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January 17, 2007

Planning Board  
Town of Wilton  
42 Main Street  
Wilton, NH 03086

Re: Objection to Subdivision Application: Applicant: Harold J. Kennedy, Lot F-3

Dear Board Members:

I represent a large number<sup>1</sup> of neighbors (hereinafter "neighbors") of the proposed use at 536 Isaac Frye Highway. My clients include several who live on Isaac Frye Highway, and others also near enough to the site to be directly affected by the truck traffic that would be generated thereby, and who therefor have standing in this matter.

The Proposal is Illegal Without an Excavation Permit:

This Board, at its December 20, 2006 meeting, properly raised the question of whether the Proposal before the Board was for a legal subdivision, or was in violation of Wilton's Zoning Ordinance and Excavation Site Plan Review Regulations (ExSP). This is the essential and fundamental question this Board must first decide, since it can not grant Subdivision Approval to a Plan that violates either.

My clients maintain that the Proposal violates **Zoning Ordinance (ZO) Section 9B.0**, the Gravel Extraction District, as the proposed gravel excavation is not in the permitted District; violates **ExSP §3**, which requires a Permit for gravel excavation as proposed herein, and violates **RSA 155-E:2** for the same reasons.

The violation of ZO §9B.0 is clear, as applicant, in May 2006, sought **several** Variances from the ZBA for gravel excavation on this site; due to his inability to comply with that ZO Section. Specifically, applicant needed a Variance from ZO §9.B.6.1, for

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<sup>1</sup> For purposes of establishing standing, my clients include, but are not limited to: Tom and Libby Barnett, 633 Isaac Frye Hwy; Bevan and Paul Buffum, 618 Isaac Frye Hwy; Peg and Bill Carnduff, 195 Wilson Rd.; Gail and Andy Hoar, 578 Isaac Frye Hwy.; Donna and Greg Joas, 203 Wilson Rd.; Eleanor and Chris Owen, 654 Isaac Frye Hwy.; and Judy and Len Peterson, 602 Isaac Frye Hwy.

the natural buffer between excavations and roads; from ZO §9.B.6.2, for transportation of earth materials on a road on which it is not permitted under the Ordinance; from ZO §9.B.2, defining the location of the Gravel Extraction District<sup>2</sup>; from ZO §4.1, prohibiting gravel extraction outside the Gravel Extraction District; and from ZO §6.1 prohibiting uses in this District that are not listed as permitted. All Variances were denied on June 26, 2006. Needless to say, an excavation Permit is not legal absent the necessary Variances, and the appeal period on the Variance denials ran out in July, 2006. Excavation is not legal on this site.

The Proposal would also involve violation of ExSP §3, which implements RSA 155-E and the above referenced Gravel Excavation District (and Overlay zone). Said Section makes gravel excavation illegal without a gravel excavation permit.

The Proposal is a Commercial Excavation by Definition, and Not an Exception thereto:

Applicant argues that his plan does not require a gravel excavation permit under either RSA 155-E:2 or ExSP §3, but is instead excepted from those requirements under RSA 155-E:2-a.1.(a) and ExSP 3.04 a., which exempt from the permit requirement an

“Excavation that is exclusively incidental to the lawful construction or alteration of a building or structure, or the lawful construction or alteration of a parking lot or way...”

My clients maintain that the Proposal is, by definition, a commercial excavation, and is not “exclusively incidental” to the construction of two homes and an access way thereto. The keys are the ExSP §2.02 and §2.06 definitions of “commercial” and “excavation”:

2.02 Commercial. Any use of any earth material for sale or resale on or off site of the excavation area. In addition, an excavation shall be considered commercial if earth materials are transported to land other than that from which the earth was excavated. Excavations which use earth materials in the processing of other material such as, but not limited to, concrete, asphalt and other building materials shall be considered commercial.

2.06 Excavation. A land area which is used, or has been used, for commercial taking of earth, including all slopes<sup>3</sup>.

It is patently obvious that the removal of some 90,000 cu yds of gravel and earth materials **offsite**, a process estimated by the landowner at the December 20, 2006

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<sup>2</sup> My clients dispute that this was an appropriate variance request.

<sup>3</sup> This definition is almost identical to that at RSA 155-E:1.



Planning Board meeting to take about a year, meets the definitions of commercial excavation.

It is equally obvious that it does not meet either the intent or plain meaning of the RSA 155-E:2-a I.(a) or ExSP §3.04 a “exclusively incidental” exception. If it were construed to do so, the “exception” will have swallowed the rule and the entire purpose of RSA 155-E, and the Wilton Excavation Regulations. How do we interpret RSA 155-E:2-a I.(a) and ExSP §3.04? The first rule of statutory construction is to look to the “plain meaning” or the words used. Cheever v. Southern NH Regional Medical Center, 141 NH 589, 591 (1997). The next is to interpret the words, whenever possible, to effectuate rather than frustrate the underlying policy of the statute or provision.

“Our analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies.” Nashua School District v. State, 140 NH 457, 8 (1995)

ExSP §3, is entitled “**PERMIT REQUIRED**”. The purpose of this Section, indeed the entire Regulation, is to implement RSA 155-E, and empower the Planning Board to regulate excavations through permitting, to prohibit excavation that is damaging to the public health, welfare, or the environment, to require proper operational standards, and finally, proper reclamation. In this context, and with this purpose, the exceptions to the permitting requirement must be construed narrowly.

What does “incidental” mean? The American Heritage Dictionary defines it as:

1. Occurring or likely to occur as an unpredictable or minor accompaniment..
2. Of a minor, casual, or subordinate nature.

Dictionary.com Unabridged defines it as:

1. Happening or likely to happen in an unplanned or subordinate conjunction with something else.

Hauling 90,000 cu yds of gravel offsite over a period of a year is not “incidental” to building a driveway and two houses. Even more clearly, it is not “exclusively incidental” to doing so. If Applicant is willing to commit to not selling the excavated material, and not removing it from the site, the Board could perhaps conclude that its removal is “exclusively incidental” to the subdivision. Absent such a commitment and legal restriction, it is clearly not incidental and is instead “commercial excavation.”

The NH Supreme Court has Once Ruled on this Exception:

In North Hampton v. Sanderson, 131 NH 614 (1989), the Court was faced with a defendant who argued that he was not subject to RSA 155-E gravel excavation

permitting because his excavation was "...incidental to the lawful construction...of a building or structure". He excavated on five lots. The Court did not have a difficult time disposing of this claim, and the facts were somewhat more extreme than the present proposal, but the Court's conclusion could serve as a coda to this proposal as well:

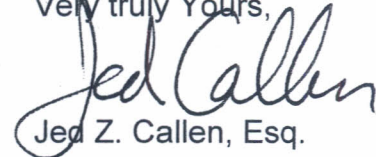
"After more than eight years of commercial gravel removal, the evidence supports the conclusion that the defendant's excavation was not "incidental" to the construction of residential homes." Id at 621. Copy attached.

It should be noted that the Court also upheld an award of costs and attorneys fees to both the Town and Intervenor, for bringing the enforcement action under RSA 155-E:10 to halt the illegal and un-permitted gravel excavation.

Summary:

For the above reasons, a Subdivision Plan that includes this magnitude of earth removal, must be deemed a commercial excavation, and a gravel excavation permit would be needed. As such a permit may not be issued for this site under ZO Section 9B, this project must be denied.

Very truly Yours,



Jed Z. Callen, Esq.

Encl: North Hampton v. Sanderson, 131 NH 614 (1989)  
cc: file