

GOSHEN ZONING BOARD OF ADJUSTMENT

Newport Sand & Gravel Co., Inc. – Special Exception Application

Public Hearings: Jointly with Planning Board: February 10, 2009, March 3, 2009, and April 14, 2009. ZBA Alone: April 30, 2009, June 16, 2009, and July 21, 2009; Deliberations: September 1, 2009.

Hearings Following Motion for Rehearing: May 11, 2010, and June 8, 2010; Deliberations June 22, 2010.

Board members participating in original decision: Thomas Lawton, Cyndi Phillips, Robert Johnson, Peta Brennan and Allen Howe; Upon Rehearing: Lawton, Brennan, Johnson, Howe & Raymond Porter.

I. Background And Standards To Be Applied:

1. Section V.F of the Goshen Zoning Ordinance, as adopted by the Town’s voters, requires a special exception to be received from the Zoning Board of Adjustment before commercial removal of earth materials. Newport Sand & Gravel Co., Inc. [“NS&G”] is applying to conduct a commercial excavation at property located at Tax Map 203, Lot 2 (Excavation) and Tax Map 204 Lot 10 (Access Road). An application for a permit under RSA 155-E was filed with the Planning Board on November 21, 2008. The special exception application was filed with the ZBA on January 22, 2009. Some of the hearings of the ZBA in this case were held jointly with the Goshen Planning Board, at the applicant’s request, since approval of both boards is required in order for the excavation to operate.
2. A prior application for an excavation on this same property (still sometimes called the “Anderson” property, although now owned by the applicant) was filed in 2000 and denied by the Goshen Zoning Board of Adjustment on May 22, 2001. That decision was upheld by the Sullivan County Superior Court in Docket #01-E-0044 (Court Order dated February 21, 2003). That decision was not appealed, and thus became final and binding on the parties, as it pertains to the facts and legal issues raised in that prior application. The details of both the ZBA’s 5/22/01 decision (19 pages) and the Court’s 2/21/03 Order (20 pages) are incorporated herein by reference, and will not be reiterated here. [Copies of those decisions shall be attached to official copies of this decision.]
3. At the time of the 2001 ZBA decision, the only Goshen Zoning Ordinance standard to be applied by the ZBA was Section V.A.1 – a section which still applies today, and which reads: *“No business shall be allowed which could cause any undue hazard to health, safety, or property values, or which is offensive to the public because of noise, vibration, excessive traffic, unsanitary conditions, noxious odor, or similar reason.”* The 2001 decision found that the application before the Board at that time failed to comply with Section V.A.1 for three reasons: (a) that it was more likely than not that it would be “offensive to the public because of noise,” (b) that the excavation “could cause [an] undue hazard to...property values,” and (c) that the excavation, because of its location adjacent to the village center, “would have a significant adverse effect on the community character of the Town of Goshen” to such a degree as to be “offensive to the public.” The Superior Court upheld all three reasons for disapproval.

4. In *Fisher v. City of Dover*, 120 N.H. 187 (1980), the NH Supreme Court held that when a prior request has been denied, a ZBA cannot address the merits of a second similar application in the absence of a material change of circumstances, which it is an applicant's burden to prove. This rule was further explained in *Morgenstern v. Town of Rye*, 147 N.H. 558 (2002), where the Court held that a ZBA had improperly refused to hear a second application: "*Throughout the litigation in this case, the town has taken the position that it denied the plaintiff's request for a variance because of concerns about the particular proposed structure's impact on the wetlands. Yet, when the plaintiff submitted a new application in 1998 that allegedly addressed these concerns, the ZBA declined to hear the application on the merits because it concluded that the application did not differ materially from the 1995 application.*" (147 N.H. 564-65). This quotation is important, particularly in its use of the word "allegedly." It makes it clear that review of an application for a use which is similar to one previously disapproved must be a two-step process. First the Board, in order to even hear the case and address the merits, must determine whether the application is materially different, and/or there are material changes of circumstances. But if so, then upon such hearing, the Board must go further and determine whether *in fact* (and not merely "allegedly") the new application *does* sufficiently address the Board's concerns with the prior application so as to justify a different decision. Contrary to the applicant's arguments here, there is nothing in *Fisher*, *Morgenstern*, or any other case law, suggesting, that upon a preliminary finding of material differences, the applicant starts with a "clean slate," or that the finality of the prior decision, and its *res judicata/ collateral estoppel* effect – with respect to the issues actually decided in that case – must be treated as having been entirely wiped out. On the contrary, see *Guy v. Town of Temple*, 157 N.H. 642 (2008) (unappealed ZBA decision has collateral estoppel effect and cannot be overturned). In this instance the Board took a vote in April finding that material changes of circumstances did exist for purposes of moving to a consideration on the merits. But that vote did not imply that *every* aspect of the new application was materially different, or that the 2001-03 decision is now irrelevant. The determination of whether the differences are decisive, such that the present application now meets the current standards of the Ordinance, is the task now before the Board.
5. An application similar to the one now before the Board was also submitted in 2004. However, prior to the ZBA reaching a decision in that case, the applicant filed a petition in the Sullivan Co. Superior Court (Docket No. 04-E-0095) alleging, among other things, violations of the Right-to-Know Law. Due to the lack of court resources that case languished without a hearing for nearly two years, and was withdrawn without a decision. Unlike the 2001 proceedings, therefore, the 2004 proceeding never reached any final resolution, and thus has no legal relevance to the case now before us.
6. Attorney Timothy Britain, on the applicant's behalf, submitted a "Motion to Strike Comments and Submissions Regarding Newport Sand & Gravel's Previous Applications for a Special Exception" dated July 31, 2009. That motion claims that the Board should not consider any comments and documents which were submitted in connection with the prior 2000 application. While the ZBA has no procedures for "striking" evidence, the Board does agree that evidence submitted at the time of the prior application is not directly relevant to the Board's present task of determining whether the present application meets the present regulations (though it can be useful to help clarify differences between the old and new

applications). That old evidence will not, therefore, be listed in the summary of evidence below. However, as stated above, the Board disagrees with that portion of applicant's motion which argues that the 2001 ZBA decision and 2003 Court decision upholding it have now been "wiped clean" and are themselves irrelevant to the present proceedings. On the contrary, those decisions remain final and binding with respect to the factual and legal issues actually decided at that time, or which could have been decided at that time, *see Town of Nottingham v. Lee Homes, Inc.*, 118 N.H. 438, 441-42 (1978).

7. The Zoning Ordinance has been amended since the 2001 proceedings. In addition to Section V.A.1 quoted above (and still applicable), there is now Section V.I entitled "Commercial Uses that Require a Special Exception," which now makes it clear that a special exception must meet "*all other applicable standards in this Ordinance.*" In addition, Section IX.B of the Ordinance, enacted since the prior decision, sets forth some standards which *all* special exceptions must meet, namely that "*the proposed special exception shall have no adverse effect upon: (1) the character of the area in which the proposal will be located; (2) The highways and sidewalks or use therefore located in the area; and (3) Town services and facilities.*" Further, there is also a new Section III.R dealing with noise regulation (to be described further below).

II. Evidence and Findings Of Fact:

8. NS&G's January 2009 Special Exception Application consists of 36 pages, of which 6 pages are a letter addressing the Ordinance criteria, and the remainder consists of additional information including a November 10, 2000 amended DES Site Specific approval (#WPS-5574A) [Note that an amendment dated June 8, 2009 (WPS-5574B) was later submitted as well.]; a map of aquifer areas; a 2008 DES fact sheet of best management practices for fueling and maintenance; an NRCS publication (1991, revised 2000) entitled "Vegetating N.H. Sand and Gravel Pits" and a 2007 DES fact sheet showing Best Management Practices for Groundwater Protection. The purposes of these last three inclusions is to represent that all of these practices would be followed in implementing the proposal.
9. The excavation plan itself is shown in a 4-sheet plan entitled "Special Exception/RSA 155-E Site Plan, Newport Sand & Gravel Co., Inc. Anderson Property, Route 10, Goshen, New Hampshire" Prepared by Richard A. Fraser, dated 11/15/2008, including Sheet 1, Sheet 2, Sheet 3, and Sheet RD1 which shows the proposed access road running south from Lear Hill Road across property of Troy Hill Holdings, LLC, an affiliate of NS&G. When the plan is compared with the plans which were subject to the 2003 court decision ("RSA 485-A:1/RSA 155-E Site Plan, Newport Sand & Gravel Co., Inc. Anderson Property, Route 10, Goshen, New Hampshire" Prepared by Richard A. Fraser, last revision date 10/26/00") – looking particularly at Sheet #1 of those plans – it can be seen that the present proposal (approximately 22 acres, as compared with the prior 67-acre proposal) is in substantially the same location as what was previously labeled "Phase I" from the prior application, except that the excavation area proposed has been somewhat altered in the following ways: (a) it does not go quite as far up the highest, most northerly hill previously proposed for excavation (generally staying below the 1075' elevation line); (b) to meet current state regulations there is no excavation proposed for the area within 200 feet of the South Branch, Sugar River; and

(c) A portion of the esker closest to the river (all proposed as excavation area in the prior application) is to be left in place as a berm – along with the vegetation now there – as a visual barrier from the village/Route 10 area, except for an area about 200 feet long in the middle, where the entire esker will be removed. The details of the excavation area, before and after, were presented to the Board by graphic computer simulations.

10. Other relevant parameters of the new application revealed by the documents and testimony are as follows:

- Whereas the 67-acre proposal from 2001 was in four sequential phases, and was expected to be in operation for between 15-20 years, the present 22-acre proposal is in one phase and is expected to be in operation around 3-5 years.
- No blasting is intended.
- Trucking – which will utilize the access road shown on the plans, onto Lear Hill Road, and northward to Newport along NH Route 10 – is proposed to be a maximum of 110 trucks per day. The applicants assert that this is similar to the number of trucks currently permitted to haul gravel through the Davis Pit from an adjacent site (the “Bridge” site) in the Town of Unity.

11. NS&G also presented to the Board the following reports, whose authors appeared and testified:

(a) A “Traffic Impact Evaluation” dated January 2009 by Stephen G. Pernaw & Company, Inc. (by Mr. Pernaw himself), concluding generally that since the Anderson excavation would utilize the same truck fleet currently permitted to be used in the Davis and Bridge sites, and asserting that the project will not create any new traffic safety issues or threaten the capacity of existing highways. (the Davis site was discussed extensively in the 2001 decision; the Bridge site is one adjacent to the Davis site across the line in the Town of Unity, from which earth materials are currently removed using the haul road at the Davis site.)

(b) A “Sound Level Impact Assessment Report” dated February 24, 2009 and prepared by Epsilon Associates, Inc. (Robert O’Neal), which concludes generally that, subject to several assumptions as set forth in the report, the project will not violate the noise standards found in Section III.R.6 of the Goshen Zoning Ordinance. This was supplemented with some additional data measured on May 1, 2009, prior to the opening of the Davis Pit for the season.

(c) A report entitled “Update to Impact Assessment Report, Newport Sand & Gravel Site Excavation, Lear Hill Road, Goshen, NH” (an update to a similar report done in 2004) prepared by Rauseo & Associates and dated February 2, 2009, and concluding, generally, that the project will not have an adverse impact on surrounding property values. It is notable that the analysis in this report relies to some degree on the conclusions of the other two reports, although in the case of noise, it relied on a 2004 version of the Epsilon report. The full report was supplemented by a letter from its author Mr. Rauseo dated March 9, 2009.

(d) Jeff Cloutier of North American Reserve presented information about aquifer tables and water quality, and submitted a letter dated Nov. 21, 2008, and concluding that if the DES permit and Best Management Practices are followed, there will be no damage to the aquifer.

12. NS&G has been represented through the hearing process by Attorney Timothy Britain, who submitted the following written documents:

(a) A memo dated February 24, 2009 concerning the Lear Hill Bridge, and enclosing a DOT inspection report.

(b) A “Memorandum Establishing Substantial Change From Prior Applications” dated March 3, 2009, and noting in particular the following differences between this application and the one in 2001: (i) NS&G is now the owner of the site, which was not true in 2001 (It should be noted that NS&G has never claimed this purchase was made in reliance upon any representation by the Town); (ii) NS&G’s affiliate company now owns the property over which the haul road will run; (iii) The project area is now around 22 acres, a 67% reduction in size from the area proposed in 2001, and is in one phase, as contrasted with 4 phases; (iv) the sequence and schedule for excavation are substantially different; (v) the differences from the prior application intended to reduce visibility to the public (preservation of a greater portion of the existing esker); (vi) the lack of any pond being created by this project; and (vii) the shorter time frame (3-5 years) compared with the 15-20 year time frame for the project disapproved in 2001.

(c) A “Memorandum In Support of Application for Special Exception” also dated March 3, 2009, replaced by an updated version dated July 21, 2009, and addressing numerous portions of the Ordinance.

(d) A “Memorandum Regarding Permissible Scope of Local Regulation of Public Highways In Support of Application for Special Exception” dated July 21, 2009, which argues that the Board is preempted by both state and federal law from considering the noise produced by trucks operating on the public highways.

(e) A “Motion to Strike Comments and Submissions Regarding Newport Sand & Gravel’s Previous Applications For A Special Exception” dated July 31, 2009, the gist of which is that materials which were submitted at the time of the 2000-2001 application cannot be accepted or considered now.

13. Mr. and Mrs. Walter testified in favor of the project. Kim Gaddes, Virginia Schendler, Mr. David Stephan and Mr. Johnson spoke in opposition.

14. The following materials were received from neighbors and citizens expressing opposition to the project:

(a) A letter from Paul and Jean Barrett dated April 14, 2009.

(b) A letter from Earl and Eleanora Brightman, abutters to the Anderson property.

(c) Letters dated April 11, 2009 and April 30, 2009 from Lilyan Wright.

(d) An undated letter from Heidi M. Lorenz, 700 Mill Village Rd.

(e) A letter dated June 8, 2009 from Milton Huston.

(f) A letter dated June 2, 2009 from Mike and Patty McGill.

(g) A letter dated April 15, 2009 from Sherri Moen.

(h) An April 28, 2009 Letter from Virginia Schendler.

(i) A letter date April 30, 2009 from Judith Filkins.

(j) A letter dated June 16, 2009 from Keith and David Bemis.

(k) A June 16, 2009 letter from Kim Gaddes

(l) Kim Gaddes also presented a written letter to her and Steve Lamery from Realtor Susan Latham dated May 28, 2009, to the effect that the application would have a negative impact on properties in the vicinity. Ms. Gaddes also submitted a 1988 property tax card for a property located in Charlestown, indicating a 5% assessment reduction due to an “abutting active gravel pit.” [Ms. Gaddes also submitted information to the effect that the excavation would be precluded by the terms of a mortgage in the property’s chain of title. The Board notes that any such real estate law issues are not within the Board’s jurisdiction.]

(m) Ms. Gaddes also submitted voluminous documents which constitute copies of documents submitted in opposition to the 2001 application by the “Goshen Special Interest Group,” a group then in opposition to the prior proposal.

(n) Undated letters from Anne Tornifoglio and Patrick Tornifoglio.

(o) A letter dated August 24, 2009 from Alan Pike (drafted to replace an earlier letter which was apparently misplaced by the Board).

15. Following the Board’s first decision on September 1, 2009, a Motion for Rehearing was submitted, and granted. All of the applicant’s witnesses testified a second time, as did many of the citizens opposing the application. The following additional written materials were submitted for rehearing purposes:

(a) The Motion for Rehearing itself, dated September 30, 2009.

(b) A Memorandum dated September 14, 2009, from Robert O’Neal of Epsilon Associates, Inc, making comments on the original draft decision, attached to the Motion for Rehearing.

(c) A Memorandum dated September 16, 2009 from David Rauseo, of Rauseo & Associates, commenting on the original draft decision, and attached to the Motion for Rehearing.

(d) An updated report from Mr. Rauseo dated May 10, 2010, and analyzing cases not available at the time of the original hearing.

III. Board’s Analysis:

16. Some of the citizen comments in this case have cited for support portions of the Town of Goshen Master Plan, and also a Community Attitudes Survey which was recently conducted by the Planning Board. Neither of those documents can be relied upon by the Board. It is well established in law that the sole purpose of a master plan is to guide the Planning Board in the performance of its duties (such as recommending zoning amendments to the Town’s voters), *see* RSA 674:2, I, and it cannot be considered as if it were a regulation.

Relation of This Application To the 2000 Application.

17. As discussed above, the excavation described in the application is quite similar to Phase I of the 4-phase application denied with finality in 2001-03. At the February 10 hearing, a board member mentioned the fact that one document still refers to this application as “Phase 1” and asked the applicant’s representative Shaun Carroll, Jr. whether that implied that there will be a “Phase 2.” The 2/10/09 minutes reflect that Mr. Carroll responded as follows: “[I]f the

Town is still pleased with the work done at that time, Newport Sand and Gravel may return for another application to do further excavation. Newport Sand and Gravel, Inc. owns a total of 208 acres, it could take fifteen or more years to excavate all the gravel from that location, but this will be done in steps to impact the Town as little as possible.” Another significant fact is that subsequent to the prior denial, the applicant purchased the Anderson property, with the intent to excavate – although, importantly, this was *not* done in reliance on any representation by the Town, but was at the applicant’s own risk. In sum, therefore, the applicant plainly does intend ultimately, if permitted, to excavate more extensively on the property than is represented by the current application.

18. One of the approaches the Board *could* have taken in 2001 was to approve the application conditionally on a phase-by-phase “wait and see” basis, with additional board review prior to implementing the next phase (similar to the approach Mr. Carroll says the company is now taking). Rather than making such a decision, however, the Board disapproved the project as a whole, and that decision became final and binding. The Board therefore concludes that the reduction in size (number of acres) does not *by itself* constitute a decisive change justifying a different result. Instead we must examine other alleged differences between the two applications.

19. The conclusion of the preceding paragraph is bolstered by the fact that, while the *acreage* covered by this application is substantially less than in the 2000 application, the projected level of annual excavation activity is not. It should be recalled that – according to the 2001/2003 ZBA and Court decision documents, the prior application contemplated the phases as being sequential, with no two phases being excavated at one time. Moreover it was represented to the Board at that time that the level of activity from the Anderson property at any particular time would be comparable to, and have no greater impacts than, the then-existing excavation in the Davis Pit (*see* Section C of the ZBA’s May 22, 2001 decision). Town records show that the levels of excavation from the Davis Pit over the relevant period have been as follows: 1998-99: **137,729** cubic yards; 2000-01: **184,384** c.y.; 2001-02: **138,744** c.y.; 2002-03: **105,070** c.y.; 2003-04: **5,996** c.y.; 2004-05: **28,026** c.y.; 2005-06: **56,123** c.y.; 2006-07: **43,648** c.y.; 2007-08: **42,122** c.y. By contrast, the applicant has stated that the amount of material expected to be removed per year from the excavation now before us is around 200,000 cubic yards (110 truckloads per day) – higher than the 184,384 cubic yard level from the Davis Pit in 2000-01, which was the highest activity in recent years for the Davis Pit. Thus the level of anticipated annual excavation activity from the project under review is actually somewhat *higher* than the activity level projected for the 2000 application, and higher than the activity level in the Davis Pit at the time of the prior application (the citizens’ experience with the Davis Pit operation having been a pivotal aspect of the testimony at that time, as revealed by the Board’s 5/22/01 decision). Again, these facts bolster the Board’s conclusion that the reduction in acreage, by itself, is not a decisive change, justifying a different result from the prior application. We now turn to the three reasons why the prior application was denied, to determine whether the present application presents decisive changes in those parameters.

The Issue of Noise.

20. The prior decision, based upon significant testimony from neighbors who had had significant experience with the existing Davis Pit, determined that it was more likely than not that the project would be offensive to the public due to noise, in violation of Section V.A.1 of the Ordinance. This finding was despite an expert report from Epsilon Associates (Robert O'Neal), the same expert who provided the applicant's testimony on the noise issue in the present proceeding. Neighbors' letters in the present proceeding have also raised noise concerns. The prior decision noted that the noise level of an individual 25-ton haul truck was given as 69 dBA at 50 feet (page 11). The report submitted from Epsilon Associates (Robert O'Neal) in support of this application lists the same noise level for haul trucks (page 17). Thus the evidence presented indicates the noise from individual trucks will be unchanged from the previous proposal.
21. One of the defects the prior board found in the earlier Epsilon report was that it did not take into account noise generated by gravel trucks from the proposed excavation which will be traveling on public highways. The newer Epsilon report shares in that same characteristic, analyzing noise from the excavation area itself, but not in any detail the noise generated by trucks on public highways. It is important to note that if trucks are operating from 7 a.m. to 5:30 p.m. and there are 110 trips daily – 220 round trips – the result is a gravel truck passing a residence on Lear Hill Road or Route 10 once every 2.86 minutes. Yet Mr. O'Neal emphasized orally that the subject of his testimony was just the noise emanating from the excavation itself. The only mention of off-site truck traffic noise in the newer Epsilon report is in Section 6.2 of that report, where it is stated that noise from off-site truck traffic “will not change significantly from current levels” because there is already significant excavation truck traffic from the existing Davis/Bridge sites utilizing Lear Hill Road. (Epsilon 2/24/09 report). The Board finds this statement unpersuasive because, similar to the 2000 application, the report is attempting to treat the existing Davis Pit impacts as a kind of base line or “given” and is then treating the new proposal as acceptable so long as it is “at least no worse.” That approach was rejected in the prior decision, and is fundamentally wrong. It is particularly inappropriate at this time, in light of the fact that – as summarized in paragraph 19 above – actual recent traffic levels at the Davis Pit have in fact been much lower than permitted there, and lower they were at the time of the 2000 Anderson application. The Board found in the prior decision (5/22/01 decision at pages 6 and 7), and now finds once again, that the applicant is *not* entitled to treat the Davis Pit impacts as a “given” or “safe harbor,” and that the traffic (and resulting noise) generated by the Anderson excavation must be analyzed as full impacts of that excavation itself. The Epsilon report fails to do that.
22. A memorandum from Rob O'Neal, Epsilon Associates, Inc., dated June 3, 2009 does present information on noise from truck activity on Lear Hill Road, but not on Route 10 or the project haul road. The sound level meter was set up on the western property line of 22 Lear Hill Road at the same setback from Lear Hill Road as the front of the house (approximately 25 feet). The existing ambient L90 sound level at 22 Lear Hill Road was measured as 44 dBA and the current hourly average (Leq) sound level was measured at 55 dBA. During the worst-case hour (i.e., most trips by Newport Sand & Gravel trucks) the modeled sound impacts of only the haul trucks was 55 dBA. Thus impact at 22 Lear Hill Road of project

trucks after they exit the haul road and are operating on Lear Hill Road would be 11 dBA over ambient. At the May 11, 2010 rehearing, Mr. O'Neal stated that when the modeled truck noise was added to the existing 55 dBA Leq noise at 22 Lear Hill Road, the total noise level would be 58 dBA. When operating at the proposed 220 round trips per day, this would be a near continuous noise level with a truck passing this location every 2.86 minutes.

23. Attorney Britain has submitted to the Board a Memorandum of Law dated July 21, 2009 (11 pages) arguing, among other things, that the ZBA's consideration of noise generated by vehicles traveling on public highways is preempted by both state and federal law. However: (a) First, all of the statute and case law cited by Attorney Britain go to the issue of whether a town may regulate the use of highways by vehicles, or businesses serving those vehicles. The ZBA is not doing that in this proceeding. What is being regulated in this proceeding is the excavation itself, a use of private land. The Board is merely taking note of one of the impacts of that use. (b) Secondly, as mentioned above, the ZBA raised exactly the same objection to the Epsilon report in conjunction with its 2001 decision (*see* paragraph 18(a) of the ZBA's May 22, 2001 decision), as was noted by the Superior Court (Order of 2/21/03 at 12), yet the Court upheld the Board. The earlier decision is therefore *res judicata* with respect to this purely legal issue raised by Attorney Britain. As noted in the *Nottingham v. Lee Homes* case (*supra.*) the 2003 Court decision is final not merely with respect to the issues of law which actually were raised at that time, but also the issues which could have been raised at that time.
24. The Board has additional concerns on the noise issue. The Epsilon study is solely based on computer modeling of the sound emanating from the Anderson pit. Soundings were taken at different locations to reach existing background noise. Neither actual sounds from NS&G gravel trucks nor the sound from an actual working pit were factored in. The report did not measure ambient sound levels at all modeled locations (Table 6), but instead relied on substitution of 2003-measured ambient (L90) values from one of three locations for the modeled location's unknown L90 value. The modeled increase over ambient in six of the eight modeled locations were well under the 10 dBA increase over ambient standard in the town's noise ordinance. The two remaining locations, Nearest property line NE and Nearest property line East, were modeled at 9 and 10 dBA, respectively, leaving little margin for error in meeting the 10 dBA above ambient standard. While use of substitution values may be a common practice in noise impact modeling, it does introduce a source of error that could affect model outputs. To the extent the projected sound levels for the Anderson pit were estimated based upon sound levels from the Davis Pit, it must be remembered that the Davis Pit is currently operating (based on Town data of yards removed in 2007-2008) at roughly 20% of projected level of removal activity for the Anderson pit. The Board also has doubts about Mr. O'Neal's depiction of a gravel truck moving at under 40 mph as being roughly comparable with the sound of conversation at three feet away. The full impact of noise is not reducible to decibel levels. For one thing such comparisons do not take into account the psychological differences between the two scenarios. Conversations are generally acquiesced in by the participants, whereas the noise of the gravel truck is generally unwelcome. *"The frequency content of each noise will also determine its effect on people... as will the number of events when there are relatively small numbers of discrete noisy events. Combinations of these characteristics determine how each type of environmental noise*

affects people. These effects may be annoyance, sleep disturbance, speech interference, increased stress, hearing impairment or other health related effects....” (excerpt from World Health Organization publication “Protection of the Human Environment.”) It should also be remembered that the enactment of the noise standards in Section IV.R of the Ordinance in no way repealed Section V.A.1, under which Board in 2001 found that truck traffic at lesser levels than under the current proposal would be offensive due to noise.

25. Again, the 2001 decision which found that the project would more likely than not be offensive due to noise is final and binding, and the primary question now is whether the applicant has persuaded the Board that the details of the current proposal differ enough from the earlier one to warrant a decisively different conclusion. For all the above reasons the Board concludes that they do not. As discussed above, the actual level of excavation activity proposed, in terms of cubic yards per year, is actually higher than under the 2000 proposal. The applicant has proposed leaving a somewhat thicker berm in place for a longer time between the excavation area and the village/Route 10 area. But neither the Epsilon report nor any other information presented by the applicant persuades the Board that this difference is sufficient to decisively address and mitigate the noise conclusions reached by the Board in the prior decision. The Board therefore again finds it more likely than not that the proposal will be offensive to the public due to noise in violation of Section V.A.1 of the Ordinance; and also that because of noise, the project is likely to have an adverse impact on the area, contrary to special exception condition #1 in Section IX.B of the Ordinance.

Dust, Traffic Safety, and Aquifers.

26. The 2001 ZBA decision found that the Anderson proposal presented at that time raised no pivotal concerns in the areas of traffic safety and congestion, impact on aquifers, and dust (Sections E, F and G of the 5/22/01 ZBA decision). Some concerns have been raised on those fronts by some of the neighbors in the present proceeding, and the Board would go into more detail on these aspects were it not for the prior decision. However the issue of finality of the prior decision also applies to the Board’s conclusions concerning these parameters. The Board does not find that any of the evidence concerning these parameters warrants decisively different conclusions from those reached with the prior application. The Board does wish to emphasize (as it did in 2001) that dust and other particulates remain a concern, but believes that, in the event the permit were to be granted, the Planning Board could substantially regulate that issue through the imposition and regular review of conditions of approval. Moreover it is impossible to disassociate traffic from the issues of dust and noise, hence the issue of traffic is somewhat embodied in Board’s conclusions concerning noise (above).

The Issue of Property Values.

27. The Board at the time of the 2000 application received substantial testimony that the project would negatively impact property values, and determined, more likely than not, that it would do so – a determination which became final when affirmed by the Court. The Board also received additional testimony as to negative property value impacts during the current

proceeding (for example see letters from Milton Huston, Keith and Davis Bemis, Virginia Schendler and Anne M. Tornifoglio).

28. To counter this testimony, NS&G submitted an "Update to Impact Assessment Report" ("Report") dated February 2, 2009 prepared by Rauseo & Associates. In response to Board member questions, a March 9, 2009 letter ("Letter") from David S. Rauseo to Shaun Carroll was submitted to the Board. The stated purpose of the Report "*...is to determine if there will be a diminution in value of any properties in the Town of Goshen as a result of a proposed sand and gravel excavation on a portion of a 208.5 acre vacant tract of land now owned by Newport Sand and Gravel Co., Inc.*" (page 6). As explained in the Report (page 18), the sales comparison approach was used as an appropriate basis for valuing residential properties and establishing a paired sales analysis to determine any diminution in value based on the proposed gravel excavation operations. Because the Rauseo Report conclusions are contrary to the remaining testimony, as well as to the common experience of Board members (as was also true in the case of the Applied Economic Research report analyzed in the Board's 5/22/01 decision), the Board has analyzed the Rauseo Report carefully.
29. The Board believes it is essential that the excavation operations (not just sites, but operations) used in Mr. Rauseo's analysis be similar enough to the proposed excavation operation that they can function as substitutes in his analysis. To assess the impact of a land use the comparisons must include a land use that is essentially equal to the proposed one. If a hardware/lumber store were under consideration, it is not enough to assess the impacts of just any hardware/lumber store. It is apparent to the Board that the impact of the Lumber Barn in Goshen is much different than would be experienced if a Home Depot had been developed in the same location. Neither Mr. Rauseo's report nor his testimony has provided a summary table of the size (in acres, daily and annual excavation in cubic yards, and maximum truckloads per day) for the excavation operations in the analysis, compared with those for the proposed excavation operation. Neither has Mr. Rauseo's report nor his testimony included a discussion of relevant facts that leads to a conclusion that the gravel excavation operations in his analysis are similar enough that they can function as a substitute for the proposed excavation operation. At the rehearing Mr. Rauseo did attempt to explain to the board his selection of excavation sites by emphasizing the importance of using locations close to the proposed site rather than excavation operations that were of comparable size. Yet the board has received no convincing arguments that the excavation operations in Mr. Rauseo's analysis are reasonable substitutes for the proposed operation. Based on what information the board can glean from the report about the characteristics of the excavation operations used in Mr. Rauseo's analysis, and without a convincing argument to the contrary, the board concludes that the excavation operations in Mr. Rauseo's analysis are not reasonable substitutes for the proposed excavation operation and thus his results have no validity in determining the impact of this proposal on local property values.
30. Even if the above argument were set aside and the board accepted Mr. Rauseo's results, his report does not adequately assess the risk to property values associated with proximity to gravel excavation sites, although he had the information to do so. Quantitative risk assessment requires evaluation of two components: 1) the probability that a loss will occur and 2) the magnitude of the potential loss. Based on the data presented in Mr. Rauseo's report (page 52), in five of twelve comparisons (41%) the sales price was less for properties

proximate to a gravel excavation site. The maximum diminution was 17%, while the average was 8.4%. The board concludes that a 41% probability of loss with an average magnitude of the potential loss of 8.4% and as high as 17% would represent an undue hazard to property values in violation of Section V.A.1 of the ordinances.

31. The board also believes there are errors in Mr. Rauseo's report, the most significant related to the C-1 and C-1b sales comparison that resulted in a 17% greater sales price for the home proximate to a gravel excavation site. It is noted that C-1 was 1.03 acres in size and was sold with an abutting 0.43 acre vacant building lot (page 76), whereas C-1b was a 0.25 acre lot (page 81). The adjustments made to make C-1b comparable to C-1 are described on page 38, but no mention is made of any adjustment to account for the value that would be associated with the abutting 0.43 acre building lot associated with C-1. The board notes here that sales G-3 included an abutting 5 acre lot with a storage garage and Mr. Rauseo did reduce the sales price from \$155,000 to \$130,000 ("*\$155,000 less \$25,000 attributed to 2nd lot and garage*") (page 69 and 70). The estimated 17% difference C-1 and C-1b is \$15,961. *The Update to the Addendum of Impact Assessment Report Dated February 2, 2009* submitted to the board on June 8, 2010 included remarks for C-1 that stated this building lot was also on a separate deed. The Board believes that a separate building lot, recorded on a separate deed that would not require subdivision and on which a house could be constructed, would have more value than the same acreage of excess rear land and thus its value should have been removed from the C-1 sales price to make the two properties comparable. If this were done, the 17% greater sales price for a home proximate to a gravel excavation site would be significantly diminished. While the board does not know the value of the 0.43 acre lot, if the difference in sales price for C-1 and C-1b were reduced to 0%, the overall average percent change for the twelve comparisons in Mr. Rauseo's report (page 52) would be -1.5%. When questioned about the C-1 vs C-1b comparison at the rehearing, Mr. Rauseo said the buyer was not motivated to sell the abutting lot and thus no adjustment was made. The Board believes value of property exists, whether or not the owner is motivated to sell.
32. The Report states that N-2 and N-2a resulted in a 4% greater sales price for the home proximate to a gravel excavation site. The Lewis excavation site associated with N-2 extracts from 9,500 to 11,000 cubic yards annually based on 2005 through 2007 records (page 115). The proposed excavation project would extract up to 200,000 cubic yards annually or 18-21 times greater than at the Lewis site. The Board does not believe one can compare the proposed excavation site to the Lewis site for the sake of evaluating proximity to a gravel excavation site on property value. The Report also states that G-3 and G-3a resulted in a 3% greater sales price for the home proximate to a gravel excavation site. G-3 was sold with an abutting 5 acre lot containing a storage garage (page 70). The property was on the market for 147 days and sold for \$15,000 or 8.8% below the asking price. G-3a was on the market for 76 days and sold for \$7,900 or 5.6% below the asking price. G-3a sold about a year later than G-3. The property proximate to the Davis Site took nearly twice as long to sell and the percentage below asking price was higher. The Board considers both factors to indicate an impact of the excavation site on the sale.
33. Again, in general the comparisons made in the Rauseo report give little or no consideration to the varying size or use of the gravel pits. The pit involved in examples C-1 and C-1a in Charlestown is described on p. 37 of the Rauseo report as follows: "*This site supplies the*

town with road materials during the spring, summer and fall. It is operational during normal working hours. However its usage is based on need and does not experience heavy activity. It is also noted that its useful life is nearly depleted.” Exposure of a property to a town gravel excavation site is simply not comparable to the proposed excavation site now before the Board. The Town of Charlestown clearly does not extract 110 truckloads of gravel daily and 200,000 cubic yards annually from their site, as is proposed for this project. Thus the Board finds this comparison invalid.

34. The Board’s 2001 decision was based on substantial testimony from realtors and residents as to the adverse impact of the project on real estate values (*see* list at paragraph 32 of Board’s 5/22/01 decision). In addition the evidence submitted to the Board in this new proceeding includes a May 28, 2009 letter from Susan Latham, Realtor, Century 21 Highview Realty to Steve Lamry and Kim Gaddes. The letter contains a market analysis for property owned by Mr. Lamry and Ms. Gaddes at 125 Mill Village Road South in Goshen. The letter states “*It is my opinion...that should the pit be approved, it will have a negative impact on the value of yours as well as all of the other homes in the vicinity.*” Based on other statements in the letter “the pit” refers to the Newport Sand and gravel pit now under consideration by the ZBA. The letter introduces the concept of obsolescence. Ms. Latham provided examples of factors that would, in her opinion, negatively change the environment around the home. The examples she included were airport noise, toxic waste, nuclear power plants, freeway noise, dust and air pollens, changes in zoning, and more. Her conclusion was that approval of the pit would cause her to devalue the Lamry/Gaddes property selling price by a minimum of 10-15%. The Board does *not* interpret Ms. Latham’s examples as an attempt to equate this gravel excavation proposal with a toxic waste site or nuclear power plant. These are simply examples that, in her professional opinion, would have an impact on property value. It is the Board’s opinion that a gravel excavation site is a type of land use that, on initial consideration, should be expected to decrease property values. In general, the Board believes the magnitude of an impact on property values also relates to the size of project being proposed. A Home Depot would have a greater impact than The Lumber Barn (Map 203 Lot 8.2), a hardware/lumber store located in Goshen adjacent to the Post Office. The Lumber Barn is the largest commercial activity in the Light Commercial Zone and occupies a total of 5.05 acres, of which 1.0 acres is classified commercial and 4.05 acres is classified as excess rear. The excavation site being proposed is significantly larger at about 22 acres and significant with a proposal for 110 truck load daily and an annual excavation of 200,000 cubic yards.
35. In summary, even if the 2001 ZBA decision were ignored entirely, the Board is not persuaded by the Rauseo report, and believes that the project could cause an undue hazard to property values, in violation of Section V.A.1 of the Ordinance; and also that because of property value impact, the project is likely to have an adverse impact on the area, contrary to special exception condition #1 in Section IX.B of the Ordinance. In addition, when considered in light of the finality of the Board’s similar 2001 finding, the Board finds that the applicant has failed to demonstrate that the present application represents a decisive change from the prior application with respect to the parameter of impact on property values.

The Issue of Community Character.

36. The Board's 2001 decision also found that the application at that time was more likely than not to be offensive to the public due to its adverse impact upon the character of the community (in violation of Section V.A.1 of the Ordinance). That finding was upheld by the Court, Judge Mangones having found persuasive, and quoting in full, the following language from the Board's decision: "*There is no question that if a 67-acre gravel excavation were proposed 800 feet away from the town common in such towns as Keene, Newport or Hanover, its defining effect and adverse impact would be dramatic. Goshen may not be as affluent as some other communities, but its character and potential for diverse economic development are just as important to its citizens. The high levels of public opposition to this project indicates to the Board that the excavation's impact on community character is in fact perceived by a large portion of the Town's citizens as 'offensive to the public,' and the Board finds that such feelings are not based on ungrounded fears, but rather upon actual experience with existing excavations including the Davis Pit.*" (Court Order of 2/21/03 at pp. 16-17).
37. A good portion of Attorney Britain's 7/21/09 "Updated Memorandum in Support of Application for Special Exception" argues that the Board is precluded, as a matter of law, from considering the issue of community character. However the Board does not believe these arguments need to be addressed in detail. This is a pure issue of law, and the Superior Court in its 2/21/03 decision stated (at p. 16): "*While the Court acknowledges that the term 'community character' is not specifically enumerated in Section V.A.1 of the zoning ordinance, the Court also concludes that a sufficient basis exists upon which the ZBA could consider the impact of the Anderson Pit on the overall character of the community.*" That ruling was not appealed, and is final and binding on the applicant here. In addition, as noted above, the three special exception standards in Section IX.B of the Ordinance – enacted subsequent to the prior application – include a requirement that the application not adversely impact "the character of the area in which the proposed use will be located."
38. When the board considered the special exception requirement that the application not adversely impact the "*character of the area in which the proposed use will be located*", it took care to ensure that its interpretation would not be so restrictive as to essentially prohibit gravel excavation anywhere in town. A gravel excavation operation will clearly have an impact on the land under excavation: access roads will be created, trees and topsoil will be removed, underlying materials will be extracted and moved off-site; and the topography will be different after reclamation than it was before. Yet if that were the interpretation of adversely affecting the "*character of the area in which the proposed use will be located*" and every area in town were essentially like every other area, then a denial in one location would require a denial in all locations. This is not the board's goal. The above indicates to the board that the terminology "*character of the area*" relates to some unique characteristics of the location. The proposed excavation would occur in the town center, which is obviously a unique area since Goshen has only one town center. Not only is the town center unique, it has social, cultural, historical, and economic significance to the town as a whole. In this instance, adversely affecting a unique area of such importance as the town center would also adversely affect the town as a whole. This interpretation would therefore still allow gravel

excavation to occur in areas in Goshen that were not both unique and significant. Review of this special exception proposal has focused on the impacts to the “*character of the area in which the proposed use will be located*”. It is due only to the fact that the special exception is being requested for a proposal located in the unique and special town center (a factor beyond the board’s control), that local area impacts would radiate to affect the town as a whole. Thus, at least in this instance and for this proposal, the board finds that adversely affecting the “*character of the area in which the proposed use will be located*” will also adversely affect the community character.

39. Major factors persuading the Board in 2001 of the adverse impact on community character included: (a) the excavation’s location in very close proximity to the historic center of Goshen (generally the area extending from the Lear Hill intersection most affected by the proposed truck traffic, to the Brook Rd. intersection area most affected by the excavation itself) – an area which not only contains the Grange Hall, Town offices and church, but also contains, and whose character is defined by, 18 unusual and historic plank houses which are on the National Historic Registry; (b) the fact that the Route 10 corridor through Goshen is already dominated by numerous gravel pits; and (c) the fact that the Town contains a good many businesses dependent upon tourism, with the potential for more such businesses.
40. Those three factors are unchanged vis-à-vis the present application. Indeed the current application is in approximately the same location as the phase *closest* to the center of town in the 2001 application. Much of the evidence from citizens in the present proceeding continues to reflect concerns over community character. It remains true, in the opinion of the Board, that the proposed gravel pit would – as the Board found in 2001 – “*cement in people’s minds the image of the Town of Goshen as a ‘gravel pit town,’ thus discouraging just the types of commercial and residential development residents would like to see in the village area.*” This application would establish a gravel pit prominently located right in the Town center that has significance to the community. Every aspect of the proposed pit discussed so far impacts on the character of this small community – noise, traffic, dust, and pollution, and the psychological impact of these factors on the residents due to their cumulative impacts – will alter the existing community character of the small town of Goshen and stifle prospects for future development. From the standpoint of persons considering relocating their residences the Town, location is everything, as any real estate person knows. Anyone wishing to open a café or similar business, to have a store which thrives on the tourist industry, or wishing to sell or buy a home, will not be able to count on location as a selling point. Rather it will become a detriment.
41. The one “community character” factor considered persuasive in 2001, which the applicant *has* attempted to address by changes in the application, is the visibility of the excavation itself. Unlike the prior application, the present application contains no provision for excavation (or creation of a pond) within the open meadow area most visible from Route 10. Earth removal will not extend as high up the hill most visible from the center of town as in the prior plans. Finally, as discussed above, the newer plans call for the retention of some portion of the esker which will shield the proposed pit area to a greater degree than with the prior Phase I plan, except for an area about 200 feet long in the middle, where the entire esker will be removed.

42. However, the Board finds, as it did in 2001, that the excavation will adversely affect community character, and that the changes proposed are not decisive ones leading to a different result. It is clear that, while the visual screening aspect is somewhat improved, the excavation will remain visible from many vantage points. The Epsilon report does not deny that it will be audible, and as discussed above, the truck traffic will actually be more intensive rather than less intensive. The issue of “area character” is in part a psychological one. For example a junkyard may influence the character of an area even though almost fully screened by high fences. There is no question that all citizens and visitors to Goshen will be fully aware of the presence of this excavation. For all of the above reasons, as well as those cited in 2001, the Board finds that the excavation will be offensive to the public due to its adverse impact upon community character, in violation of Sections V.A.1 and IX.B(1) of the Ordinance.

Action Of The Board:

At the meeting of June 22. 2010, it was moved by Howe, seconded by Lawton, to deny the request of Newport Sand and Gravel, Inc. for a special exception to operate a commercial excavation on its property located at Tax Map 203, Lot 2 in the Town of Goshen.

Voted in favor: Howe, Lawton, Brennan

Opposed: Johnson, Porter

Abstained:

_____	_____
_____	_____
