COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

TROY CURRENCE, TONY FERRETTI, JEANNINE HUNT, CAMILLE MADISON, WENDY O'BRIEN, LINDA COOMBS, KATHLEEN PAPPALARDO, JEFFREY LANDRY, REBECCA LIPTON, DOROTHY POLLITT and SAVE THE PINE BARRENS, INC.,
Plaintiffs-Appellants,

v.

A.D. MAKEPEACE COMPANY, READ CUSTOM SOILS LLC, ROBERT J. IERONIMO, AS CHAIR OF THE EARTH REMOVAL COMMITTEE OF CARVER, MASSACHUSETTS, JAMES NAUEN, MICHAEL C. HARRISON, RICHARD WARD, and WILLIAM GARNETT, AS MEMBERS OF THE EARTH REMOVAL COMMITTEE OF CARVER, MASSACHUSETTS,
Defendants-Appellees.

APPLICATION OF DEFENDANTS-APPELLEES FOR FURTHER APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT

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Dated: October 10, 2025

CORPORATE DISCLOSURE STATEMENT OF DEFENDANTS-APPELLEES A.D. MAKEPEACE COMPANY AND READ CUSTOM SOILS LLC

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21 and Massachusetts Rule of Appellate Procedure 16(a)(2), Defendant-Appellee A.D. Makepeace Company states that it has no parent companies and that no publicly traded company owns 10% or more of its stock.

Pursuant to Supreme Judicial Court Rule 1:21 and Massachusetts Rule of Appellate Procedure 16(a)(2), Defendant-Appellee Read Custom Soils LLC states that it is a wholly owned subsidiary of ADM Holdings LLC and an indirect subsidiary of ADM Management Corporation and an affiliate of A.D. Makepeace company. No publicly traded company owns 10% or more of Read Custom Soils LLC’s stock.

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

The principal holding of the Appeals Court — that "the major purpose" of a municipal bylaw regulating the excavation of land is to limit damage to the environment, see G. L. c. 214, § 7A ("Section 7A"), Addendum ("Add."), 55 — represents an error of law, which threatens to compound legal challenges to earth removal projects statewide as well as to displace a statewide system of local government regulation.

Section 7A authorizes "equitable or declaratory relief" where environmental damage is "occurring or is about to occur," and such damage "constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize" environmental damage. Id.

This case presents a question of law. Slip. op. at 14, Add. 39. The question concerns how to determine "the major purpose" of a local bylaw. As the Appeals Court acknowledged: "Section 7A does not give much direction . . . nor does the prior case law." Id.

In evaluating the bylaw at issue, the Appeals Court neglected the rules of construction for ascertaining legislative intent. Courts must prioritize the plain language of a bylaw, give meaning to every word and phrase, and interpret the text in light of relevant parallel bylaws. Respectfully, the Appeals Court abrogated these rules of construction.

Specifically, the court fixated on "the systematic stripping of earth," slip. op. at 13, Add. 38, and on earth as a "basic natural resource," slip op. at 16, Add. 41. Consequently, the court discounted a host of potential adverse impacts of earth removal on area residents, which the bylaw addresses. These impacts include the obvious safety risk posed by a gaping hole in the ground, plus noise and vibration, dust, traffic hazards, and depressed property values. If severe enough, these are hallmarks of a nuisance. The bylaw at issue serves to regulate against all such potential impacts. The major purpose is to prevent earth removal from becoming a nuisance, not to limit the "stripping of earth."

Indeed, the Appeals Court disregarded myriad indicia that the bylaw serves to prevent nuisances:

- A statement of purpose speaks in plain terms about "safety" (mentioned three (3) times), leaving excavated land "safe and convenient" for reuse without posing a "danger" to surrounding property, and conducting earth removal "in a safe manner and with minimal detrimental effect" on area residents;

- Numerous operative provisions of the bylaw demonstrate a manifest intent to balance the economic benefits of earth removal with regulating to address a wide range of potential impacts on area residents; and

- Related town bylaws contain explicit language about protecting natural resources, in direct contrast to the "anti-nuisance" purpose of the bylaw at issue.

As an unintended consequence of the court's ruling, a powerful new weapon — Section 7A — may now be deployed against what would otherwise be private, locally-regulated development projects. Residents who feel their own quality of life is diminished by excavation on another's land may seek to sue under Section 7A, while environmental groups that oppose development can seize on Section 7A as a means of wresting control of bylaw enforcement away from local government officials. The public has a strong interest in authoritative guidance from the Supreme Judicial Court before a predictable increase in statewide litigation begins.

Accordingly, Defendants A.D. Makepeace Company and Read Custom Soils LLC (together, "Makepeace") request leave to obtain further appellate review.

RELATED AND PRIOR PROCEEDINGS

This appeal arises from the campaign of one group — Plaintiff Save the Pine Barrens, Inc. ("STPB") — seeking to hinder, delay, and forestall development in Southeastern Massachusetts. STPB's campaign targets solar power projects as well as historical cranberry farming. Waving the banner of environmental preservation, STPB stands against projects that address the impending calamity of climate change. STPB has orchestrated several lawsuits challenging earth removal activity.[1] In no suit has STPB prevailed.

Section 7A authorizes civil actions to restrain environmental damage on twenty-one days' notice. G. L. c. 214, § 7A, Add. 54-57. STPB, through counsel, first threatened the Earth Removal Committee ("ERC") of the Town of Carver ("Carver" or the "Town") with mandamus by letter dated June 14, 2021. R.A. 73.

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[1] Adams vs. Standish Invs., LLC, Mass. Super. Ct., No. 2583CV00420 (Plymouth County 2025); Coppenrath vs. Hannula, Mass. App. Ct., No. 2025-P-0340 (2025); Coppenrath vs. Hannula, Mass. Super. Ct., No. 2483CV00305 (Plymouth County 2024); Ryan vs. Hannula, Mass. Super. Ct., No. 2483CV00301 (Plymouth County 2024); Save the Pine Barrens, Inc. vs. Carver Zoning Bd. of Appeals, Mass. Super. Ct., No. 2183CV00929 (Plymouth County 2021); Buckingham vs. Barrett, Mass. Land Ct., No. 21 MISC 000221 (HPS) (2021).

On August 9, the same attorney notified Makepeace and the ERC of an intent to sue under Section 7A. R.A. 56-61. Counsel sent a second such notice on March 15, 2022. R.A. 63-71. Five months later, on August 11, 2022, Plaintiffs commenced this case. R.A. 12-43.

Plaintiffs then moved for a preliminary injunction. R.A. 9. In a 13-page memorandum of decision, the Trial Court (Buckley, J.) denied that motion. R.A. 208-220. The Court:

- Perceived "very little likelihood of success on the merits" in light of the "ample evidence" submitted by Defendants, R.A. 215, R.A. 219 (emphasis added);

- Highlighted that Plaintiffs had not demonstrated "any concrete harm" to the environment nor adduced "any evidence of a Bylaw violation," R.A. 218 (emphasis added);

- Observed that Plaintiffs' "excessive delay in bringing suit . . . strongly indicate[d] a lack of irreparable harm," id.; and

- Recognized that the motion, if granted, would put scores of people out of work, R.A. 219.

Meanwhile, Defendants moved to dismiss the Complaint under Mass. R. Civ. P. 12(b)(6). R.A. 221-223. The motion was converted into one for summary judgment, and a hearing subsequently took place. Plaintiffs had to demonstrate that "the major purpose" of Carver's earth removal bylaw is to protect the environment. *See* G. L. c. 214, § 7A, Add. 55. At the hearing, Plaintiffs' counsel framed environmental protection as but one of the bylaw's "multiple purposes." R.A. 296 at I-21:9–11 ("Well, yes, the bylaw is a fee-collection statute, but it's not an either/or. It can have multiple purposes[.]").

The Trial Court (Cahillane, J.) granted summary judgment. Among other things, the court concluded that the major purpose of Chapter 9.1 "is to ensure that earth removal is conducted in a safe manner and that the land is left in a safe condition following earth removal, not to prevent or minimize damage to the environment," R.A. 338. On reconsideration, the judge vacated the summary judgment and instead allowed Defendants' motion to dismiss. R.A. 385.

Judgment was entered in favor of Defendants. Plaintiffs appealed. Their application for direct appellate review was denied. The decision of the Appeals Court followed. Neither party has sought reconsideration or modification in the Appeals Court.

STATEMENT OF FACTS

Like other municipalities across Massachusetts, Carver has a regulatory scheme for earth removal. The scheme is authorized by G.L. c. 40, § 21(17), and set forth in Chapter 9.1 of the town's general bylaws. R.A. 304-311, Add. 58-64. Chapter 9.1.1 states the bylaw's purpose, as follows:

> The purpose of this bylaw is to promote the health, safety, and general welfare of the residents of the Town of Carver, and to ensure that permanent changes in the surface contours of land resulting from the removal and regrading of earth materials will leave the land in a safe and convenient condition for appropriate reuse without requiring excessive and unreasonable maintenance or creating danger of damage to public and private property, as well as to provide that earth removal activities shall be conducted in a safe manner and with minimal detrimental effect upon the district in which the activities are located. This by law pertains to all commercial mining, agricultural excavation and excavation due to construction that is not exempt pursuant to Section 9.1.8 of this by law.

R.A. 304 at c. 9.1.1, Add. 58(emphasis added).

The bylaw structures both the ERC's composition and its decision-making process so as to strike a balance between promoting beneficial economic activity and regulating that activity in the public interest. Three members of the ERC are chosen by the Select Board, two are nominated by the Cape Cod Cranberry Growers Association, one is nominated by the Board of Health, and one is a member of the trucking industry chosen by the ERC. R.A. 305 at 9.1.3b, Add. 59. Likewise, in considering a permit application, the ERC notifies seven other Town bodies: the Board of Health, Select Board, Board of Assessors, Agricultural Commission, Conservation Commission, Planning Board, Police, and Public Works. R.A. 307 at 9.1.6a, Add. 61.

In considering a permit application, the ERC considers many factors in carrying out the bylaw's stated purpose. The ERC must determine that an application "generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate." R.A. 308 at 9.1.7a, Add. 62.

The ERC may allow a project to "disturb" a fifty-foot buffer along property lines if the applicant shows "a significant hardship and/or shows that the proposed excavation would not have a detrimental impact on the abutting property." R.A. 308 at 9.1.7c, Add. 62.

The bylaw makes exceptions to the permit requirement. In addition to allowing small projects, no permit is required to reconstruct streets or install utilities, for "any Town, state and/or federal projects," or "for normal cranberry related activities or other agricultural uses[.]" R.A. 309 at 9.1.8, Add. 63.

The ERC is empowered, finally, to issue a cease and desist order in the event of "a violation of approved plans, specifications and conditions, or [if the ERC] believes that the actual conditions or operations on the premises constitute a nuisance or public danger." Id. at 9.1.9a, Add. 63.

POINT PRESENTED FOR FURTHER APPELLATE REVIEW

Is the major purpose of Chapter 9.1 of Carver's general bylaws to protect against damage to the environment, or is it to prevent earth removal from becoming a nuisance?

ARGUMENT

I. CHAPTER 9.1's PURPOSE IS TO REGULATE THE EXCAVATION OF LAND SO AS TO PREVENT SUCH ACTIVITY FROM BECOMING A NUISANCE.

The overarching error of the Appeals Court was to disregard the traditional rules of construction for ascertaining the intent of a municipal bylaw.

A court is to "determine the meaning of a bylaw 'by the ordinary principles of statutory construction.'" Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley, 461 Mass. 469, 477 (2012), quoting Framingham Clinic, Inc. v. Zoning Bd. of Appeals of

Framingham, 382 Mass. 283, 290 (1981). Courts look first to the plain language as the "principal source of insight into legislative intent." Adoption of Daisy, 460 Mass. 72, 76 (2011), quoting Water Dep't of Fairhaven v. Dep't of Envtl. Protection, 455 Mass. 740, 744 (2010). A court further must "endeavor to interpret a [bylaw] to give effect 'to all its provisions, so that no part will be inoperative or superfluous.'" Connors v. Annino, 460 Mass. 790, 796 (2011), quoting Wheatley v. Mass. Ins. Insolvency Fund, 456 Mass. 594, 601 (2010). While applicable language itself "necessarily contains the best evidence of . . . intent," Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260 (2013), quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658,664 (1993), the court's interpretation also may be informed by "parallel language" in other bylaws, id.

These rules lead to the conclusion that Carver's bylaw serves the major purpose of preventing earth removal activity from becoming a nuisance.

a. The bylaw's stated purpose is plain.

The Appeals Court discounted the plain language of Chapter 9.1's statement of purpose. Chapter 9.1 speaks in clear and unmistakable terms of promoting the "health, safety, and general welfare" of the residents of Carver. R.A. 304 at c. 9.1.1, Add. 58. More specifically, the bylaw ensures that "permanent changes in the surface contours of land resulting from the removal and regrading of earth materials will leave the land in a safe and convenient condition for appropriate reuse without . . . creating a danger or damage to public and private property," and that earth removal itself is "conducted in a safe manner and with minimal detrimental effect" on area residents. Id.

In other words, the stated purpose is not to cabin "damage to the environment" — defined by Section 7A as the "destruction, damage or impairment . . . to any of the natural resources of the commonwealth" — but rather to regulate the exploitation of a natural resource (land). Indeed, the very notion of "earth removal" entails alteration of the environment. Earth removal bylaws seek to avoid an array of potential detrimental effects on residents,[2] which are

[2] See, e.g. Fiske v. Bd. of Selectmen of Hopkinton 354 Mass 269, 270 (1968) (disagreeable dust and noise, destruction of soil, decreased property value, traffic hazards); Goodwin v. Bd. of Selectmen of Hopkinton, 358 Mass. 164, 167-168 (1970) (undue burden on streets and roads, traffic hazards); Kelleher v. Bd. of Selectmen of Pembroke, 1 Mass. App. Ct. 174, 182-184

characteristic of a nuisance. See Byrne v. Town of Middleborough, 364 Mass. 331, 334 (1973); see also Kelleher, 1 Mass. App. Ct. at 183; see generally Rattigan v. Wile, 445 Mass. 850, 855-856 (2006) (substantial and unreasonable interference with use and enjoyment of property); see also Hennessy v. City of Boston, 265 Mass. 559, 561, (1929) (nuisance a deprivation of "exclusive right to enjoy the use of . . . premises free from material disturbance and annoyance"). As its statement of purpose conveys, Carver's bylaw serves to keep potential adverse impacts of earth removal from turning into a nuisance.

The Appeals Court decision is self-contradictory on this point. The court reasoned that land constitutes a natural resource, which can be protected under Section 7A. Slip op. at 12-13, Add. 37-38. Yet the bylaw literally permits damage to land, in the form of excavation. Nowhere does the statement of

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(1973) (noise, dust, vibration, depreciation of property); Zoning Bd. of Appeals of Woburn v. Hous. Appeals Comm., 92 Mass. App. Ct. 1115, 1 (2017) (loss of quiet enjoyment, noise, and health concerns); Martinson v. Bd. of Appeals of Uxbridge, 50 Mass. App. Ct. 1107, 1-2 (2000) (property value, noise, dust, drainage, and well water impacts); Lowe's Home Ctrs., Inc. vs. Town of Auburn Planning Bd., Mass. Land Ct., No. 07 PS 352453 (AHS), at 20-21, (July 21, 2010) (noise and truck traffic).

purpose purport to protect against damage to land in and of itself. See R.A. 304 at c. 9.1.1, Add. 58. The closest the statement of purpose comes is in respect of restoring surface contours to a "safe and convenient condition" without "danger" to property of others — not the land's original state, but a safe and convenient state that is not dangerous or unduly burdensome for area residents. See id.

The court further glossed over three references to "safety" in the statement of purpose. See id. A gaping hole in the ground is dangerous — an attractive nuisance, especially for adventuresome children — so safety is vital. The court never discussed this reality. Instead, the court noted only that "public safety" and "environmental protection" "often overlap," without explaining what exactly that means. See slip. op. at 16 n.15, Add. 41. Keeping children safe from falling into a pit in the ground does not overlap with the goal of environmental protection. Rather, safety risks can create a nuisance. Sullivan v. Chief Justice for Admin. And Mgt. of Trial Court, 448 Mass. 15, 34 (2006); Stop & Shop Co., Inc., v. Fisher, 387 Mass. 889, 891 n.2 (1983); Restatement (Second) of Torts § 821B (1979).

Beard v. Town of Salisbury, 378 Mass. 435 (1979) is not to the contrary. Beard, on which the Appeals Court relied, is about municipal power. In particular, the case addressed at length whether one town had authority to prohibit the "intermunicipal" transportation of earth. See id. at 435-442. In one sentence of text and a footnote, the Beard Court commented on the environmental impact of earth removal. See id. at 439 & n.8. The Court never explicated, much less ruled on, the purposes animating the bylaw at issue in that case.

More apt is this Court's decision in Byrne, 364 Mass. 331, which categorized the excavation of land as posing a potential nuisance to others. In considering an earth removal bylaw, the Court described the case as "involv[ing] a use of land which, if not in itself a nuisance, has been shown by experience to be likely to produce conditions bordering upon a nuisance." Id. at 334 (quotation and citation omitted). "Such a use may be subjected to regulation," the Court recognized, including via earth removal bylaws. Id.; see also Kelleher, 1 Mass. App. Ct. at 183 ("neighboring residents . . . unreasonably disturbed in the normal use and enjoyment of their homes and properties" which "constituted a nuisance in the area")(quotation omitted); Town of Burlington v. Dunn, 318 Mass. 216, 221, cert. denied, 320 U.S. 739 (1995) (effect of earth removal "can hardly be otherwise than permanently to depress values of other lands in the neighborhood and to render them less desirable for homes").

Chapter 9.1's statement of purpose conveys an intent to prevent earth removal from endangering people or otherwise becoming a nuisance.

b. Other textual evidence confirms that the bylaw serves to prevent nuisances.

The bylaw as a whole manifests the clear intent to balance economic development on the one hand and minimize the danger and detrimental effects of earth removal on the other hand. The Appeals Court never mentioned, much less explained, the significance of these provisions. Rather, in the quest for legislative intent, the court ignored them. This narrow approach to ascertaining the major purpose of the bylaw broke the rule that courts are to ascribe meaning to each and every phrase. See Connors, 460 Mass. at 790.

Among other things, this bylaw provides for representation on the ERC by members of the cranberry and trucking industries, and for notification of seven other town bodies as part of the permitting process. R.A. 305 at 9.1.3b, Add. 59; R.A. 306 9.1.5a, Add. 60. Only one body receiving notice has environmental protection as its mandate, the Conservation Commission.

The ERC further is charged with ensuring that an earth removal application conforms to principles of good engineering, sound planning, and correct land use, and provides for the reuse of available topsoil. R.A. 308 at 9.1.7a, Add. 62. These broad criteria make no special mention of environmental considerations.

The ERC may grant hardship relief to permit applicants from a fifty-foot buffer requirement if doing so would not "have a detrimental impact on abutting property". R.A. 308 at 9.1.7c, Add. 62. In other words, relief may not burden neighbors in the use and enjoyment of their property.

Nor is any permit required for excavation under certain circumstances, again regardless of environment impact. R.A. 309 at 9.1.8, Add. 63. This includes federal, state, and Town projects. Some projects may thus involve the large-scale excavation of land with no permit at all.

The ERC, finally, may issue a cease and desist order to abate "a nuisance or public danger" to others. R.A. 309-310 at 9.1.9a, Add. 63-64. Nuisance prevention, not environmental protection, is the predicate for cease and desist orders.

Despite these provisions, the Appeals Court nonetheless inferred that environmental protection is the bylaw's major purpose on the basis of a site plan requirement. Slip. op. at 15, Add. 39. It is correct that site plans submitted with permit applications must identify natural features. Yet, these plans also must identify a host of man-made features unrelated to the environment, such as "lot boundaries," "names of abutting owners," "existing and proposed roadways," "existing and proposed buildings," "parking," "loading areas," "easements and rights-of-way," "walls," and "fences." R.A. 307 at c. 9.1.5c, Add. 61. These requirements facilitate the ERC's assessment of safety risks as well as the impact of noise and vibration, dust, and traffic. Environmental features enjoy no privileged status under the site plan requirement.[3]

Read as a whole, the foregoing operative provisions embody the bylaw's stated purpose of safeguarding residents of Carver from earth removal becoming a nuisance in various ways.

c. The structure of Chapter 9 likewise confirms the foregoing analysis.

At least two other Carver bylaws — neither of which is administered by the ERC — do state an explicit environmental purpose:

- Carver's wetlands protection bylaw is "to protect . . . wetlands, related water resources, and adjoining land areas . . . ."

[3] The Appeals Court also focused on a bylaw provision referring to a restoration plan that complies with natural resource conservation standards. Slip. op. at 16, Add. 41. The definition of "restoration" is limited to "returning the land contours to safe and usable condition and planting appropriate groundcover" — echoing the bylaw's statement of purpose — "or taking other measures pursuant to Section 9.1.5c[.]" R.A. 305 at 9.1.2, Add. 59. Section 9.1.5c refers to standards promulgated by the Natural Resources Conservation Service ("NRCS"), an arm of the U.S. Department of Agriculture. Id. These standards generally deal with stabilizing excavated land. See NRCS Conservation Practice Standard, Critical Area Planting, Code 342 (U.S.D.A. 2016), Add. 89; NRCS Conservation Practice Standard, Land Reclamation, Abandoned Mined Land, Code 543 (U.S.D.A. 2021), Add. 93. The standards do not begin to demonstrate — contrary to Chapter 9.1's statement of purpose and operative provisions — that the major purpose of the entire bylaw is environmental protection.

R.A. 163 at c. 9.2.1.2, Add. 65 (emphasis added).

- Carver's stormwater management and land disturbances bylaw is intended to "protect water resources." R.A. 181 at c. 9.6.1, Add. 78 (emphasis added).

In short: when intending to protect the environment, Carver has chosen language suited to the task. The contrast to the stated purpose for Chapter 9.1 could not be clearer. The Appeals Court disregarded this "parallel language" in misapprehending the major purpose of Chapter 9.1. See Pelkey, 569 U.S. at 260.

CONCLUSION

Based on the foregoing, leave should be granted for Makepeace to obtain further appellate review.

Respectfully submitted,

/s/ Michael R. Pontrelli

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ADDENDUM

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24-P-666 Appeals Court

TROY CURRENCE & others[1] vs. A.D. MAKEPEACE COMPANY & others.[2]

No. 24-P-666.

Plymouth. May 14, 2025. – September 19, 2025.

Present: Sacks, Englander, & Walsh, JJ.

Municipal Corporations, By-laws and ordinances, Earth removal. Jurisdiction, Damage to the environment. Real Property, Environmental damage. Statute, Construction. Limitations, Statute of. Practice, Civil, Statute of limitations, Motion to dismiss. Mandamus.

Civil action commenced in the Superior Court Department on August 11, 2022.

A motion to dismiss was heard by Michael A. Cahillane, J., and a motion for reconsideration was considered by him.

Margaret E. Sheehan for the plaintiffs.
Michael R. Pontrelli for A.D. Makepeace Company & another.
Amy E. Kwesell for earth removal committee of the town of Carver.

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[1] Tony Ferretti, Jeannine Hunt, Camille Madison, Linda Coombs, Wendy O'Brien, Kathleen Pappalardo, Jeffrey Landry, Rebecca Lipton, Dorothy Pollitt, and Save the Pine Barrens, Inc.

[2] Read Custom Soils LLC and the earth removal committee of the town of Carver.

ENGLANDER, J. General Laws c. 214, § 7A, provides a claim for any ten Massachusetts residents to obtain an injunction against a person who is then causing, or is about to cause, "damage to the environment" -- provided that the environmental damage "constitutes a violation of a statute, ordinance, by-law or regulation <u>the major purpose of which</u> is to prevent or minimize damage to the environment" (emphasis added). The plaintiffs, ten residents and a Massachusetts corporation, invoked c. 214, § 7A, seeking to enjoin defendants A.D. Makepeace Company and its subsidiary Read Custom Soils LLC (collectively, Makepeace) from continuing what the plaintiffs describe as "commercial mining operations" at six sites in the town of Carver. The gist of the plaintiffs' complaint is that Makepeace has been unlawfully removing earth from these sites for over a decade, under the guise of building cranberry bogs (or solar farms); that Makepeace has done so either in violation of permits issued by the defendant earth removal committee of the town of Carver (ERC), or without any permits at all; and that these earth removal operations have caused and continue to cause significant damage to the Commonwealth's natural resources and to the environment.

A Superior Court judge dismissed the plaintiffs' complaint. As to the c. 214, § 7A, claim, the judge ruled that the statute did not apply because, among other reasons, the plaintiffs' claim was based on alleged violations of Carver's earth removal bylaw, yet "the major purpose" of the bylaw was not to "prevent or minimize damage to the environment." The judge also dismissed the plaintiffs' other claims, including a mandamus claim seeking to require the ERC to take certain enforcement actions, as well as a purported claim under G. L. c. 40, § 21 (17).

As to the c. 214, § 7A, claim, we vacate the dismissal. In our view the "major purpose" of the earth removal bylaw is to protect against damage to the environment, as that term is defined in § 7A. Land -- earth -- is a critical natural resource, and Carver regulates earth removal activity by bylaw to protect the use of that natural resource and to guard against the environmental effects of such uses. Moreover, the systematic stripping of land from a substantial area can easily qualify as "damage to the environment." Nor do we conclude (at this early stage in the proceedings) that the plaintiffs' suit is time barred. The c. 214, § 7A, claim against Makepeace accordingly will go forward. As discussed below, the remainder of the plaintiffs' claims were properly dismissed.

Background. According to the complaint,[3] Makepeace is engaged in earth removal activities in south Carver on its land,

[3] We "accept[] as true all well-pleaded facts alleged in the complaint, drawing all reasonable inferences therefrom in the

which is zoned "Residential/Agricultural" and lies over the Plymouth-Carver sole source aquifer, the principal source of drinking water for the area. The complaint addresses six sites. Three sites -- sites 4, 5, and 6 -- are leased to a third party, Borrego Solar; these sites host completed ground-mounted solar energy projects. The complaint does not allege that any earth removal is still occurring at sites 4, 5, and 6.

Regarding sites 1, 2, and 3, the complaint alleges that Makepeace is currently -- and has been since as far back as 2011 -- performing substantial earth removal, despite a lack of active earth removal permits for any of these sites. Earth removal in Carver is governed by Carver's earth removal bylaw, c. 9, § 9.1 of the town of Carver General By-laws (the bylaw).[4] The bylaw establishes the defendant ERC, a town board, which is empowered to issue earth removal permits. The ERC issues permits for twelve-month periods. Permits may be extended up to

plaintiff's favor, and determining whether the allegations plausibly suggest that the plaintiff is entitled to relief." See Lanier v. President & Fellows of Harvard College, 490 Mass. 37, 43 (2022).

The complaint was filed in 2022. This opinion reviews the order of a Superior Court judge, which was based on the facts alleged in the complaint. Our opinion is also based on those allegations, which are the facts of record. We recognize that the facts on the ground may now be different.

[4] We cite the 2021 version of the bylaw that was in effect when this litigation commenced.

five years where the permit holder has provided satisfactory quarterly reports on the project and ongoing work is performed according to the previously approved plan; however, such a permit may not be extended beyond five years without a public hearing. Bylaw §§ 9.1.4a, 9.1.7h.

Site 1, which constitutes 535 acres and contains already-existing cranberry bogs as well as forested areas, has been the subject of various permits over the last decade for ever-increasing amounts of earth removal, purportedly to create another cranberry bog that has yet to be completed. The plaintiffs allege that, instead of creating this anticipated cranberry bog, Makepeace is conducting commercial mining for sand and gravel.[5] The ERC last granted Makepeace an earth removal permit for site 1 in 2017 and never conducted a public hearing to extend the 2017 permit beyond five years; therefore, the permit had expired in 2022 when the complaint was filed.

Sites 2 and 3 are smaller, but have similar stories. Site 2 was permitted in 2019 for the removal of earth to create a

[5] The complaint additionally alleges that Makepeace has been operating Read Custom Soils LLC (Read), its subsidiary and a named defendant in the present action, on site 1. Read purportedly receives materials from other earth removal sites for blending, processing, sales, and distribution. When the complaint was filed in 2022, Read's website stated, "We operate from a state-of-the-art blending facility in Carver, Massachusetts (located in the heart of our enormous reserves of USGA quality sand)."

cranberry bog reservoir, to be completed by August of 2022. The reservoir has not been completed, and the permit has expired, but earth removal continues. Similarly, site 3 was permitted in 2020 to create a cranberry bog and reservoir, as yet uncompleted. Again, the permit allegedly has expired, but earth removal continues and, in any event, allegedly has expanded beyond the scope of the original permit.

In sum, the plaintiffs claim that Makepeace's commercial mining for sand and gravel on sites 1, 2, and 3 has resulted in the removal and stripping of soil, sand, and gravel, and the clearing of trees, all of which are necessary to filter and protect drinking water. They further allege that Makepeace has caused "permanent changes in topography and the surface contours of [the] land," as well as "destruction, damage or impairment . . . including but not limited to water pollution, [and] impairment and eutrophication of . . . water resources." Of note, the ERC permits had authorized removal of fifty truckloads of sand and gravel per day from the three sites over overlapping periods of time, totaling about 150 truckloads per day, six days a week, for a period of years.[6]

[6] The plaintiffs also claim "impairment of the interest in the natural resources and archeological history of the Commonwealth." Specifically, sites 1 and 3 may contain evidence of archeological significance pertaining to ancient Native American land use.

The plaintiffs also allege that the defendant ERC is "complicit" in Makepeace's actions, because it has failed to enforce the bylaw and the conditions of Makepeace's permits. The complaint also alleges, more generally, that the ERC is failing to function, and is "defunct." The complaint does not allege, however, that the ERC was somehow acting jointly with Makepeace.

The plaintiffs' presuit attempts to obtain relief are also material, as they bear on the defendants' statute of limitations defenses, as well as the plaintiffs' obligation to give twenty-one days' notice before filing suit under c. 214, § 7A. The instant suit was filed on August 11, 2022. Persons associated with the plaintiffs first sent a demand to the ERC over one year earlier, in April of 2021, and again in May and June of 2021. The June 2021 demand letter[7] was a "[d]emand for [e]nforcement" of the earth removal bylaw; although that demand letter references the three solar energy sites (sites 4, 5, and 6), it does not specifically reference sites 1, 2, and 3, nor does it reference c. 214, § 7A. The June 2021 letter also reveals that persons associated with the plaintiffs met with the ERC in April of 2021, after the initial demand, and that on June 1, 2021, an

[7] Copies of the April 2021 and May 2021 demands are not in the record.

attorney for the town responded by letter formally declining to take enforcement action against Makepeace.

The plaintiffs did not file suit in 2021. Rather, on August 9, 2021, and again on March 15, 2022, new demand letters were sent to the town, this time specifying c. 214, § 7A, and stating that the demands were sent on behalf of ten taxpayers. These two c. 214, § 7A, demand letters described allegedly unlawful and unpermitted "commercial mining operations" of Makepeace, much as are alleged in the complaint. The complaint alleges that the ERC ignored and did not respond to these later demands.

Under c. 214, § 7A, the plaintiffs must provide notice "at least twenty-one days" prior to bringing suit. As indicated, the complaint was filed on August 11, 2022, 149 days after the March 15, 2022, demand. In their complaint, the plaintiffs sought (1) an injunction under G. L. c. 214, § 7A, to enjoin Makepeace from continuing earth removal allegedly in violation of the bylaw; (2) mandamus under G. L. c. 249, seeking to order the ERC to require Makepeace to cease and desist earth removal and to restore the property, as well as to order the ERC to issue penalties for violations of the bylaw; (3) a declaratory judgment under G. L. c. 231A, declaring among other things that all earth removal permits issued by the ERC to Makepeace are expired and therefore void; and (4) for enforcement of the bylaw, pursuant to G. L. c. 40, § 21 (17).

A Superior Court judge ultimately dismissed the complaint in its entirety.[8] With regard to the claim under c. 214, § 7A, the judge concluded that the major purpose of the earth removal bylaw was not to prevent or minimize damage to the environment and thus that c. 214, § 7A, did not apply; the judge also held, as additional grounds for dismissal, (1) that claims related to sites 4, 5, and 6 were moot as no earth removal was then "occurring or about to occur,"[9] (2) that the ERC was not a proper defendant under the statute, and (3) that at least some claims were time barred because more than sixty days had passed since the permits for sites 1, 2, and 3 were issued. As to the other claims, the judge ruled that mandamus was not available to order the ERC to take enforcement actions because the ERC was given

[8] Initially, the Superior Court judge treated the defendants' motion to dismiss as a motion for summary judgment, and he allowed it. On reconsideration, the judge vacated the summary judgment and instead allowed the defendants' motion to dismiss.

[9] The plaintiffs now concede that the work at the solar farms on sites 4, 5, and 6 is completed. Because c. 214, § 7A, provides only injunctive relief to prevent or to minimize damage occurring or about to occur, dismissal was appropriate as to these sites, where earth removal activities may have occurred but are no longer occurring. See Nantucket Land Council, Inc. v. Planning Bd. of Nantucket, 5 Mass. App. Ct. 206, 214-215 (1977). The three cranberry bogs and reservoirs (sites 1, 2, and 3) are the only sites now at issue.

broad discretionary authority to issue and extend permits and to monitor earth removal activity, and that G. L. c. 40, § 21, does not provide a right of action to private individuals. This appeal followed.

Discussion. 1. General Laws c. 214, § 7A. The plaintiffs' principal argument is that the judge erred in dismissing their claim under c. 214, § 7A. That statute states in pertinent part,

> "The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, . . . restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment."

G. L. c. 214, § 7A.

An action under § 7A is for injunctive relief or declaratory relief only; it is not an action for damages. To prevail, the plaintiffs must be at least ten persons[10] domiciled within the Commonwealth and must show

[10] Makepeace argues that the plaintiffs no longer constitute ten persons, noting that one of the named individuals died prior to appeal. Makepeace is incorrect, because the complaint identified eleven persons as plaintiffs: ten individuals and a Massachusetts nonprofit corporation. See G. L. c. 214, § 7A ("person" includes "any individual, association, partnership, corporation, company, business organization, trust, estate"). The death of one individual plaintiff between the trial court proceedings and the filing of this appeal accordingly would not

(1) "damage to the environment"

(2) "is occurring or is about to occur,"

(3) that the damage to the environment "constitutes a violation of a statute, ordinance, by-law or regulation,"

(4) that the "major purpose" of the statute, ordinance, bylaw, or regulation so violated is "to prevent or minimize damage to the environment," and

(5) that the defendant is the "person causing or about to cause such damage."

The above statutory language raises a host of interpretative issues that are relevant to the defendants' motion to dismiss. We will begin, however, with the first issue that the judge considered dispositive, which is whether the "major purpose" of the Carver earth removal bylaw is to prevent or minimize damage to the environment. The plaintiffs' theory under § 7A is that Makepeace was violating the earth removal bylaw by removing earth either without a permit or beyond the scope of its permits, that as to sites 1, 2, and 3 those violations were continuing ("occurring"), and that the major purpose of the earth removal bylaw is to prevent environmental damage. The judge concluded, to the contrary, that the major purpose of the bylaw is not to protect against damage to the

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impact the "ten person" requirement, even if we were to assume (which we do not) that the death of a named plaintiff would vitiate standing under the circumstances.

environment, but to ensure safe earth removal and "that the land is left in a safe condition." We do not agree.

a. The alleged damage constitutes damage to the environment. A threshold question is whether the various harms that the plaintiffs allege from the earth removal qualify as "damage to the environment" under § 7A. The statute expressly defines "damage to the environment" -- it is "any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth." G. L. c. 214, § 7A. Although the term "natural resources" is not further defined,[11] the Commonwealth's Department of Natural Resources, as in existence when the statute was first enacted,[12] see St. 1971, c. 732, § 1, defined natural resources as including "forests and all uncultivated flora . . . ; land, soil and soil resources, lakes,

[11] The statute does, however, provide several nonexclusive examples of environmental damage, including "air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites." G. L. c. 214, § 7A.

[12] "[General Laws] c. 214, § 10A (repealed), the predecessor of c. 214, § 7A, and like it in all material respects," was first introduced in 1971. Cummings v. Secretary of the Executive Office of Envtl. Affairs, 402 Mass. 611, 614, 626 (1988). See St. 1971, c. 732, § 1. See also Sierra Club v. Commissioner of the Dep't of Envtl. Mgt., 439 Mass. 738, 739 n.3 (2003) (General Laws c. 214, § 10A [repealed], "now appears as § 7A" after "c. 214 was reorganized in 1973").

ponds, streams, coastal, underground and surface waters; minerals and natural deposits" (emphasis added). G. L. c. 21, § 1, as amended through St. 1968, c. 736, § 1. And the Department of Conservation and Recreation's current definition of "natural resources" includes the same language. See G. L. c. 21, § 1.

The various types of damage alleged in the complaint certainly qualify as damage to the environment under the above definition. Leaving aside the complaint's allegations about the town aquifer and water pollution (which also qualify), the alleged damage to the land and soil resources itself qualifies as damage to the Commonwealth's natural resources. There can be little doubt that the systematic stripping of earth and topsoil -- not to mention tree removal, leading to increased exposure to erosion -- constitutes damage to "soil resources."[13]

The statute itself has been described as "broad" in purpose. See Boston v. Massachusetts Port Auth., 364 Mass. 639, 646 (1974) (statute's "broad statements of purpose are incompatible with a narrow, technical interpretation" that would limit enforcement). Indeed, the legislative history contemplates the statute as addressing "wider targets, larger

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[13] Of course, de minimis earth removal would not qualify. General Laws c. 214, § 7A, states that damage to the environment "shall not include any insignificant destruction, damage or impairment to such natural resources."

aims" and acting as "another weapon in [the] anti-pollution arsenal." 1971 House Doc. No. 5023. With that in mind and taking the allegations of the complaint as true, the plaintiffs have adequately alleged that damage to the environment is occurring or about to occur at sites 1, 2, and 3. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011); Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

b. The bylaw's "major purpose" is to protect the environment. We also conclude that the "major purpose" of the earth removal bylaw is to prevent or minimize such "damage to the environment." General Laws c. 214, § 7A, does not give much direction as to how to evaluate "the major purpose" of a "statute, ordinance, by-law or regulation," nor does the prior case law. The question presents as a question of law, for the courts to decide. The use of the word "the" before "major purpose" indicates that there can be only one; we may not conclude that preventing damage to the environment is one of several "major purposes" of the bylaw.

The bylaw at issue is published by the town of Carver along with its other bylaws, in a sort of compendium. It appears in chapter 9, titled "Environment," and it is bylaw § 9.1, "Earth Removal."[14] The bylaw has a stated "purpose," which is

[14] Following the renumbering of the Carver bylaws in 2024, after this litigation commenced, the earth removal bylaw was

> "to promote the health, safety, and general welfare of the residents of the Town of Carver, and to ensure that permanent changes in the surface contours of land resulting from the removal and regrading of earth materials will leave the land in a safe and convenient condition for appropriate reuse without requiring excessive and unreasonable maintenance or creating danger of damage to public and private property, as well as to provide that earth removal activities shall be conducted in a safe manner and with minimal detrimental effect upon the district in which the activities are located."

Bylaw § 9.1.1.

The basic provisions of the bylaw are (1) it establishes the ERC, (2) it provides that no earth shall be removed in the town of Carver without a permit from the ERC, and (3) it requires an application to remove earth and a site plan with various details, including land contours before, during, and after, the locations of water bodies, surface water flows, and ground water impacts. Notably, the site plan "shall also show a fully complete restoration plan" that complies with sound engineering practices and natural resource conservation standards. Bylaw § 9.1.5c. In granting or denying the permit, (4) the ERC "shall determine that the proposal generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate." Bylaw § 9.1.7a.

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given its own chapter; there is no longer a chapter titled "Environment." See c. 136 of the Code of the Town of Carver (2024).

The Superior Court judge concluded that "the major purpose of the [b]ylaw is to ensure that earth removal is conducted in a safe manner and that the land is left in a safe condition following earth removal, not to prevent or minimize damage to the environment." We do not agree that the bylaw's purpose is narrowly confined to public safety concerns, or that such public safety concerns are the "major purpose" of the bylaw. Rather, the above review shows that the earth removal bylaw is fundamentally about protecting and preserving a basic natural resource -- earth. The bylaw requires review and permitting of earth removal, consideration of the various environmental impacts, and a "fully complete restoration plan" that complies with natural resource conservation standards. Bylaw § 9.1.5c. See Bylaw §§ 9.1.4a, 9.1.5a. The bylaw thus is initiated and permeated by concerns about the environment. While public safety is a concern, public safety is not the "major purpose" where the bylaw requirements extend far beyond public safety.[15]

Our conclusion is consistent with the genesis of such earth removal regulations. "Historically, earth removal regulation

[15] We do not mean to suggest that "public safety" concerns fall in a separate category from environmental concerns. The two often overlap. Environmental regulation is of course a subset of regulation directed at "health, safety, and general welfare," Bylaw § 9.1.1, and environmental protections are often animated by public safety concerns. The statute, however, directs us to determine the "major purpose" of the bylaw, and here it is not limited just to public safety.

was initiated to curb the effects of the uncontrolled stripping away of topsoil and other earth materials." Toda v. Board of Appeals of Manchester, 18 Mass. App. Ct. 317, 320 n.8 (1984). In Beard v. Salisbury, 378 Mass. 435, 439 (1979), the Supreme Judicial Court addressed a local earth removal bylaw in a different context, but while doing so observed that such regulation is directed at "the deleterious effects brought about by unrestrained earth removal." The court quoted at length from its prior opinion in Burlington v. Dunn, 318 Mass. 216, 221, cert. denied, 326 U.S. 739 (1945):

> "The stripping of the top soil from a tract of land is not only likely to produce disagreeable dust and noise during the process, which may be prolonged, but, more important, after it is completed it leaves a desert area in which for a long period of time little or nothing will grow except weeds and brush. It permanently destroys the soil for agricultural use and commonly leaves the land almost valueless for any purpose."

Beard, supra at 439 n.8.

In short, consistent with historical purposes, Carver's bylaw has as its major purpose the protection against damage to the environment. Nothing in the case law discussing the "major purpose" requirement of c. 214, § 7A, suggests a contrary result. The only case previously to address that language in any depth is Wellfleet v. Glaze, 403 Mass. 79, 83 (1988). In that case, the town of Wellfleet invoked c. 214, § 7A, in an effort to prohibit the defendant from mooring his boats over (and on) tidal flats that Wellfleet had licensed to third parties to plant, grow, and take shellfish. See id. at 80-82. Wellfleet claimed that the defendant's actions violated G. L. c. 130, § 67, which imposed penalties for interference with licensed shellfishing, provided the interference was "without the consent of the licensee." See id. at 81 & n.4. The court concluded that the major purpose of c. 130, § 67, was not to prevent or minimize damage to the environment, because the statutory sanctions depended on whether the licensee had consented to the interference; if the Legislature "was primarily motivated by a desire to protect the natural resources of the Commonwealth, it surely would not have limited the statutory sanction only to acts done without the licensee's permission." Wellfleet, supra at 83. The Wellfleet case is plainly distinguishable from this one, because here the earth removal bylaw applies generally to earth removal in Carver, and its enforcement is not dependent on the desires of a private individual. See Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 460 Mass. 366, 379 n.24 (2011) (chapter 214, § 7A, did not apply to alleged violations of statute "that delineates the broad authority of various agencies to construct, maintain, and acquire roadways and boulevards"; statute does not have major purpose to prevent or minimize environmental damage).

c. The "person causing" the environmental damage. The next question is who is a proper defendant in a c. 214, § 7A, claim. The statute provides an injunctive remedy against "the person causing" the environmental damage. Here that person is clearly Makepeace, the entity conducting earth removal.

The same is not true for the defendant ERC, however. The ERC is not removing earth, and it accordingly is not taking the action that is allegedly damaging the environment. The plaintiffs claim that by failing to act in its regulatory capacity the ERC is complicit in Makepeace's damage, but c. 214, § 7A's causation requirement does not encompass a claim against a government body for failing to enforce environmental regulations. Thus, in Cummings v. Secretary of the Executive Office of Envtl. Affairs, 402 Mass. 611, 614-617 (1988), the Supreme Judicial Court held that a c. 214, § 7A, claim would not lie against the Secretary of Environmental Affairs for failing to require an environmental impact report. The court concluded that the statute's language "suggests . . . that the Legislature contemplated only the agency or authority or private person proposing a project, and not the public official who administers the statutory scheme, as 'the person causing or about to cause' environmental damage." Cummings, supra at 616, quoting G. L. c. 214, § 7A. While the statute does apply where the government agency is itself the actor damaging the environment, see Boxford

v. Massachusetts Highway Dep't, 458 Mass. 596, 603-604 (2010), it does not apply to an agency whose only participation is as a regulatory body. The situation might be different if the government agency were plausibly alleged to be a joint venturer or conspirator together with the primary actor, but that is not what is alleged here. Accordingly, the c. 214, § 7A, claim against the ERC was properly dismissed.

d. The statute of limitations. Makepeace also argues that the plaintiffs' claims are barred by a sixty-day statute of limitations, which Makepeace purports to borrow from the statute of limitations applicable to actions for certiorari. See G. L. c. 249, § 4. The theory is that the plaintiffs' claims are actually challenging the issuance of the permits by the ERC, that such issuances are challengeable by certiorari, and that c. 214, § 7A, is not a vehicle to avoid the applicable statute of limitations.

If the plaintiffs' claims were limited to challenging the issuance of the ERC permits, we might well agree that the sixty-day limitations period applies. There is authority suggesting that the limitations period applicable to a c. 214, § 7A, claim is the period that would apply to challenging a violation of the statute, ordinance, bylaw, or regulation at issue. See Miramar Park Ass'n, Inc. v. Dennis, 480 Mass. 366, 375 n.9 (2018). Compare Canton v. Commissioner of the Mass. Highway Dep't, 455

Mass. 783, 794-795 (2010). But the plaintiffs' claims are not limited to challenging the issuance of permits. As to Makepeace, the plaintiffs claim that it is operating without permits, or beyond the scope of the issued permits, and that those bylaw violations are ongoing.

We cannot conclude on this record that the plaintiffs' claims are time barred. In addressing this question, we first have to decide a thorny legal question, which is what statute of limitations should apply to the plaintiffs' c. 214, § 7A, claim -- if any -- under these circumstances. Section 7A requires that the plaintiffs notify the agency responsible for enforcing the bylaw, here the ERC, "at least twenty-one days" before filing suit. If as here the agency fails to act after notice, how long should the ten taxpayers then have to bring their complaint? Such plaintiffs essentially seek to stand in the shoes of the government enforcement authority. One place to look for guidance would be whether there is any limitation on how long the government has to act with respect to a bylaw violation. Here, however, the earth removal bylaw does not provide any deadline by which the ERC must act to enforce. Moreover, by definition, under c. 214, § 7A, the plaintiffs must be challenging ongoing or imminent damage to the environment, so at least some of the common concerns animating statutes of limitation, such as staleness or the unavailability of witnesses, may not apply. These various considerations speak against a tight filing deadline, such as the sixty days proposed by the defendants. Cf. Worcester v. Gencarelli, 34 Mass. App. Ct. 907, 908 (1993) (two-year statute of limitations for claims under G. L. c. 131 did not apply to c. 214, § 7A, claim by city, where claimed filling of wetland "is a continuing violation"). And where ongoing environmental damage is at issue and the government has been notified and not acted, it is not clear why the public (the ten taxpayers) should be precluded from filing -- unless the delay is unreasonable, such that a new notice to the responsible government agency should be required. Balancing these various considerations, we conclude that a delay in filing suit of less than six months likely would not be unreasonable.

Here the delay was 128 days after the twenty-one-day notice period had passed. We cannot say that this delay was unreasonable as a matter of law.[16]

2. Mandamus. The plaintiffs also sought relief in mandamus under G. L. c. 249 to compel the ERC, among other things, to enforce the bylaw and to issue penalties for every violation established. The judge dismissed this claim,

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[16] We note that there is a further issue raised by the allegations here, which is whether Makepeace can be liable under c. 214, § 7A, as to any actions it takes that are authorized by permit (as opposed to being unpermitted or beyond the scope of any permit). To violate c. 214, § 7A, the environmental damage must "constitute[] a violation of . . . [the] by-law" at issue.

reasoning that mandamus was not available where the plaintiffs were seeking to compel the ERC to perform a discretionary act. We agree.

The law is clear that mandamus is only available to compel a government official to perform acts that do not involve a significant exercise of discretion. See Boxford, 458 Mass. at 606. The decision whether to initiate a government enforcement proceeding historically has been viewed as just such a discretionary decision. See id. (mandamus claim dismissed where agency possesses broad discretion "to act through regulations, through specific orders, or not to act at all"). Indeed, the discretionary nature of such decisions was recognized years ago by the United States Supreme Court in Heckler v. Chaney, 470 U.S. 821, 831-832 (1985), when it held that administrative decisions not to take enforcement action were generally unsuitable to judicial review and thus presumptively unreviewable in the Federal courts.[17] See Commonwealth v. Boston

[17] The Heckler court explained,

> "The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the

Edison Co., 444 Mass. 324, 334 (2005) ("the proper exercise of enforcement discretion . . . is not ordinarily judicially reviewable").

It is possible that a particular law at issue could be sufficiently directive and unequivocal that an agency might have no discretion but to take an identified enforcement step, in which case mandamus might be available. "In the absence of an alternative remedy, relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform." Lutheran Serv. Ass'n of New England, Inc. v. Metropolitan Dist. Comm'n, 397 Mass. 341, 344 (1986). See Massachusetts Soc'y of Graduate Physical Therapists, Inc. v. Board of Registration in Med., 330 Mass. 601, 603-606 (1953) (mandamus proper remedy where board required by statute to register certain applicants and instead refused registration). Cf. Brady v. Board of Appeals of Westport, 348 Mass. 515, 519-522 (1965) (mandamus proper remedy to compel local official to enforce zoning bylaw). But that is not this case. Here there is no such clear directive in the bylaw.

> action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."

Heckler, 470 U.S. at 831-832.

Among other things, the enforcement section of the bylaw predicates enforcement on whether the ERC "believes" that there is a violation of approved plans, or "believes" that the conditions on a premises "constitute a nuisance or public danger." Bylaw § 9.1.9a. As the mandamus claim seeks to compel a discretionary act, it fails as a matter of law.

3. Enforcement of the bylaw. The plaintiffs also purported to state a claim under G. L. c. 40, § 21 (17), seeking to have the court enter an order directly enforcing the bylaw. General Laws c. 40, § 21, authorizes towns to make ordinances and bylaws, and to "affix penalties for breaches thereof." It accordingly is directed to providing certain legislative authority to towns, as well as the authority for towns to enforce what they have prohibited or required. Paragraph 17 of c. 40, § 21, specifically authorizes bylaws as to earth removal, and grants the Superior Court "jurisdiction in equity to compel compliance with any ordinance or by-law."

The judge dismissed this claim on the ground that G. L. c. 40, § 21 (17), does not provide a private right of action -- that is, it provides for towns to take enforcement actions, but not private individuals. We agree. "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Unitrode Corp. v. Dynamics Corp. of Am., 379 Mass. 487, 491

(1980), quoting Transamerica Mtge. Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979). "We will not construe a statute to establish a private right of action without express terms or clear legislative intent to that effect." Nordberg v. Commonwealth, 96 Mass. App. Ct. 237, 239 (2019). We do not construe c. 40, § 21 (17), as providing for private enforcement of the local bylaws that are there authorized. Compare Fratus v. Harwich, 100 Mass. App. Ct. 27, 28-30 (2021) (no private right of action for citizen seeking to enforce statute requiring road repairs).

4. Declaratory judgment. The plaintiffs also sought declaratory judgment under G. L. c. 231A. However, the plaintiffs have not identified any legal right as to which the court may make a declaration, other than that provided to them as a ten residents group under c. 214, § 7A. Accordingly, the plaintiffs' request for a declaratory judgment is only viable as a remedy potentially available to them under c. 214, § 7A.[18] See Columbia Plaza Assocs. v. Northeastern Univ., 493 Mass. 570, 589 (2024). This c. 231A count does not state a separate claim, and was properly dismissed.

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[18] The declaratory relief that the plaintiffs seek under the heading of their c. 231A claim may instead be sought in the context of their c. 214, § 7A, claim, but we express no view on whether any of the specific declarations they seek is available, as those issues have not been briefed.

Conclusion. As against the defendants, A.D. Makepeace Company and Read Custom Soils LLC, we vacate so much of the judgment as dismisses the plaintiffs' complaint seeking declaratory and injunctive relief under G. L. c. 214, § 7A, as to sites 1, 2, and 3. We affirm the judgment in all other respects. The case is remanded to the Superior Court for further proceedings consistent with this opinion.[19]

So ordered.

[19] Defendants A.D. Makepeace Company and Read Custom Soils LLC's request for attorney's fees is denied.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-666

TROY CURRENCE & others

vs.

A.D. MAKEPEACE COMPANY & others.

Pending in the Superior

Court for the County of Plymouth

Ordered, that the following entry be made on the docket:

As against the defendants, A.D. Makepeace Company and Read Custom Soils LLC, so much of the judgment as dismisses the plaintiffs' complaint seeking declaratory and injunctive relief under G. L. c. 214, § 7A, as to sites 1, 2, and 3 is vacated. The judgment is affirmed in all other respects. The case is remanded to the Superior Court for proceedings consistent with the opinion of the Appeals Court.

By the Court,

Paul Tuttle, Clerk

Date September 19, 2025.

G. L. c. 214, § 7A: Damage to the environment; temporary restraining order as additional remedy; definitions; requisites; procedure

Section 7A. As used in this section, ''damage to the environment'' shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

As used in this section ''person'' shall mean any individual, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or any political subdivision thereof, any administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representatives, agents or assigns.

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

No such action shall be taken unless the plaintiffs at least twenty-one days prior to the commencement of such action direct a written notice of such violation or imminent violation by certified mail, to the agency responsible for enforcing said statute, ordinance, by-law or regulation, to the attorney general, and to the person violating or about to violate the same; provided, however, that if the plaintiffs can show that irreparable damage will result unless immediate action is taken the court may waive the foregoing requirement of notice and issue a temporary restraining order forthwith.

It shall be a defense to any action taken pursuant to this section that the defendant is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the plaintiffs demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction.

Any action brought pursuant to the authorization contained in this section shall be advanced for speedy trial and shall not be compromised without prior approval of the court.

If there is a finding by the court in favor of the plaintiffs it may assess their costs, including reasonable fees of expert witnesses but not attorney's fees; provided, however, that no such finding shall include damages.

The court may require the plaintiffs to post a surety or cash bond in a sum of not less than five hundred nor more than five thousand dollars to secure the payment of any costs which may be assessed against the plaintiffs in the event that they do not prevail.

Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause of action herein authorized shall be in addition to any such right or remedy.

noncriminal disposition process as provided in M.G.L. c. 40, §21D and the Town's non-criminal disposition bylaw. If non-criminal disposition is elected, then any person who violates any provision of this Bylaw shall be subject to a penalty in the amount of $100.

8.6.11.3. Any person found violating any provision of this Bylaw may be penalized by indictment or complaint brought in the District Court. Except as otherwise provided by law and as the District Court may see fit to impose, the maximum penalty for each violation of offense shall be $100.

8.6.11.4. The Town may enforce this Bylaw or enjoin violations thereof through any lawful process, and the election of one remedy shall not preclude enforcement through other lawful means.

8.6.11.5 Each day a violation exists shall be considered a separate offense.

8.6.12. SEVERABILITY
The provisions of this chapter shall be severable, and if any phrase, clause, sentence or provision of these regulations shall, for any reason, be held invalid or unconstitutional, the validity of the remainder of these regulations shall not be affected thereby.

CHAPTER 9 ENVIRONMENT

9.1 EARTH REMOVAL

9.1.1 PURPOSE

The purpose of this by-law is to promote the health, safety, and general welfare of the residents of the Town of Carver, and to ensure that permanent changes in the surface contours of land resulting from the removal and regrading of earth materials will leave the land in a safe and convenient condition for appropriate reuse without requiring excessive and unreasonable maintenance or creating danger of damage to public and private property, as well as to provide that earth removal activities shall be conducted in a safe manner and with minimal detrimental effect upon the district in which the activities are located. This by law pertains to all commercial mining, agricultural excavation and excavation due to construction that is not exempt pursuant to Section 9.1.8 of this by law.

9.1.2 DEFINITIONS

Earth: all forms of soil, including but not limited to clay, gravel, hard pan, loam, peat, rock, or sand.

Lot/land: a single parcel of land lying in a single body and separated from the owner's or other party's contiguous land by property lines described in a recorded plan or deed.

Removal: stripping, excavating, commercial mining, agricultural excavation, excavation due to construction or blasting earth and rearranging it on the same lot or carrying it away from that lot.

Property line: a line separating one lot from another.

Owner: the owner of the land from which earth is sought to be removed, including individual owners, realty trusts, companies and corporations, or other legal entities.

Abutters and other parties in interest: abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the site as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or Town.

Restoration: after an earth removal activity, returning the land contours to safe and usable condition and planting appropriate groundcover, or taking other measures pursuant to Section 9.1.5c of this by law.

Commercial Mining: The business of extracting ore, earth or minerals from the ground for sale or profit unless conditionally exempted under Section 9.1.8.

Agricultural Excavation: The process of removing earth or other materials that is necessary and incidental to prepare a site for specific agricultural use. Agricultural excavation may include the creation of wetland resource areas such as ponds, canals, cranberry bogs, and land subject to flooding as defined under the M.G.L. Ch. 131 §40 and as defined in Massachusetts Wetlands regulations 310 CMR 10.00.

9.1.3 EARTH REMOVAL COMMITTEE

9.1.3a. There is hereby established a seven (7) member Earth Removal Committee (E.R.C.). All members must be residents of the Town of Carver. The E.R.C. will consist of three (3) representatives of the Board of Selectmen at which no time shall more than two (2) of the Board of Selectman's representatives be actual members of the Board of Selectman, and four (4) additional members to be appointed by the Town Administrator subject to Section 9.1.3b and endorsed by the Board of Selectmen.

When the E.R.C. is established, one member shall be appointed for a term of one year, one member for a term of two years, and two members for a term of three years, and their successors shall be appointed for terms of three years.

9.1.3b. The membership of the E.R.C. shall be made up as follows:
Three (3) representatives of the Selectmen;
Two (2) members from three (3) nominees submitted by the Cape Cod Cranberry Growers Association;
One (1) member from nominees submitted by the Carver Board of

Health.
One (1) member of the trucking industry, nominated by the E.R.C.

In the absence of nominees from one or more of these groups, the Town Administrator shall choose members without designation. In no case shall more than two of the appointed members represent the same trade, profession, occupation, or business interest. All members shall serve without compensation and must be endorsed by the Board of Selectman.

9.1.3c. No committee action shall be taken without a quorum of four (4) members, (except to continue a hearing in the absence of a quorum), and no decision shall be made without the vote of a majority of the members present.

9.1.3 d. The committee shall meet, at a minimum, once a month at a place and time to be determined by the committee.

9.1.4 EARTH REMOVAL PERMIT REQUIREMENTS

9.1.4a. Except as provided otherwise in this By-law (see Section 9.1.8), no earth shall be removed from any lot in the Town of Carver without the issuance of a permit from the E.R.C.

9.1.4b. Before a permit for earth removal can be issued or denied, application shall be submitted on such forms or in such manner as the E.R.C. may specify in its rules and regulations. The regulations adopted shall include, but are not limited to: the method of application, filing fees, required exhibits, site plans, site plan review fees, monitoring fees, bond requirements, and the means of compliance, inspection and administration. This By-Law shall be effective notwithstanding the absence or invalidity of rules adopted by the E.R.C.

9.1.4 c. An expedited permit, as outlined in the E.R.C.'s Rules and Regulations, may be issued by the E.R.C provided that the proposed excavation is more than 1000 cubic yards per year, and less than 5,000 cubic yards per year. If deemed necessary by the E.R.C., an expedited permit may be required to have a Public Hearing as outlined in Section 9.1.6 of this by law.

9.1.5 SITE PLAN

9.1.5a. A site plan shall be submitted in the quantities and in the form required by the rules and regulations of the E.R.C. Such plan shall be submitted by the E.R.C. to the Planning Board, Agricultural Commission, Conservation Commission, Board of Health, Board of Selectmen, and Fire Department, Police Department, D.P.W., Board of Assessors and other officers and official boards of the Town for review and comment, as the E.R.C. may direct. A plan shall also be filed with the Town Clerk.

9.1.5b. The site plan shall be prepared by a registered professional Engineer.

9.1.5c. The plan shall include, but not be limited to, pertinent information on the following: lot boundaries, names of abutting owners and other parties in interest, streets contiguous to the site, vegetation, existing and proposed roadways, existing and proposed buildings, location of sources of water, wetlands, primary recharge areas, the Natural Heritage & Endangered Species Program Priority Habitat of Rare and Endangered Species, sewage disposal, parking, loading areas, easements and rights-of-way, walls, fences, ditches, streams, ponds, and known permanent monuments, and other cross-sections, profiles, and contour maps needed to describe the proposal. The site plan shall show existing intermediate and final ground levels with those of adjacent properties and shall indicate natural surface water flows and drainage ditches if any. The site plan shall also show groundwater elevations before and after removal. The E.R.C. may require drainage computations based on D.E.P. drainage program TR-55 and a sediment control plan for during and after the operation with phasing as required. These computations shall indicate 10 and 100-year storm effects. The plan shall also show a fully complete restoration plan which complies with sound engineering practices and either the Natural Resources Conservation Service Conservation Practice Standard "Land Reclamation, Currently Mined Land", Code 544 or the Natural Resources Conservation Service Conservation Practice Standard "Critical Area Planting" Code 342, as determined by the E.R.C. These requirements are on file at the Board of Selectmen's Office and the Town Clerk's Office.

9.1.5 d. In certain instances as outlined in Section 9.1.4c of this By-Law, the applicant shall be allowed to submit an abbreviated application instead of the full application and site plan described above. The E.R.C. shall specify the exact form of the abbreviated application in its rules and regulations. The abbreviated application shall include, but is not limited to: the name of the owner, the location of construction, the volume of earth to be removed, the rate and time frame of removal, the removal contractor and the time frame of restoration. The application shall be designed in such a way that the applicant can file without assistance from an engineer or other professional. Within 60 days of the filing, the E.R.C. may notify the applicant that the circumstances of the project warrant a full permit application.

9.1.6 PUBLIC HEARING

9.1.6 a. The E.R.C. shall, within 65 days after the filing of a full or abbreviated application hold a public hearing on said application. No permit shall be issued or denied until the public hearing has been held. Notification of the public hearing shall be advertised for two consecutive weeks in a newspaper generally circulated in Town beginning at least 14 days before such hearing, and by written notice to the Board of Health, Board of Selectmen, Board of Assessors, Agricultural Commission, Conservation Commission, Planning Board, Police, and Department of Public Works. The applicant shall notify all abutters and other parties in interest of the hearing by certified mail and present receipts to the E.R.C. Advertising and related expenses shall be borne by the applicant, in addition to filing fees.

9.1.7 EARTH REMOVAL PERMIT CONDITIONS

9.1.7a. The E.R.C. shall determine that the proposal generally conforms to the principles of good engineering, sound planning, correct land use, and provides for the proper and reasonable reuse of available topsoil if appropriate.

9.1.7b The applicant shall be required to cover all costs for review of the proposal by a Registered Engineer or other expert as the Earth Removal Committee sees fit and chosen by the Earth Removal Committee. The applicant shall also be required to cover the cost of monitoring the project by an agent of the committees' choosing.

9.1.7c A fifty (50) foot undisturbed buffer along all property lines must be maintained at all times. The E.R.C. may in certain instances provide relief from this restriction, if the applicant shows a significant hardship and /or shows that the proposed excavation would not have a detrimental impact on the abutting property.

9.1.7d The E.R.C. shall set hours of operation, specify special truck routes, require bonds for restoration, road repair or other purposes, require monitoring fees, and impose safety-related conditions. The board shall establish provisions for monitoring the permitted earth removal activity on a regular basis, and may, to the extent permitted by law, enter the premises at any time to inspect for compliance with the conditions set forth in the permit.

9.1.7e A bond or other performance guarantee acceptable to the E.R.C. shall be established by the E.R.C. based on the estimated cost of restoration for the project as may be deemed appropriate and shall be held by the Town of Carver until all work has been completed and conditions of the special permit have been met. The E.R.C. shall require the applicant to submit status reports every 90 days to the E.R.C. on an appropriate form as outlined in the E.R.C. rules and regulations and shall require the site to be inspected by the E.R.C. authorized agent and a report filed to the E.R.C. at the end of every 12 month period.

9.1.7f In the event that the subject property is not used for said agricultural purposes after the removal, the E.R.C. may require that a bond or other performance guarantee acceptable to the E.R.C., pursuant to Section 9.1.7e, be provided, based on the estimated cost of restoration that is consistent with NRCS Conservation Practice Standard "Land Reclamation, Currently Mined Land," Code 544.

9.1.7g Applications for permits may be granted, denied, or granted in part and denied in part. The E.R.C. shall have 45 days to render a decision after the last session of the public hearing closes, provided that any continuation of the hearing beyond the date and time noticed in the advertised hearing notice shall be announced at the hearing for a date, time, and place certain. The conditions of the permit, including the expiration date, shall be clearly set forth on the permit. The E.R.C. shall file its decision with the Town Clerk and notify the applicant of its decision within 21 days after the decision is made at a Public Meeting of the E.R.C.

9.1.7 h No permit shall be issued for a period in excess of 12 months. However, permits shall be extended beyond 12 months if the E.R.C. is satisfied with all quarterly reports regarding the project and that the work is carried out under the plans, specifications, and conditions previously approved after public hearing, and does not entail earth removal of a larger quantity or from a larger land area than allowed in the original permit. No project may be extended beyond a five (5) year period without a full hearing of the E.R.C.

9.1.8 EARTH REMOVAL CONDITIONAL EXEMPTIONS

An earth removal permit shall not be required for the following activities, provided the operation does not constitute a nuisance or danger to the public, and conforms to accepted engineering and/or agricultural practices:

A. Earth removal involving less than 200 cubic yards for a single or two family lot or less than 1000 cubic yards for an industrial, multi-family and/or commercial project.

B. Removal necessary for the reconstruction of existing streets and the installation of utilities;

C. Removal performed in connection with any Town, state and/or federal projects;

D. Removal necessary for normal cranberry related activities or other agricultural uses as defined under M.G.L. c131, s 40, 310 CMR 10.04: (a) land in agricultural use, (b) normal maintenance of land in agricultural use, and (c) normal improvement of land in agricultural use. This agricultural-related work is further defined as earth necessary to maintain or improve the applicants/owner's contiguous or non-contiguous land for agricultural purposes, and does not include the removal of earth for sale, trade or other considerations. This practice must use best management practices as outlined in the Natural Resources Conservation Service Conservation Practice Standard "Land reclamation, Currently Mined Land", Code 544 or the Natural Resources Conservation Service Conservation Practice Standard "Critical Area Planting" Code 342, as determined by the E.R.C.. Notification of this practice must be given to the E.R.C. in a timely manner. This also includes the removal of earth for sale, trade or other considerations, under this section, less than 1,000 cubic yards per year.

9.1.9 GENERAL PROVISIONS

9.1.9a. If the E.R.C. believes that there is a violation of approved plans, specifications and conditions, or believes that the actual conditions or operations on the premises constitute a nuisance or public danger, the E.R.C. shall order the operator to immediately cease and desist specific activities or the entire operation, pending a review at a posted public meeting after at least 48 hours notice thereof to the operator, which meeting shall be held within 7 days following the initial E.R.C. order. If the violation is immediately brought into compliance, as determined by the E.R.C. and/or their agent, then no public hearing will be necessary. However, the applicant shall have the right to request a public hearing at any time during the review of any purported violation of approved plans. If, after review, the E.R.C. is satisfied that the alleged violation, nuisance, or public danger was corrected or unfounded, it shall revoke or revise its cease and desist order as appropriate. If after such review the E.R.C. finds that the permit conditions may be inadequate to protect the public interest and to carry out the purpose of this By-Law, or that a conditionally exempt earth removal activity may require the imposition of conditions to protect the public interest, it shall schedule a public hearing upon the same notice and hearing requirements as for an original permit. Seven (7) days after the operator receives certified mail notice, the E.R.C. may revise, revoke, or continue the permit or permit conditions after such hearing, or may impose permit conditions on a previously exempt operation.

9.1.9b. All existing earth removal operations shall comply with this By-Law after sixty days of the effective date of the Annual Town Meeting vote hereof, or prior to the applicant's annual review which ever comes later and no further earth shall be removed after that date without a permit hereunder. The Earth Removal Committee shall hear and decide all applications from existing earth removal operations before the expiration of sixty days following the effective date of this By-law, if a complete application thereof is received by the Earth Removal Committee within thirty days following said effective date.

9.1.9c. The Enforcement Officer for the provisions of this By-Law shall be the E.R.C. or their designee of the Town of Carver.

9.1.9d. Criminal Penalty. Any person who violates any provision of this by-law, regulation, order or permit issued there under, shall be punished by a fine of not more than $100.00 each day or part thereof that such violation occurs or continues shall constitute a separate offense.

9.1.9e. Non-Criminal Disposition. As an alternative to criminal prosecution or civil action, the Town may elect to utilize the non-criminal disposition procedure set forth in M.G.L. Ch. 40 §21D and Section 10.4 of the Town of Carver By-laws, in which case Zoning Enforcement Officer of the Town shall be the enforcing person. The penalty for the 1st violation shall be $100.00. Each day or part thereof that such violation occurs or continues shall constitute a separate offense.

9.1.9f. If any earth shall be removed without obtaining earth removal permit or otherwise in violation of this section, the E.R.C. may order the restoration of the property involved in accordance with the provisions of this section. Such an order of restoration will not constitute a waiver of any other fines or penalties for such violations. Anyone aggrieved by such order may within seven days of the receipt thereof may request a hearing before the E.R.C. to be held within 30 days. At such hearing the Board may modify, rescind, or uphold its order. The Board's order, if not appealed within seven days of receipt, or as modified, rescinded, or upheld after hearing shall be deemed final action by the E.R.C.

9.1.9h. The provisions of this By-Law are severable; and if any provision or application of such provision to any person or circumstance is held invalid or unconstitutional, this shall not affect the remaining provisions.

9.2. WETLANDS PROTECTION

9.2.1 GENERAL PROVISIONS

9.2.1.1 Introduction

These regulations are promulgated by the Carver Conservation Commission pursuant to the authority granted to the Commission under Massachusetts General Law Chapter 40, Section 8C.

9.2.1.2 Purpose

The purpose of this By-law is to protect the wetlands, related water resources, and adjoining land areas in the Town of Carver by controlling activities deemed by the Carver Conservation Commission likely to have a significant or cumulative effect upon wetland values, including but not limited to the following:

a. Public or private water supply,
b. Groundwater and groundwater quality,
c. Surface water and surface water quality,
d. Flood control,
e. Erosion and sedimentation control,
f. Prevention of water pollution,
g. Storm drainage,
h. Fisheries,
i. Wildlife habitat,
j. Recreation,
k. Agriculture,
l. Aesthetics,
m. Fish/shellfish habitat,
n. Rare plant and animal species,
o. Riverfront areas.

In addition, the Commission shall provide clear guidance to applicants regarding the policies that the Commission has determined are necessary to protect wetland Resource Areas based upon Carver's particular topography and hydrology, by the unique and special value these resource areas have to the Carver residential and agricultural community, and the significant past experience of the Commission with wetlands protection.

order, if not appealed within seven days of receipt, or as modified, rescinded, or upheld after hearing shall be deemed final action by the E.R.C.

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k. Agriculture,
l. Aesthetics,
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n. Rare plant and animal species,
o. Riverfront areas.

In addition, the Commission shall provide clear guidance to applicants regarding the policies that the Commission has determined are necessary to protect wetland Resource Areas based upon Carver's particular topography and hydrology, by the unique and special value these resource areas have to the Carver residential and agricultural community, and the significant past experience of the Commission with wetlands protection.

9.2.1.3 Statement of Jurisdiction

(1) Except as permitted by the Commission as provided by this By-law, no person shall remove, fill, dredge, alter or build upon or within 100 feet of: any bank, wetland, marsh, swamp, bog, beach, or wet meadow, pond or lake; any land under said waters; any land subject to flooding or inundation by groundwater or surface water; or the 100 year flood plain.

(2) Except as permitted by the Commission as provided by this By-law, no person shall remove, fill, dredge, alter, or build upon or within 200 feet on each side of perennial rivers and streams.

(3) Except as permitted by the Commission through the issuance of a variance as defined in Section V of this By-law and the issuance of a permit as defined by Section II of this By-law, no person shall build or enlarge any structure, parking lot or impervious surface upon or within 65 feet of: any wetland, marsh, meadow, bog or swamp; any bank; any lands bordering on any lake, river, pond, stream or creek; or any land under said waters; or any land subject to flooding or inundation by groundwater or surface water.

(4) Except as permitted by the Commission through the issuance of a variance as defined by Section V of this By-law and the issuance of a permit as defined by Section II of this By-law, no person shall build any residential dwelling within 100 feet of a cranberry bog.

9.2.1.4 Exceptions: Public Utilities and Emergency Repairs

(1) The permit and application required under this By-law shall not be required for maintaining, repairing or replacing an existing and lawfully place structure or facility used in the service of the public to provide electric, gas, water, sanitary sewer, storm drainage, public roadway, telephone, telegraph, or other telecommunication services, provided that the structure or facility is not substantially changed or enlarged.

(2) Written notice must be given to the Commission at least 14 days prior to the commencement of such work and written permission must be granted by the Commission before any work begins.

(3) The permit application process required by these by-laws shall not be required for emergency work necessary for the protection of the health or safety of the public provided that the work is performed or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof.

(4) The Commission shall be notified prior to the commencement of emergency work or within 24 hours after commencement in order to certify the work as an emergency project and that the work is performed only for the time and place certified by the Commission for the limited purpose to abate the emergency.

9.2.2 FILING PROCEDURES

9.2.2.1 Request for Determination of Applicability

(1) A Request for Determination of Applicability shall be submitted to the Commission by certified mail or hand delivery to the Commission office located at the Town Hall.

(2) The Request for Determination of Applicability shall be in the form shown in the Appendix marked "Form A".

(3) The Request for Determination of Applicability shall be accompanied by 4 complete copies the applicant's plan which should include sufficient information to enable the Conservation Commission to determine the applicable scope of the project. The Commission may request up to 4 more copies of plans for each project.

(4) The Request for Determination of Applicability shall be accompanied by a check or money order made payable to the Town of Carver for $35.00 to cover administrative costs.

(5) The Request for Determination of Applicability shall be accompanied by a check or money order made payable to the local newspaper designated by the Commission to cover the publication costs required in accordance with the open meeting law, M.G.L. c. 39, sec.23B.

(6) The Request for Determination of Applicability shall be accompanied by a certification in the form of an affidavit of service shown in the Appendix marked "Form B" informing the Department of Environmental Protection and the owner, if the owner is not the applicant, that a determination is being requested under M.G. L. c. 131, sec. 40.

(7) The Conservation Commission shall hold a public hearing within 21 days of its determination that the applicant's filing is complete. Prior to making such determination, the Conservation Commission may request additional information pertinent to the application.

9.2.2.2 Notice of Intent

(1) A Notice of Intent shall be submitted to the Commission by certified mail or by hand delivery to the Commission office located at the Town Hall.

(2) A Notice of Intent shall be in the form shown in the Appendix as "Form C".

(3) The Notice of Intent shall be accompanied by 8 complete copies of the applicant's plan, which should include sufficient information to enable the Commission to determine the applicable scope of the project.

(4) The Commission at all times reserves the right to require that applicant's Notice of Intent be submitted by a professional person such as a land surveyor or civil engineer.

(5) The Notice of Intent shall be accompanied by a filing fee the amount of which shall be determined by 801 CMR 4.02(310) (Executive Office for Administration and Finance) plus an additional cost of $70.00 to cover administrative expenses. Payment shall be in the form of a check or money order.

(6) The Notice of Intent shall be accompanied by a check or money order made payable to the local newspaper designated by the Commission to cover the publication costs required in accordance with the open meeting law, M.G.L. c. 39, sec. 23B.

(7) The Commission shall have the authority to deny any project in which it determines that the application is incomplete or requires additional information not provided by the applicant.

(8) Any person filing a Notice of Intent with the Commission shall provide the Commission with an affidavit confirming that all appropriate town officials, committees, or boards having joint jurisdiction over the proposed project have been provided with a copy thereof by certified mail or hand delivery.

(9) The Commission shall not take final action pursuant to a Notice of Intent until all officials and boards having joint jurisdiction over the proposed project have had at least 14 days from receipt of notice to file written comments and recommendations with the Commission.

(10) The Commission shall have the authority to continue the hearing to a date certain announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information offered by the applicant and deemed necessary by the Commission in its discretion or by other town boards and officials, as appropriate.

9.2.2.3 Notice To Abutters and Property Owners

(1) Any person filing a permit application with the Commission shall also give written notice thereof, by certified mail or hand delivery, to all abutters using the most recent applicable tax list of the assessors.

(2) Abutters shall include owners of land directly opposite on any public or private street or way, and the abutters to abutters within 100' of the property line of the applicant, including in any other municipality.

(3) The notice to abutters shall include a complete copy of the applicant's plan if the Commission so requests or shall state where copies may be examined or obtained by the abutters.

(4) The applicant shall submit a complete copy of both the permit application and the determination by the Commission regarding the application to the property owner and any other persons determined by the Commission as eligible to receive such information.

(5) The applicant shall inform all persons designated by the Commission as land owners other than the applicant, abutters, or persons determined by the Commission to be eligible to receive such information of the time and location of the public hearing scheduled by the Commission. Notice shall be given by certified mail or hand delivery at least 14 days prior to the public hearing.

(6) The applicant shall provide the Commission with an affidavit confirming that all appropriate person or persons have been provided with the appropriate notice and plans as determined by the Commission.

9.2.2.4 Consultant Fee

(1) Upon receipt of a permit application or request for determination of applicability, or at any point during the hearing process, the Commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the Commission for specific expert engineering and other consultant services deemed necessary by the Commission to come to a final decision on the application. This fee is called the "Consultant Fee." The specific consultant services may include, but are not limited to, performing or verifying the accuracy of resource area survey and delineation; analyzing resource area functions and values, including wildlife habitat evaluations, hydro geologic, and drainage analysis; and researching environmental or land use law.

(2) The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision. If a fund for consultant expenses and fees is authorized by the town meeting, or by any general or special law, the applicant's fee shall be put into such fund, and the Commission may draw upon that fund for specific consultant services approved by the Commission at one of its public meetings. Any unused portion of the consultant fee shall be returned to the applicant unless the Commission decides at a public meeting that additional services will be required.

(3) The exercise of discretion by the Commission in making its determination to require the payment of a consultant fee shall be based upon its reasonable finding that additional information acquirable only through outside consultants would be necessary for the making of an objective decision. Any applicant aggrieved by the imposition of, or size of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

(4) The Commission may waive the filing fee, consultant fee, and costs and expenses for a permit application or request for determination filed by a government agency.
(5) The maximum consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be according to the following schedule:

Project Cost		Maximum Fee
Up to	$100,000	$500
$100,001	$500,000	$2,500
$500,001	$1,000,000	$5,000
$1,000,001	$1,500,000	$7,500
$1,500,001	$2,000,000	$10,000

Each additional $500,000 project cost increment (over $2,000,000) shall be charged an additional $2,500 maximum fee per increment.
(6) The project cost means the estimated, entire cost of the project including, but not limited to, building construction, site preparation, landscaping, and all site improvements. The consultant fee shall be paid pro rata for that portion of the project cost applicable to those activities within resource areas protected by this by-law. The project shall not be segmented to avoid being subject to the consultant fee. The applicant shall submit estimated project costs at the Commission's request, but the lack of such estimated project costs shall not avoid the payment of the consultant fee."

9.2.2.5 Rules and Regulations

After due notice and public hearing, the Commission may promulgate rules and regulations to effectuate the purposes of this section. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effects of this section.

9.2.3 PLANS

9.2.3.1 General

The applicant shall provide the following information upon submission of the application:

1. All drawings shall be drawn with the title designating the name of the project, location and names of the person or persons preparing the drawings, and the date prepared, including the last revision date

2. Drawings shall be stamped and signed by a duly qualified Registered Land Surveyor of the Commonwealth of Massachusetts. Plans depicting proposed drainage or septic systems must be stamped by a Registered Professional Engineer.

3. An 8 ½" x 11" photocopy of the U.S.G.S. quad sheet, showing location of the proposed activity and the outline of the area in which the activity is located.

4. An 8 ½" x 11" section of the Town of Carver property map on which the site of the proposed activity is outlined in red.

9.2.3.2 Technical Data

The technical data shall be in narrative form with calculations submitted as necessary to substantiate the designs proposed and shall include:

1. A description of any alterations to the 100 year flood storage capacity of the site. If a change of flood storage capacity is proposed, demonstrate compensatory storage at every elevation in the flood plain.

2. Maximum groundwater elevations must be given. The calendar dates of measurement, samplings and percolation tests shall be included.

3. Soil characterizations in representative portions of the site, including depth of peat, muck and organic matter in wetland areas.

4. A storm water management plan and calculations of runoff characteristics based on the following criteria:
   a. on-site drainage systems - 10 year
   b. roadway cross-culverts - 25 year
   c. retention/detention - 2 year & 100 year

5. Runoff characteristics should be calculated for pre- and post development conditions using the standard methods described in the U.S. Soil Conservation Service National Engineering Handbook.

6. Hydrographs that illustrate runoff characteristics before and after the proposed activity.

7. An erosion control plan shall be submitted describing all methods to control erosion and siltation on site, temporarily and permanently.

9.2.3.3 Site Plan

The applicant shall submit a site plan, at a scale of 1" = not more than 50', showing the following items:

1. Existing and proposed contours (in contrasting symbols) shall be expressed in feet above sea level with intervals no greater than 3 feet. Date of ground survey shall be given

2. The delineation of all wetlands, lands subject to flooding, water bodies, waterways, ditches, creeks, rivers, streams, ponds, whether natural or manmade, continuously or intermittently flowing. The upland boundary of all bordering vegetative wetlands shall be shown. The 100-year flood elevation shall be shown.

3. A delineation of all alterations proposed in or having an impact on wetlands.

4. Existing stonewalls; buildings, rock ridges and outcroppings shall be shown.

5. Location, extent, and area of all existing and proposed structures, roadways, paved areas, septic systems, wells, tanks, and utility easements.

6. Proposed lowest elevations of cellars or floors.

7. Existing and proposed location, rim elevation and invert elevation of all catch basins, drains, culverts, and other drainage structures immediately upstream and downstream of the site, as well as those on site.

8. Details and locations for all temporary erosion controls proposed.

9. Proposed permanent pollution control devices on site, such as: hooded catch basins flow dissipaters, or vegetative buffers.

10. Cross-sections showing existing and proposed slope, elevations, bank and bottom conditions of each water course to be altered. Locations of cross-sections shall be specified.

11. Proposed location of any fill material, which will be stored on site.

12. State on plan the location and elevation of benchmark used for survey and datum.

13. The "limit of work" line shall be shown.

9.2.3.4 Rules and Regulations

After due notice and public hearing, the Commission may promulgate rules and regulations to fulfill the purposes of this section. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effects of this section"; or take any other action relative thereto.

9.2.4 ENFORCEMENT AND SECURITY

9.2.4.1 Enforcement

(1) No person shall remove, fill, dredge, build upon, degrade or otherwise alter resource areas protected by this By-law, or cause , suffer or allow such activity to continue or allow such fill or other alteration to be left in place without the required authorization pursuant to this by-law.

(2) Enforcement Orders shall be issued by Commission members or the Conservation Agent in order to secure prompt and continued compliance with the Carver Wetlands By-law or work performed under Superseding or Final Orders issued by the Department of Environmental Protection.

(3) The Enforcement Order shall be in the form shown in the Appendix marked "Form D".

(4) The Commission or its agent or other duly authorized employee shall have authority to enter upon privately owned land for the purpose of performing their duties under this By-law and may make or cause to be made such examinations, surveys, or sampling as the Commission deems necessary.

(5) The Commission shall have the authority to enforce this By-law, its regulations , and permits issued thereunder by violation notices, administrative orders, and civil and criminal court actions.

(6) Any person who violates provisions of this By-law may be ordered to restore the property to its original condition and take any other action that the Commission deems necessary to remedy such violations.

(7) Upon the request of the Commission, the Board of Selectmen and Town Counsel shall take legal action for enforcement under civil law.

(8) Upon the request of the Commission, the Chief of Police shall take legal action for enforcement under criminal law.

(9) Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement.

(10) Any person who violates any provision of this By-law, or regulations, permits, or administrative orders issued thereunder, shall be punished by a fine of $50 (fifty dollars)

(11) Each day or portion thereof during which a violation continues, or unauthorized fill or other alteration remains in place, shall constitute a separate offense, and each provision of the By-law, regulations, permits or administrative orders violated shall constitute a separate offense.

(12) Each day or portion thereof during which a violation continues, or unauthorized fill or other alteration remains in place, shall constitute a separate offense, and each provision of the By-law, regulations, permits or administrative orders violated shall constitute a separate offense.

9.2.4.2 Security

As part of a permit issued by this By-law, in addition to any security required by any other municipal or state board, agency or official, the Commission may require that the performance and observance of the conditions imposed hereunder be wholly or in part by one (1) or more of the methods described below:

1. By a proper bond with sureties satisfactory to the Commission payable to the town or deposit of money or negotiable securities to be held by the Town Treasurer or other undertaking of financial responsibility sufficient in the opinion of the Commission to secure compliance with the Order of Conditions. Such bond or deposit shall be released upon issuance of a Certificate of Compliance.

2. By a conservation restriction, easement or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of the Town of Carver whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

3. A Certificate of Compliance may extinguish only those bonds, securities, covenants, restrictions, or easements listed in Section IV (B) (1) and (2), but shall not extinguish any other conservation restriction(s) that might run with the land.

9.2.5 DEFINITIONS

The definitions applicable to the Carver Wetlands By-law shall be the same as set forth in 310 CMR 10.00 except for the following modifications to those definitions and additional definitions.

Aesthetics -
The relevant qualities to be protected under the Carver Wetlands By-law are those natural and natively scenic impressions of our ponds, lakes, streams, rivers, and the lands bordering them. The aesthetic trust of the Commission shall be the preservation of a perception of the land, which is most conducive to

a continued wildlife habitat, a natural aquatic system, and a protective buffer between our wetland recourses and human development activities.

Alter-
Alter means to change the condition of any area subject to protection by this By-law. Examples of alterations include, but are not limited to, the following:

- Removal, excavation or dredging of soil, sand, gravel, or aggregate materials of any kind;
- Changing of pre-existing drainage characteristics, flushing characteristics, sedimentation patters, flow patterns, or flood retention characteristics;
- Drainage or other disturbance of water level or water table;
- Placing of fill, or removal of materials, which would alter elevations;
- Driving of piles, erection or repair of buildings, or structures of any kind;
- Placing of obstructions or objects in water;
- Destruction of plant life, including the cutting of trees;
- Changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water;
- Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater;
- Use of chemicals for plant or pest control.

Applicant-
Any person who files a permit application or request for determination or applicability, or on whose behalf such an application or request is filed, is an applicant.
Conservation Commission Agent-
The Agent shall be the duly authorized representative of the Commission, with the authority to carry out certain of the Commission's functions. These shall include, but not be limited to, executing the administrative duties of the Commission, site visits, determination of filing requirement for applicants, determination of filing requirements of all property under the jurisdiction of this By-law, determination of application completeness and filing requirements.
Issuing Authority-
In the Town of Carver, both under the state wetland regulations and under the local By-laws, the issuing authority is the Conservation Commission.
Recreation-
Recreation under the Carver Wetlands By-law is defined as the use and enjoyment of our natural surroundings in a manner consistent with their preservation. Activities shall not hinder access to wetlands and related water recourses.
Variance-
The Commission shall have the power, after the filing of a Notice of Intent and the conduct of a public hearing, to issue a variance to an applicant requesting to perform activities as described in Section I (C)(3) or Section I(C)(4) of this By- law. Such variance shall be set forth by the issuance of an Order of Conditions by the Commission. In order for the Commission to issue a variance with respect

to a particular project, it must specifically find, based on clear and convincing evidence set forth by the applicant, that owing to circumstances relating to the soil conditions, hydrological conditions, topography of such land and especially affecting such land but not generally affecting wetlands within the Town, a literal enforcement of the provisions of this By-law would involve substantial hardship, financial or otherwise, to the applicant, and that desirable relief may be granted without material detriment to the values protected by this By-law and without substantially derogating from the extent or purpose of this By-law. The Commission may impose conditions, safeguards and limitations in a variance to protect or further the interests protected by this By-law. Variances are intended to be granted only in rare and unusual cases.

Person-

Person shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to town by-laws, administrative agency, public or quasi-public corporation or body, this municipality, and any other legal entity, its legal representatives, agents, or assigns.

9.2.6 SEVERABILITY

The invalidity of any section or provision of this By-law shall not invalidate any other section or provision thereof, nor shall it invalidate any permit or determination that previously has been issued.

9.3 SOLID WASTE FACILITY PUBLIC PROCESS BY-LAW

9.3.1 **Preamble.** This Section establishes public participation requirements to improve the public process following the filing of a site assignment application for a new solid waste facility.

9.3.2 **Purpose.** The purpose of this Section is to protect the rights of the people of Carver to clean air and water guaranteed by Article 97 of the Articles of Amendment to the Massachusetts Constitution, and to protect their right to petition government guaranteed by the Massachusetts Constitution, Article 19 of the Declaration of Rights, and by the First Amendment to the United States Constitution.

9.3.3 **Authority.** This Section is adopted pursuant to the Home Rule Amendment of the Massachusetts Constitution, Article 89 of the Articles of Amendment, independent of the provisions of Section 150A of Chapter 111 of the General Laws and regulations promulgated thereto.

9.3.4 **Proposed Solid Waste Facilities - Public Process.** This by-law establishes procedures to require an informational meeting by the Board of Health which is held following the filing of an application for a site assignment for a proposed solid waste facility.

(1) The Board of Health shall hold a public informational meeting no later than fourteen (14) days prior to the commencement of a public hearing

9.5.6 Severability Clause

If any part of this By-law is for any reason held to be unconstitutional or invalid, such decision shall not affect the remainder of this By-law. The Town of Carver hereby declares the provisions of this By-law to be severable.

9.6 STORMWATER MANAGEMENT AND LAND DISTURBANCE BY-LAW

9.6.1 PURPOSE

A. The harmful impacts of soil erosion and sedimentation are:

1. impairment of water quality and flow in lakes, ponds, streams, rivers, wetlands and groundwater;

2. contamination of drinking water supplies;

3. alteration or destruction of aquatic and wildlife habitat;

4. flooding; and

5. overloading or clogging of municipal catch basins and storm drainage systems.

B. The objectives of this by-law are to:

1. protect water resources;

2. require practices that eliminate soil erosion and sedimentation and control the volume and rate of stormwater runoff resulting from land disturbance activities;

3. promote infiltration and the recharge of groundwater;

4. ensure that soil erosion and sedimentation control measures and stormwater runoff control practices are incorporated into the site planning and design process and are implemented and maintained;

5. require practices to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

6. comply with state and federal statutes and regulations relating to stormwater discharges; and

7. establish the Town's legal authority to ensure compliance with the provisions of this by-law through inspection, monitoring, and enforcement.

9.6.2 DEFINITIONS

ABUTTER: The owner(s) of land abutting the activity.

AGRICULTURE: The normal maintenance or improvement of land in agricultural or aquacultural use, as defined by the Massachusetts Wetlands Protection Act and its implementing regulations.

APPLICANT: Any person, individual, partnership, association, firm, company, corporation, trust, authority, agency, department, or political subdivision, of the Commonwealth or the Federal government to the extent permitted by law requesting a soil erosion and sediment control permit for proposed land-disturbance activity.

AUTHORIZED ENFORCEMENT AGENCY: The Planning Board, hereafter the Board, its employees or agents designated to enforce this by-law.

CERTIFIED PROFESSIONAL IN EROSION AND SEDIMENT CONTROL (CPESC): A certified specialist in soil erosion and sediment control. This certification program, sponsored by the Soil and Water Conservation Society in cooperation with the American Society of Agronomy, provides the public with evidence of professional qualifications.

CONSTRUCTION AND WASTE MATERIALS: Excess or discarded building or site materials, including but not limited to concrete truck washout, chemicals, litter and sanitary waste at a construction site that may adversely impact water quality.

CLEARING: Any activity that removes the vegetative surface cover.

EROSION: The wearing away of the land surface by natural or artificial forces such as wind, water, ice, gravity, or vehicle traffic and the subsequent detachment and transportation of soil particles.

EROSION AND SEDIMENTATION CONTROL PLAN: A document containing narrative, drawings and details developed by a qualified professional engineer (PE) or a Certified Professional in Erosion and Sedimentation Control (CPESC), which includes best management practices, or equivalent measures designed to control surface runoff, erosion and sedimentation during pre-construction and construction related land disturbance activities.

ESTIMATED HABITAT OF RARE WILDLIFE AND CERTIFIED VERNAL POOLS: Habitats delineated for state-protected rare wildlife and certified vernal pools for use with the Wetlands Protection Act Regulations (310 CMR 10.00) and the Forest Cutting Practices Act Regulations (304 CMR 11.00).

LAND-DISTURBING ACTIVITY: Any activity that causes a change in the position or location of soil, sand, rock, gravel, or similar earth material.

MASSACHUSETTS ENDANGERED SPECIES ACT: (G.L.c.131A) and its implementing regulations at (321 CMR 10.00) which prohibit the “taking” of any rare plant or animal species listed as Endangered, Threatened, or of Special Concern.

MASSACHUSETTS STORMWATER MANAGEMENT POLICY: The Policy issued by the Department of Environmental Protection, and as amended, that coordinates the requirements prescribed by state regulations promulgated under the authority of the Massachusetts Wetlands Protection Act G.L. c. 131 §. 40 and Massachusetts Clean Waters Act G.L. c. 21, §. 23-56. The Policy addresses stormwater impacts through implementation of performance standards to reduce or prevent pollutants from reaching water bodies and control the quantity of runoff from a site.

MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) or municipal storm drain system: The system of conveyances designed or used for collecting or conveying stormwater, including any road with a drainage system, street, gutter, curb, inlet, piped storm drain, pumping facility, retention or detention basin, natural or man-made or altered drainage channel, reservoir, and other drainage structure that together comprise the storm drainage system owned or operated by the Town of Carver.

OWNER: A person with a legal or equitable interest in property.

PERSON: An individual, partnership, association, firm, company, trust, corporation, agency, authority, department or political subdivision of the Commonwealth or the Federal Government, to the extent permitted by law, and any officer, employee, or agent of such person.

PRE-CONSTRUCTION: All activity in preparation for construction.

PRIORITY HABITAT OF RARE SPECIES: Habitats delineated for rare plant and animal populations protected pursuant to the Massachusetts Endangered Species Act and its regulations.

RUNOFF: Rainfall, snowmelt, or irrigation water flowing over the ground surface.

SEDIMENT: Mineral or organic soil material that is transported by wind or water, from its origin to another location; the product of erosion processes.

SEDIMENTATION: The process or act of deposition of sediment.

SITE: Any lot or parcel of land or area of property where land-disturbing activities are, were, or will be performed.

SLOPE: The incline of a ground surface expressed as a ratio of horizontal distance to vertical distance.

SOIL: Any earth, sand, rock, gravel, or similar material.

STABILIZATION: The use, singly or in combination, of mechanical, structural, or vegetative methods, to prevent or retard erosion.

STORMWATER: Storm water runoff, snow melt runoff, and surface water runoff and drainage.

STRIP: Any activity which removes the vegetative ground surface cover, including tree removal, clearing, grubbing, and storage or removal of topsoil.

VERNAL POOLS: Temporary bodies of freshwater which provide critical habitat for a number of vertebrate and invertebrate wildlife species.

WATERCOURSE: A natural or man-made channel through which water flows or a stream of water, including a river, brook, or underground stream.

WETLAND RESOURCE AREA: Areas specified in the Massachusetts Wetlands Protection Act G.L. c. 131, § 40 and in the Town of Carver's wetland by-law.

WETLANDS: Tidal and non-tidal areas characterized by saturated or nearly saturated soils most of the year that are located between terrestrial (land-based) and aquatic (water-based) environments, including freshwater marshes around ponds and channels (rivers and streams), brackish and salt marshes; common names include marshes, swamps and bogs.

9.6.3 AUTHORITY

This by-law is adopted under authority granted by the Home Rule Amendment of the Massachusetts Constitution, the Home Rule statutes, and pursuant to the regulations of the Federal Clean Water Act found at 40 CFR 122.34

9.6.4 APPLICABILITY

This by-law shall apply to all activities that result in disturbance of one or more acres of land that drains to the municipal separate storm sewer system. Except as authorized by the Planning Board in a Land Disturbance Permit or as otherwise provided in this by-law, no person shall perform any activity that results in disturbance of an acre or more of land. Normal maintenance and improvement of land in agricultural or aquacultural use, as defined by the Wetlands Protection Act regulation 310 CMR 10.4, are exempt. In addition, as authorized in the Phase II Small MS4 General Permit for Massachusetts, storm water discharges resulting from the above activities that are subject to jurisdiction under the Wetlands Protection Act and demonstrate compliance with the Massachusetts Storm Water Management Policy as reflected in an Order of Conditions issued by the Conservation Commission are exempt from compliance with this by-law.

9.6.5 RESPONSIBILITY FOR ADMINISTRATION

A. The Carver Planning Board shall administer, implement and enforce this by-law. Any powers granted to or duties imposed upon the Carver Planning Board may be delegated in writing by Carver Planning Board to its employees or agents.

B. Waiver. The Carver Planning Board may waive strict compliance with any requirement of this by-law or the rules and regulations promulgated hereunder, where:
(1) such action is allowed by federal, state and local statutes and/or regulations,
(2) is in the public interest, and
(3) is not inconsistent with the purpose and intent of this by-law.

C. Rules and Regulations. The Carver Planning Board may adopt, and periodically amend rules and regulations to effectuate the purposes of this bylaw. Failure by Planning Board to promulgate such rules and regulations shall not have the effect of suspending or invalidating this by-law.

9.6.6 PERMITS and PROCEDURE

A. Application: A completed application for a Land Disturbance Permit shall be filed with the Carver Planning Board. A permit must be obtained prior to the commencement of land disturbing activity that may result in the disturbance of an area of one acre or more. The Land Disturbance Permit Application package shall include:

1. a completed Application Form with original signatures of all owners;

2. a list of abutters, certified by the Assessors Office;

3. twelve (12) copies of the Erosion and Sediment Control Plan as specified in Section VI of this by-law;

4. payment of the application and review fees; and,

5. one (1) copy each of the Application Form and the list of abutters filed with the Town Clerk.

B. Entry: Filing an application for a permit grants Planning Board or its agent, permission to enter the site to verify the information in the application and to inspect for compliance with permit conditions.

C. Other Boards: The Planning Board shall notify the Town Clerk of receipt of the application, and shall give one copy of the application package to the Board of Health, Board of Public Works, Town Engineer, Conservation Commission and Building Commissioner.

D. Public Hearing: The Planning Board shall hold a public hearing within twenty-one (21) days of the receipt of a complete application and shall take final action within twenty-one (21) days from the time of the close of the hearing unless such time is extended by agreement between the applicant and Planning Board. Notice of the public hearing shall be given by publication and posting and by first- class mailings to abutters at least seven (7) days prior to the hearing. The Town Clerk shall make the application available for inspection by the public during business hours at the Carver Town Hall, 108 Main Street, Carver MA 02330.

E. Information requests. The applicant shall submit all additional information requested by the Planning Board to issue a decision on the application.

F. Action by Carver Planning Board.

The Planning Board may:

1. Approve the Land Disturbance Permit Application and issue a permit if it finds that the proposed plan will protect water resources and meets the objectives and requirements of this by-law;

2. Approve the Land Disturbance Permit Application and issue a permit with conditions, modifications or restrictions that the Planning Board determines are required to ensure that the project will protect water resources and meets the objectives and requirements of this by-law;

3. Disapprove the Land Disturbance Permit Application and deny the permit if it finds that the proposed plan will not protect water resources or fails to meet the objectives and requirements of this by-law.

G. Failure of the Planning Board to take final action upon an Application within the time specified above shall be deemed to be approval of said Application. Upon certification by the Town Clerk that the allowed time has passed without the Planning Board's action, the Land Disturbance Permit shall be issued by the Planning Board.

H. Fee Structure: Each application must be accompanied by the appropriate application fee as established by the Planning Board. Applicants shall pay review fees as determined by Planning Board sufficient to cover any expenses connected with the public hearing and review of the Land Disturbance Permit Application before the review process commences. The Planning Board is authorized to retain a Registered Professional Engineer or other professional consultant to advise the Planning Board on any or all aspects of the Application.

I. Project Changes: The permittee, or their agent, must notify the Planning Board in writing of any change or alteration of a land-disturbing activity authorized in a Land Disturbance Permit before any change or alteration occurs. If the Planning Board determines that the change or alteration is significant, based on the design requirements listed in Section 7.B. and accepted construction practices, the Planning Board may require that an amended Land Disturbance Permit application be filed and a public hearing held. If any change or alteration from the Land Disturbance Permit occurs during any land disturbing activities, the Planning Board may require the installation of interim erosion and sedimentation control measures before approving the change or alteration.

9.6.7 EROSION AND SEDIMENT CONTROL PLAN

A. The Erosion and Sediment Control Plan shall contain sufficient information to describe the nature and purpose of the proposed development, pertinent conditions of the site and the adjacent areas, and proposed erosion and sedimentation controls. The applicant shall submit such material as is necessary to show that the proposed development will comply with the design requirements listed in Section 7.B. below.

B. The design requirements of the Erosion and Sediment Control Plan are:

1. Minimize total area of disturbance;

2. Sequence activities to minimize simultaneous areas of disturbance;

3. Minimize peak rate of runoff in accordance with the Massachusetts Stormwater Policy;

4. Minimize soil erosion and control sedimentation during construction, provided that prevention of erosion is preferred over sedimentation control;

5. Divert uncontaminated water around disturbed areas;

6. Maximize groundwater recharge;

7. Install and maintain all Erosion and Sediment Control measures in accordance with the manufacturers specifications and good engineering practices;

8. Prevent off-site transport of sediment;

9. Protect and manage on and off-site material storage areas (overburden and stockpiles of dirt, borrow areas, or other areas used solely by the permitted project are considered a part of the project);

10. Comply with applicable Federal, State and local laws and regulations including waste disposal, sanitary sewer or septic system regulations, and air quality requirements, including dust control;

11. Prevent significant alteration of habitats mapped by the Massachusetts Natural Heritage & Endangered Species Program as Endangered, Threatened or Of Special Concern, Estimated Habitats of Rare Wildlife and Certified Vernal Pools, and Priority Habitats of Rare Species from the proposed activities;

12. Institute interim and permanent stabilization measures, which shall be instituted on a disturbed area as soon as practicable but no more than 14 days after construction activity has temporarily or permanently ceased on that portion of the site;

13. Properly manage on-site construction and waste materials; and

14. Prevent off-site vehicle tracking of sediments.

C. Erosion and Sedimentation Control Plan Content. The Plan shall contain the following information:

1. Names, addresses, and telephone numbers of the owner, applicant, and person(s) or firm(s) preparing the plan;

2. Title, date, north arrow, names of abutters, scale, legend, and locus map;

3. Location and description of natural features including:

(a) Watercourses and water bodies, wetland resource areas and all floodplain information, including the 100-year flood elevation based upon the most recent Flood Insurance Rate Map, or as calculated by a professional engineer for areas not assessed on these maps;

(b) Existing vegetation including tree lines, canopy layer, shrub layer, and ground cover, and trees with a caliper twelve (12) inches or larger, noting specimen trees and forest communities; and

(c) Habitats mapped by the Massachusetts Natural Heritage & Endangered Species Program as Endangered, Threatened or of Special Concern, Estimated Habitats of Rare Wildlife and Certified Vernal Pools, and Priority Habitats of Rare Species within five hundred (500) feet of any construction activity.

4. Lines of existing abutting streets showing drainage and driveway locations and curb cuts;

5. Existing soils, volume and nature of imported soil materials;

6. Topographical features including existing and proposed contours at intervals no greater than two (2) feet with spot elevations provided when needed;

7. Surveyed property lines showing distances and monument locations, all existing and proposed easements, rights-of-way, and other encumbrances, the size of the entire parcel, and the delineation and number of square feet of the land area to be disturbed;

8. Drainage patterns and approximate slopes anticipated after major grading activities (Construction Phase Grading Plans);

9. Location and details of erosion and sediment control measures with a narrative of the construction sequence/phasing of the project, including both operation and maintenance for structural and non-structural measures, interim grading, and material stockpiling areas;

10. Path and mechanism to divert uncontaminated water around disturbed areas, to the maximum extent practicable;

11. Location and description of industrial discharges, including stormwater discharges from dedicated asphalt plants and dedicated concrete plants, which are covered by this permit;

12. Stormwater runoff calculations in accordance with the Department of Environmental Protection's Stormwater Management Policy;

13. Location and description of an implementation schedule for temporary and permanent seeding, vegetative controls, and other stabilization measures;

14. A description of construction and waste materials expected to be stored on-site. The Plan shall include a description of controls to reduce pollutants from these materials, including storage practices to minimize exposure of the materials to stormwater, and spill prevention and response;

15. A description of provisions for phasing the project where one acre of area or greater is to be altered or disturbed;

16. Plans must be stamped and certified by a qualified Professional Engineer registered in Massachusetts or a Certified Professional in Erosion and Sediment Control; and

17. Such other information as is required by the Planning Board.

9.6.8 INSPECTION AND SITE SUPERVISION

A. Pre-construction Meeting: Prior to starting clearing, excavation, construction, or land disturbing activity the applicant, the applicant's technical representative, the general contractor or any other person with authority to make changes to the project, shall meet with the Planning Board, to review the permitted plans and their implementation.

B. Board Inspection: The Planning Board or its designated agent shall make inspections as hereinafter required and shall either approve that portion of the work completed or shall notify the permittee wherein the work fails to comply with the land disturbance permit as approved. The Permit and associated plans for grading, stripping, excavating, and filling work, bearing the signature of approval of the Planning Board, shall be maintained at the site during the progress of the work. In order to obtain inspections, the permittee shall notify the Planning Board at least two (2) working days before each of the following events:

1. Erosion and sediment control measures are in place and stabilized;
2. Site Clearing has been substantially completed;
3. Rough Grading has been substantially completed;
4. Final Grading has been substantially completed;
5. Close of the Construction Season; and
6. Final Landscaping (permanent stabilization) and project final completion.

C. Permittee Inspections. The permittee or his/her agent shall conduct and document inspections of all control measures no less than weekly or as specified in the permit, and prior to and following anticipated storm events. The purpose of such inspections will be to determine the overall effectiveness of the control plan, and the need for maintenance or additional control measures. The permittee or his/her agent shall submit monthly reports to the Planning Board or designated agent in a format approved by the Planning Board.

D. Access Permission. To the extent permitted by state law, or if authorized by the owner or other party in control of the property, the Planning Board, its agents, officers, and employees may enter upon privately owned property for the purpose of performing their duties under this by-law and may make or cause to be made such examinations, surveys or sampling as the Planning Board deems reasonably necessary to determine compliance with the permit.

9.6.9 SURETY

The Planning Board may require the permittee to post before the start of land disturbance activity, a surety bond, irrevocable letter of credit, cash, or other acceptable security. The form of the bond shall be approved by Town counsel, and be in an amount deemed sufficient by the Planning Board to ensure that the work will be completed in accordance with the permit. If the project is phased, the Planning Board may release part of the bond as each phase is completed in compliance with the permit but the bond may not be fully released until [the Board] has received the final report as required by Section 10 and issued a certificate of completion.

9.6.10 FINAL REPORTS

Upon completion of the work, the permittee shall submit a report (including certified as-built construction plans) from a Professional Engineer (P.E.), surveyor, or Certified Professional in Erosion and Sediment Control (CPESC), certifying that all erosion and sediment control devices, and approved changes and modifications, have been completed in accordance with the conditions of the approved permit. Any discrepancies should be noted in the cover letter.

9.6.11 ENFORCEMENT

A. The Planning Board or an authorized agent of [the Board] shall enforce this by-law, regulations, orders, violation notices, and enforcement orders, and may pursue all civil and criminal remedies for such violations.

B. Orders
The Planning Board or an authorized agent of the Planning Board may issue a written order to enforce the provisions of this by-law or the regulations thereunder, which may include:
(a) a requirement to cease and desist from the land-disturbing activity until there is compliance with the by-law and provisions of the land-disturbance permit;
(b) maintenance, installation or performance of additional erosion and sediment control measures;
(c) monitoring, analyses, and reporting
(d) remediation of erosion and sedimentation resulting directly or indirectly from the land-disturbing activity.

C. Criminal Penalty. Any person who violates any provision of this by-law, regulation, order or permit issued there under, shall be punished by a fine of not more than $100.00 each day or part thereof that such violation occurs or continues shall constitute a separate offense.

D. Non-Criminal Disposition. As an alternative to criminal prosecution or civil action, the Town may elect to utilize the non-criminal disposition procedure set forth in G.L. Ch. 40, 21D and Section 10.4 of the Town of Carver By-laws, in which case Zoning Enforcement Officer of the Town shall be the enforcing person. The penalty for the 1st violation shall be $100.00. The penalty for the 2nd violation shall be $200.00. The penalty for the 3rd and subsequent violations shall be $3,000.00. Each day or part thereof that such violation occurs or continues shall constitute a separate offense.

E. Appeals. The decisions or orders of the Planning Board shall be final. Further relief shall be to a court of competent jurisdiction.

F. Remedies Not Exclusive. The remedies listed in this by-law are not exclusive of any other remedies available under any applicable federal, state or local law.

9.6.12 CERTIFICATE OF COMPLETION

The issuing authority will issue a letter certifying completion upon receipt and approval of the final reports and/or upon otherwise determining that all work of the permit has been satisfactorily completed in conformance with this by-law.

9.6.13 SEVERABILITY

If any provision, paragraph, sentence, or clause of this by-law shall be held invalid for any reason, all other provisions shall continue in full force and effect.

9.7 ILLICIT CONNECTIONS AND DISCHARGES TO THE MUNICIPAL STORM DRAIN SYSTEM BYLAW

9.7.1 PURPOSE

Increased and contaminated stormwater run-off are major causes of:

1. impairment of water quality and flow in lakes, ponds, streams, rivers, wetlands and groundwater;
2. contamination of drinking water supplies;
3. alteration or destruction of aquatic and wildlife habitat; and
4. flooding.

Regulation of illicit connections and discharges to the municipal storm drain system is necessary for the protection of Carver's water bodies and groundwater, and to safeguard the public health, safety, welfare, and the environment.

The objectives of this by-law are:

1. to prevent pollutants from entering Carver's municipal separate storm sewer system or municipal storm drain system (MS4);
2. to prohibit illicit connections and unauthorized discharges to the MS4;
3. to require the removal of all such illicit connections;
4. to comply with state and federal statutes and regulations relating to stormwater discharges; and
5. to establish the legal authority to ensure compliance with the provisions of this by-law through inspection, monitoring, and enforcement.

9.7.2 DEFINITIONS

For the purposes of this by-law, the following shall mean:

AUTHORIZED ENFORCEMENT AGENCY: The Department of Public Works, its employees, or agents designated to enforce this by-law.

BEST MANAGEMENT PRACTICIES (BMPs): Activities, prohibitions of practices, general good housekeeping practices, structural and non-structural controls, pollution prevention and educational practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants directly or indirectly to stormwater, receiving waters, or stormwater conveyance systems. BMPs also include treatment practices, operating procedures, and practices to control site runoff, spillage or leaks, sludge, or waste disposal, or drainage from raw materials storage.

Natural Resources Conservation Service

CONSERVATION PRACTICE STANDARD

Critical Area Planting

Code 342

(Ac)

DEFINITION

Establishing permanent vegetation on sites that have, or are expected to have, high erosion rates, and on sites that have physical, chemical, or biological conditions that prevent the establishment of vegetation with normal seeding/planting methods.

PURPOSE

- Stabilize areas with existing or expected high rates of soil erosion by wind or water.
- Stabilize stream and channel banks, pond and other shorelines, earthen features of structural conservation practices.
- Stabilize areas such as sand dunes and riparian areas.

CONDITIONS WHERE PRACTICE APPLIES

This practice applies to highly disturbed areas such as—

- Active or abandoned mined lands.
- Urban restoration sites.
- Construction areas.
- Conservation practice construction sites.
- Areas needing stabilization before or after natural disasters such as floods, hurricanes, tornados, and wildfires.
- Eroded banks of natural channels, banks of newly constructed channels, and lake shorelines.
- Other areas degraded by human activities or natural events.

CRITERIA

General Criteria Applicable to All Purposes

Site preparation. Conduct a site investigation to identify any physical, chemical, or biological conditions that could affect the successful establishment of vegetation.

Clear areas to be planted of unwanted materials and smooth or shape, if needed, to meet planting purpose(s).

Prepare a suitable seedbed for all seeded species. Rip compacted layers and re-firm the soil prior to seedbed preparation, as needed.

As site conditions dictate, when grading slopes, stockpile topsoil to be redistributed over area to be planted.

Species selection. Select species for seeding or planting that are suited to local site conditions and intended uses, and common to the site or location.

Selected species will have the capacity to achieve adequate density and vigor to stabilize the site within an appropriate period.

Establishment of vegetation. Plant seeds using the method or methods best suited to site and soil conditions.

Limit sod placement to areas that can naturally supply needed moisture or sites that can be irrigated during the establishment period. Place and anchor sod using techniques to ensure that it remains in place until established.

Specify species, rates of seeding or planting, legume inoculation, minimum quality of planting stock (e.g., pure live seed (PLS) or stem caliper), method of seedbed preparation, and method of establishment before application. Use only viable, high-quality seed or planting stock.

Seed or plant at a time and in a manner that best ensures establishment and growth of the selected species.

Plant during approved times for the species to be used.

Apply soil amendments (e.g., lime, fertilizer, compost) according to the requirements in the local Field Office Technical Guide.

Mulch or otherwise stabilize (e.g., polyacrylamide (PAM)) plantings as necessary to ensure successful establishment.

Additional Criteria to Stabilize Stream and Channel Banks, Pond and Other Shorelines, Earthen Features of Structural Conservation Practices

Bank and channel slopes. Shape channel side slopes so that they are stable and allow establishment and maintenance of desired vegetation.

A combination of vegetative and structural measures may be necessary on slopes steeper than 3:1 to ensure adequate stability.

Species selection. Plant material used for this purpose must—

- Be adapted to the hydrologic zone into which they will be planted.
- Be adapted and proven in the regions in which they will be used.
- Be compatible with existing vegetation in the area.
- Protect the channel banks but not restrict channel capacity.

Establishment of vegetation. Specify species, planting rates, spacing, methods and dates of planting based on local planting guides or technical notes.

Identify and protect desirable existing vegetation during practice installation.

Use a combination of vegetative and structural practices with living and inert material when flow velocities, soils, and bank stability preclude stabilization by vegetative establishment alone. Use Conservation Practice Standard (CPS) Streambank Stabilization (Code 580) for the structural measures.

Control existing vegetation on a site that will compete with species to be established vegetatively (e.g.. bare-root, containerized, ball-and-burlap, potted) to ensure successful establishment of the planted species.

Plant streambank stabilization vegetation in accordance with the NRCS Engineering Field Handbook Part 650, Chapter 16, “Streambank and Shoreline Protection,” and Chapter 18, “Soil Bioengineering for Upland Slope Protection & Erosion Reduction.”

Site protection and access control. Restrict access to planted areas until fully established.

Additional Criteria to Stabilize Areas Such As Sand Dunes and Riparian Areas

Plants for sand dunes and coastal sites must be able to survive being buried by blowing sand, sand blasting, salt spray, salt water flooding, drought, heat, and low nutrient supply.

Include sand trapping devices such as sand fences or brush matting in the revegetation/stabilization plans where applicable.

CONSIDERATIONS

Species or diverse mixes that are adapted to the site and have multiple benefits should be considered. Native species may be used when appropriate for the site.

To benefit pollinators and other wildlife, flowering shrubs and wildflowers with resilient root systems and good soil-holding capacity also should be considered for incorporation as a small percentage of a larger grass-dominated planting. Where appropriate consider a diverse mixture of forbs to support pollinator habitat.

Planning and installation of other CPSs such as Diversion (Code 362), Obstruction Removal (Code 500), Subsurface Drain (Code 606), Underground Outlet (Code 620), or Anionic Polyacrylamide Application (Code 450) may be necessary to prepare the area or ensure vegetative establishment.

Areas of vegetation established with this practice can create habitat for various type of wildlife. Maintenance activities, such as mowing or spraying, can have detrimental effects on certain species. Perform management activities at the times and in a manner that causes the least disruption to wildlife.

PLANS AND SPECIFICATIONS

Prepare plans and specifications for each field or management unit according to the criteria and operation and maintenance sections of this standard. Record practice specifications using approved Implementation Requirements document.

Address the following elements in the plan, as applicable, to meet the intended purpose(s):

- Practice purpose(s)
- Site preparation
- Topsoil requirements
- Fertilizer application
- Seedbed/planting area preparation
- Timing and method of seeding/planting
- Selection of species
- Seed/plant source
- Seed analysis/pure live seed (PLS)
- Seeding rate/plant spacing
- Mulching, PAM, or other stabilizing materials
- Supplemental water needed for establishment
- Protection of plantings
- Describe successful establishment (e.g., minimum percent ground/canopy cover, percent survival, stand density)

OPERATION AND MAINTENANCE

- Control access to the area to ensure the site remains stable.
- Protect plantings shall be protected from pests (e.g., weeds, insects, diseases, livestock, or wildlife) as necessary to ensure long-term survival.
- Inspections, reseeding or replanting, and fertilization may be needed to ensure that this practice functions as intended throughout its expected life.
- Observe establishment progress and success at regular intervals until the practice has met the criteria for successful establishment and implementation.
- Description of successful establishment (e.g., minimum percent ground/canopy cover, percent survival, stand density).

REFERENCES

Federal Interagency Stream Restoration Working Group. 1998. Stream corridor restoration: principles, processes, and practices. USDA NRCS National Engineering Handbook, Part 653.

USDA NRCS. 2007. National Engineering Handbook, Part 654. Stream restoration guide.

USDA NRCS. 2015. The PLANTS Database (http://plants.usda.gov, 8 December 2015). National Plant Data Team, Greensboro, NC.

Natural Resources Conservation Service

CONSERVATION PRACTICE STANDARD

LAND RECLAMATION, ABANDONED MINED LAND

CODE 543

(ac)

DEFINITION

Reclamation of land and water areas adversely affected by past mining activities.

PURPOSE

This practice is used to accomplish one or more of the following purposes:

- Decrease erosion and sedimentation
- Improve offsite water quality
- Protect public health and safety

CONDITIONS WHERE PRACTICE APPLIES

This practice applies to abandoned mined land with one or more problems that degrade the quality of the environment; prevent or interfere with the beneficial uses of soil, water, air, plant, or animal resources; or endanger human health and safety.

This practice also applies to nearby nonmined areas adversely affected by the past mining activities. Treat the source of the problem before or in conjunction with treatment of the nonmined areas.

CRITERIA

General Criteria Applicable to All Purposes

Assess the hazards and resource concerns onsite. These hazards and resource concerns may include, but are not limited to, highwalls, shafts or adits, toxic soils, contaminated runoff, excessive erosion or sedimentation, invasive or unwanted vegetation, and trash and garbage. Develop a reclamation plan that addresses the hazards and resource concerns identified for the site. The plan must be consistent with the site capability, the planned land use, and the landowner's conservation objectives. Include practices necessary to reclaim the mined area and areas adjacent to the mined area that are adversely affected by the mined area.

Public health and safety
Prior to beginning onsite investigations, identify possible hazards and implement appropriate safety precautions.

Erosion and sediment control
Control or treat runoff and sedimentation from treatment areas, soil material stockpiles, access roads, and permanent impoundments. Use sediment-trapping practices, such as filter strips, riparian forest buffers, contour buffer strips, silt fences, sediment basins, or similar practices. Include temporary practices necessary during earth moving activities and permanent practices necessary to stabilize the site and control runoff from the site after reclamation.

Control the generation of particulate matter and fugitive dust during removal and replacement of soil and other materials.

Site preparation
Identify areas for preservation during construction. Include areas containing desirable trees, shrubs, grasses, stream corridors, natural springs, historic structures, or other important features that will be protected during construction activities.

Remove trees, logs, brush, rubbish, and other debris that interfere with reclamation operations. Dispose of debris material in a way that does not create a resource problem or interfere with reclamation activities and the planned land use.

Storage of soil materials
Stockpile soil or fill materials until needed for reclamation. Protect stockpiles from wind and water erosion, dust generation, unnecessary compaction, and contamination by noxious weeds, invasive species, or other undesirable materials.

Highwall treatment
Slope rock walls to slopes that are 0.5:1 (horizontal to vertical) or flatter before placing backfill against the wall. Determine the thickness and density of lifts for fill material to limit the deep infiltration of precipitation and to limit settlement of the completed fill to acceptable levels, based on the available fill material and planned land use.

Shafts and adits
Use NRCS Conservation Practice Standard (CPS) Mine Shaft and Adit Closing (Code 457)to close/seal a shaft or adit. Divert runoff away from the shaft or adit.

Placement of surface material
Develop a grading plan that returns the site, including any offsite borrow areas, to contours that are suitable for the planned land use and control soil loss. Include the spreading of stockpiled topsoil material as the final layer. Treat graded areas to eliminate slippage surfaces and promote root penetration before spreading surface material. Spread surface soil without causing over-compaction.

Shape the land surface to provide adequate surface drainage and to blend into the surrounding topography. Use erosion control practices to reduce slope lengths where sheet and rill erosion exceeds acceptable levels. If settlement is likely to interfere with the planned land use, develop surface drainage or water disposal plans that compensate for the expected settlement.

If the subsurface material is not a source of contamination, improve soil permeability after placing backfill material by using deep ripping tools to decrease compaction, promote infiltration, and encourage root development. Do not plan practices that promote infiltration if seepage through cover materials has the potential to develop or exacerbate acid mine drainage loading or treatment.

Restoration of borrow material
If cover or fill material is taken from areas outside the reclamation site, stockpile the topsoil from the borrow area separately, and replace it on the borrow area after the area is restored for its intended purpose. Grade and shape the borrow area for proper drainage, and revegetate the site to control erosion.

Establishment of vegetation
Prepare a revegetation plan for the treated areas. Select plant materials suitable for the specified end land use according to local climate potential, site conditions, and local NRCS criteria. Use native species where possible. Avoid use of invasive species.

Use the criteria in NRCS CPS Critical Area Planting (Code 342)to establish grasses and forbs. Use NRCS CPS Tree-Shrub Establishment (Code 612) for the establishment of trees and shrubs. If vegetation cannot be established, use NRCS CPS Mulching (Code 484).

Control of toxic aqueous discharge
Identify and document water quality and quantity releases from seeps, overland, and mine shafts. Quantify water impacts such as low pH, arsenic, etc. Identify measures that may affect treatment such as dissolved oxygen, iron, aluminum, magnesium, manganese, etc.

Methods for treatment of toxic aqueous discharge depend upon the type and extent of the contamination. When control of toxic mine drainage is needed, use best management practices (BMPs) that comply with State regulatory requirements. Evaluate the consequences of each potential treatment method to avoid creating a secondary problem. Select a method that can adequately treat the water based on the quantity and chemistry of the mine water and that is suitable for the planned level of operation and maintenance. Size the treatment area and settling basin(s) to allow for the volume of flow and treatment rate. Include a plan for disposal of the precipitated metals and spent treatment material.

Reduce the volume of contaminated water by diverting clean water away from the contaminated area or by limiting the opportunity for water to contact contaminated soil materials. Install practices, such as diversions, underground outlets, lined waterways, or grade stabilization structures, to control surface runoff. To the extent possible, divert clean upslope runoff away from the treated area.

Contaminated soil materials
Remove, bury, or treat soil materials that adversely affect or have the potential to adversely affect water quality or plant growth. Bury materials containing heavy metals below the root zone, add suitable soil amendments, or both, to minimize the negative effect of this material. Separate soils with high electrical conductivity, calcium carbonate, sodium, or other restrictive properties, and treat, if practicable.

Add a layer of compacted clay or a landfill cover over the contaminated material to deter infiltration. Place an earthfill blanket over the compacted clay to support plant growth. For each layer, identify the lift thickness and density needed to limit deep infiltration of precipitation and excessive settlement of the completed fill.

Mine sealing
If clean water is entering a mine opening, divert the water away. If contaminated water is exiting the mine, it may be necessary to seal the mine to prevent water movement. Use NRCS CPS Mine Shaft and Adit Closing (Code 457)to design the mine seal. Divert surface water away from the mine seal.

Neutralization and precipitation
Precipitate toxic metals and neutralize acidity in mine drainage using chemical or biological treatment. Select a method that can adequately treat the water based on the quantity and chemistry of the mine water and that is suitable for the planned level of operation and maintenance. Size the treatment area and settling basin(s) to allow for the volume of flow and treatment rate. Include a plan for disposal of the precipitated metals and spent treatment material.

CONSIDERATIONS

The key to a successful restoration is often dependent upon the proper placement of soils that will best support vegetation. One means to do this is to develop a detailed soil survey for the project and proposed borrow areas. Use the soil survey to identify the types and extent of soil materials and those that will best support vegetation.

Maintenance activities need to be done on a regular basis after the initial reclamation to ensure success. The construction of stabilized access roads allow access to the site for maintenance without causing erosion problems.

Reclaimed mine areas can provide important wildlife habitat. Improve the potential for wildlife habitat by establishing diverse vegetation types, including water in the reclaimed landscape, increasing edge effect, and diverse landforms. Avoid monocultures of vegetation. Use native, noninvasive vegetative species where possible.

Reclaimed soils are often low in organic matter. The use of organic soil amendments such as manure, compost, mulch, or sewage sludge can contribute to the success of vegetative establishment by increasing soil organic matter. Use deep-rooted perennial grasses and trees to further increase the long-term buildup of organic matter in the soil.

Consider the visual appearance of the completed site to ensure compatibility with nearby land uses.

Consider the complexity of the operation and maintenance needed for each potential solution during planning. Select treatments that are compatible with the desired level of maintenance.

PLANS AND SPECIFICATIONS

Prepare plans and specifications that describe the requirements for applying this practice to achieve the intended purpose or purposes.

At a minimum, include—

- A preliminary site report that describes the safety requirements for the investigation.
- A site investigation report that documents—
  - Risks to life, environment, and property associated with the mine.
  - Purpose of reclamation, including both onsite and offsite, as needed.
  - Access conditions on site.
  - Geology and ground water conditions at the site.
  - Amount of trash and debris onsite.
  - Presence of hazardous gases or acid mine drainage.
  - Inventory of the existing soil conditions, including the chemical and physical properties.
  - Water quality and quantity from seeps, runoff, and mine shafts.
  - Soil tests for pH and nutrients levels.
  - Mine history, including mine plan, if available.
  - Inventory of plant or animal species present onsite.
- Potential effects of changes to hydrology of site.
- Plan view of site with the location of structures, water features, etc.
- Plans showing the final grading to take place on the reclamation area. Identify lift thickness and compaction requirements.
- Profiles and cross-sections, as needed.
- Borrow and spoil requirements, including material types and quantities needed.
- Disposal plans for material removed from site.
- The location of topsoil and fill stockpiles.
- Erosion and sediment control practices.
- Dust control practices.
- Soil amendments to be applied to the site.
- Detailed information on the species and arrangement of plant materials to be planted on the site. Include the criteria for successful establishment of vegetation such as minimum percent ground and canopy cover, percent survival, or stand density.
- Site monumentation requirements.
- Active or passive treatment features such as dosing, Successive Alkalinity Producing System , Open Limestone Channel (OLC), and Anoxic Limestone Drain (ALD).
- Permanent features to be constructed on site such as fences, diversions, etc.
- Construction specifications.

- Safety requirements for construction.

OPERATION AND MAINTENANCE

Prepare an operation and maintenance plan for the site and review with the landowner prior to construction. At a minimum, include—

- Periodically check the site for areas where settlement may adversely affect drainage and land use. Perform needed repairs promptly.
- Periodically check the site for bare spots, eroded areas, areas of excessive settlement, and other areas where initial attempts to establish vegetation were not successful. Use soil testing to identify soil amendments needed to facilitate revegetation.
- Periodic soil testing and checking of vegetation to determine if additional soil amendments are needed.
- Periodically check the site for noxious weeds and invasive species. Treat, as appropriate.
- Inspection of passive treatments for clogging and damage.
- Operation requirements for active treatments.
- Maintenance of access roads.
- Maintenance of drainage structures and channels.
- Control of vehicular traffic to minimize disturbance to reclaimed areas.
- Periodically check structural measures and fencing. Repair or replace, as needed.
- Regular checking and maintenance of water treatment facilities, if applicable.

REFERENCES

USDA NRCS. 1983 (rev. July 2010). Landscape Architecture Note 1 (Title 210). Landscape Design in Mined Land Reclamation. Washington, D.C. https://directives.sc.egov.usda.gov/.

Fripp, J., P.F. Ziemkiewicz, and H. Charkavorki. 1999. Acid Mine Drainage Treatment – An Overview, TN SR-99. U.S. Army Corps of Engineers, Waterways Experiment Station, Vicksburg, MS.

2010 WL 2853883
Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court.

LOWE'S HOME CENTERS, INC., Plaintiff,
v.
TOWN OF AUBURN PLANNING BOARD and David Delollis, Philip Tully, Ronald Brooks, Daniel Carpenter, and David Doherty, in their capacity as members of the Town of Auburn Planning Board, Defendants.
Town of Auburn Planning Board, Plaintiff,
v.
Barbara Granger, Dan Lubin, Dennis Natoli, Marcia Ofcarcik and Wayne Page, in their capacity as members of the Town of Auburn Zoning Board of Appeals, and Lowe's Home Centers, Inc., Defendants.
Lowe's Home Centers, Inc., Plaintiff,
v.
Town of Auburn Planning Board and David Delollis, Philip Tully, Ronald Brooks, Daniel Carpenter, and David Doherty, in their capacity as members of the Town of Auburn Planning Board, Defendants.

Nos. 07 PS 352453(AHS), 07 PS 358322(AHS), 09 PS 393505(AHS).
|
July 21, 2010.

DECISION

ALEXANDER H. SANDS, III, Justice.

***1** Plaintiff Lowe's Home Centers, Inc. ("Lowe's") filed its unverified complaint in Permit Session Case No. 352453 on August 8, 2007, appealing, pursuant to G.L. c. 40A, § 17 and G.L. c. 185, § 3A, Defendant Town of Auburn (the "Town") Planning Board's (the "Planning Board") denial of three site plan applications (the "Site Plan Denials") and two earth removal special permit applications (the "Special Permit Denials") relating to property located at 614 Southbridge Street in Auburn, Massachusetts ("Locus"). The Site Plan Denials and Special Permit Denials were dated July 19, 2007 by the Planning Board. A case management conference was held on September 25, 2007.

Simultaneously with this appeal, Lowe's appealed the Site Plan Denials to the Town of Auburn Zoning Board of Appeals (the "ZBA"). On October 12, 2007, the ZBA filed a decision with the Town Clerk (the "ZBA Decision") that reversed the Site Plan Denials and approved the site plan applications.

On November 1, 2007, three neighbors of Locus, Gary Lemerise, Diane Bruke, and Mary Ann Anderson (the "Abutters"), filed their unverified complaint in Permit Session Case No. 358291, appealing, pursuant to G.L. c. 40A, § 17, the ZBA Decision. Also on November 1, 2007, the Planning Board filed its unverified complaint in Permit Session Case No. 358322, appealing, pursuant to G.L. c. 40A, § 17, the ZBA Decision. On November 29, 2007, a status conference was held for Permit Session Case No. 352453 and a case management conference was held for Permit Session Case No. 358291 and Permit Session Case No. 358322. In a post-hearing order of the same date, the three cases were consolidated.

On January 15, 2008, the Planning Board and the Abutters filed a Joint Motion for Summary Judgment for all three cases. On March 21, 2008, Lowe's and the ZBA filed a Joint Cross-Motion for Summary Judgment and Joint Opposition to the Motion for Summary Judgment filed by the Planning Board and the Abutters. [1] A summary judgment hearing was held on March 26, 2008, at which time the parties' motions for summary judgment were taken under advisement. By decision dated December 5, 2008 ("Land Court Decision 1"), this court found that (1) the ZBA lacked jurisdiction to hear the appeal of the Site Plan Denials and the ZBA Decision had to be reversed; (2) this court lacked jurisdiction to hear an appeal of the Site Plan Denials under G.L. c. 40A, § 17, but the appeal was properly brought before the permit session of the Land Court in accordance with G.L. c. 185, § 3A; (3) the Site Plan Applications proposed a use that was permitted as-of-right in a Highway Business ("HB") District; and (4) the Town of Auburn Zoning Bylaw (the "Bylaw") does not require Lowe's to obtain an earth removal special permit as a prerequisite to site plan approval for a use as-of-right. Because the Planning Board failed to address the Site Plan Applications within the legal framework of an as-of-right use, the Site Plan Denials were remanded to the Planning Board to take action consistent with Land Court Decision 1. The Planning Board held a remand hearing and issued a decision on January 27, 2009, approving the Site Plan Applications (the "Site Plan Approvals") with sixty-four conditions (the "Conditions").

***2** Lowe's filed its unverified complaint in Permit Session Case No. 393505 on February 13, 2009, appealing the Site Plan Approvals. On February 27, 2009, the Abutters, Lowe's, and the ZBA filed a Stipulation of Dismissal with Prejudice relative to Permit Session Case No. 358291. A pre-trial conference was held on April 1, 2009, at which the attorneys for the Planning Board filed a motion to withdraw as counsel. A status conference was held on April 24, 2009, at which the Chairman of the Planning Board, the Town Accountant, the Vice-Chair of the Board of Selectmen, and the Town Administrator were present, in addition to counsel for the Planning Board and Lowe's. A Motion to Consolidate the three remaining cases (Permit Session Case Nos. 352453, 358322, and 393505) was allowed and the Motion for Leave to Withdraw as counsel for the Planning Board was allowed. By letters dated April 28, 2009, and April 29, 2009, the Planning Board advised this court that the Board of Selectmen had voted not to continue with the litigation.

On May 28, 2009, Plaintiff submitted the written pre-filed direct testimony of Plaintiff's witnesses Lawrence Lepere and Edward B. Boiteau together with a Revised Exhibit List and Chart of Conditions. A site view and the first day of trial at the Land Court in Boston was held on June 4, 2009. [2] The second day of trial was held in the Land Court in Boston on July 22, 2009. After the completion of the trial, Plaintiff filed its Motion for Entry of Default against the Planning Board, which was allowed, and Default Judgment, which was denied. On October 6, 2009, Plaintiff filed its Proposed Findings of Fact, Proposed Conclusions of Law, and Affidavit of Lawrence Lepere Amending and Correcting Testimony Given at Trial. At that time this matter was taken under advisement.

Trial testimony was given by Plaintiff's witnesses Lawrence Lepere (site development manager for Plaintiff), Edward Boiteau (civil engineer for Plaintiff), and Michael Burke (environmental manager for Plaintiff). Plaintiff submitted 108 exhibits, but did not rely on all of them at trial.

Based on the sworn pleadings, the evidence submitted at trial, and the reasonable inferences drawn therefrom, I find the following material facts:

1. Locus consists of three adjoining parcels of land in Auburn, Massachusetts: two parcels ("Parcel 1" and "Parcel 2") owned by Lowe's and containing a total of seventeen acres, and one parcel ("Parcel 3") owned by the Massachusetts Turnpike Authority ("MTA") and containing 1.84 acres. Parcel 1 is the former site of a motel, office, and conference center. A bank building currently exists on Parcel 2.

2. The Abutters own properties abutting Locus on the west.

3. On April 27, 2006, Lowe's received an Order of Conditions from the Auburn Conservation Commission under the Wetlands Protection Act, G.L. c. 131, § 40.

4. On July 18, 2006, Lowe's submitted three Site Plan Approval Applications (the "Site Plan Applications") to the Planning Board pursuant to Section 9.4 of the Bylaw, which states: "The Planning Board may approve a Site Plan in accordance with the standards of this by-law."[3] Section 9.4.1 of the Bylaw continues:

> ***3** Applicability-Site Plan Approval shall be required in all instances for the development of land in Section 3, Table of Principal Uses as requiring Site Plan Approval and for all accessory uses thereto. Additionally, any expansion of an existing use which now requires Site Plan Approval shall be subject to the requirements of this by-law. Furthermore, any development that requires a Special Permit, or a Variance authorizing a use not specifically allowed by the By-law, is also subject to a Site Plan Approval by the Planning Board, unless this requirement is waived by the Planning Board. The requirements that follow for granting Site Plan Approval may be waived in part or in total at the discretion of the Planning Board.
>
> The site plan (the "Site Plan") filed with the Site Plan Applications proposed a development (the "Development") at Locus that would span all three parcels. All three Site Plan Applications were filed for retail store uses: Parcel 1 as Retail Store-Home Improvement Center; Parcel 2 as Retail/Bank Building; and Parcel 3 as parking lot for retail store and park and ride facility for the MTA. As shown on the Site Plan, Lowe's proposes to build a retail establishment on Parcel 1 consisting of a 168,554 square foot structure, including a 136,358 square foot building and a 32,196 square foot attached garden center.

5. Locus is located within an HB District under the Bylaw. The Bylaw's Table of Principal Uses allows a "retail store and sales" use within an HB District with site plan approval. A lumber yard is a prohibited use in an HB District.

6. Lowe's is registered to do business in Massachusetts as a corporation in the business of "Retail Sales."[4] Lowe's described its proposed use of Locus as "retail use (home improvement)" in the Special Permit Applications, as hereinafter defined, and the Site Plan Applications.

7. Section 3.8.1.2.3 of the Bylaw states that a special permit is not required for removing earth products not exceeding 500 cubic yards when incidental to and in connection with the construction of a building. Construction of the Development in accordance with the Site Plan would require blasting a ledge and removing earth in quantities substantially in excess of this threshold as described hereinafter.

8. Lowe's submitted two Earth Removal Special Permit Applications (the "Special Permit Applications") to the Planning Board on January 12, 2007, one each for Parcel 1 and Parcel 3.[5] In the Special Permit Applications, Lowe's sought approval to blast a large amount of the ledge on the northern, eastern, and western borders of Locus and to remove earth from Locus.

9. Before its first meeting with the Planning Board, Lowe's planned to have a stenographer record all Planning Board meetings to maintain an accurate record. One Planning Board member refused to hear Lowe's application if a stenographer were present. Faced with the possibility of not having a full board and not receiving a vote, Lowe's did not record the meetings.

***4** 10. The Planning Board opened the public hearing on the Special Permit Applications on February 13, 2007. After several hearings, the Planning Board closed the public hearing on April 24, 2007.

11. The Planning Board voted 5-0 to deny the Special Permit Applications. The Special Permit Denials, filed with the Town Clerk on July 19, 2007, stated the reasons for denial of the Special Permit Applications: (1) the Planning Board had requested a buffer of fifty feet where Locus abuts residential property in order to minimize the adverse effects of earth removal and Lowe's was unwilling to modify its plan accordingly; (2) the noise attenuation wall proposed along the north side of the building would not be high enough to block noise generated by HVAC units on the proposed building's rooftop;[6] and (3) the volume of earth to be removed was excessive.

12. The Planning Board voted 4-0 with one abstention to deny the Site Plan Applications. The Site Plan Denials, filed with the Town Clerk on July 19, 2007, stated the reasons for denial of the Site Plan Applications as follows:

1. *Denial of Earth Removal Special Permit:* The Planning Board denied the applicant's earth removal special permit, and the applicant was unwilling to render a site plan without earth being removed from the site.

2. *Use is Not Permitted:* A bulk merchandise retail use and/or lumber yard is not allowed in the Highway Business district.

The Site Plan Denials also stated as reasons for denial: Lack of Adequate Buffer; Noise Attenuation; Deficient Traffic Analysis; and Severe Traffic Impacts.

13. The Planning Board's review of the Site Plan and Earth Removal Special Permit Applications included peer review.[7] With respect to the Development, the following peer reviewers filed reports: Beta Group, Inc. (traffic impacts); Antonio Franco & Associates (lighting); Graves Engineering, Inc. (buffer zone and noise attenuation wall); Modeling Specialties (noise assessment); Beals and Thomas, Inc. (drainage, hydrology, landscaping, general site design). Additionally, Lowe's submitted a peer review report on drainage and hydrology commissioned by the ZBA and prepared by Graves Engineering after the Planning Board indicated it would have hired Graves Engineering as its own expert.

14. On May 1, 2008, the Town of Auburn amended the Bylaw (the "New Bylaw"). The Town added three additional lighting requirements to the New Bylaw (the "New Lighting Requirements"), added an entire section on landscaping requirements ("Section 11"), and added a requirement that architecture demonstrate cohesive planning (the "Architecture Requirement").

15. On February 20, 2009, Lowe's agreed to fourteen of the sixty-four conditions established in the Site Plan Approvals, specifically Conditions 3, 4, 9, 12, 16, 19, 29, 30, 31, 44, 46, 56, 59, and 63. Also on this date, Lowe's proposed compromise language and/or sought clarification of additional conditions. In a letter to this court dated April 29, 2009, Burney stated that the Planning Board had voted not to negotiate any of the Conditions.

***5** 16. The Site Plan Approvals acknowledge that the Planning Board looked to the New Bylaw in granting the Site Plan Approvals, stating that

> Even assuming that the May 1, 2008 zoning changes are not strictly applicable to Lowe's land, the Planning Board finds that these changes provide useful guidance as to the type of conditions that ought to be placed on a Site Plan under the pre-May 1, 2008 version of the Zoning Bylaw. The Planning Board has thus relied upon these changes to guide its decision-making on Lowe's Site Plan.

17. Fifteen conditions are based on the New Bylaw. Conditions 8 and 10 incorporate the exact language of the Lighting Requirements. Conditions 34-43, 45, and 48 either incorporate the exact language of or are consistent with the language of Section 11. Condition 49 is consistent with the language of the Architecture Requirement.

A. General Conditions

18. Condition 1 requires that Site Plan Approval will not take effect until pending variance appeals have been disposed of and become final and enforceable. The Site Plan Approvals state that four variances that Lowe's obtained are the subject of an appeal in Worcester Superior Court. The Site Plan Approvals further state that Lowe's reported the appeal has been settled "in principle" but no final judgment dismissing the appeal had been entered.

19. Condition 2 requires Lowe's to obtain permits and comply with all conditions and procedures related to dumpsters, storage of flammable liquids, waste oil, and propane as required by the Fire Department.

20. Condition 20 requires Lowe's to obtain required permits and comply with all conditions required by the Board of Health and the "State Division of Sanitation."

21. Condition 60 requires Lowe's to comply with the terms and conditions of all special permits and variances and with all terms and conditions of the Order of Conditions issued by the Conservation Commission.

22. Condition 62 requires Lowe's to maintain all entrances and means of egress in its store free of retail products, inventory or other obstructions that interfere with customer movement out of the store in accordance with the Massachusetts Fire Safety Code. Condition 62 also includes language copied directly from the State Fire Code.[8]

23. Condition 64 states that the Site Plan Approvals will not take effect until both Site Plan Approvals and the approved plan are recorded in the Worcester South District Registry of Deeds (the "Registry").

B. Nuisance Conditions

24. Lowe's submitted a dust mitigation plan in response to Condition 5, which requires Lowe's to ensure that no residue, dust or smoke is detectable beyond the property line. The plan requires Lowe's to water down earthen areas where trucks will travel and put gravel on other areas so that trucks do not drive over earth to create dust. Lowe's has dust mitigation plans on all its construction sites. The Planning Board never responded to Lowe's request for clarification as to whether the dust mitigation plan was sufficient.

C. Lighting Conditions

***6** 25. Conditions 6-10 relate to light fixtures. Antonio Franco & Associates concluded that Lowe's lighting plan provided adequate lighting for Locus and that abutting residential properties would not be impacted by the light plan. At the time of this peer review conclusion, there were no applicable standards required by the Bylaw. Subsequent to the Site Plan Approvals, Lowe's sought clarification from the Planning Board as to whether Lowe's proposed lighting designs were acceptable to fulfill Conditions 6, 7, and 8. Condition 7 requires Lowe's to equip all facade lighting luminaires with a top visor to reduce or eliminate any up light above the horizontal plane of the building facade wall. Lowe's provided the Planning Board with catalog cuts and design details of its proposed light fixtures, which included the possibility of ordering top visors to minimize up-light. The Planning Board never responded to the request for clarification nor did it respond to the request for approval of the light fixtures details.

D. Noise Attenuation Conditions

26. Conditions 11-18 and 32 relate to noise attenuation measures. Lowe's retained a sub-consultant, Resource Systems Group ("RSG"), to conduct a noise study and analyze Lowe's proposed operations and make recommendations to mitigate the effect of any noise from the site on abutting residences. Based on the RSG report, Lowe's added a number of noise mitigation elements, including a noise attenuation wall, placing rooftop HVAC units in a way to limit noise detectable by observers in nearby residences, applying noise damping materials to certain machinery, and reducing noise from delivery truck backup alarms and horns.

27. Condition 11 requires Lowe's to construct a noise attenuation wall before the commencement of any other site activities. Lowe's requested clarification of Condition 11 from the Planning Board because landscaping and other construction work is

necessary in order to prepare for constructing the wall. Lowe's proposed modifying the condition to account for prefatory activities necessary in order to construct the wall.[9] The Planning Board failed to respond to this request for clarification or to the proposed modification.

28. Condition 13 requires that the average sound level (LEQ)[10] not exceed 51 A-weighted decibels (dBA)[11] within the property of residents adjacent to Locus and authorizes the Planning Board or its designee to inspect Lowe's site within 90 days after issuance of a Certificate of Occupancy and as warranted to ensure future compliance. Lowe's proposed modification would amend Condition 13 to read:

> The average sound level (LAEQ 1-hour)[12] from all Lowe's operational sources shall not exceed 51 dBA or the average ambient sound level (L90 as defined by DAQC),[13] if greater at the time of the measurement, within the property line of the residents adjacent to the site. Lowe's shall allow the Town's designated code enforcement official[14] to access the property reasonably to take sound measurements from time to time.

***7** Lowe's proposed modification includes taking into account the average ambient sound level within abutters' property to account for the possibility that noise from sources other than Lowe's could increase noise levels in the future at residential property lines. Lowe's proposed modification also removes language that would have made the Planning Board the enforcement authority for Condition 13. The Planning Board failed to respond to Lowe's request to consider the proposed modification.

29. Condition 14 requires Lowe's to relocate the truck loading dock area from the northeast corner of its building to the western side of the building. The Site Plan Approvals state that Lowe's proposed location for the loading dock would result in intermittent noise sources from loading operations being concentrated closest to the Abutters' property. Relocating the truck dock was not discussed at any Planning Board public hearings, nor was it the subject of any peer review recommendations. Relocating the truck loading dock would require that the lumber area be relocated to the southeast corner of the building, right at the main entrance of Locus. The lumber area, where large trucks come to pick up lumber, involves a high level of truck activity. The main entrance is next to residential abutters' property and is the only access point to Locus for all vehicles.

30. Condition 15 requires Lowe's to use a noise damping compound on its trash compactor and submit to the Planning Board the details of the noise damping compound prior to construction. By letter dated March 13, 2009, Lowe's submitted to the Planning Board technical details for the noise damping compound, VBD-10, that it planned to use. The Planning Board did not respond to Lowe's letter. Lowe's proposes modifying the condition to name VBD-10 as the noise damping compound.[15]

31. Condition 17 requires that Lowe's "emergency generator shall be exercised only during daylight hours." Lowe's requested clarification from the Planning Board as to whether the Planning Board meant "tested" when it used the word "exercised." Lowe's plans for its emergency generator to be used only in case of emergencies and for it to undergo short, weekly testing during daylight hours. Lowe's agrees to Condition 17 if the word "exercised" is replaced with "tested." The Planning Board did not respond to Lowe's request for clarification.

32. Condition 18 requires that Lowe's prohibit truck drivers' discretionary use of truck horns in the rear or eastern side of the building. The RSG report specifically states that prohibiting discretionary use of truck horns is possible by posting signs or notifying drivers directly. Lowe's agreed to take various measures, including posting signs, to prevent the discretionary use of truck horns and sought clarification from the Planning Board whether these plans were sufficient. Lowe's requested clarification of Condition 18, stating that it would be impossible to prevent a truck horn ever to be blown on Locus. The Planning Board did not respond to Lowe's request for clarification.

***8** 33. Condition 32 prohibits Lowe's from installing outside loud speakers or paging systems for the conduct of business on Locus. The Site Plan Approvals state that "Lowe's Site Plan does not show any loud speaker or paging system." Lowe's will not use loud speakers on its site but will instead use handheld walkie-talkie pager systems that are audible only to the user and do not have the same noise as a loudspeaker or other paging system. Lowe's sought clarification from the Planning Board about whether its walkie-talkie system would satisfy Condition 32, but the Planning Board failed to respond.

E. Store Operation Conditions

34. Condition 61 prohibits Lowe's from placing any retail products, inventory or any other item outdoors. In discussions during the public hearing process, the Planning Board indicated that it would not allow sidewalk sales-sales along the sidewalks exterior to the building-and Lowe's indicated it was amenable to this condition. Lowe's sought clarification of whether Condition 61 would prohibit its outdoor garden center, which has areas that are unroofed and open to air, but the Planning Board did not respond.

F. Landscaping Conditions

35. Condition 47 requires that where the sound barrier wall is closer than 25 feet to an abutting residential property, plants should be placed on both sides of the wall but to the extent feasible shall be concentrated on the side closer to the abutting properties. Condition 11's requirement that the noise attenuation wall be moved closer to the abutting residential properties means there is less space than anticipated for plants on the side of the wall closer to residential property lines.

G. Sewage/Drainage Conditions

36. Condition 23 requires Lowe's to have the slope on the northwestern side of Locus assessed by a geotechnical engineer to confirm slope stability. In March 2007, Lowe's hired a geotechnical engineering firm, Haley & Aldrich, to review design elements related to proposed drainage and slope stability at Locus. Lowe's filed with the Planning Board a letter from Haley & Aldrich that approved the drainage system. Lowe's requested that the Planning Board review and respond to Haley & Aldrich's assessment, but the Planning Board did not respond.

37. Condition 22 requires Lowe's to provide dimensions for a swale intended to receive runoff water and engineering calculations to confirm the swale's capacity. Condition 24 requires Lowe's to revise its plans for the retaining wall to comply with the Haley & Aldrich recommendations. Condition 25 requires Lowe's to modify its design for proposed drainage trenching to incorporate trench dams and other appropriate engineering measures to prevent groundwater from flowing through the trenches.

38. In 2005, the ZBA hired Graves Engineering to peer review Lowe's proposed drainage system for Locus. A letter dated September 14, 2005 from Graves Engineering to the ZBA states that Lowe's revised its drainage system plans to address all comments issued by Graves Engineering, including the dimensions of the swale. Graves Engineering approved the drainage system as meeting all local and state storm water management regulations, including the Department of Environmental Protection (DEP) storm water policy. The Water District also approved the proposed drainage system. During the Planning Board's peer review process, the Planning Board indicated to Lowe's that an additional peer review on storm water and drainage issues was unnecessary because the Planning Board would have ordinarily used Graves Engineering to peer review the Lowe's project.

***9** 39. Conditions 26 and 27 require Lowe's to redesign its infiltrative and detention drainage systems by raising the systems' elevation. The Site Plan Approvals state that a report by peer reviewer Beals and Thomas indicated that the proposed drainage system would be sitting with 3 feet of groundwater in the system and, thus, would not function. This report was not included in the record. The Site Plan Approvals cite this report when stating that the observed groundwater levels are substantially above the part of the proposed subsurface detention system such that detention pipes would float and damage the proposed parking system above.

40. Jaworski Geotech (now Terracon Consultants) conducted a geotechnical investigation on the soil, groundwater, and bedrock at Locus. Terracon used the Frimpter method and a modified Frimpter method to estimate the seasonal high groundwater at Locus. [16] Terracon used a USGS well ten miles away as an index well. The index well was located in a sandy soil area; the wells on Locus are located partially in a sandy/gravelly deposit and partially in a glacial till deposit. The differences in soil types between the wells required Terracon to modify the Frimpter method to normalize the comparisons between wells. Terracon concluded that there would be adequate separation between the drainage system and the seasonal high water table

41. Terracon estimated that the adjusted seasonal high water level at Locus was approximately six feet below grade. Without the site-specific adjustments made by Terracon, the elevation of the estimated seasonal high water table could increase by three to five feet.

42. Condition 28 requires Lowe's to submit an as-built plan with the seal of a professional engineer certifying that the drainage system conforms to the conditions in the Site Plan Approvals, i.e. Conditions 22-28.

43. Conditions 23-28 require Lowe's to submit the results or revisions to the Planning Board for approval prior to commencing construction.

H. Traffic Conditions

44. Conditions 50-54, 55, 57, and 58 impose traffic mitigation requirements on Lowe's.

45. Lowe's has worked with the Massachusetts Highway Department (MHD) to design traffic mitigation measures for Locus. On May 31, 2005, the Executive Office of Environmental Affairs issued a Final Environmental Impact Report (the “FEIR”) for the Development. On September 7, 2005, MHD issued a Section 61 finding (the “Section 61 Finding) [17] that discussed specific traffic mitigation measures that would be required at Locus to minimize the impact of the Development. Conditions 50-54, 57, and 58 parrot the language of the mitigation measures detailed in the Section 61 Finding.

46. In order to become final, the conditions outlined in the Section 61 Finding must be incorporated into an MHD permit for the Development. MHD has not yet issued this permit. Lowe's is currently in the 25 percent design approval level for Section 61 Finding. [18] Lowe's is willing to fund and construct any mitigation measures required to meet final MHD approval. [19]

***10** 47. The Planning Board's justification for Conditions 50-55, 57, and 58 in the Site Plan Approvals was Section 9.4.6.15 of the New Bylaw. This section does not appear in the Bylaw applicable in 2006.

48. Conditions 50 and 51 also include language that is not in the Section 61 Finding. This language would require Lowe's to install traffic signals and to maintain, service, repair, and/or replace them as necessary for up to five years after installation. Lowe's engineers testified that once a business has paid to have traffic signals installed on a state highway, MHD services these traffic signals.

49. Condition 55 requires Lowe's to establish a Worcester Regional Transit Authority (WRTA) bus stop on Locus, post bus schedules in its store, and to construct and maintain a bus shelter within or adjacent to its proposed park-and-ride lot on the MTA parcel. The Section 61 Finding states that Lowe's should “work with the WRTA to establish a bus stop on site.” Lowe's has strict policies about the size of vehicles it allows on its site and views circulation of public buses, which it does not control or operate, on its sites as a traffic and safety conflict. Lowe's proposed modifying Condition 55 to establish a bus stop near Locus instead of on Locus to avoid creating traffic conflicts, but the Planning Board did not respond. [20]

50. Condition 56 requires Lowe's to conduct traffic counts in the Linda Avenue neighborhood prior to site occupancy and six months after the opening of the store to determine if vehicles are using the neighborhood as a short cut and whether traffic calming measures should be considered. Condition 56 then requires Lowe's to submit the results to the Planning Board and to install any traffic calming measures deemed necessary by the Planning Board.

51. Condition 58 requires Lowe's to fund a complete traffic signal warrant analysis at the intersection of Oxford Street and Bryn Mawr Avenue. Condition 58 also contains a footnote requiring that the Planning Board may ask MHD to require Lowe's to pay for installation of a traffic signal at this intersection. The Section 61 Finding states that this intersection is not under MHD jurisdiction.

I. Conditions Relating to Earth Removal

52. Condition 21 requires Lowe's to obtain an Earth Removal Special Permit authorizing removal of earth within ten feet of the natural, seasonal high groundwater table in an amount sufficient to implement the redesigned stormwater management systems required in Conditions 22-27. In May 2005, Lowe's applied to the ZBA for a variance and special permit seeking relief from the Bylaw to allow removal of earth materials within ten feet of historical high groundwater levels. After public hearings and peer review from Graves Engineering, Inc., the ZBA granted the variance and special permit in November 2005 (the “2005 Special Permit”).

53. During public hearings on the Site Plan Applications, the Planning Board indicated that it may require a fifty-foot undisturbed vegetative buffer around the perimeter of each parcel. Such a requirement would have created 100-foot wide swath of land within Locus that Lowe's would not be able to develop and would have rendered the Development unbuildable on Locus. The final decision included only a requirement for a fifty-foot vegetative buffer around the perimeter of Locus.

***11** 54. Condition 33 requires Lowe's to obtain an Earth Removal Special Permit authorizing earth removal within fifty feet of the site boundary. Lowe's proposed vegetative buffer between its store and residential property lines is approximately seventy-seven feet to the northern property line, thirty-five feet in the extreme northeast corner and between sixty-eight and sixty-nine feet to the eastern property line. To comply with Condition 33, Lowe's would need to relocate the store to the south by fifty feet and to the west by approximately forty feet. Relocating the store would eliminate 150 parking spaces, which would put Lowe's in violation of special permits for parking that Lowe's obtained from the ZBA. Relocating the store would require additional time for further redesign and re-permitting, on top of approximately two to three months of construction time. The additional excavation needed would require removing approximately 25,000 cubic yards of additional earth and rock, which in turn would add one-thousand truck trips to the 8,000 trips currently estimated to remove earth and rock from Locus.

J. Earth Removal Special Permit Denials

55. Lowe's will need to perform excavation on Locus, which will include earth cuts and earth fills to achieve the final grade required to develop Locus for its store and required parking. Lowe's plans to excavate 162,450 cubic yards of earth and to reuse approximately 31,450 cubic yards of earth as fill on site. Lowe's plans to excavate 70,100 cubic yards of rock and plans to crush approximately 20,000 cubic yards of rock for use on site. Lowe's estimates that 181,000 cubic yards of excess earth and rock would need to be removed for construction of the Development. In the Special Permit Denials, the Planning Board stated that Beta Group, the peer reviewer, estimated that construction of the Development in accordance with the Site Plan would require between 207,415 and 233,386 cubic yards of earth removal. There is no report from Beta Group in the record.

56. Earth excavation will take approximately four to five months. Lowe's plans to use the Locus to operate the store for a period of approximately twenty years. Lowe's will need to pay to have the excess earth and rock removed from Locus. Lowe's

engineers testified that there is no market in the area for such a large amount of earth and rock during the four to five months that excavation will occur and that it would cost Lowe's money to get rid of the excess material.

Of the sixty-four conditions established in the Site Plan Approvals, Lowe's has agreed to fourteen: Conditions 3, 4, 9, 12, 16, 19, 29, 30, 31, 44, 46, 56,[21] 59, and 63. Therefore, I find that these conditions remain valid and enforceable. Fifty conditions remain in dispute. I shall discuss each of these conditions in turn.

Although site plan review is a permissible regulatory tool for imposing reasonable terms and conditions on uses permitted as of right, it is well settled that the Zoning Act, G.L. c. 40A, §§ 1 et seq., does not expressly recognize site plan review "as an independent method of regulation." *Osberg v. Planning Bd. of Sturbridge,* 44 Mass.App.Ct. 56, 57, 687 N.E.2d 1274 (1997); *see also Y.D. Dugout, Inc. v. Bd. of Appeals of Canton,* 357 Mass. 25, 31, 255 N.E.2d 732 (1970). "Consequently, guidance regarding the appropriate mechanism for review of planning board action on a site plan has developed in iterative stages, depending on the particular frameworks established under various local bylaws." *Cumberland Farms, Inc. v. Planning Bd. of Bourne,* 56 Mass.App.Ct. 605, 608 n. 6, 779 N.E.2d 159 (2002) (citation omitted). Cases have recognized a distinction between site plan approvals for a use as of right and approval of special permit site plans. *See Osberg,* 44 Mass.App.Ct. at 58, 687 N.E.2d 1274.

***12** In cases where the site plan is related to a use as of right, the local board has no discretionary power to deny the use, and may only impose reasonable terms and conditions on the proposed use. *Id.* at 59, 687 N.E.2d 1274. When reviewing a planning board's decision to approve a site plan with conditions for a use as of right, the judge's standard of review is one of reasonableness. *See Y.D. Dugout, Inc.,* 357 Mass. at 31, 255 N.E.2d 732. When reviewing a planning board's decision denying approval of a site plan submitted in connection with a use allowed as of right, the judge is to "examine the proposal to see if the [reason for denial] was so intractable that it could admit of no reasonable solution." *Prudential Ins. Co. of America v. Bd. of Appeals of Westwood,* 23 Mass.App.Ct. 278, 282-83, 502 N.E.2d 137 (1986). In the absence of such a finding, the judge is not required to give deference to the board's decision. *See id.* at 283, 502 N.E.2d 137.

In Land Court Decision 1, this court determined that the use of Locus was retail and therefore an as-of-right use. Therefore, this court will evaluate the Site Plan Approvals under a standard of reasonableness. "What conditions, if any might be deemed reasonable ... requires careful factual analysis." *Muldoon v. Planning Bd. of Marblehead,* 72 Mass.App.Ct. 372, 376, 892 N.E.2d 353 (2008). Conditions that fundamentally undermine or adversely affect the fundamental use of a site have been held invalid because these issues were previously decided "in a legislative sense" when the city or town enacted a zoning ordinance allowing fundamental use of the site. *Castle Hill Apartments Ltd. P'ship v. Planning Bd. of Holyoke,* 65 Mass.App.Ct. 840, 847, 844 N.E.2d 1098 (2006) (citing *KCI Mgmt. Inc. v. Bd. of Appeal of Boston,* 54 Mass.App.Ct. 254, 261, 764 N.E.2d 377 (2002)). Lowe's has the burden of proof to show that the conditions stated in the Site Plan Approvals were not reasonable. *See Selectmen of Ayer v. Planning Bd. of Ayer,* 3 Mass.App.Ct. 545, 548, 336 N.E.2d 388 (1975).

A. Conditions Requiring Additional Approvals from the Planning Board

The following conditions require Lowe's to return to the Planning Board for additional approvals: Condition 6 (lighting); Conditions 23-27 (sewage/drainage); Condition 49 (architecture); and Condition 54 (traffic). A planning board may not impose conditions that grant the board "unfettered discretion to determine after the fact whether the details [of certain conditions] are satisfactory" after the board has rendered a site plan decision. *See Castle Hill,* 65 Mass.App.Ct. at 844 n. 7, 844 N.E.2d 1098 (observing this court's order striking conditions related to a planning board's attempts to require an applicant to seek additional approvals related to landscaping). The above-enumerated conditions fall under this concern, and as a result, I find Conditions, 6, 23-27, 49 and 54 unreasonable and invalid.[22]

Lowe's agrees to Condition 56, but Condition 56 also requires Lowe's to return to the Planning Board for additional approvals on traffic calming measures. Condition 56 must therefore be modified to eliminate any language that would require further approvals from the Planning Board. [23] Therefore, I find that the modified version of Condition 56, which removes language requiring Lowe's to obtain further approvals from the Planning Board, is valid and enforceable.

B. Conditions Relating to the New Bylaw

***13** Conditions 8, 10, 34-43, 45, 48, and 49 relate to requirements for: lighting (8 and 10) landscaping (34-43, 45, and 48) and architecture (49). Each of these conditions relate to requirements of the New Bylaw. The Site Plan Applications were filed on July 18, 2006. Lowe's argues that the Site Plan Applications should be determined by the Bylaws in existence in 2006 and that the previously enumerated conditions are invalid.

Pursuant to G.L. c. 40A, § 5, "[t]he effective date of the adoption or amendment of any zoning ordinance or bylaw shall be the date on which such adoption or amendment was voted upon by a city council or town meeting...." In the context of an application filed under the subdivision control law, G.L. c. 41, §§ 81K-81GG, the Appeals Court applied this standard in *MP Corp. v. Planning Bd. of Leominster,* 27 Mass.App.Ct. 812, 545 N.E.2d 44 (1989). In that case, a developer had filed its preliminary development plans for a commercial-retail development before Leominster adopted a new zoning ordinance and the court held that the zoning ordinance effective at the time of filing was controlling. *Id.* at 816-17, 545 N.E.2d 44.

In the case at bar, the New Bylaw became effective on May 1, 2008 and, thus, was legally inapplicable to the Planning Board's consideration of the Site Plan Applications on remand. The Planning Board even acknowledged that it had looked to the New Bylaw in granting the Site Plan Approvals. Furthermore, the language of Conditions 8, 10, 34-43, 45, 48, and 49 is copied directly from or is clearly consistent with the language of the New Bylaw. Therefore, I find that Conditions 8, 10, 34-43, 45, 48, and 49 are invalid as a matter of law.

C. Conditions That Lowe's Argues Exceed the Planning Board's Jurisdiction

Lowe's argues that Conditions 1, 2, 20, 60, 62, 50-54, 57, 58, and 64 exceed the Planning Board's jurisdiction. Condition 1 requires that Site Plan Approval will not take effect until pending variance appeals have been disposed of and become final and enforceable. Conditions 2, 20, and 60 require Lowe's to obtain permits and comply with conditions and procedures that are deemed necessary by the Fire Department, Board of Health and "State Division of Sanitation," and the Conservation Commission, respectively. These conditions do not involve the Planning Board taking enforcement power from any of the appropriate enforcement authorities. Rather, these conditions simply state that Lowe's must follow any procedures and conditions required by law by the appropriate enforcement authority. It goes without saying that Lowe's must follow all procedures and conditions required by law for the appropriate enforcement authorities for each aspect of the Development. Therefore, I find that Conditions 1, 2, 20, and 60 are reasonable and enforceable. [24]

Conditions 50-54, 57, and 58 impose traffic mitigation requirements on Lowe's. Pursuant to G.L. c. 81, § 21,

> Any person who builds or expands a business, residential or other facility intending to utilize an existing access or a new access to a state highway so as to generate a substantial increase in or impact on traffic shall be required to obtain a permit under this section prior to constructing or using such access. Said person may be required by [MHD] to install and pay for, pursuant to a permit under this section, standard traffic control devices, pavement markings, channelization, or other highway improvements to facilitate safe and efficient traffic flow, or such highway improvements may be installed by [MHD] and up to one hundred percent of the cost of such improvements may be assessed upon such person.

***14** MHD also has enforcement jurisdiction "to enforce the provisions of this section or the provisions of any permit, regulation order or approval issued under this section." *Id.; see also Davis v. Westwood Group,* 420 Mass. 739, 745, 652 N.E.2d 567 (1995) ("[MHD] oversees a permit process for approving and overseeing alterations to state highways."). Additionally, the Appeals Court has previously negated conditions imposed by a local board that required road work on a State highway because "the required road work can only be done by the governmental authorities responsible for [the State highway], and performance of that work-if it is to be done at all-will be a governmental decision beyond the control of [the applicant]." *V.S.H. Realty, Inc. v. Zoning Bd. of Appeals of Plymouth,* 30 Mass.App.Ct. 530, 534-35, 570 N.E.2d 1044 (1991).

Conditions 50-54, 57, and 58 contain the same language as the traffic mitigation measures outlined in the Section 61 Finding. Requiring and enforcing these traffic mitigation measures, however, is within the exclusive jurisdiction of MHD. Moreover, in the Site Plan Approvals, the Planning Board imposed these conditions based on a section of the New Bylaw, which as discussed earlier, is not allowed. It should be noted that in the FEIR and Site Plan Applications, Lowe's already agreed to commit to many of these traffic mitigation measures and that Lowe's must by law comply with any mitigation measures required by MHD. Furthermore, Lowe's has yet to received the required permits from MHD that would make these mitigation measures final. Therefore, I find that Conditions 50-54, 57, and 58 exceed the Planning Board's jurisdiction and are invalid as a matter of law.

Conditions 50 and 51 contain language that requires Lowe's to maintain, service, repair, and/or replace certain traffic signals after installing them. This language is absent from the Section 61 Finding. G.L. c. 85 § 2 provides:

> [MHD] shall erect and maintain on state highways ... direction signs, warning signs or lights, curb, street or other traffic markings, mechanical traffic signal systems, traffic devices, or parking meters as it may deem necessary.... No such signs, lights, signal systems, traffic devices, parking meters or markings shall be erected or maintained on any state highway by any authority other than [MHD] except with its written approval.... Any traffic control device which has not been erected or maintained in accordance with the foregoing provisions may be removed by or under the direction of MHD ... or ... may be disposed of at the discretion of MHD.

There is no evidence of written permission from MHD that Lowe's should maintain any of these traffic signals. Furthermore, I credit the testimony of Lowe's engineers that MHD is usually responsible for maintaining traffic signals after a business has paid to install them as Planning Board did not submit any evidence to the contrary. Therefore, I find that language in Conditions 50 and 51 that requires Lowe's to maintain, service, repair, and/or replace certain traffic signals after installing them is invalid because it exceeds the Planning Board's jurisdiction.

***15** Condition 58 requires Lowe's to fund a complete signal warrant analysis at the intersection of Oxford Street and Bryn Mawr Avenue and a footnote to this condition states that the Planning Board may ask MHD to require Lowe's to fund the installation of a traffic signal at this intersection. MHD itself stated in the Section 61 Finding that it does not have jurisdiction over this intersection. The Planning Board cannot ask MHD to impose a condition on Lowe's over an area which MHD has no jurisdiction. Therefore, I find that the footnote to Condition 58 is unreasonable and invalid.

Condition 62 requires Lowe's to maintain all entrances and means of egress in its store free of retail products, inventory or other obstructions that interfere with customer movement out of the store in accordance with the Massachusetts Fire Safety Code. Condition 62 reinforces this by quoting directly the relevant language from the Massachusetts Fire Safety Code that requires the removal of any obstacles that may interfere with the means of egress or escape from the building or fire department in case of fire. The Fire Department, however, is responsible for enforcing the Massachusetts Fire Safety Code. *See* 527 C.M.R. 1.03 ("It shall be the duty and responsibility of the Marshal or the head of the fire department or his designee, to enforce the provisions of the code as herein set forth."). By directly requiring Lowe's to comply with the State Fire Code and quoting requirements from the State Fire Code, Condition 62 exceeds the Planning Board's jurisdiction. Therefore, I find that Condition 62 exceeds the Planning Board's jurisdiction and is invalid.

Condition 64 states that the Site Plan Approvals will not take effect until both the Site Plan Approvals and the approved plan are recorded in the Registry. Because this court invalidates many of the conditions in the Site Plan Approvals, it would be unreasonable for Lowe's to file the Site Plan Approvals with the Registry and thus Lowe's need not file it. Condition 64, however, is not entirely unreasonable. Once the Planning Board has issued a decision consistent with these findings, as it is directed to do, *infra,* the Planning Board may require Lowe's to file its new decision with the Registry. Lowe's argues that there is no statutory requirement or municipal bylaw to record a site plan for as-of-right use with the Registry and, thus, requiring it is unreasonable. Although not required by law, requiring a site plan to be recorded has a reasonable basis. Having the decision and approved plan available at the Registry allows town residents to view these documents to understand the changes coming to their town. Therefore, I find that Condition 64 as it refers to the Site Plan Approvals is invalid, but when the Planning Board issues a new decision consistent with these findings, the Planning Board may impose Condition 64 in relation to its new decision and approved plan.

D. Conditions For Which Lowe's Requested Clarification

***16** Lowe's requested clarification from the Planning Board about Conditions 5, 7, 18, 32, and 61, but the Planning Board never responded.

Condition 5 requires Lowe's to ensure that no residue, dust, or smoke is detectable beyond the property line. Lowe's provided the Planning Board with a dust mitigation plan for Locus and argues that this plan satisfies Condition 5. Lowe's has dust mitigation plans on all its construction sites and argues that its dust mitigation plan will be effective at reducing dust, but that a standard of zero dust is impossible to meet. Condition 5 cannot reasonably require a standard of zero dust because ensuring that even the tiniest dust particle is not detectable beyond the property line is impossible and an unreasonable demand. Lowe's plan to water down earthen areas where trucks will travel and put gravel on other areas so that trucks do not drive over earth to create dust appears reasonable.

Condition 7 requires Lowe's to equip all facade lighting luminaires with a top visor to reduce or eliminate any up light above the horizontal plane of the building facade wall. Lowe's argues that its lighting fixtures satisfy Condition 7. Lowe's goal in selecting lighting fixtures is to provide a minimum level of light for safe operation and to ensure illumination levels will be near zero near property lines abutting residential property to avoid light spillage on to those properties. The lighting design details of proposed lighting fixtures that Lowe's provided to the Planning Board includes top visors as an accessory to the lighting fixtures. Furthermore, Antonio Franco & Associates, the Planning Board's peer reviewer, found Lowe's lighting plan acceptable. By including top visors in its lighting plan, Lowe's satisfies the requirements of Condition 7.

Condition 18 requires that Lowe's prohibit the discretionary use of truck horns in the rear or eastern side of the building. Lowe's proposal to post signs instructing truck drivers not to blow horns is a reasonable approach to prevent unnecessary noise from disturbing residential abutters. Condition 18 interpreted literally would require a truck horn never to be blown on this area of Locus, which is an impossible and unreasonable standard. Furthermore, the RSG report states that prohibiting discretionary use of truck horns is possible by posting signs or notifying drivers directly. There is no evidence that the Planning Board could reasonably have done anything else to minimize the discretionary use of truck horns at Locus.

Condition 32 prohibits Lowe's from installing outside loudspeakers or paging systems in the conduct of business on Locus. The handheld walkie-talkie pager system proposed by Lowe's is very different from a loudspeaker or other non-handheld paging system because it is audible only to the user. Thus, the level of noise will be much less compared to a loudspeaker or other paging system. Additionally, the record suggests that the Planning Board finds that Lowe's is in compliance with Condition 32 because the Site Plan Approvals state that "Lowe's Site Plan does not show any loud speaker or paging system."

***17** Condition 61 prohibits Lowe's from placing any retails products, inventory, or any other item outdoors. The Planning Board failed to clarify if this would include Lowe's proposed outdoor home garden center. Lowe's argues that Condition 61 prohibits sidewalk sales, not an outdoor home garden center, because Lowe's discussions with the Planning Board focused on prohibiting sidewalk sales. Section 3 .2.5.0 of the Bylaw defines retail store and sales as selling goods or merchandise within a building "except that a garden center ... may have open air display of horticultural products." Therefore, the Bylaw itself indicates that Condition 61 does not apply to Lowe's proposed home garden center.

The Planning Board's failure to respond to Lowe's reasonable request for clarification of Conditions 5, 7, 18, 32, and 61 is unreasonable because it prevents Lowe's from understanding how to properly comply with these conditions. In the absence of any evidence clarifying these conditions, I find that Lowe's interpretations of these conditions are reasonable, and, as such, I find that Lowe's interpretations of Conditions 5, 7, 18, 32, and 61 are valid and enforceable.

E. Conditions For Which Lowe's Proposed Modifications

Lowe's proposed modifications of Conditions 11, 13, 15, 17, and 55 but the Planning Board failed to respond to these proposed modifications or clarify the underlying conditions.

Condition 11 requires Lowe's to construct a noise attenuation wall before commencing any other site activities. Other site activities must be commenced before the wall is constructed because the wall cannot be constructed without prior landscaping and other construction work. Condition 11 is impossible to fulfill as written and is therefore unreasonable. Lowe's proposed modification adds language stating that the noise attenuation wall will be constructed before any other site activities except those prefatory site construction activities necessary to construct the wall itself. The modification appears reasonable because it is consistent with the intent of Condition 11 and makes it possible to fulfill the Condition.

Condition 13 requires that sound levels not exceed 51 A-weighted decibels (dBA) within the property of residents adjacent to Locus and authorizes the Planning Board or its designee to inspect Lowe's site within 90 days after issuance of a Certificate of Occupancy and as warranted to ensure future compliance. Lowe's proposed modification seeks to ensure that any additional noise is not simply attributed to Lowe's when it may in fact be from some other source. The modification would remove language that would have made the Planning Board the enforcement authority for Condition 13 because Lowe's argues that the Planning Board lacks authority to police Condition 13's requirements. Lowe's also argues that removing this language ensures that post-approval and post-store opening the Planning Board would not be able to put Lowe's Certificate of Occupancy in jeopardy.

***18** Condition 13 is unreasonable as it does not account for the possibility of increased background noise over time that is attributable to sources other than the Development. The abutters' own activities could increase noise and, because Locus lies in an HB district, it is possible that increased highway noise may elevate noise levels within abutters' properties. Lowe's modification of including an average ambient sound measurement to account for this possibility appears reasonable. Similarly, the requirement of the Planning Board or its designee inspecting Locus within 90 days is unreasonable because it requires Lowe's to obtain further approval from the Planning Board (as discussed earlier) and would allow the Planning Board to arbitrarily place Lowe's Certificate of Occupancy in jeopardy post-approval. Lowe's proposed modification appears reasonable because it allows for enforcement of the noise standard by the appropriate authority. [25]

Condition 15 requires that Lowe's use a noise damping compound on its trash compactor and submit to the Planning Board the details of the noise damping compound prior to construction. Lowe's plans to use a noise damping compound and did indeed submit such details to the Planning Board. Lowe's actions comply with Condition 15 and the Planning Board's failure to respond to Lowe's submissions is unreasonable because Lowe's has no way of knowing if the Planning Board is satisfied that Condition 15 has been fulfilled. Lowe's modification would name the damping compound it plans to use as the damping compound to be applied in Condition 15. Condition 15 does not specify the type of noise damping compound nor has the Planning Board indicated that such a compound should have any specific characteristics. Lowe's modification, to name the noise damping compound it has chosen as the noise damping compound in Condition 15, is reasonable.

Condition 17 requires that Lowe's "emergency generator shall be exercised only during daylight hours." Condition 17 read literally is clearly unreasonable because it would preclude Lowe's from using its emergency generator in an emergency after daylight hours. Lowe's substitution of "tested" for "exercised" is a reasonable modification because it ensures that the emergency generator will not be used outside of daylight hours except in an emergency.

Condition 55 requires Lowe's to establish a WRTA bus stop on Locus, post bus schedules in its store, and to construct and maintain a bus shelter within or adjacent to its proposed park-and-ride lot on the MTA parcel. Requiring a bus stop on Locus is unreasonable because it would result in additional and unnecessary traffic on Locus. Lowe's has strict traffic control policies on its sites and does not allow trucks to access the front of its stores. Allowing public buses to access the parking lots could create traffic problems because of their size and the fact that Lowe's does not control or operate them. Lowe's proposed modification to establish a bus stop near Locus instead of on Locus is reasonable in that it will serve the public interest by ensuring Locus is accessible by public transportation and prevents traffic problems that may arise from public buses accessing the parking area . [26]

***19** The Planning Board's failure to respond to Lowe's proposed modifications and reasonable requests for clarification of Conditions 11, 13, 15, 17, and 55 is unreasonable because it prevents Lowe's from knowing how to properly comply with these conditions. In the absence of any evidence clarifying these conditions or any evidence to suggest these modifications are unreasonable, I find that Lowe's interpretations of these conditions are reasonable. Therefore, I find that Lowe's modifications of Conditions 11, 13, 15, 17, and 55 are valid and enforceable. In its new decision, the Planning Board shall amend Conditions 11, 13, 15, 17, and 55 accordingly.

F. Conditions That Lowe's Argues Are Unreasonable and Invalid

Lowe's argues that Conditions 14, 22-28, and 47 are invalid because they are unreasonable. Condition 14 requires Lowe's to relocate the truck loading dock area from the northeast corner of its building to the western side of the store. The Planning Board appears to have believed that relocating the truck dock would decrease noise for residential abutters. This would require, however, that the busy lumber area, currently located on the western side of the store, be relocated to the main entrance. Placing this area at the main entrance, the only entrance and exit way for vehicles accessing Locus, would increase traffic near the property line and create more noise for residential abutters. Traffic going toward the loading dock would conflict with the substantial amount of traffic activity in the lumber area, which would in turn conflict with vehicles entering and existing Locus. Furthermore, this issue was not discussed at any Planning Board hearings nor was it the subject of any peer review recommendations. In attempting to reduce noise, the Planning Board has inadvertently exchanged one type of noise for another potentially greater noise. Therefore, I find that Condition 14 is unreasonable and invalid.

Condition 23 requires Lowe's to have the slope on the northwestern side of Locus assessed by a geotechnical engineer to confirm slope stability. Haley and Aldrich's letter filed with the Planning Board addressed this issue, but the Planning Board acted unreasonably by failing to respond to Lowe's request to review the letter. Requiring Lowe's to conduct another geotechnical investigation would be redundant and therefore unreasonable. Therefore, I find that Condition 23 is unreasonable and invalid.

Condition 22 requires Lowe's to provide dimensions for a swale intended to receive runoff water and engineering calculations to confirm the swale's capacity. Condition 24 requires Lowe's to revise its plans for the retaining wall to comply with the Haley & Aldrich recommendations. Condition 25 requires Lowe's to modify its design for proposed drainage trenching to incorporate trench dams and other appropriate engineering measures to prevent groundwater from flowing through the trenches. These conditions are unreasonable because Lowe's already provided the Planning Board with calculations and design plans required in Conditions 22, 24, and 25. Furthermore, Graves Engineering, the Planning Board's peer reviewer, approved the drainage system. It is unclear why the Planning Board would request additional calculations or how further analyses would be useful. Therefore, I find that Conditions 22, 24, and 25 are unreasonable and invalid.

***20** Conditions 26 and 27 require Lowe's to redesign its infiltrative and detention drainage systems by raising the systems' elevation. The Planning Board claimed the proposed drainage system was inadequate but cited only conclusory statements from a Beals and Thomas report. Lowe's established that site-specific adjustments to the Frimpter method were necessary to obtain accurate results for the drainage system. There was no evidence that the Planning Board's statements about the drainage system needing to be elevated incorporated a modified Frimpter method. Moreover, Lowe's proposed drainage system has already been approved by Graves Engineering as satisfying all local and state regulations and by the Water District. Requiring Lowe's to redesign the drainage system would be unreasonable because it would be in excess of what has already been deemed acceptable by peer reviewers, Terracon, and the Water District. In the absence of any evidence to suggest that revising the drainage system as required by Conditions 26 and 27 would be reasonable, I find that Conditions 26 and 27 are therefore unreasonable and invalid.

Condition 28 requires Lowe's to submit an as-built plan with the seal of a professional engineer certifying that the drainage system conforms to the conditions in the Site Plan Approvals. The conditions in the Site Plan Approvals relating to drainage have been invalidated and it would be unreasonable for Lowe's to submit a revised drainage plan conforming to those conditions. Therefore, I find that Condition 28 is unreasonable and invalid.

Condition 47 requires that where the noise attenuation wall is closer than twenty-five feet to an abutting residential property, plants should be placed on both sides of the wall “but to the extent feasible shall be concentrated on the side closer to the abutting properties.” Lowe's argues that Condition 47 is unreasonable because it requires Lowe's to place more plants than is feasible on the side of the wall closer to abutting residential properties. Moving the noise attenuation wall closer to the property line results in less space than anticipated for plants on the side of the wall closer to residential property lines. Lowe's argues that the current plan is reasonable and conforms to the Planning Board's intent to create visual screening between the wall and the abutting properties. Nevertheless, Lowe's fails to demonstrate that Condition 47 is unreasonable. The “to the extent feasible” language indicates that Lowe's is required to concentrate plants on the side closer to the abutting properties only if it is possible to do so. Condition 47 thus will not apply to areas where it is impossible to concentrate plants on the side of the noise attenuation wall that is closer to residential property lines. Therefore, I find that Condition 47 is reasonable and enforceable.

G. Conditions Relating to Earth Removal

Conditions 21 and 33 relate to earth removal with regard to the Development. Condition 21 requires Lowe's to obtain an Earth Removal Special Permit authorizing removal of earth within 10 feet of the natural, seasonal high groundwater table in an amount sufficient to implement the redesigned stormwater management systems required in Conditions 22-27. This court has found Conditions 22-27 unreasonable and Lowe's has already obtained this particular special permit and a variance from the ZBA. Therefore, I find that Condition 21 is unreasonable and invalid.

***21** Condition 33, which requires Lowe's to obtain an Earth Removal Special Permit authorizing earth removal within fifty feet of the site boundary, has limited benefits to residential abutters. First, it affects a small portion of Locus because only buffer in the extreme northeast corner of Locus is less than fifty feet, yet its implementation would create several problems and increase the duration of construction. Lowe's would be forced to violate special permits for parking obtained from the ZBA. Moreover, Condition 33 would require an additional delay for redesign and re-permitting on top of extra construction time, and would require more extensive earth removal operations leading to increased noise and traffic for abutters. Therefore, I find that Condition 33 is unreasonable and invalid.

H. Earth Removal Special Permit Denials

Lowe's appeals the Planning Board's denial of two special permits for earth removal and argues that it need not apply for such permits because the excavation activities it plans are incidental to its as of right use. The denial of a special permit "can only be disturbed 'if it is based on a legally untenable ground' ... or is 'unreasonable, whimsical, capricious or arbitrary.' " *Subaru of New England, Inc. v. Bd. of Appeals of Canton,* 8 Mass.App.Ct. 483, 486, 395 N.E.2d 880 (1979) (quoting *Gulf Oil Corp. v. Bd. of Appeals of Framingham,* 355 Mass. 275, 277-278, 244 N.E.2d 311 (1969)).

"An accessory or 'incidental' use is permitted as 'necessary, expected or convenient in conjunction with the principal use of the land.' " *Henry v. Bd. of Appeals of Dunstable,* 418 Mass. 841, 844, 641 N.E.2d 1334 (1994) (citing 6 P.J. Rohan, Zoning and Land Use Controls, Section 40A.01, at 40 A. -3 (1994)). Under *Henry,* an incidental use must be (1) subordinate and minor in significance to the primary use, (2) have a reasonable relationship to the primary use, and (3) be attendant or concomitant to the primary use. *Id.* at 844-45, 641 N.E.2d 1334; *see also Gallagher v. Bd. of Appeals of Acton,* 44 Mass.App.Ct. 906, 907, 687 N.E.2d 1277 (1997).[27] In *Henry* the court found that "the amount of gravel to be removed, the duration of the excavation and the monies to be realized from excavation" indicated that removal was not an incidental use but effectively a quarrying operation. *Henry,* 418 Mass. at 847, 641 N.E.2d 1334 (reversing special permit approval where applicant permitted to remove 300,000 to 400,000 cubic yards of gravel over at least three to four years and would be able to sell gravel and invest proceeds in her business).

Lowe's has established that the earth removal activities are minor and subordinate to the primary use of Locus (retail sales) because the initial earth removal component will last only four to five months (as opposed to three to four years in *Henry*) in comparison to the multi-decade use of Locus for retail sales. The excavation bears a reasonable relationship and is attendant to retail sales as the excavation is done solely to prepare for construction of the retail store. Although the volume of earth to be removed may be large, the fact that earth removal will take place over a short period of time, that Lowe's plans to reuse some of the excavated material for construction, and that Lowe's is unlikely to earn income from the removal alleviates any concerns that it is effectively a quarrying operation unrelated to the primary use of Locus, the main concern of the court in *Henry. See id.* at 847, 641 N.E.2d 1334. Therefore, I find that the earth removal is incidental to the Development's as-of-right use and Lowe's need not apply for earth removal special permits under the Bylaw. As such, the Special Permit Denials are unreasonable, arbitrary, and capricious.

Conclusion

***22** Lowe's argues that the Planning Board has acted in bad faith in its actions related to the permitting of the Development. Lowe's requests that this court issue the Site Plan Approvals, without the unreasonable conditions, and Earth Removal Special Permits instead of remanding this action to the Planning Board. This court, however, is not convinced that the record warrants a finding of bad faith and believes that the more appropriate remedy is to remand the case to the Planning Board to issue a decision consistent with this court's findings. Lowe's, however, will not be subject to any arbitrary or unreasonable action by the Planning Board because the Planning Board is required to issue a decision consistent with these findings.[28] Moreover, the Planning Board may not adopt new conditions or review any of the findings made by this court.

Consistent with this the Decision, judgment shall enter annulling the Planning Board's January 27, 2009 decision relative to the Site Plan Approvals and its denial of two Earth Removal Special Permits on July 19, 2007. This case is remanded to the Planning Board for action consistent with this Decision. The Planning Board shall act within thirty days of this Decision.

Judgment to enter accordingly.

All Citations

Not Reported in N.E.2d, 2010 WL 2853883

Footnotes

1 Although Lowe's sought review of the Special Permit Denials in its complaint in Permit Session Case No. 352453, the Special Permit Denials were not argued in either the Joint Motion for Summary Judgment or the Joint Cross-Motion for Summary Judgment.

2 Adam Burney ("Burney), the Town Planner, attended the first day of trial and sat at counsel table but did not speak. Because the Board of Selectmen had voted not to continue with the litigation, the Planning Board did not participate at the trial.

3 Lowe's initially submitted a single Site Plan Application in March 2006, but the Planning Board instead required Lowe's to submit three separate applications corresponding to the three parcels comprising Locus. Lowe's Site Plan Applications related to a single Site Plan narrative.

4 As part of their 2006 Annual Report, filed with the Secretary of the Commonwealth, Lowe's provided the response: "retail sales" to the request to: "[b]riefly describe the business of the corporation."

5 Lowe's did not believe that it needed to apply for an Earth Removal Special Permit but did so at the Planning Board's insistence that it would otherwise not proceed to review Lowe's Site Plan Application.

6 It is questionable as to how potential noise from rooftop HVAC units relates to earth removal.

7 In this peer review process, the Planning Board engaged engineering consultants to review and opine on the elements of the Site Plan and Earth Removal Special Permit Applications, including whether design elements conform to good engineering practice and meet zoning requirements.

8 *See* 527 C.M.R. 10.03 (2006) ("Any obstacle which may interfere with the means of egress or escape from any building or other premises, or with access to any part of the building or premises by the fire department in case of fire, shall be removed from aisles, floors, halls, stairways and fire escapes. Doors and windows designated as exits shall be kept clear at all times.").

9 Lowe's proposed modification would add the following sentence to Condition 11:

> It is understood that certain construction activities will be required as a prerequisite to the construction of the sound attenuation barrier wall, including clearing, grubbing, cutting and filling along the proposed fence line, installation of a temporary construction security fence, creation of an access way for equipment, materials and vehicles, the installation of required site stormwater pollution prevention and erosion control measures or other measures required by law or condition of a permit or approval.

10 According to the RSG report, a weighted average sound level called equivalent sound level (LEQ) is used frequently in environmental noise analysis to account for changes in noise over time. The report states that "LEQ averages total pressure, and results in weighing loud and infrequent noises more heavily than softer and frequent noises."

11 According to the RSG report, the decibel scale "can be weighted to emphasize human perceptions of annoying frequencies." The "A" weighting scale is the most common scale and is used in environmental noise analysis.

12 LAEQ 1-hour is the A-weighted version of LEQ over a period of one hour.

13 L90 is defined by the Department of Environmental Protection's (DEP) Division of Air Quality Control (DAQC) as the background A-weighted sound level that is exceeded 90% of the time during equipment operating hours.

14 The record does not indicate who is the Town's designated code enforcement official.

15 Lowe's modification of Condition 15 would read: "The outside of the proposed trash compactor chute shall be treated with noise damping compound VDB-10 (or equivalent), which shall be reapplied as needed to maintain maximum effectiveness, consistent with the product's technical data sheet."

16 The Frimpter method estimates the seasonal high water table at a site by comparing groundwater levels at the site to groundwater levels observed at United States Geological Survey (USGS) wells throughout Massachusetts.

17 Pursuant to G.L. c. 30, § 61,

> All agencies, departments ... of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and use all practicable means and measures to minimize [their] damage to the environment.... Any determination made by an agency of the Commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.

18 Final approval for a project comes after stages of approvals controlled by MHD put in percentages: 25 percent, 50 percent, 75 percent, and 100 percent.

19 The FEIR notes that Lowe's committed to implement mitigation measures, which included the measures that the Planning Board incorporated in Conditions 51, 53, 54, 56, 57, and 58. Furthermore, in the Site Plan Applications, Lowe's stated that it would perform the same mitigation measures.

20 Lowe's would modify Condition 55 to read:

> Consistent with the FEIR and Planning Board submittals, Lowe's shall contact the WRTA to explore the possibility of establishing a stop for the Lowe's store on the route 42 bus route, which currently passes by the site on Route 12 between downtown Worcester and the Town of Webster. Lowe's will post WRTA bus schedules in its store.

In connection with its other stores, Lowe's has come to arrangements similar to the one in its proposed modification.

21 Condition 56, however, will be modified as described hereinafter.

22 This court also finds Conditions 23-27, 49, and 54 unreasonable and invalid based on other grounds described hereinafter.

23 The modified version of Condition 56 should read as follows:

> Prior to Site occupancy and again six months following the opening of the retail facility, Lowe's shall conduct traffic counts in the Linda Avenue neighborhood to determine if vehicles are using the neighborhood as a short cut and whether traffic calming measures should be considered. Lowe's shall be responsible for the installation of any traffic calming measures necessary. Prior to Site occupancy, Lowe's shall place $25,000 in escrow to fund the implementation of traffic calming measures in the Linda Avenue neighborhood.

24 This court cannot identify any entity described as the "State Division of Sanitation." Condition 20 is therefore modified by eliminating any reference to this entity.

25 Although it is unclear who would be the appropriate Town code enforcement official, the modification is reasonable because it does not designate the enforcement official but leaves it up to the Town to determine and then use the appropriate enforcement authority.

26 It should be noted that the Section 61 Finding stated that Lowe's should work with the WRTA to place a bus stop "on site." It is unclear whether this would require a bus stop on Locus itself or near Locus. Although Condition 55 is modified here, Lowe's is still bound to follow any final traffic mitigation measures imposed by MHD.

27 It should be noted that the case law appears silent on the issue of whether earth removal that is required as part of site preparation in order to construct a building for its as-of-right use is considered an incidental use. Therefore, I apply the factors outlined in *Henry* to determine whether Lowe's earth removal is incidental to its as-of-right use.

28 Pursuant to G.L. c. 40A, § 17, costs are granted only if a planning board acts "with gross negligence, in bad faith or with malice." Lowe's is denied costs for this action as the Planning Board's actions do not meet this standard.

End of Document

CERTIFICATE OF COMPLIANCE

I hereby certify, in compliance with Mass. R. App. P. 16(k), that the foregoing Application is in compliance with the rules of court pertaining to the filing of briefs, including, but not limited to:

Mass. R. App. P. 27.1 (further appellate review);
Mass. R. App. P. 16(a)(13) (addendum);
Mass. R. App. P. 16(e) (references to the record);
Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. App. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 27.1(b) and 20(a)(4)(B) because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and includes a statement as to why further appellate review is appropriate of 10 pages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e), I, Jared H. Pliner, hereby certify that on October 10, 2025, I served a true copy of the foregoing Application of Defendants-Appellees A.D. Makepeace Company and Read Custom Soils LLC, relating to *Currence et al. v. A.D. Makepeace Company et al.*, Massachusetts Appeals Court No. 2024-P-0666, upon the attorney of record for each party by email:

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