

**SOUTH HADLEY ZONING BOARD OF APPEALS MEETING
MAY 9, 2019
AS APPROVED**

Present: Martha Terry, Chair; Chriss Quigley, Member; Jacqueline Dupre, Associate Member; Simon Elliott, Associate member; Attorney Lisa Mead, Town Council; Attorney Patrick Markey, Appellate Attorney

Agenda Item #1 ---- Call to order

Chair Terry called the Meeting into order at 7:00 PM

Chair Terry introduced Member Criss Quigley and Associate Member, Simon Elliot. She also appointed Associate Member Jacqueline Dupre to serve as an acting/voting member.

Agenda Item #2--- Minutes

Motion: Member Quigley moved to approve the draft of the minutes of September 13, 2018. Associate Member Dupre seconded the motion. Three (3) out of Three (3) voting members voted in favor of the motion.

Agenda Item #3 --- 7:00 PM PUBLIC HEARING for the Appeal by Chicopee Concrete Services, Inc., Leo Concrete Services, Inc., and J & L Realty Management, LLC, of the Building Commissioner's Cease and Desist Order regarding Parcel 15 and 20 on the Assessor's map #54

Chair Terry asked that the submitted brief distributed to Members, Associate Members and the Town Attorney, Lisa Mead, be entered into evidence.

Member Quigley read aloud the Public Hearing notice as follows:

In accordance with the provisions of Chapter 40-A of the Massachusetts General Laws, and Section 10 of the Town of South Hadley Zoning By-Law, the South Hadley Zoning Board of Appeals will hold a public hearing on Thursday, May 9, 2019 at 7:00 p.m. in the Town Hall, Selectboard Meeting Room to hear the appeal of Chicopee Concrete Services, Inc.; 652 Prospect Street; Chicopee, MA 01020. Chicopee Concrete Services, Inc. has filed an appeal of the decision of the Building Commissioner to issue a Cease & Desist Order regarding "earth removal operations" at their property off Hadley Street in South Hadley. The subject property is identified in the Notice of Appeal as 328 Hadley Street, South Hadley, MA and is further identified as Parcels #15 and #20 on Assessor's Map #54.

The letter of appeal and related materials are on file with the Town Clerk's Office. The application and submitted materials may be viewed at the Office of the Planning Board during normal office hours (8:30 a.m. to 4:30 p.m.). Anyone interested in, or wishing to be heard on, the application should appear at the time and place designated.

*The Zoning Board of Appeals
Barbara Erwin, Clerk*

*Publication: Friday, April 5, 2019
Friday, April 12, 2019*

Attorney Markey, representing the petitioners, said he would refer to certain pages of the brief during the presentation. He also asked if the Building Commissioner would be present as it is his burden in this case.

Chair Terry outlined the order of the proceedings: Attorney Markey would present the brief/case. Board Members, Associate Members and Attorney Mead will ask questions or make comments to Attorney Markey during the presentation. Then the Hearing would be open to the public in attendance for questions and comments.

Attorney Markey stated that it is the Building Commissioner's burden to establish that the cease and desist was properly imposed upon his client, Chicopee Concrete. Attorney Markey commented, "I think I win automatically". He introduced Mr. Jay Ouellette who, along with his father, are the principals of Chicopee Concrete. They have been doing earth removal at the Hadley Street location since 1944.

Attorney Markey called attention to Exhibit 2 from the Assessor's Map to show what the discussion would entail, parcels #15 and #20. The Building Commissioner issued a cease and desist on #20 and #43 on the grounds that there are no valid permits in place.

Attorney Markey continued. He commented that there were amendments to the zoning by-laws and two of the amendments were key to earth removal. South Hadley first adopted zoning by-laws in 1946. Earth removal operations were not addressed then and therefore were not some zoning by-laws which addressed earth removal operations (in the brief, tab 3, Section 16, pages 26 to 28). Subsequently, the by-laws were further amended in 2001 when the special permit requirement came into play. Before that, anyone wanting to do earth removal applied under the 1956 by-laws for a permit through the Building Commissioner. No one else was involved. The Planning Board required that a plan of excavation be submitted. Its power beyond that was limited to ensuring a certain slope would be achieved and not surpassed in the excavation and that the excavation did not exceed a certain depth. The idea was to keep the site safe. You did not want a 90-degree drop off.

Chair Terry asked about the 1956 zoning by-law amendment. She inquired if Planning Board approval of a plan for excavation was the first step?

Attorney Markey stated that the Planning Board could impose a depth limit and a slope limit of 3:1 or 2: 1 incline. That was the extent of their authority. But all that changed in 2001. The Planning Board obtained much broader authority including the ability to impose special permit conditions, the ability to impose fees, and the ability to impose wells. None of that was required when parcel #15 was permitted. The permit requirements that governed both parcels #15 and #20 were the 1956 by-law amendments. There was a permit application for parcel #15 in 1981, long

before the 2001 by-law amendment that required special permits and authorized the Planning Board to impose all kinds of conditions. Parcel #20 obtained a permit in 2000, a year before the special permit requirements and the ability to impose conditions was granted to the Planning Board.

Chair Terry asked, “When you said in 1956 that the Planning Board received a plan from the applicant for the depth limit and the guide limit, was there also an area limit; specifically the dimensions of the area to be excavated?”

Attorney Markey replied that yes that is correct. He couldn’t get a permit to excavate into the neighbor’s yard or beyond the parameters set by the Planning Board.

Chair Terry commented, “So, the Planning Board is not really giving a permit. They are just approving a plan or setting the limits on a plan.”

Attorney Markey replied that this is correct. If the Planning Board approved the plan --the grade, the depth, and the boundaries--it would make that recommendation to the Building Commissioner. The Building Commissioner, under the 1956 by-law, was the individual who had the authority to grant a permit.

Chair Terry asked if the Building Commissioner was granting a building permit.

Attorney Markey replied that no, it was a permit for earth removal. The Building Commissioner grants all kinds of permits, but in this instance, under the 1956 earth removal by-law amendment, he was granting a permit for earth removal. This offered a nice segue to Exhibit #5.

Exhibit #5 was the permit that was issued for parcel #15 in 1981. The permit was on the first page of Exhibit #5. The second page was the Planning Board’s recommendation to the Building Commissioner that he issue the permit. The third page was the plan that the applicant submitted along with the application which the Planning Board recommended and then became the subject of the permit which was the first page of Exhibit #5.

Chair Terry confirmed that this was the plan that was submitted to the Planning Board with the grade limit, the depth limit, and that area that would be parcel #15.

Attorney Markey replied that that was correct.

Chair Terry confirmed that the first page was the earth removal permit from the Building Commissioner who, at the time, was Mr. Thomas Bamber.

Attorney Markey replied that this was correct.

Chair Terry confirmed the information that the “Work is to be completed and the land brought to the predetermined grade on or before September 1, 1981. The date at the top is February 26, 1981.”

Attorney Markey replied that this was right.

Chair Terry then asked if the work was completed and the land had been brought to the predetermined grade on or before September 1, 1981.

Attorney Markey replied that they were not able to locate any documents verifying that. However, documents were located from years later from Richard Harris, South Hadley Town Planner. It could be assumed that by September 1, 1981 everything was brought to the grade prescribed by the Planning Board and ordered by the Building Commissioner.

Attorney Mead asked, "What is the grade today? Is it the grade that it was supposed to be finished as according to this plan?"

Attorney Markey replied that he wished to confirm that with his client.

Attorney Mead asked, "Would you confirm that, whether or not it is. Your understanding is and you have your client, and I just want to know for the Board what the fact actually is."

Attorney Markey made a statement. What I will tell you is that the Building Commissioner, who is not here tonight, came and did a site visit last week and said that (parcel) 15 looks good.

Attorney Mead followed, "But he didn't withdraw his cease and desist?"

Attorney Markey replied that the Building Commissioner had not withdrawn.

Attorney Mead stated, "With all due respect, did he change his mind on parcel 43, did he not?"

Attorney Markey replied, "Yes, he did."

Attorney Mead stated, "So we can go back to the Chair's question, Was it brought up to grade according to the plan on or before September 1, 1981? And so, if it was, it is at the grad today, absent a different permit?"

Attorney Markey replied, "Yes, that's correct. What this permit imposed is the obligation to maintain that slope forever."

Attorney Mead replied. If you can't confirm it tonight, should this matter be continued, perhaps you could bring that to the Board to confirm that.

Attorney Markey replied, "Absolutely. Just so everyone understands, what the Planning Board said is that the slope had to be 2:1, and we will verify that that was the case in 1981 and it remains the case today."

Attorney Mead asked Attorney Markey to verify that the entire Parcel 15 as represented on this plan on the permit or a portion of it.

Attorney Markey replied that it was.

Member Quigley asked, “What are the documents you referred to from Richard Harris?”

Attorney Markey replied, “Richard Harris, this is how we know that the depth and the grade requirements must have been met in 1981 and continue to be met. Exhibit #6 is a letter from Richard Harris. You’ll see on the ‘re’ line, it’s addressing Assessor’s Map 5 4, Parcel 15. And it is addressing Parcel 20 which it says is grandfathered, which he says is grandfathered, and, Parcel 15, there was some question at the time as to whether that applicant had exceeded the boundaries that ended up being addressed. But what this establishes is that there is no suggestion that it did not meet the grade or depth requirements in 1999.”

Attorney Mead asked if there still excavation happening on Parcel 15.

Attorney Markey replied that, as there is now a cease and desist, nothing is happening. The site is only being driven over now. Prior to the issuance of the cease and desist, the parcel has been part of the overall earth removal operations but soil had not been taken from that parcel in years.

Attorney Mead asked if Attorney Markey could describe for the Board what “being part of the overall operations means?”

Attorney Markey replied that, until the cease and desist was ordered, his client was lawfully in earth removal operations on Parcel 43, 15 and a portion of 20.

Attorney Mead asked Attorney Markey, “What does ‘earth removal operations’ on Parcel 15 mean?”

Attorney Markey replied that it could mean two things. It could mean taking out gravel daily or it can be part of a larger, or differently located, earth removal operation within the property owned by the petitioners.

Attorney Mead asked, “So what’s happening on Parcel 15 today, absent the cease and desist?”

Attorney Markey replied that it would be used for access to cells 1 and 2 on Parcel 20.

Attorney Mead said, “So it was being used for earth removal operations by way of access and movement of equipment; not actual earth removal?”

Attorney Markey replied that was happening occasionally. He did not want to mislead the Board into thinking that earth removal was happening every day when that is not the case.

Attorney Mead asked, “Can you describe for the Board, absent the cease and desist, what activities are taking place on Parcel 15?”

Attorney Markey stated, “On Parcel 15, there would be the occasional removal of gravel consistent with the permit that issued in 1981 to the grade and depth .They never got to the

depth, and as long as they maintain the grade, they can keep going until they hit that depth .They never hit that depth, but they didn't always use that parcel to get gravel. Sometimes they did, but sometimes especially after 2000, when they got a permit for earth removal in Parcel 20, two cells, they used Parcel #20 more frequently for gravel."

Attorney Mead asked, "Did they cross Parcel #15 to access Parcel #20?"

Attorney Markey replied, "Yes."

Chair Terry asked, "You said that until recently there was occasional removal of gravel still going on Parcel 15?"

Attorney Markey answered, "Yes."

Chair Terry stated, "The original permit from February 26, 1981 said the work would be completed and the land brought to the predetermined grade on or before September 1, 1981. So how from 1981 to the cease and desist was ordered, under what was that operation taking place on Parcel 15?"

Attorney Markey stated, "I understand your reading of the permit and our reading of the permit and it is consistent again with the Richard Harris letter of 2000 (Exhibit #6), December 8, 1999, that presumes that there was an existing permit. You'll see that in one of the paragraphs he references the existing permit from 1981. The second paragraph, 'I have concern that the excavating may not be occurring in conformity with the conditions attached to the February 24, 1981 approval by the Planning Board.' So that presumes that that permit was still valid and soils could still be removed. I would submit that the deadline of December 1981 was the deadline to bring it to the proper grade not the deadline for removing beyond which no more soil could be removed. But that all becomes immaterial in 2000 because the world changed a little bit in 2000."

Chair Terry made a comment. It does say work is to be completed September 1, 1981. So there is a finite date by which the work has to be completed. I'm not sure by what authority the work continued from September 1, 1981 and it was still going on December 8, 1999. But if we skip ahead to Exhibit 6.... is your copy any better than ours because I can barely read it?

Attorney Markey replied. My copy is not better. We've been very limited, I have to say, we spent hours a day, my client actually, not me, in the town archive and the record keeping is not excellent.

There was discussion about difficulty of reading exhibit 6. Member Dupree read a section of exhibit 6 aloud:

...Pierre Van Belle, your gravel pit excavation site...Hadley Street...after careful review of your gravel pit excavation site. After careful review of the records I determine that the subject gravel pit is subject to the conditions of a permit granted by the Planning Board of Feb. 24, 1981. Excavation is limited to the above referenced property only which is

depicted on the attachments. Any property on which excavation occurred prior to adoption of the zoning bylaw and on which your excavation has continued according to the bylaws may be eligible for consideration as a non-conforming use. Based on the available information, no excavation has been permitted for nor is considered grandfathered on property identified on the attached excerpt of assessor's map 54 as parcel #20.

Member Quigley commented that the actual permit is dated the 24th. We don't have a copy of that, we just have the letter. So is there a copy of the actual permit?

Attorney Mead commented that Richard is wrong about that. If you look at Exhibit 5, it says February 26. I think there's a typo but the 1999 letter isn't about verifying the permit, it refers to the permit.

Attorney Markey replied. That assumes that the permit is still in force and that it did not terminate in December of 1981.

Attorney Mead asked if it was Mr. Harris the Zoning Enforcement Officer in 1999?

Discussion ensues about Richard Harris being the Planning Director and not the Zoning Enforcement Officer.

Attorneys Markey commented that the point is, nobody was doing anything in secret. Everybody was operating under the assumption that the 1981 permit permitted the petitioners to excavate parcel #15 until they reached the depth beyond which they can't go. So if you think about it as like a pool that has boundaries, they had to operate within those boundaries and they could only go down at a 2:1 grade, so if you go at a 2:1 grade, that means two feet run over rise, two feet run for every one foot rise. At some point, coming in from the pool edges, you're going to reach a pinpoint from all four sides. At that point, assuming that point was above the limit set by the Planning Board in 1981, you can't do any more excavating.

Attorney Mead inquired what you think that limit is.

Attorney Markey responded. I'm not sure what the Planning Board prescribes, but we know for a fact that the parcel is presently subject to environmental protection regulations which prevent it from going, I think, closer than five feet to the high water table.

Attorney Mead asked what it is at today.

Attorney Markey responded that it's way above that.

Attorney Mead asked if we have a number. Do you want to verify that because this plan says level at elevation 77?

Attorney Markey made a statement. We will verify that we have not gone beyond level 77, if that's what you're asking.

Attorney Mead responded. Please.

Attorney Markey made a comment. I should make a list of things to follow up on.

Chair Terry asked a question. I'd like to go back to my earlier question. The permit for parcel 15 has a finite date. Work is to be completed and the land brought to the predetermined grade on or before September 1. Was there any extension of this original permit? I don't see anything in Mr. Harris' letter that says anything about work being continued under some extension. All he's saying is that it doesn't conform to the original specifications. To try to make the jump that Mr. Harris somehow endorsed it continuing after 1981 until 1999 is a quantum leap that I can't quite take.

Attorney Markey made a statement. I understand your position; we respectfully disagree and it may be that that is something that a court will have to determine, but that is our position. Again, historical for context: Back in 1981 the town was concerned about excavation in the area of parcel 15 so it required that the excavation be brought to a certain grade and be brought under the 1956 Zoning Bylaw Amendment, and that is the work, we would submit, that had to be done by December. I understand you disagree, but our position is the grading work, the work to bring it to a grade, had to be completed by December 1981. It's a big enough parcel that it would be virtually impossible to extract all the gravel that this permit contemplated being excavated between February 1981 and December of 1981. Unless there's other questions, I want to leave that point and demonstrate why in the end it doesn't matter because there was another permit that included parcel 15.

Chair Terry asked why the town set such a small window of time. February 26, 1981 to September 1, 1981 - 6 or 7 months

Attorney Markey replied that it was sufficient time to bring the excavation that had occurred to the grade requirements. That was a bit of an exigency and a bit of an emergency as the town saw it. They wanted the excavation that had occurred, which apparently must have exceeded the 2:1 requirements addressed by December 1981. They were addressed by December 1981 and excavation at that run-over-rise continued. I want to move on to parcel 20, which, well, let me show you the plan that was submitted for another permit, again under the 1956 bylaw permit, this is a plan that was submitted for consideration of the Building Commissioner and the Planning Board in the year 2000

Chair Terry asked if it was in the booklet.

Attorney Markey replied that it is

Chair Terry asked if it was section 7.

Attorney Markey stated that it's actually addressed in a couple of sections. #7 is a letter to Leo Ouellette, Jason Ouellette's dad, dated September 26, 2000. That is the Planning Board report on the application that Chicopee Concrete, then Leo Concrete, made for the expansion of the 1981

permit into parcel number 20, so again, 1981 covered this (indicating on map.) The permit that was applied for in 2000 covered 15 (indicating on map) and this part of 20

Chair Terry asked if that could possibly be described as cell one.

Chair Markey replied. So, there is cell one and cell two. This is parcel 43. You can see the outline of that. This right here (indicating) is parcel 15 and this is parcel 20. In the year 2000 the petitioners applied for a permit under the 1956 bylaws for an expansion of the permit dated 1981 for parcel 15 to include those portions of parcel 20 that are designated cell one and cell two.

Attorney Mead asked a question. Can you explain the connection, that it was an expansion of or an amendment to the permit?

Attorney Markey responded that the original permit, the first time a permit was required, and was for 15, that's right here. So the petitioners wanted to expand beyond 15 into part of 20.

Attorney Mead inquired how you make that leap.

Attorney Markey responded. How do we make that leap? We look at the application paperwork and it talks about cell 1 and cell 2, most significantly you can see at exhibit #9 the map that was submitted by Durkee White, as you recall, parcel bylaw, the 1956 bylaw amendments required that applicants submit a plan of the land where it proposed to do soil removal and that is Exhibit 9, and this is Exhibit 9 (indicating) blown up. You'll see that cell one and cell two are part of parcel 15 and more in parcel 20. None has been able to find the actual permit from 2000. Richard Harris hasn't found it and the Building Commissioner hasn't found it. My clients haven't found it. We know that it issued, however. We know that it issued, because every year, pursuant to that permit, my clients paid \$2000, they ended up paying \$18,000, that was a condition, we say, illegally imposed by the Planning Board in 2000.

Attorney Mead asked a question. Did you appeal that condition in 2000?

Attorney Markey replied. I do not believe so.

Attorney Mead stated that, for the Board's edification, in case you don't already know, in Massachusetts law, if there's a condition in a decision of a permit that's not appealed, notwithstanding the fact that it may not be legal, if it's not appealed, it carries with the permit.

Attorney Markey made a statement regarding permits. Which we don't actually have, nor does the Building Commissioner. So, we know that a permit was issued, though, because the recommendations of the Planning Board to the Building Commissioner are contained in Exhibit #7. These are the terms, pay \$18,700, Section 6 future permits to be granted for, is committed to granting the following permits in the future, a second five-year permit to continue excavation in cell one, remember there's cell one and cell two, cell one overlaps 15 and 20 and cell 2, goes in in section 6 on page 3, excavation in cell two, provided the conditions specified here, especially the reclamation activities are satisfied. Just so everybody here knows, my clients never got to the point of getting into cell 2. They've confined themselves to cell 1. And they've adhered to their

requirements. They've stayed within cell 1, they paid the money, they brought it to the required grade, they didn't go below the prescribed depth, they came in for annual reviews when called, they came for ten years of annual reviews. After ten years, the Planning Board stopped calling them in for annual reviews, and they continued to operate in cell one with the full blessing, apparently, of the Building Commissioner and the Planning Board.

Chair Terry made a statement. On the original permit from September 26, 2000, it does say at the end the present permit approval is a five year period. When the Planning Board is using approval there, that's approval of the plan, that's not whatever is supposed to come from the Building Commissioner. We have two separate things going on. We have the Planning Board that has to approve the plan and the Building Commissioner issues (a building permit)

Attorney Markey commented. The procedure is the applicant submits a plan, the Planning Board reviews it, with conditions it thinks it's legally entitled to impose, and then makes a recommendation to the building commissioner. Only the Building Commissioner is empowered to issue the permit

Chair Terry commented that it says here that the present permit approval is for a five year period. Therefore, the work is to be completed and the land brought to a pre-determined grade on or before September 26, 2005. However as provided for in the aforementioned conditions, the Board is committed to issuance of a subsequent permit to complete work in cell 1 such that the deadline for completion can be extended through September 26, 2010. Do you know if they received, went through the process again, and they were issued a subsequent permit to continue work until 2010?

Attorney Markey made a statement. My client does not have a permit; that is one that they would probably have....as 2006 is not as long ago. We think what probably happened is that the Planning Board did a couple contradictory things here. They said this is for five years, but they said pay your fees over ten years, so that assumes the second permit was either allowed defacto, or they issued it. Nobody in the Town, either because it doesn't exist, or because the records are not that good, has been able to locate a permit that was issued in 2006 or any permit that issued for cell one and cell two, which overlap parcel 15 and parcel 20. So, it's our position that the permit from 2000 is controlling and has been extended up to the present and I can't stress enough that my client didn't do this in the dark of the night. They continued with the full apparent blessing of the Building Commissioner and Richard Harris. They continued excavating in cell one, again maintaining the required slope and not going beyond the depth. They made all the payments that were required went beyond the five years. How can you issue a permit for five years and require payment for ten? It doesn't make sense.

Attorney Mead asked that for the sake of this discussion, presuming the permit ended in 2010, since you paid fees until 2010, do you have a permit after that.

Attorney Markey commented that no, there are no permits, at least the Town hasn't been able to (provide them)

Attorney Mead asked a question. Does your client have any permits?

Attorney Markey replied no.

Attorney Mead asked a question. The Building Inspector says there's no permit so does your client have any permits?

Attorney Markey made a statement. I already said no. We have the one permit and we've been relying on and we've been relying on that one permit with the full knowledge of the various Building Inspectors since the year 2000. So it's our position that we complied with the 2000 building permit, made the payments over ten years, kept it within the grading and the depth restrictions, appeared before the Board every single time they were asked, they did annual reviews any time there was an annual review, we appeared and got their blessing. Those documents do exist, the annual reviews do exist.

Chair Terry asked a question. You're saying that's from 2000 to 2010? So they paid their fees but what happened in 2010 that they didn't come back for another review?

Attorney Markey made a statement. They were not called back.

Attorney Mead asked a question. Do you have the annual reviews?

Attorney Markey made a statement. I do. I didn't bring them but I'm happy to fax them. We have virtually all of those. As we said, my client spent days in the archives and was able to find those.

Chair Terry asked a question. So you're saying that your client continued operating after the deadline was extended through 2010 because they weren't called back?

Attorney Markey replied that that's correct.

Associate Member Dupre made a statement. I think the burden is on the applicant.

Attorney Markey commented that, as a matter of law, the burden is actually on the Building Inspector.

Attorney Mead commented that the Building Inspector has said there is no permit. So he said there is no permit.

Attorney Markey stated that he has to testify.

Attorney Mead made a comment. Maybe he will come in at the next meeting? But his letter has said there is no permit. So that's what he said. He's looked in the file and there is no permit.

Attorney Markey made a statement. Well, we can differ on burdens and how you meet the burden but I respectfully disagree.

Chair Terry commented that it seemed the applicant knew to come back in September 26, 2005 for an extension of the permit.

Attorney Markey commented that the Planning Board would say 'this is your review date' and my client would appear. My client didn't make the appointment; the appointment was made for my client.

Chair Terry made a comment. Right, with a finite date on it. When that came (the date), wasn't some red flag raised? 'Oh my goodness, I have a date of September 26, 2010 and somehow the Planning Board hasn't contacted me. Maybe I should contact the Planning Board because I have a finite date of a deadline that this has to be completed by'. It just seems to me a little remiss in assuming that you have a finite date by which to complete something and you haven't completed it then and you want more permits to me it behooves the applicant to apply for the next extension of five years.

Attorney Markey made a statement. We don't know is what Leo Oulette, the Building Commissioner and the Planning Board talked about in 2010. That may be something we may need to take depositions to find out. But you get to the crux of it, that's what's going to be dispositive. Who had the burden of calling for the review, was it the town or was it the petitioners? And then if there was some sort of agreement between the Planning Board, the Building Commissioner and the Applicant, what was the agreement?

Chair Terry asked a question. Could you repeat that again? I couldn't quite get it all.

Attorney Markey replied. I wish I could remember what I said. One of the important things that we don't know is what actually happened in 2010. My client had paid all the fees he was required to pay, came every time he was called and stopped getting calls. So who is at fault there? I don't know, I'm not going to speculate. What's really going to be interesting are the depositions of the Building Commissioner and Richard Harris about what the discussions were. Why did they not call my clients back? Was it because there was an agreement that the permit extended until the depth limits were met? That's our position.

Attorney Mead replied. Are you suggesting that if a permit requires an annual review and has a finite period, that it is the obligation of the town to make sure those renewals happen and reviews happen and not the obligation of the permit holder?

Attorney Markey replied. I am.

Associate Member Dupre made a comment. I think if you look at the Massachusetts RMV and how they administer licenses now, the burden is upon the person who owns the license to see they get it renewed. There are no reminders.

Attorney Markey replied. Yes.

Associate Member Dupre commented that if you forget and get pulled over by the police you're out of luck.

Attorney Markey replied. I agree that's how it works at RMV. That statutory construct can't be imposed on different operations and different activities. Each activity is subject to its own regulatory framework. That's what I'm saying.

Attorney Mead made a comment. Exhibit 7 in paragraph 14 of the September 28, 2000 letter from the Planning Board to Leo Concrete, the permit is subject to satisfactory annual review by the Planning Board. So you're saying that that annual review that the burden is on the Planning Board to call the applicant in to make sure that annual review happens?

Attorney Markey responded. All we know is that is what happened historically.

Attorney Mead commented. That not the question I asked. The question I asked was, the permit says there will be an annual review and your suggestion is that it is the obligation and burden of the town to make that happen.

Attorney Markey replied. Yes

Attorney Markey commented. That is the extent of my presentation. I understand I have some homework. You would like copies of the reviews. Was there something else?

Associate Member Dupre made a comment. What was there proof of payments to the town?

Attorney Markey replied. I suppose we could go back if banks keep records that long. But we know the payments were made because at every review they were told to come back next year. So presumably the payments were made because they wouldn't have said 'come back next year' if the payment hadn't been made.

Attorney Mead asked a question. If the town issued a bill to make sure that the permit fee was paid.

Attorney Markey replied. I don't know.

Attorney Mead commented. So, it was the obligation of the town to make sure the permit holder paid the fee or was it the obligation of the permit holder to pay the fee because it was in the permit.

Attorney Markey replied. I think there is a subtle difference there. I think that the obligation was on my clients to make the payments

Attorney Mead asked what the difference is.

Attorney Markey made a statement. The difference is that the language is that my client shall make the payments; not a meeting shall be called. A review shall be called. A review shall be called leaves ambiguous as to who is calling the meeting but obviously my client can't call a meeting. Only the Planning Board can call a meeting.

Attorney Mead replied. They (Chicopee Concrete) can't request a meeting?

Attorney Markey commented that payment has to be made and only one party can make a payment and that is my client. Two parties can call a meeting so that's the subtle difference.

Attorney Mead stated that that regarding Parcel 15, are you going to provide proof that the grade was met and what the current level is at the bottom of parcel 15?

Attorney Markey replied okay.

Chair Terry asked if there were there any annual reviews required on parcel 15.

Attorney Mead confirmed that no, that was for parcel 20.

Attorney Markey commented that just to clarify, parcel 15 became subsumed by the permit we are referring to as the parcel 20 permit. Parcel 15 is cell 1 which straddles 15 and 20. So that the 2000 permit was for both 15 and 20. It was for cell 1 which is part of 15 and 20.

Chair Terry asked if any else confused about that?

Attorney Mead addressed Attorney Markey in saying, you might want to go over the plan.

Attorney Markey pointed out on parcel 43. He indicated to parcels 15 and 20. He compared the plan with the 1920 plan which includes parcel 43, parcel 15 and cell one which all became parcel 20. Cell one includes all of 15 and 20.

Chair Terry had a question. Your saying parcel 15 originally stood by itself and then got subsumed into cell one. How did that happen?

Attorney Markey replied. I think it was a convenience of the town to issue one permit for both of those.

Chair Terry made a comment. You're saying the permit issued in 2000 not only included cell one but retroactively include parcel 15 which had already been permitted back in 1981. Why?

Attorney Markey replied remember parcel 15? It had very few restrictions on it. It had restrictions on depth, grade and boundaries. I think what the Planning Board said 'we want to impose more restrictions on parcel 15'. So as part of this application to do work in parcel 20, we going to say 'okay, we'll give you that permit for parcel 20 but we want to impose the conditions that we're going to impose on 20 on 15 as well' The cell (was drawn) to include 15 and 20 because the restrictions placed on 15 in 1981 there weren't many at all. They were the ones the bylaw permitted, but there weren't many. But in 2000 the Planning Board wanted to impose more restrictions. The only way to do that was to get the applicant to include that as part of its new application for work in parcel 20.

Chair Terry asked what exhibition is that in the brief.

Attorney Markey asked a question. The plan?

Chair Terry clarified. Where Lot 15 is subsumed into 20.

Attorney Mead replied Exhibit 9

Attorney Mead asked a question. So you're saying the town asked for that plan? That the applicant didn't do that? What evidence do you have of that?

Attorney Markey replied. We actually can be in touch with the lawyer who appeared before the Planning Board in 2000. As you probably know, these things don't actually happen with an application and then there is a vote. There's a lot of back and forth. So there was a lot of back and forth and the upshot was that 15 and 20 were going to become cell one together and an application for cell one and cell two would be made and approved by the Planning Board and it was

Attorney Mead made a comment. So to carry on with your line of reasoning there, the applicant came in 1999 to do something on parcel 20 and through the hearing process.

Attorney Markey replied. I think pre-hearing, yes.

Attorney Mead commented that at some point during that process between the applicant and the Town, they created cell one and cell two to include parcel 15 and parcel 20 together.

Attorney Markey replied. That was correct.

Attorney Mead made a comment. The reason I'm curious is that the letter from the Planning Board doesn't say anything about parcel 15, it just talks about parcel 20.

Attorney Markey replied. Right, but it talks about cell one and we know from the submission, cell one included 15. That's an ambiguity. But the plan is what controls. The plan clearly includes parcel 15 within cell one. That's something Richard Harris will know because he was the one overseeing the negotiations.

Attorney Mead commented. And where is work taking place right now? Not obviously at this moment.

Attorney Markey replied. Mostly in cell one. But most recently, not the parcel 15 portion in cell one.

Attorney Mead commented. Your argument, notwithstanding your initial argument, that parcel 15 has now been subsumed in the permit of 2000.

Attorney Markey replied. Correct.

Chair Terry asked a question. You're saying that proof of that combination is in the letter from September 26, 2000?

Attorney Markey replied. Yes, but more significantly, that letter was the recommendation from the Planning Board to the Building Commissioner to issue the permit. It references the plans submitted by Durkee White. The plans from this document and Exhibit 9 are in your binder. The plan very clearly shows parcel 15 as part of cell one. That's what was approved in 2000.

Attorney Mead asked a question. So even if it expired in 1986, or whatever year it was, your argument is that it became a part of the permit in 2000?

Attorney Markey made a statement. It was subject to the 1981 permit and it was part of the overall consideration of cell one.

Martha Terry asked a question. But not until 2000?

Attorney Markey replied. Correct. Our position just to be clear is that the 1981 permit goes forever. But it was blessed again in 2000 when a permit for that portion of it which extends into parcel 20 was granted.

Chair Terry asked a question. So you're saying the permit from 1981 was limitless? It was not finite? It was infinite?

Attorney Markey replied. Yes

Chair Terry asked a question. Why did they need to make it part of parcel one if it could continue infinitely?

Attorney Markey replied. I think my clients were trying to be reasonable. The Town said 'you want a permit for parcel 20'? 'Well, promise us you're going to do for 15 what you're agreeing to do for 20'. That's how it happened.

Chair Terry asked a question. And that's in the Planning Board letter?

Attorney Markey replied. There is nothing that says 15 and 20 like that but we do know how those negotiations went and that's how they went.

Chair Terry asked a question. And what's the evidence for how those negotiations went?

Attorney Markey replied. The lawyers and their parties, Richard Harris, the Lawyer for my client, and my client.

Chair Terry asked a question. So you've spoken to them and this is the testimony you've gotten from them?

Attorney Markey replied. I've spoken to my client. Richard Harris is an honorable person. He's not going to contradict this.

Associate Member Quigley asked a question. Where is his testimony?

Attorney Markey responded. We don't have it. He's not here.

Associate Member Quigley asked a question. I thought you said you had his testimony already?

Attorney Markey responded. No, to be clear nobody has testified under oath.

Chair Terry commented. That might be something we do down the line because I think if someone said something I would certainly like to have it under oath rather than have a 'robin-go-round' of he-said-she-said. I would like to have that important testimony. Attorney Lisa (Mead), will we deal with that at another hearing?

Attorney Mead replied. Or he can get an affidavit as well

Attorney Mead asked Attorney Markey about his position that the 1981 permit continued and was amended in 2000. She observed that the 1981 permit and the 2000 permit do not appear similar.

Attorney Mead made a comment. If that is the case, then the 1981 is out of conformance or the 1981 was amended by 2000 one.

Attorney Markey asked a question. How is it out of conformance?

Attorney Mead responded. Because the plan is different. The plan for excavation on parcel 15 is different. The 1981 plan shows 3 sides of a pit. The 2000 plan shows one side on cell 1 in parcel 15. Parcel 15 is different in excavation in 2000 than that was permitted in 1981. Either the permit exists in 1981 and forward and is out of conformance or was amended in 2000.

Attorney Markey commented. We can argue in the alternative. The Board can make the decision on that.

Chair Terry made a statement. We are now done with presentation. Any questions from the Board before allowing the public to proceed with comments on what has been presented

There were no questions from the Board.

Chair Terry clarified that the public may speak, but only may speak on the appeal and the material presented today.

Attorney Mead commented. The public can submit material, but must speak in favor or opposed to the appeal of the order of the Building Commissioner

Chair Terry added that the public cannot speak about issues of water quality, we may only talk about Cease and Desist order and the appeal.

Chair Terry asked that public to give their name and address and that those speaking be recognized by the Chair.

Robert Pleasure, 10 Jewett Lane, addressed the Board. If I understand correctly, the appellant is relying on the permit from the 1980s and the extension of the permit in 2000. The 2000 permit identifies the permit as non-transferrable. There was dialogue between Chicopee Concrete, represented by Mr. Leveque, and Mr. Harris in which Mr. Harris reminded the appellant that the permit was not transferrable. I have that email that was made accessible to us through a freedom of information

Chair Terry asked. This is the 2000 permit?

Robert Pleasure read from paragraph 12 about the transferability of the permit and made pairing commented,

This permit is not transferable to any entity for which Mr. Leo Ouellette is not the principal owner/operator. While a new permit subject to these same conditions will not be unreasonably withheld, the Board reserves the right to impose new conditions based on the new permittee's history and experience in the area and the industry.

At a certain point, I believe Mr. Leo ceased to be the principal, that he passed away I believe in 2015. Unless a new application was filed in 2015, at a minimum there was no permit for the activities between 2015 and the current date. I can provide copies of the email October 5th, 2018 between Mr. Harris and Mr. Leveque in which Mr. Harris reminded him of this fact. I believe you have a copy of the decision of the Planning Board as relayed in the letter from the planning board, the September 26, 2000 letter that says it was not transferable. Paragraph 12 in Exhibit 7. Mr. Pleasure provided it to MT. CQ pointed out that it also discusses this on page 6, section 9 of the minutes from September 12, 2000. CQ proceeded to read: this permit, if granted, is not transferable to any entity for which Mr. Ouellette is not the principal. However, a new permit may not be unreasonably withheld. Members, Mr. Leiter, and Mr. Ouellette discussed the implications and meaning of this restriction. Mr. Leiter stated that he and his client agreed that it is necessary [to] limit the permit in that Mr. Ouellette is an established [local] business person and the Board needs to ensure that the permittee is a responsible party. There was some concern about being able to transfer to his son.

Chair Terry commented. This is something we will take into consideration.

Chair Terry clarified with Robert Pleasure that the copy of the email was provided in response to a public documents request for emails between the applicant and the Planning Department, and that it was among many hundreds of emails. Mr. Pleasure added that it would be helpful to look at the adoption of the special permit requirements from 2001 passed unanimously by the Town Meeting at that time. He doesn't want to make an argument. It should be constructive on the issue of burdens about who should come forward to get a new permit or a renewal. It is helpful

because the required grade in major earth removal is 3:1, unless specifically a leave is granted. He does not know the grade currently or the last couple of years, though there was an allowance of 2:1 until a portion was finished, then they had to make it a 3:1. Looking at the documents and the various annual reviews that Mr. Harris conducted. He got a copy of a report from the Clerk's office of Mr. Harris' report to the town meeting on the bylaws that they adopted May 21, 2001.

Chair Terry will make a copy for everyone.

Diane Mulvaney, Lyman St, asked. Will the brief Attorney Markey provided and other documents be online?

Attorney Markey would work with Mr. Harris to get this copy online. Everything that Chair Terry has received needs to go to Mr. Harris to go online.

Sandra Zieminski, Lyman Terrace, asked. Who was the Building Commissioner, and the attorney for the applicant in 2010?

Attorney Bruce Leiter, of Costello & Leiter, was the applicant's attorney in 2010.

Discussion of who it was the Building Commissioner in 2010 ensued. Upon quick review of the 2010 minutes, it was not clear who the Building Commissioner was at the time.

Attorney Mead asked a question. Who is the principal of Leo Concrete?

Jason Ouellette replied that Leo Ouellette Jr. is the principal of Leo Concrete and Chicopee Concrete is 100% owned Leo Concrete.

Agenda Item #4- CONSIDER MAKING DECISION REGARDING the appeal by Chicopee Concrete Services of the Building Commissioner's Cease and Desist Order regarding Parcels 15 and 20 on Assessor's Map #54

Chair Terry inquired if there was a motion. Is it appropriate to make a motion to continue this meeting to receive more evidence and to review what was provided? At the next meeting, we will discuss part of the public hearing. We will discuss the information we have and whether we need more information, then we can close to decide on deliberation.

The Board decided on June 6, 2019 at 7:00 PM in the Selectboard Room. Chair Terry worked with Attorney Markey and Attorney Mead to sign the document agreeing to the June 6, 2019 continuation date and time.

Motion: Associate Member Dupre made a motion to continue the public hearing to June 6, 2019 at 7:00 PM in the Selectboard Room. Member Quigley seconded the motion. Three (3) out of Three (3) voting members voted in favor of the motion.

Agenda Item #5 ---Other New Business (topics which the Chair would not reasonably expect to be discussed/consideration as of the date of this notice)

Chair Terry thanked the audience for being well-mannered and excellent and asked the Board if there was any new business. There was no new business.

Agenda Item #6 ---Adjournment

Motion: Associate Member Dupre moved to adjourn the meeting at 8:26 PM. Member Quigley seconded the motion. Three (3) out of Three (3) voting members voted in favor of the motion.

Respectfully Submitted,

AS APPROVED

Martha Terry, Chair
Chriss Quigley, Member
Jacqueline Dupre, Associate Member and
Simon Elliott, Associate Member

(Complied and formatted by Colleen Canning, Clerk to Planning and Conservation)

Appendix

Document Name	Document Location
Brief in Support of Petitioners Appeal to the Zoning Board of Appeals from Building Commissioners' issuance of Cease and Desist Order	Zoning Board of Appeals Files
Documents Submitted by Robert Pleasure including: 2018 departmental e-mails, 2001 Town Meeting Recommendations, and 2000 Planning Board Minutes	Zoning Board of Appeals Files