A project of Save the Pine Barrens
158 Center Hill Road
Plymouth MA 02360
www.savethepinebarrens.org
environmentwatchsoutheasternma@gmail.com

January 26, 2023

BY HAND DELIVERY
Mr. Michael Main, Chair
Zoning Board of Appeals
Town of Plymouth
26 Court Street
Plymouth MA 02360

Re: Zoning Appeal G.L. c. 40A, §§ 7, 8 and 15 and Town of Plymouth Zoning Bylaw, § 202-7

ZBA Special Permit ZBA Case No. 3879 dated March 6, 2018, extended for 2 years on February 17, 2021

Location: Map 121 Lot 002-002 off Firehouse Road, Plymouth
Operators/Operators:
E.J. Pontiff Cranberry Co.
P.A. Landers, Inc.

Dear Chairman Main and Members of the Board,

This is an appeal of the Building Commissioner's December 29, 2022 denial of the December 19, 2022 demand for enforcement ("Demand") by Community Land and Water Coalition ("CLWC") a project of Save the Pine Barrens, Inc. ("STPB") for a cease and desist and remediation of unlawful earth removal at the above location ("Site"). The Demand and the Building Commissioner's denial are **Exhibits 1 and 2**. The project is a concocted "agricultural tailwater pond" used to disguise a stand-alone sand and gravel mining operation by E.J.Pontiff Cranberries, Inc. ("Pontiff") and P.A. Landers.

Eric J. Pontiff is an officer and director of E.J. Cranberries, Inc. and other corporations and is managing partner of Deer Pond Village, LLC and EJP Redbrook LLC. Susan A. Meharg ("Meharg") is a director of EJ Pontiff LLC, a related affiliate to E.J. Pontiff Cranberries. The ZBA has issued numerous industrial scale earth removal permits to Pontiff and Meharg since at least 2008 under the claim of "agricultural excavation."

This appeal represents an ongoing effort to obtain enforcement from the Zoning Board of Appeals ("ZBA") of the Plymouth Zoning Bylaw regarding sand and gravel mining operations conducted under various ruses, pretenses and concocted schemes. These schemes are concocted to evade the Bylaw prohibition against standalone mining operations in all zoning districts and to qualify for "agricultural exemptions" or "subdivision" exemptions. The ZBA approved these industrial scale mining operations including the Pontiff project in blatant disregard of the standards and established law in *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994) and the Plymouth Zoning Bylaw ("Bylaw"). Allowing the continued operation of the Pontiff project is a further derogation of the ZBA's duty to implement and enforce the Bylaw according to well-established case law including the Town's own case of *Old Colony Boy Scouts Council of Am. v. Zoning Bd. of Appeals of Plymouth*, 31 Mass. App. Ct. 46 (1991). The Henry and Old Colony cases are attached at **Exhibit 2**.

STPB requests again that the Board exercise its powers under the Bylaw Sections 203(B)(1) and 202-7(C) to order relief to issue a cease and desist and order remediation and penalties. The Bylaw Section 202-7(C) states the Board "may make orders or decisions, reverse

or affirm in whole or in part, or modify any order or decision appealed.…"[1] This confers on the ZBA the authority to make orders to rectify the Bylaw violations.

1. **The Pontiff "tailwater pond" is not now and never was "incidental" agricultural excavation under *Henry v. Board of Appeals*, 418 Mass. 841 (1994) or the Bylaw**

The Pontiff "tailwater pond" is not "incidental" agricultural excavation and never was. Therefore, it is and continues to be a land use being conducted in violation of the Bylaw. In other words, it is an ongoing prohibited use of residentially zoned land for an industrial sand and gravel mining operation in a residential district. There is no statute of limitations for an illegal land use: there is "an open-ended period to attach uses that are violative of local zoning provisions or an original building permit [in this case, a special permit] and that cannot properly claim grandfathered status." Bobrowski, *Massachusetts Land Use and Planning Law*, § 7.05.

STPB presented the Building Commissioner with credible evidence that Pontiff's "tailwater pond" is and was a ruse to remove the highest hill on his property to extract sand and gravel worth about $ 9 million, in concert with P.A. Landers, Inc., whose business façade claims it is a "supplier of sand to the cranberry industry with our own working sand pits." https://palanders.com/about/landers-farm-llc/ Website, accessed 1/24/2023.

[1] Bylaw § 203-3(B)(1), *Powers of the Zoning Board of Appeals*, states in part the Board shall have the power**,** "To hear and decide appeals from decisions of the Building Commissioner in accordance with G. L. c. 40A, §8. In exercising this power, the Zoning Board of Appeals may, as provided in G. L. c. 40A, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision of the Building Commissioner, and to that end shall have all the powers of the Building Commissioner and may issue or direct the issuance of a permit.…"

Bylaw § §202-7 (4), *Appeal to Zoning Board of Appeals*, states in part, "For the purpose of an appeal pursuant to this Section, the Board shall have all the powers of the Building Commissioner, and in exercising its authority under this Section, may make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision appealed, including issuing or directing issuance of a permit."

The Building Commissioner erred in failing to conduct an investigation and blatantly ignored credible evidence of ongoing violations of the permit and the Bylaw.

Under the Bylaw and case law, Pontiff's proposed earth removal was required to be "incidental" to the primary use of the land in order to qualify for a special permit under the "agricultural exemption". It was not then and it not now, contrary to the ZBA 2018 Permit. **See, Exhibit 4.** Rather "it is a major independent commercial quarrying project, separate and apart from any agricultural or horticultural use." *Henry v. Board of Appeals*, 418 Mass. 841, 843 (1994). The ZBA knew or should have known this when it issued the permit. Now, it is allowing the unlawful use to continue.

Under *Henry*, it is the "net effect" of the operation "and not such external considerations as the property owner's intent or other business activities" that determines whether a mining operation is "incidental" to agriculture. The sand and gravel mining must have a 'reasonable relationship" to the agricultural use. Whether Pontiff plans to build a tailwater pond or not is irrelevant – what is relevant is whether the mining operation meets the test for "incidental." It does not.

First, the 19-acre site was not in agricultural use in 2018 so there was no agricultural use on the site **for the mining operation to be "incidental" to**. The site was pristine forested uplands, not in agricultural use. This is the crux of the scam.

Second, the ongoing 5-year duration of Pontiff's mining operation establishes unequivocally under *Henry* that it is not "incidental" to any cranberry use of the land, even if there was one. Under *Henry*, "three or four years" is not incidental, but a primary use of the land as a sand and gravel quarry. The *Henry* court ruled, where "the proposed gravel removal project is a major undertaking lasting three or four years prior to establishment of the Christmas tree farm [the alleged agricultural use]" it was not "incidental".

Third, Pontiff's volume of at least 1 million cubic yards is almost double the volume of what the *Henry* court found was not incidental agricultural excavation. Further, the ZBA has issued a number of other earth removal permits to Pontiff and Meharg showing that their

business is a stand alone sand and gravel mining operation – not "cranberries." Permits issued to Pontiff by the ZBA under the claim "cranberry agriculture" include:

March 19, 2008: 206,000 cubic yards

July 21, 2010: 434,000 cubic yards

July 18, 2012: 256,000 cubic yards

Fourth, Pontiff's revenues from mining far exceed cranberry revenues at the Site, showing the mining does not qualify as "incidental" under *Henry*. Where the mining operation generates "substantial funds in excess" of the revenue to the alleged agricultural use on the site, the mining operation is not incidental. In *Henry*, the landowner was going to remove 100,000 cubic yards for three or four years, to generate about $30,000 in annual revenue from selling Christmas trees The court because of this the mining was incidental. Pontiff's revenue from the mining operation is about $9 million over 5 years, far exceeding decades of cranberry revenue from the 47-acre site and the *Henry* standard.

The ZBA knows that Pontiff's sand mining revenue exceeds cranberry revenue. At the ZBA's February 17, 2021 meeting, when Pontiff came in for a two year permit then-Chair Conner stated something to the effect:

"Eric [Pontiff] I guess cranberries aren't making as much money as sand and gravel so you need an extension"

Pontiff responded "yes" and Conner and the entire ZBA agreed to extend the mining permit for two years.

The ZBA members thus admitted in 2021 that Pontiff's mining operation did not meet the *Henry* test based on revenues generated. And, the ZBA's decision to extend the permit to a total of five years meant it did not meet the duration test of *Henry*.

The Operation is in Violation of the Special Permit

The violations include those identified in the attached **Exhibit 1**.

Request for Waiver of Unlawful $1,000 Peer Review "fee"

Once again, STPB requests that the ZBA waive the unlawful, *ultra vires*, unconstitutional, discriminatory and arbitrary and capricious $1,000 "peer review" fee imposed by the ZBA on persons seeking to obtain enforcement of the Bylaw by way of an appeal to the ZBA under G.L. c. 40A, §§ 7, 8 and 15. The ZBA has been asked since approximately 2016 to waive this fee for petitions to enforce the Bylaw but it refuses to do so. The ZBA is not authorized by G.L. c. 40A, §§ 9 or 12 or any other statute or regulation to impose such a fee on a person seeking enforcement of the Bylaw or a special permit, as in this case. The ZBA purports to impose this fee on petitioner under its *Regulations Governing Fees and Fee Schedules*, Section 4, *Project Review Fees*, 4.3(B) *Administrative Appeal of a Decision of the Building Commissioner*. There is no "peer review' here an no reasonable grounds for imposing this fee. Instead, the fee is being used by the ZBA to chill the public's constitutional right to petition the government for redress of grievances **including illegal sand and gravel mining operations.**

STPB has standing to bring this appeal

STPB and its members are aggrieved by the Building Commissioner's[2] failure to enforce the Bylaw. STPB members who are aggrieved include abutters and persons who live, work and recreate near, abutting and/or adjacent to the Site. They have suffered and/or will suffer harm to interests protected by the Bylaw. STPB's mission includes protecting the Plymouth Sole Source Aquifer from contamination. Members of STPB obtain their drinking water from the Aquifer.

"An organization has standing to represent its members if the members have standing, the interests the organization seeks to represent are germane to the organization's purpose, and neither the claim nor the relief sought requires the individual participation of its members." *Fathers & Families, Inc. v . Mulligan*, 26 Mass. L. Rep. 165 (2009) (citing *Associated Subcontractors of Mass., Inc. v. University of Mass. Building Auth.,* 442 Mass. 159,

[2] The Bylaw defines "BUILDING COMMISSIONER" as "[t]he officer charged with enforcement of this Bylaw, as provided in G.L. c. 40A, § 7, including the Director of Inspectional Services and his or her designee." Nicholas Mayo is the Director of Inspectional Services of the Town of Plymouth and qualifies as the Building Commissioner.

164, 810); *Modified Motorcycle Assoc. of Mass., Inc. v. Commonwealth,* 60 Mass. App. Ct. 83, 85 n.6 (2003)).

Relief Requested

STPB requests that the Board order the following relief as stated in the Demand:

1. Hire a professional expert at the violator's expense to conduct a forensic audit of the volume of earth removed from the Project Site.
2. Conduct an investigation to determine the nature, scale and scope of the violations of the earth removal.
3. Order the payment of earth removal fees owed to the Town by the violator.
4. Hire a professional expert at the violator's expense to ascertain the environmental impact of the unlawful earth removal, including loss of protection for the Plymouth Carver Sole Source Aquifer and impacts on evapotranspiration, groundwater recharge rates and ground water flow direction.
5. Hire a landscaping and ecology expert at the violator's expense to devise a plan for immediate restoration of the Project Site and mitigation of the loss of vegetated cover, impacts to abutters, and to implement measures to protect the Plymouth Carver Sole Source Aquifer and offset the of loss of forested lands.
6. Issue a cease and desist preventing any further earth removal on the Project Site and preventing any further changes in topography, grading, clearing, removing of trees or other alterations until such time as the violations have been remedied to the Board's satisfaction.
7. Issue penalties for each day of violation.

In conclusion, the ZBA should not continue to concoct grounds to bend to the sand and gravel mining industry's demands for earth removal permits and to deny requests for enforcement of the Bylaw. In doing so the ZBA is allowing,

> "the statutory exemption [for agriculture as an incidental use] to be **manipulated and twisted** into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [town's] zoning power would thus be

rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes. *Henry* at 847.

This is a fundamental derogation of the ZBA's responsibility under the Bylaw and Zoning Act to protect the public health, safety and welfare.

Very truly yours,

Margaret E Sheehan

Margaret E. Sheehan
Community Land & Water Coalition
Save the Pine Barrens, Inc.
158 Center Hill Road
Plymouth MA 02360
ecolawdefenders@protonmail.com
508-259-9154

Enclosures:
Check for $1,000.00 reserving rights to seek a fee waiver
Petition form
Certified Abutters List

Cc: Town Manager, Derek Brindisi
Chair, Plymouth Selectboard
Natural Heritage and Endangered Species Program
Plymouth Conservation Commission
MassDEP, SERO

Exhibit 1: December 19, 2022 CLWC Demand Letter to the Building Commissioner

Exhibit 2: December 29, 2022 Denial Letter (one page form letter) from the Building Commissioner

Exhibit 3: *Henry* and *Old Colony* cases

Exhibit 4: March 6, 2018 ZBA Special Permit Case No 3879 to EJ Pontiff Cranberry ("Pontiff")

Exhibit 5: Plan, Flaherty & Stefani, Tailwater Recovery, 140 Firehouse Road, Sheet 2, accompanying Special Permit application

ZONING BOARD OF APPEALS

PETITION APPLICATION

PETITIONER: SAVE THE PINE BARRENS INC DATE: 1/26/23

PETITIONER/ADDRESS: 158 CENTER HILL RD PLYMOUTH 02360

LOCATION OF PROPERTY: FIREHOUSE RD.

ASSESSORS' PID NO. MAP 121 002-002 +1A ZONE: RR

OWNER OF PROPERTY: EJ PONTIFF CRANBERRY
(IF OTHER THAN PETITIONER) ~~c/o Federal Furnace Cranberry~~

ADDRESS OF OWNER: 184 Marshall St Duxbury MA 02332
(IF OTHER THAN PETITIONER) ~~a/k/a 184 Standish St Duxbury~~

TITLE REFERENCE:
BOOK NO. 47757 PAGE NO. 264 (UNREGISTERED LAND)

CERTIFICATE OF TITLE NO. _____ (REGISTERED LAND)

DID YOU OWN THIS PROPERTY ON JANUARY 1ST? ☐ YES ☑ NO

IF NOT, WHO WAS THE OWNER ON JANUARY 1ST? _____

THE PETITIONER/APPLICANT CERTIFIES THAT THERE IS NO INFRINGEMENT OF WORK OR STRUCTURES ON PLYMOUTH TOWN PROPERTY OUTSIDE OF THE RIGHT-OF-WAY AND/OR THE PROJECT DOES NOT REQUIRE ACCESS ON/OVER/THROUGH TOWN PROPERTY. IF WORK, ACCESS, OR STRUCTURES ARE PROPOSED ON TOWN PROPERTY, YOU MUST CONTACT THE TOWN MANAGERS OFFICE, IN WRITING, IMMEDIATELY. FAILURE TO OBTAIN THE TOWN'S PERMISSION OR ACKNOWLEDGMENT OF PLANS THAT INCLUDE WORK, ACCESS, OR STRUCTURES ON TOWN PROPERTY WILL RESULT IN THE DELAY OF THE PERMIT REVIEW PROCESS.

SIGNATURE: MMeehan (OWNER OR AGENT)

REASONS FOR THIS REQUEST, INCLUDING PROVISIONS OF THE ZONING BY-LAW FROM WHICH RELIEF IS REQUESTED: ***(PLEASE CHECK THE ZONING DENIAL FOR THIS INFORMATION)***

SIGNATURE: _____ (OWNER OR AGENT)

PRINTED NAME: _____ (OWNER OR AGENT)

MAILING ADDRESS: _____

PHONE NUMBER: _____

EMAIL ADDRESS: _____

EXHIBIT 1

A project of Save the Pine Barrens
158 Center Hill Road
Plymouth MA 02360
www.savethepinebarrens.org
environmentwatchsoutheasternma@gmail.com

December 19, 2022

BY HAND
Nicholas Mayo
Director of Inspectional Services
Building Department
Town of Plymouth
26 Court Street
Plymouth MA 02360
Email via Town of Plymouth web portal

Re: Demand for Enforcement
ZBA Special Permit ZBA Case No. 3879 dated March 6, 2018 and Plymouth Zoning Bylaw
Location: Map 121 Lot 002-002 off Firehouse Road, Plymouth
Operators: E.J. Pontiff Cranberry Co.
P.A. Landers, Inc.

Dear Mr. Mayo,

This is a demand for enforcement of the Plymouth Zoning Bylaw (Bylaw) and Special Permit Case No. 3879 (the "Permit") against E.J. Pontiff Cranberry Co. and Eric Pontiff its sole officer and director, and P.A. Landers, Inc., David Prosper, President and those acting in concert

with them, jointly and severally, including their agents, contractors, subcontractors or employees, successors and assigns ("Violators"). This demand is made pursuant to the Plymouth Zoning Bylaw, ("Bylaw") § 202-12 and G.L. c. 40A, § 7 which charge you with enforcing the Zoning Bylaw and permits and addressing violations thereof. It is brought by Community Land & Water Coalition ("CLWC").

Since 2018, the Violators have been operating an unlawful sand and gravel mine at Plymouth Assessor's Map 121 Lots 002-002, also known as Lots 1A and 2A, off Firehouse Road in Plymouth ("the Site"). This is not an agricultural project but a stand-alone industrial sand and gravel mine. Pontiff concocted the Permit application as a ruse to evade the Bylaw's prohibition against industrial mining in the RR district where it is located. *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841(1994) (alleged agricultural use a ruse for earth removal, violated the bylaw); *Old Colony Council–Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth, 31* Mass. App. Ct. 46, (1991); *Coggin v. City of Westfield*, Land Court, Sept. 24, 2009 (145,000 cubic yard earth removal was not incidental).

You as Director of Inspectional Services ("DIS") are well aware and have a duty to be aware that the primary business operations of EJ Pontiff Cranberry and PA Landers is sand and gravel removal for commercial sale and that the primary use of the land since 2018 has been as an industrial sand and gravel mine. Pontiff has conducted additional industrial scale earth removal operations, alone or with excavation companies such as PA Landers, under the pretense of agricultural operations in other locations in the Town.

The ZBA's Findings in Decision Case No. 3879 ("Decision") were based on the false pretense that leveling 19 acres of 100-foot hills to at least 10 feet below grade and into the Aquifer Pontiff's was necessary and incidental agriculture. See Bylaw, as of 2017, § 205-18(F). It was not. Further, the mining operation was not then and is not now "agriculture" within the meaning of G.L. c. 128, § 1A or G.L. c. 40A, § 9. The alleged "tail water recovery pond" was and is a ludicrous ruse concocted to remove at least $ 9 million in sand and gravel. Hence, the ZBA's was void *ab inito*.

Even if the Permit was properly granted, which it was not, the Violations at the Site include the following:

- Excavation outside the area shown on the Permit plans,
- Excavation beyond 10 feet below the water surface.
- Excavation exceeding the volume allegedly permitted: the Permit purported to allow the excavation of 838,186 cubic yards and at least 1,109,115 cubic yards have been removed from the Site.

  Photographic documentation and earth volume calculation attached hereto.

  Below: Alleged tail water recovery pond, Google Earth, 2021.

In addition, the Violators have violated and continued to violate the Bylaw and Permit as follows:

1. The special permit application was based on misrepresentations designed to evade the Bylaw's prohibition against stand-alone mining operations. The ZBA ignored the obvious

and blatant ruse presented by the Violators and their engineers and consultants and approved the plan. Examples from the Permit are as follows:

Relation to surroundings # 4: The "proposed tailwater recovery pond" is and was a ruse for industrial scale, stand-alone mining operations, not an "accepted farming method."

Natural features conservation #5: The portion of the site as mapped wetland has been obliterated without an Order of Conditions from the Conservation Commission in violation of the law. The NHESP priority habitat has been obliterated.

Siting and Design of Structures #6, 8, 9. A public records request to the town shows no record of that the "pond" is in compliance with NRCS methods or that it bears any relation to a legitimate cranberry bog operation. There is no record or verification that the "pond" is being used to reduce the nutrient loading in White Island Pond, or that phosphorous in the Pond has been reduced as was claimed as the purpose of the tail water recovery pond. The claim that the excavation was necessary to help reduce nutrients in White Island Pond was and is a false pretense and ruse for Violators' stand-alone industrial sand and gravel mining operation.

In response to an inquiry from CLWC, you forwarded an email from Pontiff stating the his earth removal "behind Deer Pond Village" is occurring because "When we dug the tailwater recovery pond we utilized sand from that removal area in the renovation of the cranberry bogs because it was closer to where we were renovating rather than remove it from our existing sand pit behind Deer Pond Village."

This email dated September 8, 2022, is an admission by the Violators that they are they excavating outside the area shown on the plans. This is confirmed by Exhibit 1 here to, observations and Google Earth and other images readily available to you.

Conditions 11, 12. The Town has produced no record to show that the Violators are incompliance with the "proposed Habitat Management Plan (NHESP tracking No. 24767) or that they have implemented said plan. The plan and statement in the Permit that this plan would be implemented was intended to deceive and manipulate others into believing that the sand and gravel operation would not harm listed species under MESA. The claim that the Violators have "minimized site disturbances and impacts" is untrue.

The ZBA unlawfully and illegal extended the Special Permit multiple times most recently on February 17, 2021 as an "Informal Matter" with no public hearing and no credible

evidence. At the February 17, 2021 ZBA meeting Board Member and Chair Connor remarked to the effect "Eric, I guess cranberries aren't making as much money as sand and gravel removal", smiled, and when Eric agreed, Connor voted to extend the Permit.

2. The Violators intentionally sited a 10-acre "tail water recovery pond" on the highest hill on the property, showing plans to excavate across a 19-acre area to extract lucrative sand and gravel for commercial sale. This was not and is not necessary and incidental agricultural excavation, in violation of the Bylaw. The ZBA and the DIS know this. See, *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841(1991) where a smaller operation was found to be the primary use as a sand and gravel mine, not agriculture.
3. The Special Permit and Conditions are window-dressing intended to create the appearance that the ZBA is enforcing and implementing the Bylaw.
4. At all times since the Permit was issued the Violators have been in violation of the Permit Conditions and Findings:

Condition 1: Violators have used the site as a principal use of sand and gravel removal in violation of Condition 1 from 2018 to the present. See,

Condition 2: Topsoil has not been placed as required. The area is partially in an Aquifer Protection District Zone II and the operation has removed topsoil and sand and gravel in violation of the Massachusetts Clean Waters Act and MassDEP excavation guidelines. Massachusetts Sand and Gravel Operation Guidelines state, "Vegetation and the upper soil horizons provide a pollution buffer for shallow groundwater. Improperly managed sand and gravel operations may reduce this protection and introduce hazardous materials and other toxins to groundwater."

"Sand and gravel also provide a very porous medium for transporting soluble pollutants to the underlying groundwater. Page 322, *Massachusetts Erosion and Sediment Control Guidelines for Urban and Suburban Areas." DEP, March 1997; May 2003.* The removal of sand and groundwater quality is vulnerable to contamination because of the loss of filtration provided by sand and gravel.

Condition 4: No snow fence has ever been placed a the "limit of disturbance for each phase perimeter."

Condition 5: No "NHESP approved seed mix" has been used.

Conditions 6, 24: There is no signage as required.
Condition 9: There is no record that Violators have granted the easement required.
Condition 10: There is no record that Violators complied with the Wetlands Protection Act or Town Wetlands Bylaw and in fact are likely in violation with both. The work is not "normal improvement of land in agricultural use" under the Act or regulations or the Bylaw and required an Order of Conditions from the Conservation Commission which it did not obtain.
Conditions 11 and 12: The ZBA had no grounds for extending the Permit since the work was based on false pretenses and misrepresentations.
Conditions 15 and 16: The ZBA has never independently verified that the hours of operation and truck routes have been followed.
Condition 19: The "donation" to the Town of ten cents a cubic yard for gravel removal is pretense and unlawful. The Violators have not paid the required "gift" in full and the ZBA had no independent verification of the volumes of sand and gravel removed. It is not a "gift" when provided in exchange for a privilege – that is, the sand and gravel mining permit.
Condition 21: The ZBA cannot verify that the actual volume removed is 838,186 cubic yards.
Conditions 25 and 30: The quarterly and monthly reports supplied by Flaherty and Stefani are boilerplate, cut and paste and identical to each other than for the claimed removal of sand and gravel. They are not credible and are mere window dressing relied on by the ZBA to perpetuate the ruse that it is enforcing the Zoning Bylaw prohibiting sand and gravel removal in an RR district other than that necessary and incidental.
Condition 26: Violation of requirement not to disturb more than five acres at one time. The 19 acre site is being worked and disturbed with active mining in the Sole Source Aquifer.
Condition 28. The Building Commissioner's decision that a $10,000.00 bond for a 1 million dollar 5+ year earth removal operation was a farce which the ZBA perpetutated by renewing the Permit over and over.

Further, the work is threatening and/or has harmed the Plymouth Carver Sole Source Aquifer, the drinking water supply for the Town of Plymouth and about 200,000 people in the Aquifer area. By conducting work in violation of the Natural Features Conservation protections of the Bylaw, Section 205-18 (2017 Version), the Violators have harmed and continue to harm the drinking water supply, including irreversibly removing vegetation and sand and gravel that

removes the filtration protection for the aquifer, changed the rate of evapotranspiration and recharge of the drinking water supply, and possibly changed groundwater flow direction. The MassDEP "Drinking Water" regulations, 310 CMR 22.00 **prohibit sand and gravel removal within four feet of the groundwater table to protect drinking water**. 310 CMR 22.21, Groundwater Supply Protection. Section 22.21(2)(b)(6).

Demand

This is a demand that you:

1. Issue a cease and desist preventing any further earth removal on this Site and preventing any further changes in topography, grading, clearing, removing of trees or other alterations until such time as the violations have been remedied.

2. Hire a professional expert at the Violators' expense to conduct a forensic audit of the volume of earth removed from the site (local firms supporting the Big Digs need not apply).

3. Conduct an investigation to determine the nature, scale and scope of the violations of the earth removal.

4. Order the payment of earth removal fees owed to the Town.

5. Hire a professional expert at the Violators' expense to ascertain the environmental impact of the unlawful earth removal, including loss of protection for the aquifer and impacts on evapotranspiration, groundwater recharge rates and ground water flow direction and hydrological conditions.

6. Hire a landscaping and ecology expert at the Violators' expense to devise a plan for immediate restoration of the Site and mitigation of the loss of vegetated cover, impacts to abutters, and to implement measures to protect the Plymouth Carver Sole Source Aquifer and offset the of loss of forested lands.

7. Order the Violators to show compliance with the NHESP requirements for a habitat plan, the Clean Waters Act, the MassDEP stormwater regulations, and the Wetlands Protection Act and regulations thereunder and the Town Wetlands Byaw.

Should you wish to have a further explanation of these violations or specific explanations of how to calculate the area of the earth removal and the actual volume of earth removed using readily available GIS tools we welcome the chance to meet with you.

For the record, this is one of many illegal earth removal sites that have been brought to your attention over the past two years which you have chosen to ignore and refuse to enforce the Bylaw. Your failure to enforce the Bylaw and to protect the Aquifer and drinking water supply for 200,000 people from illegal sand and gravel mining is a matter of grave importance that cannot be overstated.

The obvious and blatant ruses to evade the Bylaw concocted by Pontiff, Landers and others can no longer be denied. Your complicity in these ruses have the potential to rise to the level of civil rights violations under Section 1983. The complicity of the DIS in allowing earth removal under the pretense of agricultural or a subdivision was outline in our October 20, 2022 Demand Letter to you for violations on Long Pond Road.

Please send your response by email to: environmentwatchsoutheasternma@gmail.com and by mail to the address above.

Very truly yours,

Margaret E Sheehan

Margaret E. Sheehan
Community Land & Water Coalition

Cc: Lee Hartman, Town Planner
Colleen Tavekelian, Planning Department
Attorney General Maura Healy
Ron Amidon, Commission of Department of Fish and Game
Eve Shulter, NHESP
Jesse Leddick, NHESP

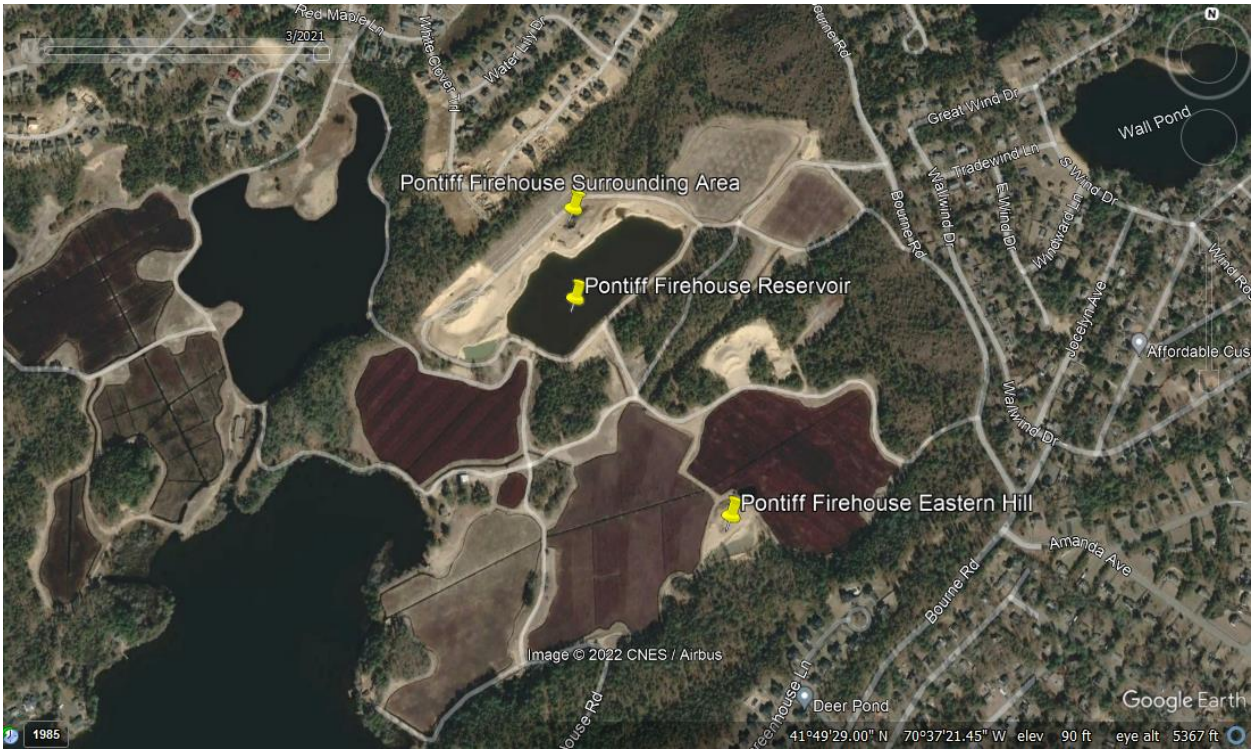
Below: Mining outside area of Plans, October, 2022, Firehouse Road, EJ Pontiff and PA Landers, Inc., Plymouth MA

Below: Depth of excavation exceeds 10 described in permit plans as shown by depth of excavator arm below the water surface. Plans say bottom of pond will be 10 feet below surface. March 2022.

<u>Below: Calculation of earth removal volume</u>

These tables compare topographic elevations taken in the year 2000 at the site to present day elevations after earth removal at the site. Then the area of current excavation is measured and the volume of earth missing is calculated. The total volume of earth removal from the 3 areas is estimated at 1,109,115 cubic yards.

Locations:



Area 1: Location of Tail Water Recovery Pond (Reservoir) total of 384,083.04 cubic yards not including excavation up to 30 feet below the water surface.

Pontiff Firehouse Reservoir	Nearby Bog - 10feet for Res
80	43
66	48
67	44
80	51
84	45
84	45
71	53
86	47
82	43
68	43
76.8	46.2
Difference in Elevation	Foot to Yard Conversion
30.6	10.2
Area in Acres	Acres to Square Yard Conversion
7.78	37655.2
Total Cubic Yards	
384083.04	

Area 2: Surrounding Area, to the west, total of 658,240 cubic yards.

Pontiff Firehouse Surrounding Area	Nearby Bog
100	53
90	58
111	54
101	61
105	55
109	55
89	63
84	57
88	53
93	53
97	56.2
Difference in Elevation	Foot to Yard Conversion
40.8	13.6
Area in Acres	Acres to Square Yard Conversion
10	48400
Total Cubic Yards	
658240	

Area 3: Eastern Hill, to the southeast total: total of 66,792 cubic yards.

Pontiff Firehouse Eastern Hill	Nearby Bog Path
91	62
101	57
100	56
83	58
100	62
78	65
94	62
103	57
104	56
97	56
95.1	59.1
Difference in Elevation	Foot to Yard Conversion
36	12
Area in Acres	Acres to Square Yard Conversion
1.15	5566
Total Cubic Yards	
66792	

EXHIBIT 2

Town of Plymouth
Department of Inspectional Services
26 Court Street
Plymouth, Massachusetts 02360
508-747-1620
Fax 508-830-4028

December 29, 2022

Ms. Sheehan
158 Center Hill Road
Plymouth MA 02360

RE: Demand for Enforcement Dated December 19, 2022. ZBA Special Permit Case No. 3879

Ms. Sheehan,

This notice is in response to a complaint filed by you with the Town of Plymouth Building Department regarding

☐ Because your complaint was found to have merit a violation notice was issued. The subject property is pending enforcement action in accordance with the Town of Plymouth Building Department policy. When the actions taken by this department have concluded all documentation will be available as part of the public record. At that time you may come to the Building Department and review the file to better understand what action was taken and the outcome of any enforcement action.

☒ The Building Department did not take action with respect to your compliant as the alleged violation was found to be either without merit or un-enforceable, therefore no violation notice has been issued. You may come to the Building Department to review the file and examine any documentation that we have received from you or in response to your complaint. Please refer to the address of the alleged violation when making inquiries.

You may appeal the Building Department's determination on this matter to the Zoning Board of Appeals (ZBA). Should you decide to make an appeal, this letter shall serve as a referral to the ZBA for that purpose.

No further notices from the Building Department will be issued regarding this matter. If you have any further questions, please do not hesitate to contact me at the Building Department at 508-747-1620. My office hours are 8:30 – 9:30am Monday through Friday.

Sincerely,

Nicholas Mayo
Director of Inspectional Services

7020 3160 0001 4904 7466

EXHIBIT 3

KATHLEEN B. HENRY *vs.* BOARD OF APPEALS OF DUNSTABLE.

Middlesex. September 9, 1994. - November 16, 1994.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, & LYNCH, JJ.

Richard W. Larkin, Town Counsel, for the defendant.

Robert J. Sherer (*Francis A. DiLuna* with him) for the plaintiff.

Tara Zedeh, Special Assistant Attorney General, for Department of Food and Agriculture, amicus curiae, submitted a brief.

ABRAMS, J. We granted the defendant board's application for further appellate review to consider its claim that the excavation and removal of 300,000 to 400,000 cubic yards of gravel from a hilly five-acre portion of the plaintiff's thirty-nine acre plot is not incidental to an agricultural or horticul-

tural use of the land and therefore is subject to the local zoning by-law prohibiting commercial earth removal. See generally § 15 of the zoning by-law of the town of Dunstable.

The plaintiff's property is in an R-1 residential district within the town of Dunstable. In an R-1 district an owner may remove or transfer earth within the property boundaries. However, Dunstable's zoning by-law prohibits commercial earth removal in an R-1 district as of right. The plaintiff applied to the Dunstable board of selectmen (selectmen) for a special permit. The selectmen denied the plaintiff's application.

The board denied the permit on the ground that the removal operation would be "injurious, noxious or offensive to the neighborhood" within the meaning of the applicable by-law. The plaintiff appealed to the Superior Court on the parties' stipulation of facts. A Superior Court judge determined that the proposed use was exempt from regulation by the Dunstable zoning by-law, under G. L. c. 40A, § 3 (1992 ed.),[1] as incidental to an agricultural use, and that the plaintiff could proceed with the earth removal operation. The Appeals Court affirmed. *Henry* v. *Board of Appeals of Dunstable*, 36 Mass. App. Ct. 54 (1994). We allowed the board's application for further appellate review. We reverse the judgment of the Superior Court.

I. *Facts.* We summarize the following from the parties' stipulation of facts. Kathleen B. Henry owns thirty-nine acres of land on High Street in Dunstable, a rural area classified as an R-1 residential district. The plaintiff's plot is forest land within the meaning of G. L. c. 61 (1992 ed.), and has been under a G. L. c. 61 forestry management plan for over ten years.

For the past several years, the plaintiff has used a portion of this property to cultivate 1,000 trees to restore the forest and to begin a Christmas tree farm. After consulting experts,

[1]General Laws c. 40A, § 3 (1992 ed.), reads in pertinent part: "No zoning ordinance or by-law shall . . . unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture [or] horticulture . . . ."

the plaintiff realized that a "cut your own" Christmas tree farm would be much more profitable than a saw log operation. During winter, neither mechanized farming equipment nor customers of a "cut your own" operation would be able safely to have access to the proposed five-acre area unless the steep grade of the land, created by an esker, is leveled by removing 300,000 to 400,000 cubic yards of gravel.

To realize her contemplated "cut your own" tree farm, the plaintiff planned to hire a contractor to remove 100,000 cubic yards of gravel annually until the necessary gravel was removed (at least three to four years). The contractor would sell the gravel at the market rate, currently one dollar per cubic yard, and share any profits with the plaintiff, which she planned to invest in startup costs of the "cut your own" operation. Eight years after completion of the excavation and planting, a sustainable annual crop of 700 to 1,000 Christmas trees is expected, which currently would sell for thirty dollars a tree.

II. *Incidental use.* Because § 3 of the Zoning Act, G. L. c. 40A (1992 ed.), does not define "agriculture" or "horticulture," we look to the plain meaning of those terms in deciding whether the plaintiff's activity is agricultural. See, e.g., *Building Inspector of Peabody* v. *Northeast Nursery, Inc.*, *ante* 401, 405 (1994). The planting of evergreen trees for either a saw cut operation or a "cut your own" Christmas tree farm is within the commonly understood meaning of agriculture or horticulture. The board does not contend otherwise.

The board asserts that the plaintiff's proposed earth removal does not qualify for the exemption because it is a major independent commercial quarrying project, separate and apart from any agricultural or horticultural use. Two statutory provisions supply guidance in interpreting whether the scope of the agricultural use exemption for a proposed evergreen farm includes an initial, large-scale excavation project. First, G. L. c. 128, § 1A (1992 ed.), defines "agriculture" and "farming" to include practices by a farmer on a farm incident to or in conjunction with the growing and harvesting

of forest products.[2] Second, G. L. c. 61A, § 2 (1992 ed.), defines "horticultural use" to include uses "primarily and directly" related to or "incidental," and "customary and necessary" to commercial raising of nursery or greenhouse products and ornamental plants and shrubs.[3] Thus, the scope of the agricultural or horticultural use exemption encompasses related activities. Because the proposed excavation of 300,000 to 400,00 cubic yards of gravel is not primarily agricultural or horticultural, the issue is whether the proposed excavation is incidental to the creation of a "cut your own" Christmas tree farm.

Uses which are "incidental" to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. 2 E.C. Yokley, Zoning Law and Practice § 8-1 (4th ed. 1978). An accessory or "incidental" use is permitted as "necessary, expected or convenient in conjunction with the principal use of the land." 6 P.J. Rohan, Zoning and Land Use Controls § 40A.01, at 40 A-3 (1994). Determining whether an activity is an "incidental" use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses. In analyzing the plaintiff's proposed earth re-

[2]Section 1A provides in part: " 'Agriculture' and 'farming' shall include . . . the growing and harvesting of forest products upon forest land . . ., and any practices, including any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations . . . ."

[3]Section 2 provides: "Land shall be deemed to be in horticultural use when primarily and directly used in raising . . . nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling such products in the regular course of business or when primarily and directly used in raising forest products under a program certified by the state forester to be a planned program to improve the quantity and quality of a continuous crop for the purpose of selling such products in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products and preparing them for market."

moval project, the focus is on the "activity itself and not . . . such external considerations as the property owner's intent or other business activities." *County of Kendall* v. *Aurora Nat'l Bank Trust No. 1107*, 170 Ill. App. 3d 212, 218 (1988).

The word "incidental" in zoning by-laws or ordinances incorporates two concepts: "It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. . . . But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." *Harvard* v. *Maxant*, 360 Mass. 432, 438 (1971), quoting *Lawrence* v. *Zoning Bd. of Appeals of N. Branford*, 158 Conn. 509, 512-513 (1969).

The plaintiff's activity meets neither aspect of an incidental use. The proposed gravel removal project is a major undertaking lasting three or four years prior to the establishment of the Christmas tree farm. That project cannot be said to be minor relative to a proposed agricultural use nor is it minor in relation to the present operation. Nor can the quarrying activity be said to bear a reasonable relationship to agricultural use. *Jackson* v. *Building Inspector of Brockton*, 351 Mass. 472 (1966) (construction of new building to operate agricultural machine on farm in residential district was reasonably related to farming activities and thus permitted under zoning ordinance). We conclude that the net effect of the volume of earth to be removed, the duration of the project, and the scope of the removal project are inconsistent with the character of the existing and intended agricultural uses.

We think that the plaintiff's case is governed by *Old Colony Council-Boy Scouts of Am.* v. *Zoning Bd. of Appeals of Plymouth*, 31 Mass. App. Ct. 46 (1991). In *Old Colony Council*, the Boy Scouts of America applied for a permit under a Plymouth zoning by-law to excavate 460,000 cubic

yards of earth in order to create a cranberry bog near a campsite in a "Rural Residential District." *Id.* at 49. The Plymouth zoning board of appeals denied the application on the ground that a special permit was required for such an excavation project. The plaintiff appealed to the Superior Court which affirmed the denial of the permit. The Appeals Court also affirmed on the ground that, considering the volume of earth to be excavated, the duration of the project, and the funds involved, the excavation was not incidental to the proposed cranberry bog. *Id.* (because "the proposal involved the removal of 460,000 cubic yards of fill over a two and a half year period and an excavation which would provide substantial funds in excess of the cost of constructing the bog, the judge was warranted in upholding the board's conclusion that the excavation of material was not incidental to the construction and maintenance of a cranberry bog").

In its reasoning, the Appeals Court stated the plain meaning of "incidental" to be "something minor or of lesser importance." *Id.* at 48 & n.2, quoting Webster's Third New Int'l Dictionary 1142 (1971) ("subordinate, nonessential, or attendant in position or significance") and American Heritage Dictionary 664 (1976) ("[o]ccurring as a fortuitous or minor concomitant: incidental expenses"). Applying this definition of "incidental" use, the court then considered the net effect of the proposed activity on the surrounding area.

In our view, the Appeals Court in *Old Colony Council, supra*, correctly considered the "net effect" that the proposed cranberry bog would have had in the rural residential area and concluded that the effect was so great that the excavation could not be said to be incidental (or attendant or minor) to the cranberry bog. *Id.* at 49 (given amount of gravel to be excavated, estimated duration of excavation of project, and profit to be made from the excavation, excavation was not incidental to proposed cranberry bog). Interpreting accessory use provisions to require both that an incidental use be minor relative to the principal use and that the incidental use have a reasonable relationship to the primary one is essential to preserve the power and intent of local zoning au-

thorities. Any other construction of the statute would undermine local zoning by-laws or ordinances. Applying the same reasoning to this case, considering the amount of gravel to be removed, the duration of the excavation and the monies to be realized from the excavation, the removal of gravel cannot be said to be minor or dependent on the agricultural use.[4]

The magnitude of the plaintiff's mining operation, if permitted, would be "a de facto quarry operation to be carried on in violation of the [Dunstable] zoning [by-law]." *County of Kendall* v. *Aurora Nat'l Bank Trust No. 1107*, *supra* at 219. We conclude the special permit was properly denied because, "[t]o hold otherwise would be to allow the statutory exemption to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [town's] zoning power would thus be rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes." *Id.*

This matter is remanded to the Superior Court for entry of a judgment affirming the board's denial of a permit.

So ordered.

[4]The Appeals Court cited, 36 Mass. App. Ct. 54, 58 (1994), out-of-State cases in support of its conclusion. See, e.g., *Atwater Township Trustees* v. *Demczyk*, 72 Ohio App. 3d 763 (1991) (excavation to create lake and track for horses on fifteen year old horse farm held incidental to agricultural activity); *VanGundy* v. *Lyon County Zoning Bd.*, 237 Kan. 177 (1985) (quarrying rock to construct pond for irrigation was incidental to primary agricultural activities). However, in each of the cited cases, the net effect of the "incidental" use was minor in comparison to the primary use, especially because the agricultural use predated the excavation. Furthermore, to the extent that those cases are inconsistent with the result we reach, we decline to follow them.

[redacted]

OLD COLONY COUNCIL - BOY SCOUTS OF AMERICA *vs.* ZONING BOARD OF APPEALS OF PLYMOUTH.

No. 89-P-1325.

Plymouth. March 14, 1991. - July 12, 1991.

Present: BROWN, DREBEN, & IRELAND, JJ.

[redacted]

John H. Wyman for the plaintiff.

Jane M. O'Malley for the defendant.

DREBEN, J. Old Colony Council - Boy Scouts of America (plaintiff) is a charitable organization which owns and operates a summer camp for Boy Scouts in Plymouth. To become more self-sufficient and lessen its reliance on external funds, it sought to create a new cranberry bog adjacent to an existing nonproductive bog on a portion of its campsite. The cost of constructing the bog would, under the plaintiff's plan, be paid for by the sale of excavated material to the site con-

tractor, who would construct the bog and would pay the plaintiff in addition approximately $200,000.

The site chosen requires reducing the elevation of a hill (from 106 feet to fifty-three feet in one area) and the removal by truck of 460,000 cubic yards of earth. Removing this quantity of earth will entail thirty truck trips per day on a narrow gravel road, five days a week, for two and a half years.

When the plaintiff applied for a zoning permit,[1] the town's zoning agent refused to issue one on the ground that a special permit was required under § 301.06 of the zoning by-law. The plaintiff petitioned the zoning board of appeals (board) to reverse the decision of the zoning agent or, in the alternative, to grant a special permit for the proposed excavation. After the board denied both requests, the plaintiff unsuccessfully sought relief in the Superior Court pursuant to G. L. c. 40A, § 17. It now appeals from the judgment of the Superior Court. We affirm.

1. *Zoning permit.* The plaintiff first claims that a special permit is not needed and that a zoning permit should be issued because its proposal falls within the exception provided in § 301.06 of the by-law. That section is part of the "Natural Features Conservation Requirements" of the by-law, the intent of which, as expressed in § 301.01, "is to prevent cumulative damage to landscape and topography and related valuable and non-renewable natural resources of the Town of Plymouth." Even for allowable uses a zoning permit is required so that, as stated in § 301.02, the building inspector "shall review applications for conformity with this section," that is, as few lasting changes in topography as possible are to be made.

Section 301.06, upon which the plaintiff relies, provides:

> "Except when incidental to and reasonably required in connection with the construction of an approved

[1]A zoning permit is required for all excavations in excess of ten cubic yards to ensure that there is compliance with the "Natural Features Conservation Requirements," § 301 of the Plymouth zoning by-law.

> use . . . no removal for sale, trade or other consideration, or for use on a separate site, of soil, sand, gravel, or quarried stone in excess of ten (10) cubic yards shall be allowed except by special permit. . . . Such special permit for excavation shall be subject to all applicable Environmental Design Conditions . . . and . . . the Board of Appeals may prescribe additional conditions and safeguards . . . ."

The plaintiff's argument is that a special permit is necessary only when the sole purpose is earth removal; where a use is permitted as of right, no special permit is needed for the excavation necessary to prepare a site for that permitted use, regardless of the quantity of the earth materials to be removed. Therefore, according to the plaintiff, since the creation and cultivation of cranberry bogs are permitted as of right, the court erred in upholding the board's denial of the zoning permit.

The purpose of § 301 and the language used in § 301.06, when read in the light of that aim, support the reading adopted by the board and the judge. Whether there is "damage to the landscape and topography" surely does not depend on intent, but rather on what happens on the ground. Demolition of a hill does or does not damage the landscape irrespective of the demolisher's purpose.

Section 301.6 uses the word "incidental," a term which, when used in the context of zoning, often incorporates the concept "that the use must not be the primary use of the property but rather one which is subordinate and minor in significance." *Harvard* v. *Maxant*, 360 Mass. 432, 438 (1971), quoting from *Lawrence* v. *Zoning Bd. of Appeals of North Branford*, 158 Conn. 509, 512 (1969). The ordinary lexical meaning of "incidental" also connotes something minor or of lesser importance.[2] According this meaning to the

[2]In Webster's Third New International Dictionary 1142 (1971), the first definition given of "incidental" is "subordinate, nonessential, or attendant in position or significance." In the American Heritage Dictionary 664 (1976), "incidental" is defined as "[o]ccurring as a fortuitous or minor concomitant: incidental expenses."

word "incidental," in our view, best achieves the purpose of the special section of the by-law of which § 301.06 is a part.

That the excavation was not minor or incidental follows from the findings of the judge: "The net effect of the plaintiff's undertaking . . . is the creation of a sand and gravel quarry in conjunction with creating a cranberry bog." Where, as here, the proposal involved the removal of 460,000 cubic yards of fill over a two and a half year period and an excavation which would provide substantial funds in excess of the cost of constructing the bog, the judge was warranted in upholding the board's conclusion that the excavation of material was not incidental to the construction and maintenance of a cranberry bog.

2. *Special permit.* "Under . . . G. L. c. 40A, § 17, a court reviewing a decision of the board denying a permit does not possess the same discretionary power as does the board, and the decision of the board can only be disturbed 'if it is based "on a legally untenable ground" . . . or is "unreasonable, whimsical, capricious or arbitrary". . . . To hold that a decision . . . denying a permit is arbitrary . . . whenever the board, on the facts found by the trial judge, could have granted a permit, would eliminate the board's intended discretion.' *Gulf Oil Corp.* v. *Board of Appeals of Framingham*, 355 Mass. 275, 277-278 (1969)." *Subaru of New England, Inc.* v. *Board of Appeals of Canton*, 8 Mass. App. Ct. 483, 486-487 (1979).

The judge was correct in upholding the board's denial of the special permit under § 301.06. The campsite was subject both to the zoning requirements of a "Rural Residential District" and the more stringent requirements of an "Aquifer Protection District." In the latter, § 401.17(F)(1)(j) prohibits: "The mining of land except as incidental to a permitted use; such as cultivation of cranberries." Allowed are uses which are permitted in "Wetlands Areas," "including uses incidental thereto such as the excavation and use of materials in connection with the creation and maintenance of agricultural uses, such as cranberry bogs." Zoning by-law of Plymouth § 401.17 (D)(1).

Not only was the board warranted in determining that the removal of the material was not "incidental" to the creation of an allowed use, but it also had good reason to decide that adequate and appropriate facilities were not available for the proposed operation.[3] As the judge found, the road to be used was a narrow gravel road, the trucks to be employed were heavy and wide and, in some places, would not be able to pass each other. The board's refusal of a special permit for earth removal was not arbitrary or whimsical.

Judgment affirmed.

[3]The board also urges that § 407.17 (D)(1) means that the "excavation and use" must both be on the property. Since we hold that the board was justified in concluding that the excavation was not "incidental," we need not reach this issue. We also need not reach other issues, including whether a special permit procedure exists in an "Aquifer Protection District."

EXHIBIT 4

TOWN OF PLYMOUTH

26 Court Street
Plymouth, Massachusetts 02360
(508) 747-1620

Board of Appeals

Decision

Case No. 3879

LANDOWNER: E. J. Pontiff Cranberries Inc.
PETITIONER: E. J. Pontiff Cranberries Inc.
SUBJECT PROPERTY: 140 Fire House Rd., Plymouth, Massachusetts
PARCEL ID NO: 121-000-001A-000U & 121-000-002A-000 (N/K/A 121-000-002-002)
TITLE REFERENCE: Plymouth County Registry of Deeds, Book 47757, Page 264
DATE OF PUBLIC HEARING: September 6, 2017, continued to October 18, 2017, continued to December 13, 2017, continued to January 17, 2018, continued to February 21, 2018 and concluded thereon

****

In exercise of its discretionary powers, the Plymouth Zoning Board of Appeals (Members: Peter Conner, William Keohan, Michael Main, and David Peck in the affirmative, and Edward Conroy in the negative) voted (4-1) to **GRANT** the petition of **E. J. Pontiff Cranberries Inc.** requesting a Special Permit per Section 205-18, including but not limited to Paragraphs F, G, & H, of the Town of Plymouth Zoning Bylaw (the "Bylaw"), subject to Environmental Design Conditions for gravel removal in order to construct a tailwater recovery pond on the property of **E. J. Pontiff Cranberries Inc.** located at **140 Fire House Rd** and shown as Lots 1A and 2A (N/K/A Lot 2-2) on Plat 121 of the Assessors Maps dated January 1, 2017 in a RR Zone.

SUBMITTED DOCUMENTATION:

a. Notice of public hearing
b. ZBA Petition Application 7/12/17
c. Dept. of Inspectional Services Denial dated 7/19/2017
d. Deed recorded in BK 47757, PG 264
e. Plot Plan 7/18/17
f. Notice of description form Flaherty & Stefani 7/12/17
g. Environmental Impact Statement 7/12/17
h. Water Resource Protection pamphlet received 7/18/17
i. Tailwater Recovery Plan 7/13/17
j. Revised Tailwater Recovery Plan 8/14/17
k. Revised Tailwater Recovery Plan 9/15/17
l. Traffic Impact Assessment 8/2/17
m. Revised documentations from Flaherty & Stefani, Inc. 9/20/17
n. Revised Tailwater Recovery Plan 10/27/17
o. Revised Tailwater Recovery Plan 11/15/17
p. No supporting neighbor's documentation 10/7/17

q. McKenzie Engineering Group Comments 9/5/17
r. Town Engineer Comments 8/24/17
s. Revised Town Engineer Comments 10/12/17
t. Revised Notice of Description Flaherty & Stefani 10/29/17
u. Revised Traffic Impact Assessment 8/25/17
v. Memorandum of Agreement from Agricultural Resources received 8/28/17
w. Topographic Map received 8/28/17
x. Flood Management received 8/28/17
y. Garret Group Supportive Document 8/24/17, as revised
z. Revised Notice of Description Flaherty & Stefani, Inc. 8/28/17
aa. Revised Notice of Description Flaherty & Stefani 8/24/17
bb. Continuance of Case from Attorney Betters 10/12/17
cc. Zoning board waiver of time requirement 11/29/17
dd. Flaherty & Stefani, Inc. comments 2/12/18
ee. Town Engineer comments 1/3/18
ff. Continuance of Case from Attorney Betters 12/1/17
gg. Garrett group comments 12/1/17
hh. Flaherty & Stefani, Inc. comments 1/23/18
ii. Revised Tailwater Recovery Plan 1/23/2018
jj. McKenzie Engineering Group Comments 2/13/2018
kk. Town Engineer Comments 2/20/2018
ll. Letter from White Island Pond Conservation Alliance, Inc. 9/6/2017
mm. Letter from Massachusetts Division of Fisheries & Wildlife 12/15/17
nn. Revised Notice of Description Flaherty & Stefani 1-9-18
oo. McKenzie Engineering Group Comments 12-1-17
pp. Town Fire Departments Comments 8-9-17
qq. McKenzie Engineering Group Comments 10-2-17
rr. Proposed Drainage Easement Plan 1-5-18

THE PLYMOUTH ZONING BOARD OF APPEALS FINDS THE FOLLOWING FACTS:

1. The subject property is approximately 184 acres in size, containing 47.4 acres of existing cranberry bogs. It is the Petitioner's intent to create a tailwater recovery pond for the existing bogs to improve cranberry bog management operations. The proposed plan, as revised, requires the removal of approximately 838,186 cubic yards (CY) of sand and gravel from the site, which requires a Special Permit per Section 205-18 paragraphs F, G and H of the Bylaw subject to Environmental Design Conditions (EDC) for gravel removal. The original request was for the excavation of approximately 1,013,000 CY of sand and gravel; however, working with the Town's consultant on the design and location of the tailwater recovery pond has reduced the proposed sand and gravel removal by approximately seventeen (17%) percent.
2. In April 2017, Town Meeting adopted a new earth removal bylaw, however, this petition was filed before the new earth removal bylaw became effective, and the Petitioner also had filed a preliminary plan for this land and its abutting land, which according to MGL c. 40A, §6 grandfathers this property from the revised earth removal bylaw. However, notwithstanding

this zoning protection, the Petitioner has voluntarily agreed to the following new conditions of the bylaw:

- A minimum of six (6") inches of topsoil shall be placed on areas designated to be restored to a natural state (side slopes, open space and areas that are not to be otherwise improved). This minimum depth of topsoil shall be increased to twelve (12") inches in the Aquifer Protection District Zone II.
- All areas of excavation and access ways to earth removal operations shall be clearly marked with legally posted no trespassing signs. Areas of steep slope or grade, as judged by the permit granting authority (for Section 205-18F of the Bylaw, the Building Commissioner for Zoning Permits in Section B and the Zoning Board of Appeals for Special Permits in Section C), shall additionally be fenced and clearly marked "DANGER- KEEP OUT" every 150 feet.
- Excavation or depositing of excavated material shall not be made within fifty (50') feet of any lot line and no excavation depth of greater than fifteen (15') feet shall be made within 100 feet of any lot line. For excavation sites in or directly abutting the RR, R40, R25, R-20SL and R-20MF zones, excavation under the new earth removal bylaw shall not occur within 200 feet of the project's property lines, which shall include a 100-foot vegetated natural buffer. The project will not have a 200-foot setback but will have a setback of 100 feet. Given the location of the existing cranberry bogs on the site and the Natural Heritage requirements as to size and location of the excavation, there were constraints on the site and the Petitioner has taken steps, consistent with recommendations from MEG, to locate the tailwater recovery pond as far away from the abutting property as logistically possible.
- Ten (10') foot-wide terraces are required for areas where cuts to the natural topography exceed forty (40') feet (on slopes exceeding eighty [80'] feet, terraces are required each forty (40') foot cut).
- An operation sequencing plan updated quarterly with details on activities to occur over the next three (3) months shall be submitted.
- Quarterly inspections and quarterly written certifications from a registered Professional Engineer shall be submitted to the Building Commissioner demonstrating substantial compliance with the Zoning Bylaw, the earth removal Special Permit, and accepted engineering practices.

Review Under Environmental Design Conditions per § 205-9C as required per § 205-18 of the Bylaw by cross reference:

Relation to surroundings

3. In November 2016, the Petitioner purchased approximately 211 acres that included the subject 184 acres. The site is located off the west side of Bourne Road within the Rural Residential (RR) zoning district. The property includes an existing residential dwelling on

site located near White Island Pond at 140 Fire House Road along with wooded uplands and a series of cranberry bogs that are historically known as the "Ware Bogs".

4. The Petitioner recently received a special permit to develop a thirty-nine (39) unit single family Village Open Space Development (VOSD) neighborhood, named Deer Pond Village, on adjacent property it owns to the south of the subject site. This property was a part of the original 211-acre purchase. The Petitioner re-configured the land to create Lot 2-1 for this residential development and Lot 2-2 consisting of both additional upland that could be added to the Deer Pond Village subdivision and the land constituting the cranberry farming operation. Other adjacent properties include the A. D. Makepeace Redbrook development (Redbrook) to the northwest, active bogs to the west, White Island Pond to the southwest and residential neighborhoods to the east across Bourne Road. The proposed tailwater recovery pond is an accepted farming method that is consistent with the existing use of cranberry farming, and with the surrounding area to the west.

Natural features conservation

5. The existing 184-acre site includes 47.4 acres of cranberry bogs, with associated bog roads and accessory structures and upland woodland. The vegetation is consistent with surrounding forested areas mainly pine and oak; with soil conditions that are classified as Carver, coarse sand. A small portion of the site in the northeast quadrant is mapped as MassDEP wetland (shrub swamp) and a portion of the project site is within Areas 2 and 3 of the Aquifer Protection Zone. In addition, a portion of the site has been designated to be a priority habitat of rare species by the Natural Heritage and Endangered Species Program (NHESP).

Siting & Design of Structures

6. The Petitioner has stated that they are committed to farming and provided a Cranberry Farm Plan that was prepared by the USDA-Natural Resources Conservation Service (NRCS), recommending best management practices for the existing bogs. Amendments to the plan were made, reviewed and approved collectively by the NRCS, USEPA, Corps of Engineers, MassDEP, and UMass and identified as being environmentally sound.

7. Tailwater recovery ponds are included in the Best Management Practice (BMP) for cranberry crops under the NRCS crop management guidelines. Tailwater recovery is the circulation of water on site to improve water use efficiency, improve offsite water quality, and reduce energy use. Many older cranberry bogs have been undergoing similar renovations to add tailwater recovery ponds in recent years in the Town of Plymouth.

8. White Island Pond is listed as an impaired water body under the EPA's cranberry "303d" list requiring a total maximum daily load of nutrients. The subject bogs are included in a Memorandum of Agreement between the Commonwealth of Massachusetts Department of Agricultural Resources, the Commonwealth of Massachusetts Department of Environmental Protection, The Cape Cod Cranberry Growers' Association and the UMass Cranberry Station to work toward reducing annual nutrient loads to White Island Pond. Measures have been taken and BMPs have recently been implemented to reduce phosphorous loading on White Island Pond. The addition of a tailwater recovery pond for this series of bogs will help to improve the water quality of White Island Pond. Currently, the process of watering these

bogs requires pumping three times: from White Island Pond to one canal, to another canal and then again to flood the bogs. The proposed process will require one pumping with a gravity system to distribute water flow and then return it to the tailwater recovery pond to complete a full recycling of water. This process of isolating and pre-treating cranberry process waters from surrounding surface and groundwater resources, and serving as a surface water sink for holding and allowing time for nutrients such as phosphorus and nitrogen, along with any approved chemigation agents, to breakdown before re-entering the surrounding environment, will significantly reduce future nutrient loads into White Island Pond. Additionally, the tailwater recovery pond will act as an on-site retention pond, eliminating the need for White Island Pond to be a year-round water supply for the various times of flooding of the bogs throughout the year. A letter was provided from the White Island Pond Conservation Alliance, Inc. (WIPCA) in support of the proposed tailwater recovery pond. The WIPCA represents 220 of the residents on White Island Pond, and is organized to assist in protecting the ecosystems within the White Island Pond watershed, educating the public about watershed nutrient abatement practices, and identifying and stopping sources of nutrients accelerating the eutrophication of the pond. A portion of the property is within the Aquifer Protection (AP) District (Zones 2 and 3). This retention function will also help to protect the aquifer. It should be noted that Section 5(b) of the Use Table in the AP District under Section 205-57 of the Bylaw prohibits removal of material within five (5') feet of the historical high groundwater, which is the case for this site. However, this prohibition does not apply because under MGL c. 40A, §3, a zoning bylaw cannot prohibit the use of land for the primary purpose of agriculture, which is the case in this matter. Moreover, this tailwater recovery project is allowed under the express provisions of Section 5(a) of this Table, which allows by right in each aquifer area all uses consistent with the Wetlands Protection Act, which specifically exempts agricultural uses.

9. The tailwater recovery pond on the proposed plan is approximately 11.8 acres with regrading and re-sloping of the land required to create the pond. According to Marc Garrett, the Petitioner's conservation consultant, the siting of the tailwater recovery pond was based on site contours, creating the most energy efficient flows of water to the bogs; and incorporating the existing and undersized overflow waterhole. The pond is designed at a ten (10') foot depth to provide the required 2.5 feet of water to cover the 47.4 acres of bog. The proposed design of the pond reduces water depths and water storage capacity to twenty-five (25%) percent of the recommended general specification from UMass and is encouraged by NHESP.

10. Flooding the bogs will help to protect the fruit and vines from freezing in winter months and is part of the harvesting process. The construction of the pond will occur primarily outside any wetland buffers, not including any existing cranberry bogs which are exempt from Conservation Commission jurisdiction. Any work within any buffer zones of White Island Pond will be filed with the Conservation Commission. Overall site disturbance to create the tailwater recovery pond is approximately nineteen (19) acres. This includes the access road to the pond and grading of side slopes to create the pond. The work is planned within the forested upland. The largest area of cut is along the western side of the proposed pond. A 100' wide undisturbed buffer runs along the property boundary that abuts Redbrook. Ten

(10) foot-wide terracing is provided to break up the extent of the 2:1 slopes from the top of the excavation at elevation 116 down to the bottom of the tailwater recovery pond at elevation forty (40). Slopes are planned to be stabilized with six (6") inches of loam, then hydroseeded with an NHESP approved seed mix with cellulose binder, and erosion control blankets installed to control run-off and provide permanent vegetation of the slopes. Construction will be divided into four phases, each approximately five (5) acres in size. The project is anticipated to be completed within a two (2) to three (3)-year period. Snow fencing will be installed at the limit of disturbance for each phase perimeter.

11. The Petitioner originally submitted plans entitled "Tailwater Recovery Plan of Parcels: 121-000-001A-000, 121-000-002-002 140 Fire House Road, Plymouth, MA" dated July 13, 2017 for a tailwater recovery pond requiring sand and gravel removal. Since the time of the initial submittal, the plans have been further developed due to ongoing discussions with the Massachusetts Department of Fish & Game addressing their NHESP. It was determined that the proposed project falls within the agricultural exemption of the Massachusetts Endangered Species Act (MESA); however, plans were revised to reduce the impacts and provide for a greater consolidation of habitat for the endangered moth species that is prevalent in this area. The Petitioner has provided a proposed Habitat Management Plan (NHESP tracking No. 24767) that was submitted to the Massachusetts Division of Fisheries and Wildlife (the "Division") by their consultant, The Garrett Group. The Division provided a letter dated December 15, 2017, stating that the project, as currently proposed, is exempt from a MESA review provided that the "Proposed Habitat Management Plan" is implemented.

12. Also, based on peer review comments from McKenzie Engineering Group (MEG) and the Town of Plymouth DPW, the Petitioner has further reduced the size of the tailwater recovery pond and provided the 100' undisturbed buffer along the western property line. The revised plans, dated January 23, 2018, indicate a seventeen (17%) percent reduction in the removal of sand and gravel from the original (approximately) 1,013,000 CY down to approximately 838,186 CY. MEG provided some alternatives to the location and size of the proposed tailwater recovery pond, which were incorporated to the extent reasonably practicable into the final proposal. The alternative would require a total site impact nearly the same (19.5 acres) as the proposed site disturbance (19.0 acres) in the Petitioner's plan. The Petitioner has worked closely with NHESP on the site design to minimize site disturbances and impacts to habitat, and increasing the area of impact would be inconsistent with the dictates of NHESP to limit the disturbed area as much as possible. MEG ultimately determined that the proposed tailwater recovery pond was in the most appropriate location.

Vehicular and pedestrian circulation

13. Excess fill from site construction is planned to be trucked off-site over existing bog roads onto Bourne Road. Ingress/egress of trucks will be restricted to the proposed access road off Bourne Road and is not planned to use Fire House Road. Trucks will exit the site and head north or south on Bourne Road to disperse truck traffic along Bourne Road and surrounding roads. The Petitioner proposes to evenly split truck traffic exiting the site between the northbound and southbound routes, to impose a limit of forty (40) round-trip truck trips per

day for the earth removal operations, and to restrict the hours of operation to between 7:00 am and 4:00 pm during weekdays.

14. The construction entrance of the access road onto Bourne Road will have fifty (50') feet of pavement with an additional fifty (50') feet of crushed stone to minimize spillover of dirt onto Bourne Road. To minimize dust, the Petitioner will have a water tank available for sprinkling when needed. Vegetation within the site lines will be removed and replanted with low-growth plantings in order to maintain visibility for trucks exiting the site.

15. According to Vanasse & Associates, Inc. (VAI), current traffic volumes along Bourne Road are below the design capacity of the roadway, providing sufficient reserve capacity to accommodate the additional traffic demands that may be associated with the project. Bourne Road provides two twelve (12') foot wide travel lanes separated by a double-yellow centerline with one (1') foot wide marked shoulders provided. The posted speed limit varies between twenty-five (25) and thirty-five (35) mph, except in school zones where it is posted at twenty (20) mph. The prevailing speed limit in this vicinity is found to be approximately thirty-nine (39) mph, which is four (4) mph above the posted speed limit. The traffic study proposes that the project will result in a minimal increase in traffic on the roadways serving the Project site (approximately one [1] additional vehicle every four [4] to five [5] minutes during peak hours) and will not result in a material increase in motorist delays or vehicle queuing along Bourne Road or at associated intersections along this roadway. The potential traffic volume increases will be during the construction phase of 2-3 years; after which traffic volumes associated with cranberry farming operations will be limited in both volume and duration.

16. The following considerations suggested by VAI have been added as Conditions 16, 17 and 18 of this special permit approval:
    a. Limiting or restricting truck activity associated with the project during school pick-up and drop-off timeframes in order to avoid conflicts with school-related traffic.
    b. Vegetation to be trimmed or removed and maintained within the sight triangle areas of the proposed access point(s) to the project site in order to provide required site lines for safe operation
    c. Provide signs indicating "Trucks Entering Ahead," which should be installed on Bourne Road approaching the access drive(s).

Surface Water Drainage

17. The plan indicates a fifty (50') foot long paved entrance driveway with drainage swales accessing Bourne Road with a fifty (50') foot long crushed stone road leading to it from the construction area.

Utilities

18. No additional utilities are proposed on the plans.

Signs

19. No signs are proposed at this time.

Petitioner's Voluntary Contribution; Road Widening and Drainage Easements

20. Bourne Road is used and maintained by the Town as a public way. As a voluntary contribution towards improvements to Bourne Road, the Petitioner has agreed to pay to the Town an amount equal to $0.10/CY for the volume of material removed from the site.

21. The Town currently has no drainage easements allowing drainage from Bourne Road onto the Petitioner's property, allowing untreated water from the roadway to flow into the Petitioner's cranberry bogs, to the detriment of those bogs and White Island Pond. The Petitioner has worked with the Town to finalize a road widening easement (thirty [30'] feet from the centerline of the existing travelled way) and location of drainage easements to be granted to the Town. The Petitioner will have the ability to relocate those drainage easements in the future, provided that alternative drainage easement(s) are provided on the site and that the Petitioner assumes all costs for the relocation. The Petitioner must get approval from the DPW Engineering Division for such relocation prior to construction.

THE GRANTING OF THIS SPECIAL PERMIT IS BASED ON THE FOLLOWING REASONS:

It is recommended that the Special Permit per Section 205-18 Sections F, G & H of the Bylaw, subject to Environmental Design Conditions, for gravel removal be **GRANTED** based on the following reasons, and subject to the following CONDITIONS:

a) In light of the agricultural exemption included in MGL c. 40A (the Zoning Act), the proposed activity is appropriate to the Rural Residential zone and this specific site as the sand and gravel excavation is allowed by Special Permit and is necessary for and incidental to the development of the ongoing maintenance of the cranberry bogs and associated uses. Chapter 40A provides broad protections and exemptions to agricultural uses. Per the "Handbook of Massachusetts Land Use and Planning Law" Section 4.03 Agricultural Uses, case law states that the exemption standard also applies to uses accessory or incidental to the principal agricultural use. Furthermore, as noted above, although Section 5(b) of the Aquifer Protection District (AA) Use Table in Section 205-57 (Aquifer Protection District [AA]) of the Bylaw prohibits excavation within five (5') feet of the historical high groundwater, the agricultural exemption under MGL c. 40A, §3 applies to this provision. Moreover, this tailwater recovery project is allowed under the express provisions of Section 5(a) of this Table, which allows by right in each aquifer area all uses consistent with the Wetlands Protection Act, which specifically exempts agricultural uses.

   In addition, White Island Pond is on the EPA's list of impaired water bodies that are required to operate under a Total Maximum Daily Load (TMDL) for nutrient loading. Measures have been taken and some recommended Best Management Practices (BMPs) have recently been implemented to reduce phosphorous loading on White Island Pond. The addition of the proposed tailwater recovery pond for this series of bogs is required

under Section 303d of the Clean Water Act to meet the TMDL of 10 kg per year, as stipulated in the interagency and stakeholder Memorandum of Understanding, to improve water quality of White Island Pond.

b) Adequate and appropriate facilities are available and will be in place to provide for the proper operation of the use. This site consists of existing cranberry operations that have been in place for decades, and the project being proposed will enhance those operations and provide environmental improvements both for the site and for White Island Pond.

c) There will be no hazard to pedestrians or vehicles because grading and excavation work will be temporary and limited to the site. Trucking routes will be restricted by this Special Permit, and maintenance of the exiting truck route will be performed by the Petitioner as stated in the conditions below.

d) There will be no nuisance or adverse effect upon the neighborhood if the conditions of the Special Permit are met. The site is isolated geographically from abutting uses due to the large expanse of cranberry bogs and the site topography.

CONDITIONS:

1. The Petitioner has agreed that the land encompassing the tailwater recovery pond and the associated cranberry bogs shall not be used for any other principal use for a period of five (5) years after the date of this Decision (provided, however, that such prohibition on change of use shall not apply to the existing Deer Pond Village subdivision on the Petitioner's abutting land and any extension of that subdivision to adjoining upland of the Petitioner not encompassing the existing cranberry bogs).
2. A minimum of six (6") inches of topsoil shall be placed on areas designated to be restored to a natural state (side slopes, open space and areas that are not to be otherwise improved). This minimum depth of topsoil shall be increased to twelve (12") inches in the Aquifer Protection District Zone II.
3. Phase 1 of the construction shall be completed within twelve (12) months after the filing of the Decision with the Town Clerk, or, if applicable, within twelve (12) months after the date of resolution of any appeal of that Decision in the Petitioner's favor.
4. Snow fence shall be installed at the limit of disturbance for each phase perimeter.
5. Slopes are planned to be stabilized with six inches (6") of loam, then hydroseeded with an NHESP approved seed mix with cellulose binder, and erosion control blankets installed to control run-off and provide permanent vegetation of the slopes.
6. All areas of excavation and access ways to earth removal operations shall be clearly marked with legally posted no trespassing signs. Areas of steep slope or grade, as judged by the permit granting authority (the Building Commissioner), shall additionally be fenced and clearly marked "DANGER- KEEP OUT" every 150 feet.

7. Excavation with a depth of greater than fifteen (15') feet shall be setback a minimum of 100 feet of any lot line.

8. The Petitioner shall create a roadway layout along Bourne Road extending thirty (30') feet from the existing centerline of the existing roadway, and grant an easement for said area to the Town of Plymouth for Highway Purposes.

9. The Petitioner has agreed to grant a road widening easement (thirty [30'] feet from centerline of the existing travelled way) and drainage easements to the Town, as shown on the Petitioner's site plans. The Petitioner would have the ability to relocate those drainage easements in the future, provided that alternative drainage easement(s) are provided on the site, that the Petitioner assumes all costs for the relocation, and that the Petitioner obtains approval from the DPW Engineering Division for all drainage easement relocations prior to construction.

10. The Petitioner shall confirm any regulated wetland areas in the northeast quadrant and consult with the Plymouth Conservation Commission prior to the finalization of the on-site habitat management plan.

11. Sixty (60) days prior to the completion of the original 3-year limitation period, the Petitioner may file a written request to the Board of Appeals for an extension of the excavation period, which shall be granted if determined to be consistent with the intent and purpose of Section 205-18 and the Bylaw generally, and may be denied for one or more of the following reasons:
    a) One or more violations of the conditions of the permit or work not consistent with the approved Zoning Permit or Special Permit;
    b) Abandonment of the work site, as determined by the Building Commissioner;
    c) Failure to maintain the required landscaping, dust suppression measures, erosion control measures and proper stabilization measures;
    d) The presence of any unsafe condition; or
    e) One or more violations of the approved heavy equipment route plan or other traffic control conditions of the Earth Removal special permit.

12. A maximum of one (1) excavation period extension may be granted for a term not to exceed two (2) years. Additional extensions shall require a modification/reapplication of the Zoning Permit or Special Permit.

13. Evidence of recording of this Special Permit at the Plymouth County Registry of Deeds shall be presented to the Building Inspector, and the plans shall be recorded with the Special Permit.

14. The Petitioner shall submit an erosion control plan (and dust suppression measures if needed) including a planting plan for stabilization of the disturbed slopes to the Building Commissioner. Any exposed banks created by the excavation should be hydro-seeded or

otherwise stabilized in a manner acceptable to the Building Commissioner and maintained for three (3) years.

15. Excavation, trucking and equipment start-up and operation and any related use shall be limited to Monday through Friday and hours of operation shall be limited to 7:00 AM to 4:00 PM, with no excavation activities permitted on State or federal holidays.

16. Truck activity associated with the project shall be restricted/limited during school pick-up and drop-off timeframes to avoid conflicts with school-related traffic. The Petitioner will notify the school system with respect to the truck route and coordination with bus routes.

17. Vegetation within the sight triangle areas of the proposed access point(s) to the project site shall be trimmed or removed and maintained to provide required site lines for safe operation.

18. The Petitioner shall install "Trucks Entering Ahead" temporary warning signs along Bourne Road and the proposed locations should be clearly shown on the plans in accordance with the current edition of the Manual on Uniform Traffic Control Devices (MUTCD).

19. The Petitioner has agreed to donate to the Town $0.10 per CY of gravel removal from the site as a roadway fee to mitigate repair costs for any damages to the existing Bourne Road condition attributable to the proposed sand and gravel operation.

20. The Petitioner shall be responsible for the clearing of any sand that accumulates on the truck route as a result of the excavation of material on a daily basis. The Petitioner shall coordinate with the Plymouth DPW to perform any roadway cleaning along Bourne Road that may be required during construction.

21. The Petitioner shall provide an "as-built" survey which verifies that no more than 838,186 cubic yards of material were removed (as measured at bank face).

22. Heavy vehicle round trips shall be limited to forty (40) round trips per day to and from the site.

23. A heavy vehicle route plan sufficient in the opinion of the Building Commissioner shall be established to minimize the negative effects of heavy vehicles.

24. "No Jake Brake" signs shall be installed at the exit of the haul road and on Bourne Road at the approaches to the entrance of the haul road. The Petitioner plans to restrict the use of "engine brakes" on Bourne Road and require the engine RPMs to be less than 1800 RPM.

25. Quarterly inspections and quarterly written certifications from a registered Professional Engineer shall be submitted to the Building Commissioner demonstrating substantial compliance with the Zoning Bylaw, the earth removal Special Permit, and accepted engineering practices.

26. Permanent stabilization of any portion of the development site not under active construction for a period of six (6) months shall be required. No area greater than five (5) acres may be disturbed at one time for earth removal, stockpiling, and/or processing, and prior to the commencement of disturbance of any subsequent area, the preceding five (5) acre area shall be stabilized, either temporarily or permanently, as required by the Building Commissioner. In areas where vertical cuts exceed thirty (30') feet, the Board of Appeals may allow, at their sole discretion, areas of disturbance in excess of five (5) acres, provided that based on documentation prepared by a qualified professional, the Board of Appeals finds that a larger area will minimize operation hazards or is necessary due to the size and scale of an earth removal operation.

27. Within three (3) months of the reasonably anticipated completion of operations, the applicant shall provide written notice to the Building Commissioner of intent to complete operations and the estimated date thereof, and shall make the premises available for inspection by the Building Commissioner for conformity with the Special Permit, Zoning Permit and all approved Development Plans in advance of the intended date of completion.

28. The Building Commissioner shall calculate, after consultation with a qualified professional, a performance guarantee in an amount reasonably estimated to restore, regrade and revegetate the area under active excavation and other disturbed areas, if any, and shall include an adjustment for projected inflation or other predictable factors affecting cost of restoration over the term of the Earth Removal special permit plus one (1) year. A cash performance guarantee or bond acceptable to the Building Commissioner shall be in place prior to the commencement of work.

29. The Building Commissioner or its duly authorized agent shall have access to the excavation site at all times in order to inspect the site to insure compliance with the approved site plan.

30. Monthly statements are to be submitted to the Building Commissioner from a Registered Professional Engineer stating that the conditions of the Special Permit are being followed, and providing tallies of earth removal to accurately determine the amount of gravel being removed.

31. If all of the above noted conditions are not adhered to the Building Commissioner may cause all excavation work to cease until the problems identified are corrected.

If substantial use or construction permitted by this Special Permit has not commenced within two (2) years from the date on which a copy of this decision is filed with the Town Clerk, excluding the amount of time required for an appeal period to expire and the amount of time required to pursue and await the determination of any such appeal, then this Special Permit shall expire.

Any relief not expressly granted hereunder is hereby denied.

We hereby certify that copies of this decision were filed with the Town Clerk, Building Inspector, and the Planning Board on: March 6, 2018

ZONING BOARD OF APPEALS

Peter Conner, Chairman

Michael Main, Member

David Peck, Vice-Chairman

DENIED
Edward Conroy, Member

William Keohan, Clerk

NOT SEATED ON THIS CASE
Michael Leary, Alternate

NOT SEATED ON THIS CASE
Barnaby Bosenquet, Alternate

This decision shall not take effect until (a) a copy of this decision certified by the Town Clerk to the effect that twenty (20) days have elapsed since the decision was filed in the Office of the Town Clerk without any appeal having been filed or that any appeal filed has been dismissed or denied has been recorded in the Plymouth County Registry of Deeds or with the Assistant Register of the Land Court for Plymouth County, and (b) a certified copy indicating such Registry recording has been filed with the Board.

Any person aggrieved by a decision of the Board of Appeals has the right to appeal such decision to the Superior Court, the Land Court, or the District Court of the Commonwealth of Massachusetts pursuant to Massachusetts General Laws, Chapter 40A, Section 17, by filing such appeal within twenty (20) days after the date on which the decision was filed with the Town Clerk.

Copy to Applicant via Certified Mail on: March 6, 2018

Notice of Decision to interested parties on: March 6, 2018

Zoning Board of Appeals
Agenda
Via Zoom, Meeting ID: 984 5684 6832
Wednesday, February 17, 2021 at 7:00pm

Pursuant to Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020 Order imposing strict limitation on the number of people that may gather in one place, this meeting will be conducted via remote participation to the greatest extent possible. Specific information and the general guidelines for remote participation by members of the public and/or parties with a right and/or requirement to attend this meeting can be found on the Town's website, at https://www.plymouth-ma.gov/ .
For this meeting, members of the public who wish to watch participate in the meeting may do so in the following manner: download the "Zoom" meeting application, go to https://zoom.us/j/98456846832, join meeting by using Meeting ID 984 5684 6832 or dial +1 929-205-6099 US, join meeting by using Meeting ID 984 5684 6832 (Voice Only). No in-person attendance of members of the public will be permitted, but every effort will be made to ensure that the public can adequately access and participate in the proceedings in real time, via technological means. In the event that we are unable to do so, despite best efforts, we will post on the Town's website an audio or video recording, transcript, or other comprehensive record of proceedings as soon as possible after the meeting.

7:00 Case #4011 Todd A. Bailey Trust
1423 Old Sandwich Rd, Map 52, Lot 39-1
Special Permit required per Section 205-2 (RR) dimensional table and section 203-9C to waive side setback to construct breezeway between preexisting non-conforming structure and workshop

7:15 Case # 4007 Michal Knutel Continued from 1/6/21
260 Bourne Rd, Map 114, Lot 19-12
Special Permit required per Section 205-2 and dimensional table to waive side setbacks to enlarge a non-conforming structure to construct a two (2) car garage 24' x 24' with living space above; 1st floor connector 11'5" x 16'; 2nd floor connector 11'5" x 16'; front porch 4' x 12' with stairs; 2nd floor 24' x 28'; and 2nd floor balcony 12' x 5'

7:15 Case #3970 LWP Plymouth, LLC Hearing Closed 1/13/21
Colony Place, Map 104, Lot 26-29
Comprehensive Permit to create 320 residential rental units on land, of which not less than 25% or eighty (80) units shall be restricted as affordable for low- or moderate-income persons or families

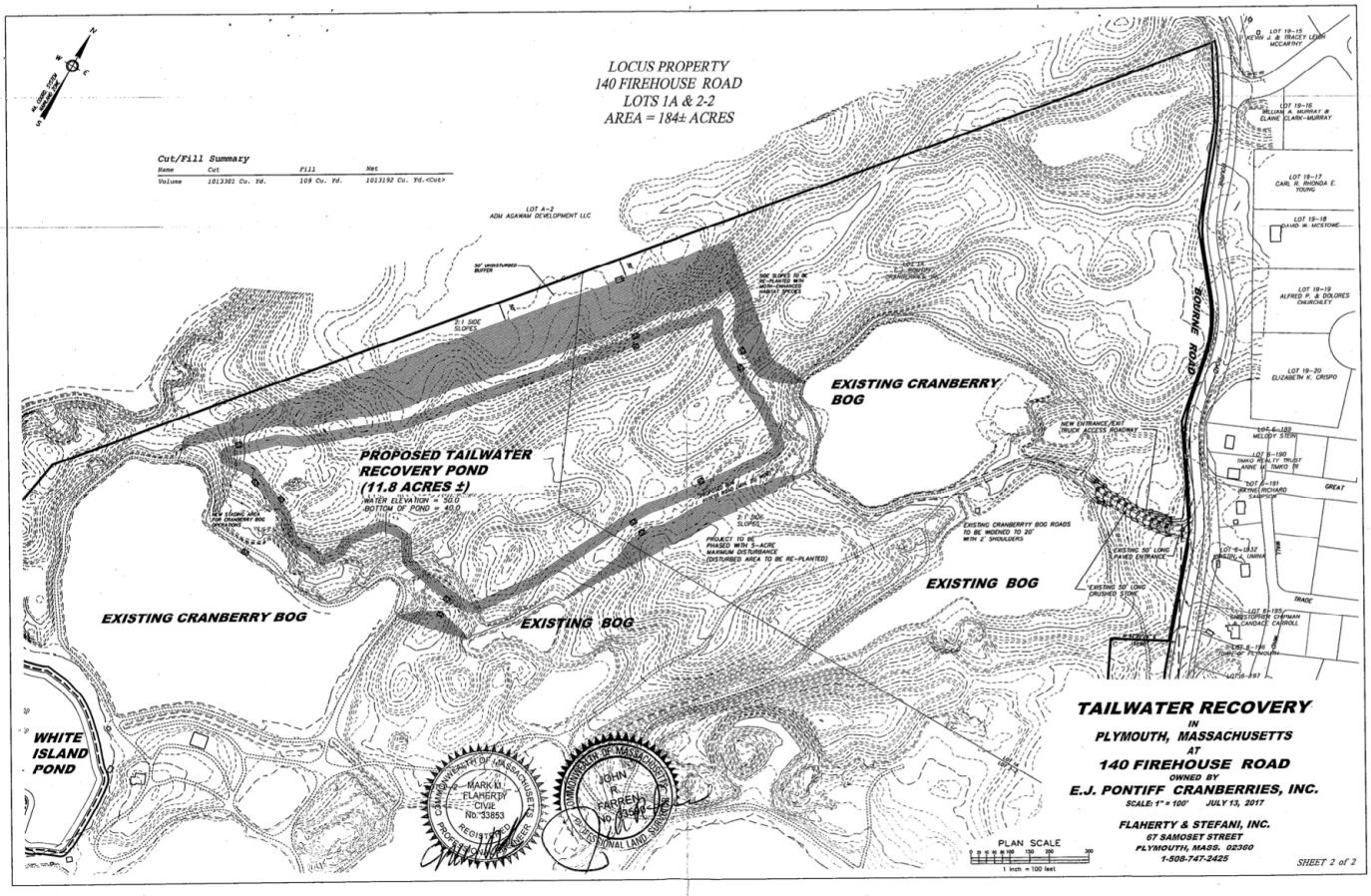
Informal Business:

Case #3879 E.J. Pontiff Cranberries Inc.
140 Firehouse Rd, Map 121, Lots 1A & 2A
Request to extend the three (3) years excavation period for an additional two (2) years per Condition No. 17 & 18

Other Business:
Review & Approval of Previous Meeting Minutes

May include topics not reasonably anticipated by the Chair 48 hours in advance of the meeting.

EXHIBIT 5


LOCUS PROPERTY
140 FIREHOUSE ROAD
LOTS 1A & 2-2
AREA = 184± ACRES
Cut/Fill Summary
Name Cut Fill Net
Volume 1013301 Cu. Yd. 109 Cu. Yd. 1013192 Cu. Yd.<Cut>
LOT A-2
ADM AGAWAM DEVELOPMENT LLC
50' UNDISTURBED BUFFER
2:1 SIDE SLOPES
50' SLOPES TO BE RE-PLANTED WITH NON-INVASIVE WOODY SPECIES
LIMIT OF DISTURBANCE
EXISTING CRANBERRY BOG
PROPOSED TAILWATER RECOVERY POND
(11.8 ACRES ±)
WATER ELEVATION = 50.0
BOTTOM OF POND = 40.0
NEW ENTRANCE/EXIT TRUCK ACCESS ROADWAY
FIREHOUSE ROAD
LOT 19-15
WILLIAM J. & TRACEY LEWIS MCCARTHY
LOT 19-16
WILLIAM A. MURRAY & ELAINE CLARK-MURRAY
LOT 19-17
CARL R. RHONDA E. YOUNG
LOT 19-18
DAVID W. MCSTOME
LOT 19-19
ALFRED P. & DOLORES CHAMONLEY
LOT 19-20
ELIZABETH K. CRISPO
LOT 6-182
MELODY STEN
LOT 6-190
TRUSTEE
LOT 6-191
GREAT
LOT 6-193
TRADE
LOT 6-195
CHRISTOPHER CHIPMAN & CANDACE CARROLL
LOT 6-196
LOT 6-197
EXISTING CRANBERRYY BOG ROADS TO BE WIDENED TO 20' WITH 2' SHOULDERS
EXISTING 50' LONG PAVED ENTRANCE
EXISTING 50' LONG CRUSHED STONE
EXISTING BOG
EXISTING CRANBERRY BOG
EXISTING BOG
WHITE ISLAND POND
PROJECT TO BE PHASED WITH 5-ACRE MAXIMUM DISTURBANCE (DISTURBED AREA TO BE RE-PLANTED)
COMMONWEALTH OF MASSACHUSETTS
MARK J. FLAHERTY
CIVIL
No. 33853
REGISTERED
PROFESSIONAL ENGINEER
COMMONWEALTH OF MASSACHUSETTS
JOHN R. FARRELL
No. 2354
PROFESSIONAL LAND SURVEYOR
PLAN SCALE
1 inch = 100 feet
TAILWATER RECOVERY
IN
PLYMOUTH, MASSACHUSETTS
AT
140 FIREHOUSE ROAD
OWNED BY
E.J. PONTIFF CRANBERRIES, INC.
SCALE: 1" = 100' JULY 13, 2017
FLAHERTY & STEFANI, INC.
67 SAMOSET STREET
PLYMOUTH, MASS. 02360
1-508-747-2425
SHEET 2 of 2