

Appeals Board Chair Griff Fenton called the meeting to order at 6:33 PM.

Present were: Appeals Board members Constance Bender, Jim Crotteau, Hancock “Griff” Fenton, Jay Fowler, and Jon VanAmringe; Code Enforcement Officer Michael Jordan, Attorney Ed Bearor [representing Gott], Friends of Lamoine representatives Kathleen Rybarz, Kathryn Gaianguest, Bruce Gillett, Catherine deTuede, John Jerabek, Lynn Tscheiller, Carol Korty and Valerie Sprague.

[Minutes – 25 February 2015](#) – Jon commended the efforts of Administrative Assistant Stu Marckoon in preparing detailed and extensive minutes. Jon moved to approve the minutes as amended. Jay 2<sup>nd</sup>. **Vote in favor was 5-0.**

[Friends of Lamoine \(FOL\) v. Code Enforcement Officer \(CEO\)](#) – Chairman Fenton thanked parties for preparing briefs and said he would like to go through specific items of agenda at this meeting, starting with a determination of whether the Board of Appeals has jurisdiction in this matter.

John Jerabek said just as a matter of procedure, if it is found that someone has a conflict of interest and their vote on an earlier matter could make a difference. We would like to go back and revisit that matter.

Griff asked whether he wished to address this issue before considering jurisdiction. Jerabek said no, that would not be necessary.

John Jerabek said that the issue is complicated because the Gravel Ordinance by reference is included in the BLUO and that ordinance talks about appeals to Board of Appeals.

#### [Determination of Jurisdiction](#)

**Jim moved, Jay 2<sup>nd</sup> that the Board of Appeals does not have jurisdiction in this matter.**

Discussion followed.

Jim said that Lamoine Board of Appeals does not have general jurisdiction, rather jurisdiction over specific matters as specified by Lamoine Select Board. These include matters derived from the Planning Board with regard to the Gravel Ordinance and Building and Land Use Ordinance [BLUO]. Board of Appeals can only review actions of the CEO with respect to matters under the BLUO.

Griff cited Rule 80B of the Rules of Civil Procedure - A notice of violation or an enforcement order by a CEO under a land use ordinance is reviewable on appeal by the Board of Appeals and in turn by the Superior Court. He further asserted that the Board of Appeals can also hear issues

with respect to Zoning, citing Title 30A Section 4301, 15A Definition of Zoning Ordinance. This means a type of land use ordinance that divides a municipality into districts and prescribes and reasonably applies different regulations in each district. Lamoine has three main Zones. Zones as pertaining to gravel issues are confusing. Regulations are inconsistent. Consideration under Rule 80B needs to be reasonable.

Jim said that Rules 80B and 80C do not give a right to appeal. There is no basis on process, but only offers guidance on how to appeal. Mr. Crotteau noted that Rule 80B applies to government regulations and he was very familiar with them as he has worked with rule 80B previously. It in no way applies in this case. Title 30A is the ruling law in this case.

Carol Korty clarified a statement about zoning. In the building and land use ordinance, existing gravel pits are permitted in the Rural/Agricultural with planning board review and permits. No new gravel pits are allowed in the Rural and Agricultural zone.

The issue of moving 500 cubic yards has been brought up as being rather restrictive and it would seem appropriate that at some point either the citizens or the planning board would propose a change for that.

She further said that FOL were appealing whether the CEO should have required a gravel permit for this project.

Carol: I just wanted to correct you on the statement about zones. In the building and land use ordinance, gravel pits are permitted in the Rural/Agricultural. They are not permitted in the residential. But with planning board permission they are permitted in the rural/agricultural and there are lots and lots of them in that zone, which is the largest zone on the peninsula.

M Jordan/J Fowler: No new ones are allowed in the Rural and Agricultural zone.

Carol: That's true, no new ones are allowed. The issue of moving 500 cubic yards has been brought up as being rather restrictive and it would seem appropriate that at some point either the citizens or the planning board would propose a change for that. Because the CEO has been brought up that that is an issue.

Griff: We have been saying that for a year. With the new ordinance they are not allowed at all.

Attorney Bearor: Mr. Chairman I don't want to delay your vote. The appeal was filed as an appeal of the CEO's decision that a gravel permit was not necessary, not an appeal of a violation of a zoning ordinance.

John Jerabek said that the issue is more complicated because the Gravel Ordinance by reference is included in the BLUO and that ordinance talks about appeals to Board of Appeals.

Jim responded that regardless, the Statute is specific about matters that may come before the Board of Appeals. The Statute specifies precisely matters that can be appealed.

Griff agreed and further said that other ordinances are also specific.

Jerabek disagreed stating that enforcement or lack of enforcement by the CEO can be appealed.

Attorney Ed Bearor said that issues with respect to Notice of Violation by the CEO on this property were settled in 2013 with denial of a gravel permit by the Planning Board.

Jim said that the appeals process of the BLUO can consider actions of the CEO, but only refers to Gravel and other ordinances and is not specifically incorporated in BLUO.

Kathy Gaianguet stated that the next section of the BLUO, section 9.A., states that enforcement of ordinances is by the code enforcement officer, “appointed by the Board of Selectmen for the purposes of assuring compliance and assisting the planning board in the administration of all ordinances and regulations.”

Jim: Yes, but that doesn’t mean that we review everything that the CEO does, we can only review items that are clearly contrary to the specific provision with this ordinance. The CEO may do other things and that doesn’t give us the authority to review everything he does. We can only review decisions that are contrary to the building and land use ordinance.

Jim again maintained that the Board of Appeals can only review issues that clearly pertain to decisions under the BLUO.

Valerie Sprague asked why the Board of Appeals cannot consider new information and in her mind that the application of “rules” is inconsistent.

Jim responded that the Board of Appeals is not the final authority. If we are wrong, our decisions can be appealed to the courts. The issues considered tonight are different and final. We do our best.

Griff continued that the Board of Appeals makes every effort to do what is best for the town. We cannot take on responsibilities that are not specifically granted by the Select Board. We are bound by rules.

Carol Korty said that if any ordinance specified a need to go to Court there ought to be first a town body before which issues could be heard. All ordinances should be consistent in this regard.

Jim responded that the Board of Appeals is not a board of general jurisdiction rather is only

empowered specifically by the Select Board.

Carol Korty asked whether it was the Select Board or ordinance that pertains.

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Jim responded that the Board of Appeals cannot assert jurisdiction unless the Town has prior specified that ability.

John Jerabek thanked Mr. Crotteau for simplifying matters, but it is a little more complicated than what he has stated. If you look at the land use table under the building and land use ordinance, there is a note at the bottom there which says:

“Refer to the gravel ordinance for the standards there to be applied. “

Now, admittedly the Gravel Ordinance has an appeal provision for when permits are granted or denied. But the gravel ordinance is incorporated by reference of that footnote into the building and land use ordinance. For some reason, it was decided to be broken out, probably a poor language choice using the term ordinance in the appeals part of the BLUO as being confined to that ordinance. If you look at appeals section of the BLU ordinance, it talks about determinations of the CEO. That’s how statues are written sometimes and, they get a little sloppy. But to isolate one part from another, in view of the footnote in the land use table, I think is erroneous.

Jim disagreed and stated that this isn’t a specific grant of an authority for us to review. If the statue was more broadly worded it might have been appropriate, but I just don’t see this as the specificity as referred to in the complaint.

Griff said that there is specific language in each ordinance, but they aren’t married, they didn’t do that.

Jerabek disagreed stating that enforcement or lack of enforcement by the CEO can be appealed. . If you look at appeals section of the BLUO, it talks about determinations of the Code Enforcement Officer (CEO). So I would be of the mind that the denial of the complaint is a determination by a Code Enforcement Officer. In fact there is one court case here in Maine, a superior court decision that talks about something similar to our BLUO language as including enforcement decisions, stop work orders, and the broad definition is administration of ordinance includes decisions on permits and enforcement or stop work orders. I can give you the citation on that case if you would like it. For language to actually say enforcement, or interpretation or compliance is more than what the courts expect at this point. Maybe it needs to be clarified in the future, but determination itself is a decision by a code enforcement officer on any manner.

Attorney Bearor asked what is the date of the Superior Court determination that you are referring to – 2003?

Attorney Bearor made further statement about a 2013 revision -- Notice of Violation or an enforcement order, not merely a determination.

Jim commented that he was not concerned about that decision. The Appeals Provision of the BLUO only allows us to review a decision of the CEO is contrary to the ordinance. There are separate standards, it says look at them. There is no specificity to look at a decision of the CEO referring to compliance with this Ordinance. The footnote doesn't incorporate the Gravel Ordinance into the BLUO. This is the plain reading of it.

Jerabek asked if the last part of that paragraph [referring to the state statute, Title 30-A, Sec 2691(4)] was to be read as limiting or whether it allows for this type of decision by a CEO. It is Friends of Lamoine's position that it can be interpreted to allow for an appeal of a denial as in this instance.

Jim: I don't know what you would expect us to do here?

John Jerabek replied that we would like you to find that Gott is not in compliance and needs a Gravel Permit.

Jim responded that we already made that decision back in July 2014, when we said he could go ahead.

John Jerabek stated that's not what the statute says.

The Planning Board raised the issue as to whether the gravel ordinance applies, and the Code Enforcement Officer was sitting at those meetings.

John Jerabek asserted that we have a provision in the Site Review Ordinance which states specifically "Whenever this Ordinance is inconsistent with other provisions in this Ordinance or standard the more restrictive applies."

John Jerabek further said that this was a matter of site review and there was a level of absurdity with regard to the 500 cubic yard standard noted in the Gravel Ordinance.

Jim asked is it your position that every time someone removes more than 500 cubic yards that the Gravel Ordinance would apply?

Jim said again that the Board of Appeals was limited. We can only do what we are supposed to do? We made the decision based on appeal of the Planning Board that a building permit should be issued under BLUO. We further suggested certain restrictions, as to timing and site specifications, with which Attorney Bearor agreed on behalf of his client.

John Jerabek said that this was a matter of site review and there was a level of absurdity with regard to the 500 cubic yard standard noted in the Gravel Ordinance.

CEO reminded that the Board of Appeals considered in their decision that some 70,000 cubic yards of material would be moved as part of the building project.

Valerie Sprague said that the issue is not 500 cubic yards, but that the “pit” is dangerous and the extended construction period is objectionable.

Griff responded that the Board of Appeals tried to ameliorate these issues in the suggested restrictions for Gott. The Planning Board chose not to include or insist on those restrictions when the building permit was issued to Gott.

Attorney Ed Bearor said that we are now just revisiting issues that have been fully discussed in prior meetings and that we should act on the motion.

John Jerabek said that the issue on the Gott Property is the removal of 70,000 cubic yards of gravel is an unregulated activity. That the purpose of the gravel ordinance is not only noise control but specific standards related to maintenance of slopes. This is an activity within 500 yards of a school and a neighborhood with many kids running around. We are aware of history, and the problems that can be caused by gravel pits and kids.

Jerabek stated that in this case one CEO is making decisions for the entire town. The AB had previously voiced concern about the five member planning board making decisions for the entire town. The Appeals Board should be equally concerned about one CEO making such decisions.

John Jerabek suggested that the Appeals Board needs to fix the local ordinance to address this issue.

Carol Korty responded to Jim that we need to acknowledge what is needed. Gott lot needs a gravel permit. Rev. John Holt [Planning Board Chair] did not have authority to issue building permit with restrictions.

Chairman Fenton called the motion that the Board of Appeals does not have jurisdiction in this matter. **Vote was 5-0 in favor.** Griff said therefore other items on the agenda were now moot.

After the vote on jurisdiction was taken, Chairman Fenton inquired whether the Appeals Board should proceed to decide other issues, such as possible Conflict of Interest.

John Jerabek stated there was no need to proceed with that, since the FOL did not prevail on the jurisdiction issue. The Board agreed.

Valerie Sprague commented that when the gravel permit was issued, the Board of Appeals brought in new information; the calculating of how much money the gravel company would receive for the gravel. In that instance no "new information" should have been considered. Why

was that okay?

The Planning Board didn't hear the information about how much the gravel would cost or how much the gravel company would get when they sold it. I am confused as to why new information is heard and other times it is not. No "new information" should have been allowed. So, the Board goes by the book sometimes and other times it doesn't.

And to compare that to someone building a house and putting in a foundation is unjustified. They are working from 4 in the morning till 6 at night 6 days a week. It's a lot different than building a house. That would be over in a few months. It's been going on for a long time, and it's in residents' backyards. I'm not against every gravel pit owner. There are a lot of homes on the Shore Road, and my road that it's affecting. That's why I'm here. At least if it had a gravel permit there would be restrictions. You would have times when they would start and stop. There would be setbacks. The Gott permit is right on Mike's property line, and there are three young boys that live there. The slopes are also pretty high and it's dangerous.

Kathryn Gaianguet stated that the requirement that anyone excavating or extracting over 500 cubic yards needs a gravel permit is part of the current ordinance that the citizens of Lamoine voted in in 2013. It may be that some disagree with it or don't like it, but until it is changed it needs to be upheld by everyone, especially our officers who represent and act for our town. Until it is changed it is a requirement and needs to be enforced—by our CEO. In addition, "70,000 cubic yards is not 500 cubic yards."

Griff and Jim responded that the Board of Appeals needs to deal with rules,

Jim said that if Gott did not construct the building and restore the property as proposed, he would not believe Gott in future matters. Attorney Ed Bearor [representing Gott] noted Jim's concern and said that it was his client's intention to do so.

There being no further business, the meeting adjourned at 7:38 PM.

Respectfully submitted,

Jon E. VanAmringe, Secretary

Lamoine Board of Appeals