

To: Members of the Appeals Board, Town of Lamoine
From: John Holt, Chair, Planning Board, Town of Lamoine
Re: Appeal of Doug Gott & Son, Inc., dated Feb 3, 2011, with regard to the Planning Board's
January 5, 2011 denial of Gott's application for a Site Plan Review permit for Map 3, Lot
8 and Map 3, Lot 6
Date: April 23, 2011

On behalf of the Planning Board, Town of Lamoine, I wish to submit the following testimony in response to Doug Gott & Son, Inc.'s February 3, 2011 appeal of the Planning Board's January 5, 2011 decision to deny Doug Gott & Son, Inc. a Site Plan Review permit and a Gravel Extraction permit for a proposed project named 'B&H Pit Expansion' located on Map 3, Lots 6 & 8.

I. SITE PLAN REVIEW ORDINANCE

A. With regard to Review Standard 1 of the Site Plan Review Ordinance, the appellant raises two objections:

1. While noting correctly that two members of the five-member Planning Board voted to find that the appellant had met Review Standard 1, two others voted that the Review Standard had not been met, and one abstained from voting, the appellant asserts that this constitutes a "tie" vote and that this "tie vote" is to be interpreted as a vote in favor, not a vote in opposition. In support of this surprising conclusion, the appellant cites 'a noted authority on municipal corporations.'

The Planning Board endeavors to conduct its business under guidelines recommended by the Maine Municipal Association in its handbook *Manual for Local Planning Boards: A Legal Perspective* (October 1999 edition), where, on pages 29-30 and in a section titled *Approval and Form of Decision*, is found the following: "Tie Votes. If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion." The Planning Board thus believes that it interpreted the meaning of the tie vote correctly, as failure to approve.

2. The appellant asserts that the Planning Board "conducted a wholly irrelevant comparison between the benefits of the pit to the landowner and the costs to surrounding properties" and

“made absolutely no findings of fact relating to whether the project will preserve natural landscaping ‘as much as is practicable.’ ”

The Planning Board, in response, would reiterate that the Site Plan Review Ordinance obligates the Town to “protect the health, welfare and safety of the residents of the town of Lamoine” and “to balance the rights of landowners to use their lands with the corresponding rights of abutting and neighboring landowners to live without undue disturbances from nuisances such as, but not limited to, noise, smoke, fumes, dust, odor, glare, traffic, storm water runoff or the pollution of ground or surface waters...” (Site Plan Review, Section F. Purpose)

A discussion concerning the rights of the appellant to expand an existing gravel pit into a six-acre virtually untouched parcel directly abutting three residences (and more generally adjacent to the one of the more densely built-up areas in Lamoine [Mill Road and portions of Lamoine Beach Road])) and the rights of these residents of Lamoine can hardly be dismissed as a “wholly irrelevant comparison.” It is central to the Planning Board’s responsibility.

No proposed construction project is quite as extensive in its maximization of tree removal, disturbance of soil, and removal of existing vegetation as is the creation of a gravel pit. In this case, since the proposed use of the pit would be essentially the storage of materials brought from other locations, the Board felt the proposed scope of the alteration of the landscape in its natural state was of sufficient importance to justify denial of the expansion into this area.

B. With regard to Review Standard 16 of the Site Plan Review Ordinance, the appellant raises three distinct objections:

1. The appellant argues that Review Standard 16 and the Board’s application of it is unconstitutional and cites *Nestle Waters North America, Inc. v. Town of Fryeburg* to support his assertion. As I testified to this Appeals Board in June of 2010 when the Board heard this very argument from the same appellant, Lamoine’s Site Plan ordinance is substantially different from that of the Fryeburg’s in that it specifically names and cites Lamoine’s Comprehensive Plan as a particular Review Criterion, a particular standard with which any proposed land use must comply. The Planning Board acted properly in applying this review standard of conformance with the Comprehensive Plan, for the standard is expressly written in the Site Plan Review Ordinance.

In any event, it is not within the authority of the Appeals Board to make a judgment as to the constitutionality of Review Standard 16. That is a judgment for the Courts to make.

2. The appellant asserts that the Planning “Board expressly stated that a basis for denying the application is the fact that the Applicant is a commercial business that owns other property.” Such an assertion is without merit. The basis for denying the application is the Board’s determination that the application failed to meet Review Standards 1 and 16. The appellant has been granted many gravel permits in the Town of Lamoine by the Planning Board.

3. In the event that Review Standard 16 might be constitutional, the appellant argues that because gravel pits are expressly contemplated by the Comprehensive Plan they are, “thus, ‘ in conformance’ with it.” The Planning Board does not dispute that the Comprehensive Plan acknowledges that extraction of sand and gravel may take place within the Rural and Agricultural zone. In fact, the Planning Board has issued many gravel extraction permits in the past year to the appellant and others.

The issue is not whether gravel pits always or never must be permitted within the R&A zone, but under what conditions. The fact that gravel extraction permits are subject to the Site Plan Review Ordinance suggests that a gravel extraction proposal must be evaluated within its larger contexts of the area in which it is proposed, Lamoine as a whole and the Town’s vision for itself as a community. The fact that the citizens of Lamoine, through the Site Plan Review Ordinance, give authority to the Planning Board to issue or deny gravel extraction permits suggests that the community’s judgments as to appropriateness of the location, scope and activity within any single pit are factors to be considered when assessing the pit’s impact on the ‘health, welfare, and safety of the residents of the town of Lamoine.’”

The Board is not contending that all gravel pits are not in conformance with the town’s Comprehensive Plan. It is contending that the appellant’s expansion of the B&H pit into Lot 8, Map 3 (the Stephens’ property, so-called), is not in conformance, for the reasons noted in the denial dated January 5, 2011.

II. GRAVEL EXTRACTION PERMIT

A. With regard to Review Standard 4 the appellant asserts that the Planning Board's interpretation is unconstitutionally vague. The court case cited, *Kosalka v. Town of Georgetown*, however, is not concerned with the vagueness of an interpretation, but the vagueness of a standard written into the ordinance. The appellant is not arguing that Review Standard 4 is vague. Thus, the citing of the court case is inappropriate and irrelevant; further, alleged matters of unconstitutionality are not within the scope of the Appeals Board authority to determine.

The appellant states that the Planning Board failed to consider whether the restoration provisions of the ordinance were met. That is not accurate. The Board reviewed the restoration plans of the applications and found them to be satisfactory. The majority of the Board felt, however, that overall loss of loss of natural beauty, even with satisfactory restoration plans, was too significant for the abutting and neighboring properties.

B. With regard to Review Standard 6, the appellant asserts that there are no findings of fact to support the Board's conclusion that surrounding properties will be adversely affected. It is clear, in retrospect, that the Board should have stated, clearly and in detail, what seemed to the Board to be self-evident, namely, that expanding a gravel pit to a parcel which abuts three existing residences will result in more noise, more dust, more potential for pollution, more fumes from the operation of equipment and lower market values for those abutting and many other neighboring properties. Surrounding properties clearly will be affected and, clearly, adversely.

The Board felt obliged to discuss the 'value' of the proposed expansion of the B&H pit in an effort to compare it to the 'value' of the adverse effects on abutting properties. Such an analysis is not 'wholly inappropriate and irrelevant' as the appellant asserts, but quite appropriate and relevant.