

Community Land & Water Coalition
A project of Save the Pine Barrens, Inc.
Plymouth MA 02360
www.savethepinebarrens.org

February 8, 2023

By hand

Nick Mayo,
Director of Inspectional Services
Town of Plymouth
26 Court Street
Plymouth MA 02360

With email copies to:

Planning Board
Lee Hartman, Director of Planning and Development
Robin Carver, Town Planner
MassDOT
Maurriso A. Fabbo, Office of Real Estate and
Economic Development
Jonathan Gulliver, Highway Administrator
(re: Grading Easement of Sheava Development LLC)

Re: Demand for Enforcement of the Zoning Bylaw at 10 Collins Avenue,
Spencer Plymouth Realty LLC/Sheava Development LLC Owner
Notice of Violations
Operator: G. Lopes Excavating
Map 101 Lots 37-1H, 38, 42-1 and 42-9

Dear Mr. Mayo,

This is a demand by Save the Pine Barrens, Inc. ("STPB"), an aggrieved party, for enforcement under Section 202-12(C) of the Plymouth Zoning Bylaw (the "Bylaw") and G.L. c. 40A, Section 7 against Spencer Plymouth Realty LLC also doing business as Sheava Development (collectively, "Spencer") and G. Lopes Excavating ("Lopes") (collectively, "the Violators") for ongoing violations of the Bylaw at 10 Collins Avenue in Plymouth, MA (the "Site").

On January 12, 2022, the Planning Board purported to approve the Violators' mining operation as "necessary and incidental" to the end use of a 137,500 SF industrial/manufacturing building for Spencer's business, Northeast Traffic Controls. The mining operation consists of excavating at least 488,000 cubic yards of sand and gravel over two or more years. On January 2, 2022, you issued Zoning Permit Z 20220040 ("the Zoning Permit") purporting to authorize the mining operation and the building under the Bylaw.

The current mining operation violates the Bylaw for several reasons. First, there is no record that the project obtained a Certificate under the Massachusetts Environmental Policy Act (MEPA) despite being required by law and acknowledged by MassDOT. See **Exhibit 1**. As a necessary prerequisite to local permitting, this alone invalidates the Town's approvals as in excess of their authority. Second, within the context of the Zoning Permit, Spencer is also in violation for exceeding the Bylaw, and the Zoning Permit, limit of 40 truck trips per day. These facts underscore the error in issuing the Zoning Permit in the first place, that the excavation is not now and never was necessary and incidental to any primary use of the land and is, in fact, an unlawful sand and gravel mining operation. Finally, Spencer has sold Northeast Traffic Controls to a foreign entity, the very business that the Board found was locally based and central to its decision to grant its approval. You are requested to take the actions listed at the end of this demand letter.

1. There is no record that the project has obtained state approval under the Massachusetts Environmental Protection Act (MEPA)

The Bylaw Section 203-2 prohibits you and the Planning Board from approving any earth removal for a project that has not "received all required local and state permits for the use." There is no record that the project obtained a MEPA Certificate as required by the September 22, 2021 Interoffice Memorandum from Maurizio A. Fabbo, Office of Real Estate Development to Johnathan Gulliver, Highway Administrator regarding the "Disposition of Excess Land pursuant to the "GRADING EASEMENT" sought by Sheava. **Exhibit 1**. MEPA review is required because the project creates more than 150 parking spaces. According to the Planning Board Memo from Robin Carver, Town Planner, the project will have 240 parking spaces. The Town did not require Spencer to show compliance with state law. The Town just ignored this. However, the Board's approval was in excess of its authority where it had no basis under the Bylaw to grant its approval.

2. Spencer and Lopes violated the 40 truck limit at least once, and casual observation shows violations are likely ongoing

Bylaw Section 203-2(C), Section 203-2(c)(4)(ix) states, "Heavy vehicle round trips shall be limited to 40 round trips per day to and from the site."

On at least one occasion, January 4, 2023, Spencer and Lopes exceeded the truck limit. From 7:52 a.m. to 12:35 p.m. on January 4, 2023, 48 trucks exited the Site loaded with sand and gravel. This was during a about 4.5 hours. The operators continued to operate after 12:35 p.m. with additional trucks leaving the Site.

Of the 48 trucks leaving the Site on January 4, 2023 between 7:52 a.m. and 12:35 p.m., only three trucks were weighed on the scale at the Site.

The evidence of the violations is contained in the attached log, **Exhibit 2**. Details are available on request.

3. As law and facts presented to you previously establish and current facts confirm, Spencer's earth removal is not "necessary and incidental" within the meaning of the Bylaw, Section 203-3(c)(4)

Under no circumstances or set of facts is Spencer's stand-alone mining operation "necessary and incidental" under the Bylaw. The scope, scale duration and excessive truck trips exiting the Site establish this. While you, the Planning Board and the ZBA chose to ignore and disregard established case law in approving this scam in 2021 and 2022, current drone images and truck traffic expose your erroneous findings. In *Henry v. Board of Appeals of Dunstable* the court made clear that the landowner's future business plans are irrelevant to whether the operation is incidental to the primary use of the site (here a building). The case is attached as **Exhibit 3** for your reference. It is the "net effect" of the operation that determines whether it is incidental. You based your decision solely on Spencer's future business plans not on the criteria of *Henry*. Now even those futuristic, fictional business plans have apparently evaporated into thin air.

4. Spencer no longer owns Northeast Traffic Controls

Spencer has sold his business Northeast Traffic Controls, the company that he claimed needed to excavate the site for a manufacturing facility. You are requested to investigate the circumstances surrounding this sale and confirm whether or not the new owner has credible plans to build the 137,000 square foot manufacturing facility on the Site according to the plans Spencer presented to the Planning Board and that are the basis for your Zoning Permit. If the new owner of Northeast Traffic Controls does not provide credible proof that it is building the project, the Zoning Permit must be revoked.

Spencer represented that the earth removal permit was necessary for the business he **personally owned**, and even his son pitched the project as a locally owned family enterprise. At four public hearings before the Zoning Board of Appeals and the Planning Board, Spencer and local businessmen appeared to personally promote the project on the grounds that this was a "local business" by a "local developer" and keeping Spencer's locally owned and operated business in Town was important. All of this is recorded on video. Within months of the hearings, however, in December 2022, Spencer dissolved both Northeast Traffic Technologies, Inc. and Northeast Traffic Control Technologies, Inc., formed new corporations NTT Seller and NTCS Seller Inc., and sold them to an entity that appears to be owned by Helix Traffic Solutions, owned by Nonantum Capital Partners, a private equity firm. Helix is based in Tennessee. **Exhibit 4**. Thus, the assumption that Spencer himself was going to operate the site is no longer valid.

The Planning Board's Memo, approved by the Planning Board, cites to Spencer's personal role in the project and sympathizes with his need to give this local business a location so it would not move out of Town. For example, the January 12, 2022 Planning Board Memo by

Robin Carver, Town Planner cites to Spencer's personal role. The Memo states it is "for Petitioner's business, Northeast Traffic Control." Memo, Condition 4. The "Petitioner" is described on plans and applications as Spencer and the plans are for "his business", Northeast Traffic Control. The Memo further states,

"The Petitioner previously owned property off Scobee Road where he operated his business on an 8-acre parcel, also within the Plymouth Industrial Park. The developer recently purchased the subject property to move his business to a larger site to fulfill expansion needs." (emphasis supplied)

Given that Spencer no longer owns "his business" you are requested to investigate whether the project will be carried out according to the plans approved by the Planning Board.

5. Spencer's Long Pond Road other earth removal violations

As you know, this is not the first earth removal scam involving Spencer. STPB presented credible evidence to the ZBA on January 4 and 18, 2023 that Spencer conducted an unpermitted earth removal operation on Long Pond Road in Plymouth under the ruse of a residential subdivision. After removing about 334,000 cubic yards of sand and gravel illegally, Spencer dissolved Yellow Maple, LLC, the shell corporation that obtained the Planning Board site plan review and sold the property to a church. You refused to take enforcement action in that case, too.

Conclusion

As the zoning enforcement officer, you are required to make a determination of the allegations contained herein within 14 days. See Bylaw, §202-12; G.L. c. 40A, § 7. This may include investigating the allegations to determine whether or not a violation has occurred. Affirmative evidence is not required and allegations of a zoning violation are sufficient. Where there is a clear violation, as has been alleged herein, the duty to act in upholding the zoning laws of the Town of Plymouth and the Commonwealth rests with you.

You are requested to:

1. Issue a cease and desist of all operations at the Site,
2. Obtain an independent forensic accounting of the volume of earth removed from the Site, including by reviewing the bills of lading, truck logs, Department of Transportation manifests and other evidence to verify the volume of earth removed by G. Lopes Excavating,
3. Order restoration of the Site,
4. Order compliance with the state Massachusetts Environmental Policy Act, and

5. Issue penalties and fines under the Bylaw.

Please feel free to contact me regarding any of the above.

Sincerely,

Margaret E. Sheehan

Margaret E. Sheehan
Attorney
Save the Pine Barrens, Inc.
Mailing Address: 158 Center Hill Road
environmentwatchesoutheasternma@gmail.com
Plymouth MA 02360

Cc: Secretary of Energy & Environmental Affairs Melissa Tepper

EXHIBIT 1

Corporations Division

Business Entity Summary

ID Number: 043326980

[Request certificate](#)

[New search](#)

Summary for: **NORTHEAST TRAFFIC CONTROL SERVICES INC.**

The exact name of the Domestic Profit Corporation: NORTHEAST TRAFFIC CONTROL SERVICES INC.

Entity type: Domestic Profit Corporation

Identification Number: 043326980

Old ID Number: 000531767

Date of Organization in Massachusetts:
03-27-1996

Date of Charter Surrender: 12-27-2022

Last date certain:

Current Fiscal Month/Day: 12/31

Previous Fiscal Month/Day: 00/00

The location of the Principal Office:

Address: 8 SCOBEE CIRCLE

City or town, State, Zip code, PLYMOUTH, MA 02362 USA

Country:

The name and address of the Registered Agent:

Name: SCOTT W. SPENCER

Address: 8 SCOBEE CIR. P. O. BOX 946

City or town, State, Zip code, PLYMOUTH, MA 02362 USA

Country:

The Officers and Directors of the Corporation:

Title	Individual Name	Address
PRESIDENT	SCOTT W. SPENCER	38 WAVERLY OAKS DRIVE PLYMOUTH, MA 02360 USA
TREASURER	SCOTT W. SPENCER	38 WAVERLY OAKS DRIVE PLYMOUTH, MA 02360 USA
SECRETARY	SCOTT W. SPENCER	38 WAVERLY OAKS DRIVE PLYMOUTH, MA 02360 USA
DIRECTOR	SCOTT W. SPENCER	38 WAVERLY OAKS DRIVE PLYMOUTH, MA 02360 USA

Business entity stock is publicly traded:

The total number of shares and the par value, if any, of each class of stock which this business entity is authorized to issue:

Corporations Division

Business Entity Summary

ID Number: 010772582

[Request certificate](#)

[New search](#)

Summary for: **NORTHEAST TRAFFIC TECHNOLOGIES INC.**

The exact name of the Domestic Profit Corporation: NORTHEAST TRAFFIC TECHNOLOGIES INC.

The name was changed from: SCOBEE SPENCER CORP. **on** 06-05-2020

Entity type: Domestic Profit Corporation

Identification Number: 010772582 **Old ID Number:** 000837885

Date of Organization in Massachusetts:
03-18-2003

Date of Charter Surrender: 12-27-2022 **Last date certain:**

Current Fiscal Month/Day: 12/31

The location of the Principal Office:

Address: 8 SCOBEE CIRCLE

City or town, State, Zip code, PLYMOUTH, MA 02360 USA
Country:

The name and address of the Registered Agent:

Name: SCOTT W. SPENCER

Address: 8 SCOBEE CIR. P. O. BOX 946

City or town, State, Zip code, PLYMOUTH, MA 02362 USA
Country:

The Officers and Directors of the Corporation:

Title	Individual Name	Address
PRESIDENT	SCOTT W. SPENCER	8 SCOBEE CIR, PLYMOUTH, MA 02360 USA
TREASURER	SCOTT W. SPENCER	8 SCOBEE CIR, PLYMOUTH, MA 02360 USA
SECRETARY	SCOTT W. SPENCER	8 SCOBEE CIR, PLYMOUTH, MA 02360 USA
DIRECTOR	SCOTT W. SPENCER	8 SCOBEE CIR, PLYMOUTH, MA 02360 USA

Business entity stock is publicly traded:

The total number of shares and the par value, if any, of each class of stock which this business entity is authorized to issue:

Corporations Division

Business Entity Summary

ID Number: 001631142

[Request certificate](#)

[New search](#)

Summary for: **NORTHEAST TRAFFIC CONTROL SERVICES LLC**

The exact name of the Foreign Limited Liability Company (LLC): NORTHEAST TRAFFIC CONTROL SERVICES LLC		
Entity type: Foreign Limited Liability Company (LLC)		
Identification Number: 001631142		
Date of Registration in Massachusetts: 01-18-2023		
Last date certain:		
Organized under the laws of: State: DE Country: USA on: 12-27-2022		
The location of the Principal Office: Address: 114 CAPITAL WAY City or town, State, Zip code, CHRISTIANA, TN 37037 USA Country:		
The location of the Massachusetts office, if any: Address: 70 INDUSTRIAL PARK RD City or town, State, Zip code, PLYMOUTH, MA 02360 USA Country:		
The name and address of the Resident Agent: Name: C T CORPORATION SYSTEM Address: 155 FEDERAL ST. SUITE 700 City or town, State, Zip code, BOSTON, MA 02110 USA Country:		
The name and business address of each Manager:		
Title	Individual name	Address
The name and business address of the person(s) authorized to execute, acknowledge, deliver, and record any recordable instrument purporting to affect an interest in real property:		
Title	Individual name	Address
REAL PROPERTY	BRENT SMITH	114 CAPITAL WAY CHRISTIANA, TN 37037 USA
<input type="checkbox"/> Consent <input type="checkbox"/> Confidential Data <input type="checkbox"/> Merger Allowed <input type="checkbox"/> Manufacturing		

Corporations Division

Business Entity Summary

ID Number: 001631148

[Request certificate](#)

[New search](#)

Summary for: **NORTHEAST TRAFFIC TECHNOLOGIES LLC**

The exact name of the Foreign Limited Liability Company (LLC): NORTHEAST TRAFFIC TECHNOLOGIES LLC

Entity type: Foreign Limited Liability Company (LLC)

Identification Number: 001631148

Date of Registration in Massachusetts:
01-18-2023

Last date certain:

Organized under the laws of: State: DE **Country:** USA **on:** 12-27-2022

The location of the Principal Office:

Address: 114 CAPITAL WAY

City or town, State, Zip code, CHRISTIANA, TN 37037 USA
Country:

The location of the Massachusetts office, if any:

Address: 70 INDUSTRIAL PARK RD

City or town, State, Zip code, PLYMOUTH, MA 02360 USA
Country:

The name and address of the Resident Agent:

Name: C T CORPORATION SYSTEM

Address: 155 FEDERAL ST. SUITE 700

City or town, State, Zip code, BOSTON, MA 02110 USA
Country:

The name and business address of each Manager:

Title	Individual name	Address

The name and business address of the person(s) authorized to execute, acknowledge, deliver, and record any recordable instrument purporting to affect an interest in real property:

Title	Individual name	Address
REAL PROPERTY	BRENT SMITH	114 CAPITAL WAY CHRISTIANA, TN 37037 USA

Consent

Confidential Data

Merger Allowed

Manufacturing

EXHIBIT 2



TRUCK WATCH



your name

10 Collins Ave.

redacted

Plymouth.

Date	Time	Truck Size	Name on Truck	Weighed 4 or N
1/4/2023		18 wheels or Dump		
1/4/2023	7.52	8 wheels / Single Trail	G. Lopes	NO
1/4/2023	7.57	16 wheels / Single Trail	G. Lopes	NO
1/4/2023	7.59	16 wheels / Single Trail	G. Lopes	NO
1/4/2023	8.01	16 wheels / Single Trail	G. Lopes	NO
1/4/2023	8.17	Dump truck 12 wheel	G. Lopes	NO
1/4/2023	8.46	16 16 wheels / Single trail	G. Lopes	NO
1/4/2023	8.50	16 wheels / Single trail	G. Lopes	NO
1/4/2023	8.50	16 wheels / Single trail	G. Lopes	NO
1/4/2023	8.52	Dump / Single trail	G. Lopes	NO
1/4/2023	8.55	16 wheel / Single trail	G. Lopes	NO
1/4/2023	9.04	16 wheels / Single trailer	G. Lopes	NO
1/4/2023	9.06	Dump / Single Trail	G. Lopes	NO
1/4/2023	9.16	16 wheels / Single Trail	G. Lopes	NO
1/4/2023	9.17	16 wheels / Single trail	G. Lopes	NO
1/4/2023	9.21	16 wheels / Single trail	G. Lopes	NO
1/4/2023	9.25	16 wheels / Single trail	G. Lopes	NO
1/4/2023	9.31	16 wheels / Single trail	G. Lopes	NO
1/4/2023	9.34	16 wheels / Single trail	G. Lopes	NO
1/4/2023	9.41	16 wheels / Single trail	G. Lopes	Yes
1/4/2023	9.47	Dump / Single trail	G. Lopes	NO

TRUCK WATER

redacted

Date	Time	Truck	Name	weighed	
1/4/2023	9:56	16 wheel / ST	G. Lopes	N	21
1/4/2023	10:08	16 wheels / ST	G. Lopes	N	22
1/4/2023	10:22	12 wheels - Dump	G. Lopes	N	23
1/4/2023	10:24	12 wheels - Dump	G. Lopes	N	24
1/4/2023	10:26	12 wheels - Dump	G. Lopes	N	25
1/4/2023	10:30	16 wheels / ST	G. Lopes	N	26
1/4/2023	10:33	Dump 12w	G. Lopes	N	27
1/4/2023	10:44	16 wheels / ST	G. Lopes	Y	28
1/4/2023	10:50	16 wheels / ST	G. Lopes	N	29
1/4/2023	10:53	16 wheels / ST	G. Lopes	N	30
1/4/2023	10:57	16 wheels / ST	G. Lopes	N	31
1/4/2023	11:05	16 wheels / ST	G. Lopes	N	32
1/4/2023	11:05	Dump / ST	G. Lopes	N	33
1/4/2023	11:31	16 wheel / ST	G. Lopes	N.	34
1/4/2023	11:36	16 wheels / ST	G. Lopes	N	35
1/4/2023	11:45	Dump / ST	G. Lopes	N	36
1/4/2023	11:47	Dump / ST	G. Lopes	N	37
1/4/2023	11:50	16 wheels / ST	G. Lopes	N	38
1/4/2023	11:52	Dump / ST 8w	G. Lopes	N.	39
1/4/2023	12:02	Dump / ST	G. Lopes	N Y	40
1/4/2023	12:05	Dump / ST	G. Lopes	N	41
1/4/2023	12:12	16 wheel / ST	G. Lopes	N	42
1/4/2023	12:15	16 wheels / ST	G. Lopes	Y	43
1/4/2023	12:23	16 wheels / ST	G. Lopes	N	44
1/4/2023	12:26	16 wheels / ST	G. Lopes	N	45
1/4/2023	12:32	Dump / ST	G. Lopes	N	46

Drove over us
But didn't stop.

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.

[REDACTED]

[REDACTED]

[REDACTED]

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 horticultural

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,

¹General 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-

²Section 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"

³Section 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."

removal 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.

⁴The 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.

EXHIBIT 4


massDOT

Massachusetts Department of Transportation

INTEROFFICE MEMORANDUM

MB210922.MAF

TO: Jonathan Gulliver, Highway Administrator

FROM: Maurizio A. Fabbo, Office of Real Estate and Economic Development. 

DATE: September 22, 2021

RE: DISPOSITION OF EXCESS LAND

CITY/TOWN: Plymouth
LAYOUT No.: 4723, Dated 10/14/1958
F.A.P.: F-336(4)

LOCATION: Route 3 @ Collins Avenue
AREA: 116,985 +/- Sq. Ft.
COST CODE: 004-734-191-2900-6802

The Office of Real Estate and Economic Development received a request from Sheava LLC, for a GRADING EASEMENT on MassDOT owned land along Route 3 at Collins Avenue in the Town of Plymouth, Massachusetts. The land will be used to reshape the area.

We have canvassed the various Departments and Sections at the Highway Division and received the following comments:

District #5, Highway Director: No Objection. However, additional information will be needed, and details will be required to be discussed with the applicant as part of a MassDOT Access Permit to perform the work. These issues are as follows.

- A review of the proposed grading plan is required to ensure no adverse impacts to the Route 3 roadway.
- There is an existing drainage basin for drainage discharge from Route 3 which will need to be maintained under the final grading conditions. A review of the proposed grading plan with respect to the basin and method of access to the basin for maintenance is required.
- The applicant is planning to utilize the area to traverse between privately-owned property on either side of the subject parcel.
 - o The parcel should not be utilized for the storage or stockpiling of materials or equipment.
 - o The area of transit should consist of a material suitable for vehicular traffic, such as dense graded crushed stone, to prevent erosion or damage to the abutting Route 3 layout.
 - o The existing layout is labeled as "No Access". A layout alteration will be required to provide a break in access.
 - o Gates in the existing layout fence should be provided and should remain locked at all times when not in use.

- District #5, H.D. (Cont.): o An additional fence and vegetated buffer should be provided along the proposed access road to prevent encroachment from the Route 3 layout.
- The applicant should be responsible for long-term maintenance of the parcel for the duration of the easement terms for use of access, including control of vegetation and litter removal.
 - The lease agreement should take into account the possibility of the applicant selling the property in the future.
- Highway Design Engineer: No Objection. However, we will reserve the right to acquire back if needed for future roadway widening.
- Traffic Engineer: No Objection. Provided No Direct access to Route 3 be maintained. We defer to the District 5 office and other sections that may have any comments relative to issue.
- Highway Operations: No Objection. However, the easement must explicitly describe the uses allowed and prohibit the use of the land for any other purposes such as parking vehicles and storage of equipment.
- Environmental Division: No Objection. However, we request that the developer provide plans to the stormwater unit for review regarding the grading effort around the infiltration basins. The developer should collaborate with the stormwater unit staff.
- BTP&PPDU: No Objection. However, the Applicant should be aware that if the proposed project exceeds one of the Massachusetts Environmental Policy Act (MEPA) review thresholds, such as generating 1,000 new vehicle trips per day and creating 150 new parking spaces or generating 2,000 vehicle trips, the Applicant must therefore file the appropriate MEPA documentation with the Executive Office of Energy and Environmental Affairs (EEA) to initiate a public review of the project under MEPA. The MEPA review process must be complete before MassDOT can issue any permits or take other final actions to allow the project to advance. As part of the MEPA review process, the Proponent should coordinate with MassDOT, including the Public/Private Development Unit and the Highway Division District 5 Office to identify and address any traffic impacts and the mitigation measures that would be required to address the project's impacts
- Layout Engineer: No Objection. The Project Proponent shall be responsible for a land survey verifying the location of all utilities (public and private) including highway drainage within the proposed easement parcel. The Project Proponent is responsible for the preparation of the necessary state highway easement plan and written descriptions, or any other plan. All documents must be prepared by a firm prequalified by the MassDOT Highway Division's A&E Board in the "S3" category (Layout Document Preparation) and in accordance with the appropriate MassDOT standards.

Layout Engineer (Cont.):

The firm preparing the plans and written instruments shall utilize a sample specification package designed by MassDOT's Layout Section. The sample specification package will be developed specific to the conditions of this project. It will be necessary to provide the Layout Section with conceptual drawings which illustrate any proposed parcel conveyance. A sample specification package is to be requested by the Office of Real Estate and Economic Development (OREED) to the Layout Section after completion of the canvassing process.

Based on the responses received, The Office of Real Estate and Economic Development recommends that the Highway Division Administrator approve the request and therefore available for a "GRADING EASEMENT", subject to the following conditions/provisions:

1. The Administrator declares the subject parcel not needed for highway or highway-related purposes and available for a "GRADING EASEMENT".
2. OREED shall have an appraisal performed in order to determine Fair Market Value of the subject area.
3. OREED will obtain Federal Highway (FHWA) Approval, if required.
4. The Proponent shall be responsible for a land survey verifying the location of all utilities (public and private) including highway drainage within the proposed easement parcel.
5. The Project Proponent is responsible for the preparation of the necessary state highway easement plan and written descriptions, or any other plan. All documents must be prepared by a firm prequalified by the MassDOT Highway Division's A&E Board in the "S3" category (Layout Document Preparation) and in accordance with the appropriate MassDOT standards. The firm preparing the plans and written instruments shall utilize a sample specification package designed by MassDOT's Layout Section. The sample specification package will be developed specific to the conditions of this project. It will be necessary to provide the Layout Section with conceptual drawings which illustrate any proposed parcel conveyance. A sample specification package is to be requested by the Office of Real Estate and Economic Development (OREED) to the Layout Section after completion of the canvassing process.
6. The Proponent is aware and agrees to work with District 5 personnel on the following issues:
 - i. A review of the proposed grading plan is required to ensure no adverse impacts to the Route 3 roadway.
 - ii. There is an existing drainage basin for drainage discharge from Route 3 which will need to be maintained under the final grading conditions. A review of the proposed grading plan with respect to the basin and method of access to the basin for maintenance is required.
 - iii. The applicant is planning to utilize the area to traverse between privately-owned property on either side of the subject parcel.
 1. The parcel should not be utilized for the storage or stockpiling of materials or equipment.

2. The area of transit should consist of a material suitable for vehicular traffic, such as dense graded crushed stone, to prevent erosion or damage to the abutting Route 3 layout.
 3. The existing layout is labeled as “No Access”. A layout alteration will be required to provide a break in access.
 4. Gates in the existing layout fence should be provided and should remain locked at all times when not in use.
 5. An additional fence and vegetated buffer should be provided along the proposed access road to prevent encroachment from the Route 3 layout.
 - iv. The applicant should be responsible for long-term maintenance of the parcel for the duration of the easement terms for use of access, including control of vegetation and litter removal.
 - v. The lease agreement should take into account the possibility of the applicant selling the property in the future.
7. The Proponent is aware that MassDOT will reserve the right to acquire back the area, if needed for future roadway widening.
 8. The Proponent is aware that No Direct access to Route 3 is granted or implied with this approval.
 9. The Proponent is aware the easement must explicitly describe the uses allowed and prohibit the use of the land for any other purposes such as parking vehicles and storage of equipment.
 10. The Proponent is aware and agrees to provide plans to the stormwater unit for review regarding the grading effort around the infiltration basins. The Proponent will continue to collaborate with the stormwater unit staff.
 11. The Proponent is aware that if the proposed project exceeds one of the Massachusetts Environmental Policy Act (MEPA) review thresholds, such as generating 1,000 new vehicle trips per day and creating 150 new parking spaces or generating 2,000 vehicle trips, the Applicant must therefore file the appropriate MEPA documentation with the Executive Office of Energy and Environmental Affairs (EEA) to initiate a public review of the project under MEPA. The MEPA review process must be complete before MassDOT can issue any permits or take other final actions to allow the project to advance. As part of the MEPA review process, the Proponent should coordinate with MassDOT, including the Public/Private Development Unit and the Highway Division District 5 Office to identify and address any traffic impacts and the mitigation measures that would be required to address the project’s impacts



Jonathan Gulliver, Highway Administrator

Date