

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

MICHAEL J. O'NEILL, ESQ.
E-mail: moneill@mcgregorlaw.com
(617) 338-6464 ext. 125

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
AND EMAIL RlaFOND@carverma.org

June 14, 2021

Chairperson
Earth Removal Committee
Town of Carver
Municipal Building
108 Main Street
Carver, MA02330

RE: Demand for Enforcement of Town of Carver Earth Removal Bylaw

Dear Sir or Madam:

This is a formal and final demand to the Earth Removal Committee of the Town of Carver (“ERC”) to perform a clear-cut duty it owes to the public, namely enforcement of the Earth Removal Bylaw, Chapter 9.1 (the “Bylaw”), pursuant to Chapter 9.1.9a of the Town of Carver Bylaws.

This is a demand that ERC fully enforce the Bylaw and all conditions in all Earth Removal Permits issued to ADM Makepeace Company (“ADM”), obtain an accurate accounting of the volume of earth ADM has removed from Carver since 2008, require a forensic audit to verify that all earth removal fees were paid under the Bylaw, order ADM to cease and desist all earth removal and related activities in Carver, and take any other enforcement action that the ERC deems appropriate at its next special or regular meeting.

This Firm represents Save the Pine Barrens, Inc., a non-profit corporation, and its program, Community Land & Water Coalition (collectively “STPB”). Before filing a complaint for Mandamus in Court, STPB makes this final demand upon the ERC to perform its duty to enforce the Bylaw and any Earth Removal Permit conditions.



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Previously, STPB served demands for enforcement upon the ERC dated April 6, 2021 and May 13, 2021.¹ Members of the public and representatives of STPB met with the ERC on April 14, 2021 and April 22, 2021. The Chair of the ERC is on video at a public meeting stating that ADM was violating its Earth Removal Permits by exceeding truck limits. The ERC has been provided with video and documentary evidence that ADM has conducted commercial mining without Earth Removal permits, to which the ERC has turned a blind eye, depriving the Town of Carver (the "Town") of up to \$1 million in earth removal fees. For the three (3) active sites where ADM is conducting commercial mining operations, videos show violations of the hours of operation, dust mitigation requirements and truck traffic routes. ADM's violations have continued unchanged and unabated.

Despite this, an attorney for the Town, Amy E. Kwesell of KP Law, wrote to Margaret Sheehan of STPB on June 1, 2021, stating that the ERC had not observed violations of the Bylaw or Earth Removal Permits during a site visit on May 1, 2021 and was declining enforcement. KP Law's claim that there were no observed violations is not credible because there were no full-time operations going on at all three (3) active commercial mining sites during the May 1, 2021 site visit. Consequently, ERC did not observe regular truck traffic, or equipment operation, and did not observe whether projects were built according to the plans. It did not observe or inspect truck sheets, checks collected or compliance with the inspection reports.

**The Purpose of the Bylaw is to Ensure that Earth Removal
Will Cause Minimal Detriment**

The stated purpose of the 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...as well as to provide that earth removal activities shall be conducted in a safe manner and with minimal detrimental effect..." Bylaw, Sec. 9.1.1.

The Bylaw, Sec. 9.1.9a provides that:

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.

¹ The April 6 and May 13 Demands, plus a follow-up email dated May 16, 2021 from Margaret Sheehan, an STPB volunteer, to the chair of the ERC are incorporated herein by reference.



Thus, the ERC has a non-discretionary duty to take action to enforce the Bylaw when it believes that there is a violation of the Bylaw. It has a duty to investigate unlawful earth removal when presented with credible information.

**Failure to Require Permits, Accounting for Volume, and
Payment of Fees for Three Sites**

The ERC has ignored at least three (3) ADM commercial mining operations, thus allowing the unregulated removal of an estimated 4,000,000 to 8,000,000 cubic yards between 2014 and continuing to the present. These sites are at Assessors Map 131, Lot 1-2, 1-2, 1-3, 50, 2-1 and Map 134, Lot 2-4 (Golden Field Solar, Hammond Street Solar and Federal Road Solar). The ERC requires payments of \$0.10 to \$0.35 cents per cubic yard of earth removed from Carver by commercial mining operations. (See, video of April 24, 2021 ERC meeting where all members agreed “we get thirty-five cents” when certain conditions are met). The ERC has failed to collect fees of \$400,000.00 to up to \$2,800,000.00 for these three sites and possibly others.

The Bylaw provides that an Earth Removal Permit “shall” include certain conditions. Bylaw, Sec. 9.1.7. These are mandatory conditions in every Earth Removal Permit.

The mandatory conditions include:

- Provision for monitoring the project on a regular basis,
- Such monitoring is to be performed by an agent of the ERC’s choosing, at the cost of the permit holder;
- Hours of operation;
- Truck routes;
- Safety-related conditions;
- A bond or other performance guarantee acceptable to the ERC shall be established based on the cost of restoration for the project and shall be held by the Town until all work has been completed and conditions of the permit have been met;
- The ERC shall require the applicant to submit status reports every 90 days;
- The site shall be inspected by the ERC-authorized agent and a report filed with the ERC at the end of every 12-month period;
- In the event that the property is not used for agriculture after earth removal, the ERC may require a bond or other performance guarantee based on the estimated cost of restoration;
- No permit shall be issued for a period in excess of 12 months;
- Permits shall be extended beyond 12 months IF the ERC is satisfied with all quarterly reports and that work is carried out under the plans and conditions previous approved and does entail earth removal of a larger quantity or from a larger area than allowed in original permit. No project may be extended beyond five years without a full hearing of the ERC;
- The plans shall also include a fully complete restoration plan;



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- Applicant shall notify all abutters and other parties in interest of the public hearing on the permit 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; and
- 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.

ADM's ongoing commercial mining operations (defined by the Bylaw as "[t]he business of extracting ore, earth or minerals from the ground for sale or profit unless conditionally exempted under Section 9.1.8") are in flagrant disregard of the fundamental purposes of the Bylaw that they are to "promote the health, safety and general welfare" of Carver residents, have "minimal detrimental effect" on the property and its environs and "leave the land in a safe and convenient condition". ADM has conducted commercial mining of tens of millions of cubic yards of earth since approximately 2002 for commercial sale, denuding the land, with no attempt to minimize the detrimental effect on the property, surrounding area or Town and its residents generally.

The ERC on April 22, 2021 stated that ADM is conducting commercial mining at three active sites in Carver under ERC permits. The ERC has failed to have a monitor of ADM's commercial mining operations, as required by the Bylaw and its mandatory permit conditions. Instead, it has allowed violations to occur and continue, including allowing ADM to self-report its daily number of truck trips and volume of earth removed on an approved ERC form, in order to calculate the amount of the fee due to the Town, at the rate of \$.10 to \$.35 cents per cubic yard. The form requires ADM to sign it under the penalties of perjury.

The ERC has provided STPB with only nine (9) months of Quarterly Billing Forms for ADM for two of the three active sites. Violations shown in these Forms are identified in the Bill of Particulars attached hereto.

The ERC must determine the actual volume of earth removed from Carver by ADM and collect from ADM the full amount due under its permits, as determined by a forensic accountant paid for by ADM.

The ERC has a mandatory duty to monitor ADM's operations.

STPB Has Standing to Make this Demand

STPB makes this final demand upon the ERC to perform its clear-cut duty to enforce the provisions of the Bylaw, including all conditions required in all Earth Removal Permits, before filing a complaint for Mandamus in Court.



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Mandamus is an appropriate remedy to require local officials to comply with local ordinances. *Sinclair v. Brightman*, 198 Mass. 248, 256 (1908) (Mayor, auditor, and treasurer of a city may be compelled by mandamus to comply with city ordinance).

STPB has standing to make this demand. "Where the object of a petition is to procure the enforcement of the law, a petitioner without separate interest in the subject matter independent of the rights of the public, has a standing by reason of his citizenship to maintain a petition for a writ of mandamus to enforce a public duty of interest to citizens generally." *Pilgrim Real Estate, Inc., v. Superintendent of Police*, 330 Mass. 250, 251 (1953). "When the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws." *Brooks v. Secretary of the Commonwealth*, 257 Mass. 91, 93 (1926).

Attached is a Bill of Particulars listing the violations by ADM of Earth Removal Permits which the ERC is under a clear-cut, non-discretionary duty to enforce.

Conclusion

Our clients demand that the ERC immediately enforce the Bylaw and permit conditions, obtain an accurate accounting of the volume of earth ADM has removed from Carver since 2008, require a forensic audit to verify that all earth removal fees were paid under the Bylaw, and that it immediately order ADM to cease and desist all earth removal operations in the Town of Carver without delay.

Sincerely,



Michael J. O'Neill



Violations

Ignored at least 3 commercial mining sites

ERC ignored three commercial mining sites on Federal Road and Hammond Street and allowed commercial mining to occur without an ERC permit. These sites are: Golden Field Solar on Federal Road, 0 Hammond Solar, Federal Road Solar-276 Federal Road.

This deprived the Town of between \$400,000 and \$2.8 million in fees.

ERC has as not determined the volume of earth removed from the three sites.

ERC failed to collect at least \$400,000.00 to \$800,000.00 (at 10 cents per cubic yard) and up to \$1,400,000.00 to \$2,800,000.00 (at 35 cents per cubic yard) in earth removal fees for the removal of at least 4 million to 8 million cubic yards 2014 to 2020 at the three sites.

2020 Permit #76, Map 131 Lot 1-2C (Permit 76)

1. ERC has not collected fees of \$.10 to \$.25 cents per cubic yard for the earth removed under Permit 76 allowing a violation of Permit 76.
2. ERC has not determined the accurate volume of earth removed from Lot 1-2C by ADM.
3. ADM exceeded daily truck limits of 50 round trips more than 100 times from July 2020 through March 2021 in violation of Permit 76.
4. ADM submitted Quarterly Billing Forms for July 2020 to March 2021 that are unsigned in violation of Permit 76.
5. ADM Quarterly Billing Forms for July 2020 to March 2021 that do not identify "Name of Truck Co" in violation of Permit 76.
6. ADM began work allowed by Permit 76 20 days before its effective date.
7. Permit 76 requires all trucks leaving site to turn right on Federal Road toward Wareham; trucks regularly and routinely violate this requirement.
8. Permit 76 starting time is 7:00 a.m. and ending time 4 p.m. This is frequently violated.
9. Permit 76 limits Saturday operations to 7:00 a.m. to 12 p.m. This is frequently violated.
10. ADM did not notify all abutters and other parties in interest of the public hearing on Permit 76 as per Bylaw 9.1.6.a.
11. ADM's use of the land at Lot 1-2C is not the correct land use. Bylaw. 9.1.7a.
12. Commercial mining of 4.4 million cubic yards on Lot 1-2C is not an agricultural use and is not a correct land use under Bylaw 9.17.a.
13. Federal Road is not kept clean of dust and dirt in violation of Permit 76.
14. Permit 76 Dust Mitigation plan is for the wrong location.
15. ADM plans for Lot 1-2C call for the creation of an 8-acre reservoir. Construction of the reservoir has not received approval from Carver Conservation in violation of Permit 76.

2019 Permit # Map 131, Lot 1-4 (Permit 74)

1. ADM routinely violates the maximum number of truckload trips per day not to exceed 50 round trip.
2. ERC has not collected fees of \$.10 to \$.25 cents per cubic yard for the earth removed under Permit 74.
3. Permit 74 requires Tihonet Road to be kept clean of dust and dirt. ADM routinely violates this.
4. Permit 74 sets hours of operation: weekdays 7 a.m. to 4 p.m., Saturday 7 a.m to 12 p.m.
5. ERC has not determined the accurate volume of earth removed from the site under Permit 74.
6. ERC has not required ADM to post a bond for restoration and repairs.
7. ERC has not required ADM to “cover the cost of monitoring the project” (9.1.7.b) by an independent qualified third party to determine the volume of earth removed by ADM.
8. ERC has not required ADM to “cover the cost of monitoring the project” (9.1.7.b) by an independent qualified third party to determine the earth removal fees owed to the Town and whether or not they were paid.
9. The ERC has not appointed its own agent at ADM’s expense to monitor the projects.
10. ERC has not regularly monitored the commercial mining operation, including truck safety, truck limits, volumes of earth removed and fees paid.

2017 Permit #65: Map 131 Lot 2-4 (Permit 65)

1. ADM continues to conduct work at this site, more than four years after Permit 65 was issued.
2. ADM represented work would take three years at time of application. ADM did not obtain an extension of the permit for more than 12 months, and the conditions required to extend Permit for more than 12 months were not met.
3. ADM has not constructed the agricultural bogs identified in the permit application and ERC has not taken any action.
4. ERC has not determined the accurate volume of earth removed from the site under Permit 65.
16. ERC has not collected fees of \$.10 to \$.25 cents per cubic yard for the earth excavated at from site. April 24, 2021 video: 1:40.
17. ADM routinely and regularly violates the 50 truck limit in Permit 65.
18. ERC has not enforced the violations of the 50 truck limit in Permit 65 as shown on the quarterly billing statements from July 2020 to March 2021.
19. ADM Quarterly Billing Forms for July 2020 to March 2021 that do not identify “Name of Truck Co” in violation of Permit 76.
20. Permit 65 starting time is 7:30 a.m. This is frequently violated.

21. Permit 65 limits hours of operation on Saturday to 7:30 a.m. to 12 p.m. This is frequently violated.
22. Permit 65 requires Federal Road to be kept clean of dust. This is violated.
23. ERC has not required ADM to post bonds for restoration and repairs.
24. ERC has not required ADM to "cover the cost of monitoring the project" (9.1.7.b) by an independent qualified third party to determine the volume of earth removed by ADM.
25. ERC has not required ADM to "cover the cost of monitoring the project" (9.1.7.b) by an independent qualified third party to determine the earth removal fees owed to the Town and whether or not they were paid.
26. ERC has not determined the amount due to Town at the rate of \$.10 and \$.25 per cubic yard, failure to pay deficiency (if appropriate).
27. The ERC has not appointed its own agent at ADM's expense to monitor the projects.
28. ERC has not regularly monitored the commercial mining.