

# *Town of Goshen Planning Board*

## **Request of Guildhall Sand & Gravel For An Excavation Permit Under RSA 155-E.**

Public Hearing: February 3, 2004, continued to February 11 and February 24, 2004.

Deliberations: February 24, March 2, and March 10, 2004.

Members Participating: John Wirkkala, Richard Moen, Selectman James Carrick, John Scranton, and Melanie Bell-Harrington.

### **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 application was delivered to the Goshen Town Office on January 5, 2004.

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)). At the time of the present application, the excavation is operating under a prior 3-year permit which expires on July 12, 2004.

3. The current permit was originally issued by the Board on July 12, 2001. In response to a permit amendment proposed by the applicant, the permit was amended by the Board on April 3, 2002 to authorize the applicant to expand its excavation to encompass approximately 4.1 additional acres in Map 403, Lot 4.2, conditional on the applicant reclaiming an equivalent area before proceeding with the expansion.

4. The applicant appealed the original permit to Superior Court, on numerous counts. On June 17, 2002 Judge Jean Burling vacated two of the challenged provisions, remanded one to the Board, and affirmed all other original provisions (*see* Sullivan County Superior Court Docket No. 01-E-058). On October 1, 2002, the Board held a public hearing to resolve the remanded issue and amended the permit in accordance with the judge’s instructions. At that time the Board also amended paragraph 3(a) of the permit, in response to a request by the applicant during the hearing, to clarify that routine equipment maintenance could take place on Saturday mornings.

5. The new three-year permit now under consideration will commence at the termination of the current permit on July 12, 2004 and will remain in effect until July 12, 2007.

6. The written materials describing the proposal for which application is made are contained in a two-sheet plan, labeled "Updated RSA 485-A:17/RSA 155-E Site Plan," prepared by Guildhall Sand & Gravel, dated 5/19/2003, and signed by Richard Fraser. Sheet 1 is further labeled "Existing Conditions" and has a Rev. No. 4 revision date of 02/10/04. Sheet 2 is further labeled "Final Grading Plan" and has a Rev. No. 5 revision date of 02/10/04. The proposal also includes a third map which the applicant submitted to the Board on February 11, 2004, and which is neither labeled nor dated. This third map shows the excavation area (gold polygon) portion of the "Final Grading Plan" sheet, and within the gold polygon it shows red polygons which the applicant said delineate the open excavation areas as they exist at the time of this application. Copies of these plans are found in the Board's case file 2004-3.

7. The applicant was represented at the 2004 hearings by Shaun Carroll and Shaun Carroll, Jr., owner-operators of the company, and by Richard Fraser of the company.

8. The Town of Goshen has no local excavation regulations under RSA 155-E:11. Hence the standards applicable to this proposal are solely those contained in RSA 155-E itself, particularly Sections 4 "Prohibited Projects," 4-a "Minimum and Express Operational Standards," 5 "Minimum and Express Reclamation Standards," and 5-a "Incremental Reclamation."

## **II. Findings and Rulings of the Board.**

9. *Previous Findings and Rulings.* Section II, "Findings and Rulings of the Board," as documented in the decision of the Board on July 12, 2001 (*see* the Board's record of proceedings on the Guildhall Sand & Gravel permit application, 2001) is incorporated herein by reference, for purposes of illustrating the Board's ongoing regulatory process with this excavation, and as further support for the Board's decision on the current application, except as specifically updated or otherwise changed in this decision.

10. *Hours of Operation Issues.* The applicant testified that the company had been unduly handicapped by having to wait until 7:00 a.m. to start the loader on weekdays. This was despite the fact that in 2001 the Board extended the hours of operation from 5:00 p.m. to 5:30 p.m. to accommodate the company's startup and close-down activities. After discussion, the Board decided, on an experimental basis, to allow the company to start the loader at 6:45 a.m., with the provision that the noise from the loader shall not be noticeable to abutters and neighbors. The Board also decided that this experimental start-up time should be reviewed at such future time as the company may apply for a new three-year permit.

11. The applicant testified that the company had in the past conducted some volume of third party sales within the Davis site. The applicant indicated that, depending on how the Board responded to its request for additional trucks, and depending on market conditions, the company might continue and expand its third-party on-premises sales. To clarify that the term “operation” includes these sales, and indeed the loading of excavated material into any vehicle at any time by any means and by any party, the Board has expanded the definition of “operation” to include the “moving of any excavated material on or from the site.”

12. The applicant testified that the company would like to be able to use hand tools to conduct reclamation activities on weekends. The Board decided that this was a reasonable request and would clarify the definition of “operation” to specify that forbidden activities are those which generate “noise from power equipment such as bulldozers or chainsaws.”

13. ***Scope of Operation Issues.*** Richard Fraser presented a map to the Board on February 11, 2004 which indicates that the currently-open areas within the excavation site total approximately 18 acres. These acres, as well as any new areas to be opened during the course of this permit, are located within the 33 acres contained within the gold polygon on the site plan. As represented by the applicant, this will be the work area permitted during the next three years. The applicant has agreed that there shall be a total of no more than 22.84 acres of open excavation area at any one time, and no new areas shall be opened so as to bring the total over 22.84 acres, until an equivalent area which is open has been fully reclaimed in accordance with the applicant’s reclamation plan and RSA 155-E:5.

14. The applicant in these proceedings has requested an increase in the permitted number of trucks per day. It asked for an average of 105 to 110 trucks per day and a maximum of 123 trucks per day, saying it was basing its request on the historical level of trucking that took place at the site prior to the Board’s limitation of 77 trucks a day in the 2001 permit. The Board reviewed the history of the 77-truck limitation, including the original reasoning for the limit and the ruling of the Superior Court, which had supported the Board’s limitation (*see* the Board’s record of proceedings on the Guildhall Sand & Gravel permit application, 2001). It also reviewed the Board’s decision of June 17, 2003, which rejected the applicant’s request at that time to increase the number of trucks to an average of 104 trucks per day and a maximum of 110 per day (*see* the Board’s record of proceedings on the Guildhall Sand & Gravel application to amend its permit, May – June, 2003). The Board reviewed two traffic studies prepared by the company’s consultant, Mr. Stephen Pernaw. The November 2000 Pernaw study had said that the company ran an average of 63 trucks a day and that the 77 trucks counted on an observed day in the year 2000 “reflects a higher than average day.” (*See* report entitled “Traffic Impact Evaluation, Proposed Excavation Site, Anderson Property, Goshen, New Hampshire,” November 2000, Stephen G. Pernaw & Company,

in the Board's record of proceedings on the Newport Sand & Gravel permit application for excavation at the Anderson site, 2000). By contrast the May 2003 Pernaw study reported that a review of company historical data from the Davis site indicated that in the year 2000 the company ran an average of 104 trucks a day, and that a maximum of 123 trucks occurred on two dates in June 2002 (*see* report entitled "Traffic Impact Evaluation, Davis Excavation Site, Goshen, New Hampshire," May 2003, Stephen G. Pernaw & Company in the Board's record of proceedings on the Guildhall Sand & Gravel application to amend its permit, May – June, 2003).

15. In response to Board concerns that the bar charts in the 2003 Pernaw report appeared to be in conflict with that report's conclusions, the applicant made actual company data available to the Board members. According to the Board's analysis of this data, the average number of loads per day that were actually hauled from the site over the four years 1997 – 2000 before the 77-truck limitation was in effect ranged from 81 to 83. Mr. Pernaw attended the public hearing on this current application on February 24, 2004, and reviewed his traffic studies with the Board. However the Board noted that on the two dates on which Mr. Pernaw observed traffic at the site, the company's truck data did not match Mr. Pernaw's data. (On October 25, 2000, Mr. Pernaw counted 77 haul trucks, while the company data reported 73 haul trucks. On November 19, 2002, Mr. Pernaw counted 77 trucks, while the company data reported 63 haul trucks.) Hence there do remain some discrepancies concerning the historic levels of trucking.

16. Besides Mr. Pernaw, two citizens, Fred Trommsdorff and Judith Filkins testified on February 24, expressing concerns about the disruptive impact that any increase in the maximum number of trucks and its accompanying noise would have on citizens. The Board also received a letter from citizen Diane Gosselin which expressed similar concerns about any increase in the truck traffic.

17. Mr. Pernaw, who has experience in conducting traffic studies in urban situations, testified that there is little difference between 77 trucks a day and 123 trucks a day. However, the history of this excavation leads the Board to conclude that in the environment of the center of Goshen, where this excavation is located, an increase in truck traffic would rise to the point of being "unduly hazardous or injurious to the public health and welfare" under the standards of RSA 155-E:4, IV. In particular:

(a) Prior to 1997, there is no record of citizen concern about truck traffic from the Davis site. Basically, Mr. Davis was at that time running a fairly small business. Significantly, this Davis-run operation had its principal entrance and exit (its main haul road) located on Route 10 very near the Newport town line. Such limited truck traffic as existed did not use Lear Hill Road for access, as the current operation does.

(b) Around 1997 the Carrolls became noticeably involved in the operation of the Davis site. In April of 1998, after public meetings with Mr. Carroll, Mr. Davis, their civil engineer Ross Stevens, and their attorneys, as well as concerned citizens, particularly the Barons, the Planning Board issued a permit in the names of two owner/operators: Don and Alice Davis, and Shaun Carroll. (Shaun Carroll assumed the full ownership of the site soon after the 1998 permitting.) This permit addressed issues of hours of operation and dust control, but it said nothing about limiting the number of trucks. (See the permit dated March 3, 1998 in the Board's records of proceedings on an application by Donald Davis and Shaun Carroll for an excavation permit at the Davis site.)

(c) By the year 2000, when Newport Sand & Gravel applied for a permit to operate a new pit nearby at the so-called Anderson site, citizen complaints concerning the existing Davis site pervaded the hearings. A number of citizens raised concerns about the proposed Anderson excavation, based on their experience with the Davis excavation. For example Page 9 of the minutes from the Planning Board's November 30, 2000 hearing contains the following:

“Ken Baron ... Stated he and his wife have also done truck traffic counts and have seen 1 truck approximately every 8 minutes, 7:00 a.m. – 5:00 p.m., Monday thru Friday. This creates a large amount of dust and makes it impossible for us to enjoy our front yard. We also cannot open our home's windows due to the dust, fumes, and noise. The effect on our home and the structural beams due to heavy gravel truck traffic is that our stone foundation is crumbling. Constant rumbling and shaking of the earth can be felt in our home. We have had to sweep and shovel dirt from the roadside and have also observed Newport Sand & Gravel sweeping at the entrance of Lear Hill Road.”

Page 10 of these same minutes contains the following:

“D Gosselin: Stated that she lives across the road from the Lear Hill entrance, and would like to present the board with photos of the existing Davis pit and real estate evaluations. ...Also expressed a concern for possible pollution from dust. Played a tape recording of gravel trucks stopping and going up Route 10 from her driveway and bedroom. Further stated that she has also counted trucks coming and going from Lear Hill Road and sees one about every 2-5 minutes.”

These statements are typical of citizen concerns raised at that time

(d) In March of 2001, the Planning Board began public hearings to consider a new three-year permit for the Davis site. Simultaneously, the ZBA was hearing testimony for the proposed excavation at the Anderson location. In both of these proceedings, testimony was presented by Mr. Baron, Ms. Gosselin, and numerous other citizens concerning the issues involving noise and truck traffic at the Davis

site. The testimony from citizens made it clear to the Planning Board that material was being hauled from the site at a rate that was adverse to the lives and properties of citizens and abutters. (*See* the Board's record of proceedings on the Guildhall Sand & Gravel permit application, 2001; *also see* the record of proceedings of the Zoning Board of Adjustment on a special exception application by Newport Sand & Gravel for excavation at the Anderson site, 2001.)

(e) The trucking issue was one of several matters that the Planning Board struggled with during the 2001 permitting hearings. However the Applicant at that time provided no trucking data, saying only that "it is not possible to meaningfully estimate the number of trucks necessary to haul excavated material." (*See* the document "Applicant's Responses To Questions Promulgated by the Board" in the Board's record of proceedings on the Guildhall Sand & Gravel permit application, May 2, 2001.)

(f) In light of that response, which the Board felt was one that could provide no reasonable assurance to affected citizens and property owners concerning the scope of trucking, the Board settled on a limit of 77 trucks per day, based on two lines of reasoning. First, in his traffic study in support of the Anderson proposal, Mr. Pernaw reported that he observed 77 haul trucks during his day of observation at the Davis site on October 25, 2000, and based on information provided to him by the company, he concluded that this "reflects a higher than average day." Second, the Board reasoned that if Guildhall were to haul material on 167 days (the number of days used by Mr. Pernaw, the company's expert) and if trucks were loaded to an average of 16 cy per truck (based on truck sizes provided by Mr. Carroll), then the company could haul 184,000 cy of material (the total reported by the applicant for the year 2000) using an average of just 69 trucks per day. Putting these two lines of reasoning together, it seemed reasonable to the Board to set the maximum number of trucks a day at 77. This parameter was affirmed by the Superior Court in its decision of June 17, 2002.

18. The 2001 Board applied a cap on the maximum daily haul truck traffic because it believed it was necessary to do so in order to prevent the traffic from rising to the level where it became hazardous or injurious to the public welfare. The Davis pit is located in a residential area in the center of town, where truck traffic has a serious impact on surrounding properties and the character of the community in general. The Board finds that a trucking limit is still necessary to prevent such injurious effects. The fact that the testimony does not point inexorably to one specific number does not preclude the Board from selecting a number. A number chosen is not necessarily unreasonable merely because another number would also have been reasonable, see *Town of Windham v. Alford*, 129 N.H. 24 (1986). Despite the fact that Mr. Pernaw has now disavowed the 77-truck per day statement as a statement of historical accuracy, the

Board finds based on the discrepancies recited in paragraph 15 above, that the information as a whole does not support the figures now being requested (105 to 110 trucks per day average and a maximum of 123 trucks per day) as representative of historic trucking levels. More importantly, however, the Board now finds that the limit of 77 trucks a day, notwithstanding how it was originally arrived at, has in the Board's view, along with the other terms and conditions imposed upon the permit in 2001, kept what was at one time an injurious level of activity within tolerable limits for the surrounding property owners since the company began to observe the limitation after June 2002. While these hearings have not resolved all discrepancies in the reported historical trucking number, the averages computed from the Company's figures do show that 77 trucks per day is not substantially different from those averages, and to the extent that individual trucking days have exceeded such levels in the past, the Board finds on the basis of testimony from this and past proceedings as well as the Board's own observations, that trucking levels on those days did indeed create effects that were injurious to the public welfare. Therefore, in order to prevent injurious impacts to the public welfare, the Board will, as a condition of this permit, continue to require that the scope of the operation 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.

19. As stated in paragraph 11 above, the company has commenced some third-party on-premises sales. The Board will include a provision in the permit that specifies that any such sales must be conducted in accord with all of the permit parameters, including the trucking limitations.

20. The applicant testified that no regular blasting was contemplated at the Davis site, but that blasting had been required on one previous occasion to deal with a boulder and that a similar situation might require limited blasting again at some time in the future. The Board will therefore incorporate provisions requiring the applicant to notify the Goshen Board of Selectmen prior to any blasting activities.

21. ***Dust and Noise Issues.*** The applicant has volunteered to continue to employ those measures to control dust and noise that were specified in paragraphs 5 and 6 of the 2001 permit. The Board will include these same provisions as conditions of this permit, with the exception of provision 5(d) of the 2001 permit, since all paving requirements of that particular provision have been fulfilled.

22. ***Site Safety Issues.*** The applicant has volunteered to continue to employ those measures to ensure site safety that were specified in paragraph 8 of the 2001 permit. The Board will include these same provisions as conditions of this permit, with the exception of specific fencing provisions that have already been complied with. The applicant has assured the Board that the company will enforce Mine Safety and Health Administration (MSHA) regulations with respect to all potential third-party on-premises sales.

23. **Buffers and Visual Impact Issues.** The company has fulfilled the requirement in paragraph 9(b) of the 2001 permit to plant seedlings in the buffer area of the Keach lot to provide a visual and noise barrier. The Board therefore has removed this requirement from this permit but will continue to monitor the health and growth of the plantings.

24. With respect to the former haul road located within the buffer area along the Lewis property, the Board observed during its site visit in November 2003 that reclamation was incomplete. The company testified that they had seeded this area but that the seed might not have taken hold. As a provision of this permit, the Board will require that full reclamation be completed by the end of the 2004 production season.

25. **Reclamation Issues.** The amount of the reclamation bond currently on file, in accord with the 2001 permit, is \$84,456. This was based on the cost of reclamation of 23 acres, which was the company's estimate of the open acreage at that time, plus a cushion to reflect the possible need for the planting of trees and other reclamation uncertainties. The total subject to the applicant's terrain alteration permit under RSA 485-A:17 is currently 33 acres, which is the area within the gold polygon on sheet 2 of the site plan. The applicant has agreed that there shall be a total of no more than 22.84 acres of open excavation area at any one time, and no new areas shall be opened until an equivalent area which is now open has been fully reclaimed in accordance with the applicant's reclamation plan and RSA 155-E:5. Mr. Carroll has stated that although the active excavation area is currently less than 20 acres, he is agreeable to maintaining the bond at its current amount. On the site plan, there are areas designated as storage areas for materials outside of the gold polygon. The Board feels that, taking all this into consideration, a bond based on 23 open acres is still reasonable.

26. In the "Revegetative Guidelines" section of the company's permit application, there is a statement by Richard Fraser that indicates that he "would like to reserve the option of using prescriptions which deviate from the standard recommendations" in the document "Vegetating New Hampshire Sand & Gravel Pits," as revised in April 2000. Mr. Fraser testified that this means that a different mixture of seeds might be used, but that it does not mean that an entirely different type of seed would be used. The seeds would be taken from the three mixtures listed in "Vegetating New Hampshire Sand & Gravel Pits." The Board regards Guildhall's excavation site, which existed prior to the adoption of a Town Zoning Ordinance, as exempt from that ordinance's requirement that topsoil must be used for reclamation. The Board will therefore accept Mr. Fraser's request.

27. **Reporting and Review Procedure Issues.** The applicant requested that the Board conduct its annual site inspection during the last half of the month of October each year. The Board agreed that this is a desirable time for the inspection. If weather

and Board members' schedules allow, the Board will conduct its inspection during this time frame.

28. Paragraph 11(b) of the 2001 permit required the applicant to “copy the Board on all correspondence between Guildhall Sand & Gravel and any governmental agencies.” The company agreed that they had not fully complied with this requirement in the past but that they would do so in the future.

### **III. Action of the Board.**

It was moved by John Scranton, and seconded by Rich Moen to issue an excavation permit to Guildhall Sand and Gravel, LLC, to be worded as follows: (Permit Attached) *Adopted Unanimously on March 10, 2004.*