his excavating activities, Mr. Varney showed more outlines of what was new. The Planning Board had oversight of the gravel pits in Town, so if one was expanding beyond what was approved, then the Board should respond to that and bring the operator in and inform them that they needed to be in compliance, but that did not happen with the Alteration of Terrain permit. With the new Excavation permit, it was eventually given condition approval with some conditions, like a safety plan and letter from abutters. Nobody stated that the wall was steep, and it was up to the Board to point that out to inform the pit operator to fix it, not the Conservation Commission. Mr. Varney noted that he and Mr. Babb had gone before the New Durham Planning Board, because Mr. Babb owned a pit in that town, and they sat before that Planning Board and had a pleasant conversation back and forth. Mr. Varney noted that if Mr. Babb was told to do something, he would get it done. He noted that the enforcement should not have come through the Conservation Commission, it should have come from the Board. Attorney Sessler recommended that the Board recess this hearing so they could consult with him about some legal issues. He recommended that this hearing be continued to a date certain, which was the next

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regularly scheduled Planning Board meeting on October 15, 2019, at 6:00 pm, and would be the first item on the agenda. A decision would be rendered at that point.

Mr. Carter MOVED to continue Case #P17-24 to the next regularly scheduled meeting on October 15, 2019, at 6:00 pm and would be the first item on the agenda, in order for the Board to have time to determine their decision on the Alton Conservation Commission's status of being an approving abutter for the purpose of issuance of an Excavation Permit, according to NH RSA 155:E and the Town's Excavation Regulations.

DISCUSSION:

Attorney Sullivan noted that this had been along drawn out process and he wanted to know that in the meantime Mr. Babb was out of material. It cost Mr. Babb \$100,000 to blast and crush. Attorney Sullivan asked if the Board would allow Mr. Babb to continue to operate until the Town made their final decision. Attorney Sessler stated that there could be no issuance of a permit until this issue was resolved. Attorney Reimers asked if on October 15, 2019, the Board would announce their decision; Attorney Sessler stated, yes. Attorney Sessler also noted that the public hearing was closed, but they were going to render their decision in public. Attorney Reimers asked if any oral argument was expected at that hearing. Attorney Sullivan stated that if everyone was ready to close the public hearing tonight, then there was going to be no additional public hearing on October 15th. Attorney Sullivan noted that it was just a business meeting. Attorney Sessler agreed, unless there was new evidence of some sort, then a request needed to be filed for that, but he did not think there would be any new evidence because these were all legal issues.

Mr. Regan seconded the motion, and it PASSED unanimously.

Other Business:

1. Old Business:
2. New Business:
3. Approval of Minutes:
4. Correspondence for the Board's review/discussion/action:
5. Correspondence for the Board's information:
6. Any Other Business that may come before the Board:

Public Input on Non-Case Specific Local Planning Issues

ADJOURNMENT

At 7:43 P.M., Mr. Carter MOVED to adjourn.

Mr. Regan seconded the motion, and it PASSED unanimously.

The meeting adjourned at 7:43 P.M.

Respectfully submitted,

Jessica A. Call
Recording Secretary

Minutes approved as submitted: December 17, 2019