

History and Status of Newport Sand & Gravel's Proposal to Excavate the 'Anderson' Property

The purpose of this brief summary is to recap the *facts* of how the local government process has worked in the case of Newport Sand and Gravel ('NS&G'). It is not to advocate or defend the Zoning Board of Adjustment's decision. The ZBA's decision speaks for itself. So does the Superior Court's decision upholding the ZBA. Please read those decisions for more details. [Available online at <http://goshennh.org/zba.pdf> and <http://goshennh.org/court.pdf> or at the Town Office.]

1. The Goshen Zoning Ordinance, since it was first enacted by the voters in 1970, has required a special exception from the ZBA before anyone excavates sand and gravel. NS&G applied in 2000 for a special exception to excavate the property then owned by the Andersons (Tax Map 203, Lot 2). The application was for a 4-phase project lasting over 10 years. In May 2001 the ZBA issued a decision *denying* that request, for three reasons: (a) The excavation would likely be offensive to the public due to noise; (b) It would cause an undue impact on property values; and (c) Because of its location adjacent to the center of Town, it would adversely affect the character of the community.

2. NS&G appealed that 2001 decision to court. But the Superior Court in Docket #01-E-0044 *upheld* the ZBA on *all three* of its reasons. NS&G did not appeal to the Supreme Court, so that decision became final. Around that time, NS&G bought the Anderson property. That purchase was not made in reliance on any representation by the Town, since the only Town decision then on record was the 2001 denial.

3. The application now on appeal was filed by NS&G in January 2009. (An application for a state-required excavation permit under RSA 155-E was also filed with the Planning Board, but it was agreed to delay that until after the ZBA action.) The 2009 application was similar to, yet different from, *one* of the 4 phases proposed back in 2000. The excavation area was around 22 acres. NS&G estimated annual removals of 200,000 cubic yards at 110 truckloads per day. With trucks operating 7 a.m. to 5:30 p.m., that translates into around one truck every 2.86 minutes. The expected life of the project was 3-5 years.

4. State law prohibits the same application from being heard twice. Here, however, the ZBA decided to hear the case, because the scope was different from the 2000 request. The ZBA spent a total of *10 meeting nights* hearing and discussing the case – the last 3 of those devoted to a rehearing request made by NS&G. NS&G presented written expert reports on traffic, sound impacts, and property value impacts. The Board also closely questioned the experts in person, as well as considering the comments of abutters and the public, and their own knowledge of the Town.

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5. To reach a written decision (required by state law), the ZBA used an approach recommended by the NH Office of Energy and Planning. A discussion draft was prepared by two board members with legal assistance. That draft was presented to the full ZBA at the public deliberation, and debated. It would have violated state law for a quorum of members to have worked on a draft outside of a public hearing. The same procedure was used in acting on NS&G's rehearing request, except that in that case one ZBA member – also with the help of the Board's attorney – prepared an draft for an different, alternative decision. In both cases, the Board voted by majority vote (3 to 2) to deny the application.

6. The complete reasons for the denial are given in the decision itself, which must be read as a whole to fully grasp the Board's reasoning [*Available online at <http://goshennh.org/zba.pdf> or at the Town Office.*] In short, the reasons for disapproval were similar to the three reasons given for disapproving the 2000 application – namely, noise, impact on property values, and impact on the character of the Town of Goshen. Importantly, the Board found that, despite the smaller size of the newer proposal, the *rate* of excavation activity and number of truck trips would actually *increase* over the prior proposal. The Board thus found that the differences in the two applications were not decisive enough to warrant different conclusions, and that NS&G had not met its burden of proof in those three areas.

7. NS&G appealed the ZBA decision to the Sullivan County Superior Court (Docket #220-2010-EQ-0068). The hearing was on March 16, 2011. In her 37-page written decision dated May 31, 2011 [Superior Court Decision, *available online or at the Town Office*], the Honorable Margerite L. Wagelin wrote: “*Based upon review of the underlying record, arguments and pleadings of the parties, and caselaw, the Court finds that the ZBA acted lawfully and reasonably when it denied NS&G's application.*” The Court, in its very thorough analysis, did not find that the ZBA made a mistake on *any* point of either law or fact.

8. NS&G has appealed the Superior Court's decision to the NH Supreme Court. No hearing date has yet been established.

9. The Town has not closed the door to NS&G. The Town's attorney, in a letter written on behalf of the ZBA and Select Board, said: “*The Town's officials wish to emphasize to your client, however, that they remain entirely open at any time to consideration of alternative, perhaps less intensive operations on the Anderson property which might overcome the objections laid out in the existing decision – as long as such consideration is consistent with statutory and due process requirements.*” NS&G has, as yet, not contacted the Select Board about this offer.

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The Carrolls, in their recent open discussion sessions, have asserted that the Town has spent over \$250,000 in legal fees fighting them and their proposals. Here are the facts: Since the year 2000, the Carrolls have filed six lawsuits against the Town of Goshen, relating to either the proposed Anderson site excavation, or to their existing Davis site excavation. The Sullivan County Superior Court docket numbers are #01-E-044 (Appeal of 2001 ZBA decision); #01-E-0058 (Appeal of Planning Board permit decision concerning Davis site); #04-E-0095 (Request to remove all then-sitting members of the ZBA); #06-E-0017 (Challenge to legality of Planning Board's Excavation Regulations); #06-E-0051 (Request for Injunctive Relief concerning ZBA's review process); and #10-E-0068 (ZBA appeal currently before the NH Supreme Court).

Out of those six lawsuits, one of them (#04-E-0095) was withdrawn after the Court failed to reach it. The other five cases were decided by the courts *in favor of the Town of Goshen* (although of course the last case is still on appeal).

The legal fees spent by the Town in defending itself against these six lawsuits in the last 11 years are (in the same order listed above): \$18,768, \$9,048, \$12,442, \$7,815, \$7,281, and \$10,880. The total is **\$66,234**. It is true that these amounts do not include legal advice and assistance given directly to the Town (including its boards) outside those lawsuits. However none of that advice involved an adversarial relationship with the Carrolls.

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