

Town of Dresden

**Dresden Board of Appeals P. O. Box 30 Dresden, Maine 04342**

Meeting minutes for April 29, 2021 at Pownalborough Hall

**Continuation of Appeal for Heather Beasley (owner of Beasley-Ballard Gravel Pit)**

Present – Board of Appeals (BOA) members – Steve Collemer (Chairman), Kevin Campbell, Jon Madore, Lorna MacKinnon and Scott Silverman.

**Others present – Edward Dardis (Ms. Beasley's Attorney), Jack & Jason Shaw (abutting gravel pit owners), Joe Siviski (attorney representing Dresden CEO, James Valley), John Rzasa (1<sup>st</sup> Selectman), Allan Moeller (2<sup>nd</sup> Selectman), Gerald Lilly (3<sup>rd</sup> Selectman).**

**Residents** - Donna Martin, Cindy Moeller, Gary Blau, and Gorham Lilly.

**Others** - Shari Lilly (secretary) and Jessica Lowell (KJ Newspaper), Art Mayer (Wiscasset Newspaper), Evan Houk (LCNews).

The public hearing was convened at 6:00 p.m. by Chairman, Steve Collemer, reminding all this is a continuation in regard to an appeal request initiated by Heather Beasley and her attorney, Edward Dardis dated September 25, 2019. The Pledge of Allegiance was then recited.

*Steve* informed all those present that we are still following the guidance from the Maine CDC and Governor Mills implementation of social distancing and face coverings. He then requested that all cell phones be silenced during the meeting.

*Steve* proceeded by referencing the workshop held on November 23, 2020 for the purpose of developing Findings of Facts to help with the determinations by the Board. He went on to list the areas that will be discussed at this meeting which would include the following:

- 1.) Information from the DEP. Reference was made to an email he received in communication with Michael Clark of the DEP.
- 2.) Ballard Road - Referencing research documents that were provided to the Town by Historian, Jay Robbins. Questioning if the BOA can use this research which had previously been objected to by Mr. Dardis. Mr. Dardis would be providing his own documentation.
- 3.) Rejection of the remediation plan by Town Officials.

***First order*** of business was to vote on and sign the minutes of the November 19, 2020 public hearing and the November 23, 2020 workshop. Kevin moved to approve both sets as presented; Jon seconded. The motion was approved by all those present and voting. The approved minutes were then signed by all members and will be submitted for the file.

Steve asked if the CEO, James Valley, would be attending tonight. Mr. Siviski said he doesn't think so, but he is here to represent him.

***Action Items in the workshop minutes*** - Steve said we will be getting into the list of 'Action Items' from the November 23 workshop.

First, the abutting land owned by Peter and Mary Walsh has been sold to Debra Gonzalez, so she is the person that the notice of the public hearing was mailed to. Steve asked if she was present, but she is not. Steve said that as this item has been taken care of, it is now closed.

Next action item is for the Stop Work Order. The CEO stated 'all work must stop due to a violation'. Does this mean all work in the pit or just the area in violation? Steve talked to an attorney at Maine Municipal who emailed him some information, however she did advise him to contact our town attorney. Asked by reporter, Art Mayer, the name of the person he was in contact with, Steve said it was Brianna Gersham who was very helpful and professional to deal with.

**ACTION ITEM** - Steve will contact our attorney, Jessica Avery, when he needs more guidance on this.

*Mr. Siviski* stated that it was his understanding the Stop Work Order in regard to the disputed buffer area does have a agreement between the appellant and the Town. Mr. Dardis said he doesn't believe it's a formal agreement, but letters that were exchanged. Kevin noted that the BOA had not been furnished with that information, so it will be helpful to have it. Mr. Siviski said he would provide that information as soon as he can. Steve said that will help to simplify things.

*Steve* then referenced the action item by Scott in regard to there possibly being a previous version of the ordinances prior to 1992 for setbacks. Scott did locate the ordinance which has been provided to the members. He found that those from March 13, 1971 indicated the excavation of sand, gravel or other minerals below grade level of an adjacent road shall be prohibited to 150' from the centerline of such road unless the slope is 30 degrees or less. Adjacent property lines is a 100' setback unless there is a written agreement between property owners. Steve added that there is no such agreement for these property owners. Mr. Dardis stated that we have been dealing with the 1991-92 ordinances and doesn't want to backup on what has been done. He doesn't think the 1971-72 ordinances should even be considered valid. They weren't even included in the original ones, but was tacked on at the end of the later ordinances. Scott said it was just misplaced at the town office. Mr. Dardis continued by saying that as we had been dealing with the 1991-92 ordinances, it had already been decided not to bother with any earlier version. Steve noted that Mr. Dardis has been using the 1992 version for his entire presentation of the appeal.

*Kevin* said the point isn't if the pit existed or not. We all agree that it did, but the point is to know if, whenever the first ordinance was enacted, did that area of the pit already violate the terms of the ordinances. If it did, then that's where the grandfathering would come in. If that area of the pit was prior to the ordinance, you would have been able to go anywhere. Now, with the ordinance that was enacted, you're in violation. That's when the grandfathering would be considered, at the time the ordinance was enacted, we recognize the pit was already in that area but you cannot expand. If the area was not in violation at that time, there would be no grandfathering as there would be no violation. Mr. Dardis referenced a case he had provided in his presentation that addresses grandfathering with respect for gravel pits which is a different 'kettle of fish than our usual run-of-the-mill' grandfathering situation in which the area is undersized by virtue of new ordinances and therefore you could continue to do whatever it was you were allowed to do when it was first created'. Those pits still around are mostly

grandfathered. It's the use and size that matters as much as where it's located. This information lays out specifically the issue we are talking about and he would suggest they look that case over. Steve feels it's important to include this piece of information into our Findings of Facts. Mr. Dardis wants to go back and layout the law for this. Steve would welcome the information and said the whole Board should have the information to read and agree if it should be included. We will discuss that later, too.

*Jason Shaw* said the Town of Dresden ordinances are more restrictive than the DEP which gives a 50' setback. So the violation would still be there regardless because the excavation is even less than the 50' State setback. He added there is only 110' to the property line. Mr. Dardis said the State Statutes themselves are of recent origin and so you have some of the same grandfathering issues as with municipal. Steve said the DEP is trying to be in concert with the Town so that they don't tell Heather one thing and the Town says something else about the remediation at the pit. Just trying to co-operate and do teamwork with everyone. Mr. Dardis added that the timing of when the pit was there, the size and given it has been inspected numerous times by DEP, obviously it's not a problem. The State did not agrieve the issue. Kevin mentioned that there is an issue that has been proposed by Michael Clarke in his December 04, 2020 email he had sent out to the BOA in order to keep everyone aware. Mr. Dardis replied that he has not seen that memo. Steve said that Heather and Mr. Clarke had been communicating so he was surprised that Mr. Dardis didn't have the information.

Side Note - Scott requested to have attendees introduce themselves when they request to speak.

Mr. Mayer (Wisc. News) asked Steve who the person speaking previously was to which Steve said it was Jason Shaw, son of the abutting landowner, Jack Shaw.

**Action Item** - Steve will provide the email from Mr. Clark to Mr. Dardis. (Lorna gave her copy of the email to Mr. Dardis which has completed this action item.)

This completed the ACTION ITEMS list.

### ***Developing the Findings of Facts :***

**Ballard Road - Ownership?** - The BOA had asked that they have access to information gathered by Historian, Jay Robbins, whom the Town of Dresden hired to do extensive research on the road. However, Mr. Dardis had objected to that, but offered his own documentation. The BOA received the 2-page email from Mr. Dardis containing the historical documents on November 24, 2020 which was the day after our workshop so we were not able to discuss it at that time. Steve looked over what Mr. Dardis provided, but he is still in need of more information and clarity that Heather owns Ballard Road as he couldn't find any proof in the documents. He added that this is what we want to discuss tonight to, hopefully, digest it and come away with a good understanding of who owns Ballard Road.

Allan Moeller (3<sup>rd</sup> Selectman) said that if the Board only hears one side, they are not getting all the information on the issue. Steve said Mr. Dardis had legally objected so we couldn't do otherwise without legal advice. Allan said it's wrong to only hear one side of an issue. Steve added that the Board wanted research, but Mr. Dardis objected. Mr. Dardis said that's because the Board had closed the evidence. Steve said the Board was no where close to scraping the barrell on Ballard Road. Mr. Dardis said our records would show what transpired. Mr. Dardis

is curious as to what the additional information would be. He said that even if Heather doesn't own that area, the location is where the survey has it which is right on the boundary line. It's a 2-rod wide road of 33' with 15 to 16' on each side. That's the road. If the town owns it, they would use that location for the set backs.

Steve said that he is the only Board member who had received the Jay Robbins documents and has not passed them on to the members until he could find out what he could do legally. He added that the appellant has the burden of proof that Heather owns the road, and, to Steve, there has been no proof provided.

Mr. Siviski asked if the violation is a separate provision to distance from the road. If that was cited in the Notice of Violation (NOV), he could understand why it would be important to establish ownership of the road, but he feels it's a simpler issue than Mr. Dardis is making it out to be. Mr. Dardis said that potentially, later on, the CEO could come back and say there is a new NOV in regard to the road. Mr. Siviski said that hasn't happened. Mr. Dardis said no, and hopefully the CEO would be more reasonable than that.

*Kevin* said the ordinance has two (2) parts - one being the property lines. Jason Shaw said why this would be a relevant point to the violation is because of the setbacks which now is only 20' from the Shaw's boundary. Steve said he had previously mentioned that the Ballard Road is something that needs to be addressed. Mr. Siviski asked if the road has anything to do with the property between the Shaw's and Ms. Beasley. Mr. Dardis said, no, it is shown that the line is in the center of the road. It is shown on several of the surveys. The violation is for the setback from the property line. Mr. Siviski said if there is a road there, then it is 150' setback from the road. The NOV refers to the property line itself.

*Kevin*, in regard to grandfathering - Referencing the SWO and the DEP erosion control issue. The SWO says nothing can be done as all work was ordered to stop, so that can be an issue as far as the remediation plan. Mr. Dardis said Heather had tried numerous times to work something out for the erosion control, but was prohibited. Steve had hoped Mr. Clark would be here, but he will generate a reply to the email advising him that we had met and discussed this. Mr. Clark (DEP) stated in his email that they don't want to enforce their remediation plan until they know what the Town is going to decide. Steve said that's what the intent is, for them to do the remediation as soon as the issue is addressed. Mr. Dardis said some of the problem was due to nature causing it to erode. However, it was noted that there is no way to know for sure as there are no pictures. Kevin said Mr. Clark's email says the DEP will be requiring that the the erosion remediation 50' buffer will be restored and stabilized at the least, whether the town requires it or not. Mr. Dardis said they have always intended to comply with the State minimum of 50'. When asked if they would comply with the town requirements, Mr. Dardis said they would comply with the State one. The site review showed the bank has simply collapsed; not due to just being dug, per se. Heather had commented on the pipes & wires that were showing which would have been destroyed if it was due to just digging. Jon said it could have been due to digging too close. He added it's going to be difficult as we have no proof of what it looked like before. But now we need to determine the issue of the Ballard Road in order to make the right decision.

Steve asked Mr. Dardis if he wanted to go over the documentation he provided to the Board along with the attachments. Then he asked the members if they wanted him to do so. Mr.

Dardis said it's all in the blue folder he had provided. However, Steve said this would give the Board the chance to ask questions. Mr. Siviski asked for the date of the email from Mr. Dardis. Steve told him it was dated November 24, 2020 containing 2-pages and attachments. Mr. Siviski will get a copy from Mr. Dardis. Mr. Dardis began with the first paragraph of his email starting with TAB - O (Establish boundary of a rangeway.) - The rangeway that was laid out in 1763 as a 'monument' of the road. Steve asked if it was a stone, rock, etc. Mr. Dardis said it could have been either. The rangeway line effectively becomes a monument for laying out of a road. Steve then said it was probably like any kind of a marker. Jon noted that, at that time, rangeways were like foot paths so landowners can't be landlocked from their property. Mr. Dardis said that isn't really the relevant termination. He added that rangeways have pretty much been effectively abolished. The Legislature had enough of them, they created headaches to resolve and no one could actually tell where they were. In 2017, if towns didn't specifically reserve rangeway rights laying out their roads, they would be totally abolished. The one he is discussing between Shaw & Beasley is just a descriptor. He refers to this rangeway because we have maps showing where it is and it contains the boundary lines between the properties. It is only to help locate where the roadway is. In explaining the laying out of a road, he continued by saying the Selectmen, usually, would lay out a proposed way on the earth as a proposed way the road will go. They would then develop a description and present it to the townspeople for acceptance. It would then be considered 'taken property'. The Legislature then requires the Town to pay any damages to the people they have taken property from for the road. You have to have both the laying out and the acceptance. Jon added that he would just like to have the facts as to the issue we are dealing with if this is a town road.

Mr. Dardis continued by saying the Town of Dresden refused to lay out the road, but after controversy and an appeal process by townspeople, at that time, the County Commissioners, through the court, overrode the town, laid out the road, described the road, and, being a legislative body, they accepted it as they legally could do. He then presented a document for that, stating that is the legal location of where the roadway is - no question. It is specifically the middle line of the road that was laid out as a 2-rod road. Allan Moeller corrected him as it is a 3-rod road, which Mr. Dardis acknowledged. Allan added that the County had the Town of Dresden do it as a roadway, not a rangeway and he can provide that information when it's needed.

The middle line of the road being laid out with 25' on the Shaw side and 25' on the Ballard-Milligan side. This is a three-rod road. Allan said this is a roadway, not a rangeway. Mr. Dardis said that, as indicated at the site walk, the property line is the stone wall which is in the middle of the road, and isn't where the legal laying out is. It is about 25' - 30' off of where the line should be. That's why he was pointing out where the stone wall which is the centerline as well as property line. Jason Shaw wanted verification that there is 25' on both sides of the stonewall, which has been stated. The 25' back is obviously not there as it's either due to erosion or excavation. Mr. Dardis said the erosion is actually north of where the town road would be. Steve asked if he was referring to going along the road itself to which Mr. Dardis agreed. Jason Shaw said he believes the survey marker is for the tree cutting. If you go 25', you're in the pit.

Kevin said the SWO stated it was 20' from the stone wall or 5' into the roadway. Mr. Dardis added that with the large amount of trees growing, it is obvious it hasn't been used in a long time.

The used part is actually on Beasley. Kevin then questioned if the roadway is an actual roadway or abandoned due to lack of use or overgrowth. Regardless, the pit is currently within 20' of the stone wall. Anyway you look at it, that is way within the setback requirements. However, that is not up to us to decide. Steve and Mr. Dardis both noted the setback is agreed to be violated and is not being contested. Kevin added that's what we're looking at. As far as the road, in and of itself, it's almost immaterial because, based on what we have here, it only exists on paper. Mr Dardis' email has given a document showing where the discontinuance of the McFadden Road was in 1838. Kevin said the County Commissioners said the town had to take it back. We have to deal with the pit being 20' from an established boundary line and what can be done to bring out to some sort of setback. The Town says 150' setback, the State says 50'. Mr. Dardis contends the area is grandfathered so the 150' doesn't apply, but they would agree with the 50' State requirement. Jon said the road issue is what he is concerned with and needs a resolution as to ownership. As the Town contends they have ownership, he would like to have that conflict settled. Mr. Dardis agrees that the violation exists and the 50' of erosion etc, which would be taken care of in the remediation. Speaking for the Town, Selectman Moeller said they would not agree with the 50' setback because our ordinances require the 150' which is what the CEO has to apply. Mr. Dardis said the power doesn't lie with the Selectmen. It is the sole decision of the CEO. He added that is why there is litigation - because the remediation plan denial was done illegally.

Art Mayer (Wis.News reporter) asked if the excavation was under the perview of th BOA. Steve said it's the CEO who decides on the Notice Of Violation (NOV); adding that the Board has to decide if the CEO made an error or omission in his decisions on the Stop Work Order (SWO).

Kevin said we need to be bringing this to a conclusion. All members agreed. We should deal with the remediation. Mr. Dardis said it is also including the grandfathered issue. Kevin said, if at the time of the ordinance, was the pit a specific footage. He added that it appears Mr. Dardis is saying the pit can operate regardless of any ordinances and they don't have to worry about getting too close to property lines. Mr. Dardis said no, and again referenced the case example he provided earlier. Kevin went on to say that you still can't continue excavating closer in than it was when the ordinance was enacted. If, for example, the pit was 60' from the line and the town says 150', the town would recognize that footage, but you can't continue to excavate 50', 40' 30' etc closer which is what has happened. It needs to be put back to where it was when the ordinance was applied and it was grandfathered. We need to see what the earlier ordinances were at that time as they would have applied unless we find they were improper. That's a different ball of wax. Mr. Dardis then referred to Ms. Beasley's earlier testimony in regard to walking along the road as young child and the pit being right at the edge of the roadway. Referring to Ballard Road, not the legal road. Kevin said that's what we need to look at in terms of if the pit was grandfathered at a certain distance. That's what really needs to be put back. Mr. Dardis said they have agreed to a remediation plan by State requirements. He referred to previous testimony by Dick Condon that he was able to haul gravel from right up against the wall. Kevin said you could drive your vehicle right in then, but you can't now. Jack Shaw stated that when he purchased his pit, he was able to drive up Ballard Road with trucks very easily and it was a safe avenue, but now you can't. Until the last few years it was very passable, but now that's been taken away. Jason Shaw said that Michael Clark (DEP) has photos of the area from the 1970s, some of which are aerial. Allan also mentioned you can check on Google Maps and

it will give you aerial photos of the whole area including from previous years. Jon asked him if he wanted the Board to do the research for him, but Allan said no, it was information of what the area looked like before if the Board wants it. Mr. Siviski said there is documentation showing the indisputable evidence of more excavation that Mr. Moeller is referring to. He also indicated on some displays set up that you can see where it depicts the extent of excavation since 2003.

Steve said the basis of our decision is going to be the facts we have in our FOF. Everyone, please go through and put down your comments to bring for all of us to make our decision on. He will send more information to everyone and will double-check to make sure all BOA members have the papers. Mr. Dardis asked that all members be provided the documentation he had given. The members all stated they do have it.

*DEP - Michael Clark* - Steve said the memo deals with the erosion problem requiring Ms. Beasley to comply with a unified plan for remediation, but wants to be in sync with the town. Steve was hoping he would be here tonight, but he'll try to get him for the next meeting. Kevin said he feels the email itself explains what they plan to enforce in regard to the remediation. Mr. Dardis said that Heather is in agreement for remediation as per the State requirements.

*Jay Robbins documentation* - Steve had been provided the documents (unsolicited) by a previous Town Administrator. As Mr. Dardis had objected to the Board using that information, Steve talked to Jessica Avery who provided a response, but was somewhat hard to interpret. Scott noted that the documentation may be the same as what Mr. Dardis had provided. Mr. Dardis said he isn't inclined to object, but would like to have a copy to look over first. If there is nothing compelling, he probably won't object to them, but it will depend on what, if any, new information could be contained in them. Cindy Moeller asked why he has the power to object to any information; what right a lawyer has to object to certain things as the BOA is supposed to be making their decision on all information pertaining to what the issue is. Why does he have the power to decide who and what can be considered to help the Board make the right and fair decision? Mr. Dardis said the BOA had closed the case, moving on to the fact-finding. It wasn't due to the information. Many of those in attendance were in agreement with Ms. Moeller. Kevin added that, in reading Jessica's email, there can be an objection, but the Board has the right to sustain or overrule, with reasons and decide whether or not to use the information. He feels we should be able to do just that. This should be part of our Fact Finding. Steve said Kevin is correct that the Board can make the decision to accept the documents or not. Allan mentioned that Mr. Robbins only took 20 minutes when he made his presentation at a Selectman meeting. Mr. Dardis said it would then be asking for more data. He has not seen any of the documents, so he has no idea what's in them, but he does have the right to respond to them. He wants to know when the Board will stop these proceedings and move on to a decision. This is his argument now and doesn't think these documents would add a whole lot to this. Scott said that we could have Mr. Robbins testify. Mr. Dardis noted there may be pertinent additional information to get brought in, but he has no idea. This is why you have an end point to the presentation of the facts. That's why you close it and you're done. Steve said Allan Moeller brought up a good point. He added that the emails from Michael Henderson (former TOD Admin) were just factual information to look through. Allan added that Mr. Dardis has his drawings which came from the County, so he would like the Board to look at both sides for information.

Mr. Siviski said it is for the BOA to decide, but he would support the Board requesting the information from Mr. Robbins. Mr. Dardis did bring up the Ballard Road and the Board should be allowed to respond to the testimony from Mr. Robbins. Kevin said he would like that. Mr. Dardis said there are three (3) documents that indicate the layout of the road. Kevin would like the Board to get the information and then decide if they want to have Mr. Robbins present it. Gary Blau said that if Mr. Robbins had done a presentation at the Selectboard meeting, it should be recorded. Perhaps this Board could use the minutes and information from that. Jon said he had Googled town roads, found the one behind his house, but nothing for Ballard Road. He is curious as to why it's not there.

Mr. Dardis would prefer to look at the documents from Mr. Robbins first. Lorna said the BOA should be the ones to decide on what we need to clarify the information. Selectman, Gerald Lilly, added that once you look at the documents, you many not need Mr. Robbins to do a presentation.

Steve made a motion to accept all documents from Jay Robbins and will forward all copies, along with Selectboard minutes of the meeting containing the presentation to the Board. Kevin moved the motion; Scott seconded and the motion passed by a show of hands. Keeping in mind that we may want to have Mr. Robbins attend our hearing.

Town Administrator, Mike Faass, will send the documentation out via email tomorrow morning.

Any chance for updates on remediation. Nothing else right now, but Board members can contain any suggestions in their FOF.

Steve will contact everyone to set up the next hearing.

Motion to adjourn by Kevin; second by Lorna. Approved by all present and voting at 7:38 p.m.

Respectfully submitted,

Shari Lilly (secretary)

APPROVED BY:

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Steve Collemer, Chr

Jon Madore

Kevin Campbell

Scott Silverman

**Dresden Board of Appeals**