

## **TOWN OF GOSHEN PLANNING BOARD**

### **Request of Guildhall Sand & Gravel For An Excavation Permit Under RSA 155-E., August 26, 2008 (Final Revisions September 2, 2008)**

Public Hearing: November 27, 2007, continued in 2008 to March 4, April 1, May 6, May 27, June 3, June 12, and July 15.

Deliberations: July 15, July 29, and August 26, 2008

Members Participating: Allen Howe, John Wirkkala, Jonathan Purick, Richard Moen, John Scranton, and Melanie Bell.

#### **I. INTRODUCTION AND PROCEDURAL POSTURE.**

1. Guildhall Sand & Gravel (“the applicant”), a company with the same ownership as Carroll Concrete, has submitted an application for an excavation permit on land located on Lear Hill Road in Goshen, Tax Map 403, lots 4.1 and 4.2, and Map 204, Lot 15 – collectively often referred to as the “Davis Pit” or “Davis Site.” The initial application, including a letter from Mr. Shaun P. Carroll, Sr., dated October 26, 2007, was first delivered to the Goshen Town Office on November 14, 2007.
2. The property was operated as an excavation before the Goshen Zoning Ordinance was adopted in 1970, thus it is not subject to a special exception under Section V(F) of that Ordinance. However, the excavation is not exempt from a permit under RSA 155-E, because no report was filed within the time required under RSA 155-E:2, I(d) (see also RSA 155-E:2, II(a)(3)).
3. It is the Board’s position based on a May 27, 2008 legal opinion from Attorney H. Bernard Waugh, Jr. (attached) that use of the Davis Site haul road for excavated materials originating off-site from the Bridge Site in Unity could be subject to whatever limitations are included in the 155-E permit for the Davis Site. If no 155-E permit existed for the Davis Site, then use of the site solely for a gravel haul road could require a special exception from the Goshen Zoning Board of Adjustment.
4. The most recent gravel excavation permit for this site (attached) covered the July 12, 2004 through July 12, 2007 period. It was extended during litigation, as described below, but had expired by the date the new application was received by the Town.
5. At a Public Hearing the company requested and was granted waivers for the provisions in Goshen’s Excavation Regulations Section III.3.A.4 and III.3.C.3 (Seal of an Engineer or Surveyor) and Section III.3.C.8 (Cross-sectional views). Initially the Board found the application to be incomplete and provided specific items to be addressed at the 11/27/2007 and 3/4/2008 hearing dates. The applicant subsequently addressed the missing items through updated maps, revised application narrative, supplementary written submissions, and verbal commitment to address reclamation plan specifics via a condition in the permit. The Board voted to accept the application as complete on May 27, 2008.

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6. The final two-sheet plan prepared by Richard Fraser for Guildhall Sand & Gravel describing the proposal for which application is made are labeled as follows: Sheet 1 - "RSA 155-E Site Plan, Existing Conditions" dated 10/19/2007, rev 3/28/2008; Sheet 2 - "Updated RSA 485-A:17/RSA 155-E Site Plan, Final Grading Plan," dated 10/19/2007, rev 3/28/2008. A third sheet dated 4/11/2008 (Davis SheetBS.dwg) was prepared by Guildhall Sand & Gravel at the Board's request to delineate reclaimed areas, areas brought to final grade, and areas open to excavation as they exist at the time of the application.
7. The applicant was represented at the 2007 and 2008 hearings by Shaun Carroll, Jr., owner-operator of the company, and/or by Richard Fraser of the company and by Attorney Timothy Britain of the law firm Cleveland, Waters, and Bass.
8. The Town of Goshen has adopted local excavation regulations. Thus the standards applicable to this proposal are those contained in RSA 155-E itself and in the Town of Goshen Excavation Regulations, April 2004.

## II. FINDINGS AND RULINGS OF THE BOARD.

9. **Permit Status.** During the time period when Guildhall Sand and Gravel and the Town of Goshen were involved in litigation before the New Hampshire Supreme Court regarding the Town's excavation regulations, an agreement between counsel (which is evidenced by a letter from Attorney Britain to Attorney Waugh dated May 24, 2007, and Attorney Waugh's response dated June 12, 2007) was reached that specified the old permit would continue until a new permit is issued "*it being a condition of the extension that Guildhall will submit a complete application for a new permit within 90 days after the Supreme Court releases a decision on the pending appeal*".

The Supreme Court's July 20, 2007 decision stated "...we conclude that RSA chapter 155-E authorizes municipalities, in the context of excavations that require a permit, to impose regulations more stringent than those contained in the statute. The Town's ordinance does just that and is therefore not preempted."

Ninety days after the July 20, 2007 Supreme Court decision date was October 18, 2007. On November 27, 2007 the Board determined that at the time the present application was submitted (November 14, 2007), the excavation site's most recent permit had expired.

10. **Application for Amendment or Renewal.** From a substantive standpoint, a renewal application is treated like an original application. The application was submitted as a renewal and was treated as such in these proceedings. According to Goshen's Excavation Regulations Section III.6.C: "*The Board shall not, either as part of a request for amendment or as part of a renewal application, address any request to change or alter a condition or limitation imposed by the Board as part of a prior hearing concerning the*

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*particular property, unless the applicant demonstrates to the satisfaction of the Board that there exists a material change of circumstances affecting the merits of the condition or limitation involved*". It is not simply enough for an application to request a change of condition or limitation. The applicant did submit some information (see below) related to historical truckloads per day. Yet the information did not demonstrate any material change in circumstance directly related to the reason (concern over impacts to public welfare) why the previous 77 truck per day limit was adopted

- 11. Operational Limitations.** Those operational limitations contained in the prior permit that will become conditions of the new permit relate to the definition of "operation", days and hours of operation, haul truck round-trips per day, size of haul trucks, maximum annual excavation, dust and noise abatement, provisions for blasting, maintenance of buffers, and site safety.

The applicant requested "...a maximum transportation vehicle trip count of one hundred ten per day". It was stated in supplementary materials presented to the Board by Mr. Carroll on 4/1/2008 (attached) that "*The company will process typically 200,000 cubic yards of material at the Newport aggregate processing plant during an up economy.*" How much of that material would come from the Davis Site was not stated. A chart depicting 1998-2007 excavation by year from the site (attached) was also provided to the Board by the applicant on 4/17/2008. The maximum removal never reached 200,000 cubic yards per year and since the year 2003 hasn't exceeded about 55,000 cubic yards per year.

The development of the 77 truck per day limit condition is included in the Reasoning of Decision for the 2004 permit (attached) and will not be repeated here. On June 12, 2008 Mr. Carroll presented to the Board tabular information titled "*Load Count Data*" (attached). Data for 1996 through 2001 showed an annual truckload per day average that ranged from as low as 64.39 in 1996 to as high as 83.32 in 2001. The truckload per day average over the entire 1996 through 2001 period was calculated by the Board Chair as 80.10. Although the daily truckload range within a month and year often exceeded the annual truckload per day average for that year, without a frequency distribution one could not assess if the high end of the range was common or infrequent.

The previous permit had, in order to prevent injurious impacts to the public welfare, established as a condition of the permit, that the scope of the operation would continue to be limited to no more than 77 haul truck round trips per day and no more than 184,000 cubic yards of excavated material per year. As noted above, since no material change of circumstances has been demonstrated relative to these previously imposed conditions, the 77 haul truck round trips per day limit and 184,000 cubic yards of excavated material per year will apply to the new permit.

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12. *Use of the Davis Site as a Haul Road.* The Board should take into consideration the entire use of the Davis Site in making a decision on renewal of the application for that site. The applicant has been issued a gravel excavation permit from Unity for excavation on property owned by Ernest Bridge and located at 392 Lear Hill Rd, Map 9 Lot 683. The permit was granted for a period not to exceed five years and ending October 18, 2011. The above Unity property abuts the Unity-Goshen Town line at the Davis Site in Goshen. Excavated material from the above Unity Site will be trucked through the Davis Site to reach public highways. The Unity permit specifies a 110 truckload per day limit, but imposes no annual limitation on the amount of materials that Newport Sand and Gravel may remove from the Bridge Site. Truck size is limited to 14 wheelers, although there is a provision for requesting use of larger trucks should Newport Sand and Gravel, Carroll Concrete, or an affiliated company be awarded a contract with respect to closure of the Unity Landfill.

If the Davis Site permit were renewed with the previous 77 truckload per day limit, the potential cumulative impact at the Davis Site would be 187 truckloads per day (110 from Unity and 77 from Goshen). The Board expressed concern that this level of use would be excessive. The Board recognizes that if trucks from the Unity pit were to enter onto public highways in Unity, the Goshen Planning Board would have no jurisdiction over them. The Board also believes that the impact of gravel trucks traveling from the Unity pit via Lear Hill Road to Goshen and Route 10 would have at least as much impact on Goshen highways and residents as the same trucks accessing public roads via the Davis Site. Therefore, the Board concludes a reasonable number of trucks originating in the Unity Pit should be allowed to use the Davis Pit as a haul road so long as those trucks are not in addition to the permitted trucking from the Davis Site itself.

Mr. Carroll volunteered at the June 3, 2008 hearing to accept a condition in the Davis Site permit that would limit the total truckloads per day exiting the Davis Site to 110 with no more than 77 carrying material excavated at the Davis Site.

This condition of the Davis Site permit would preserve the historic level of gravel trucking originating from the Davis Site (i.e., the 77 truckload per day limit for the Davis Site is not being changed) and it would cap the potential maximum trucking through the Davis Site at 110 truckloads per day, which is more favorable to Goshen residents than no limit at all.

The Board decided this compromise position was acceptable and has adopted the above condition as part of the Davis Site permit to be reviewed and altered or reaffirmed by the Board annually. Yet the Board still believes it has authority to regulate use of the Davis Site as a haul road and may elect to do so for a future permit.

All trucking using the Davis Site as a gravel haul road must adhere to the operational limits and standards for trucking, including days and hours of operation, as specified for

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the Davis Site permit unless a specific exception is granted by the Goshen Planning Board.

13. **Scope of Operation Issues.** Plan Sheet 1 listed above depicts via a non-stippled gold polygon 22.10 acres that will be open to excavation during this permit period. Additional acreage has been brought to final grade and is depicted as the gold polygon with stippling.
14. **Reclamation Bond.** The amount of the reclamation bond currently on file, in accord with the 2004 permit, is \$84,456. This amount was established by the Planning Board in 2001, based on a recommendation by Carol Ogilvie, Senior Planner from the Southwest Region Planning Commission (attached) and by Town Counsel Bernard Waugh, Jr. The Board contacted Deb Weymouth, Natural Resources Conservation Service (NRCS), and was informed that while they had technical expertise on gravel pit restoration, they could not assist in determining reclamation bond amounts. In response to a notice posted by the Board Chairperson on the State of New Hampshire Office of Energy and Planning list-server, two responses specific to gravel pit restoration bonds were received (attached). The Woodstock, New Hampshire Planning Board, which has a gravel pit owner on the board, uses a figure of \$10,000 per acre for a restoration bond. The Belmont New Hampshire Planner provided a figure of about \$6,900 per acre, but also included a more specific breakdown prepared by Northpoint Engineering. Based on the breakdown it was apparent that about half the amount was for purchasing of topsoil to provide four inches of coverage per restored acre. If available, four inches of topsoil is specified in NRCS guidelines for gravel pit restoration. Goshen's Excavation Regulations also specify use of topsoil. Yet in a prior decision, the Board regarded Guildhall's excavation site, which existed prior to the adoption of a Town Zoning Ordinance, as exempt from the requirement that topsoil must be used for reclamation (March 10, 2004 Reasoning of Decision, page 8). The \$84,456 bond for 22.10 open acres equates to about \$3,800 per acre. Given the above facts, the Board felt the current bond of \$84,456 would be adequate. Mr. Carroll was accepting of that conclusion.
15. **Reclamation Plan.** The applicant's reclamation plan primarily cites the NRCS Technical Note PM-NH-21, Vegetating New Hampshire Sand and Gravel Pits. Mr. Carroll submitted an unsigned letter from Theodore Kelsey dated April 5, 2008 (attached) which explains that the warm season grasses used in gravel pit reclamation are native to North America and also describes how they became common in New Hampshire. Mr. Carroll also provided a letter (attached) in which he cites Ted Kelsey as recommending the site not be mowed and that it be allowed to naturally revert to a "more natural state."

Per Goshen's Excavation Regulations Section III.7.D "*If the Board deems it necessary, it shall require a representative of the NRCS, an engineer, or other expert(s) to review plans or to conduct impact studies and shall request the Town's Counsel to review the*

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*final permit, at the applicant's expense in accordance with RSA 155-E:11, III.*" Throughout the hearing the Board expressed a desire to have an independent technical expert review the reclamation plan. The NRCS is available to provide technical expertise on gravel pit restoration free of charge. The Board would like to take advantage of this no-cost service to obtain technical expertise for restoration plan review for the 22.10 acres open to excavation under this application. At the May 27, 2008 hearing Mr. Carroll verbally agreed to the cooperative approach to restoration that would involve the expertise from his company, oversight by the Planning Board, and technical expertise of the NRCS. Since the request for NRCS assistance must come from the property owner, Mr. Carroll or his representative must contact the NRCS to request this assistance. Thus one condition of this permit is that Mr. Carroll convenes a meeting to involve the company, the Goshen Planning Board, and the NRCS to review and approve the restoration plan.

As noted above, the Board determined for the previous permit that Guildhall's excavation site, which existed prior to the adoption of a Town Zoning Ordinance, is exempt from that ordinance's requirement that topsoil must be used for reclamation.

16. There was a particular product that Mr. Carroll called "sugar" sand that is available on the site. The Board wanted to monitor extraction of this material from the site. The April 1, 2008 submission from Mr. Carroll (attached) specifies the maximum time to complete all reclamation would be 2030. Given an estimate of only 570,000 cubic yards yet to be excavated, 2030 seemed like a long time before final reclamation is accomplished. The Board wishes to monitor excavation more closely over the next permit cycle.
17. ***Reporting and Review Procedure Issues.*** The applicant and the Board established the mid-September through mid-October period for the Board's annual site inspection. This "window" provided more scheduling flexibility and might ensure more temperate weather than the last half of October schedule. A daily count of the truckloads of material excavated at the Davis Site shall be tabulated separately from the daily count of the truckloads simply using the Davis Site as a gravel haul road. This daily count record shall be submitted as part of an annual report to be submitted to the Planning Board.

### III. ACTION OF THE BOARD.

It was moved by Allen Howe, and seconded by Melanie Bell to issue an excavation permit to Guildhall Sand and Gravel, LLC, to be worded as follows: (Permit Attached)  
***Adopted on August 26, 2008.***

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#### ATTACHMENTS

1. July 12, 2004 through July 12, 2007 Excavation Permit for the Davis Site on Lear Hill Road.
2. July 12, 2004 through July 12, 2007 Reasoning of Decision for the Excavation Permit Davis Site on Lear Hill Road.
3. Letter from H. Bernard Waugh to the Goshen Planning Board dated May 27, 2008.
4. Materials presented to the Goshen Planning Board by Shaun Carroll at the April 1, 2008 hearing. The document addresses the Board's outstanding issues as specified in the supplement to the March 4, 2008 hearing minutes.
5. A chart received from the applicant on April 17, 2008 that depicts the annual cubic yards of excavated material taken from the Davis Site, 1998 through 2007.
6. Memorandum dated July 2, 2001 from Carol Ogilvie, Senior Planner, Southwest Region Planning Commission, to John Wirkkala, Chariman, Goshen Planning Board, regarding Guildhall Bond Estimate.
7. Emails from Anne-Marie Perry, Woodstock Planning Board, and Candace Daigle, Belmont Town Planner, to Allen Howe about gravel pit reclamation bonds and an attachment from Northpoint Engineering with a breakdown of estimated per acre reclamation costs.
8. An unsigned letter from Theodore Kelsey dated 4/5/2008 provided to the Board by Mr. Carroll on 4/17/2008. The letter describes the origins of grass species used in gravel pit reclamation, as well as a brief statement about seeding on slopes over 25%.
9. A May 27, 2008 letter from Shaun P. Carroll, Jr. regarding site reclamation, including mowing.
10. A document titled "*Load Count Data*", provide by Mr. Carroll on June 12, 2008.